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CONSTITUTIONALISM V. CONSTITUTIONAL QUESTIONS V. RELIGIOUS HERITAGE

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'Vision is the art of seeing things invisible'

"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***

ABSTRACT

Present moment of the day is, how to identify the Constitutionalism: That is, **collective sovereign**, what powers the sovereign possessed, and how one recognized when that sovereign acted differently. This is because of human nature as quoted by Philosopher, John Locke"**…**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…" In order to eliminate the abuse of power the constitution and the constitutionalism come into exist. Ananalyst could approach the study of historic events focusing on issues that entailed 'constitutional questions' as 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.

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 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**; it draws on particular cultural and historical contexts from which it emanates; and it resides in public consciousness. Nevertheless, constitution is a charter of government deriving its whole authority from the governed, whereas, 'constitutionalism' means limited government or limitation on government. 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. 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 to the art

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of constitutionalism. After the end of conflict between monarch and the feudal lords, and also the results of the revolutions of different kinds in France, USA, USSR, and the over throw of the colonial rule in the 3rd world countries, the concept of **"constitutionalism"** has taken deep roots.

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". For Cicero and other pre-Christian pagan thinkers, *"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 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 constitution in natural law.

KEYWORDS: Constitutionalism V. Constitutional Questions V. Religious Heritage

INTRODUCTION

The study of Constitution is not necessarily synonymous with the study of Constitutionalism. Although frequently conflated, there are crucial differences. A discussion of this difference appears in legal historian Christian G. Fritz's *American Sovereigns*, notes, that an analyst could approach the study of historic events focusing on issues that entailed 'constitutional questions' and that this differs from a focus that involves 'questions of constitutionalism'[2], which seeks accountability of government to the 'popular will' through a system of independent courts, judicial review &transparency[3].

Constitutional questions involve the analyst in examining how the constitution was interpreted and applied to distribute power and authority as the new nation struggled with problems of war and peace, taxation and representation. However, these political and constitutional controversies also posed questions of constitutionalism – how to identify the collective sovereign, what powers the sovereign possessed, and how one recognized when that sovereign acted. For instance, the adoption of Nepal's constitution has triggered many questions& alarm bells in India, and expressed its displeasure about the content. India asked the Nepal government to make as many as seven amendments to address the concerns of the Madhesis and Janjatis (minority groups in Nepal)[4].

Unlike constitutional questions, questions of constitutionalism could not be answered by reference to given constitutional text or even judicial opinions or based on any principle. Rather, they were open-ended questions drawing upon competing views, the Americans developed after Independence about the sovereignty of the people and the ongoing role of the people to monitor the constitutional order that rested on their sovereign authority[5] that the sovereign determines the problem posed such as 'identity of collective sovereign', when it is acting positively or differently. For instance,

[2]http://en.wikipedia.org/wiki/constitutionalism#cite_note_Fritz-13
[3]C.H. Mell Wain, *Constitutionalism: Ancient & Modern* (1947)
[4]MukeshRawat, Freelance journal, New Delhi, October 07, 2015.
[5]http://en.wikipedia.org/wiki/constitutionalism#cite_note_Fritz-13

'Sovereign acted differently' is -in international law- the II GULF WAR. This WAR gave an idea for the ISI Scrisis, due to the use of military force by the US allied forces in the name of collective sovereign under the umbrella of UN when the collective sovereign acted differently against the truth that the Iraq posses chemical weapons. Telling the truth is the necessary first stage to understand the meaning of constitutionalism. Even in the case of 'Odd-even' traffic policy (idea) to control the traffic at Delhi in India for air quality purpose[6] involves many competing interest. The 'Basic Structure case'[7], is an another example for judicial idea that the Supreme Court of India ventured to takeover entire power of 'will of the people' (legislature & executive) under the idea of 'basis structure theory'. This case alone is raising many hard questions such as: What is basic structure? Whether the basis structure is defined in the case? Whether the meaning as provided in that case is a correct meaning or not? Whether the 'basic structure principle' does apply to the National Judicial Commission's case[8], or not? In India, the legislature and judiciary must restrict their intervention to the public matters in national interest.

Hard questions be asked and answered for tracing the origin of constitutionalism. In sum, 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[9], and this article surveys some of them.

