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Constitutional Borrowing: The Case of the Indian Parliamentary System

ASTHA¹

ABSTRACT

Constitution plays an extremely important role in deciding the way a government works, including but not limited to how it caters different issues affecting the society, both internally and externally. Therefore, it is important that countries learn from the past experiences of other countries while framing their constitution. Over the last several decades, Indian Constitution has simply been referred to as a Borrowed Constitution, because of its sections being inspired from constitutions of various nations. In this paper, I have discuss the Indian Parliamentary System and its similarities and differences from the British Parliamentary System, from which it has been influenced. Some of the notable differences have been discussed which cements the assertion that it has not been completely borrowed, rather modified to suit the Indian circumstances, and live up to the expectations of the Indian society.

Keywords: *Constitutional borrowing, Indian Constitution, Indian Parliamentary System, British Parliamentary System, Borrowed Constitution.*

I. INTRODUCTION

Since the beginning of time, humans have travelled the world to learn new things and gain ideas and apply them to their own civilizations to enrich and prosper them. Scholars from Asia and Europe have reportedly travelled to different nations in order to comprehend how their communities and cultures can profit from this experience, moreover, these academics thoroughly investigated the cultures in great detail in order to grasp new learnings from it.²

In the late nineteenth and early twentieth centuries, there was a sharp fall in the number of colonial entities, and therefore the newly constituted nations had little time to develop their constitutions. Before they could produce a final text, the dignitaries tasked with drafting the constitution had to take into consideration a number of variables, including the local population, the cultural heritage, the diversity of the residents, and the expectations of the citizens.³ A few nations established the constitution based mostly on the policies they had already developed,

¹ Author is a student at Nirma University, Ahmedabad, India.

² Robert L. Tsai, Considerations of History and Purpose in Constitutional Borrowing, 28 WM. & MARY BILL Rts. J. 517 (2019).

³ *Id.*

using their own experience as a guide. The constitutions of other republics and democracies around the world were examined by many nations, however, in order to keep a bigger picture in mind. They look through several laws, regulations, and other pertinent documents to assess their benefits and drawbacks and determine whether they apply to their situation or not. Another group of nations, who were already accustomed to adhering to such laws, essentially copied their constitutions from the nation that had colonized them in the past.⁴

Across different constitutions around the globe, patterns are seen which allows for comparison in order to understand the applicability of the regulation in question, in a particular context. Since the mechanisms and ideas in every constitution have similarities, borrowing is an unavoidable fact. It happens when the framers of the constitutions/regulations come across a problem and they start looking around to other states or nations to understand their way of dealing with the same. Robert Godin suggested, “*Reading across any large set of constitutional texts, it is striking how similar their language is; reading the history of any nation’s constitution-making, it is striking how much self-conscious borrowing goes on.*”⁵

This form of adapting and copying text from other constitutions is what classifies as “*constitutional borrowing and transplantation.*” This happens when the drafters investigate other constitutions for solutions to their current problems. Borrowing can be done from multiple documents at a time, in order to filter out the best policies while disregarding the others. Dr. B. R. Ambedkar was of the view that since there is no patent on any fundamental rights and we all hold the same human rights; the constitutional text can be easily borrowed.⁶ However, there were limitations to how much was borrowed depending on how different the society was perceived to be. Thus, his paper will deal with the complexities in drafting a constitution while making optimum use of constitutional borrowing and transplantations, further suggesting ways to overcome such difficulties.

(A) Literature Review

Before I start with my analysis of the Indian Constitution, it is imperative to first cover the previous studies on the constitutional borrowing and transplantation as a whole in order to better analyse the text in hand. As discussed earlier, borrowing has been ongoing for many decades,

⁴ Choudhry, S., 2006. Migration as a new metaphor in comparative constitutional law.

⁵ Galligan, D. J., and C. Palmer,

'Patterns of Constitutional Thought from Fortescue to Bentham',

in Denis Galligan (ed.), *Constitutions and the Classics: Patterns of Constitutional Thought from Fortescue to Bentham* (Oxford, 2014; online edn. Oxford Academic, 22 Jan. 2015), <https://doi.org/10.1093/acprof:oso/9780198714989.003.0001>, accessed 27 Nov. 2022.

