



“CONSTITUTIONAL ARCHITECTURE: POWER OF STATE ORGAN IN POLICY MAKING”

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Abstract

Policymaking is a complex and continuously changing process which is conditioned by a multitude of factors. It involves not only the interplay of numerous political, economic and social forces, but also the structure of power derived from the constitutional rules. Policymaking is a manifestation of power. In terms of public policy, it means the exercise of political power for making policy decisions (policies) relating to the people and their problems and needs. Public policy mainly comprises executive (government) decisions, parliamentary statutes, constitutional laws and judicial orders. Public policy reflects societal goals, and its breach warrants punishment in accordance with procedure established by law (in India) and due process of law (in the USA).

Key words: Policy, Constitution, Parliament, Statutes, Government, Power.

INTRODUCTION

Policymaking is a complex and continuously changing process which is conditioned by a multitude of factors. It involves not only the interplay of numerous political, economic and social forces, but also the structure of power derived from the constitutional rules. Policymaking is a manifestation of power. In terms of public policy, it means the exercise of political power for making policy decisions (policies) relating to the people and their problems and needs. Public policy mainly comprises executive (government) decisions, parliamentary statutes, constitutional laws and judicial orders. Public policy reflects societal goals, and its breach warrants punishment in accordance with procedure established by law (in India) and due process of law (in the USA). Here, in this Article an attempt is made to discuss the constitutional rules and structure of power for policymaking in India.

CONSTITUTIONAL ARCHITECTURE FOR POLICYMAKING

The Constitution of India prescribes the rules as well as structure for policymaking at the central, state and local levels. Constitutionally, India has been described as a union of states,¹ but organized on federal lines, with jurisdiction of powers between the centre and the states and an independent judiciary to determine the constitutionality of actions of the legislature and the executive. Thus, rules for policymaking in government at the centre, state and local² are found partly in the Constitution and partly in those aspects of the political culture which prescribe how political activity should be carried on. Thus, the Constitution is the principal statute prescribing rules and provisions which specify how those in authority are to be recruited and how they are to use their official positions in making policies.

To appreciate the dynamics of public policymaking in India, we must first understand the constitutional architecture in which public policymaking occurs. Though many of its features have been imitated and adapted, constitutional system reflects four features which stand out most prominently.

1 Predominantly, India is federal comprising 28 states and 8 UTs (2022).

2 By the 73rd and 74th Constitution Amendments, local governments (panchayats and municipalities) have been given the constitutional status to function as institutions of local self-government.

Democratic and Republican Self-government

The Preamble-though by itself not enforceable but reflect the objects which the Constitution seeks to establish and promote-to the Indian Constitution envisages for the country not only a democratic form of government, but also a sovereign republic infused with the spirit of 'justice, liberty, equality and fraternity'. The Constitution declares India to be a democratic and sovereign republic. This means that all governments, whether central, state or local, derive their powers from the people. The people are sovereign. The sovereignty of the people has come to mean that the final authority which determines the policies for the country lies with the government at different levels. The elected representatives of the people form the government and hold office at the people's will.

The Indian system of government is fundamentally democratic. The requirement for it is that the wishes of the people are reflected in the policy decisions of governments. There are basically two requirements which must be fulfilled for a democratic system of government. Pickles states,

It must, first, be able to elicit as accurately as possible the opinion of as many people as possible on who shall be their representatives and on how the country ought to be governed. Second, it must provide ways of ensuring that those chosen for the public do in fact do what the electorate wants them to do or that they can be replaced if they do not, even between elections.

In India, the people may be thought to be politically sovereign, transmitting their will and opinion to the government. The people in a democratic set-up initiate the process of legislation and policymaking by voting for candidates whose opinions and intentions they know and understand. In India, the government

is dependent on the support of the Parliament or the state legislature for its existence. Through the legislature, the representatives of the people frame laws and decide policy by majority vote. The outstanding feature of policymaking in government is characterized by accommodation and settlement of conflicting interests. Being a multiparty system, certain national policies are modified at times, as a result of discussion in Parliament. In determining policy, and in order to resolve conflicts on policy issues, majoritarianism is adopted because the alternative would be authoritarianism. However, the constitutional provisions and rules prevent any abuse of the powers which derive from a majority position. The courts in India further guard against the tyranny of the majority by providing for an impartial judiciary which will arbitrate free from any bias towards the interests of those in authority.

