

The Universal Origin of Fundamental Rights in the Indian Constitution

Viraj Vikrama

Amity Institute of Social Sciences, NTCC, International Journal For Multidisciplinary Research

Abstract

Indian constitution has been referred to as “a bag of borrowings” since its first draft back in 1948.

However, “slavish imitation” is an accusation that Dr. Ambedkar denied in the constitutional debate on 4 Nov 1948.

Indeed, with the fine mix of features from multiple constitutions across the globe, taken with judicious discretion as fits our nation best, is more a borrowing in spirit, as the mixture of these features results in a very original composition.

Among such ‘borrowed features’, the USA Constitution is considered the source of Fundamental Rights in the Indian Constitution. It needs to be considered, however, that a shift of such magnitude, of the conception of fundamental rights in such a form that lasts almost unaltered for centuries, requires a long gestation period of rising awareness and shift in mindset of the society marked by outliers whose work influences this shift over centuries, like that of John Locke, whose work can be directly attributed to the rise of Fundamental Rights across the world. It is to this process that the origin of Fundamental Rights can be traced.

Keyword: Fundamental Rights, John Locke, Petition of Right, Bill of Rights

The Indian Constitution

As per the Supreme Court of India¹,

“The fountain source of law in India is the Constitution which, in turn, gives due recognition to statutes, case law and customary law consistent with its dispensations.”

This is very aptly puts the fact that all laws, the procedure and provisions for making such laws (statutes), repealing these laws and constitutional amendments are all described in detail within the Indian Constitution itself.

The constitution has stood the test of time in the sense that even though leaders and the people of India have debated upon and enacted many amendments to the constitution, faith in the constitution itself has remained unwavering throughout.

There are many reasons for this. The flexibility of the constitution being the chief reason. Not to mention that being the longest written constitution in the world, it has detailed provisions for, arguably, all spheres of life of a citizen, from organs of state, such as administration, Legislature, Judiciary to commitments to the citizens in the form of Fundamental Rights and Directive Principles of State Policy, i.e, “the conscience of the constitution” as per the constitutionalist Granville Austin.

¹ Supreme Court of India. *Sources of Law*. Government of India.

The Indian Constitution has been called ‘A Bag of Borrowings’, and for good reason. It is a feature of the constitution that was touched upon in the constitutional debates themselves.

On 29th April 1947, pertaining to the fundamental rights, Sardar Patel mentioned, and I quote,

“...They[Drafting Committee] studied all the constitutions of the world...”,²

acknowledging that the constituent assembly had as a matter of fact gone through almost all constitutions in the world to arrive at a balanced and comprehensive first draft, known as the ‘Draft Constitution’, building upon the intellectual labours of previous generations, standing on the shoulders of giants to peer at greater heights.

Of course, at that same time, the constituent assembly was accused of slavish imitation by contemporaries in India itself, as the first draft had picked major chunks of the Government of India Act 1935, and features of other constitutions, like Fundamental Rights and the process of Judicial review from the United States of America; Parliamentary Government, Separation of Power, Single citizenship, etc. from the United Kingdom; The Directive Principles of State Policy from Ireland; and other features like the Concurrent List and the process of constitutional amendment, from countries like Australia and South Africa, respectively³.

B.R. Ambedkar addressed this accusation of slavish imitation of western nations in the constitutional debates by enumerating the various facets of the constitutions that draw upon other constitutions, but are different from all others. He listed ways in which we have a President like the the United States of America, but follow a Prime-ministerial form of government like in the United Kingdoms.

The President is more alike the Monarch of the United Kingdoms, albeit without the power to dismiss the government, but with the erstwhile Weimar Republic’s provision of emergency powers.

On the topic of federalism, he said:

“...there are some other special features of the proposed Indian Federation which marks it as different, not only from the American Federation but from all other Federations. All federal systems including the American are placed in a tight mould of federalism. No matter what the circumstances, it cannot change its form and shape. It can never be unitary.”⁴

This referred to the fact that the Indian Constitution does not follow a dual citizenship, like in the United States of America, where each citizen has citizenship of the nation and the native state in the nation.

Also, as per the emergency provisions in article 352 of the constitution, the President can make the nation unitary in structure if the need arises in case of a national emergency.