⁶ Singh, U.K. and Roy, A., 2017. BR Ambedkar and the Ideas of Constitutionalism and Constitutional Democracy.

even centuries, and hence there are literatures that date back multiple decades back as well. There have also been examples of borrowing that have been executed poorly or in a way to be beneficial to a certain set of the society. While this is not optimal, there has been a long tradition of this and this occurs when the diversity of the constitution drafters is not considered.

“*Constitutional Borrowing*” by *Tebbe & Tsai* is, probably, the most extensive text of what borrowing is, its methods as well as its pros and cons. There are numerous accounts of different types of borrowings by various constitutional setups. The authors have divided types of borrowings into transplantations, hedging, displacement, and corruption. They have also explained the factors favouring and resisting these borrowings, including the causes of concerns when such a process is followed. At last, the authors have presented tools to evaluate the incidences of these borrowing. However, the authors fail to highlight the relationship between the different types of constitutional borrowing.⁷

As discussed previously, the constitutional borrowing is supposed to take the local populace in consideration in order to get the most optimum result out of it. However, there have been numerous exceptions to this, wherein the borrowing favours a particular community or race. *Robert Tsai*⁸, in his journal paper “*Consideration of history and purpose in constitutional borrowing*”, has discussed how the constitutional borrowings in USA have traditionally been favourable for one community while disadvantageous for the other. He has presented various arguments wherein he has discussed that a lot of the laws in US favour the white and the powerful while giving little thoughts about those at the other end of the spectrum. He has also discussed how this creates a divide in the society based on race and colour. He, thus, conveys a message that these borrowings should be neutral and beneficial to all, and not just a particular set of people.

Another ill by-product of the constitutional borrowing is “*Abusive Borrowing*”, which has been discussed by *Dixon and Landau*. They have made a significant and sobering contribution to the comparative constitutionalism literature. It considers the role of legitimating ideologies that help support different modes of abusive constitutionalism and combines analytical clarity with granular detail drawn from case studies worldwide to show how would-be authoritarians pretend to be liberal democrats while simultaneously undermining the structures and values of liberal democracy⁹.

⁷ Robert L. Tsai, Considerations of History and Purpose in Constitutional Borrowing, 28 WM. & MARY BILL Rts. J. 517 (2019). Accessed 5 Oct, 2022.

⁸ Robert L. Tsai, Considerations of History and Purpose in Constitutional Borrowing, 28 WM. & MARY BILL Rts. J. 517 (2019).

⁹ Dixon, Rosalind, and Eric A. Posner. "The Limits of Constitutional Convergence." Chicago Journal of

An extremely important part of the borrowing analysis is to understand if the borrowing has been successful. *Mark Tushnet*, a scholar well known to those who study the American Constitution, ponders the benefits of comparative constitutional law by examining three elements. First, he examines how we might determine when a constitutional borrowing has been successful. Next, he explores what units of comparison might be most useful for comparing constitutions. Finally, he analyses a functionalist approach and determines that such a method founders when it is used to address context-specific problems of a specific society or legal system. The author goes on to describe in well detail the factors to be considered to ascertain the success of the constitutional borrowing, which is extremely beneficial for analyses like the one described in this paper.¹⁰

One of the major shortcomings of the borrowing constitutional propositions from other constitutions is that true essence of the provision gets diluted. Another frequently observed issue is that it leads to loss of a sense of belongingness and nationalism since they may not reflect the needs and aspirations of the citizens. Borrowed constitution may turn out to be unsustainable if they lack sufficient self-consciousness and the special character of the national populace. In such cases, not only are they destined to fail, but are also unlikely even to cause meaningful societal change. Thus, an effort has been made to first analyse the significance of constitutional borrowing and transplanting before providing alternatives to address these challenges in order to simplify the aforementioned complexity.¹¹

II. STAKEHOLDERS IN A CONSTITUTION

There are primarily five different classes of citizens who form the stakeholders of a constitution in most of the nations or states worldwide.

