BASIC GUIDELINES TO COMPARATIVE CONSTITUTIONAL LAW: AN IDEOLOGICAL AND METHODICAL DISCUSSION

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Abstract: The rapid growth and expansion of the field was propelled by the transitions to constitutional democracy in Eastern and Central Europe after the fall of the Berlin Wall in 1989, followed by the making of many constitutions in the 1990s, including in South Africa and in many South American countries. Many of these new constitutions have 'imported' constitutional norms from abroad the South African Constitution explicitly mandates that the country's Constitutional Court consider foreign law when interpreting the domestic Bill of Rights and many of the considered foreign constitutions have explicitly refrained from incorporating some of the latter's provisions into their new constitution. Another important factor in the growth of comparative constitutional law is the 'internationalization' of constitutional law through implementation of the provisions of international covenants such as the European Convention on Human Rights. Purpose of the present Chapter is to provide an overview of the current status of comparative constitutional law as a discipline and an accounting of fundamental constitutional developments, concepts, and debates as they emerge through the lenses of the said discipline. The field of comparative constitutional law has grown immensely over the past couple of decades. Once a minor and obscure adjunct to the field of domestic constitutional law, comparative constitutional law has now moved front and center.

Keywords: The Constitution, Constitutionalism, Comparative Constitutional Law, Comparative Approach, Legal Boundaries

Introduction: The field of comparative constitutional studies can be traced back at least to Aristotle's politics, which systematically evaluated the constitutions of the Greek city states to inform normative theorizing on optimal design. Classical thinkers in Imperial China, India and elsewhere also spent some thinking about the fundamental principles state regulations and provisions that we would call constitutional. The field of comparative constitutional studies can be traced back at least to Aristotle's Politics, which systematically evaluated the constitutions of the Greek city states to inform normative theorizing on optimal design. Classical thinkers in Imperial China, India and elsewhere also spent some time thinking about the fundamental principles of statecraft, arguing about matters that we would call constitutional. In the Western intellectual tradition, such analysis continued through many of the great political thinkers, from Machiavelli to Montesquieu to John Stuart Mill. In the 17th century, state-builders in the Netherlands undertook extensive study of ancient and contemporary models to resolve constitutional problems of the nascent Dutch republic, finding particular inspiration in the proto-federalism of the biblical Israelites. In the 18th century, besides Montesquieu's foundational exploration, lesser known figures such as Gottfried Achenwall and Johann Heinrich Gottlieb von Justi undertook surveys of political forms. Comparative constitutional study thus has a long and distinguished lineage. It is the rise of the written constitutional form, conventionally understood to have emerged in full flower in the late 18th century that spurred the field to develop more systematically and to become distinct from political theory per se. The enlightenment thinkers of the French, Polish and American projects saw written constitutions as acts of purposive institutional design, for which wide study was a desirable, even necessary, feature.

They thus engaged in extensive examination and debate about the appropriateness of particular models. In turn, the models they produced, as channeled through the liberal 1812 Spanish Constitution of Cadiz, influenced the early constitutions of Latin America: the 1821 Constitution of Gran Colombia, the 1830 and 1832 Constitutions of New Granada, the 1830 Constitution of Venezuela, the 1823 and 1828 Constitutions of Peru, the Argentine Constitution of 1826, the Uruguayan Constitution of 1830, and the Chilean Constitution of 1828. Throughout the 19th century, new state-builders, initially in Latin America and Western Europe but also in Japan, sought to adopt the new technology of the written constitution, and in doing so needed to engage in practical comparisons about which institutions were optimal.

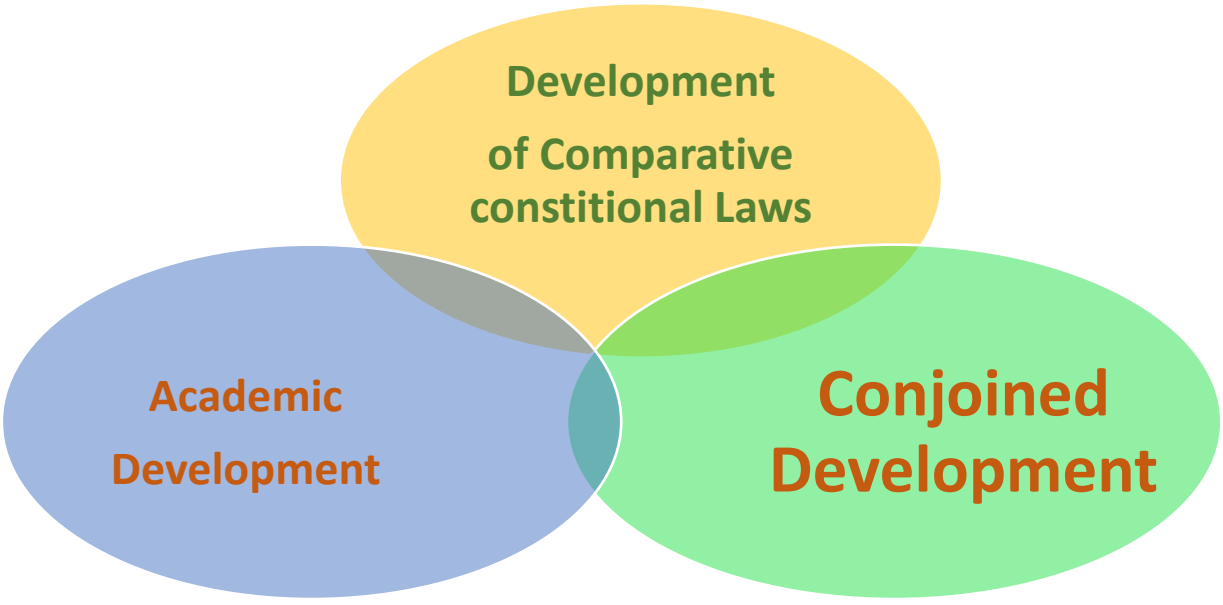
As a result, constitutional compilations became more popular, focusing on both European and Latin American countries (Marcos 2003: 314–16). The method involved a mix of normative and positive analysis, and in turn informed drafting exercises in new states and old (Takii 2007). The 19th century also saw the rise of the academic discipline of comparative law, culminating in the International Congress of Comparative Law in 1900 (Riles 2001; Clark 2001). The zeitgeist was captured by the notion of legal science, an internal and autonomous study of law, using distinctively legal forms of reasoning to determine the answers to normative questions. Scholars sought to