In terms of Fundamental Rights, which are modelled after the Bills of Rights, 1791 and 1689 of the United States of America and England respectively, it must be noted that there are key differences, especially in the fact that the constitution gives flexibility to the government in the form of division of rights into justiciable and non-justiciable rights, i.e, Fundamental Rights and the Directive Principles of State Policy, where the latter act as guiding principles for governance.

This is again a feature which can be found in the Irish Constitution adopted in 1937, which lacks, however, the same flexibility that the Indian Constitution possesses. The Irish Constitution has been amended 32 times in 86 years till 2023⁵, while the Indian Constitution has been amended more than a 100 times in 73

² Lok Sabha Secretariat (2014). *Constitutional Assembly Debates, Volume III*. Government of India.

³ Singh, H. (2023). *Constitution of India: Features borrowed from other countries*. Jagran Josh.

⁴ Lok Sabha Secretariat (2014). *Constitutional Assembly Debates, Volume VII*. Government of India.

⁵ Irish Statute Book. *Constitution of Ireland*. Government of Ireland.

years, till Sept 2023⁶.

This flexibility matters a lot in the sense that the Directive Principles of State Policy can be made Fundamental Rights through a constitutional amendment, while the Irish Constitution requires a state-wide plebiscite to be amended.

This was the case with respect to article 45 of the constitution that had a provision for state funded primary education, a costly affair in the backdrop of the challenges India faced in the early years of Independence, including two wars with Pakistan and China respectively and the Green Revolution. In due time, this led to the article 21A, stipulating compulsory primary education from age 6-14, as a fundamental right.

Thus, in this process of taking parts of other constitutions selectively, and putting them all together, the Indian Constitution became unlike any other nation's from which it has drawn its salient features from.

India may have taken provisions from various constitutions around the globe, but these have not been slavishly imitated, nor haphazardly compiled. The arrangement and combination of provisions is a very original creation.

On the Subject of the Origin of Fundamental Rights

The question remains however, that which part was borrowed from where.

In the case of fundamental rights, it is generally accepted that they are borrowed from the Bill of Rights, 1791, of the United States of America.⁷

Although the division into Fundamental Rights and Directive Principles of State Policy has been credited to the Irish Constitution, other similarities are again credited to the Bill of Rights in the case of the Irish Constitution as well.

This does not mean that the bill of rights, or the Declaration of Independence of the United States of America, is the fountain from which the fundamental rights sprang from. This, however, does not include the fact that the French established fundamental rights for the citizens before the United States did.

The French also passed the Declaration of the Rights of Man and of the Citizen during this period, although after the Declaration of Independence, but two years prior to the passing of the Bill of Rights of 1791, the document that guarantees the 'fundamental rights' in the United States of America.

If one focuses on the question of which came before the other for the sake of establishing which of the above is the source of fundamental rights, it is hard to come to a conclusion, for both were influenced heavily by thinkers of the time — such a revolutionary step is not possible without a long gestation period intellectual developments and rising awareness among the society of these intellectual ideas.

The French Revolution was influenced heavily by the like of Rousseau, Voltaire, etc, and the American War of Independence was also influenced by the ideas of these thinkers and, of course, John Locke, whom Thomas Jefferson once referred to as one of the three greatest people to have lived along with Francis Bacon and Isaac Newton⁸, and Voltaire whom called, "le sage Locke".

Such refined and balanced documents enumerating the rights inalienable from the people of a nation, and have remained so for 250 years, do not come out of nowhere.

That is, in essence at least, and some more, the Bill of Rights of the United States of America, too, were borrowed.

⁶ The Legislative Department. *The Constitution (Amendment) Acts*. Government of India.

⁷ Singh, H. (2023). *Constitution of India: Features borrowed from other countries*. Jagran Josh.

⁸ Jefferson, Thomas. *Thomas Jefferson to John Trumbull*. Library of Congress.

This leads to the fact that as opposed to these popular documents being credited as the revolution that led to the adoption of inalienable fundamental rights natural rights for all, across the globe, perhaps the first instance of rights guaranteed to the citizens in a passive sense, i.e, at all times, without exception, was the bill of rights of England, passed in the year 1689, an entire century before the French declaration.

The Bill of Rights (1689)

The Bill of Rights, 1689, an English Act of Parliament with the full title ‘An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown’, was the act passed that guaranteed certain rights to the citizens of England in the sense that fundamental rights are promised to citizens across the globe: negative in nature, in the sense that it stipulates limitations upon the state/king to forbid certain actions that threaten the natural, inalienable rights of citizens such as their liberty, freedom, dignity.

