



**CONSTITUTIONALISM OLD AND NEW – MARKET ECONOMY, THE “CONSTITUTIONAL MOMENT” AND NEW TECHNOCRATIC REGULATORY INSTITUTIONS IN LIBERALIZING INDIA**

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**ABSTRACT**

The present project was commenced to study the onset of technocratic regulation of the market economy in India and its relationship to forms of Reform. The study provides a detailed descriptive and analytical account of the intellectual foundations and actual operation of constitutional authority alongside its Extra-Constitutional Administrative Cousin, its failings, and the “constitutional moment” in the early ’90s which offered the impetus and the opportunity for the construction of the new autonomous regulatory state – also on a foundation of extra-constitutional administrative entities. This analysis is done over the background of the history and development of constitutionalism both in its more recent modernist reinvention in the European enlightenment as well as the ancient roots of the Greek City-States and the Roman Republic. The study sets out a framework for the purposes of finding and elaborating the nature of the transformation from the extra-constitutional command economy to the autonomous regulatory bodies managing the emergent and resurgent

free market i.e. it sets out a hierarchy of transformation along the axis of the *transformation in degree* versus the *transformation in kind* i.e. *subordinate or superordinate transformation* and finds the former to be characteristic of India’s new regulatory state rather than the latter.

**I. INTRODUCTION**

The present study is being undertaken to study a more neglected realm of the literature surrounding the period of economic and governmental liberalization of the early ’90s in India. The studies show largely the description of the constitutional struggles leading up to the economic crisis of 1991 which is mostly a matter of the study of Judicial construction, precedents, and Constitutional doctrine<sup>1</sup>. The same problem plagues the study of India’s legal and political history which lacks a more nuanced and contextual approach to the questions surrounding the decision-making process, the actual outcomes obtained by the processes involved, and the key moments in the developmental pathways in the constitutional history of the nation. These are all connected with the movement towards the liberalized state in the ’90s (Thiruvengadam, 2019). Here a distinction must be made in the constitutional and the administrative order, the former referring to a more stringent and constitutionally sanctioned order which is clearly visible in the explicit actions and utterances of the functionaries of the state and the analysis of the constitutional document itself. The latter requires more careful consideration of the operation of the administrative order in the state reference being had to the executive exercise of

<sup>1</sup> See (Thiruvengadam, 2017) for more detail on the narrow and doctrinal work in the field of constitutional analysis.



delegated as well constitutional authority and frequently *extra-constitutional authority*, the authority on which the constitution is simply silent or which does not have a constitutional basis.

Once this distinction is understood, the purpose of the thesis would become at once far clearer, the administrative state is characterized by rulemaking in the shadows (Custos, 2009). It is not necessarily obscure but certainly more ad hoc, and with lesser restraints on its exercise, especially in cases where its use is extra-constitutional. The question to be answered given the prevailing scenario in the administrative state is the degree of the transformation v. the kind of change effected. That is to say, whether the transformation effected is merely conditional and discretionary exercise of the constitutional authority which has brought about what we might call *subordinate transformation* which is entirely reversible, carries no significant consequence for how the constitutional order is psycho-socially perceived and carried on or is it a larger and far more consequential *superordinate transformation* which would imply a deep-seated and fundamental shift in the nature of the constitutional order and thereby imply that the psycho-social understanding of the order itself stands forever altered. That the business of government is perceived in a wholly new manner is a dubious prospect, that the gov't may not merely once again move back to the prior extra-constitutional arrangement by the exercise of the very same powers that were used to establish it, that the new extra-constitutional administrative entities depend on the very same legal-constitutional edifice as the ones before it and the only difference is as regards the *degree* to which those powers are exercised and not the

*kind* of powers and the *kind* of authority the gov't assumes unto itself.

## II.BACKGROUND

The constitutional order of the modern state owes its origins much to the ancient heritage of the western world as also to more recent developments particularly since the fall of the absolute monarchies. The rise and origins of the written constitutional form of government have been attributed variously to the Greek city-states such as Athens and Sparta. As far as Athens is concerned, it was the first democracy in recorded history with a very unique set of institutions and a progressive and innovative society at least given the time. Sparta, on the other hand, was a conservative, militaristic society and yet gave rise to many characteristic features of western governance, such as a limited separation of powers, the subordination of the executive to Judicial authority including ouster from power. However, one ought not to be misled, in that Sparta was an exemplar of what scholars' term "constitutional authoritarianism" whereas Athens was far more particular in its attempt to impose fetters on the actual exercise of political authority in the state. The question of the origins or definitions of constitutionalism leads invariably to the difficulty of not only limiting the exercise of political authority by law but also controlling or constraining such power. Mere limitation by law can be thwarted quite easily given that the law-making organ would be free to craft such law as grants it complete authority to impose its will, therefore what acquires significance is the question of the limitation of Sovereignty. As has been stated, a more rudimentary form of constitutional thought, limitation by law was known almost universally to the ancients. All the way from the Greek city-



