

## THE IDEA OF CONSTITUTIONALISM

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### ABSTRACT

- *WORLD HISTORY is a history of a big idea. Big changes have always needed big ideas capable of appealing to the hearts and minds of the multiples and energizing them into action. Constitutionalism is one such big idea, which deals with what powers the sovereign possessed, and how one recognized when that sovereign acted differently.*
- *Over the years, constitutionalism has transformed the constitutional principles and connected people in ways beyond imagination. With the Constitutionalism gaining the center stage, nations across the world are experimenting with innovative ideas for constitutional principle from the religious heritage.*
- *Analyst could approach the study of historic events focusing on issues that entailed ‘constitutional questions’ as the constitution and that this differs from a focus that involves ‘questions of constitutionalism’, which seeks accountability of government to the ‘popular will’ through a system of independent courts, judicial review & transparency.*
- *Constitutionalism that merely talks about ideas while in the situation of conflict or in competing interests. It is a system of commitment to limitations on ordinary political power; it revolves around a political process, one that overlaps with democracy in seeking to balance state power and individual and collective rights.*
- *A constitution can be defined as the fundamental laws custom, conventions, rules, and regulations, stipulating how a country is governed, while constitutionalism can be defined as a principle which is not just a constitution but put limitations to the activities of individuals and the government.*
- *It is true that the Constitution, as the foundational law of the land, is to enjoy a position of primacy over and above any and all other laws, offices, and authorities. Yet, the question may be asked, why is this so? The question may be answered by looking to founding ideas about natural law, from which then flows the idea of natural rights which every Constitution enshrines and affirms, unlike the constitutionalism that merely talks about ideas while in the situation of conflict or in competing interests.*
- *Constitutionalism first found its expression in the Philadelphia Convention (USA). It was the first nation to experiment with a written constitution, and later, the American constitution laid the foundation for the art of constitutionalism. After the end of the conflict between monarch and the feudal lords, and also the results of the revolutions of different kinds in France, USA, USSR, and the overthrow of the colonial rule in the 3<sup>rd</sup> world countries, the concept of the “constitutionalism” has taken deep roots.*
- *From Cicero to Blackstone, natural law theory –it applies everywhere and at all times- embodies a set of related ideas based on ordering principle in the universe, on which religious thought (pre/ post-Christian law) explicitly*

projecting all human laws; that is to say, no human laws should be suffered to contradict these, whatever may be the religious belief of different sects. This study, accordingly, traces and concludes that the origin of constitutional questions or question of constitutionalism goes to religious heritage- in fact; it goes to the moral basis of the constitution in natural law.

- *Finding: The study traces and concludes that the origin of constitutional questions or question of constitutionalism goes to religious heritage- in fact; it goes to the moral basis of constitution in natural law.*
- *Suggestions: Constitutionalism leads to international peace & security. It requires a continuous effort to evolve a culture that is sensitive to the basic needs of every human being. Aggressive violation of constitutional principles increasingly becomes part of the problem rather than a solution. Hence, a few suggestions are: Learn driving analogy of economic policies in international human rights system, Central research work at Delhi LL.M- Human Rights/ MBA- & International Trade Law (Delhi School of Business). Banks' co-ordination in emerging market economics, in crisis; the world of academia to conduct more research on world constitutionalism; to evaluate the impact of human rights for everyone living in the country to ensure that everyone has the wherewithal to enjoy a "basic" standard of living 1 and to prevent exploitation.*
- *In sum, From Cicero to Blackstone, natural law theory was perhaps the key concept in the thinking of the generation which fought the Revolution against Britain and then established the constitutional republican form of government. But what is natural law? Essentially, natural law theory embodies a set of related ideas about the fundamental originalism of "law" as an ordering principle in the universe, on which the religious law is an associate. This natural law is universal – it applies everywhere and at all times, explicitly rejecting the concept of "moral relativism" – because it originated from the God who created the universe. For Cicero and other pre-Christian pagan thinkers, this god was pantheistic in nature, but the concept easily transferred over into Christian thinking from earliest times due to the compatibility of the Christian conception of a monotheistic, all-powerful, all-knowing, and over-achingly sovereign God who created the universe and continues to overrule and superintend it. This is the universal religious thought "This law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity if contrary to this;... upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these" 2 , whatever may be the religious belief.*

*"We should not fret for what is past, nor should we be anxious about the future; men of discernment deal only with the present moment ..."*