For instance, the SC on 21 July 2015 dismissed the centre's plea requesting it to review its verdict quashing the latter's decision to include Jats in the central Other Backward Classes (OBCs) list for reservation in jobs and higher education.⁴ Similarly the SC struck down the 99th Constitution Amendment Act, 2014 and the National Judicial Appointments Commission (NJAC) Act, 2014 as unconstitutional on 16 October 2015.

Parliamentary Executive

Direct democracy being impossible, representative (indirect) democracy is the next alternative, for it entails the free choice of representatives by all adults through fair elections. The Indian system of government purports to be parliamentary type of executive both at the centre and in the states. In this system, the real executive power of the government is to be exercised by the Council of Ministers comprising the leadership of the political party or parties holding a majority in the legislature and collectively responsible to it in its working. The following are the distinctive features of a parliamentary executive:

- (i) All ministers are members of one or the other house of Parliament. They hold office at the pleasure of the President.
- (ii) The government, both at the centre and in the states, is responsible for its actions to the respective legislature. Responsibility refers to both the collective actions of the government and the acts and omissions of individual ministers and their departments. Governments are answerable to the legislature and must resign if their policies prove unacceptable, or if they lose the confidence of the legislature. Under the concept of individual responsibility, ministers are required to answer for their own acts and the conduct of their departments. That is, if a minister or civil servant makes an error, it is the minister who is answerable to the legislature and should resign from the office if found guilty. The link between representative and responsible government is to be found in the fact that the accountability of the executive to the legislature ensures that the government is both responsive and respectable.
- (iii) In a parliamentary form of government, civil servants are required to observe the principles of political neutrality, impartiality and anonymity. Responsible government is designed to prevent democracy

from falling prey to an over-dominant bureaucracy. It presupposes that politicians, not civil servants, are to be blamed for executive action.

Federally Organized Polity

The Indian constitutional system has been devised in such a way as to reflect not only unitary but also striking federal features. The federal structure of the polity is divided into states and union territories (UTs). The parliamentary democracy combines broadly a unitary form of government with a dominant central government with many federal features containing a large area of governmental autonomy and even a degree of independence to the states of Indian Union. A conscious effort has been made to define and demarcate clearly the areas of policy formulation between the central government and state governments by listing subjects in the union list (entries increased from 97 to 100), the state list (entries decreased from 66 to 61) and the concurrent list (entries increased from 47 to 52). All residuary powers are vested in the union government. If the Parliament enacts a law on the entry (subject) under the concurrent list, the states are debarred from entering that

5 A. H. Birch, Representative and Responsible Government (London: Allen & Unwin, 1964), .

6 The Indian Union consists of 28 states and 8 UTs (2022). The word 'federation' does not figure in the Constitution, although the Supreme Court characterized the Indian polity as federal.

7 The distribution of legislative power is done under Articles 245 and 246 read with the Seventh Schedule of the Constitution.

field. However, in a situation of dispute between the central and state governments, the matter is decided by the SC.

The framers of the Indian Constitution created a strong national government. Parliament is authorized under Article 249 to enact legislation on any subject in the state list and under Article 312 to create new all-India services, provided the Rajya Sabha by a two-third majority empowers it to do so. Again, Articles 256 and 257 place a state government under an obligation to comply with the union laws and directions issued by the central government. Articles 200 and 201 empower the Governor of a state to reserve a bill passed by the state legislature for the consideration of the President who has the power to veto it without giving any reasons. Under Article 253, Parliament may enact a law to give effect to international treaties even though the subject falls in the state list.

The powers of the central government become far-reaching in situations of emergency.

