P09 / Constitutional Economics for Public Policy

Topic : INEQUALITIES AND PUBLIC POLICY

Chair : Sony Pellissery (National Law School of India University)

Second Chair : Sattwick Dey Biswas (Young Scholars Initiative, Institute for New Economic Thinking)

GENERAL OBJECTIVES, RESEARCH QUESTIONS AND SCIENTIFIC RELEVANCE

With increasing economic inequality, there is an intense search among policymakers as to how the market logic could be constrained. Traditionally, constitutional values were the guiding light to advance the public interest. Yet, there is a criticism that constitutional forms were created in liberal societies to limit democratic control over economic policies. Contemporary scholar Katharina Pistor (2019) showed that laws are rigged to maintain the hegemony of one economic class over the rest, whereas Brown (2015) argues that such neo-liberal policies eventually undermine democracy. These articulations force us to search for the reasons for the disjunction between constitutional promises and policy outcomes.

James Tully (2016) attempted to answer this divergence by showing the distinction between constituent power and constitutive power. First, constituent power reflects the particularistic identities within a society that often shape legal structures to their benefit, which can potentially undermine constitutional solidarity. Second, in many Global South nations, constitutive power has been influenced by the legacies of imperialism, embedding these post-colonial states into neoliberal economic orders. According to Tully, these entanglements limit the ability of constitutional frameworks to deal with economic forces and, thus, perpetuate inequality.

During ICPP3 in Singapore, three panels were organised on the interface of Law and Public Policy. Selected papers presented in those panels were published as a book, Transformative Law and Public Policy (Routledge, 2019). We are very keen on how this genre of scholarship is expanding by examining the relevance of Constitutional Economics for Public Policy. We adopt a political economy framework to understand how the constitutionality of both democracy and economic decisions are intertwined. These constitutionality questions can’t be understood without an examination of how the judiciary has given verdicts on the conflicts brought in front of it. Therefore, an interdisciplinary examination of law, politics and economics comes to the centre stage of these policy analyses.

In advancing justice, both philosophers and economists have examined the interface of law and economic decisions. Friedrich Hayek, Robert Nozick, and John Rawls have all expressed the centrality of law to protect property owners and to limit the power of the State, which harms individual liberty. Yet, a clear articulation of Constitutional Economics was achieved only by James Buchanan (1986) as the need to study the processes of rule-making that constrains the actors of policy making. The success of Western Capitalism is largely credited to the legal institutionalism that protects the liberty of individuals and firms, as well as the State's role in maintaining peace and order in society. This legal institutionalism has been promoted as ‘good governance’ across the world today. However, the rise of inequality has prompted a challenge to the basis of constitutional economics.

Key References

Brown, W. (2015) Undoing the Demos: Neoliberalism’s Stealth Revolution, MIT Press.

Buchanan, J. (1986) The Constitution of Economic Policy (Nobel Prize Lecture).

Pistor, K. (2019) The Code of Capital: How the Law Creates Wealth and Inequality, Princeton University Press.

Tully, J. (1995) Constitutionalism in an Age of Diversity, Cambridge University Press.

CALL FOR PAPERS

Building on the momentum of the panels at ICPP3 in Singapore and the subsequent publication Transformative Law and Public Policy (Routledge, 2019), we seek to expand this scholarship by exploring the relevance of constitutional economics in addressing contemporary public policy challenges.

Traditionally, constitutional values have played a critical role in guiding the public interest and maintaining

checks and balances on economic policies threatening democratic integrity. Modern critiques suggest that constitutions, often shaped in democracies and constitutions written by the propertied class, may not adequately challenge the forces driving economic inequality. This panel seeks to engage this tension, particularly in contexts marked by political and social inequalities. Many older democracies' constitutions were written when not all sections of the population were constituents (e.g., the USA) or during times of emergency or dictatorship (e.g., Chile), making equality for all sections of the population a distant consideration. In many Global South nation-states, the constitutive power has been influenced by the legacies of imperialism and social stratification, embedding these post-colonial states into neoliberal economic orders. This entanglement limits the ability of constitutional frameworks to assert democratic control over economic forces, therefore perpetuating inequality.

We are looking for papers that attempt to answer questions in three tracks:

1) What kind of clash or convergence of ideas do we see in economic and legal institutional logic while addressing questions of inequality and diversity in policies?

2) How successfully have constitutional courts tested public interest questions in proposed legislation and policies? We seek in-depth analysis of success/failure stories from country contexts and comparative constitutional cases.

3) Both in the project of constitutional democracy and constitutional economics, the conflicts are between different types of rights. How do actors and institutions prioritise and mediate the conflicts between rights?