examine the scientific principles of law that provided a universal underlying structure to inform the drafting of civil codes.

The comparative method was also used by those who sought to link legal science to social science, exemplified by Henry Sumner Maine's (1861) monumental efforts to discover the origins and development of legal institutions. Comparison, then, was a natural part of the milieu of 19th century jurisprudence, but the relative dearth of constitutional adjudication meant that there was little attention to that topic.4 Perhaps as a legacy of this era, comparative law was to focus heavily on the private law core of Western legal systems for much of the next century. By and large, the great figures of Western comparative law did not place public law in their sights, preferring to ascribe to the public law a particularity and responsiveness to local values. In contrast, private law was seen as embodying common and universal features, derived ultimately from the Roman tradition.

There was, to quote one such effort, a common core of private law. The only comparable 'core' in the public law sphere was embodied in international human rights law, which formed a template of minimum content that constitutions were encouraged to adopt into local law. In the early 1950s, there was a burst of interest in the field in the United States, with many law schools offering a course in comparative constitutions. But for the bulk of the 20th century, comparative constitutional law was not a vigorous or prominent field for writing by academic lawyers. Other disciplines, however, did focus on constitutional comparison. With the formation of political science as a modern discipline in the United States in the early 20th century, constitutional studies formed an important part of the core curriculum, with comparison being at least a part of the approach. The sub-discipline of public law spent a good deal of energy examining constitutional texts and describing the various political institutions they created, both to inform potential borrowing and also to understand how systems operated (Shapiro 1993). With the behavioral revolution in the 1940s and 1950s, however, social scientists turned away from formal texts as objects of study, and instead sought to examine the 'science' of government decision-making. Public law scholars turned to judicial behavior, examining the micro-foundations of legal decisions rather than the broader structures within which judges were embedded. This necessarily involved a turn away from formal institutions and toward individual agents. Formal institutions such as law were seen to some degree as façades masking interests and 'real' politics.

Two developments in the late 20th century one academic and one in the world conjoined to provide a fruitful environment for the growth of comparative constitutional studies.

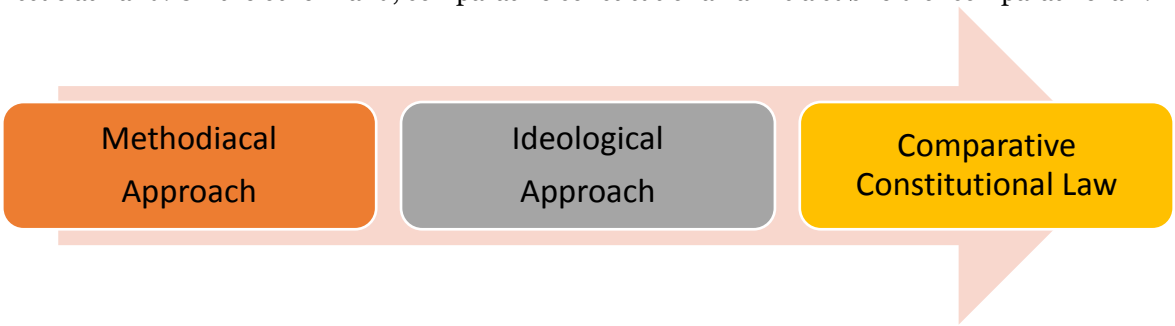


The academic development was the revival of various institutionalisms in the social sciences (March and Olsen 1989; Powell and DiMaggio 1991; Clayton and Gilman 1998). Sociologists and some political scientists began to emphasize that individual agents were embedded in broader institutional structures, and that these structures helped to determine outcomes. From another angle, economists moving away from neoclassical models began to understand that rules were important (Buchanan and Tullock 1961; North 1991). Institutions were defined as the rules of the game that structured behavior. Constitutions, as the social devices that structure the creation of rules, were the ultimate institutions worthy of analysis. Hence there was a turn in economics to understanding constitutional structures. With some exceptions (Brennan and Pardo 1991; Voigt

1999), the literature in constitutional political economy focused more on theory than empirics, but it did provide a set of working assumptions and hypotheses for analyzing constitutions.