states,<sup>2</sup> to the Roman Jurists<sup>3</sup> and philosophers. The notion of the superordination of the law to the administrator was in place along with the expectation of universal obedience to the law. Overall, however, the doctrines of popular sovereignty as championed by the state of Athens and the limitation or fetters on constitutional authority were less developed. These received a developmental impetus following enlightenment thinkers such as Jean Bodin, Montesquieu, and Thomas Paine. Writing at the time of great social upheaval these thinkers introduced into the politics of the time several notions to develop further constitutional thought. At the time constitutional government implied simply good governance or that which was comported with established norms of the day as derived from usage or custom and agreed upon by the people in their governance (“Constitutionalism: Ancient and Modern, Charles Howard McIlwain,” 2002.). The progressive emergence of the nation-state and the increasing population and state formation now necessitated the involvement of the state in the lives of ordinary people to a much larger degree than before, as a response the new thinkers and their writing proliferated given the invention of the printing press around this time (“Controlling the State: Constitutionalism from Ancient Athens to Today, Scott GORDON, Scott Gordon,” 2002).

Several theorists like Thomas Hobbes and John Locke enunciated their notion of the

social contract as the source of political authority and the construction of state order. On the other hand, theorists like Thomas Paine developed the modern notion of the constitutional state as one where the constitution is antecedent to the existence of any government and its authority, and without a constitution, there can be no source of justified use of political authority or force<sup>4</sup> (“Paine: Political Writings, Thomas Paine,” 2002). Similarly, Lord Camden argued for Natural rights in the British System as a natural fetter on the Parliament (“Constitutionalism: Ancient and Modern, Charles Howard McIlwain,” 2002), in effect a limitation on the legislative organ which was antecedent to its own authority and therefore could not be abrogated without the direct resolution of the supreme power i.e. the people.

Administrative law, on the other hand, has decidedly more modern origins, the notion of the administrative state took hold in the French Republic after the French revolution of 1792, when the feudal order crumbled away and was directly replaced by the intellectual theorizing of political and legal scientists (Rose-Ackerman et al., 2017). The new order as obtained reduced the state to the dynamic of the State-people and the empty space in between attracted the construction of viable administrative structures which were as well autonomous and impervious to the general Judicial power of natural rights review, is subject to its separate

<sup>2</sup>See (“Controlling the State: Constitutionalism from Ancient Athens to Today—Scott GORDON, Scott Gordon, 2002) for a description of Constitutional thought among the leading philosophers of the time viz. Plato, Aristotle – who studied over a hundred separate constitutional systems and Cicero along with a cross-civilizational account spanning Athens, Sparta and the Roman Republic.

<sup>3</sup> The magistrates and consuls were expected to swear fealty to the law when entering into service and exiting, see Supra.

<sup>4</sup> See also (Otis, 1764) and (“A vindication of the British colonies: By James Otis, Esq; of Boston.. - James Otis—Google Books,” 1769.)



administrative review by administrative courts.

The constitutional and administrative regime in India is borrowed from the Westminster parliamentary scheme as infused with the American bill of rights (Rose-Ackerman et al., 2017). It is in effect the combination of the two major exponents of the Anglo-Saxon constitutionalism i.e. the American constitution with the Bill of rights and Judicial Review and the British system with a conjoint legislative-executive in the form of the parliament with the direct accountability of the executive to the peoples' representatives and the closer accountability and less independence therefore of administrative organs. This general truth held in the era of Nehruvian socialism but in the more recent period after the liberalization, the peculiar feature of autonomous and independent administrative and regulatory bodies that have proliferated in the United States and have also made their way to European continental Jurisdictions like Germany and France have also made their way over to India as the preferred way to transition to a regulated Free market (Dubash & Morgan, 2013).

