Ideology and Institutions in India

Shruti Rajagopalan

Abstract: Research examining rule of law in India blames individuals and events for the deterioration of the Indian Constitution. In this paper, I explore the role of the ideas. I argue that the pursuit of socialist ideas in India undermined the Constitution. At the pre-constitutional level, I analyze how the pursuit of socialist ideology created some contradictory rules. At the post-constitutional level, I analyze the role of socialist ideology removing the constitutional constraints on Indian democracy. My analysis explains the role of ideology in creating and transforming institutions.

* For comments and suggestions I thank Peter Boettke, Peter Leeson, Mario Rizzo, Virgil Storr, Richard Wagner, Larry White and participants of Graduate Student Paper Workshop. I also gratefully acknowledge the H.B. Earhart Foundation and the Mercatus Center for financial support. The standard disclaimer applies.

Email: srajago1@gmu.edu Address: Department of Economics, George Mason University, MS 3G4, Fairfax, VA 22030.
1 Introduction

Historians and legal scholars have chronicled the gradual decline of Indian institutions over the years. Palkhivala described it as the systematic defiling and defacing of the Indian Constitution (1974). Singh argues that “over the next 30 years these constituent rules were progressively chipped away” (Singh 2006: 305). India today, is characterized as a nation with weak property rights and the lack of the rule of law.¹

However, the picture was not always dismal in India. On January 26, 1950, a New York Times editorial welcomed the newly-minted Republic of India to the fold of sovereign democratic nations. Referring to the new Indian constitution as a great document, that was “starting a new era”, the Times wrote that the Constitution “is a document in which Britons, especially, can take pride, for it is British liberal parliamentary ideas and practices that form the primary basis for the new federation”.

Despite the great beginning, why did the rule of law progressively deteriorate in India? On this question, the emphasis of past work has been to single out individuals, cases, or events. While there is a general consensus that institutions in India deteriorated; no systematic explanation has been put forth for the constitutional decline during the first few decades of post-independence India.

I argue that the real reason for constitutional decline in India was the prevailing socialist ideology, which gradually removed the constraints on Indian democracy. There are two parts to my argument. First, that socialism and constitutionalism are fundamentally incompatible institutions. Constitutionalism prevails when general rules are announced beforehand and apply equally to all individuals in a non-arbitrary manner. However, socialist planning necessarily involves deliberate discrimination between individuals. The Indian constitution included principles to form a socialist state as well as create a constitutional democracy. This internal contradiction in the Constitution was a major cause of decline. Second, both at the pre-constitutional and post-constitutional level of analysis, ideas played an important role in the various policy and judicial discussions. An important aspect of the interaction between the constitutional rules and the post-constitutional strategy of the political actors was determined by the ideas of the time. In particular, I argue that systematic pursuit of socialist planning, and frequent amendment of the constitution, requires the general support of the electorate.

¹ Subramanian (2007) provides empirical evidence for decline of Indian institution such as bureaucracy and judiciary. India ranks 87th on the corruption index and is rated 3.3 on a scale of 10 on the Corruption Perception Index where 10 is most transparent and 1 is most corrupt. “In the World Bank’s “Ease of Doing Business” index, India ranks 134th out of 183 countries, scoring particularly badly on enforcing contracts (182nd). Another index, on “Entrepreneurship and Opportunity”, produced by the Legatum Institute, a think-tank, puts India 93rd out of 110 countries.” http://www.economist.com/node/18586958
My argument directly challenges the existing literature on the specific question of the relation between socialism and rule of law in the Indian Constitution. Scholars view them as so “interdependent as to be almost synonymous” (Austin 1999: 633). This view is not unique to Austin, and others have made similar arguments. Dhavan (1992) argues that the Constitution deteriorated because law became a tool for the powerful. Dhavan states that rule of law and socialism are compatible; and the failure was caused by poor execution. He provides a list of suggestions (requirements) for socialism to work without abuse of arbitrary power; and his formula hinges on selfless political participants. Other scholars like Mirchandani (1977) blame the opportunism of politicians and bureaucrats and Kohli (1990) argues that the political actors took advantage of the conflict between the haves and have-nots and, in the process, undermined the rule of law. Thus, the prevailing view is that while socialism and rule of law were sound and harmonious, it is the poor execution of these principles that undermined the Indian Constitution. My analysis explains how socialist policies weakened the Constitution; I argue that the political actors in question were pursuing the socialist ideology of the nation’s founders to its logical conclusion.

This research contributes mainly to three literatures. First, the past work on Indian constitutional law, which describes the decline using the historical, political and legal narrative. The general theme here is that, India was off to a good start under the leadership of Jawaharlal Nehru, but subsequent leaders like Indira Gandhi undermined the Constitution. Bose (2010) blames the weak judiciary and the misinterpretation of the Constitution by lawyers and judges. Singh explains the deterioration of property rights through the weakening of separation of powers with an all-powerful executive (2006).

Second, there is a vast literature on socialist planning resulting in poor economic growth in India. Socialist policies are blamed for poor incentives and information and unintended economic consequences (See Shenoy 1969; Bhagwati and Desai 1970; Das 2000; Panagariya 2008; and Manish 2011). However, one implication of the socialist ideology, regarding the institutional consequences of compromising the rule of law in India, has been overlooked in the

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2 Even when Austin concedes that these goals are in conflict at times, he believes the conflict is temporary and there is no long-term incompatibility between the two. “The goals of unity-integrity, democracy, and social revolution were not always in perfect harmony and on occasion seemed in competition. These difficulties had to be surmounted, circumvented or accommodated in the conditions prevailing in the country.” (Austin 1999: 636) “Conflict between the web’s democracy and social revolution strands is inevitable. … efforts toward long-term harmony between the strands make the short-term conflict inevitable.” (Austin 1999: 668)

3 Dhavan analyzes whether Nehru’s plan, which espoused socialist planning within a constitutional democracy, can work. According to Dhavan, four ingredients are necessary for Nehru’s plan to work. First, that Parliament is determined to enact radical legislation. Second, such legislation is supported by large ideological consensus, even those adversely affected. Third, bureaucrats are dedicated and incorruptible. Fourth, Indians must not abuse public power. He suggests that socialism and rule of law have not worked because the “will” to make it work is missing. (Dhavan 1992: 60-61)
literature on economic consequences. In this paper, I state that, to implement socialist planning, the Indian constitutional contract was changed to a point where the spirit of the constitution, which was to create a constrained democracy with adequate checks and balances, was diluted. These transformed institutions created extremely perverse incentives for any political authority. This transformation has consequences for economic growth. In this paper, I argue that by concurrently espousing the ideologies of socialism and constitutionalism, the founding fathers set the stage for many inevitable constitutional conflicts.

Third, scholars have agreed on the importance of ideas in shaping institutions and economic outcomes (See Hayek 1949; Buchanan and Wagner 1999; Boettke 2010; White 2011.) Martin argues that the role of ideas is more important in politics relative to other institutions like the market. This is because the feedback mechanism in polities is not as tight as feedback in the market and ideas play a more dominant role (2010). Specific to India, White (2010) and Adhia (2010), discuss the impact of ideology in shaping economic policies. In this paper, I analyze the role of ideas shaping institutions at the pre-constitutional level, as well as, the role of ideas in transforming institutions at the post-constitutional level.

In this paper I use the pre-constitutional and post-constitutional levels of analysis that Buchanan (1999) emphasizes. Pre-constitutional analysis is the shaping of the rules of the game, while post-constitutional analysis examines strategies of political actors within these defined rules. In this paper I explore the interaction between these two levels through the role of ideology.

I primarily focus on the time period of 1946-1981, during which socialist policies were pursued in India. Though Indian policy makers embraced market friendly reforms only in 1991, there was a definite move away from socialism starting in 1980. Indian constitutional history in this period, through constitutional amendments and case law provides a unique perspective to understand how socialist policies undermined the rule of law. As evidence, I use relevant debates of the Indian Constituent Assembly and subsequently, of the Indian Parliament, as well as Supreme Court case law to demonstrate the conflict.

In Section II, I discuss a constrained democracy and socialism, the two main ideas held by the architects of modern India at the time of drafting the Constitution. I emphasize the influence of socialist and liberal ideology in shaping the Indian Constitution. In Section III, I discuss features of the Indian Constitution as a product of these ideas. In Section IV I argue that a constrained democracy with the goal of maintaining rule of law is incompatible with state socialism. Provide evidence of how the pursuit of socialist planning undermined the Indian

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4 Also, after 1980, while there have been many amendments to the Parliament, these are not of the same color as the initial 44 amendments, which abridged fundamental rights and curtailed rule of law.
Constitution. The evidence describes how the socialist ideas of intellectuals, political actors and the general electorate systematically removed the constraints on the state, provided in the Constitution. In Section V, I conclude.

2 The Ideas that formed India

The prevailing ideas in India at the time of independence and constitution making are important because these set the parameters for the constitutional debate and shaped the written constitution. In this section, I discuss the ideas generally held by Indian intellectuals during the colonial period and at the time of drafting the Constitution.

2.1 Ideas of the Independence Movement

Indian intellectuals of the nineteenth century, like Ram Mohun Roy, Dadabhai Naoroji, Sir Syed Ahmed Khan, etc were influenced by British and continental liberal philosophers. Many Indian liberals, had written against the caste system (specifically because old Hindu laws punished different castes differently for the same crime) and lobbied for equal rights for men and women. Ram Mohun Roy was an advocate of “a limited government presenting a variety of checks on any abuse of its powers”. He argued for constitutional limitations constraining the British East India Company. He believed a strong free press and independent judiciary along with an elected citizenry were the future of India. (Bayly 2010).

Over five decades prior to Indian independence in 1947, liberals who believed in British values and wanted to make them available to Indian citizens of the Crown had founded the Indian National Congress Party, which went on to play a leading role in the independence movement. Gopal Krishna Gokhale was inspired by liberal thinkers such as Burke and John Stuart Mill and believed in a free society with a limited role for the state in provisioning of public goods and free education (Guha 2010:99). Dadabhai Naoroji, was also a liberal thinker and “first and foremost a constitutionalist” (Doctor: 28). Even though both wrote extensively against the British Empire and supported self-rule in India, their demand was for a liberal and not a socialist society. Given that India was dealing with social problems such as the caste system, untouchability and low status of women, the only legal way to deal with these concerns was to create a liberal constitution that granted political equality.