Christian Origins of Essential American Doctrine V. Property, Liberty & Rule of Law

In midst of the modern, mindless battle to drive religion completely from American life, a small and inconvenient fact has been ignored: virtually every important, original American idea is a product of Christianity. Further, had these doctrines never been developed, the US would not arguably be as productive, free or happy. These ideas involve property, liberty, and the rule of law. John Locke listed a group of human rights to "life, liberty and property" as superior to any other rights.

Today the government of America bears down upon the Constitution, menacing the Bill of Rights and American entire way of life, offering to trade the American freedoms for the supposed security of state control. Americans life, liberty and pursuit of happiness hang in the balance of individual freedom with social need. We would do well to remember that the source of all original constitutional doctrines come from natural law, common law and American profound biblical heritage. For once American loses their freedoms, liberties and economic vitality; they are unlikely to taste these ever again. And does America not owe their children and subjugates of other countries a duty to protect this irreplaceable inheritance? This article surveys some of the most important doctrines which came down from a biblical antecedent in order to understand the origin of Constitutionalism, and Constitutional/ religious heritage. For instance[10]:

Property V. Natural Rights

The emergence of modern expressions of Natural Law and Natural Rights is traced by Brian Tierney in The Idea

[6] 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
[7] KesavanandaBharati v. State of Kerala, AIR 1973 SC 146
[8] The Supreme Court has upheld the collegiums' system of appointment of judges and has struck down the 99th 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 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.
[9] C.H. Mell Wain, *Constitutionalism: Ancient & Modern* (1947)
[10] http.llen.wikipedia.org/wiki/constitutionalism#cite-note-Fritz13

of Natural Rights, to a debate between The Franciscans and Pope John XXII. The argument concerned whether the followers of Saint Francis had a right to declare themselves to be in a property-less state. This debate was famously joined by William of Ockham.

The House of Lords in UK, in an Irish case[11] held that the Defence of the Realm (Consolidation) Act, 1914, Public Safety Act of 1924 and the regulations framed there under did not infringe upon the Habeas Corpus Acts and the 'Magna Carta' (Great Writ) for the simple reason that the Act and the orders become part of the law of the land. The conclusion of British law in this matter 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"[12]. They are as a rule directed not only against State not to deprive freedom under the law but are also governed by Constitutional rights which provide adequate protection to safeguard individual interest that is originating from the natural law.

Natural Law itself is defined by Ockham as "law in conformity with a natural reason that never fails". An example would be the Ten Commandments prohibitions against lying and adultery, being a kind of enlightened understanding of law. Pagans also had a lesser natural law with which to reason, such as that described by Cicero. Ockham argued that while anyone could give up any rights they had through Christian liberty, but the right to self-preservation which is bestowed by Natural Law could not be taken from anyone, nor could it be relinquished. Further, God had given mankind the right to property after the fall and this could not be arbitrarily taken away from mankind. Beyond, Ockham claimed the Pope could not take away the Christian liberty of his subjects, whom he also gave the right to choose their own rulers. These conclusions made Ockham a lifelong enemy of the papacy, needless to say[13].

Magna Carta V. Biblical Antecedent

Magna Carta, or the Great Writ, is the first written document that is considered to be the centerpiece of Anglo-American liberties. The origin of Magna Carta goes to King John in the year 1214 when the magnates squeezed their charter. English people exacted an assurance from King John for respect of the then ancient liberties in a document. The Magna Carta is an evidence of human success. It is fascinating therefore to discover that this great work was negotiated and drafted between King John and the Lordsby Stephen Langton, Archbishop of Canterbury who interpolated biblical ideas into the final draft[14]. Magna Carta offers the biblical idea of putting the law above the king[15].

John Locke, the philosopher most often quoted as an authority on the subject, listed a group of human rights to "life, liberty and property" as superior to any other rights which we call in subsequent time as freedom. In theoretical sense, the origin of freedom goes to natural law through religious vision whatever may be reference made to Magna Carta. (It is the first written document relating to the basic rights of humankind, which says that no free man shall be taken, or imprisoned, diseased or outlawed, exiled or in any way destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land [16](chapter 39 of the charter demands)