### III. ANALYZING THE "CONSTITUTIONAL MOMENT"

What followed after the collapse of India's economy in the wake of the rising external short term debt and the collapse of foreign exchange reserves due to the unsound fundamentals of the internal economy, was what has been termed the "constitutional moment" (Ackerman, 2000), by leading scholars on the area such as Bruce Ackerman's work on comparative constitutionalism (Thiruvengadam, 2019). The schema evolved by Professor Ackerman

whilst cannot be subjected to a full and comprehensive review can still help to illuminate many of the happenings in the Indian constitutional order since the early '90s. That was the decade that the long continuing administrative socialist agenda began to finally fall apart after its statutory implementation had already been stymied by the courts. The command of the economy began to give way to the regulatory state under the economic and international pressure generated by the failure of the Indian economy to keep chugging along at a snail's pace.

In fact, the collapse of the economic order exposed the rotten roots of the extra-constitutional administrative state that had been playing fireman for the years prior, frantically attempting to put the falling blocks back into place – a job for which it was and will forever be fundamentally unsuited. On the other hand, the emergence and development of the regulatory state had contemporaneous support in that the economies of various nations in the global south were experiencing a similar shift from the domination and control of non-market socialism through administrative and executive despotism to a regulatory state managing the outcomes of a market economy (Dubash & Morgan, 2013). India as it began the process of liberalization had to embark on an ambitious and quick program of first dismantling the overbearing extra-constitutional structures that existed at the time and building modern and independent technocratic institutions in their place to regulate the now unleashed free market and energies of the entrepreneurial public (Bhalla, 2018). This process will be more fully analyzed in the next section. What is more immediately relevant here, is the



application of the notion of the constitutional moment and Ackerman's schema to the events of the '90s in light of the numerous demonstrable failures of the desired socialist order. As well one must consider how the rest of the constitutional order reacted to the turbulent years and the radical change which was to be initiated in place of the Nehruvian state that had been erected decades prior.

To begin with, Ackerman's scheme of comparative constitutional development posits a tripartite structure, i.e. it goes from the revolutionary constitutionalism of which the Indian case is considered the prime archetype (Thiruvengadam, 2017) to the more docile establishment constitutionalism – where moderate outsiders join forces with pragmatic insiders for stable and continuous constitutionalism - or the elitist construction of constitution – where the excluded political and cultural elites can return to power once the dominant structure gives way under decay and collapse (Thiruvengadam, 2019). The task here is to understand the application of this framework, according to Ackerman himself, the first type applies to the Indian case and proceeds over four distinct temporal stages leading to the present moment (Rose-Ackerman et al., 2017). However, it is meant here to show that the first type of constitution-making in the Indian case manages to exhaust itself merely after the first stage, namely the revolution, and thereafter begins to manifest the signs of the other two varieties. It is as though after the revolutionary anti-colonial struggle of the founders and the convoluted self-defeating logic of Socialism which was attempted, the state exhausted itself after battling against its

own self for a half-century and thereafter put down its intellectual and legal tools to begin another phase of reform in the country. This would normally have been identified as the end of revolutionary communist constitutionalism and the beginning of a more moderate “establishment constitutionalism” – to the degree that once the revolutionary order collapsed the erstwhile revolutionaries in power suddenly found themselves on the outside of the legal and political mood and only the more moderate among them were able to join forces with the now neo-liberal climate of the 90's – as well as an elitist construction – to the degree that personalities such as Manmohan Singh, the finance minister in the gov't of Narasimha Rao were finally able to get an opportunity to put into place their preferred free-market reforms which were taboo even in the years leading up to the disaster of 1991 (Sharma, 2019).

Given that the revolutionary moment had ended, why was the shift not recognized? This has to do with the nature in which the construction of the command state in India had been restricted already constitutionally such that it slowly fizzled out over the decades following Rajiv Gandhi's “weak strong state” (Thiruvengadam, 2017)<sup>5</sup> and the primary tool, in fact, had already transitioned to the extra-constitutional administrative state which had the mandate of closely guarding and operating the “license-permit-quota” Raj in India. So, we see a twin movement, one the collapse of any vestiges of the constitutional command order, as well as finally the phasing out of the Quota Raj in the administrative state to usher in the

governmental structure leading to a paradoxical and paralysed federal govt.

<sup>5</sup> Thiruvengadam explores the centralised state asserting and consolidating authority combined with the weak reach to the extremities of India's



Regulated free market. At this time, as a natural consequence of this reshaping of the legal and economic order, the actual constitutionally empowered technocratic bodies of the election commission and the Auditor and Comptroller General began to effectively discharge their functions and utilize their constitutional Authority (Thiruvengadam, 2017). As the administrative state finally also rescinded and was frustrated like the legislative initiative had been for decades, the constitutional technocratic bodies also found more breathing room to operate and develop professionally in the Indian Legal and Constitutional space.