The union can virtually function as a unitary state when

- (i) The security of the country is threatened,
- (ii) There is a failure of the constitutional machinery in a state or

(iii) There is a threat to the financial stability of any state.

Where the President's rule is imposed in any state under Article 356, the Parliament gets the power to exercise the legislative powers of the state.

Further, under Article 3, the Parliament can also form a new state, increase or diminish its area.⁸ Constitutional rules regarding the appointment and certain conditions of services of officers of All India Services, serving the state governments, the judges of the state High Courts and the Comptroller and Auditor General (CAG) of India, auditing the accounts of the state governments, favour the unitary features of the polity.

The central government has enjoyed wide powers for the formulation of policies in the development sectors of the economy. In many cases, the implementation of the programmes and policies involves both the union and the state governments and the two have to jointly share responsibility for results. The central government often subsidizes many schemes (e.g. of the 27 centrally sponsored schemes [CSS], the centre funds fully 10 and provides 60% of the funds for the 17 others) and has used the concurrent list to develop many new administrative institutions in respect of agriculture, social welfare and community development, and many other programmes. Thus, the process of policymaking has to contend with the federal form of the country's polity. In a federal set-up, the intergovernmental relations (IGR) gain wide significance in policymaking

Socio-economic Philosophy

For the socio-economic philosophy underlying our Constitution, Dr Radhakrishnan once said, 'Poor people who wander about, find no work, no wages and starve, whose lives

⁸ Thus, Hyderabad and Madhya Bharat were abolished. In the year 2000, three new states were formed, namely, Chhattisgarh, Uttarakhand and Jharkhand. Telangana became the 29th state of India in 2013. The process of territorial change does not require special majority in Parliament or consent of the states.

Structure of Policymaking in /GR Context (India)

Source: Author's own. Distribution of Legislative Powers

Union Government List=100 entries State Government List=61 entries

Concurrent (Union/States) List= 52 entries Local Government List=47 entries

(i) Panchayats = 29 entries

(ii) Municipalities=18 entries

are a continual round of sore affliction and pinching poverty, cannot be proud of the Constitution or its law'.⁹

The Constitution enunciated the basic principles of the State and its structure and included a detailed description of the political and other institutions to be established. Public policies must conform to the provisions of the Indian Constitution, such as those laid down in the Preamble, the Fundamental Rights and the Directive Principles of the State Policy. The Preamble declared India to be a sovereign, socialist, secular, democratic republic securing to all its citizens justice, equality and liberty.¹⁰ The Directive Principles of State Policy indicates, inter alia, that India must be a welfare state, whose economic, social and welfare aspects should form part of the governance of the state. Among other directives, the State shall direct its policy towards securing 39 '(a) that the citizen, men and women equally, have the right to an adequate means of livelihood; (b) that the ownership and control of the material resources of the community are so distributed as best to sub serve the common good; and (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment; (d) that there is equal

9 Speech of the Vice President at the Seminar on Parliamentary Democracy, 25 February 1956.

10 Words 'socialist', 'secular' and 'integrity' were inserted by the Constitution (42nd Amendment) Act, 1976 in the Preamble.

pay for equal work for both men and women; (e) that the health and strength of workers and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength; and (f) that childhood and youth are protected against exploitation and against moral and material abandonment'.¹¹

Although these directives were described as fundamental in governing the country and it was the duty of the state to apply them in making laws, they were not the source of legislative powers but only their political justification. Fundamental Rights and Duties and Directive Principles have been the subject of public debates and disputes among the political parties regarding their importance and place in the Indian polity. The current judicial thinking is that the Fundamental Rights and the Directive Principles are complementary to each other, since they are mutually reinforcing in nature. Now both levels of government are under an obligation to formulate public policies, taking into account the Directive Principles.