---- Chanakya

**KEYWORDS:** International Human Rights System, Right to Housing, Right to Work and Many

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### Article History

**Received: 29 Jan 2018 | Revised: 28 Feb 2018 | Accepted: 28 Feb 2018**

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**Figure 1**

## **INTRODUCTION**

WORLD HISTORY is a history of greater ideas. Vast changes always required vast ideas that are capable of interesting the minds and hearts of the people and revitalizing them into accomplishment. John Locke is a philosopher and the originator of one of such big ideas -**collective sovereign**. This idea deals with the powers possessed by the sovereign, and how the sovereign was recognized when it acted contrarily. Constitutionalism has changed over the ages, by changing the constitutional values and people were connected in many ways beyond imagination. The countries nations across the globe are trying the innovative ideas for the constitutional principle with the constitutionalism moving towards the center stage. The increasing percentage of the population of the world is moving to Constitutional innovative from disruption and vulnerabilities. The Human Right's concept is one such principle of the constitution, which is based on the principle of freedom and dignity. Both are strictly compromised when people are unable to meet their basic needs of social and economic rights. These human rights assure that each person is provided conditions under which their needs are met like Right to Food, Right to Health, Right to Social Security, Right to Education, Right to Housing, Right to Work and many more. The violation of social, economic, and ethnic rights occur when the obligations are failed by the State to ensure that it is enjoyed without discernment or in its duty to protect, respect, and fulfill them. The violation of one right is connected with the violation of other rights. These characteristics enable to deal with CONSTITUTIONALISM, from where it is initiated as ORBIT OF CONSTITUTIONALISM.

### **Popular Will**

Philosopher John Locke quotes, "... all government in the world is merely the product of force and violence, and that men live together by no other rules than that of the beasts, where the strongest carries it..." To eliminate the power abuse, the constitutionalism and the constitution should come into existence. Analysts could approach the historic events study that focusses on the problems that entailed 'constitutional questions' as the constitution and that this varies from the emphasis that contains 'questions of constitutionalism', which seeks government's accountability to the '**popular will**' through an independent courts' system, transparency, and judicial review.

It is factual that the Constitution, as the basic land's law is to adore the primacy's position over and above all other offices, laws, and authorities. Yet, there can be a query asked, why is this so? The query may be responded by looking at the new ideas of natural law from which the insight of natural rights flows which every Constitution preserves and sustains, unlike the constitutionalism that simply talks about **concepts** while in the conflict situation or in competing

benefits. Constitutionalism is a commitment system to restrictions on ordinary political rule revolving around a political process, which overlays with democracy in **seeking to balance state power and individual and collective rights**; it takes on particular historical and cultural contexts from which it originates, and it exists in the consciousness of the public. Nonetheless, the constitution is a government charter originating its whole expertism from the ruled, whereas, 'constitutionalism' means a limitation on government or limited government. A constitution can be well-defined as the fundamental laws conventions, custom, rules, and regulations, instructing how a nation is governed, while constitutionalism can be defined as a belief which is not just a constitution but lay restrictions to the individuals' activities and the government. First, constitutionalism found its mien in the Philadelphia Convention (USA). It was the first country to test a constitution that is written, and then the American constitution laid the basis to the constitutionalism art. After the termination of conflict between the feudal lords and the monarch, and also the revolutions results of various types in USA, France, USSR, and the revolution of the colonial rule in the 3<sup>rd</sup> world countries, the concept of "**constitutionalism**" has deep roots.

From Blackstone to Cicero, maybe the natural law theory was the key concept in the thinking of the era that struggled the Britain revolution and then recognized the constitutional republican method of government. But, what is a natural law? Fundamentally, the natural law theory represents a set of interrelated **ideas** regarding the basic originalism of "law" as an assembling value in the universe, on which the spiritual law is an assistant. This natural law is considered to be universal as it can be applied everywhere at all times, clearly declining the "moral relativism" concept. For Cicero and other pre-Christian pagan philosophers, "*law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity if contrary to this;... upon this foundation and more, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these*", whatever may be the holy trust of various groups. Accordingly, this research finds and concludes that the source of constitutional questions or constitutionalism questions goes to religious legacy. Indeed, it goes to the ethical constitution basis in natural law.