#### **IV. The Rising Tide of Regulation: India's Technocratic State**

An analysis of the construction of India's new regulatory administrative state is germane to determine what the true lasting nature of the constitutional moment was, i.e. whether it ushered in a sub-ordinate change or super-ordinate transformation. What we find in India is that the various sectors have been impacted disparately depending on the politics which were germane to that sector, the degree to which such politics could give way to the liberal market move and how entrenched the administration was in that sector, and how amenable to a fundamental transformation (Thiruvengadam, 2019). Arun Thiruvengadam in his work argues, that the regulatory state was not simply a dictate of the World Bank, as a pre-condition to the granting of crucial financial instruments which would rescue India from the economic Crisis of 1991, rather there was a will already in the interior of market reform and the

ending of the command model of the administration which when combined with external pressure could fructify into several key reforms (Thiruvengadam, 2017). These must be considered case by case along the axis of their legal and economic magnitude.

#### **A. From the Top-Down Planning commission to Bottom-Up Advisory Planning**

The death of the Planning commission in 2014 soon after the election of the Narendra Modi Gov't signaled the end of the extra-constitutional planning model. The body had been relegated to the shadows even under the previous Congress gov't's especially after the Manmohan Singh administration opted to constitute a national advisory council that performed an advisory and recommendatory function<sup>6</sup>, considering and confirming bills for enactment. Critics have claimed that the NAC was beginning to resemble a second cabinet which would run afoul of the constitution but in that respect, it was much tamer than compared to the planning commission (Kapur, 2017).

The Narendra Modi Gov's discontinued both the Planning commission and the National advisory council, to constitute an entirely new body, which was termed the national institution for transforming India or Niti Ayog in short. The stated objective of the institution is as a national policy think tank which is to operate collaboratively and consultative in the spirit of co-operative federalism rather than the one-way policy channel of the Nehruvian state ("Modi Planning: What the NITI Aayog Suggests

<sup>6</sup> The dissatisfaction with its performance had been rising in the decades prior to the economic collapse and the destruction of all credibility and legitimacy of

Nehruvian planning in India. See (Bhargava & oReader in Economics, 1982).



about the Aspirations and Practices of the Modi Government: South Asia: Journal of South Asian Studies: Vol 38, No 4,” 2015). In terms of the words on paper, this represents an absolute sea change whereby the socialist state has been completely turned on its head. The official statements about the nature of Niti Ayog insist on a bottom-up approach to policy and social transformation rather than the top-down channel that the planning commission aimed at (“Overview | NITI Aayog,” 2019). Whatever the practical accomplishments, the theoretical framework around the command state has been effectively dismantled and the reigning extra-constitutional structure champions the multi-stakeholder and free-market approach to economic and social transformation.

### **B. Regulation of the Financial Markets**

In the realm of financial markets, the erstwhile regime of capital control via the capital issues act of 1947, was discontinued entirely. Before the liberalizing moment which set up the Securities and exchange board of India in 1988<sup>7</sup> by executive resolution (and was eventually given statutory backing by the SEBI act of 1992<sup>8</sup>), the capital issue regime was predicated on the control of capital and its lifecycle (Ramachandran & Swaminathan, 2005.). The intent was very much an economic determination of the distribution of capital in society via extensive capital controls imposed on the populace.

This was along with the rest of the socialist agenda found extremely wanting and was eventually replaced by the disclosure and investor protection regime ushered in along with the newly established body of SEBI. The technocratic component here refers to the official agenda, which is to lay down and ensure compliance with financial transparency and disclosure norms which are meant to inter alia, create a level playing field among investors, protect their investments against potential fraud by listed entities, and fundamentally to produce a sound economy in the real of capital issues whether primary issues through initial public offers or those traded in the secondary market (Gokarn, 1996). The move away from complete control and prior approval regime has unlocked the dormant savings in society and produced a plethora of investment opportunities for the layman as also the professional day trader (Gokarn, 1996). Ultimately, however, in terms of the quality of change this sector has experienced, it must be noted that the govt neglected to allow the market to take over from the previously despotic state<sup>9</sup>. Electing instead to jump to the model of regulated state created by for instance the Securities exchange act of 1933 and 1934 in the United States where the new deal state constructed to battle the economic depression mandated the move away from the exceedingly liberal state “blue sky” laws to the establishment of the central technocratic regulatory body of the Securities Exchange Commission in the secondary market which would also penalize offenders

<sup>7</sup> Infra.