PRINCIPAL ORGAN OF THE STATE POWER

Policymaking cannot be properly understood apart from the environment in which it is conditioned. Demands for policy actions are made on the political system by various constituents of the society-civil society groups, citizens, pressure groups, political parties and so on. At the same time, the environment places constraints upon what can be done by policymakers. Included in the environment are geographical characteristics such as natural resources and topography; demographic factors such as population size, age and sex; and other socio-, politico-economic variables. Our discussion here focuses on the government organs of the state that shape policymaking in government. Principal organs of the state-legislature, executive, judiciary-draw their strength and powers from the Constitution. The Constitution itself

empowers Parliament to supplement the provisions of the Constitution by legislation. But the Parliament or Executive may exercise power much more than what is suggested in the Constitution. The Indian Judiciary sits over the wisdom of any legislative policy or executive action.

Power in Legislature

The Indian Constitution, as has been explained in this chapter, has adopted the parliamentary form of democracy, also called the Westminster system, which affects a harmonious blending of the legislative and executive organs of the state. People are the sovereign. The sovereignty of the people is exercised through legislature elected on adult franchise with a Council of Ministers both at the centre and in the state, collectively responsible to it in its working. In law and constitutional theory, the Parliament in India¹² or in England and the Congress in the USA are supreme public policymaking bodies. They are at the heart of public policymaking. Indeed, in a parliamentary form of government, the legislature reigns supreme because the PM is dependent on support from a parliamentary majority to

11 Article 39 (f) was substituted by the Constitution (42nd Amendment) Act, 1976. Other changes included insertion of Article 51A with 10 fundamental duties.

12 The Parliament of India consists of the President and two Houses (the House of the People, Lok Sabha and the Council of States, Rajya Sabha). See Article 79.

remain in office. Wade and Phillips observe, 'neither devolution nor delegation of legislative authority infringes the supremacy of (the British) Parliament'.

Government powers are, in theory, shared among three branches of government. The Parliament makes the laws and legitimizes the decisions of the government. It authorizes taxation and expenditure and makes the government accountable for financial decisions. In addition to its legal role, it subjects administrative actions to criticism and scrutiny. It serves as a forum for public debate on issues of public policies, besides a forum for the expression of complaints and grievances. The parliamentary power enhances further as fewer votes are made into votes of confidence, over which a government can fail. When a vote is not a vote of confidence, individual MPs have greater freedom to vote without threatening the continuation of their government. The parliamentary systems in Germany and the UK as well as India work somewhat along these lines. No court in England since the 17th century has struck down an Act of Parliament for violating some fundamental principle.

Law-making power resides in the elected members in the Parliament.¹⁴ Within the powers devolved to them by the Constitution; the Parliament is the final determinant of policy. Thus in law and constitutional theory, the power of the Parliament is unlimited in democratic systems. On the other hand, the Congress in the USA has less power than a Parliament, because it does not participate in the process of choosing the head of the executive branch. Moreover, the Constitution of the USA prohibits legislators from holding positions in the executive. For example, the officials of the President's Cabinet, unlike the Cabinet in the parliamentary system, may not be members of the Congress.

Parliamentary Realities

It is now widely recognized that the power of the Parliament in policymaking is more real in a legalistic sense than in terms of practical policies. In reality it does not reign supreme. The Council of Ministers, including the Cabinet and the Prime Minister, become representatives and leaders of the parliamentary majority. They are assured a legislative majority for the proposals they present. The Prime Minister or other Cabinet members initiate policy proposals and use the resources of government ministries to do so. There is thus the likelihood of Parliament being described merely as a rubber stamp. It is described as a 'forum for influence not direct power, advice not command, criticism not obstruction, scrutiny not initiative, and publicity not secrecy'.

However, in practice, the Indian Parliament or Congress in the USA does not gain apparent ascendancy over the executive. Any control which Parliament might be said to exercise over the executive is apparently indirect, inducing responsibility under the threat of exposure. It does not determine policies except in a legal and constitutional sense. The concept of legislative power has been formulated as a response to the political reality of executive dominance reinforced by the party system.

14 In India, power of the Parliament (state legislature) is constrained by the judicial review exercised by the Supreme Court (Article 32) and High Courts (Article 226).