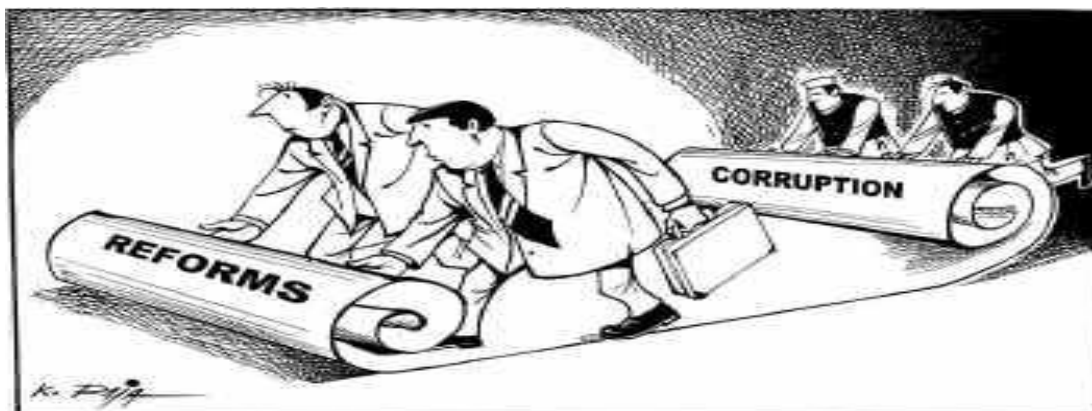
### Questions of Constitutionalism

The Constitutional study is not essentially identical with the Constitutionalism study. Though it is conflated frequently, there are critical modifications. A debate of this variance looks in permissible historian Christian G. Fritz's *American Sovereigns*, who notes that the study of historic events could be approached by an analyst concentrating on the problems that required 'constitutional questions' and that this varies from an effort that includes 'questions of constitutionalism'<sup>1</sup>, which pursues the responsibility of government to the 'popular will' via judicial review, system of independent courts & transparency<sup>2</sup>.

<sup>1</sup>[http://en.wikipedia.org/wiki/constitutionalism#cite\\_note\\_Fritz-13](http://en.wikipedia.org/wiki/constitutionalism#cite_note_Fritz-13)

<sup>2</sup>C.H. Mell Wain, *Constitutionalism: Ancient & Modern* (1947)

The questions of the constitution include the analyst in investigating how the constitution was understood and used to distribute the authority and power as the new country fought with issues of peace and war, representation and taxation. However, these constitutional and political arguments also postured constitutionalism questions –what powers the self-governing had, how to detect the joint sovereign, and how one got familiarized when that sovereign represented. For example, the approval of the constitution of Nepal has prompted many queries & alarm bells in India and stated its annoyance about the content. India questioned the government of Nepal to make seven revisions to address the concerns raised by the Janjatis and Madhesis.



**Figure 2**

Different from the constitutional questions, the constitutionalism questions could not be responded by referring to the provided text of the constitution or even legal views or based on any value. They were slightly open-ended queries drawing upon challenging opinions, the Americans advanced after Independence about the rule of the people and the continuing people's role to have a track of the constitutional order that refreshed on the authority of sovereignty<sup>3</sup> that the sovereign regulates the issues posed such as 'collective sovereign identification', when it is acting differently or positively. For example, 'Sovereign acted differently' is -in international law- the II GULF WAR. This WAR gave the insight for the crisis of ISIS, due to the military force usage by the US associated forces in the tag as collective sovereign under the UN umbrella when the united sovereign acted otherwise in contradiction to the truth that Iraq owns chemical weapons. Speaking the truth is the required first step to comprehend the meaning of constitutionalism. Even in the case of 'Odd-even' traffic policy (idea) to regulate the Delhi traffic in India for the quality purpose of air<sup>4</sup> includes numerous challenging interest. The 'Basic Structure case'<sup>5</sup>, is another instance for the legal insight that the Supreme Court of India expressed to overthrow the whole authority of 'will of the people' (executive and legislature) under the idea of 'basis structure theory'. This instance alone is rising numerous tough questions such as: What is the fundamental structure? Whether the meaning as given in that case is a right meaning or not? Whether the fundamental structure is well-defined in the case? Whether the 'basic structure principle' apply to the National Judicial Commission's case<sup>6</sup>, or not? In India, the

<sup>3</sup>[http://en.wikipedia.org/wiki/constitutionalism#cite\\_note\\_Fritz-13](http://en.wikipedia.org/wiki/constitutionalism#cite_note_Fritz-13)

<sup>4</sup>See more at: <http://indianexpress.com/article/cities/delhi/odd-even-policy-traffic-police-may-not-let-go-of-soft-touch-to-avoid-pile-ups/#sthash.cnFr1F2C.dpuf>