1. Drafters of the constitution

The individuals tasked with drafting the constitution play the most important role in the entire process. They are the ones who decide the basic framework of the constitution along with the government setup and rules and acts to maintain an order in the state. They are also the first ones to borrow ideas and setups from other constitutions, either partially or wholly. In this process, they also consider the difference between the local social environment in comparison to the one that the text is being inspired or borrowed from, in order to make them more suitable

International Law, vol. 11, no. 2, Winter 2011, pp. 399-424. *Hein Online*, <https://heinonline.org/HOL/P>

¹⁰ Tushnet, Mark. "The Possibilities of Comparative Constitutional Law." *The Yale Law Journal*, vol. 108, no. 6, 1999, pp. 1225-309. JSTOR, <https://doi.org/10.2307/797327>. Accessed 7 Oct. 2022

¹¹ "India." *The Journal of Asian Studies*, vol. 28, no. 5, 1969, pp. 233-332. JSTOR, <http://www.jstor.org/stable/2942618>. Accessed 27 Nov. 2022.

for the citizens.

2. Lawmakers

A country's constitution is always a work in progress. Even after the first draft is approved by the country's government, there are always scope of improvement to it. A country not willing to change its laws based on the current circumstances is considered to be too rigid and non-progressive. Therefore, it is extremely important for the lawmakers to be aware of the idea of borrowing and both its advantages and disadvantages.

3. Human Rights Organisations

While not so much of a factor earlier, these human rights organisations have come to the fore with the United Nations taking central role in the world stage to ensure peace and fair treatment to the entire world population. They can influence a government to amend their ways by bringing an amendment to the constitution if, in their belief, there isn't a fair treatment meted out to the masses and there can be changes brought in by looking at other nations that have a similar demographic and are doing things in a much better way.

4. Judges

A lot of countries have judiciary at the top of the hierarchy in a country, even ahead of the country's parliament, at times. Therefore, the judges have absolute authority in these cases to overrule a parliament judgement if they feel that a fair and due diligence has not been done by the lawmakers. They should also be very well aware of countries across the world who have faced or are facing the same problem as them, how they have dealt with it and how well did it turn out in those instances.

5. Citizens

At the bottom of the hierarchy are the citizens, who are ultimately the benefactor of the constitutions and various amendments made to it. Every effort must be taken to make sure that the common public is not marginalised by any of the policies announced by the government or other authorities in power. In an unfortunate situation of this being the case, a prompt course correction must be done by those in power.

III. THE CASE OF INDIAN CONSTITUTION

The Indian Constitution has often been called as a Borrowed Constitution. The following provisions have been borrowed from foreign constitutions:

1. Government of India Act, 1935:

Federal Scheme, Office of Governor, Judiciary, Public Service Commissions, Emergency provisions, Administrative details.

2. British Constitution:

Parliamentary government, Rule of Law, Legislative procedure, Single citizenship, Cabinet System, Prerogative Writs.

3. US Constitution:

Fundamental Rights, Independence of Judiciary, Judicial Review, Impeachment of the President, Removal of Supreme Court and High Court judges and post of Vice-President.

4. Irish Constitution:

Directive Principles of State Policy, nomination of members to Rajya Sabha and method of election of President, Federation with a strong centre, Vesting of residuary powers in the Centre, appointment of State Governors by the Centre and advisory jurisdiction of the Supreme Court.

5. Canadian Constitution:

Federation with a strong centre, residuary powers with the centre, appointment of state governors by the centre and advisory jurisdiction of the Supreme Court.

6. Australian Constitution:

Concurrent List, Freedom of trade, commerce and intercourse joint sitting of the two Houses of Parliament.

7. Weimar Constitution:

Suspension of Fundamental Rights during Emergency.

8. Soviet Constitution:

Fundamental duties, the ideal of justice (social, economic and political) in the Preamble.

9. French Constitution:

Republic and the ideals of liberty equality and fraternity in the Preamble.

10. South African Constitution:

Procedure for amendment of the Constitution and election of the members of Rajya Sabha.

11. Japanese Constitution:

Procedure established by law.

Having noted the similarities above, it is also important to stress that Indian Constitution is the most detailed constitution of the world. Where the American Constitution has only seven articles, Australian Constitution 128 articles, Indian Constitution originally consisted of 395 articles which have now increased to 448 articles.