P09 / Constitutional Economics for Public Policy

Chair : Sony Pellissery (National Law School of India University)

Second Chair : Sattwick Dey Biswas (Young Scholars Initiative, Institute for New Economic Thinking)

Session 1

Thursday, July 3rd 10:15 to 12:15 (D2)

Public Interest Litigation as a Tool for Social Change: The Role of Constitutional Courts in India, South Africa and Kenya

Jayasuriya J (Central European University - GmbH)

Public Interest Litigation as a Tool for Social Change: The Role of Constitutional Courts in India, South Africa, and Kenya

Abstract
Public Interest Litigation (PIL) has emerged as a transformative legal mechanism, enabling judicial intervention in matters of public concern and facilitating social justice. Rooted in the principles of constitutionalism, fundamental rights, and judicial activism, PIL provides a platform for marginalized and underrepresented groups to seek legal remedies against state and non-state actors. This paper explores the role of constitutional courts in India, South Africa, and Kenya in advancing social change through PIL, highlighting their jurisprudential approaches, landmark judgments, and socio-political impact. India pioneered the evolution of PIL in the Global South, transforming its judiciary into a proactive guardian of rights and justice. The Supreme Court of India, through expansive interpretations of Articles 14, 19, and 21 of the Constitution, has broadened access to justice and facilitated progressive reforms in environmental protection, gender rights, labor welfare, and socio-economic entitlements. Cases such as Vishaka v. State of Rajasthan (1997), MC Mehta v. Union of India (1986), and People's Union for Democratic Rights v. Union of India (1982) illustrate how PIL has reinforced the state's accountability in governance and human rights protection. However, concerns about judicial overreach and the misuse of PIL for political and frivolous purposes remain pertinent. South Africa, with its post-apartheid constitutional framework, offers a distinct yet comparable trajectory of PIL. Anchored in a transformative Constitution and an independent judiciary, the South African Constitutional Court has wielded PIL to dismantle institutional inequalities and promote socio-economic rights. Landmark cases such as Government of the Republic of South Africa v. Grootboom (2000) and Minister of Health v. Treatment Action Campaign(2002) underscore the court's commitment to enforcing the right to housing and healthcare. Unlike India, where PIL emerged primarily through judicial activism, South Africa's legal framework formally recognizes class actions and public interest litigation, allowing civil society organizations to play an active role in litigation-driven social change. Kenya's constitutional evolution, particularly after the enactment of the 2010 Constitution, has also witnessed a growing role of PIL in enforcing constitutional rights and democratic accountability. The Kenyan judiciary has addressed issues such as electoral justice, environmental conservation, and human rights violations through PIL. Cases like Mitu-Bell Welfare Society v. Kenya Airports Authority (2021) highlight the courts' role in protecting socio-economic rights, particularly housing rights, against forced evictions. However, challenges such as judicial independence, political interference, and resource constraints continue to shape the effectiveness of PIL in Kenya. By comparing these three jurisdictions, this paper examines the effectiveness of PIL as a tool for social change in different legal and political contexts. While India demonstrates an activist approach that has expanded judicial power, South Africa institutionalizes public interest litigation within a constitutional framework, and Kenya represents a hybrid model evolving within a young constitutional democracy. The paper concludes by addressing the challenges posed by judicial activism, separation of powers, and the accessibility of PIL mechanisms. It also offers recommendations for enhancing the role of PIL in deepening democracy, strengthening human rights enforcement, and ensuring accountability in governance. This comparative analysis contributes to the broader discourse on the role of constitutional courts in advancing justice through PIL, emphasizing its significance as a catalyst for legal and societal transformation in the Global South.

Committed Judiciary and Transitioning Economic Regimes: Policy Challenges to Economic Democracy in India

Manish . (National Law School of India University)

Anubhav Bishen (National Law School of India University)

Constitutionalism, as a means to preserve democracy, is essentially a *political* project. Yet, challenges to democracy have manifested in spaces outside the political: in recent times, neoliberalism has established itself in domestic constitutions (Tushnet 2019), and the resulting inequality has hollowed out liberal democracy (Brown 2015). Challenges of this nature require a “thicker” reconceptualization of democracy facilitating citizens’ participation (beyond just elections) in democratic deliberation, through judicial protection of liberties (Dixon 2023). In a world shaped by global capital flows, economic inequality becomes a significant barrier to full democratic participation. Constitutional courts therefore play a critical role in negotiating the relation between neoliberalism and economic democracy.

During the founding moment of India’s constitution, the framers were cognizant of the vast socio-economic inequality among the population, but also recognised the democratic value in not freezing economic policy prescriptions into the document but leaving them to “be decided by the people themselves according to time and circumstances” (Rodrigues 2024). The result was the creation of the Directive Principles of State Policy (DPSP) as Part IV of the Constitution, a broadly worded set of provisions with economic justice at their core, without being prescriptive of method or ideology. However, the DPSPs have been used been inconsistently used by Indian courts for economic justice (Bhatia 2017). The most recent example of this is the Supreme Court of India’s 2024 decision in *Property Owners Association vs State of Maharashtra*, on the interpretation of Article 39(b), a provision in the DPSP which permits the state to distribute "ownership and control of the material resources of the community…to subserve the common good".