<sup>5</sup>KesavanandaBharati v. State of Kerala, AIR 1973 SC 146

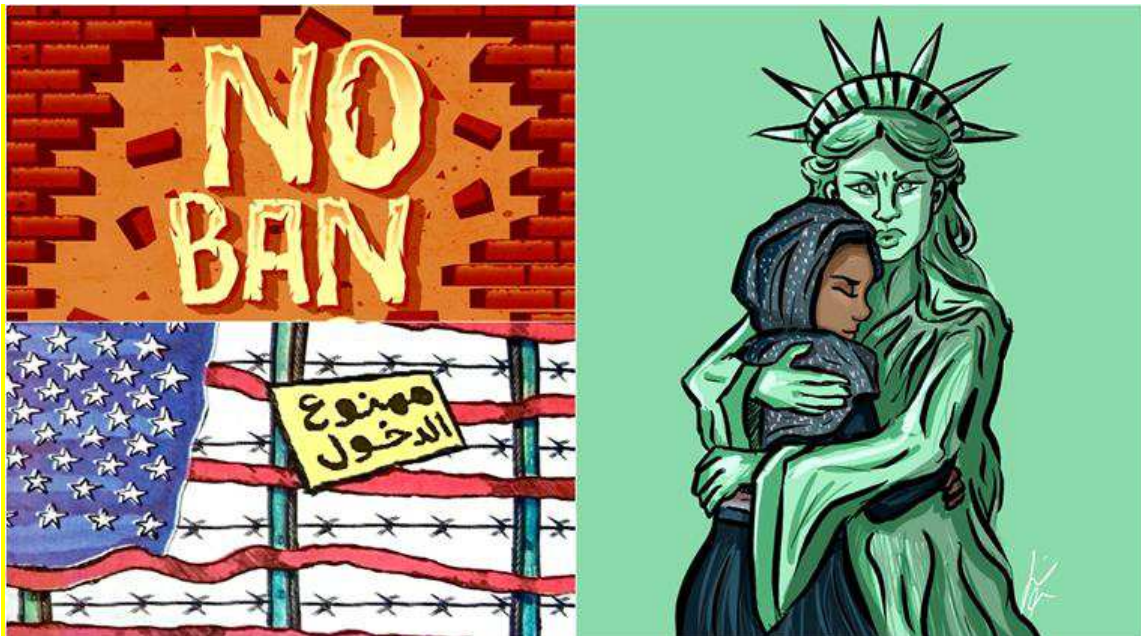
<sup>6</sup>The Supreme Court has upheld the collegiums' system of appointment of judges and has struck down the 99<sup>th</sup> Constitutional amendment that introduced National Judicial Appointments Commission (NJAC). The unanimous verdict quashing the NJAC Act was delivered by a five-judge Constitution bench comprising justices JS Khehar, J Chelameswar

judiciary and legislature should confine their interference to the public matters in nationwide interest.

Tough queries are asked and responded for tracing the origin of constitutionalism. In total, the origin of constitutional questions or question of constitutionalism goes to spiritual legacy- in fact; it goes to the ethical basis of the constitution in natural law<sup>7</sup>, and this paper reviews some of them.

### **Christian Origins of Essential American Doctrine v. Property, Liberty & Rule of Law**

In the middle of the modern, monotonous battle to initiate the religion completely from American life, a minor and troublesome truth has been ignored, which is practically every significant that the original American idea is a Christianity product. Further, the US would not questionably be as free, productive, or happy had these principles never been created. These ideas involve liberty, property, and the rule of law. John Locke created a group of human rights to “life, liberty and property” as greater than any other rights.



**Figure 3**

Nowadays, the American government tolerates the Constitution, threatening the Bill of Rights and American method of life, providing to trade the freedoms of American for the imaginary state control’s security. Americans life, the pursuit of happiness and liberty dangle in the individual freedom balance with social necessity. It is well remembered that the source of all original constitutional principles come from common law, natural law, and American thoughtful biblical legacy. If the American loses their independence once along with their freedoms and economic liveliness; they are improbable to sense these ever again. And does America not owe their offspring and conquerors of other countries a responsibility to guard this unique legacy? This paper investigates few of the most important policies which came from a biblical ancestor to comprehend the origin of Constitutional/ religious or Constitutionalism heritage. For example<sup>8</sup>:

MB Lokur, Kurian Joseph and AK Goel which also rejected the plea of Central government to refer for review to larger bench the 1993 and 1998 verdict of the apex court on the appointment of judges to the higher judiciary.

<sup>7</sup>C.H. Mell Wain, *Constitutionalism: Ancient & Modern* (1947)

<sup>8</sup><http://en.wikipedia.org/wiki/constitutionalism#cite-note-Fritz13>

### Property v. Natural Rights

The arrival of recent expressions of Natural Rights and Natural Law is tracked by Brian Tierney in *The Idea of Natural Rights*, to an argument between Pope John XXII and The Franciscans. The dispute troubled whether Saint Francis' followers had the freedom to announce themselves to be in a property-less state. This discussion was popularly joined by William of Ockham.

In an Irish case<sup>9</sup>, the House of Lords in UK, held that the Defence of the Realm (Consolidation) Act, 1914, Public Safety Act of 1924 and the regulations outlined there did not invade the Habeas Corpus Acts and the 'Magna Carta' (Great Writ) for a simple reason that the Act and the commands become a part of the law of the land. The British law's conclusion in this says, "no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice"<sup>10</sup>. They are as a law fixed not only against State not to deny the independence under the rule but are also ruled by the Constitutional rights which offer a suitable defense to protect the interests of individuals, which is initiating from the natural law.