These rights and liberties as mentioned in the act included:

- Putting limits on the power of the Monarch by declaring that only the Parliament could levy taxes, and not the king, nor could the king keep a standing army in times of peace.
- Establishing the rights of Parliament, including, but not limited to, regular parliaments and free elections.
- Rights of men to have freedom of speech and debate and the right for protestants to own arms to protect themselves, a provision very similar to the second amendment of the US Constitution providing right to keep and bear arms.

In this manner, this Bill of Rights, passed a century before the Bill of Rights of the United States of America, set forth provisions for many of the rights now fundamental in nature in democracies across the world, based on the principles of natural rights, that are inalienable to men, popularised by the 17th century English Philosopher, John Locke, in his famous work, the Two Treatises of Government.

John Locke has been credited, perhaps incorrectly⁹, for providing ideas that formed the bedrock of the Bill of Rights of 1689.

This is for the simple reason that John Locke published the Two Treatises in 1689 itself.

Of course, that is not to say that he, for certain, did not influence the Bill of Rights 1689 in any way and that it was the other way around. It is more complicated than that, as explored in the next section.

In any case, John Locke’s significance is merely diminished a little due to this, for this does not take into account how he influenced future generations, particularly in the United States of America, to adopt the principles of ‘natural’ rights in the constitutions of newly formed democratic republics.

John Locke

The earliest thinker, in temporal chronology, to have a significant influence on the Constitution of the United States of America, was John Locke, an English thinker who lived from 1632 to 1704 in England.

John Locke is known today primarily as one of the key contributors to the Social Contract theory.

The Social Contract theory, first proposed by Thomas Hobbes, alludes to a social contract by the people which brought the ‘state’ into existence from the anarchic forest dwellers of ancient times.

While Thomas Hobbes described the state of nature to be harsh, unforgiving and a state of constant war, which required people to surrender their liberty to a monarch in order to safeguard the safety in the confines of a stable society; John Locke described the state of nature as a time when everyone was free,

⁹ Schwoerer, Lois G. (1990). *Locke, Lockean Ideas, and the Glorious Revolution*. *Journal of the History of Ideas*. **51** (4): 531–548.

equal and independent, with the limitation that there was no impartial way to seek redressal for injuries to self or to one’s property, to which end, people entered into a social contract, giving up right to seek justice on one’s own and entrusting imparting impartial justice to the state, which had to do so without violating the natural rights of people which were not surrendered in John Locke’s version of a social contract.

This theory of a Social Contract is but a part of the works of John Locke, including the two treatises published in 1689, although written a decade earlier when John Locke was in exile.

This brings about the possibility that he influenced the ideals in the Bill of Rights of 1689, as he had a close relationship with people in power, like the Earl of Shaftesbury, who could have picked John Locke’s brain to bring about the revolutionary Bill of Rights, although the revolution that it brought about at that time was not limited to the guarantee of rights for men, but primarily that of being the first incidence when the Parliament established superiority over the Crown in some senses, like finance, war and governance. The Two Treatises of Government not only introduced the social contract theory of John Locke, which was the foundation of his ideas which he expounded further in his two treatises, it also introduced the idea of natural rights; rights inherent to men which the state has a responsibility to uphold, for that is the purpose of a social contract where men surrender rights to seek justice which the state is duty bound to impart impartially.

These ideas were, in fact, so ahead of their times that John Locke never acknowledged to authoring his works, even after publishing three editions of his two treatises. It was only in his will that he finally acknowledged the authorship of his works, including the Two Treatises of Government, An Essay Concerning Human Understanding

John Locke’s ideas’ influence on the US Constitution, the American Revolution, and especially upon to the founding document of the United States of America, is hard to be overstated.

This can be seen from the fact that some scholars have gone so far as to say, “Locke’s justification of revolt, as based on his theory of natural rights, was the background from which the Declaration sprang.”¹⁰ Heavy words. And words which do justice to the influence of John Locke on the USA’s Declaration of Independence, 1776.