IV. BORROWING FROM THE BRITISH CONSTITUTION: THE PARLIAMENTARY SYSTEM

The Indian parliamentary system is very much borrowed from the British Parliamentary system. A few of the similarities between the two systems are:

- Two houses of Parliament:

Both the British and Indian Parliament is bicameral i.e., there are two houses or chambers. The British parliament has the House of Commons (Lower House) and the House of Lords (Upper House), while the Indian parliament has the Lok Sabha (Lower House) and Rajya Sabha (Upper House).

- Government Organisation

The concept of real and nominal executives. In Britain, the Crown is the nominal executive and the Prime Minister acts as the real executive. In other words, the Crown is the head of the State while the Prime Minister is the head of the government. A similar procedure is followed in India. The President is the nominal executive while the Prime Minister is the real executive.

- Cabinet of the Government

Both, India and Britain follow a cabinet formation of the government. This means that the power doesn't stay with one person but the entire council of ministers. This system is based on the collective responsibility of the government and its council.

- Appointment of the Prime Minister

In both the constitutions, the leader of the political party with an absolute majority of seats in the lower house is selected as the Prime Minister.

In case there's no majority attained by any party, the opportunity to form the government is first passed on to the leader of the party with the largest number of seats.

- Position and Responsibilities of the Prime Minister

The constitutional position of the Prime Minister in India is modelled on the same lines as the Britain's Prime Minister.

The Prime Minister is the chief of the cabinet in both the constitutions.

In India, the Prime Minister acts as a link between the Parliament/Cabinet and the President. This is the same as Britain where the PM acts as the link with the Queen and their Parliament or Cabinet.

The PM can recommend the dissolution of the lower house in both the countries.

The appointment of the ministers is taken by the Prime Minister in both the setups.

- Appointment of Civil Services / Bureaucrats

The Indian constitution carried forward the model of appointment of civil servants from the pre-independence era, which was introduced by the Britishers. Consequently, the competitive exams are the basis of selection. These positions are also supposed to be politically neutral.

- Judiciary

The actions of the Executive can be declared ultra vires in both, the British and the Indian, democracies.

The judiciary, however, remains the highest interpreter and the guardian of the constitution.

In both the constitutions, the judiciary has come to the forefront to challenge the decisions made by the government in power and advised them to take corrective steps. In the case of *Miller v. Govt of 2017* in Britain, the UK Supreme Court ruled that the British government may not initiate the Brexit procedures without making it a parliamentary act. This was significant as the UK court had generally refrained from encroaching into the government decisions until then. A similar pattern is now being seen in the Indian setup as well.

Tenure of the judges

In both the countries, the Rule of Law safeguards the judges from their removal from office, except in cases of serious misbehaviour and following a due diligent procedure that requires approval from both the houses of the parliament.

This has been incorporated so that the judges are free to provide judgements which they believe is right without being afraid of any reprisal from the parties affected. It is because of this reason that the Judiciary is an unmistakable part of the constitutions in both the countries.

- The election system

The first-past-the-post system is the basis of the general elections to the House of Commons as well as the Lok Sabha. Unlike the United States of America, the majority in these elections is determined by the total number of seats won by each party, rather than seeing the majority in each state and then adding them up.

- The fundamental rights

Britain was one of the first countries to bring in the idea of human rights for its citizens. As an integral part of their constitution, these human rights are derived from common law, the Bill of Rights of 1689 and the Human Rights Act of 1998. They have also been influenced by the membership of the Council of Europe (The EU) and the international laws.

In India, Articles 12-35 of Part III of the Indian Constitution provide details of the fundamental rights that its citizens enjoy and are extensively described.

- The Citizenship models

The idea of not allowing dual-citizenship was influenced by the British Parliament of that time which had similar provisions. Although Britain now allows for dual citizenship, the same is not the case in India, yet.

Having described the similarities of the two parliament, it is also important to point out the differences of the two, in order to establish that the Indian constitution makers did not copy-paste the entire constitution without any due-diligence.

- The Parliamentary System

British parliament is about 300 years old, and it can be the only institution which exercises sovereign powers and on which there are no limits because there is no written constitution. In India we have written constitution and power and authorities of every organ of government and function are only as defined and delimited by the constitutional document. The power of parliament itself is also clearly defined and delimited by the constitution within its own sphere, parliament is supreme.

Indian parliament is representative institution of the people. But it is not sovereign in the sense in which the British parliament is sovereign and can do or undo anything.