The late 20th century also saw epochal changes in the real world that made it hard for academics to ignore constitutions. The third wave of democracy beginning in the mid-1970s brought new attention to constitutions as instruments of democratization, and the emergence of new states following the end of the Cold War prompted a new round of efforts to theorize and analyze institutional design. In particular, constitutional design became a central focus for ethnically diverse states in the hope that proper institutions could ameliorate conflict (Choudhry 2008; Ghai 2001; Horowitz 1991). There was a revival of interest in federalism and other design techniques (Le Roy and Saunders 2006). The purpose of the present book is to provide an overview of the current status of comparative constitutional law as a discipline and an accounting of fundamental constitutional developments, concepts, and debates as they emerge through the lenses of the said discipline. The field of comparative constitutional law has grown immensely over the past couple of decades. Once a minor and obscure adjunct to the field of domestic constitutional law, comparative constitutional law has now moved front and center. The prominence and visibility of the field, both among judges and scholars has grown exponentially, particularly in the last decade. Even in the United States, where domestic constitutional exceptionalism has traditionally held a firm grip, use of comparative constitutional materials has become the subject of a lively and much publicized controversy among various justices of the US Supreme Court.

Though such covenants are not formally or technically constitutions, their provisions particularly as interpreted by courts such as the European Court of Human Rights are the functional equivalent of constitutional norms. Moreover, a veritable dialogue among judges has emerged as a consequence of this process of internationalization. Thus, for example, judges on the European Court of Human Rights often consider the national constitutional jurisprudence in the relevant field for example, free speech of states that are party to the Convention. Conversely, constitutional judges in the latter states frequently consult decisions of the European Court both for purposes of conforming the respective jurisprudences where feasible and of taking into account valuable judicial insight on the issue at hand. On the other hand, comparative constitutional law is a subfield of comparative law.



Comparative constitutional law, however, is in several respects a standout subfield that seems more subject to contest and controversy, both on methodological and ideological grounds, than other subfields. Traditionally, comparison in private law has been regarded as less problematic than in public law. Thus, whereas it seems fair to assume that there ought to be great convergence among industrialized democracies over the uses and functions of commercial contracts that seems far from the case in constitutional law. Can a parliamentary democracy be compared to a presidential one? Or, a federal republic to a unitary one? Moreover, what about differences in ideology or national identity? Can constitutional rights deployed in a libertarian context be profitably compared to those at work in a social welfare context? Is it perilous to compare minority rights in a multi-ethnic state to those in its ethnically homogeneous counterparts? These controversies add an important dimension to the field of comparative constitutional law and they contribute to carving out a distinct domain of inquiry that displays many links to constitutional law, public law in general, and comparative law while remaining distinct from the latter in several significant respects.

Furthermore, the subject matter coming within the sweep of comparative constitutionalism has been analyzed from the various perspectives of many different disciplines beyond law, including political science, political theory, and philosophy. Representatives from all these disciplines are among the contributors to the present Handbook and they complement, supplement, and enrich the insights emanating from within the discipline of law. In order to place the contributions to this volume in their proper context, this Introduction proceeds as follows. Section I provides a brief overview of the history of comparative constitutional law. Section II focuses on the uses and purposes of, and the challenges confronting, comparative constitutional law. A related development was the secular increase in the role of courts in many societies, a phenomenon known as judicialization. Designated constitutional courts were prime locations for judicialization in many countries, and the phenomenon was examined by lawyers and political scientists interested in particular countries. The spread of judicialization and constitutionalization meant that there were

both many more contexts in which the operation of the constitutional system 'mattered' as well as much more demand for comparative analysis. Some of this work was implicitly comparative, but most of the work in the 1990s considered a single jurisdiction (but see Baun and Franklin 1995).

Reality, Theory, and Great Narratives:

Most manifestations of the positivistic agenda lead to a division of the normative from the empirical, a separation of the law from social reality. Many consider this division constitutive of the discipline's autonomy; it is even conceived as an ontological datum. However, some constitutional scholar's worry that this division may leave them out of touch with reality and may prevent them from doing justice to the 'life' which law and legal scholarship are supposed to serve. Precisely for this reason, the positivistic project faced vehement criticism from the very beginning with remarkable delay in Austria due to Kelsen's overwhelming influence. In response to the establishment of the positivistic agenda, the call for an integration of 'reality' and 'fundaments' into constitutional and public law studies rang out almost everywhere, albeit with significant variation in volume and pitch.