We use this judgment to draw connections between how Article 39(b) has been interpreted by the Court since the commencement of the Constitution, and contemporaneous changes in economic ideology of the State mediated by international financial institutions and processes. We argue that while these changes have reduced the ability of citizens to effectively participate in decision-making, the court has not sufficiently accounted for them and consequently only responded to local impulses while interpreting the DPSP, without being alive to the influence of global politics in undermining the Indian constitutional economic project.

To this end, we divide the Indian constitutional economic journey into three phases. In the first phase (1950-70), the legislature and judiciary clashed, with the judiciary seeking to uphold private property rights in contrast to the legislative mandate of redistribution. In the second (1970-90) and third phase (1990-present), the judiciary remained committed to the State despite starkly different economic regimes. By analysing the different interpretations of Article 39(b) in relation to private property, this paper analyses how the tension between legal institutions and economic logic remains. In the *Property Owners Association* case, the judiciary upheld the State’s ideology of free market, while still carving out exceptions with its broad reading of Article 39(b). We conclude by suggesting that adopting a responsive framework of judicial review (Dixon 2023) might address some of these issues while maintaining fidelity to the constitutional vision of economic democracy.

UNDERSTANDING THE CONSTITUTIONAL OUTLOOK TOWARDS DEVELOPMENTAL AID

Poulami Ghosh (Just Transition Research Centre, Indian Institute of Technology, Kanpur (India))

UNDERSTANDING THE CONSTITUTIONAL OUTLOOK TOWARDS DEVELOPMENTAL AID

Foreign aid plays a pivotal role in helping developing countries attain economic and welfare goals. In the recent past, literature exploring the role of human rights, good governance and GDP per capita on aid allocation, notes that economic health, education, government effectiveness, and literacy rate do not significantly impact aid distributions, however, GDP per capita of the recipient country does play a crucial role (Keramat et al., 2022) Understanding the donor behaviour over a significant period, the study highlighted that more aid attention has shifted towards Countries with higher levels of poverty and stronger policy rather than country size or debt burden, indicating the need to understand the policy and institutional environment in both donor and receipt countries, how the selectivity of aid operates, which can further help in enhancing aid effectiveness. (Claessens et al., 2009) Related works investigating how donors' ideologies influence foreign aid found that Left-wing governments were more likely to provide aid to autocratic than to democratic recipient countries and proposes it to be a significant case study for partisan politics which further can help in localising the aid. (Brech & Potrafke, 2014) Further, research also highlighted the need to

understand ODA from a judicial standpoint and the lack of study done to understand the preferences for aid from a recipient perspective. (Hennessy et al., 2023) Airey, S. (2022). While delving into the nuances of understanding the political landscape and perspectives of donor and recipient country, as well as recipient interest in aid allocation, an area of research unexplored is the interplay of constitutional values of both donor and recipient country when receiving foreign aid. (Harding, 2019) (Bui, 2019)

This paper can be used as an essential knowledge source in investigating the flow of aid in Global South Countries from 2000-2024 [This time frame covers the overarching goals under MDGs, SDGs, COVID-19 world and post-Covid-19 era] using the foreign aid data by DAC to account for each aid by sector and the Constitution of the Global South Countries to address the following research questions.

1. How has the allocation of international aid across different sectors changed over the years?

2. Do the sectors receiving aid in Official Development Assistance (ODA) align with the constitutional values of Global South countries?

3. How do the constitutional values of recipient countries influence aid allocation?

Economic negative constitutionalism in the Israeli Supreme Court

Lilach Litor (Open University of Israel)

Social rights, such as the right to live with dignity, are important freedoms. Nevertheless, many constitutional documents and jurisdictions do not recognize the constitutional status of social rights or tend to consider the scope of these rights as limited.

The paper introduces two approaches -economic negative constitutionalism and positive social constitutionalism. The former tends to reject the possibility of recognizing social rights as constitutional rights, while the latter posits that the state is under an obligation to actively recognize the constitutional status of social rights and to enable wide protection on them. Economic negative constitutionalism could be also characterized by recognizing only a limited scope of social rights, and by advancing economic liberal freedoms, such as freedom of occupation. The economic negative approach is based on the thought that the state has limited means at her disposal for the fulfilment of social rights.

When Israel was founded, a formal constitution was not adopted. Israel has been characterized since its establishment and in its first decades up until the end of the 1980s as an interventionist welfare state, in which human rights have not been considered as having a constitutional status. The loss of the 1977 elections by the Labor Party and an economic crisis during the 1980s have been followed by a decline in welfare-social beliefs.