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5 For Rammohan Roy’s writings See Guha 2010: 33. For Gokhle’s writings see Guha 2010: 101 and Ambedkar’s writings see Guha 2010: 213
6 Ram Mohun Roy, Asiatic Journal, NS, 12, (1834), 212
7 Gandhi, perhaps the most important Indian leader in the early twentieth century, considered Gokhale his teacher and mentor. However, Gandhi felt Gokhale was too liberal in his ideas and faith in western institutions. Gandhi believed more in village-level grassroots institutions.
8 This critical social reform was an urgent and pressing concern. Changing these social circumstances through education and culture was considered too long a process, leaving social change through state intervention to be seen as the ideal solution.
In the 1920s, the movement for some form of home rule or Swaraj gained momentum. At the All Parties Conference in 1928, Motilal Nehru, father of Jawaharlal Nehru, wrote a draft Constitution calling for a democratic republic. This, was the first constitution written by Indians only, conceived of dominion status for India within the Empire, was very similar to the American Constitution and outlined a Bill of Rights. But with time, and with the passing of leaders like Gopal Krishna Gokhale, the strong liberal fervor within the Party was fading away.

The next generation of Congress leaders was more inspired by socialist ideas. In particular, many scholars have discussed the influence of Fabian ideas on Indian intellectuals (See Bhagwati 1993, Austin 1999, Das 2001, Guha 2007, Varma 2007, White 2010). This generation of intellectuals was skeptical of capitalism, which they equated to mercantilism, and international trade in particular, due to India’s historical experience with colonial firms like the British East India Company. Many believed that a socialist welfare state would uplift the masses deprived and exploited 200 years of colonial rule (Das 2000 and Varma 2008). It was from this colonial past, that the idea of an independent India was formed; the Indian independence movement was the coming together of ‘national’ and ‘social’ revolutions.

The most prominent among this generation of intellectuals was Jawaharlal Nehru, the liberal Motilal Nehru’s son. A lawyer trained in England, Jawaharlal Nehru developed strong socialist leanings during his time in England. He believed that capitalism could not strengthen either political or socio-economic equality. Nehru wrote:

"Democracy and capitalism grew up together in the nineteenth century, but they were not mutually compatible. There was a basic contradiction between them, for democracy laid stress on the power for many, while capitalism gave real power to the few." (Nehru 2004: 547)

The main thread joining these two ideas, critiquing capitalism and embracing socialism, was that political equality was meaningless unless there was economic equality in India. Sydney and Beatrice Webb, the founders of the Fabian Society emphatically made this connection between substituting the capitalist order with a socialist democracy.

“The central wrong of the Capitalist system is neither the poverty of the poor nor the riches of the rich: it is the power which the mere ownership of the instruments of production gives to a relatively small section of the community over the actions of their fellow-citizens and over the mental and physical environment of successive generations. Under such a system personal freedom becomes, for large masses of the people, little better than a mockery.... What the Socialist aims at is the substitution, for this Dictatorship of the Capitalist, of

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9 “The national revolution focused on democracy and liberty- which the colonial rule had denied to all Indians- whereas the social revolution focused on emancipation and equality, which tradition and scripture had withheld from women and low castes.” (Guha 2007: 107).
government of the people by the people and for the people, in all the industries and services by which the people live”.

Along with the Webbs, George Bernard Shaw and Harold Laski’s ideas left a mark on Nehru during his time at Harrow and Cambridge (Nehru 2004: 27). On his visit to the Soviet Union for the tenth anniversary of the Bolshevik revolution, Nehru believed he had witnessed a system, which had achieved the idea of equality in every sense. In a gushing travelogue written in 1927, Nehru concluded that the Soviet system treated its workers and peasants, its women and children, even its prisoners better than any liberal system. Describing this visit, he wrote:

“The contrast between extreme luxury and poverty are not visible, nor does one notice the hierarchy of class” (Nehru 1929:13).

Like Nehru, others were also inspired by the socialism as a cure for other social evils. Most important among them was Jayaprakash Narayan, who founded the Congress Socialist party in 1934 as an attempt to give voice to Nehru’s wishes of instilling a commitment toward economic equality and social change within the Congress party. The Congress Socialist party leadership included Kamaladevi Chattopadhyay who believed socialism would lead to more equal status for women in society (Guha 2010:274). Ram Manohar Lohia, another devoted member, believed socialism would eliminate caste differences by giving preferential treatment to lower castes for a few decades (Guha 2010: 395). Young activists like Narendra Dev, Yusuf Meherally and Achyut Patwardhan also joined the Congress Socialist Party. Their ideas were so powerful that within a few years, the Congress Socialist Party was more than one-third the strength of the All India Congress Committee with its influence spreading to the grassroots (Devasahayam 2012:9). With the strength of the socialists increasing in the Congress Party, in 1938 the Congress constituted the National Planning Committee with Nehru as its first chairman (Nehru 2004b: 435). The policies planned under this banner were largely inspired by policies already in place in the USSR. India also had its own taste of central economic planning, in an effort to channel resources to aid the British war effort, during World War II.

But there were aspects of the Soviet system that the Fabians could not reconcile with, most specifically the restrictions on speech and press. While discussing the politics of the Congress Socialist Party formed in 1934, Guha writes:

“At the same time, these Congress Socialists detested the so-called Socialist Fatherland, the Soviet Union. Condemning its one-party state and its political treatment of political dissidents, the CSP stood rather for a marriage of democracy and socialism.” (2010:264)

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Nehru thought the Soviet system was over-regimented, that individuals were not politically free, and this was too high a price to pay for the economic development that USSR promised. He disliked many aspects of Soviet Russia including “the ruthless suppression of all contrary opinion, the wholesale regimentation, the unnecessary violence in carrying out various policies.” (Nehru 2004: 377).

This sentiment against following the Soviet model completely was not unique to Nehru, but prevalent in the socialist thinking of the time in India. This had important implications on India embracing socialism. The Indian freedom movement can be characterized as Gandhian - one that was non-violent, non-cooperative and which involved civil disobedience by large masses of people making it difficult for the British to govern India. That the movement must be peaceful and non-violent was so fundamental to Indian independence, that a movement away from that value towards the Soviet system would not have received acceptance of the Congress Party or the people at large.

It is in this aspect that Fabianism was as powerful as it was romantic. It was against violent revolutions and over-regimentation and suppression of press; and offered political rights to all. And yet it borrowed the idea of economic egalitarianism from socialism - and the combination worked perfectly given India’s needs. On one hand, Indian leaders wanted free speech, free press and freedom of association and on another they wanted economic equality and shunned free markets and freedom of business, as these were not considered conducive to economic equality.

It was not only the members of the Indian National Congress who were Fabian socialists. Outside the Party, an influential group of businessmen also held strong socialist views. In 1944, with independence on the horizon, a group of leading industrialists published the “Bombay Plan” stating that the “principal objective of our plan is to bring about a doubling of the present per capita income within a period of fifteen years” (Bombay Plan: 9). Even these capitalist businessmen believed in a strong state economic plan and that “the existing economic organization, based on private enterprise and ownership, has failed to bring about a satisfactory distribution of the national income” (Bombay Plan: 65).

“If a planned economy involves, as it necessarily must, the restriction of individual freedom in varying degree, such restriction under a democratic government will be of limited duration and confined to specific purposes. … We believe that planning is not inconsistent with a democratic organization of society. On the contrary, we consider that its objects will be served more effectively if the controls inherent in it are voluntarily accepted by the community and only enforced with its consent” (Bombay Plan: 91).
In fact, almost all Indian intellectuals at the time were sympathetic to some kind of socialism, with critics being few and far between. “Given these circumstances, when India attained its independence in 1947, it was strongly socialist in orientation, its intellectual atmosphere having been shaped largely by Harold Laski of the London School of Economics, who had greatly inspired Nehru” (Friedman: 2000).

2.2 Ideas of the Constituent Assembly

Austin describes the leaders in New Delhi, at the time of independence as, “believers in the seamless web: confirmed democrats, advocates of social and economic reforms, and nationalists with broad perspective.” (Austin 1999: 17)

The Indian independence struggle was founded on the idea “self rule” or Swaraj. Indians were in awe of the political rights offered to British citizens, which were significantly denied to citizens in the colonies.

At the eve of independence in India, there was an overwhelming demand for a forming a Republic. Indians were skeptical of monarchy in general, as many of monarchs had benefitted from Colonial rule and the feudal system. Among the leaders at the time, Jawaharlal Nehru was most in favor of drafting a Constitution with British, American and Soviet institutions. To Nehru, a system of governance where all were equal before the law, was imperative in unifying India. To the founders, democracy meant a constitutional democracy accompanied with a framework of individual rights and the relevant checks and balances through separation of powers and federalism. But the idea of an Indian republic not only opposed the political imperialism, but also the economic imperialism of the West.

In order to form a Constitutional Democracy, a Constituent Assembly was formed in 1946 and members were chosen through indirect election by the members of the Provincial

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11 Gandhi was opposed to socialism in theory since for him the means did not justify the ends. MS Golwalkar believed socialism was not an ideal goal for India since it was not part of Indian tradition but an alien idea imposed from a foreign intellectual movement. Specifically it was a movement born out of the hatred and envy of rich capitalists and not out of a higher spiritual need. (Guha 2010:380). The real dissent to socialism in an organized manner came much later in the late 1950s. This came from C Rajagopalachari and the Swatantra Party. The dissent for socialism from the economists came from BR Shenoy (1969).


13 "It [the Indian Constitution] may be summarized as having three strands: protecting and enhancing national unity and integrity; establishing the institutions and spirit of democracy; and fostering a social revolution to better the lot of the mass of Indians. The framers believed, and Indians today agree, that the three strands are mutually dependent and inextricably intertwined.”

14 Opposition to the idea of a Constituent Assembly came from two quarters. While the first was Gandhi, , once it was clear that the Constituent Assembly would be completely Indian and with sufficient representation from the provinces, Gandhi also supported the idea. The second criticism came from Communists and Marxists who believed in a social revolution to bring change and were opposed to English educated lawyers in the Congress leadership claiming to represent all of India.
Legislative Assemblies. Most of the members of the Constituent Assembly were current or prior members of the Congress party. The Congress Party, in its 1946 provincial election manifesto, promised the abolition of the feudal system, agrarian land reform, and the nationalization of the key industries.

Given the popular political and economic ideology, India was to become a Republic with a Parliamentary democracy and also a Socialist Welfare State. This was summed up in Nehru’s “Objectives Resolution” toward the Indian Constitution that was debated, discussed and approved by the Constituent Assembly. Nehru said,

“I think also of various Constituent Assemblies that have gone before and of what took place at the making of the great American nation when the fathers of that nation met and fashioned out a constitution that stood the test of so many years … Then my mind goes back to a more recent revolution which gave rise to a new type of State, the revolution that took place in Russia and out of which has arisen the Union of Soviet Socialist Republics, another mighty country, which is playing a tremendous part in the world” (Nehru 1946).

Capitalism was considered incompatible with the society the Constituent Assembly envisaged, and socialism the most important means toward eliminating poverty.