Ockham defined the Natural Law as "law in conformity with a natural reason that never fails". An instance would be the Ten Commandments prohibitions against adultery and lying, being a type of empowered understanding of the law. As described by Cicero, Pagans also had a minor natural law with which to reason. Ockham reasoned while anyone could give up any privileges they had through Christian liberty. But the right to self-preservation which is given by Natural Law cannot be taken from anyone by anyone, or it could not be abandoned. Further, God had given the rights to manhood for the property after the drop and this could not be subjectively taken away from them. Beyond, Ockham appealed the Pope cannot take away the Christian liberty of his fellow beings for whom he gave the rights to select their own leaders. Needless to say<sup>11</sup>, these inferences made Ockham a lifetime opponent of the papacy.

### Magna Carta v. Biblical Antecedent

Magna Carta, otherwise called the Great Writ, is the first written article that is considered as the centerpiece of Anglo-American authorities. Magna Carta's origin goes to King John in the year 1214 when the tycoons embraced their contract. English people obtained a pledge from King John for the admiration of then olden freedoms in a document. The Magna Carta is a mark of human success. It is wonderful to learn that this prodigious work was negotiated and written between King John and the Lords by Stephen Langton, Archbishop of Canterbury who interposed biblical thoughts into the last draft<sup>12</sup>. Magna Carta provides the biblical knowledge of putting the law above the king<sup>13</sup>.

The philosopher, John Locke who was most often quoted as a subject expert, listed a collection of human rights to "life, liberty and property" as bigger than any other rights which we call in following period as freedom. In a theoretic sense, the source of freedom goes to the usual law through spiritual idea whatever may be the reference made to Magna Carta. (It is the first document written with reference to the basic humankind rights, which tells that no free man shall be arrested, or imprisoned, outlawed or diseased, banished or destroyed in any way; nor shall we go upon him, nor send upon

<sup>9</sup>*The King v. Halliday*, 1917 A.C. 260: (86 L.J.K.B.1119) & *The King v. Military Governor of Hare Park Camp* (1924) 2Ir.

<sup>10</sup>*EstrugbayiEleko v. Officer Administering Govt. of Nigeria*, 1931 A. C. 669 [AIR (18) 1931 P. (248)].

<sup>11</sup><http://en.wikipedia.org/wiki/constitutionalism#cite-note-Fritz13>

<sup>12</sup>Langton was the same person who introduced chapter and verse into the modern Bible.

<sup>13</sup>Reference: [Why Separating Church & State is a Fool's Errand: Consider Magna Carta's Origins](#)

him, but by the legal verdict of his nobles or by the law of the land<sup>14</sup>(chapter 39 of the charter demands)

### **Democracy v. Individual Choice v. Popular Will**

Natural Law is in conventionality with an ordinary reason that never fails. Liberty was accepted as a right in sight of biblical reasons, and that advanced democracy, etc. as under:

### **Foundation of Democracy in Reformation v. Free Inquiry<sup>15</sup> v. Priesthood<sup>16</sup>**

Recent democracy is not from the ancient Greeks. According to GP Gooch in 'The History of English Democratic Ideas in the Seventeenth Century', modern democracy is a progeny of the Reformation of the Protestants. The primitive Catholic Church inclined towards compassion to kings and monarchies. Contra, the Reformation, with its importance on the individual choice of each believer, inevitably included democratic philosophies. Writes Gooch, the Reformation mostly owed its source to the declaration of two knowledgeable values, the equitable duty of free inquiry, and the priesthood of all supporters. Its defense could be seen in no others. A free inquiry led directly from scriptural to political condemnation, and the philosophy of worldwide priest-hood showed the overall investigation's direction. The 'free inquiry' led to freedom; the 'priesthood of all believers' to equivalence. The significance of the fact that the modern democracy principles, harmed by a theocratic partiality, advanced under the Reformation wing, is hard to exaggerate. In the people emancipation, the Reformation played a portion that it is not possible to oversee. Gooch releases the Huguenots<sup>17</sup>, the French Protestants, as being predominantly important in this history.

### **Democracy as American Popular Will v. Arbitrary Government**

By the time America was discovered, the notion of the widespread sovereignty of the people was well-established. The Anti-Federalist Paper #1 states, in every free administration, the people should give their agreement to the laws by which they are administered. This is the true measure between an arbitrary government and a free government. The latter is ruled by the determination of the whole, articulated in any way they may decide; the former by the will of one, or a few. Hence, James Madison, who studied, perceived of and written the American Constitution decided that an assorted democratic republic state would best push off the hazard of oppression by either the few, or the many that leads to the current constitutionalism era.

### **Constitutionalism**

Basis of constitutionalism is fixed on the trust that menfolk are all equal and may not be arbitrarily ruled by another and that to avoid such dictatorship, all real governments should rest upon the agreement of sovereign people from where all authorities flow. The Supreme Court of India documented the constitutionalism<sup>18</sup> principle that the constitutionalism is a legal principle now, which needs regulation over the government exercise of the power to confirm that it does not terminate the autonomous principles upon which it is based such as separation of power, fundamental rights, etc.