At the beginning of the 1990s, two Basic Laws of human rights were constituted- Basic Law of Human Dignity and Liberty and Basic Law of Occupation. According to a ruling of the Supreme Court in 1995, these Basic Laws enjoyed a constitutional status[1]. This ruling came to be known as the constitutional revolution[2]. The court also ruled that it had the power to review legislation, potentially disqualifying unconstitutional laws.

Nevertheless, the introduction of these two laws came to be known as the emergence of a new economic order in Israel based on neoliberalism. These Basic laws included a limited list of rights and only liberal economic freedoms such as the right to property, and did not include any social rights. Even though different human rights were not included in the constitutional documents of the Basic Laws of human rights, the Supreme Court has recognized several right as derivative and as having a constitutional status.

The constitutional revolution in Israel was followed by development of economic negative constitutionalism. The economic negative constitutionalism is reflected in cases regarding welfare policies and reforms and legislation that affected social rights.

The paper focuses on cases of constitutionalism in the Israeli Supreme Court, regarding the right to live with dignity and the right to health, and explores the adoption of certain constitutionalism . It will also explore, in a comparative look, the adoption of a positive social approach in South Africa.

Based on the pathologies of the current jurisprudence, the paper draws on the lines for a suggested model regarding the interplay of social rights and constitutionalism.

[1] HCJ 6821/93 Bank Hamizrahi v Migdal 1995 PD 49(4) 221.

[2] Ran Hirschl, ‘The “Constitutional Revolution” and the Emergence of a New Economic Order in Israel’ (1997) 2(1) Israel Studies 136, 142–47.

(Virtual) Contested Spaces: Civil Society Organisations, Neoliberalism, and Rights Mediation in India

Abishek Nippani (International Initiative for Impact Evaluation)

Srishti Rongpipi (Centre for Effective Governance of Indian States)

Navya Poonia (National Law School of India University)

The neoliberal state has redefined the balance between economic imperatives and constitutional guarantees, raising critical questions about how rights are mediated in public policy. This paper investigates the role of Civil Society Organisations (CSOs) in India under neoliberal governance, focusing on how the state navigates conflicts between rights such as freedom of association, expression, and its policy imperatives of economic growth and depoliticisation.

India has witnessed the rise of CSOs addressing socio-economic inequities and environmental challenges amid the retrenchment of the state's developmental role (Chatterjee, 2004). However, regulatory mechanisms, particularly the Foreign Contribution (Regulation) Act (FCRA), have been used to constrain dissent and marginalise rights-based advocacy (Pistor, 2019). Prominent CSOs like Greenpeace, Amnesty International, CARE India, and Save the Children have faced targeted crackdowns under the pretext of safeguarding sovereignty and ensuring accountability. These cases highlight how the Indian state has increasingly used legal tools to restrict the operations of CSOs critical of its policies, particularly those advocating for marginalised communities and environmental sustainability.

Drawing on James Buchanan's theory of constitutional economics (1986) and Wendy Brown's critique of neoliberalism (2015), this paper will examine the institutional logics of neoliberal governance. It employs a multi-method approach: (1) case studies of targeted CSOs, (2) comparative analysis of regulatory trends in the Global South, including Brazil and Kenya, and (3) document analysis of court rulings, legislative debates, and constitutional provisions. In Brazil, environmental CSOs opposing deforestation have faced funding restrictions under similar pretexts (Bebbington et al., 2008). Kenya presents a comparable trajectory, where land rights organisations have been suppressed through restrictive legal provisions. These patterns reflect a shared institutional logic among post-colonial neoliberal states, where constitutional rights are subordinated to market imperatives and state sovereignty.

The findings will underscore the paradox of neoliberal governance: constitutional guarantees of freedom of association and expression preserved in form but undermined in practice; a trend which challenges the normative role of constitutions in protecting democratic values and enabling civic participation. By bridging theoretical insights from constitutional economics and empirical evidence from India and the Global South, this paper will emphasise the need to reimagine legal frameworks that safeguard civil society's role in upholding democratic values while navigating the complexities of contemporary governance.

References:

- Bebbington, A., Hickey, S., & Mitlin, D. (2008). Can NGOs Make a Difference? The Challenge of Development Alternatives. London: Zed Books.

- Brown, W. (2015). Undoing the Demos: Neoliberalism's Stealth Revolution. Cambridge, MA: MIT Press.

- Buchanan, J. M. (1986). The Constitution of Economic Policy. Nobel Prize Lecture.

- Chatterjee, P. (2004). The Politics of the Governed: Reflections on Popular Politics in Most of the World. New York: Columbia University Press.

- Pistor, K. (2019). The Code of Capital: How the Law Creates Wealth and Inequality. Princeton, NJ: Princeton University Press