15 United Kingdom, Study of Parliament Group Memorandum to the Select Committee on Procedure, Fourth Report, 1964-5 Session H.C. 393 (HMSO, 1965), 139.

As common in parliamentary countries in Europe also, much of the legislation in India and USA is now prepared within the executive branch and introduced by a minister in India or the President in America. But, if the President or a minister proposes, the Parliament/ Congress still dispose. Consequently, the role of Parliament in India in policymaking can be more correctly understood if Parliament is considered to be a constitutional procedural device for legitimizing the decisions of the government, rather than as an independent decision or policymaking unit. The passing of the Taxation Laws (Second Amendment) Bill, 2016 by the Parliament in India in the face of stiff nationwide opposition is an example of the executive-controlled status of the elected body, that is, the Parliament, like the Nuclear Act, NJAC Act, 2014 was passed by Parliament with near-unanimity (although this Act was struck down by the SC on 16 October 2015 as unconstitutional). As such, power does not reside in Parliament, but in the group of individuals (executive members) who at a particular time gain ascendancy over its procedures, thereby succeeding in making policy decisions. When Council of Ministers, headed by the Prime Minister, is selected by a parliamentary majority of the same party, automatic approval of the policy decisions or proposals becomes possible. Having been elected, the PM and the Council of Ministers are then able to create majority within the Parliament with varying degrees of support from outside the Parliament.

Again, it must be emphasized that it is not the strength or weakness of the Parliament which is crucial to the policymaking process. What is crucial is the creation of alliances beforehand between different parliamentary groups or committees to influence legislation or policy decisions. The government usually does not depend on the support of the opposition. It has, however, to rely on the backbenchers to provide it with the majority necessary to conduct government business. Hence the government is more afraid of its own backbenchers than the opposition members. It fears that its own backbenchers may form a majority in the opposition division lobby. Then, there is also the need to maintain the support and morale of the majority party. When a government is confronted with the prospect of rebellion from its backbenchers, constant attention is paid to them through whips and party committees. Excessive conflict has to be resolved more by compromise on both sides than by expulsion or the threat of dissolution.¹⁶ However, it has been observed that most MPs would rather see their party in power than the opposition, even when they disagree with the leadership on particular policy decisions. The discipline which gives the parties their cohesion is more often self-imposed than enforced on frightened and reluctant backbenchers by the whips. Whatever its cause, however, the party unity and discipline are usually real enough to reinforce the power of the government. The convention of the majority party government also enables the leaders of the party to assure themselves of a legislative majority for the proposals they present. In many cases, it is observed that Bills on a new policy are not approved by the Parliament because of certain flaws in the Bills and protests from certain sections of the community. Since 1834, some 6,612 central statutes have been enacted. At some point or the other, 3,831 have been repealed. Of the remaining 2,781 central statutes (in October 2014), the Ramanujan Committee (set up

¹⁶ For example, when the Dravida Munnetra Kazhagam (DMK) chief M. Karunanidhi threatened to snap ties with the United Progressive Alliance (UPA) (the Manmohan Singh government) over the resolution seeking an international probe into 'genocide' by Sri Lankan troops against Tamils in the last phase of the anti-Liberation Tigers of Tamil Eelam (LTTE) war (2009), the UPA rushed three central senior ministers to pacify the chief. See The Tribune, 19 March 2013.

in September 2014) identified 1,741 Central Acts for repeal.¹⁷ The Parliament on 27 April 2016 passed two bills repealing 1,053 old laws which had become redundant legislations.

The power vested in Parliament or Congress must become decentralized if it is to give due weight age to policy proposals. To be able to discuss these genuinely, it needs to develop expertise about the issues involved in proposals. Hence is need of the decentralization of parliamentary power to various committees. The idea for legislative committees actually came from the British parliament, but in England, the committees atrophied with the growth of the cabinet government¹⁸ Once parliamentary committees have been set up to allow more expert consideration of proposals, the Parliament will show a reasonable degree of deference towards the committees' decisions. Thus the committees are crucial in determining the fate of legislation. In the USA, the power of the Congress is decentralized to the level of the individual member, permitting him to introduce a bill. On the contrary, in countries with a parliamentary form of government, bills are generally introduced by the cabinet ministers. In contrast to the Congress which give genuine

consideration to many law proposals, most Parliaments rarely consider proposals that are too new, too vague or have too little political support. In a parliamentary system, ideas, however, must incubate within the executive branch.