Democracy V. Individual Choice V. Popular Will

[11]*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.
[12]*EstrugbayiEleko* v. *Officer Administering Govt. of Nigeria*, 1931 A. C. 669 [AIR (18) 1931 P. (248)].
[13]http.llen.wikipedia.org/wiki/constitutionalism#cite-note-Fritz13
[14]Langton was the same person who introduced chapter and verse into the modern Bible.
[15]Reference: Why Separating Church & State is a Fool's Errand: Consider Magna Carta's Origins
[16]Constituent *Assembly Debate*. Vol. VII, p 850

Natural Law is in conformity with a natural reason that never fails. Liberty as a right was accepted in view of biblical reasons, and that developed democracy, etc. as under:

A. Foundation of Democracy in Reformation V. Free Inquiry[17] V. Priesthood[18]

Modern 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 child of the Protestant Reformation. The medieval Catholic Church tended towards sympathy to kings and kingdoms. Contra, the Reformation, with its emphasis on the individual choice of each believer, inevitably embraced democratic principles. Writes Gooch, the Reformation largely owed its origin to the enunciation of two intellectual principles, the rightful duty of free inquiry, and the priesthood of all believers. Its justification could be found in no others. Free inquiry… led straight from theological to political criticism, and the theory of universal priest-hood indicated the general direction of the investigation. The 'free inquiry' led to liberty; the 'priesthood of all believers' to equality. The importance of the fact that the principles of modem democracy, however mutilated by a theocratic bias, advanced under the wing of the Reformation, is difficult to exaggerate. In the emancipation of the people, the Reformation played a part it is impossible to overlook.Gooch singles out the Huguenots[19], the French Protestants, as being particularly important in this history.

B. Democracy as American Popular will V. Arbitrary Government

By the time America was founded, the notion of popular sovereignty of the people was well-established. The Anti-Federalist Paper #1 states, in every free government, the people must give their assent to the laws by which they are governed. This is the true criterion between a free government and an arbitrary one. The former are ruled by the will of the whole, expressed in any manner they may agree upon; the latter by the will of one, or a few. Hence, James Madison, who researched, conceived of and drafted the American Constitution, decided that a mixed state of a democratic republic would best push off the danger of tyranny by either the few, or the many that leads to the present era of constitutionalism.

Constitutionalism

Foundation of constitutionalism is rooted on the belief that men are all equal and may not be ruled arbitrarily by another and that, to avoid such tyranny all legitimate governments must rest upon the consent of sovereign people from where all powers flows. The Supreme Court of India recognized the principle of constitutionalism [20] that the constitutionalism is now a legal principle which requires control over the exercise of government power to ensure that it does not destroy the democratic principles upon which it is based such as fundamental rights, separation of power, etc.

Thomas Hobbes & John Locke held that man could create their own governments as their 'Reflection & choice', and not to be doomed as a result of 'accident & force'. The limitation on governmental powers is the intention of people. That is, their political philosophy of the natural rights based on the moral ground of originalism that men are born equally and thus cannot be ruled arbitrarily. Instead of unlimited sovereignty verses that of sovereignty limited by the terms of a social contract contains substantial limitations on the principles of constitutionalism: moral basis for the constitution in natural law[21]. Hard question be asked and answered in a conflicting situation to understand the true principle of

[17]'*Free inquiry*' is the child work of Christian Protestant Reformation, which led to the Freedom of Liberty.
[18]'*Priesthood of all believers*' is the child work of Christian Protestant Reformation that led Freedom of Equality.
[19]http.llen.wikipedia.org/wiki/constitutionalism#cite-note-14
[20]I.R. Coelho (Dead) by *LRs v. State of Tamil Nadu & Others*, AIR 1999 SC 3197
[21]By Tim Dunkin, December 18, 2014

constitutionalism during all ages of time and that can be traced at (A) Ancient time (till 12th century), (B) Medieval time (after 12th century), and at (C)Modern era (present era) ... as under.

A. Ancient Constitutionalism-

Natural law is a God law. That is, the God is the authority of natural law. The jurist William Blackstone- in his Commentaries on the law of England, identified God as the author of both natural & special revelation (Bible), essentially arguing that both came from same source. The natural law applies everywhere & at all times due to the Christian conception of a Sovereign God who created the universe & continues to overrule & superintend it. The doctrine of divine law is found only in the Holy Scriptures as revelation of the original law of nature. Therefore, natural law & special revelation (Bible) come from the same God & thus they cannot contradict each other. It is out flowing of God's purposes & benevolence towards man. Man & State are the outcome of nature in the natural law. Therefore, man was in full possession of his natural rights & State came into being to prevent blood path by restricting the natural rights (Rev. John Hurt 1777) because man has a sinful nature that led him to abuse the natural rights which are guaranteed by the nature.