This disciplinary agenda to 'integrate reality' expands the discipline of constitutional law into other areas after its successful establishment. The expansion permits the discipline to reflect on its foundations and to exchange and compete with other disciplines which also strive to analyses and interpret social reality. Today, many continental scholars could subscribe to some bland and broad form of realism. The expansion becomes more justifiable the less weight one ascribes to the positivistic distinction between law and fact: the more one understands law as part of the societal whole, the better one can use legal expertise as the basis both for assertions about societal reality and for opinions on its development. In contrast to the success of the agenda of the 'positivist legal method', the 'integration of reality' and theoretical reflection fail to conjoin into a common disciplinary platform: here, as opposed to the doctrinal sphere, the relevant insights are often incommensurate. New dimensions open up for comparative constitutional scholarship due to European integration, not least because it shakes traditional ways of undertaking constitutional scholarship. One challenge is the project of creating a European research area, including the humanities, social sciences, and legal scholarship, in order to foster research through new opportunities and increased competition, as it happened with the Single European Market. More contact and more confrontation imply more comparison, and the establishment of the new area leads to questioning established topics and methods, publication and career patterns, reputation hierarchies, and even identities. The overwhelmingly national organization of constitutional scholarship is coming under pressure.

A second challenge stems from the rapid development of the European legal area with ever more issues of constitutional importance, often tightly interlinked with international legal phenomena. This undermines the established scholarship's usual focus on one single source: the national constitution. Whereas the constitution was formerly conceived as creating a normative universe, it is now increasingly understood as being but a part of a normative pluriverse, pushing towards comparison.

A third challenge is occasioned by leading US institutions which considerably participate in the formation of future academic leaders for the European research area. As varied as legal research is in these institutions, it almost always contrasts with the usual way of carrying out legal research in Europe. In a globalized system of legal research, the sheer prestige of these institutions, but also the competition for winning the best minds and influence abroad, call for a stocktaking of constitutional scholarship in Europe. In light of these challenges, this contribution will compare some elements of the development of constitutional scholarship in Europe. The emerging European constitutional scholarship as a form of comparative constitutional law scholarship cannot be understood without looking at the traditions of scholarship at the level of national constitutional law. In the continent, the decisive form of scholarship can be described as one of doctrinal constructivism. As the focus of the discipline, this is defining its roles and identity. Doctrinal constructivism represents a singular combination of theory and practice, and stresses the practical importance of constitutional scholarship in many European countries.

When Ernest Gellner asserts: 'The foundation of the modern social order is not the executioner, but the professor', this statement appears particularly suited for legal scholarship. Although not everyone would agree with this categorical assertion of theory's superiority to practice, no one would deny that legal scholars have a key role in the legal order of the member states of the European Union. Legal scholarship not only describes from an external point of view, it also shapes from within. One can even recognize the identity of a public law system as being grounded in scholarship's conceptual creations, illustrations of which are the concepts of Staatssouveränität for Germany, service public for France, or parliamentary sovereignty for Britain. Legal scholarship develops and often even devises the fundamental concepts and structures, elucidates and legitimates

the current law in light of general principles, inspires and criticizes legal developments, and shapes the next generation of jurists.

Many legal scholars, often on the basis of scholarly reputation, also act directly as legal practitioners: as legal experts, advisors, counsel, or, in consummation of an academic career, as judges. A thorough understanding of a legal order is hardly conceivable without a familiarity with its legal scholarship. This analysis presents legal scholarship as a science, at least in the meaning of the German concept of Wissenschaft. Granted, the use of the label 'science' is problematic, especially regarding academic writing presenting the law construed as legal doctrine, for various reasons. Distinctions between truth and falsity here have only limited relevance; there is only rudimentary methodological reflection on how to construe doctrine; and the active participation of many legal scholars in legal practice hardly seems to represent scientific neutrality.5 It is certainly arguable that doctrinal analysis the main field of legal scholarship in Europe—forms a part of the (legal) practice rather than of the world of science. Tellingly, the terms Verfassungsrecht, diritto costituzionale, and constitutional law denote not only the object, the constitutional law in force, but also the corresponding scholarly discipline.

Nevertheless, this observation need not undermine the conception of legal scholarship as a science, a Wissenschaft: legal scholars are members of institutions within the 'scientific system', dedicating thought, lectures, and publications to systematic exposition of public law, in a professionalized scheme and 'unburdened' by the need to decide cases. So it comes as no surprise that legal scholarship is institutionalized at universities. Accordingly, it is covered by the constitutional guarantee of a freedom of science (Wissenschaft), and not only by the more general freedom of speech. Indeed, historically, the law faculty has from the beginning been one of the basic elements of the (continental) European university. Accordingly, most continental constitutional scholars conceive constitutional scholarship as a science, but few as a social science. Geisteswissenschaft or the stand-alone term of legal sciences (the plural is due to the dualism of canon law and civil law) embodies the predominant understanding. This corresponds well with the importance of doctrinal constructivism. An examination of legal scholarship should not limit itself to examining the research. In perhaps no other Wissenschaft are research and teaching so closely connected. The development of material for instruction constitutes one of the central tasks of research in legal science: across Europe, the leading treatises and textbooks receive significantly more scholarly attention than in most of the other academic disciplines

With the rising prominence of constitutional courts as loci of major social and political decision-making, it became apparent that some of the problems courts were confronting were recurring in different countries. Many new democracies, for example, had to deal with lustration and other issues of transition, economic transformation, and electoral issues. These courts quite naturally began to pay attention to how the issues were resolved in other countries, especially the established democracies with well-developed jurisprudence on similar questions. Courts were also in dialogue about the interpretation of international human rights instruments, and what limitations might be acceptable within a free and democratic Society. This phenomenon of transnational judicial dialogue was in fact quite old, but Received renewed attention and was heavily criticized by judicial conservatives in the United States. The critique prompted a spate of work on the appropriate role for judicial borrowing across jurisdictions. Indeed, in part for this reason, the early 21st century has seen a veritable explosion of interest in the field. The prominence and visibility of the field, both among judges and scholars has grown exponentially, particularly in the last decade. Even in the United States, where domestic constitutional exceptionalism has traditionally held a firm grip, use of comparative constitutional materials has become the subject of a lively and much publicized controversy among various justices of the US Supreme Court.