House of lords can propose and make amendments. However, its power is limited if it doesn't approve of a piece of legislation it can only delay its passage into law for up to a year. After that there are rules to ensure that the wishes of the house of commons and the government of

the day prevail.

House of lords can be called as the weakest upper house in the world. Since the passage of the Act of 1919 and 1949 the house of lords has lost all the real legislative powers. It is in other words delaying chamber now. It can delay ordinary bill for maximum period of one month.

Rajya Sabha has equal power with Lok Sabha as far as an ordinary bill or an amendment of the constitution is concerned. Rajya Sabha is also delaying chamber like house of lords as far as money bill is concerned. However, in case of a money bill, the Rajya Sabha can delay the bill for a maximum of 14days.

The British Parliament follows the concept of shadow government, whereas in India, we have the concept of the principal opposition party and its chief. They, in no way, acts like a shadow government in India; instead their role is to question the government if, in their belief, the government needs to revisit their policies.

- The Cabinet

In Britain the responsibility of cabinet is based on conventions whereas In India it is specified in Article 75 of Indian constitution

- The Prime Minister

In Britain PM should be member of Lower house while in India PM can be member of Lok Sabha or Rajya Sabha

- Evolutionary

The British constitution is a specimen of evolutionary development. It was never framed by any constituent assembly. It has an unbroken continuity of development over a period of more than a thousand years.

Indian Constitution is framed by a constituent assembly and it has well defined provisions.

- Flexibility of Changes

The British constitution is a classic example of a flexible constitution. It can be passed, amended and repealed by a Simple Majority (50% of the members present and voting) of the Parliament, since no distinction is made between a constitutional law and an ordinary law. Both are treated alike. The element of flexibility has provided the virtue of adaptability and adjustability to the British constitution.

Indian Constitution, in contrast, is both flexible as well as rigid. This compliments the basic ideology of the Indian Constitution quite well, wherein certain features like Sovereignty,

Secularism, and Republic et al have been held sacrosanct, but otherwise the Constitution is amendable.

- Unitary v. Federal

The British constitution has a unitary character as opposed to a federal one. All powers of the government are vested in the British Parliament, which is a sovereign body. There is only one legislature. England, Scotland, Wales etc. are administrative units and not politically autonomous units.

The Constitution of India establishes a federal system of government. It contains all the usual features of a federation, viz., two government, division of powers, written Constitution, supremacy of Constitution, rigidity of Constitution, independent judiciary and bicameralism

- Role of Conventions

A necessary corollary to the unwritten character of the British Constitution is that conventions play a very vital role in the British political system.

In Indian political system, conventions have minimal role. Rules and Procedure are detailed in Constitution, and it is further backed by numerous statutes.

- Secularity

The official religion of the United Kingdom is Christianity, with the Church of England being the state church of its largest constituent region, England.

The Constitution of India stands for a secular state. Hence, it does not uphold any particular religion as the official religion of the Indian State.

V. CONCLUSION

In this paper, the paper significantly discussed the concept of borrowing and transplant in a constitutional setup. A lot of literature was presented, which helped in better analysing the case of the Indian constitution. The constitution of India has several salient features that distinguish it from the constitutions of other countries. It can very well be argued that while they studied constitutions of countries across the globe, they did not copy-paste it. The relevant sections were modified as per the basis of the Indian Constitution, the best way that they could determine. Since India was under the British occupation for a couple of centuries, the local populace would have found it easier to continue with some of the old rules and acts, and that is one of the important reasons why some sections of the Indian Constitution can seem to be eerily similar to the British Constitution. There are various other countries like Japan, South Africa, USA,

Australia, France and Canada from where a few sections of the constitution have been borrowed/transplanted. However, with the passage of time, some of these needed amendments and modifications that were never carried out. Consequently, a lot of the desired results are yet to be achieved.

As mentioned before, the constitution of any nation should always be a work in progress and the same applies to India as well. While there are obvious flaws that still remain and need a course correction, it may not be a bad idea to, once again, borrow the ideas from other nations' experiences. Therefore, while some of the sections of the constitution have been borrowed with the honest intentions of doing good to the country, it will be extremely unjust to call the Indian Constitution as a Borrowed Constitution.