B. Medieval Constitutionalism—Jean Gerson

Quentin Skinner[22], explains how the beginnings of modern constitutionalism are associated with the Gregorian papal reform of the 12th century. As the papacy's power was maximized, scholars and high ranking members of the Church began to ask what remedies would exist if the Pope became power mad. This resulted in the Councilor Movement, according to Skinner.

Jean Gerson, a talented scholar during the Great Schism summed up this notion, being that the Church should be properly conceived as a constitutional monarchy. Skinner writes, in defending the authority of the General Councils over the Church, Gerson in particular committed himself to enunciating a theory about the origins and location of legitimate political power within the secular commonwealth. And in the course of setting out this particular argument, he made two major and deeply influential contributions to the evolution of a radical & constitutionalist view of the sovereign State.

Skinner goes on to explain that there were two independent kingdoms—the religious and secular. This idea was then amplified into the thesis that, under the law of nature, no leader of a free people can assert a power greater than the people have in themselves. John Locke developed this conviction in his own theory of constitutional government by subsequent works.

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

John Locke theory of constitutionalism greatly influenced the Founders of constitutionalism. He wrote about the proper role of limited 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…" This treaty, further, says that the power of the legislative being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands[23].

[22]http.llen.wikipedia.org/wiki/constitutionalism#cite-note-14
[23]Lary Alexander (ed) *Constitution: Philosophical Foundation*, Cambridge (1998)

The United States boasts the first modern constitution ever composed. Donald S. Lutz, in '*The Origins of American Constitutionalism*', describes the development of this work. The earliest American expressions of law, the *Mayflower Compact* and *Pilgrim Code*, helped to develop the later notion of Constitution as a kind of church covenant[24]. In other words, American Constitution is modeled upon the early American covenants which were themselves taken from a biblical model.

In sum, constitutionalism is the idea, often associated with natural theories and later by political theories, the founders of the American republic … Constitutionalism emphasizes that the government can and should be legally limited in its powers, and that the government authority or legitimacy depends on its observing these limitations. This idea brings with it a host of vexing questions of interest not only to legal scholars, but to anyone keen to explore the legal and philosophical foundations of the state & the law.

Freedom of Religion V. Tolerance V. Free Will Choice

The greatest work in the history of the Freedom of Religion is John Locke's –'*A Letter Concerning Toleration*'[25]. John Locke's views agreed with his Puritan upbringing which accepted that only God could cause a person to have faith. It was under the mighty preaching of the Vice-Chancellor at Oxford, John Owen, that John Locke would have been acquainted with this idea. As said, "We have a right to religious freedom because the nature of faith itself is contradicted by compulsion." John Locke correctly observed that the mind "cannot be compelled to the belief of anything by outward force," but laws, ultimately, are upheld by force. However, such coercion is not reconcilable with authentic 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."[26]

Common Law

The British Common Law is arguably the greatest and most influential legal theory in modern history. It was not simply the law behind the justice system in England, but also the driving ideology of society itself. It was also deeply influenced by biblical civilization. James R. Stoner, in '*Common-Law Liberty, Rethinking American Constitutionalism*', explains how the English Common Law theory arose upon a background of pagan philosophy, and built jurisprudence to a great extent upon biblical disclosures. It is notable that constitutionalism and the Bill of Rights theories are both prominent products of school of common law[27]. In fact, Magna Carta is the first written document for human rights. Thereafter from time to time the King had to confer many rights to his subjects. In 1689 by consolidating all rights and liberties of British subjects the King enacted the Bill of Rights. These demands were complied in all the subsequently enacted law of freedom or deprivation thereof until the principle of "Rule of Law" is established.