This can be strongly felt by comparing the paragraphs of the Declaration of Independence and John Locke’s Second Treatise in the following table (the First Treatise was never published in the 13 colonial states of America)¹¹:

<u>Locke’s Second Treatise</u>	<u>The Declaration of Independence, 1776</u>
“...till the mischief be grown general, and the ill designs of the rulers become visible, or their attempts sensible to the greater part, the people, who are more disposed to suffer than right themselves by resistance, are not apt to stir...” (Sec. 230)	“..all experience hath shewn that mankind are more disposed to suffer, while evils are sufferable than to right themselves by abolishing the forms to which they are accustomed...”

¹⁰ Stern, Kenneth D. (1966). *John Locke and the Declaration of Independence* (pp. 9). Volume 15, Issue 1, Cleveland State Law Review.

¹¹ Laslett, P. (1988), III. *Locke: Two Treatises of Government* (pp. 14-15). “Conclusion” Cambridge University Press.

<u>Locke’s Second Treatise</u>	<u>The Declaration of Independence, 1776</u>
<p>“...But if a long train of abuses, prevarications and artifices, all tending the same way, make the design visible to the people, and they cannot but feel what they lie under, and see whither they are going; it is not to be wondered, that they should then rouse themselves, and endeavour to put the rule into such hands which may secure to them the ends for which government was at first erected...” (Sec. 225)</p>	<p>“...But when a long train of abuses and usurpations, pursuing invariably the same object evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security...”</p>

*Adapted from “*John Locke and the Declaration of Independence*” in *Cleveland State Law Review*¹²

John Locke’s ideas are also credited for influencing the Bill of Rights of 1689, which hold some ground as recent scholars like Peter Laslett¹³, have shown that he wrote the Two Treatises of government well before the Glorious Revolution of 1688, even though he published them around the time that the Bill of Rights was passed in 1689, giving him enough time to influence policymakers.

However, upon closer inspection, it can be observed that John Locke and the Bill of Rights both were, more a product of the times, than of each other.

This can be better understood from the Petition of Right of 1628, which enumerated rights for the common man and limited the powers of the Monarch in many ways, and paving the way for Parliamentary supremacy over the Crown, more that half a century before the Bill of Rights, even though the incumbent ruler, Charles I, did not acknowledge it as a legal document after accepting the petition.

The Events Leading up to the Petition of Right (1628)

There were a series of events that led up to the Petition of Right in 1628.

The king of England, Charles I, to fund his war with Spain, and unable to get the parliament to pass loans for the same, he resorted to ‘forced loans’ and anyone who did not comply was imprisoned without trial. Martial law was imposed, according to which, citizens had to provide board and food to soldiers and sailors of the English army, without consent. Any protest was met with arbitrary detention.¹⁴

Although this had precedent as used by Charles I’s predecessors in case of imminent invasions or internal rebellions, it was the case then, causing discontent over the arbitrary infringement of property and personal liberty of the English people.

To safeguard the arbitrary violations of such rights, the parliaments, i.e, the House of Commons drafted a petition at the advice of Edward Coke, which sought recognition of four principles:

- Any taxes levied by the king without the express consent of the Parliament was not permissible.
- The Crown could not imprison subjects without charging them with a crime.
- The Crown could not force citizens to provide boarding and food for soldiers and sailors of the English army without their consent.

¹² Stern, Kenneth D. (1966). *John Locke and the Declaration of Independence*. Volume 15, Issue 1, Cleveland State Law Review.

¹³ Laslett, P. (1988), III. *Locke: Two Treatises of Government*. Cambridge University Press.

¹⁴ Schwoerer, Lois G (1974). ‘No Standing Armies!’: *The Antiarmy Ideology in Seventeenth-Century England* (pp.43-48). The Johns Hopkins University Press.

- The Crown could not declare martial law in peacetime to suit their needs, it could only declare martial law in cases of emergencies, such as imminent invasions or rebellions.

Charles I begrudgingly accepted the Petition in 1628 in order to get the Parliament to provide loans for his war efforts.

He never accepted the Petition as a legal document however, leading to increased tensions between the Parliament and the Crown, culminating in the English Civil Wars between 1638-53.

It was in this civil war that another event of monumental importance took place: The execution of Charles I.

The King of England ruled by divine right, i.e, he was ordained by God to do so, and to defy him would be to defy God. To execute him, then, would lead to God forsaking them.

Thus, when Charles I was executed in 1649, and the world did not stop spinning, nor did a calamity strike, the supremacy of the monarch was shaken for good, laying the foundation for the Parliament to claim powers superseding the Crown through the Bill of Rights of 1689.