The problem the Constituent Assembly faced was that the socialists could not agree on the kind of socialism in the Constitution. Mises defines socialism as a system where all the means of production are in the exclusive control of the organized community (1920:211). Many Indian intellectuals did not subscribe to this definition of socialism.

There were three groups within the Constituent Assembly. First were Marxists and Communists who supported the state control of all means of production. The second group, which included Nehru and most members of the Congress Socialist Party, supported socialism because they were skeptical of capitalism. They all believed that state socialism would lead to economic progress, but the trade-off was the suppression of individual liberty, especially political rights. Nehru wrote, “Certain economic results are undoubtedly obtained that way, but the price paid is

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15 The Assembly was formed as following: (i) 292 members were elected through the Provincial Legislative Assemblies; (ii) 93 members represented the Indian Princely States; and (iii) 4 members represented the Chief Commissioners’ Provinces. After partition, a separate Constituent Assembly was set up for Pakistan and representatives of some Provinces ceased to be members of the Assembly, reducing the membership of the Indian Assembly to 299.
17 Assembly discussed it from 13-19 December 1946 and on December 21st its consideration was postponed. Discussed again on January 20-22, 1947. On the last day all members standing adopted it UNANIMOUSLY. (B. Shiva Rao (2006) Vol II: Page 4)
19 With the exception of C Rajagopalachari and KM Munshi, almost all members of the Constituent Assembly believed in some form of a socialist state.
The third group was Gandhian Socialists, many of whom belonged to the Congress. They believed State socialism led to tyranny and the only way to be free was to create democratic village republics and neither be a slave to capitalism or state socialism. But almost all believed in some form of socialism. In many debates in Parliament, socialism was used, often interchangeably, to mean two different things. The first was socialist ideals or goals, which was mainly economic egalitarianism. The second was socialist means towards those goals, which was centralized state planning of the economy. During the debates, despite these differences of opinion, a great effort was made to find common ground and reach consensus within a constitutional framework.

India, at the time, was largely agrarian, and mostly an illiterate population. The call from the populace was not for a federal government, or a powerful judicial system, but for land reforms, peasant and worker rights, and abolishing untouchability. The Constituent assembly was indirectly elected but representative of India at the time. It had a disproportionately high number of British educated lawyers, and therefore paid attention to certain liberal principles during the drafting process. During the drafting process and debates, the tensions between the many meanings of socialism, as well as the liberal and welfare agenda came to the forefront.

2.3 Preamble

So, while the Constituent Assembly did want India to become a socialist state, there was no agreement on the kind of socialist state that free India would become. This lack of agreement was not new to the Constituent Assembly. In his Presidential Address at the annual session of the Congress Party in 1946 at Meerut, JB Kripalani said that words like socialism “can be made to cover multitude of Sins”. One of the first issues debated in the Constituent Assembly was a draft of the Preamble of the Indian Constitution. In his resolution, Nehru declared India to be an “Independent Sovereign Republic” but many believed that the word Socialist should be included.

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20 Many years later in a letter to State Chief Ministers, Nehru wrote, “Thus far we see a full-blooded socialism, if that is the right term, working in Communist countries, together with the accompaniment of authoritarian control and an absence of the democratic approach. That is, practically everything is State-controlled and that develops bureaucracy in an extreme measure, apart from suppressing individual freedom. Certain economic results are undoubtedly obtained that way, but the price paid is heavy.” (See Guha 2010: 339)

21 "The State under Socialism threatens, as in Russia, far from withering away, to become an all-powerful tyrant maintaining a stranglehold over the entire life of the citizen. This leads to totalitarianism of the type we witness in Russia today. By, dispersing the ownership and management of industry and by developing the village into a democratic village republic, we break this stranglehold to a very large extent and attenuate the danger of totalitarianism. Thus my picture of a socialist India is the picture of an economic and political democracy. In this democracy, men will neither be slaves to capitalism nor to a party or the State. Man will be free.” – Jaya prakash Narayan quoted by MR Masani. See n.24

22 “Broadly, it was used synonymously with ‘social revolution’, meaning national social-economic reform with an equitable society as its goal, and tacitly including such ideas as special treatment for disadvantaged citizens. In essence, it meant social egalitarianism and political equality. Narrowly, it had a more classical meaning: central government planning, the dominance of the state sector in the economy, and so on” (Austin 1999: 634).
MR Masani, and a democratic socialist at the time, was against adding the word Socialist in the preamble. Masani argued that “it would be wrong to provide for such a thing, because this House has no mandate to go in for far-reaching economic changes in the country,” especially given the lack of consensus on the meaning of socialism.

BR Ambedkar, the architect of the Indian Constitution, did not advocate Soviet style socialism, but nevertheless expressed his disappointment when Socialism was not included in the Preamble to the Constitution. Seth Govind Das, RR Sidhwa, Dakshayani Velayudan, Shibban Lal Saksena, and Algurai Shastri opined that the dream of a socially and economically just India could only be realized through socialism and insisted that the preamble include reference to India as a Socialist Republic. This was irrespective disagreement on the meaning of socialism.

Some members of the Constituent Assembly proposed amendments to the preamble to add more specificity, all of which were negative by the overall Assembly. VD Tripathi suggested that the “Constitution shall be formed in a socialistic and positively not on a capitalistic basis”. Maulana Hasrat Mohani wanted to be specific about the type of socialism and wanted the preamble to read “We, the people of India, having solemnly resolved to constitute India into a union of Indian Socialistic Republics to be called U.I.S.R. on the lines of U.S.S.R”. Brajeshwar Prasad wanted to add the words “socialist order” in the Preamble and he clarified, “I believe that the future of India is in Socialism. I believe in a Socialist order. When I say that I believe in a socialist order, I do not mean that I accept the Marxian interpretation of History. I do not believe in class war nor in the materialist Philosophy which is so widely prevalent among the socialist circles. By socialism I mean an equalitarian social order”.

Thus, the various proponents of Socialism could not come to an agreement on the precise nature of the proposed economic system. Finally the word socialist was left out of the Preamble, which declared India a “Sovereign Democratic Republic”.

2.4 Economic Rights and Wrongs

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23 He later changed his views and joined the Swatantra Party, the main liberal party in India, post-independence.
24 Tuesday, the 17th December, 1946 Constituent Assembly Debates Vol I
25 Tuesday, the 17th December, 1946 Constituent Assembly Debates Vol I
26 Tuesday, the 17th December, 1946 Constituent Assembly Debates Vol I
27 Wednesday, 18th December, 1946 Constituent Assembly Debates Vol I
28 Thursday, 19th December, 1946 Constituent Assembly Debates Vol I
29 Monday, the 17th October, 1949 Constituent Assembly Debates Vol X
30 Friday, 20th January 1947, Constituent Assembly Debates Vol II
31 Tuesday, the 21st January, 1947 Constituent Assembly Debates Vol II
32 Monday, the 17th October, 1949 Constituent Assembly Debates Vol X -
33 Monday, 17th October, 1949, Constituent Assembly Debates Vol X
The socialist and constitutional ideas of the Assembly members were again at the forefront in the debates on the question of the Bill of Rights [hereinafter Fundamental Rights]. In September 1946, Constitutional Advisor issued a preliminary note discussing fundamental rights to all the assembly members. The note discussed some of the rights relevant to Indian citizens and also compiled the rights guaranteed in other countries including relevant case law. An important idea was incorporated in this note, one that reflected the views of the constituent assembly members.

“It is useful to recognize a distinction between two broad classes of rights: there are certain rights which require positive action by the State and which can be guaranteed only so far as such action is practicable, while others may merely require that the state shall abstain from prejudicial action.”

KT Shah also sent a similar note dividing the Fundamental rights into Civil, Political and Economic Rights. Civil and Political rights were mostly negative rights. The Economic Rights were positive rights, were inspired by Roosevelt’s progressivism and included the right to earn, to a decent home, health and medical care, and education. To Shah, these rights were the most important because without them, civil and political rights were meaningless. KT Shah also included safeguards against private monopolies. Alladi Krishnaswami Ayyar, in a note on Fundamental Rights discussed both negative and positive rights which should be included in the Constitution. The only dissent against adding any positive rights, or socialist duties of the state came from KM Munshi. His rationale was that rights must be “enforceable through writs” otherwise they are meaningless and positive rights are not enforceable.

The ideas of socialism and liberalism were reflected in the October 1947 draft of the Constitution, specifically in Part III, which enumerated the Fundamental Rights and Directive Principles of State Policy [hereinafter Directive Principles]. The fundamental rights included equal treatment and protection under the law, freedom of speech, expression, conscience and trade; protection of life liberty and equality under the law; and protection of private property from

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34 Further, that both these category of rights were mentioned under Fundamental Rights in the USSR Constitution, because neither was intended to be enforced by legal action. Only the second type in American Constitution. And Both types in Irish Constitution, which deals with FR and the DP explicitly excluded from the purview of the courts. B. Shiva Rao (2006) Volume II p. 33
37 like “Article 19: No individual or corporation will be permitted to found, support, or maintain any institution of public utility or social service, like a school, college, library, hospital, well, tank, canal, whose use is restricted on any ground of caste, creed, community, sex or colour.” See SR II p.51
38 Note on March 17 1947
39 Draft Constitution prepared by Constitutional Advisor, October 1947, SR III
40 Fundamental Rights were mostly negative rights which were borrowed from the US Constitution, Australian Constitution and the Government of India Act 1935. The Directive Principles were inspired by the 1936 USSR Constitution and the Irish Constitution.
acquisition. The Directive Principles emphasized the “duties” of the state and this draft set the stage for socialist planning. Some of the principles guiding the state were:

“The ownership and control of the material resources of the community are so distributed as best to subserve the common good”\textsuperscript{41}. To ensure “that the operation of free competition does not result in the concentration of the ownership or control of essential commodities in a few individuals to common detriment”\textsuperscript{42}. And that “The State shall endeavor to secure, by suitable legislation or economic organization or by any other way, to all workers, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities.”\textsuperscript{43}

The Draft Constitution of February 21 1948 also contained these socialist guidelines. BR Ambedkar, the architect of the Indian constitution, a Columbia-educated lawyer who was inspired by the American Bill of Rights, approached the Fabian idea from the Constitutional and legal point of view. Based on the idea of complete equality, Ambedkar included socialist planning as an economic right in his draft of the Bill of Rights for the Indian constitution\textsuperscript{44}. Ambedkar’s rationale was:

“The soul of democracy is the idea of one man, one value. Unfortunately, democracy has attempted to give effect to this doctrine only so far as political structure is concerned by adopting the rule of one man one vote which is supposed to translate into fact the doctrine one man one value. It has left the economic structure to take the shape given to it by those in a position to mould it. This has happened because constitutional lawyers have been dominated by the antiquated conception that all that is necessary for a perfect constitution for democracy was to frame a constitutional law which would make Government responsible to its people and to prevent tyranny of the people by the Government. ... They never realized that it is equally essential to prescribe the shape and form of economic structure of society, if democracy is to live up to its principle one man, one value.”\textsuperscript{45}

Ambedkar anticipated that future governments might support capitalism and deviate from their duty to the Indian citizens. He wanted to constrain all government to the socialist path. A constitutionalist before everything else, Ambedkar believed he was imposing constraints on the government, not dissimilar from negative constraints.