The famous French Declaration of Rights of Man and Citizen, which came out at much the same moment in history, named more or less the same civil and political rights. A bird's eye view of the declaration is that the Estates General of France met the King at Versailles, ten miles or so from Paris, on 5th May 1789. It consisted of three orders -285 nobles, 308 clergy & 621 representatives of the third Estate elected by all men of twenty-five and above who were on the

[24]America's Constitutional Foundation of Biblical Covenant
[25]http://www.constitution.org/ji/Toleration.http.
[26]*The Foundations of Modern Political Thought, The Age of Reformation* (Vol. II)
[27]http.llen.wikipedia.org/wiki/constitutionalism#cite-note-14

tax register. Each member had brought with him a cashier list of complaints & grievances from his constituency. On the 23rdJune 1789, the King in the joint meeting of three orders granted some Constitutional concessions by placing several restrictions. He, also, issued the Royal Commands that the three Estates had to meet separately and they were not to discuss the form of the Constitution and Federal property. He desired the members of the third Estate to depart and left the hall. After the king, the noble &clergy also left but the members of the 3rd Estates continue to stay on. This created the King to request the deputies of the third Estates to retire. At this, Mirabeau came forward, "Sir, go tell your master that we are here by the will of the people and nothing but bayonets shall derive us out". Four days later, the King yielded and ordered the union of 3 Estates. On the 7thJuly 1789, the Constituent Assembly appointed a committee on the Constitution and two days later, Mousier delivered its first report. It is a genesis of Declaration of Rights of Man and Directive Principles of State policy[28]. The Declaration (1789) is a natural inalienable and sacred right of man and citizen. This is a basic document which gave power and duties of the State as well as to an individual to preserve the public as well as an individual good. In sum, these are the stirring documents that gave birth to the rule of law.

Rule of Law

It is a religious understanding of law which places the law above the king. For example, Saul in the Old Testament loses his kingdom when he breaks the law. This ideal was articulated by the writer and divinity 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 the king by nature is not king, as is proved; therefore, he must be king by a politic constitution and law; and so the law, in that consideration, is above the king, because it is from a civil law that there is a king rather than any other kind of governor.

Man as a rational being, desires to do many things but in a modern society his desires have to be balanced, controlled, regulated and reconciled with the exercise of similar desires of others in a society. The prosperity of the society is no less important than that of the individual. The laws of the land for shielding the interest of the society harmonize the liberty of the 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[29]".Personal freedom I mean the freedom of every Law abiding citizen to think what he wills, to say what he wills, to go where he wills, on his lawful occasion without hindrance from any person. ... It must be matched, of course, with social security by which I mean the peace and good order of community in which we live[30]. Liberty inheres in what one urge to do; yet, several interests control it specially the public interest. However, how much restrictions are best to a community depend on the public interest. There are several distinct lines of thought in the matter of reconciling of several provisions of freedom to protect individual as well as social engineering. The authorities, therefore, have to act entirely based on those provisions of law, which uphold the rule of law. They cannot strike with the liberty of the individual in a causal manner. Such an approach does not advance the true social interest. Continued interference with individual liberty is bound to erode the structure of any democratic society.

In legal sense, freedom means absence of restraint. Freedom in a sociological wisdom means something

[28]K. K. Bharadwaj, The French Revolution and the work of Constituent Assembly, Employment *News 23 29, April 1994*.
[29]J. S. Mill, *On Liberty*, at p. 71.
[30]*Freedom Under the Law*, 1949 at p. 5.

completely different. It means that, there is no liberty if dominant opinion can control the social habits[31]. We can say someone is free in a sociological brain if he has the legally free choice between at least two equal opportunities. Freedom depends, therefore, upon the possibility of competition especially religious competition[32]. In truth, individual freedom always competes with social interest. Therefore, if one loses one's freedom by detention, he loses all other freedoms. To prevent the abuse, the 'rule of law'- that is, the God of Law comes into existence.

Question of Constitutionalism

Constitutionalism deals with open-ended questions drawing upon competing & conflicting interest. In fact, constitutionalism is the ideaoften associated with the political theories of John Locke and the founders of the American republic that government can & should be legally limited in its powers & that its authority (legitimacy) depends on its observing these limitations. Yet, a question may be asked- How can a government be legally limited if the law is a creation of government? The answer to that particular question goes to the limitation by constitutional constraint because constitution establishes a state framework[33] for exercise of public order.

CONCLUSIONS

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.

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*"[34], whatever may be the religious belief.