<sup>8</sup> Securities and Exchange Board of India Act, 1992 (Act No. 15 of 1992)

<sup>9</sup> Studies show the limited liberalization and its impact on performance lags behind the attempt to replicate the performance of the Asian tiger economies. See

(Majumdar & Chhibber, 1999) ; (Shirai, 2004) ; (“Indian Capital Control Liberalization: Evidence from NDF Markets by Michael M. Hutchison, Jake Kendall, Gurnain Kaur Pasricha, Nirvikar Singh: SSRN,” 2009) ; (“International Capital Markets: Systems in Transition—Google Books,” 2002)



in the Primary Market. Similarly, in India, the regime now requires active disclosure and prescribes a heavy penalty for offenses such as insider trading and collusion (“International Capital Markets: Systems in Transition—Google Books,” 2002). However, the state has not relinquished its authority over the citizen’s private property and has instead simply rescinded the heavy administration in favor of a regulatory approach (Raste,2011), leaving the room open for the progressive expansion of regulation until the difference between the command economy and the regulated economy may become hard to detect.

### C. Regulation of Economic Competition

Economic competition in the economy refers to the acts of economic agents as they go about conducting their economic affairs. The Theory of economics in the free market schools posit that without govt interference what would prevail would be pure economic competition which is conceptualized as the best method available for economically efficient decisions to be made. The Regime was also liberalized in 2002 with the introduction of the Competition act<sup>10</sup>. What is remarkable about the aforesaid legislation is that its pre-supposed free competition and only conceptualized fetters as a form of regulation or control. This is a radical departure from the previous scheme under the Monopolies and restrictive trade practices act of 1969 – the legislative instrument in furtherance of the command economy of the time as regards economic competition and its statist control (Bhattacharjea et al., 2019). That act directly targeted as monopolies as a per se wrong and for the purpose operated on the premise of prior approval of capital

allocations and purchases. As a consequence, the sharp pain of its interference and burden was felt by the ordinary Businessman in India. On the other hand, the competition act is conceptualized as partly a recommendatory and advisory body as well as a regulatory body to channel competition effectively and prevent private market entities from restricting it unfairly. Unlike the previous act which it replaced the legislative intent is not to directly interfere and determine the competition themselves rather safeguard it and maintain its integrity which is to be accomplished by control of anti-competitive agreement, regulation of combinations, and the prohibition of the abuse of dominance. Therefore, at once it is visible that the hated monopoly of the past has not been singularly outlawed or targeted as a per se wrong rather the *abuse of dominance* is pathologized as a fetter to effective competition in the marketplace (Bhattacharjea et al., 2019). However here it is necessary to note and comprehend that the state believes proper competition begins with state policy and not truly from the bottom-up actions of the actual flesh and blood agents of the economy i.e. the citizens. Similarly, the citizens conceive of the problems of economic organizations as descended from the omissions of the corrective exercise of govt authority, presuming it is both necessary and possible for such corrections to be made by such exercise of authority, which as has already been shown is an impossibility and fundamentally flawed as an intellectual world view.

### D. Regulation of Telecommunication

The Telecom sector is particularly is instructive as the penetration of

<sup>10</sup> The Competition Act (Act No. 12 of 2003).



telecommunications into India has been one of the most visible signs of the transforming economic and legal order. The sector from the beginning had been a gov't monopoly, beginning with the telegraph act of 1885 which made the telegraphs installed in the country by imperial authority a monopoly of the colonial authority, although that had already been the case prior to that act from the mid-19<sup>th</sup> century. After independence, the position of telecommunications as a gov't monopoly was continued and as new communications technology arrived on the scene, they were included within the ambit of the Telegraph Act of 1885 which has proven remarkably flexible and resilient. However, the performance of the Gov't in the sector itself was not particularly impressive in fact it was fairly dismal leading to much consternation<sup>11</sup>. One example of the absurdities of the sector included the fact that labs run by the gov't for the development of advanced telematics failed to do so and were habitually importing material from foreign producers – which the actual Indian public itself was prohibited so to do as well as any domestic development or manufacturing in the telecom sector (Dokeniya, 1999). From the late '90s onwards the sector began to relax, some licensing deals before the liberalization had proven Indian manufacturers capable of providing services at a fraction of the cost of the Gov't department in Charge, namely the Department of Telegraph and the apex body, the telecommunications Commission constituted in the late '80s (Ranganathan,

2012). Once the crisis hit, however, the gov't was forced to hit reset which is accomplished in the historic New Telecom Policy of 1994 which finally opened the sector up for licensed private players.