It were these events of 17th century England that shaped the political philosophy of John Locke and the English people, enabling them to pass the Bill of Rights in 1689, after the Glorious Revolution of 1688, when James I was forced to flee and the Parliament established superiority over the Crown for the first time, in addition to guaranteeing rights for the English people at large for the first time. In the process, these events laid the foundation for the spread of the concept of inalienable natural rights in the Western world, including France and the United States of America, then in Ireland and ultimately in India.

Conclusion

Thus, as we've seen, the rabbit hole of the universal origin of human rights can be traced all the way to the early 17th England's tumultuous relationship between the Parliament and the Crown, which shaped the society and the political thinkers of the time, and events shaped the political history of the world thereon, especially the development and the adoption of guaranteed rights, fundamental in nature for citizens of democratic republics across the world.

Many Parliaments in the world have been strong enough to influence the choice of rulers, like the Turk-i-Chalghani of the Mamluk Dynasty of Delhi Sultanate, who forcefully replaced Razia Sultana with her brother in 1240.

In 17th century England, however, the difference lay in the fact that the even though the Parliament was oligarchic in nature, the rights of the Parliament and the aristocrats were safeguarded by a Charter granting certain rights to the barons signed in 1215.

The Magna Carta of 1215 served as a precedent for the parliamentary leaders, and Edward Coke, in 1628, when Charles I was resorting to arbitrary use of Martial Law to provide food and boarding for soldiers and sailors, and demanding 'forced loans', failing which he resorted to imprisoning without trial.

The usual solution for such injustices in previous times would be to rebel against the King and depose him and install a more popular and just ruler on the throne.

However, with the precedent of the Magna Carta of 1215, when the nobles had forced the king to guarantee certain rights to them, the Parliament chose the novel method of expanding the concept of guaranteed rights for citizens as well, hoping, possibly, that these rights would hold well as a long term solution, just as the Magna Carta had for 4 centuries by that point in the 17th century.

It has now been close to 4 centuries since the Petition of Rights of 1628, and it can be concluded that the concept of these rights has held firm and acted as a guiding principle for constitutionalists across the world,

charged with the responsibility of framing constitutions for new nations across centuries, from Thomas Jefferson and the Assembly of the Estates General, to B.R. Ambedkar and the Irish people¹⁵.

References

1. Dossal, R.S. (1952). *Constituent Assembly Debates on Fundamental Rights a Sidelight*. The Indian Journal of Political Science, Vol. 13, No. 3/4 (July-September & October-December, 1952), pp. 99-107 (<https://www.jstor.org/stable/42743406>)
2. Irish Statute Book. *Constitution of Ireland*. Government of Ireland. <https://www.irishstatutebook.ie/eli/cons/en/>
3. Jefferson, Thomas. *Thomas Jefferson to John Trumbull*. Library of Congress. <https://www.loc.gov/exhibits/jefferson/18.html>
4. Laslett, P. (1988), III. *Locke: Two Treatises of Government*. Cambridge University Press.
5. Legislative Department. *The Constitution (Amendment) Acts*. Government of India. <https://legislative.gov.in/the-constitution-amendment-acts/>
6. Lok Sabha Secretariat (2014). *Constitutional Assembly Debates, Volume III*. Government of India.
7. Lok Sabha Secretariat (2014). *Constitutional Assembly Debates, Volume VII*. Government of India.
8. Schwoerer, Lois G (1974). 'No Standing Armies!': *The Antiarmy Ideology in Seventeenth-Century England* (pp. 43-48). The Johns Hopkins University Press. ISBN 978-0801815638.
9. Schwoerer, Lois G. (1990). Locke, Lockean Ideas, and the Glorious Revolution. *Journal of the History of Ideas*. 51 (4): 531–548. doi:10.2307/2709645. JSTOR 2709645.
10. Singh, H. (2023). *Constitution of India: Features borrowed from other countries*. Jagran Josh. <https://www.jagranjosh.com/general-knowledge/constitution-of-india-features-taken-from-other-countries-1409660545-1>
11. Stern, Kenneth D. (1966). *John Locke and the Declaration of Independence*. Volume 15, Issue 1, *Cleveland State Law Review*.
12. Supreme Court of India. *Sources of Law*. Government of India. <https://main.sci.gov.in/constitution>

¹⁵The Irish Constitution was passed by a state-wide referendum.