During the meeting of the Drafting Committee on November 1 1947, the Directive Principles were transferred to a new part and it was clarified that “the principles set forth in this Part are intended for the guidance of the State. While these principles are not cognizable by any

\textsuperscript{41} Article 32(ii) B. Shiva Rao (2006) Volume III p.13
\textsuperscript{42} Article 32(iii) B. Shiva Rao (2006) Volume III p.13
\textsuperscript{43} Article 35 B. Shiva Rao (2006) Volume III p.13
\textsuperscript{44} Ambedkar’s Memorandum and Draft Articles on the Rights of States and Minorities March 24\textsuperscript{th}, 1947: Article II, Section II, Clause 4. B. Shiva Rao (2006) Vol II: page 102
court, they are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws”.\textsuperscript{46}

Socialist ideas did not simply add a set of positive rights to the constraints enumerated in Fundamental Rights. These ideas also affected the debates on negative rights, and in particular, the right to private property and the eminent domain clause. The first draft of this provision, proposed by KM Munshi, read almost exactly like America’s Fifth Amendment. The Sub-committee\textsuperscript{47} on fundamental rights re-drafted the clause initially as “No property, movable or immovable, of any person or corporation, including any interest in commercial or industrial undertaking, shall be taken or acquired for public use unless the law provides for the payment of just compensation for the property taken or acquired and specifies the principles on which and the manner in which compensation is to be determined”.\textsuperscript{48}

BN Rau observed that while such a clause may prevent “predatory legislation” in the future, it might also stand in the way of “beneficial social legislation”.\textsuperscript{49} This clause was likely the most debated; multiple members worried that such a strict limit on governmental power would prevent land reforms and control of important natural resources.” Even liberal members of the Assembly like C Rajagopalachari conceded that a strict clause would prevent or delay abolishing feudalism and redistributing land. The question of compensation became moot. AP Jain, VD Tripathi, RK Sidhwa and VC Keshava Rao felt that the clause was too strict in requiring compensation for acquisition of all property\textsuperscript{50} and property immorally acquired by feudal lords should be exempt from this requirement.

Apart from the liberals and those supporting social legislation, the third point of view came from socialists who were completely opposed to this clause. Damodar Swaroop Seth, KT Shah and Jayaprash Narayan were absolutely against a clause which prohibited expropriation without compensation. Narayan described the clause as “Magna Carta in the hands of capitalists of India”.\textsuperscript{51}

In this three-way debate, the Fabians prevailed over the liberals and the Marxists. The eminent domain clause finally stated that No person could be deprived of property without due process of law and “no property... shall be taken possession of or acquired for public purposes

\textsuperscript{50} Constituent Assembly Debates Volume III p. 514-16
\textsuperscript{51} Constituent Assembly Debates Volume III p. 514-16
under any law authorizing the taking of such possession or such acquisition, unless the law provides for compensation”. In the process “Public use” was broadened to “public purpose” to allow for social legislation like land reform. And “just compensation” just became “compensation.”

2.5 Constitution and the Rule of Law

During the war years, the British executive had resorted to many arbitrary actions like curtailing freedom of press, denying a fair trial before deportation, and appropriation of resources. It thus became a priority for the members of the Constituent Assembly that the individual be protected from the arbitrariness of the state.

BR Ambedkar wanted to make the protection of the individual the object of discussion in the Constituent Assembly. Having received his legal training at both Columbia University and the London School of Economics, Ambedkar was familiar with Dicey’s requirements of rule of law. AV Dicey identifies three fundamental characteristics of the rule of law: the rule of law, not men; equality before the law of all persons and classes, including governmental officials; and the incorporation of constitutional law as a binding part of the ordinary law of the land (Dicey 1915)\(^2\). These principles of rule of law do not have a substantive component to protect the individual from coercive acts of the State\(^5\). To bring in the substantive component, Ambedkar was keen to incorporate the Bill of Rights added through amendment to the American constitution. The idea behind incorporating substantive content in addition to the principles of rule of law, is that individuals may, though the judiciary, seek protection from coercive state acts, through writ remedies. Therefore Ambedkar insisted upon the inclusion of the Bill of Rights as included in the American Constitution. Concurrently, Ambedkar and a majority of the Assembly members also believed that individual liberty might be meaningless if some basic need remained unfulfilled. Therefore along with the Bill of Rights, Ambedkar also intended to draft certain rights with positive content intended for the state to support the individual in fulfilling his basic needs.

The Constituent Assembly intended to create a stable working machinery for the state with appropriate checks and balances. India was to be a federal structure. It was clearly specified, which areas were open for legislation by the federal government, by the provinces, and by both.\(^4\)

\(^2\) Similarly Hayek argues that, rule of law requires that the state action be bound by rules fixed and announced beforehand. These rules must be general, known and certain, so that individuals may adjust their behavior accordingly. And the rules must apply equally to all persons and without prejudicing some categories of people at the expense of others. In short, for Hayek, certainty, generality and abstraction, and equality of the rules are requisite conditions for the rule of law (Hayek 1944: 92 and Hayek 2010:318-9). However, the debates for the Indian Constitution, preceded Hayek’s work and only Dicey was incorporated.

\(^3\) See Rajagopalan and Storr (2012), Mercatus Center Working Paper. In this paper, we argue that formal content of Hayek’s rule of law is insufficient to protect the private sphere.

\(^4\) Seventh Schedule of the Constitution of India
There was separation of legislature, executive and the judiciary, in a Parliamentary system with the executive accountable to the legislature and the legislature to the voters, with independent judicial review. Specific provisions were incorporated in the constitution to provide for equal treatment and equal protection under the law, and against discriminatory legislation without classification. For the substantive portion of rule of law, a Bill of Rights was worked out with a right to judicial remedies provided through writs.

Therefore, the Assembly drafted a constitution which enabled the law to be general, certain and equal and created provisions for the formal rule of law. In addition, the Assembly also added substantive content through the chapter on Fundamental Rights.

3. Constitution or Contradiction?

With the multiple ideas and agendas discussed above, did the Assembly create a constraint or give rise to contradictions? From the Constituent Assembly Debates, the difference between those who were republicans and those who were socialist democrats in the Constituent Assembly becomes clear. The socialist democrats wanted the constitution to enumerate the powers, or provide a laundry list of state activities explicitly provided for in the constitution. The republicans on the other hand, viewed the constitution as the document that enumerates the “constraints” on the state and purpose of the constitution was to protect the individual from arbitrary government excesses. There was an inherent contradiction in the Constitution. However, did this inherent contradiction defeat the purpose of the Constitution?

One could say of the above discussion, that the reason for such a Constitution was interests of the Assembly members and not ideology. A self-interested politician reduces the constraints imposed by the Constitution, and therefore maximizes future redistributive activity. And the debate on Constitutional constraints for three years was simply a smokescreen for this agenda. However, two things must be kept in mind. First, Indian population did not demand a constrained democracy. The immediate call was for land redistribution etc. and some form of political participation through democracy. Therefore, for an elected Constituent Assembly, which had the support of the general public the smokescreen, of a three year long constitutional debate based on liberal principles, was unnecessary. Second, the Congress Party, which mainly crafted the constitution and won the first general election, had virtually no opposition. Especially Nehru, faced very little opposition from within and outside the party.

Given the preferences of the electorate, the very fact that a Constituent Assembly was formed and principles such as separation of powers, federalism, bill of inviolable rights and

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55 Dhavan poses some pertinent questions in this regard. Was the individual the basic unit? Or society? And if it is both, then which is dominant? (Dhavan 1978:65-6)

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judicial review were debated; shows a certain commitment to protect the individual and constrain the arbitrary actions of the government. On these principles, there were debates on specifics such as presidential or parliamentary system; strong or weak federalism; but the general agreement was that these principles were necessary to constrain the state and therefore should be included in the Constitution.

However, smokescreen or not, the Constitution was passed unanimously by the Constituent Assembly. Independent of the intentions, good or bad, and aspirations of the Assembly members, a written Constitution, with appropriate checks and balances constraining the state, now had its own meaning for generations to interpret in the future. Therefore, independent of the continuing existence of the ideas and beliefs of the Assembly members, the Indian Constitution was a body of objective knowledge.

Despite some inherent contradictions, there is no question that the Indian Constitution adopted in 1950 constrained the state in order to preserve rule of law and protect the individual; even while allowing for the socialist or welfare agenda. There are some features of the Indian Constitution that make it clear that the intention was to constrain the state.

The Indian Constitution provides for separation of powers between the legislature, executive and the judiciary in the Constitution. Separation of powers for the federal government is enumerated in Part V of the Constitution - Articles 52-151. Separation of powers for the state government is enumerated in Part VI of the Constitution - Articles 152-242. Apart from outlining the checks between the three branches of the government, independent judicial review was explicitly provided for in the Indian Constitution. Therefore, as a Parliamentary democracy, the executive was made accountable to the legislature. The legislature was accountable to the electorate and an independent judiciary could review legislation.

Second, the Indian Constitution created a Federal State and Part XI of the Constitution outlined the distribution of powers between Central and State governments. The Seventh Schedule of the Constitution provided a list of subjects on which the Central and State legislatures could legislate.

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56 While the ideas that influenced members of the Constituent Assembly guided their behavior in the Parliament; these ideas were manifest in the Indian Constitution. In the Popperian sense the prevailing ideas discussed in the above section belong to World 2 and the written Constitution is a World 3 object. (Popper 1978) Therefore, independent of the continuing existence of the ideas and beliefs of the Assembly members, the Indian Constitution was a body of objective knowledge, and this manifestation remains invariant. Another aspect of this distinction between the ideas held by constituent assembly members and the actual Constitution itself is that the legitimacy or the validity or the intention of the members ceases to matter. Whether they really believed in the right to property or they only pretended to believe in the idea no longer matters, once we enter the World 3 or the physical manifestation of the Article that protects property and curtails the eminent domain power.
Third, the Fundamental Rights in Part III of the Constitution, despite some dilution by the socialists, secured a sphere protecting the individual from arbitrary actions of the state. Part III of the Constitution provided for the right to equal treatment and protection under the law, right to private property, freedom of speech and religion, and most importantly right to writ remedy through an independent judiciary.