The rapid growth and expansion of the field was propelled by the transitions to constitutional democracy in Eastern and Central Europe after the fall of the Berlin Wall in 1989, followed by the making of many constitutions in the 1990s, including in South Africa and in many South American countries. Many of these new constitutions have 'imported' constitutional norms from abroad the South African Constitution explicitly mandates that the country's Constitutional Court consider foreign law when interpreting the domestic Bill of Rights and many of the considered foreign constitutions have explicitly refrained from incorporating some of the latter's provisions into their new constitution. Another important factor in the growth of comparative constitutional law is the 'internationalization' of constitutional law through implementation of the provisions of international covenants such as the European Convention on Human Rights. Though such covenants are not formally or technically constitutions, their provisions particularly as interpreted by courts such as the European Court of Human Rights are the functional equivalent of constitutional norms. Moreover, a veritable dialogue among judges has emerged as a consequence of this process of internationalization. Thus, for example, judges on the European Court of Human Rights often consider the national constitutional jurisprudence in the relevant field for example, free speech of states that are party to the Convention. Conversely, constitutional judges in the latter states frequently consult decisions of the European Court both for purposes of conforming the respective

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These controversies add an important dimension to the field of comparative constitutional law and they contribute to carving out a distinct domain of inquiry that displays many links to constitutional law, public law in general, and comparative law while remaining distinct from the latter in several significant respects. Furthermore, the subject matter coming within the sweep of comparative constitutionalism has been analyzed from the various perspectives of many different disciplines beyond law, including political science, political theory, and philosophy. Representatives from all these disciplines are among the contributors to the present Handbook and they complement, supplement, and enrich the insights emanating from within the discipline of law.

Similar sacred request turned out to be especially significant in the fallout of the transformations in the United States and France. The Founding Fathers and the French progressives needed to imagine another association of the state and they could depend just partially on prior structures. The exact proof offered by examination was both a wellspring of motivation and of legitimation. In the Federalist Papers, references to unfamiliar encounters are made for justificatory purposes. In France, the interpretation of an assortment of US state constitutions got one of the most significant scholarly wellsprings of reformist and progressive political thought, and examinations with the US and English game plans were regular in the discussions of the National Constituent Assembly.18 In the liberal constitution-production cycle of the mid nineteenth century, correlation with the different French constitutions was standard system and Latin American constitution-production frequently depended on a thought and near investigation of the US constitution.

In liberal sacred hypothesis examination, now and again supporting formative speculations kept on being pertinent, similar to the case with J.S. Plant's Representative Government in issues of political race law. Constant, Tocqueville, and Eötvös utilized established examination extensively, and Bryce built up a more orderly methodology set apart by his differentiation among unbending and adaptable constitutions. However, all things considered, protected law became at this stage an autonomous however to some degree restricted subject, and progressively its combination implied the deserting of correlation.

Distinctively, in Germany before the solidification of the Empire and of its open law framework, correlation was a significant wellspring of insightful and reformist inspiration. Actually, the nineteenth-century German endeavor to tame the regulatory (police) state required dependence on near open law, and the hypothetical and pragmatic elaboration of the sacred hypothesis of the Rechtsstaat was affected by examination and had a significant effect in Europe through the interpretations of the idea. Subsequently, the enthusiasm for looking at managerial equity as an opportunity improving authority over the organization. Indeed, even Dicey's Introduction to the Law of the Constitution wandered into near investigations.

Curiously, Dicey's misconception of the French framework can be contrasted with the rousing blunders of Montesquieu in regards to balanced governance in Britain, a century earlier. With the foundation of positive established law in the nineteenth century, universal correlation lost a lot of its allure and lawful science and open law rehearses turned out to be progressively self-referential, as though the presence of a public constitution would have made unfamiliar law unimportant. This was the age of the exegetes, whose assignment was not to give inventive arrangements yet to manage definitively and dependably the attorneys and directors through the labyrinth of an ever-expanding assemblage of laws. It appears to be that the pervasiveness of legitimate positivism effectively degraded all wellsprings of intrigue other than the content of the positive lawful standard. There was little requirement for relative motivation in a legitimate existence where the attorney is keen on serving existing force instead of the opportunity of residents. Lawful science became conceited and arranged toward systematization and accordingly its methodological objectives didn't leave a lot of room for comparison.

But even in this period ruled by positivism, the scholastic enthusiasm for correlation survived. In this unique situation, examination of governments turned into a center that was planned to fulfill clever interest, and mostly to move change. Georg Jellinek, a main type of lawful positivism, built up a hypothesis of the universalism of basic freedoms depending on a relative methodology.