The regulation of the sector was handed to the autonomous and technocratic body created for the purpose i.e the Telecom regulatory authority of India<sup>12</sup>. This body was originally insufficiently vested with authority and there began a contest of wills between TRAI and the DOT which retained a lot of authority over the sector (Chowdary, 1998). Eventually however, TRAI has been successively empowered to discharge its functions and a separate and exclusive tribunal has been established to handle appeals from its orders, the TDSAT.

#### V. CONCLUDING REMARKS

The problem for a great many years with the Indian polity was the inability to successfully pull away from the radical centralizing agenda put in place right after Independence. This is not to say the old regime in its entirety was ill-founded or entirely mistaken, the founders had reasonable anxiety over the integrity of the newly founded nation in an uncertain and tumultuous world and sought a strong and centralized federal polity as a natural safeguard against such forces. This echoes the sentiment of the American founders, who though lauded for their idealistic and revolutionary ideas, in the end, did situate their radical new governmental

<sup>11</sup> T H Chowdary laments the state of the telecom sector, the hubris of the DOT relative to its numerous failings, the refusal of the telecom commission to usher in private players until the new telecom policy of 1994 as well as the continued battle for authority between the newly established TRAI with DOT. The impressive performance of the new private entrants

makes the loss of productivity over the prior decades all the more painful. See (Chowdary, 1998).

<sup>12</sup> The Telecom Regulatory Authority of India *Act, 1997 (Act No. 24 of 1997)*; The Telecom Regulatory Authority of India (Amendment) *Act, 2000 (Act No. 2 of 2000)*; The Telecom Regulatory Authority of India (Amendment) *Act, 2014 (Act No. 20 of 2014)*.



experiment within a very pragmatic, realistic, and sober assessment of its prospects and overall a very continuous conservative tradition of Anglo-Saxon constitutional thought continued to be the container of their new project even after seeking independence from their parent empire (“Constitutionalism: Ancient and Modern—Charles Howard McIlwain—Google Books,” 2002). This choice has a lot to do with the ability of their parent culture to remain extra-ordinarily friendly with the former colony even after the acrimonious rebellion. We see the same after-effects in the Indian polity, where despite the heavy egalitarian and utopian rhetoric, the founders diluted the new and revolutionary aims of complete and substantive equality and made them subordinate to the more conservative and pessimistic measures, such as the bill of rights in Part III which anticipates and provides against the despotic expansion of state power.<sup>13</sup> This stands in direct contrast to the French experience and intellectual momentum at the time of the revolution in 1792 where we see great suspicion and disapproval of the attempts by the American founders and thinkers such

Thomas Jefferson<sup>14</sup>, John Adams, and Thomas Paine<sup>15</sup> of advocating and putting fetters against the exercise of governmental authority by the newly conceptualized and constituted government, particularly against the expansion of nameless and obscure administrative state which is hard to hold to account by congressional edicts (Shuffleton, 1995).

The French enlightenment thinkers like Montesquieu (Hochstrasser & Schröder, 2003) did advocate the separation of powers and the functional differentiation that has become part and parcel of modern constitutional governance, however like the assembly which replaced the Bourbon dynasty after the violent uprising, the French intellectuals were possessed of a more primarily utopian vision of the future, not only as a guiding principle but also as the likely outcome – an unbridled optimism in the potential of man and his rationality commensurate with the unbridled pessimism about the failures and intentions of the *ancienne regime* (Haakonssen, 1996). Now of course we are conscious of the failures of

<sup>13</sup> The actual operation of the constitution over the next half century validated the fears of the founders regarding the dangers of state authority though they may have even come to regret the expansive emergency powers and exceptions baked into Part III citing “public necessity” if they had greater awareness of inherent of centralized “development” as opposed to mere maintenance of the Union. See (kaul, 2014) ; (sharma,2015) ; (“Democracy and Constitutionalism in India: A Study of the Basic Structure ... - Sudhir Krishnaswamy—Google Books,” 2010)