<sup>14</sup>Constituent *Assembly Debate*. Vol. VII, p 850

<sup>15</sup>'Free inquiry' is the child work of Christian Protestant Reformation, which led to the Freedom of Liberty.

<sup>16</sup>'Priesthood of all believers' is the child work of Christian Protestant Reformation that led Freedom of Equality.

<sup>17</sup><http://en.wikipedia.org/wiki/constitutionalism#cite-note-14>

<sup>18</sup>I.R. Coelho (Dead) by *LRs v. State of Tamil Nadu & Others*, AIR 1999 SC 3197





**Figure 4**

John Locke & Thomas Hobbes held that people can create their own governments as their ‘Reflection & choice’, and not to be destined as an outcome of ‘accident & force’. The limitation on the powers of the government is the purpose of people. Their strict idea of the natural rights based on the moral grounds of originalism that people are equally born and thus cannot be arbitrarily ruled. Instead of limitless rule verses, that of rule limited by the terms of a social contract comprises considerable limits on the principles of constitutionalism: the moral foundation for the constitution in natural law<sup>19</sup>. Tough questions be asked and replied in a conflicting condition to comprehend the true principle of constitutionalism throughout all ages of time and that can be traced at (A) Ancient time (till 12<sup>th</sup> century), (B) Medieval time (after 12<sup>th</sup> century), and at (C) Modern era (present era)... as under.

### **A. Ancient Constitutionalism**

Natural law is a God law, which means that the God is the representative of the natural law. The jurist William Blackstone- in his comments on the law of England, recognized God as the author of both special and natural revelation (Bible), basically disagreeing that both came from the same source. The natural law can be applied everywhere & at all times due to the Christian outset of a Sovereign God who formed the universe & remains to master & supervise it. The principle of heavenly law is seen only in the Holy Scriptures as disclosure of the original law of nature. Therefore, special revelation (Bible) and natural law come from the same God thus, they cannot oppose each other. It is outflowing of the purposes & benevolence of God towards the man. Man & State are the results of nature in the natural law. Therefore, the human being was in full possession of his natural rights & State came into being to avoid blood route by limiting the natural rights (Rev. John Hurt 1777) because a human being has a wicked nature that led him to misuse the natural rights which are warranted by nature.

<sup>19</sup>By Tim Dunkin, December 18, 2014

### B. Medieval Constitutionalism—Jean Gerson

Quentin Skinner<sup>20</sup>, elucidates how the early stages of modern constitutionalism are connected with the Gregorian papal reform of the 12<sup>th</sup> century. As the power of the papacy was maximized, the researchers and high ranking members of the Church started to ask what therapies would exist if the Pope became authority mad. According to Skinner, this led to the Councilor Movement.

Jean Gerson, a skilled researcher during the Great Schism summed up this idea, being that the Church should be conceived properly as a constitutional kingdom. In defending the authority of the General Councils over the Church, Gerson in particular, dedicated himself to pronouncing a philosophy about the ancestries and position of authentic political power within the worldly commonwealth. He made two main and intensely influential aids in the course of setting out this specific argument, to the development of a constitutionalist and radical view of the sovereign State.

Skinner continues to explain that there were two independent monarchies—the secular and religious. This insight was then improved into the thesis that under nature’s law, no leader of a free public can proclaim a rule bigger than the public has in themselves. John Locke developed this belief in his own philosophy of legitimate rule by succeeding works.

### C. Modern Constitutionalism—John Locke & American Idea V. Biblical Idea

John Locke theory of constitutionalism significantly inclined the Founders of constitutionalism. He penned about the appropriate role of restricted government, in *The Second Treatise of Government* in Chapter XI that “all government in the world is merely the product of force and violence, and that men live together by no other rules than that of the beasts, where the strongest carries it...” Further, this treaty says that the authority of the judicial being derivative from the public by an optimistic voluntary funding and institution, can be no other than what that optimistic endowment conveyed, which is being only to create laws, and not to create representatives, the judicial can have no power to assign their power of making laws, and place it in other hands<sup>21</sup>.

The United States claims the first contemporary constitution ever collected. Donald S. Lutz, in *The Origins of American Constitutionalism*, defines the expansion of this work. The earliest American expressions of law, the *Mayflower Compact* and *Pilgrim Code*, assisted to grow the advanced notion of Constitution as a kind of church agreement<sup>22</sup>. Alternatively, the American Constitution is showed upon the initial American contracts which were themselves taken from a biblical model.