For his part, Adhémar Esmein, who likewise considered the state and its sway a legitimate marvel, focused on the significance of utilizing some examination in talking about French established law. Even Duguit, whose grant was to an impressive degree coordinated against Esmein, kept on remembering near compositions for his work. For Duguit, the 'unfamiliar' experience filled in as an extra social actuality that he used to battle juridical metaphysics. Édouard Lambert, then again, organized (corresponding to Henri Capitant) a common law-based similar law in France and the primary French near law foundation in 1921. Besides, Lambert's portrayal of the US law relating to work might be viewed as an antecedent of the treatment of unfamiliar established law as a component similar law. so, though legitimate positivism might not have been especially great for the near methodology, the last served the down to earth needs of open law change and constitution-making.

Notwithstanding the presence of a similar enthusiasm for scholastic protected law (exemplified by the primary universal gathering in 1900 and by the foundation of the 'Société de enactment comparée' in Paris in 1869), present day near law (as a semi-self-ruling control) started in the endeavors of private law specialists. This may be identified with global business interests and furthermore to the longing to send out public common law codes. Such 'government' was absolutely present in the advancement of the German Civil Code. The hypotheses of similar law reflected contemplations and ideas of private law, and protected law was regularly dismissed in the relative investigation of extraordinary legitimate frameworks.

The position of safety of established law in near law might be because of the challenges in discovering general components in protected law. By and by, as of now in the period between the two universal wars, similar sacred law got set up as a different academic control most importantly because of the grant of Boris Mirkine-Guetzevitch. Steeped in the positivist custom, the last trusted that the developing condition of law would offer articulation to popular government in a legitimate language, and he wished specifically that the post-First World War constitutions would accommodate their own security by conveying legal audit. One can ascribe to him the possibility of the internationalization of sacred law in the feeling of applying the coupling power of worldwide law for motivations behind reinforcing the constitutions of country states.

While issues relating to similar constitutionalism kept on being the topic of conversation inside political theory as a feature of government studies, examination turned out to be more mainstream because of the transitioning of justified parliamentarianism, followed upon its breakdown by the development of tyranny. To a huge degree, enthusiasm for similar constitutionalism was the consequence of migration. Established attorneys and lawful theoreticians, being constrained out of nations under heartless fascism were especially worried about the shortcoming of the liberal state and propelled to locate a hypothetical response to the obvious achievement of authoritarian systems.

The developing grant incorporates such great compositions at the convergence of near established law and political theory as Loewenfeld's articles on Militant Democracy and Naumann's Behemoth and Fraenkel's Dual State. Clinton Rossiter's 1942 thesis, Constitutional Dictatorship: Crisis Government in the Modern Democracies, relates to this gathering, however Rossiter was conceived in the United States and had no law degree.

Near sacred law grant didn't rise as a scholastic control until after the Second World War. In post-Second World War Europe relative protected law was affected by the East/West partition. Unfamiliar protected frameworks were regularly concentrated as a component of Soviet lawful investigations, and, separately concentrates on Western middle class state law. Similar law was perceived as the investigation of unfamiliar frameworks, with a substantial philosophical complement.

Though he was all the while working inside political theory, Carl J. Friedrich, a top notch researcher of German sacred law, offered ascend to a change in perspective, by focusing on the constitutionalization of present day government and focusing on the significance of legal review. Friedrich, while still worried about influence as the focal issue for current political theory, utilized established law comparatively. By doing as such and by additionally captivating in recorded examination, Friedrich drove protected hypothesis' move away from the then overall worldview towards a worth arranged methodology. Friedrich summed up the resulting change in perspective in the accompanying terms: 'If sacred law starts to ask what individuals really do under a specific constitution, and not simply what skirmish of words they participate in for the settlement of contentions among them, the established attorney turns into a political researcher (one hopes).'

The move towards a worth based methodology is positively attached in the coming to intensity of authoritarian systems. It came about because of the discontent with positivism in political theory and law as the last had demonstrated mentally weak against despotism. While not express, this standardizing promise to constitutionalism stays powerful in similar established law, regardless of whether this outcomes in the disregard of the investigation of non-liberal systems. The enthusiasm for correlation roused by the move to a worth based methodology kept on continuing a relative enthusiasm after the Second World War, as a feature of Cold War thinking, as liberal

majority rule governments protected their framework contrary to socialist tyranny. The post-war period was described by a universal basic liberties upheaval, with different floods of state development and democratization, combined with expanding judicialization of sacred law.