Despite some mixed messages and the list of positive rights in Directive Principles under Part IV; Article 37 made it clear that the Directive Principles are merely guidelines and therefore unenforceable. Further, that in case of a conflict, Fundamental Rights would prevail. Therefore, while Directive Principles opened the door for expansion of the state, the decision to do so was left to the legislature, one that was constrained by the rest of the Constitution.

Therefore, the Indian Constitution, as adopted in 1950, provided principles required to constrain the state and protect the individual from coercion. However, written Constitutions are subject to interpretation, and the prevailing ideas give life to a Constitution.

4 Socialist Planning v Constitution of India

India’s Constitution was amended thirteen times during the first five Plans, to directly give effect to targets/objectives of these plans. These Constitutional amendments often enabled the planners to retrospectively give effect to plan objectives after the Indian judiciary had struck policy down for violating constitutional principles.

The three decades that comprise central planning in India can be divided in two phases: from 1951-64 and then from 1965-81. The first phase, coinciding with Nehru’s tenure as Prime Minister, saw a large role for the public sector in agriculture and the imposition of licensing requirements on the private sector in various industries, but was relatively liberal on international trade. The second phase extended a much greater role to the state, imposed enormous restrictions on large enterprises and foreign investment, created reservation for small scale industries, nationalized banks, insurance, coal and oil industries and created even greater licensing requirements for industry (Panagariya: 48). As Prime Minister, Indira Gandhi orchestrated most of the second phase, after which Indian policymakers started moving away from socialist policies.

In the following sub-sections I first describe the policies enabling the Five Year Plans. Second, I outline how the Constitution was in violation of these policies. Third, I outline the importance of ideas that enabled socialism to win in its conflict with the Constitution.

57 It is pertinent to point out here that Directive Principles were merely guidelines, and it was up to the Central or the State government to legislate upon them. For instance, prohibition of alcohol is one of the Directive Principles; however very few states have legislated to impose prohibition. Therefore, the state was not “constrained” by the duties listed in the Directive Principles.

4.1 The Nehru Years (1951-64)

An important institution set up a few months after the Indian Constitution was the Planning Commission. The Commission was Nehru’s brainchild and he was also its first Chairman. The Commission was responsible for drafting the Five Year Plan. While this document also specified targets for different industries, it’s most important function was to detail the exact investment and resource requirements for each sector and industry. In the few areas open to the private sector, a highly restrictive industrial licensing regime was formulated to direct private enterprise.

India’s First Five-Year Plan expressly stated as its objective, to “reduce disparities in wealth and income, eliminate exploitation, provide security for tenants and workers, and, finally, promise equality of status and opportunity to different sections of the rural population” (First FYP: 88). Toward this ambitious goal, Nehru decided to focus on expanding heavy industry given planners’ concern the lack of economic activity in intermediate goods, especially heavy industry. But since a large part of the economy was agrarian and three-fourths of Indians lived in villages, land reform was also crucial.

Many policies pursued to fulfill the First FYP and also give meaning to the Directive Principles violated other parts of the Constitution. Nehru described this tension as one between the Directive Principles “which represent dynamic movement towards a certain objective” and Fundamental Rights which “represent something static, to preserve certain rights”. The Constitution was amended multiple times during the first and second FYP to reduce these difficulties – primarily to cover issues relating to land, industry and price controls.

4.1.1 Land

The First FYP tackled the problem land reform with two targets: first, agricultural production, and second, from the point of view of different interests in the land (First FYP: Chapter 12). Ironically, the second target involved breaking up large feudal estates for

59 Nehru (1951), Parliamentary Debate on First Amendment Bill, 16 May 1950, p. 8820
60 First, the Parliament has the power to legislate on provisions that may be different from certain articles in the Indian Constitution. These articles are procedural and tentative in nature, and a simple process involving passing an ordinary legislation is sufficient for these clauses (even when in contravention with the clause in the Constitution). Under Indian laws, for ordinary legislation, a simple majority of members present and voting in the legislature is adequate. Second, most provisions in the Constitution can only be amended according to the procedure in Article 368 of the Constitution. A Bill amending these provisions may be initiated in either house of the Parliament. A majority of the total membership of the House with not less than two-thirds of the members of each House of Parliament present and voting is required for amending these provisions. Third, is the amendment procedure for the “entrenched-clauses” of the Constitution, which are provisions relating to the federal nature of the state. To amend these provisions, a majority of the total membership of the House is required along with ratification by at least half the state legislatures. Some Articles of the Constitution dealing with Federalism and Separation of Powers are considered entrenched clauses with the higher requirement of ratification of the states. Curiously, the Fundamental Rights can be amended by a majority of the total membership of the House with not less than two-thirds of the members of each House of Parliament present and voting.
redistribution among landless peasants; while the first target required consolidation of land holdings to increase productivity. The focus was on abolition of the feudal or zamindari system, which basically meant imposing agrarian land ceilings, and the redistribution of surplus land holdings.

However, some legislation toward agrarian reform violated right to private property going beyond the prescribed eminent domain power and the right to equality under Article 14. In *Kameshwark Singh v The Province of Bihar*, the Patna High Court struck down the Bihar Management of Estates and Tenures Act, 1949, holding that the legislation was unconstitutional as it violated the right to equality under Article 14. The State challenged the High Court’s ruling in the Supreme Court of India. While the challenge was pending in the Supreme Court against this matter and certain other similar matters, the Constituent Assembly which, at the time, was the Provisional Parliament (pending elections) passed the Constitution (First Amendment) Act, 1951 diluting the eminent domain clause and the right to private property to enable policies of the First FYP and the Directive Principles. The Statement of Objects and Reasons forming part of the First Amendment expressly stated -

“The validity of agrarian reforms … formed the subject-matter of dilatory litigation, as a result of which the implementation of these important measures [land reform], affecting large numbers of people, has been held up. … The opportunity has been taken to propose a few minor amendments to other articles in order to remove difficulties that arise.”

A key change prescribed in the First Amendment was the addition of Article 31B, which created a list of preferred legislation called the Ninth Schedule, placed within the Constitution to supersede the Constitution. Article 31B stated that laws to be listed in the Ninth Schedule could not become void on the ground that they violated any Fundamental Right; the government proposed to protect all land reform legislation by including such legislation in the Ninth

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61 AIR 1950 Patna 392
62 The legislation assessed the compensation payable to the owner of property acquired at 20 times the assessment for a poor owner and at 3 times the assessment for a rich owner. The Patna High Court held this classification unconstitutional. (See Seervai (2008): 1369)
63 Other cases included questioning the right of the government on Constitutional grounds to take over a private motor bus concern; and the claim put in to the Bombay High Court by mill owners whose concern had been taken over by the government that their fundamental right to property was violated since they received no compensation (*Dwarkadas Srinivas v The Sholapur Spinning and Weaving Company Ltd.* AIR 1951 Bombay 86).
64 The main members of the provisional parliament in 1951 were also the members of the constituent assembly that drafted the constitution. With the exception of a handful of members, the framers believed in socialist planning. With a clever legal innovation, they by-passed judicial review for legislation concerning agrarian reform and enabled legislation previously declared invalid by the Courts to become valid retrospectively. The First Amendment created the Ninth Schedule, a list of legislation not subject to judicial review, and it passed with a striking majority of 228 to 20. The framers viewed the Ninth Schedule as a necessary trade-off between constitutionalism and execution of the land redistribution agenda essential for prosperity in India.
65 Article 39
66 Objects and Reasons - Constitution (First Amendment) Act, 1951
Schedule. The legislation was fully protected against *any challenge* in a court of law. The “few minor amendments to other articles in order to remove difficulties” essentially defeated the purpose of the constitutional constraint.\(^67\)

While not explicit in the debates, it was clear that the newly formed Indian state had few resources and a very small tax base. Where compensation had to be provided for all property taken over by the government, other welfare and industrial targets of the FYP would remain unfulfilled. Further, the magnitude of the compensation would bankrupt the Indian treasury.

In *State of West Bengal vs. Bela Banerjee* \(^68\), the Supreme Court reasoned that while the legislature has the discretion to lay down principles on the basis of which compensation is paid for appropriated property, such principles must ensure that the compensation is “a just equivalent to what the owner has been deprived of” and that the content of such principles is adjudicated by the court’. This decision of the Supreme Court prompted the Parliament to pass the Constitution (Fourth Amendment) Act, 1955.

“\(\text{\textit{It is considered necessary, therefore, to re-state more precisely the State’s power of compulsory acquisition and requisitioning of private property and distinguish it from cases where the operation of regulatory or prohibitory laws of the State results in ‘deprivation of property’}}\)’ The Amendment also added three state land reform laws in the Ninth Schedule. The Fourth Amendment amended Article 31 (2A) to state,

“no such law [which transfers ownership or possession of property to the State or a Corporation] shall be called in question in any court on the ground that the compensation provided by the law is not adequate.”

Despite the First Amendment, the land reform policy of the states frequently violated even the diluted protection of the eminent domain clause in the Constitution. The states were battling the judiciary over the validity of these laws, and appeals were made to the Central government to step in. The Constitution (Seventh Amendment) Act, 1956 proceeded along the lines of the First and Fourth Amendments, giving more power to the Central Government - the reason for the Amendment was to “avoid these [multiple entries on acquisition of property] difficulties and simplify the constitutional position, it is proposed to omit the entries in the Union and State List and replace the entry in the Concurrent List by a comprehensive entry covering the whole subject.” The new focus was now expanded. Not only were laws on land ceiling and

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\(^67\) In 1951, the First Amendment was challenged in the Supreme Court in *Shankari Prasad Singh v Union of India* (AIR 1951 SC 458). The Court held that Parliament was empowered to amend the Constitution without any restrictions as long as it followed the procedure laid down for amendment in the Constitution.

\(^68\) In *State of West Bengal vs. Bela Banerjee* AIR 1954 SC 170, the validity of West Bengal Land Development and Planning Act 1948 which provided for acquisition of land after payment of compensation not exceeding the market value of the land on December 31, 1946 was challenged.
redistribution given the protection of the Ninth Schedule, consolidation of land holdings to increase agricultural productivity was also an important part of the agenda.

4.1.2 Industry

In India, toward the development of industry, the following policies were formulated. The Industries (Development and Regulation) Act of 1951, based on the Industrial Policy Resolution, 1948\(^69\) instituted a highly restrictive industrial licensing regime to control the private sector. Under the Act, all private industrial undertakings had to register with the central government. Any new undertaking required state permission, and expansion of existing firms required licenses. In certain cases, the government could assume control of private industries under this Act\(^70\).

