The nature of constitutional choice

1. The key to constitutional choice concept understands the difference between the two type of decision making, namely ‘constitutional’ and ‘in-period’ level.

2. When ‘constitutional choice’ is written with a capital ‘C’ as ‘Constitutional choice’, it refers to decision making as per a legal document called the Constitution.

3. For individual decision making, ‘constitutional’ choice constraints include laws, rules, conventions, customs and institutional arrangements that jointly constitute social order. The idea of ‘choice’ is not limited to some explicit
and deliberative process, but includes a wider range of processes by which social order may emerge from ‘individual decision making’.

4. In economic choices an individual chooses between products as per prices and ability to pay. Those prices are the institutional arrangements made by the market, and they act as the constraints under which an individual makes a choice.

5. The ‘constitutional economics’ involved in such decision making refers to alternative property rights specifications, alternative rules of exchange and other institutional arrangements. The individual ‘constitutional choice’ is a decision among these constraints.

6. The complexity of constraints increases in the political and public policy sectors. What policy to adopt? Who to vote in the elections? Preferences of people as consumers are different from their choices as a voter, as taxpayers, as social workers, as unemployed.

7. **Literature on constitutional choice** in economic institutions include:

   1. Literature on Market institutions and structures.
   2. Literature on traditional Industrial organisation including the modern 'mechanism design'.
   3. Literature on traditional political theory that includes alternative political and social institutions.
   4. Literature distinguishing constitutional politics from constitutional economics.

   4.1 **Constitutional economics** differs from mainstream economics in terms of subject matter, normative commitments, and styles of constitutional reflection. For constitutional economics the rules are not objects of choices but are outcomes within rules. Economic analysis is cast in the language of sets as x1 and y1. Constitutional economics firstly analyses the rules of the game of choices that create the constraining structures of price etc in the market. Secondly, does their analysis impacts or make any difference to the consumers or the market?
8. How is ‘constitutional choice’ different from ‘In-period’ choices?

8.1. Choice among rules has the following four important aspects:


2. The Information Aspect of choices is less abstract than constitutional choice.

3. The Social Capital Aspect of choices

4. The Public Goods Aspect choices

9. In Motivation Choice the shift from ‘in period’ to ‘constitutional’ level of analysis increases as per the individual’s preference to choose general interest against self-interest. In this the self-interest fades into the background. The notion underlying this preference is that the constitutional level is characterised by forms of uncertainty that induce a ‘veil of ignorance’ over self-interest. This motivates the individual to select the set of rules that offer the best outcome for all, in the given circumstances.

9.1. In Buchanan formulation the predicament of radical individual uncertainty simply allows an approximation to unanimity. In Rawlsian version the same predicament is presumed to make individuals behind the veil of ignorance to move towards a choice that is in the best interest of one individual. In contrast to this clash of two views, the kind of institutional rules that would be chosen under the expected return or maximum criteria outcome would be different. Such these differences
of opinions behind the ‘veil of ignorance’ reflect different assumptions and application of logical reasoning.

9.2. The theory of ‘veil of ignorance’ concept, through motivation, can be used to convert choice as per ‘self-interest’ into constitutional choice in ‘public interest’. Under this logic the debate over constitutional choices will be less divergent than the debate over ‘in-period’ rules based choices. The in-period debate is a subject matter for seminars, while the voting choice of the ballot box is a constitutional level choice where self-interest and public interest seem to converge.

10. The Information Aspect of choices is less abstract than constitutional choice. In key factor in deciding on a choice as per the ‘constitutional’ route and the ‘In period’ route, is availability of ‘relevant information’ on the institutional structure. A choice made on basis of institutional structure requires less information on alternative aspects that are required under the substantive choice. This argument is derived from Hayek (1945)

10.1 In sum, the critical factor in Information Aspect is that the logic of institutional analysis can indicate how best to structure political decision making without any detailed knowledge of the precise preferences of voter-citizens.

11. The Social Capital Aspect: As argued by North, the institutions or rules of the game are expected to remain fixed over long periods of time. Rules provide information to players about the game and the value of information is lost if they are changed frequently. The primary function of rules is to provide information to agents to enable them to coordinate their choices for purpose of action. Rules for traffic and use of roads are a good example. Rules that establish systems of currency, trade, weights and measures, language, are known as ‘Social capital’ in official circles.

11.1 Rules take time to learn and they shape decisions of an individual, that impact the future. If this basic ‘social capital framework of rules is not stable or is not known intelligent choices cannot be made by society. Investment
decisions, for example, cannot be made without knowing the property rights rules.

11.2. In sum, among the attributes of constitutional options available behind the ‘veil of ignorance’ stability of rules is a key attribute. The fact that constitutional rules are ‘social capital’ has two important implications. First that expected stability is an important property of constitutional rules. This stability is a part of ‘meta rules’ and is therefore valued as ‘meta constitutionally’.

11.3. The Constitution of India specifies rules under which the Constitution can be amended. This shows that rules are restrictive, and involve special and more inclusive decision making. As such, ‘stability’ is specifically chosen in the Constitution. This ‘stability’ of Constitutional social capital has some ‘transaction costs’. This is carried on as ‘transaction cost of stability of social capital nature of all rules.

12. **The Public Goods Aspect:** With exceptions, constitutional choice typically involves options that are non-excludable and non-rejectable. Public goods are goods that are consumed equally by all. The institutional arrangements that structure social interaction will be subject to collective decision making processes, and whatever is left for decentralized individual official decisions, is the same for all members of the political community.

12.1. As per the arguments considered above, if the identifiable self-interests disappear into the background of the ‘veil of ignorance’, in the context of constitutional choice, then the basis for ‘interpersonal trade’ or self-interest also disappears. If at the constitutional level all the objects of choice are pure public goods, there cannot be any space for self-interest based choices in a pure ‘veil of ignorance’. However, self-interest will exist if the veil of ignorance is partial and there are individuals who are not ‘fully ignorant’ of the background. This will give rise to ‘free riders’ who will treat the constitutional options not as objects of choice but as occasions for expressing their own values and preferences. This ‘preference’ of agents over alternative institutional arrangements will result in infusion of self-interest over public interest.
13. **In sum the** rules based on constitutional choices have the attributes of stability and transaction cost involved in changing them. Rules are self-imposing by nature. Collectively they are known as social capital. The constitutional choice process gives priority to public interest over self-interest.

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1 Source: Constitutional choice by Geoffrey Brennan and Alan Hamlin in The Elgar companion to public choice