To conclude, constitutionalism is the insight, which is often connected with natural philosophies and later by dogmatic philosophies, the creators of the American republic ... Constitutionalism highlights that the régime can and must be officially restricted in its powers and that the government legitimacy or authority depends on its perceiving these boundaries. This impression carries with it a host of puzzling questions of attention not only to lawful academics but to anybody interested to discover the philosophical and legal foundations of the state & the law. Below picture is the symbol of the fight for ideas:

<sup>20</sup><http://en.wikipedia.org/wiki/constitutionalism#cite-note-14>

<sup>21</sup>Lary Alexander (ed) *Constitution: Philosophical Foundation*, Cambridge (1998)

<sup>22</sup>America’s Constitutional Foundation of Biblical Covenant



Figure 5

### Freedom of Religion V. Tolerance V. Free Will Choice

The supreme work in the history of the Freedom of Religion is John Locke's—'A Letter Concerning Toleration'<sup>23</sup>. John Locke's sees the approved with his Puritan rearing which acknowledged that only God can cause an individual to have confidence. It was under the huge preaching of the Vice-Chancellor at Oxford, John Owen, that John Locke would have been familiar with this insight. As said, "We have a right to religious freedom because the nature of faith itself is contradicted by compulsion." John Locke properly observed that the mind "cannot be compelled to the belief of anything by outward force," but ultimately laws are maintained by power. However, such pressure is not reconcilable with reliable religious belief. As John Locke concludes, "The magistrate's power extends not to the establishing of any articles of faith, or forms of worship, by the force of his laws. For laws are of no force at all without penalties, and penalties in this case, are absolutely impertinent because they are not proper to convince the mind."<sup>24</sup>

### Common Law

The British Common Law is questionably the highest and most powerful legal theory in contemporary history. It was not just the rule behind the justice system in England, but also the driving philosophy of community itself. It was also intensely prejudiced by biblical civilization. James R. Stoner, in 'Common-Law Liberty, Rethinking American Constitutionalism', elucidates how the English Common Law theory ascended upon a contextual of pagan attitude, and built jurisprudence to a great degree upon biblical revelations. It is prominent that constitutionalism and the Bill of Rights theories are the projecting products of school of common law<sup>25</sup>. In fact, the Magna Carta is the first written document for human rights. Thereafter, from time to time the King had to discuss many privileges to his subjects. In 1689, by combining all the privileges and freedoms of British subjects, the King passed the Bill of Rights. These demands fulfilled all the subsequently passed law of deprivation or freedom thereof until the principle of "Rule of Law" is recognized.

<sup>23</sup><http://www.constitution.org/ji/Toleration.http>

<sup>24</sup>*The Foundations of Modern Political Thought, The Age of Reformation* (Vol. II)

<sup>25</sup><http://en.wikipedia.org/wiki/constitutionalism#cite-note-14>

The renowned French Declaration of Rights of Man and Citizen, which came out at much the same instant in the past, named more or less the same political and civil rights. A bird's eye view of the statement is that King at Versailles was met by the Estates General of France, ten miles or so from Paris, on 5<sup>th</sup> May 1789. It comprised three orders -285 nobles, 308 clergy & 621 legislatures of the third Estate voted by all menfolk of twenty-five and above who were on the tax register. Every member had carried a cashier list of complaints & grievances with him from his community. On the 23<sup>rd</sup> June 1789, the King in the meeting of three commands arranged some Constitutional enterprises by placing several limitations. He also supplied the Royal Commands that the three Estates had to separately meet and they were not to converse the Constitution form and Federal property. He wanted the third Estate members to leave the hall. After the king, the clergy & noble also left but the 3<sup>rd</sup> Estates members remain to stay on. This made the King to appeal the assistants of the third Estates to give up work. At this, Mirabeau came forward and said, "Sir, go tell your master that we are here by the will of the people and nothing but bayonets shall derive us out". After four days, the King generated and ordered the union of 3 Estates. On the 7<sup>th</sup> July 1789, the Constituent Assembly selected a board on the Constitution and two days later, Mousier offered its first report. It is a beginning of the Declaration of Rights of Man and Directive Principles of State policy<sup>26</sup>. The Declaration (1789) is a normal unchallengeable and holy right of a citizen. This is a fundamental document which gave authority and responsibilities of the State as well as to a person to reserve the community as well as a specific person's good. To conclude, these are the inspiring papers that gave birth to the rule of law.

### **Rule of Law**

It is a sacred understanding of law which places the law above the king. For instance, when Saul breaks the law in the Old Testament, he loses his kingdom. This model was spoken by the writer and the religious professor of Saint Andrews, Samuel Rutherford, in his *Lex Rex, or Law is King*. He wrote, Assert. 1.—the law hath supremacy of constitution above the king:— Because by nature the king is not king, as is demonstrated; therefore, he should be king by a politic law and constitution; and in that consideration the law is above the king, because it is from a civil law, there is a king rather than any kind of governor.