Such similar intrigue drew further motivation from the improved insurance of basic rights that gave from the US Supreme Court beginning toward the start of the 1940s. This strong assurance was motivated by a political want to characterize the United States as a rampart of opportunity despite autocracy, the most despised foe in the Second World War and vulnerable War. As A.L. Goodhart composed it in his Foreword to Bernhard Schwartz's American Constitutional Law, a book with relative references, as it was composed for an English crowd:

The English peruser will be intrigued to locate that a portion of the issues which are currently being considered in the United States are additionally of prompt significance in Great Britain. The first is worried about the support of our common freedoms during a period of 'cold war'. How much, for instance, should the right to speak freely of discourse be agreed to the individuals who advocate the persuasive oust of the current arrangement of government? The second is worried about the cutting edge improvement of the regulatory process. In spite of the fact that Schwartz's work is a standard sacred law composition, it is trademark that as a hotspot for the investigation of 'unfamiliar' protected law, it was considered as having enduring significance as a major aspect of the political theory writing. It is especially vital that in the progress from relative government studies to near protected law as a scholastic control inside the ambit of lawful grant the enthusiasm for the topic end up being fundamentally philosophical. Without a doubt, a central expectation was to support liberal constitutionalism against despotism, and the elaborate

Similar Constitutional Law: Uses, Purposes, and Challenges under Comparative Constitutional Law:

Comparative constitutional law is a newly energized field in the early 21st century. Never before has the field had such a broad range of interdisciplinary interest, with lawyers, political scientists, sociologists and even economists making contributions to our collective understanding of how constitutions are formed and how they operate. Never before has there been such demand from courts, lawyers and constitution-makers in a wide range of countries for comparative legal analysis. And never before has the field been so institutionalized, with new regional and international associations providing fora for the exchange of ideas and the organization of collaborative projects. The limitations of any effort to distill such a rich field into a single volume. But I also believe that the time has come for some organization of the various issues and controversies that structure academic and legal debate. As the field matures, such efforts will help to advance scholarship to the next level, by focusing attention on outstanding questions as well as raising awareness of issues worth pursuing in under-analyzed jurisdictions. This Introduction provides a brief history of the field, and wrestles with the definitional issues of the boundaries of the constitution. It then draws out the common themes that emerge from a reading of the chapters, particularly as they relate to patterns of constitutional similarity versus difference, or convergence versus divergence. The conclusion briefly speculates on future directions for the field.

Employments: One can perceive four chief employments of near sacred law. Two of these, employments of unfamiliar sacred materials in constitution-production—comprehensively comprehended as enveloping established correction or revision and in protected understanding are in the possession of entertainers or members in the established field. The other two uses, giving clear accountings and explaining regularizing evaluations of member dealings with relative established materials, conversely, are essentially held for the individuals who expect the job of onlookers, in particular researchers in law and in other significant orders. Models flourish of real employments of established materials starting in a locale other than that in which the real clients of such materials do official capacities comparable to their own constitution. Accordingly, for instance, different constitutions, including the Canadian Charter of Rights and Freedoms, have affected constitution-production in South Africa, New Zealand, and Hong Kong and the Basic Law in Israel. Similarly, such uses have additionally happened in protected translation, and are even once in a while expressly embraced by constitutions themselves, as in the South African Constitution, which, as noted above, explicitly engages courts to consider unfamiliar law when deciphering the Bill of Rights. These utilizations, also, have spread to transnational settings, where their constitution-production and their established understanding measurements have, now and again, been joined.

A prime example of this happened when the European Court of Justice (ECJ), the EU's most noteworthy legal body, started filling established holes when the overseeing deals of the transnational unit that is presently the EU come up short on any essential rights-related arrangements. In its milestone 1974 Nold decision, the ECJ expressed that so as to shield essential rights with regards to EU-forced guideline, it needed to begin from the basic protected customs of the part states. Appropriately, the ECJ 'can't permit estimates which are contradictory with basic rights perceived and ensured by the constitutions of those States'.

What Nold dispatches is both a piecemeal ECJ-driven constitution-production venture identifying with central rights and an interpretive plan contingent upon established sources outward to the EU (or its settlement based ancestors). In fact, what the ECJ forced on itself in Nold corresponding to its translation of EU law, was both to allude to the public constitutions of the EU part states and to distil what was normal to the entirety of the last mentioned. All together for constitution-producers and mediators to make pertinent and ideal utilization of unfamiliar established materials that they either should, or wish to, consider, it is fundamental for the last to pick up recognition with them and to get ready to check what value a specific unfamiliar referent may have in a given solid dynamic occurrence. This is probably going to require both a comprehension of how an unfamiliar protected standard figures in its own institutional setting and how it analyzes to apparently comparable standards in one's own and other appropriate sacred frameworks.

Constitution-creators and judges do utilize institutional models, structures, cycles, contentions, and precepts originating from past their own locale, and they need adequate recognition with those materials to legitimize such use to themselves and to the crowds to which they should stay responsive. Besides, judges can hone their relative information and energy about unfamiliar materials through exchanges with protected appointed authorities from different countries, and through reference to significant assessment, examination, and similar appraisal of the said materials in progress of near established law researchers.

The last researchers approach the applicable material as eyewitnesses, and they tackle it from either an expressive or a prescriptive point of view. From an engaging outlook, the researcher inspects efficiently the similar sacred work that member's attempt, playing out various undertakings going from order to basic appraisal. For instance, a researcher may recognize territories or subjects corresponding to which much examination happens and those that offer ascent to insignificant correlation. Or on the other hand a researcher might be reproachful of existing examinations in a specific zone, let us state free discourse, after inferring that sacred appointed authorities base correlations on shallow similitudes while overlooking less clear yet substantially more significant contrasts. Regularizing or prescriptive insightful work, then again, focuses on what the researcher esteems alluring or plausible, contingent upon the last's observational, philosophical, or discipline-based position. One might be persuaded, for example, that constitutions are profoundly moored in a specific convention and that utilization of unfamiliar material is in this manner bound to deceive the basic to keep up the uniqueness of each sacred framework. Or then again, one might be convinced that major rights are eventually widespread and that nations with less created established law ought to consistently try to profit by the encounters of their partners with unmistakably more grew such statute.