<sup>14</sup> In this connection, Jefferson though originally an idealist and believer in the French revolutionary zeal and approver of their unlimited and unbridled optimism later reformed his views in light of its brutality and instead became an apostle of limitation on governmental power even when such power is in the hands of the proverbial people. He recognized the

limitless potential for self-harm and corruption in man and formulated his notion of freedom along the axis of Individual liberty as opposed to the equality or elevation of social classes. See (Shuffleton, 2009) ; (“Thomas Jefferson, Thomas Jefferson, Political Writings—PhilPapers,” 1999)

<sup>15</sup> See (“Common Sense, The Rights of Man and Other Essential Writings of ThomasPaine—Thomas Paine—Google Books,” 2003). In his seminal works “the rights of man” and “common sense” Thomas paine developed the theory of modern American constitutionalism as natural rights limitation on positive constitutional law though with the notable exception of judicial review as the mechanism to enforce such limitation owing to his pre-occupation with revolutionary enforcement through popular revolt.



Maximilien Robespierre and his reign of terror and are given to understand the inversion of the French optimism into the pessimism of the Indian and American founding fathers directly born fruit as the rights of the individual were at least to some extent safeguarded against the tyranny of the state. The French experience shows us the limits of the intellect and that the scapegoating mechanism quite clearly visible in many popular uprisings should not be confused with a more sober and judicious comprehension of the existence and potentialities of *popular sovereignty*. Putting fetters therefore on that power proved excellent in the American case and the absence of it put the lie to the intellectual fraud and deceit of many of the French intellectuals of the time.

It is not the intent to draw a direct parallel between the American pessimism and the Indian case, given that the American constitution errs on the side of liberty and even with the strong state deliberately goes so far as to in the original text remove the direct interaction of the federal state with the Individual, a relationship reserved for the constituting *state and the individual*, the federal was to interact only with the state which was to be officially equal to it but autonomous only in its own sphere (Tillman, 2010). In the Indian case, the intent was to imbue the federal state with all the power necessary to potentially coerce integrative behavior on the part of the constituent and separate states, and of course, the parliamentary system is necessarily more integrative and less separatist than the presidential model (Thiruvengadam, 2017). The intent is to point out the framer's sagacious vision in anticipating failure rather than *success* in keeping the project going

merely with the proper exercise of discretionary authority vested in the constitutional functionaries. The actual consequence of this anticipation is markedly different than in the American case, where the faith was had in the people's spirit of liberty rather than the state's integrative role. However, in the Indian case given the incredible diversity of ethnic background and interest of the people's it did seem more difficult at the time to divert away from the state's role of maintaining internal security and harmony. At any rate, this leads directly to the initial observation, that there was experienced great difficulty in moving away from this heavy and centralized state (Kaul, 2011). India witnessed a progressive growth of this authority of the executive-legislature, though stymied by the Judiciary, same as was the case in the American republic where the federal state grew to become more or less a unitary republic as opposed to the originally envisioned confederation of the autonomous republics coming together to form a union of free states in a unified federation.

It did not help that the strong state in India was combined with the discretionary aims of the socialist founders to imagine an ever-expansive role of state power in socially engineer egalitarian outcomes (Kapur, 2017). This was a somewhat more secondary goal for the republic, the primary being merely to exist or to overcome the disintegrative forces of diversity and fragmentation. However, the key aim for the founders did not translate into knowledge of the people as if it had the goal would have been rendered redundant there and then. Instead, the logic of the state had for the public been the Apriori role of the Gov't in developmental activities in the state and the People as mere extensions or children



of this Apriori action. This was represented in the collectivist simplicity of the Nehru-Mahalanobis “input-output” (Kaul,2014) model of the whole economy which was nevertheless agreeable with the general public when communicated. This expanding role of the secondary goal became the noose around the Indian economy and governmental culture was stultified in the noxious milieu of centralized planning as opposed to mere centralized governance (Kaul,2014). This pathologized leveraging of the state’s power continued to haunt the Indian republic until its demise in 1991 owing to its own failure to bring about the development of the Indian union which it had championed as its primary aim. Therefore, it becomes necessary to examine closely, to what manner of change was finally accomplished in the administrative state after a half-century of socialist-progressive administrative supremacy.