Man is a rational being and he wishes to do numerous things but in a contemporary society, his desires should be controlled, balanced, regulated and resigned with the workout of analogous needs of others in a society. The wealth of the community is no less important than that of the a single person. The laws of the land for protecting the social interest complement the freedom of an individual with social interests. In the words of John Stuart Mill, "Liberty consists in doing what one desires. But the liberty of the individual must be thus far limited; he must not make himself a nuisance to others<sup>27</sup>". Personal freedom means the liberty of every law abiding citizen to ponder what he likes, to go where he likes, to say what he likes, on his legal time without interruption from any individual.... It should be matched, of course, with social safety by which I mean the good order and peace of community in which we live<sup>28</sup>. Freedom inheres in what one need to do; yet, numerous benefits specially control the public interest. However, how much limitations are best to public depends on the interest of the public. There are numerous separate lines of thought in the reconciling matter of numerous supplies of liberty to protect individual as well as social engineering. Therefore, the authorities have to act completely based on those necessities of law, which support the rule of law. They cannot raid with the freedom of the person in a causal

<sup>26</sup>K. K. Bharadwaj, *The French Revolution and the work of Constituent Assembly*, *Employment News* 23 29, April 1994.

<sup>27</sup>J. S. Mill, *On Liberty*, at p. 71.

<sup>28</sup>*Freedom Under the Law*, 1949 at p. 5.

manner. The true interest cannot be advanced because of such an approach to the true social interest. Constant intrusion with specific freedom is bound to corrode the structure of any democratic civilization.

In lawful sense, freedom means the nonappearance of restraint. Freedom in a sociological understanding means completely different. It means that if overriding opinion can control the social habits<sup>29</sup> there is no freedom. We can tell that someone is free in a sociological mind if he legally has the free option between at least two identical chances. Therefore, freedom depends on the opportunity of rivalry particularly religious one<sup>30</sup>. In fact, an individual freedom always contests with social interest. Therefore, if someone loses one's liberty by custody, he misses all other liberties. To avoid the misuse, the 'rule of law' - that is, the God of Law comes into reality.

### Question of Constitutionalism

Constitutionalism deals with open-ended queries drawing upon conflicting and competing interest. In deed, constitutionalism is an idea often connected with the political philosophies of John Locke and the originators of the American republic that government should & can be limited legally in its authority (legitimacy) & that its powers depends on observing these limitations. Yet, questions arise- How can a government legally be restricted if the law is created by the government? The answer to that question goes to the restriction by constitutional limitation because constitution creates a state framework<sup>31</sup> for workout of public order.

### CONCLUSIONS

It is factual that the Constitution, as the basic land's law is to adore the primacy's position over and above all other offices, laws, and authorities. Yet, there can be a query asked, why is this so? The query may be responded by looking at the new ideas of natural law from which the insight of natural rights flows which every Constitution preserves and sustains unlike the constitutionalism that simply talks about **concepts** while in the conflict situation or in competing benefits.

From Blackstone to Cicero, maybe the natural law theory was the key concept in the thinking the era that struggled the Britain revolution and then recognized the constitutional republican method of government. But, what is a natural law? Fundamentally, the natural law theory represents a set of interrelated **ideas** regarding the basic originalism of "law" as an assembling value in the universe, on which the spiritual law is an assistant. This natural law is considered to be universal as it can be applied everywhere at all times, clearly declining the "moral relativism" concept. For Cicero and other pre-Christian pagan philosophers, "*law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity if contrary to this;... upon this foundation and more, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these*", whatever may be the holy trust of various groups.

<sup>29</sup>H. J. Laski, *Liberty in the Modern State* (1935).

<sup>30</sup>J. N. Figgis, *Political thought from Gerson to Grotius*.

<sup>31</sup>Supreme principle, i.e. Rule of law & not Rule by law, *The Foundations of Modern Political Thought, The Age of Reformation* (Vol. II)

An analogous division was drawn by British constitutional scholar A.V. Dicey in evaluating Britain's unrecorded constitution. Dicey observed a variance between the 'law of the constitution' and the 'conventions of the constitution.'<sup>32</sup> The important difference between the two notions (unwritten & written constitution) was that the law of the constitution was through of rules recognized or enforced by the courts, building up a figure of laws in the correct sense of that term. On the contrary, the agreements of the constitution included practices, customs, maxims, or principles which are not recognized or enforced by the Courts, yet they make up a body of political and constitutional ethics, but not of laws.<sup>33</sup>

In accordance with this, this survey completes that the constitutionalism origin and its insight goes to the spiritual belief that occurs in natural law theories.

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<sup>32</sup>A.V. Dicey, *Introduction to the study of the law of the Constitution* (1982) Edn.

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(Note: All pictures are from Web: Collected from the various sources)

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