Apart from decentralization, to increase the workload would mean giving legislators less time to consider the content of the policy proposals on which they must vote.¹⁹ Most legislators in India do not, however, spend much time doing research and reading about legislation. When they have to decide quickly, they are more likely to take cues from colleagues who sit on the committee in the policy area in which a vote is taking place. Increasing time pressures and loads on legislators make them harried and further increase the power of committee members over bills in their policy areas.

It may also be pointed out that legislators who would be policymakers are bedeviled by the exacting demands of other roles. As representatives they must be responsive to their constituents' requests. If they are interested in re-election, legislators will spend much of their time appearing at countless public functions in their constituencies. Such visits and

17 See The Financial Express (Chandigarh), 22 July 2015. Similarly in March (2015), there were more than 70 Bills pending for 2-15 years before the Indian Parliament. These include 'Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005'; the Code of Criminal Procedure (CrPC) was proposed to be amended in 2006; a bill to bring about the 103rd Amendment to the Constitution has been pending since December 2004; Pension (Regulations) Bill, 2005; Amendment to the Land Acquisition Act, 2013; Benami Transaction (Prohibition) Act, 1988; and so on. In contrast, the Commercial Courts Bill, the SC/ST Amendment Bill, Atomic Energy Bill and the Arbitration Bill got five minutes a piece before getting passed on 23 December 2015 by the Rajya Sabha (See The Financial Express, 24 December 2015).

19 For example, the Defamation Bill was introduced in the Lok Sabha on 29 August 1988, and the members were given just half an hour to table amendments. It was passed on the same day despite the staging of a walkout by the entire opposition except All India Anna Dravida Munnetra Kazhagam (AIADMK) members in the Lok Sabha. Similarly, the Parliament on 23 December 2008 passed nine vital legislations in a span of 17 minutes without any discussion. Four bills passed in the Lok Sabha were not even listed for the day, forcing a walkout by the Left parties. Enraged by government's 'casual' attitude towards important legislations, the Left later boycotted the closing ceremony, marking its adjournment sine die.

Meetings strengthen the connection between policy choices and electoral choices in the minds of voters.

Conclusion

The role of Parliament in policymaking is thus understood as a procedural device for legitimizing decisions. Moreover, in a parliamentary type of executive, a mass of legisla- tion is made under the powers

delegated to the ministers by parent statutes for reasons of pressure on parliamentary time, the technical quality of much legislation and the need for sufficient time to develop adequate administrative machinery. Only a small proportion of statutory instruments receive any parliamentary scrutiny at all, although what there is can be relatively effective. In reality, the bulk of delegated legislation in India seems to be treated by most legislators with complacent indifference. Also many policies approved by the Parliament are initiated by the members of Cabinet or Council of Ministers, having been planned within the departments of state after consultation with affected interests. Legislatures everywhere play a little role in the policymaking process. Rather, it is the ability of politicians to create majorities within the legislature which is of significance to the policymaking process.

Reference:

- 1) A. H. Birch, Representative and Responsible Government (London: Allen & Unwin, 1964), 21.
- 2) The distribution of legislative power is done under Articles 245 and 246 read with the Seventh Schedule of the Constitution.
- 3) E.C.S. Wade and G.G. Phillips, Constitutional Law (London: Longman, 1960). 49.
- 4) 14 In India, power of the Parliament (state legislature) is constrained by the judicial review exercised by the Supreme Court (Article 32) and High Courts (Article 226).
- 5) 15 United Kingdom, Study of Parliament Group Memorandum to the Select Committee on Procedure, Fourth Report , 1964-5 Session H.C. 393 (HMSO, 1965), 139.
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