During the formulation of the FYP, there was concern that empowering the state to impose controls on private enterprise would violate the Constitution. The Nehru government had already experienced problems with the judiciary on land policy. Towards fulfilling the IPR 1948, Nehru’s government realized the conflict with Article 19 (1)(g), which declared that all citizens shall have the right “to practice any profession, or to carry on any occupation, trade or business”\(^71\).

To solve this problem, the First Amendment to the Constitution added an exception to the above right which stated that nothing would prevent the State from making any law relating to “the carrying on by the State, or by a corporation owned or controlled by the State, of any trade business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise”.

Through the Fourth Amendment, Chapter III-A of the Industrial Disputes Act, 1951 was added to the Ninth Schedule. The Chapter empowered the state to assume management or control of an industrial undertaking in certain cases. Similar provisions involving insurance and the railways were also enabled through the Ninth Schedule.

4.1.3 Price System

The First FYP stated that the entire price system would be secondary to the needs of the nation and within the purview of the Plan. The First FYP declared that the “maintenance of a structure of prices which brings about an allocation of resources in conformity with the targets defined in the Plan must be the consistent aim of economic policy” (First FYP: Chapter 2).

\(^69\) IPR 1948 divided Indian industry in three categories - those on which the state had a monopoly, those where both the private sector and public sector were allowed to operate and those where private sector may operate but within the purview of state regulation.


\(^71\) The proviso read that the right was subject to reasonable restrictions that the State may impose in the interests of the general public.
However, halfway into the First FYP, problems relating to inputs for industrial sector were becoming apparent, and the Second FYP took steps toward resolving this in 1956. But before that, in 1954, Nehru’s government wanted greater legislative control over pricing of means of production. The other issue affecting the Nehru government was the federal structure of the Constitution and the government’s inability to control the production, supply, distribution and prices of inputs and essential commodities. Toward this goal, the Constitution (Third Amendment) Act, 1954 was passed to enable the Central Government to control prices of certain commodities. The object of the Amendment was:

“to legislate in respect of certain specified essential commodities” and to provide the “legal powers to control the production, supply and distribution of some of these essential commodities.”

The Essential Commodities Act, 1955 enacted based on this enabling Constitutional Amendment placed a price ceiling on inputs. The Act gave the government wide powers to control “production, supply, distribution, and purchase and sales prices of essential commodities”. (See Panagariya 2008: 42)

4.1.4 Analysis of the Nehru Years

‘Nehruvian’ socialism infringed on many Constitutional principles considered integral constraints during the drafting of the Constitution. The first casualty was the Separation of Powers. Independent judicial review was suppressed after the First Amendment added the Ninth Schedule to the constitution Under Article 31B.

The next casualty was the Fundamental Rights, which were attacked in multiple ways. First, any legislation added to the Ninth Schedule could overrule any fundamental right. Second, right to private property was violated by continuous expansion of the eminent domain power. Third, the right to freedom of trade and profession was amended and further restricted.

The next institution undermined to enable planning was the Federal structure prescribed in the Constitution. The distribution of powers between the Central and the state governments are described in Part IX and the Seventh Schedule of the Constitution. However, to control the price system of an entire economy, centralization in legislative and executive power is essential. Through the Third Amendment, the Central government usurped greater legislative control “the production, supply and distribution” of essential commodities.

Despite the fact that Nehru was a champion of many of these principles, and was the frontrunner in seeking a Constitution outlining these principles; the contradiction between socialist planning and a set of fixed and general rules caught up with him. Dhavan points out this
contradiction within Nehru’s plan and how Nehru failed himself through a series of Constitutional Amendments (Dhavan 1992).

These proactive and the retroactive amendments to the Constitution make it explicit that multiple policies suggested by the Planning Commission were in conflict with the Constitution. As Hayek had forewarned, socialist planning necessarily involves deliberate discrimination between individuals, in order to fulfill plan objectives. Therefore it is difficult for socialist planning to fit within the scheme of general rules which are announced beforehand and apply equally to all individuals in a non-arbitrary manner (Hayek 1944).

Khilnani observes that “during this period the idea of Planning Commission directing India’s economic development within the framework of constitutional democracy was in crisis” (Khilnani 1997: 86). The crisis referred to here is the crisis of the Constitution as a roadblock in economic progress. However, PC Mahanobolis, the architect of the Plan, recognized this and responded by moving toward economics, science and technology and away from political problems. He held a view that objective science was key to increased economic growth, and that political and constitutional problems were merely roadblocks Nehru must deal with. (Khilnani 1997: 87)

The question arises, as to why Nehru and other members of the Parliament did not update or abandon these policies. With each of the above policies Nehru’s government faced two choices - first, to pursue the socialist policy in violation of the original constitution (thereby amending the Constitution), or second, to abandon the socialist policy as instructed by the courts enforcing the Constitution. With each policy, the former route was chosen and the Constitution amended.

At this stage in this analysis, an important question arises over the influence of ideas and interests. One view may be that Nehru, bring Prime Minister, was removing constraints on the state to serve his personal interests. While there may be some merit in this argument, these policies were welcomed by the general public and intellectuals. Even the judiciary, while enforcing the Constitution and invalidating laws which violated it; declared that Parliament was supreme in its power to amend the Constitution72.

Despite these Amendments, Nehru was voted in during each Parliamentary election with overwhelming support. During his tenure as Prime Minister, the Congress party had a huge majority in the Lower House of Parliament. In his first term from 1952 to 1957, Nehru led the Indian National Congress to a majority of 398 of the 542 seats in the House, which was greater

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72 In Shankari Prasad Case. (supra) the Court held that the Parliament was empowered to amend the Constitution without any restrictions as long as it followed the procedure laid down in the Constitution. The Seventeenth Amendment (which added 44 legislations to the Ninth Schedule) was challenged in the Sajjan Singh Case in the Supreme Court in 1964. In response to the main question regarding the power of the Parliament to amend the Constitution, the majority opinion of the Supreme Court confirmed the ratio of Shankari Prasad Case.
than two thirds of the seats in the lower house. During this period, seven legislations were added to the Ninth Schedule through the Fourth Amendment Act, 1955, to go along with the original thirteen legislations included through the First Amendment.

After seven Amendments, when it became clear that socialist policies would be chosen over Constitutional principles, the Congress party had even greater support in Nehru’s second term, when the party had a majority of 402 out of 534 seats, a little over 75% of the seats. In his third term, Nehru again led the Congress to victory in 394 of the 540 seats, again well above the two-thirds requirement with 73% of the seats.

It is clear that members of parliament maximize votes and intend to remain elected to the legislature. However, in a democracy, it is rare to see such overwhelming support for a leader or a political party where the electorate does not support the ideas and policies of the incumbent government. Further, long before becoming Prime Minister, Nehru supported Soviet style central planning. It seems like in Nehru’s case there was really no conflict between his interest and his ideology. During his time in India, Galbraith wrote,

“The commitment to the goal of a socialist society is central in modern Indian thought. It is regularly averred by the government and indeed, all articulate Indians. Even the most intransigent Indian capitalist may observe on occasion that he is really socialist at heart.” (Galbraith 1958: 588).

Guha, a historian, writes of economic planning in the 1950s:

“The free-market critique; the human capital critique; the ecological critique – these make for fascinating reading today. But at the time [1950s] these notes of dissent were scattered, and they were politically weak. There was an overwhelming consensus in favour of a heavy industry-oriented, state-supported model of development” (Guha 2007:224)

Oddly, the criticism of Nehru came from those who were farther left on the economic and political spectrum. Nehru was criticized as not pushing the socialist agenda enough. For instance, longtime socialist Jaya Prakash Narayan was invited by Nehru to joint the first Cabinet. But Narayan refused due to rejection of his 14-point program mandating an overhaul of the Constitution, nationalization, and formation of cooperatives and collectives. Narayan had tremendous popularity and grassroots support for his socialist cause. Similarly, in the general elections in 1957, the Communist Party of India emerged as the largest opposition party to the Congress. The CPI won the state elections in Kerala. It was the first time that a Communist party had won a democratic election in a Constitutional democracy. Dissent from liberals on Nehru’s

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73 To pass an ordinary socialist policy requires simple majority. To pass a constitutional amendment requires two-thirds majority. Therefore, without some kind of general support for the amendments, consistently amending the constitution is unfeasible.
agenda came very few quarters, mainly the Swatantra Party led by C Rajagopalachari, and these voices of dissent had very little political support.

4.2 The Indira Gandhi Years (1965-78)

After Nehru’s death in 1964, which was mid-term, the question of succession was discussed within the Congress Party. Lal Bahadur Shastri was elected Prime Minister by the Congress Party. Party members also clamored to include Nehru’s daughter, Mrs. Indira Gandhi, for a more prominent role in the Party. She was appointed through the upper house (she had not stood for elections in the 1962 elections) and given a Cabinet portfolio. She was considered inexperienced and timid in both parliament and party meetings.

Shastri died in 1966 and when the question of succession arose again, Congress President K. Kamaraj and the Congress Party “Syndicate” unreservedly supported Mrs. Gandhi. Mrs. Gandhi served as Prime Minister for the rest of the term. In the 1967 elections, also Mrs. Gandhi’s first general election, the popularity of Nehru was sorely missed, as the Congress’s majority shrank significantly; with the party only winning 303 of the 552 seats. For the first time the party had less than two-thirds of the seats in the lower house. Once again Desai wanted to be the Prime Minister, however the Syndicate preferred Mrs. Gandhi.

Mrs. Gandhi soon realized that her position as Prime Minister was controlled by the Syndicate and threatened by Desai. She intended to create a place for herself and decided to identify herself as a socialist. An important factor in his decision was her Chief Advisor PN Haksar who advised her to embrace socialist ideology (Guha 436).

74 Party President K. Kamaraj was discussed potential successors with Congress ministers and powerful party members (collectively known as the Syndicate). Morarji Desai, an incorruptible socialist Chief Minister of Gujarat was considered controversial. The Syndicate preferred Lal Bahadur Shastri, Nehru’s Deputy Prime Minister whose policy agenda was a continuation of Nehru’s plan.

75 Some suggest that it was her timid and quiet nature that led to her approval. The Syndicate thought she would be easy to control and hers would be a “collective” leadership. Morarji Desai, the frontrunner, was considered too headstrong and controversial to be controlled by the Syndicate. (Guha 2007:404)

76 Haksar was a socialist polymath who was educated at the LSE. He was unabashedly pro-state and anti-market in his leanings. In particular he was pro-Soviet.