A similar distinction was drawn by British constitutional scholar A.V. Dicey in assessing Britain's unwritten

[31]H. J. Laski, *Liberty in the Modern State* (1935).
[32]J. N. Figgis, *Political thought from Gerson to Grotius.*
[33]Supreme principle, i.e. Rule of law & not Rule by law, *The Foundations of Modern Political Thought, The Age of Reformation* (Vol. II)
[34]http://www.constitution.org/ji/Toleration.http.

constitution. Dicey noted a difference between the 'conventions of the constitution' and the 'law of the constitution.'[35] The essential distinction between the two concepts (written & unwritten constitution) was that the law of the constitution was made up of rules enforced or recognized by the Courts, making up a body of laws in the proper sense of that term. In contrast, the conventions of the constitution consisted of customs, practices, maxims, or precepts which are not enforced or recognized by the Courts yet they make up a body not of laws, but of constitutional or political ethics.[36]

Accordingly, this survey concludes that the origin of, whether the questions of constitutional law or the question of constitutionalism goes to religious thought based on natural law -that is, the mother of all other laws.

REFERENCES

1. Dr. ChettiarArunachalam BSc (Maths), Dip (Engg), DLL (Symbiosis), LL.B (ILS), LL.M, PhD (Law-Pune) is the Principal (Sinhgad Law College-Pune), and Ex- Dean, Principal, Professor of Pune, Mumbai, Delhi and Sardar Patel University. This article is a part of his research work at Delhi for LL.M, on Constitutionalism. [1]http://en.wikipedia.org/wiki/constitutionalism#cite_note_Fritz-13
2. C.H. Mell Wain, *Constitutionalism: Ancient & Modern* (1947)
3. MukeshRawat, Freelance journal, New Delhi, October 07, 2015.
4. http://en.wikipedia.org/wiki/constitutionalism#cite_note_Fritz-13
5. 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
6. KesavanandaBharati v. State of Kerala, AIR 1973 SC 146
7. The Supreme Court has upheld the collegiums' system of appointment of judges and has struck down the 99th 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 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.
8. C.H. Mell Wain, *Constitutionalism: Ancient & Modern* (1947)
9. http.llen.wikipedia.org/wiki/constitutionalism#cite-note-Fritz13
10. *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.
11. *EstrugbayiEleko* v. *Officer Administering Govt. of Nigeria*, 1931 A. C. 669 [AIR (18) 1931 P. (248)].
12. http.llen.wikipedia.org/wiki/constitutionalism#cite-note-Fritz13
13. Langton was the same person who introduced chapter and verse into the modern Bible.
14. Reference: Why Separating Church & State is a Fool's Errand: Consider Magna Carta's Origins

[35]A.V. Dicey, *Introduction to the study of the law of the Constitution* (1982) Edn.
[36]http.llen.wikipedia.org/wiki/constitutionalism#cite-note-14

15. Constituent *Assembly Debate*. Vol. VII, p 850
16. '*Free inquiry*' is the child work of Christian Protestant Reformation, which led to the Freedom of Liberty.
17. '*Priesthood of all believers*' is the child work of Christian Protestant Reformation that led Freedom of Equality.
18. http.llen.wikipedia.org/wiki/constitutionalism#cite-note-14
19. I.R. Coelho (Dead) by *LRs v. State of Tamil Nadu & Others*, AIR 1999 SC 3197
20. By Tim Dunkin, December 18, 2014
21. http.llen.wikipedia.org/wiki/constitutionalism#cite-note-14
22. Lary Alexander (ed) *Constitution: Philosophical Foundation*, Cambridge (1998)
23. America's Constitutional Foundation of Biblical Covenant
24. http://www.constitution.org/ji/Toleration.http.
25. *The Foundations of Modern Political Thought, The Age of Reformation* (Vol. II)
26. http.llen.wikipedia.org/wiki/constitutionalism#cite-note-14
27. K. K. Bharadwaj, The French Revolution and the work of Constituent Assembly, Employment *News 23 29, April 1994*.
28. J. S. Mill, *On Liberty*, at p. 71.
29. *Freedom Under the Law*, 1949 at p. 5.
30. H. J. Laski, *Liberty in the Modern State* (1935).
31. J. N. Figgis, *Political thought from Gerson to Grotius.*
32. Supreme principle, i.e. Rule of law & not Rule by law, *The Foundations of Modern Political Thought, The Age of Reformation* (Vol. II)