At this juncture, we have to leverage the narrative of growth and change that the neo-liberal state has crafted for itself after the collapse of the old order of planning, as this thesis has so far illuminated the narrative change is lagging far behind the implemented tools<sup>16</sup>. That is to say, the actual rationale of the failure of the old order as well as the rationale of the freer state today has not enjoyed the manner of attention it deserves. The old logic of the centralizing and integrative federal state itself stands somewhat abrogated or questioned by the new decentralized order of regulated free

markets, where the onus of carrying on the task of culture is devolved to the culture itself. It is the case in general that the Public has not full awareness outside of the utilitarian notion that the previous regime of control and co-ordination could not deliver material prosperity, of the deep deontological failures of central planning and administrative control, and why the extra-constitutional autonomous regulatory state instead inverts the order to daringly put the supreme authority in the state – the people – in the Driver’s seat. It is hard to say that the govt has any confidence in making such a proclamation to the people or that it would ever have the appetite to not only conditionally and occasionally in this manner limit its power but that it would seek to fully discredit Part IV of the constitution or that it would fully discredit its supremacy by making the argument that its extra-constitutional intervention in the market and cultural processes is illegitimate. That the people are the foundation source of law, the source of the basic law of the state, and without their approval the state cannot proceed to on its own account attempt to preserve the integrity of the state in any manner that it sees fit. Thus, we see that the state has not made such an argument or made such a revelation to the public. Nor has the public sought such an account of why and how’s of administrative-executive operation. In fact, even back in 1991 the gov’t may have had finally in a utilitarian fashion the justification<sup>17</sup> for dismantling the socialist creed of centralized control and co-ordination

<sup>16</sup> T H Chowdary comments upon the insufficiency of the reforms back in the late 90’s, he notices that the majority opinion is still against the liberal regime and the theories of imperialism dominate the mindshare and the headlines and party culture despite the fact that the Indian govt is moving out to foreign entities to seek Loans and not vice-versa. Further that the states

themselves are happy to be freed from the one-way policy channel and are generally more supportive of independently seeking foreign investment into their regions without the interference and political machinations of the centre. See (Chowdary, 1998)

<sup>17</sup> The govt kept the oncoming re-configuration of the currency under wraps until after it had already



it still did not dare to so much as offer a word of advice that it was doing so in advance to the public.

The perception of the sub-ordination of the gov't (as conflated with the state and its basic source – the constitution and the constituting people) to foreign interests dominate the mindshare of the public. Until the actual changes were made – the devaluing of the Rupee, The market determination of its value, Ending state monopolies in many sectors, The dismantling of the License-permit-quota Raj, all these changes were made in the ignominious obscurity of quick-witted and opportunist moves by Manmohan Singh as the finance minister acting with the tacit or explicit approval of an enabling and amenable Prime Minister Narasimha Rao (Sharma,2015). The public remains ignorant of the fundamental transformation underneath the state machinery and the state remains hesitant to argue for that transformation. The Modi Govt can speak of de-centralization, but the people themselves still consider the de-centralized state itself as a top-down reform initiated by a new and superior gov't in intention and practice to the old guard. Therefore, fundamentally the logic and action of the state begin with the gov't – not with the people. The autonomous regulatory state is considered to be conditionally and occasionally restricted and

occurred in consonance with the demands of the World Bank. This was largely due to the expected backlash and criticism which the gov't anticipated by the public which may have made the move impossible unless kept secret. The only alternative to not default on the loans then would have been hyper-inflation – so either the public was to be kept in secret about the restoring of their authority and agency in the state by the reining in of the administrative outgrowth on which the Public had come to rely even as it deprived them of their liberty because the state was considered

no one doubts the power of the state to expand its powers once more to control and monopolize sectors of the economy where the *state* perceives the necessity not the *demand of the people*. Writers and scholars have lamented this “reform by stealth”<sup>18</sup> of the economy and the ignorance as to the fundamentals of the constitutional order, that what is necessary is not simply the overthrow of the socialist administrative state rather it is time to question and phase out the anxiety of the founders – the integrative central state which does not fully honor the founding logic and myth of the Indian republic, that of democratic revolt and democratic destiny. What is desired is a superordinate or fundamental transformation of the psycho-social perception of the constitution not merely the subordinate or conditional transformation of the institutions by the gov't of the day.

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prior to the action of the Individual or face complete bankruptcy through the crash of the Rupee by runaway inflation. See (sharma,2015)

<sup>18</sup> See (sharma,2015) for a narrative account of the inability of the governmental elite to wring themselves free of adulterated founding myths of the republic, which is rooted not only in democratic revolt but also in the collectivist notions which prohibit the free telling of the decentralised logic to the Indian public.



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