77 Pre-1967, Mrs. Gandhi had never identified herself as a socialist. The generous interpretation of this move by historians is that she wanted to identify herself with the electorate, which favored socialist policies, in order to get elected. An alternate is that she embraced socialism to increase the public sector and create a position for concentration of power. Almost all historians place her ideological leaning at a different and lower level than Nehru’s. (Guha, Austin) “Nehru’s halting yet honest attempts to promote a democratic ethos in a hierarchical society were undone by his own daughter, and in decisive and dramatic ways. … Nehru respected the freedom of the press, and allowed it to flourish. Nehru respected the autonomy of the bureaucracy and the judiciary: there are no known cases of his having intervened to favour or act against a particular official.” (Guha 2007: 518) “Unlike Nehru, under Mrs. Gandhi “economic and social transformation were to be sought at the expense of liberty and democracy.” (Austin 1999:290)

“Nehru worked to strengthen the effectiveness of the country’s centralized federalism and to establish the institutions and the spirit of democracy. Although he could and did take undemocratic actions, he was a democrat by conviction and understood that at some point over-centralization crosses into authoritarianism. Conversely, Indira Gandhi … over-centralized for personal political survival, seemingly unconcerned with the effect this had on the institutions of democracy and federalism.” (Austin 1999:573)
The Syndicate that dominated the organizational wing of the Congress “favored dilution of planning, a reduced role for the public sector, and greater reliance on private enterprise and foreign capital”. Mrs. Gandhi on the other hand wanted “to go farther left in her policies.” In May 1967, she announced the Ten-Point Program, which included policies like nationalization of banks and insurance, curbing monopolies, land reforms, urban land ceiling, rural housing, and abolition of privy purses\(^{78}\) – which was a hugely popular agenda. (Panagariya 2008:50). She followed Haksar’s advise and positioned herself as the “real” socialist relative to Desai (who was opposed to bank nationalizations) and the Syndicate (which wanted to move away from socialist policies all together)\(^{79}\). Armed with her Soviet style socialism, Mrs. Gandhi set out to nationalize important sectors of the economy.

### 4.2.1 Bank Nationalization

In 1969, almost overnight, Mrs. Gandhi government nationalized 14 banks with assets over 500 million rupees and brought 54% of India’s bank branches into the public sector. This was done first by an Ordinance promulgated on July 19\(^{th}\), 1969, followed by the government passing the Banking Companies (Acquisition and Transfer Undertakings) Act, 1969, which had retrospective effect from 19\(^{th}\) July 1969\(^{80}\).

In a popular radio speech, she argued that “control over the commanding heights of the economy is necessary, particularly in a poor country where it is extremely difficult to mobilize adequate resources for development”. She committed the newly nationalized banks to serve the common good and to give credit not only to the rich and big businesses, but also to “millions of farmers, artisans and other self-employed persons”\(^{81}\).

The nationalization of banks was challenged in the Supreme Court for violating the right to private property of a shareholder and the question of adequate compensation was again raised. In holding the Act void\(^{82}\), the majority judgment of the Supreme Court reasoned, “in all States

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\(^{78}\) All programs other than abolishing privy purses were detailed in the Fourth and Fifth Five Year Plan. Privy Purses were payments made to the royal families of erstwhile Indian princely states as part of their initial agreements to integrate with independent India. In 1969, Mrs. Gandhi’s initial attempt to abolish the Privy Purses lost by one vote in Parliament. With a renewed majority, the government passed the Constitution (Twenty-Sixth Amendment) Act, 1971 to abolish privy purses guaranteed by the Constitution.

\(^{79}\) Subsequently, the Syndicate split away and created a new Party called Congress (O).

\(^{80}\) Nationalizing banks was not new to India. In 1955, the Imperial Bank of India was nationalized to form the State Bank of India – even today, India’s largest bank. The Parliament passed SBI Subsidiary Banks Act 1959 to acquire 8 banks as its subsidiaries.

\(^{81}\) July 19, 1969

\(^{82}\) On grounds that (i) the Act makes hostile discrimination, preventing the 14 banks from carrying on their business whereas other Indian and foreign banks may continue to carry on business (ii) the Act restricts banks from carrying on business under Article 19, (iii) the Act violates the guarantee of compensation guaranteed under Article 31(2) because the compensation is not according to relevant principles.
where the rule of law prevails, the right to compensation is guaranteed by the Constitution or regarded as inextricably involved in the right to property. … In India, which is a state, the rule of law prevails. Therefore the Constitution of India provides for just compensation.”

Mrs. Gandhi was advised to amend the Constitution to give effect to social legislation furthering the Directive Principles. However, in the 1967 elections, for the first time, the party had less than two-thirds of the seats in the lower house. Separately, due to a series of amendments to the Constitution, the Supreme Court had held in Golak Nath v State of Punjab\footnote{Golak Nath v State of Punjab AIR 1967 SC 1643. The Golak Nath family challenged one of the entries in the Ninth Schedule, the Punjab Security of Land Tenures Act 1953, on the ground that it deprived them of their right to private property. The power of the Parliament to amend the constitution and the Fundamental Rights was raised and an eleven-judge bench led by Chief Justice Subba Rao heard the matter.} 1967, that though the earlier Amendments would not be affected, in future, the Parliament could not amend the Constitution to abridge any of the Fundamental Rights.\footnote{The decision was an important shift in the attitude of the judiciary. Part of the reason attributed to the decision were populist and self-interested government policies after Nehru’s death. Members of the Supreme Court Bench felt that there was no political statesman left who could be trusted with over-reaching powers. The decision also captured the growing impatience of the judiciary and intellectuals, with the government constantly changing the Constitution.}

Largely due to Mrs. Gandhi’s newly acquired socialism, and the extremely popular move to nationalize banks, in elections in March 1971, the Congress Party won 351 out of 525 seats in the Parliament, which gave the government the requisite two-thirds majority to amend the constitution. The government went to work immediately. After regaining the power to amend the Constitution, through the Twenty-Fourth Amendment, the government proceeded to realize the ideals of the new and aggressive form of socialism.\footnote{The Object and Reasons of the Amendment Act read: “The Supreme Court in the well known \textit{Golak Nath’s Case} reversed by a narrow majority, its own earlier decisions upholding the power of Parliament to amend all parts of the Constitution including Part III relating to fundamental rights. … It is, therefore, considered necessary to provide expressly that Parliament has power to amend any provision of the Constitution so as to include the provisions of Part III within the scope of the amending power.”}

Soon after, the Government passed the Constitution (Twenty-Fifth Amendment) Act, 1971. The Objective of the Act was:

“\textit{In the Bank Nationalization case [1970, 3 SCR 530], the Supreme Court has held that the Constitution guarantees right to compensation … The Bill seeks to surmount the difficulties placed in the way of giving effect to the Directive Principles of State Policy by the aforesaid interpretation. The word “compensation” is sought to be omitted from Article 31(2) and replaced by the word “amount”. …}”

In the Fourth FYP she declared, “The nationalisation of the fourteen big banks is evidence of our determination to bring a greater volume of resources within the area of social decision.”

\subsection*{4.2.2 Nationalization of Means of Production}

\footnote{R.C. Cooper vs Union of India (1970) 3 SCR 530 at 605-6. Also see Para 1466 – Seervai (2008) - Page 1387}
After the nationalization of banks, Mrs. Gandhi’s government continued its mission to capture the “commanding heights”. In October 1971, the government took over the management of coking coalmines and coke oven plants pending nationalization. The nationalization was done in two phases, the first with the coking coalmines in 1971-2 and then with the non-coking coalmines in 1973. Coalmines were nationalized as being an important input for steel production, which was critical for the success of the Fourth FYP. In 1972, Indian Copper Corporation Ltd, was nationalized and made part of Hindustan Copper Ltd.

Next came general insurance; life insurance had already been nationalized in 1956. In 1972, general insurance was nationalized as part of the Ten-Point Program and one of the objectives of the Fourth FYP.

Another spate of nationalizations was sick firms, mostly textile mills. In 1968, The National Textile Corporation was incorporated to manage sick textile undertakings, taken over by the Government. Starting with 16 mills in 1968, this number gradually rose to 103 by 1972-73. In 1974, all these units were nationalized. Legislation was passed in 1973 to nationalize the undertakings of the Alcock Ashdown Company Ltd “for the purpose of ensuring rational and coordinated development and production of goods essential to the needs of the country in general, and defence department in particular.” This was arbitrary, even by the standards of Mrs. Gandhi’s government, since legislation was passed to nationalize a single firm. Apart from the government’s nationalization agenda, a new layer of regulation was added through the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP), which was aimed specifically at large firms. In 1973, the government restricted any new production activity of companies covered by MRTP to a very narrow set of industries. In addition to the usual licensing procedures, these firms required additional approval from the Central government for all new undertakings, expansion, mergers, amalgamations, and takeovers. (For details on MRTP policy see Panagariya 2008: 59-60 and Bhagwati and Desai 1970)

In 1973, in addition to the Foreign Investment Board, the government enacted the Foreign Exchange Regulation Act, 1973 (FERA), which required all non-bank foreign branches, and companies incorporated in India with over 40% foreign equity, to obtain permission from the

87 Coking Coal Mines (Emergency Provisions) Act, 1971
88 The Coking Coal Mines (Nationalisation) Act, 1972
90 The Indian Copper Corporation (Acquisition of Undertaking) Act, 1972
91 General Insurance Business Nationalization Act 1972
92 The Sick Textile Undertakings (Taking Over of Management) Act, 1972
93 The Sick Textile Undertakings (Nationalisation) Act, 1974
94 The Alcock Ashdown Company Limited (Acquisition of Undertakings) Act, 1973
95 In 1968, the Board was originally set up to take decisions on projects involving foreign collaboration.
central bank in order to conduct business. Foreign non-banks, which did not dilute their foreign equity, were not given “national treatment” and had to wind up their business. (For details on FERA policy see Panagariya 2008: 61 and Bhagwati and Desai 1970).

These legislations were challenged in the courts and declared unconstitutional. Mrs. Gandhi however was dedicated to central planning. She famously said,

“We should be vigilant to see that our march to progress is not hampered in the name of the Constitution.” (Gandhi 1975)96

After much litigation, the Mrs. Gandhi government passed the Constitution (Thirty-Ninth Amendment) Act, 1975 to add these controversial legislations in the Ninth Schedule. In the Objects and Reasons the thirty-ninth Amendment Act stated:

“Recourse was had in the past to the Ninth Schedule whenever it was found that progressive legislation conceived in the interests of the public was imperiled by litigation. It has become necessary to have recourse to this device once again now. Between 1971 and 1973 legislation was enacted for nationalizing coking coal and coal mines for conservation these resources in the interests of steel industry. These enactments have been brought before courts on the ground that they are unconstitutional. So is the case of sick textile undertakings which were nationalized in 1974. To prevent smuggling of goods and diversion of foreign exchange which affected the national economy, Parliament enacted legislation which again has been challenged in the Supreme Court and in High Courts. These and other important and special enactments which it is considered necessary should have the constitutional protection under article 31B, are proposed to be included in the Ninth Schedule.”

This Amendment continued the trend of enabling socialist policies by placing them in the Ninth Schedule, a legal maneuver the Nehru government had also used frequently.

4.2.3 The Emergency

The Thirty Ninth Amendment was challenged in the Supreme Court, but the main challenge was not regarding licensing and nationalization. The government’s main reason for passing the Thirty Ninth Amendment was that Mrs. Gandhi’s power was threatened due to a series of events beginning with the 1971 election.

Raj Narain, a politician who lost to Mrs. Gandhi in the 1971 Parliamentary Election, filed a petition alleging that she had won the election through corrupt practices and had used government officials and official machinery in her campaign. On June 12, 1975, the Allahabad High Court found Mrs. Gandhi guilty on two counts and her election to Parliament was declared null and void.

While her appeal was pending in the Supreme Court and she was under pressure to resign, Mrs. Gandhi issued an Ordinance on June 25, 1975 declaring a state of internal emergency. Elections and civil liberties were suspended, Mrs. Gandhi ruled by decree.

On August 10, 1975, the government passed the Thirty Ninth Amendment. The Amendment sought three things - to withdraw the election of the Prime Minister from the scope of the judicial review process; to declare the decision of Allahabad High Court, invalidating Mrs. Gandhi’s election, void and to exclude the Supreme Court’s jurisdiction to hear an appeal on the matter of the election.

The amendment was challenged in the Supreme Court and the Court declared the Amendment clause unconstitutional as it violated three essential features of the Constitution. It destroyed the democratic institution of India, it violated the principle of separation of powers in the Constitution and finally violated the right to equality of status and opportunity by creating a privileged position for the Prime Minister.

Though Mrs. Gandhi had declared emergency and suspended democracy; the pretense of a Constitutional Amendment was made to legitimize the new regime. The Constitution (Forty-Second Amendment) Act, 1976 stated as its Object and Reasons:

“The question of amending the Constitution for removing the difficulties which have arisen in achieving the objective of socio-economic revolution. … The democratic institutions provided in the Constitution have been subjected to considerable stresses and strains and that vested interest have been trying to promote their selfish ends to the great detriment of public good. … It is, therefore, proposed to amend the Constitution … to make the directive principles more comprehensive and give them precedence over those fundamental rights which have been allowed to be relied upon to frustrate socio-economic reforms for implementing the directive principles.”

The Amendment declared the supremacy of the Parliament, both above the Constitution and the judiciary. The Fundamental Rights in Part III of the Constitution, which expressly protected the individual from the excesses of the State, were now subject to Directive Principles, or socialist welfare agenda of the State.

It is perhaps fitting, that the Forty-Second amendment, which was the most undemocratic and unconstitutional move by the Indian Parliament, should also declare India a ‘Socialist’ state in the Preamble to the Constitution.

4.2.4 Population Planning

97 Section 4 Article [329A(3)] The Constitution (Thirty-Ninth Amendment) Act, 1975
98 Section 4 Article [329A(4)] The Constitution (Thirty-Ninth Amendment) Act, 1975
99 Section 4 Article [329A(5)] The Constitution (Thirty-Ninth Amendment) Act, 1975
100 Indira Nehru Gandhi v Raj Narain AIR 1975 SC 1461
The Planning Commission declared that population control and Family Planning were “of the highest priority” (Fifth FYP: Chapter 18). Food shortage and poverty were blamed on “over-population” in the seventies. Typical of the Planning Commission, targets for the number of health centers, doctors, nurses and contraception were specified in the FYP. It also provided positive incentives, such as small cash payments on undergoing sterilization procedures like male vasectomy.

In April 1976, a new vigor was associated with the population planning program as Mrs. Gandhi’s son, Sanjay Gandhi made it a priority and engaged in “continual verbal harrassment of the regional political leaders over whom they had influence” (Gwatkin 1979:40). Guha states that Sanjay Gandhi catalyzed a competitive political process for population planning, “He would tell one chief minister of what another had claimed to have done” (2007:514). Sanjay Gandhi’s speeches and discussion incited officials and led “to a wave of unilaterally raised sterilization targets” (Gwatkin 1979:40). These targets were passed on the district level bureaucrats. Soon the bureaucracy resorted to coercion in order to meet the sterilization targets. Most of these were vasectomy of thousands of men. In a few months by beginning of 1977, 14 million people had been sterilized (Gwatkin 1979:49). Figures for the number of forced sterilizations are unavailable.

This infringement of individual rights did not witness any Constitutional Amendments. While some states like Maharashtra proposed legislation allowing for compulsory sterilization, the proposals never passed to be challenged in Court. Also, during this period, writ remedies to challenge the infringement of Fundamental Rights were suspended. This large-scale violation of individual liberty went unchecked.

4.2.5 Analysis of the Indira Gandhi Years

Mrs. Gandhi’s government is culpable for undermining many institutions in the Constitution. First was the Separation of Powers by declaring the Supremacy of the Parliament to amend the Constitution and reversing the Supreme Court in doing so. She placed 124 laws in the Ninth Schedule, beyond the purview of judicial review, and these laws also violated Fundamental Rights. Second, Fundamental Rights were undermined under Article 31C, as Directive Principles were given precedence over Fundamental Rights in case of conflict. Finally, she suspended democracy in India by declaring the Emergency and placing the office of the Prime Minister outside the purview of judicial review.

There is no doubt, that apart from the unfortunate incidents leading to the Emergency, the other Amendments to the Constitution were made to give effect to the Fourth and Fifth FYP. Mrs. Gandhi came under much criticism and is blamed for single-handedly destroying democratic institutions in India. However, Mrs. Gandhi used the same tools to establish herself in a position
of power (above the judiciary and the Constitution) as practiced to forward the socialist agenda in previous decades.

Despite Mrs. Gandhi’s intentions being criticized in a way that Nehru’s intentions were never\textsuperscript{101}, until 1977, she was supported by the electorate and her policies were extremely popular. Her call “Garibi Hataao” to banish poverty became a national slogan; and abolishing privy purses as well as nationalizing other industries, was considered by the general public as a welfare measure. Though her actions were unconstitutional, it is difficult to frequently amend the Constitution without support from the general public.

Though Mrs Gandhi’s governments were at loggerheads with the Supreme Court, and almost the entire content of the Constitution (Forty-Second Amendment) Act, 1976 was held unconstitutional; the Supreme Court appreciated the declaration of India as a “socialist” nation in the Preamble. The Court called it the “most eloquent example of how amending power can be exercised consistently with the creed of the Constitution.” And stated that the amendment offers “the promise of more”; it does not “scuttle a precious heritage”\textsuperscript{102}.

Though Mrs. Gandhi had strong political opposition, unlike Nehru who was universally loved. However, Mrs. Gandhi’s opposition also favored socialism. In 1977, the Janata Party was formed under the leadership of Morarji Desai and supported by Jayaprakash Narayan. Desai was a staunch socialist, though more in the Nehruvian way. Mrs Gandhi’s other political opponent, Jayaprakash Narayan had proposed a 14-point program eerily similar to Mrs. Gandhi’s views in 1952, which was rejected by Nehru. Even in the constituency where Mrs. Gandhi lost in the 1977 election, the candidate elected was Raj Narain, an old school Gandhian Socialist. Both Desai and Narayan were confirmed democrats, and they campaigned on the promise of restoring democracy and reversing Forty Second Amendment.

Therefore, the electorate had once more supported the socialist agenda. Mrs Gandhi and the Congress lost most seats in states where forced sterilizations were aggressively pursued.

\textsuperscript{101} “Nehru’s halting yet honest attempts to promote a democratic ethos in a hierarchical society were undone by his own daughter, and in decisive and dramatic ways. … Nehru respected the freedom of the press, and allowed it to flourish. Nehru respected the autonomy of the bureaucracy and the judiciary: there are no known cases of his having intervened to favour or act against a particular official.” (Guha 2007: 518)

“Unlike Nehru, under Mrs. Gandhi “economic and social transformation were to be sought at the expense of liberty and democracy.” (Austin 1999:290)

“Nehru worked to strengthen the effectiveness of the country’s centralized federalism and to establish the institutions and the spirit of democracy. Although he could and did take undemocratic actions, he was a democrat by conviction and understood that at some point over-centralization crosses into authoritarianism. Conversely, Indira Gandhi … over-centralized for personal political survival, seemingly unconcerned with the effect this had on the institutions of democracy and federalism.” (Austin 1999:573)

Even writers like Das (2000) and Varma (2008) who criticize the complete embracing of socialism and discuss the influence of socialist ideology in Indian economy, blame Indira Gandhi and her government for undemocratic behavior relative to Nehru’s government (Das 2000: 174).

\textsuperscript{102} Minerva Mills v Union of India 1980 SC 1789 at p. 1799
Many believe that forced sterilization was the most important reason for her loss, placed even higher than suspension of political and civil liberties. However, it is unlikely that Mrs. Gandhi lost the elections due to her socialist agenda, as the opposition was also explicitly socialist in its manifesto.

In 1978, under a Desai-led Janata Party government, the Forty Fourth Amendment to the Constitution was debated and passed in the Parliament. This amendment undid most of the mischief of the Indira Gandhi government, but retained the socialist features. The government retained Article 31C and to this day in India, Fundamental Rights, which expressly protected the individual from the excesses of the State, are subject to Directive Principles. The 44th Amendment also deleted what was left of the right to private property and also remained all restrictions on the power of eminent domain. The Constitution (Forty-Fourth Amendment) Act, 1978 stated as its Object and Reasons:

“the right to property, which has been the occasion for more than one amendment of the Constitution, would cease to be a fundamental right and become only a legal right.”

5. Conclusion

In conclusion ideas played an important role in the formation as well as the transformation of the Indian Constitution. At the pre-constitution level, the Constituent Assembly created a constitution with some contradictions. While Part IV containing Directive Principles, attempted to expand the duties of the State; Parts III outlining the Fundamental Rights, and Parts V and VI, outlining the Separation of Powers, constrained the State. This Constitution sent mixed messages to future legislators. Future governments were to pursue socialist planning, but within the constraints of the Constitution, a task which poses a choice between the Constitution and the Socialist Plan.

At the post-constitutional level, pursuit of socialist ideas created two choices for the legislature- first, to pursue the socialist policy in violation of the original constitution, or second, to abandon the socialist policy as instructed by the courts enforcing the Constitution. With each policy, the former route was chosen and the Constitution amended. Both Nehru and Mrs. Gandhi, enjoyed popular support of the electorate and won elections by large margins, despite frequently amending the Constitution.

Therefore, ideas, may serve as the ultimate constitutional constraint. The ideas of the electorate and intellectuals frame the parameters and boundaries within which each policy is debated and pursued.
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