Purposes: The key worry in relative law as it rose in the common law custom in the late nineteenth and mid twentieth century was to discover the fonds commun législatif. This was the situation of Capitant and Lambert in France, and it encouraged the preparation of unfamiliar legal counselors in the public custom for the sake of similar law. There is a similar to drift in near protected law rising up out of crafted by the individuals who place its main objective as refining what is all inclusive or regular in every single established framework and customs. Likewise, near established investigation is here and there vivified by a quest for the general based on what can be observationally watched or of adjustment to the ideal (liberal, constitutionalist) plan through variation of complex specific settings in changing social and authentic conditions.

This quest for the general returns to the early near law custom exemplified by Anselm Feuerbach, the mid nineteenth-century German researcher who is credited with establishing the order of relative criminal law. Also significant was the impact of near etymology, sought after by the liberal constitutionalist Wilhelm von Humboldt, which was planned for creating a widespread feeling of language dependent on similar language examines. This attention on universals is particularly striking in relative sacred law attempts to look at public arrangements as far as constitutionalism's quest for a political ideal of requested freedom. Additionally, the solid accentuation on the all-inclusiveness of common freedoms and the utilization of examination in basic liberties settling which are planned to discover a measure or standard of generally relevant standards point a similar way. Some contend, for instance, that there is a for the most part acknowledged essentially widespread technique for avocation with regards to surrounding the extent of basic rights: that gave by the norm of proportionality, however judges and researchers contrast in their originations of this universal standard.

In this specific situation, the investigation of the constitution of narrow-minded democracies fixates on the purposes behind take off from the ideal model, and spotlights on the degree to which non-liberal protected frameworks can continue a well-working lawful request.28 Altogether, the impact of the constitution on the legitimate framework in liberal popular governments works out positively past formal institutional settings and meaning of lawful sources: sacred qualities become inserted in the different parts of law and even in private relations.

There is an absence of agreement concerning the best possible objectives of relative examination that is because of more extensive philosophical differences about the nature and capacity of law when all is said in done, and of protected law specifically. Toward one side of the range are the individuals who, predictable with the above comments on universalism, accept that the lawful issues that face all social orders are basically comparative and that their answers are in a general sense universal. Specifically, some contend that fundamental standards of established law are basically the equivalent all through the world. Accordingly, the primary objectives of relative investigation are to distinguish and feature the normal or widespread standards and to decide how specific sacred statutes do, or might be made to, adjust to those standards.

At the opposite finish of the range, are the individuals who keep up that all legitimate issues are so attached to a general public's specific history and culture that what is important in one established setting can't be significant, or possibly likewise pertinent, in another. This position is epitomized as Montesquieu would see it that 'the political and common laws of every country ought to be so proper to the individuals for whom they are made that it is far-fetched that the laws of one country can suit another'. If that were undoubtedly the situation, at that point the main real assignment for near examination is clarify how every established framework adjusts to the solitary needs, goals, and mores of the specific commonwealth for which it has been structured. Therefore, other than cultivating a methodical comprehension of how law changes as indicated by the points of interest of its socio-world of politics, the essential objective of examination in any event as far as members are concerned would be a negative one. Since no two commonwealths are probably going to share basically comparable conditions, there should be a solid presumption.

Sacred obtaining and transplantation of protected standards, structures, conventions, and organizations is an unavoidable truth paying little mind to philosophical or hypothetical issues with these practices. Besides, even the individuals who energetically article to transplantation in one setting may discover it altogether fitting in another. For instance, in dismissing the importance of unfamiliar sacred involvement with the setting of settling a debate concerning the constraints of the public government's forces under US federalism, Justice Scalia underlined that 'relative investigation [is] unseemly to the errand of deciphering a constitution however it [is,] obviously, very applicable to the assignment of composing one'. Given the multiplication of new constitutions since the finish of the Second World War, it would undoubtedly be odd if constitution-producers abstained by and large from looking to unfamiliar constitutions throughout structuring their own. Besides, as noted, contemporary established adjudicators regularly counsel and refer to unfamiliar specialists which definitely prompts some proportion of acquiring or transplantation.

Established 'transfers' and impacts are accordingly applicable and significant subjects of similar examination. Nonetheless, their assessment will undoubtedly rely upon the specific take one has on the dynamic among similitudes and contrasts across isolated sacred requests. One significant variable is the manner by which one interprets the nexus between established standards and public character. In the event that the nexus is frail, at that point transfers might be generally unproblematic. For instance, in supporting implantation of Western-type private property rights and against constitutionalization of social rights in new constitutions for earlier communist East European commonwealths on the move to showcase economies, one observer watches:

It is regularly said that constitutions, as a type of higher law, must be viable with the way of life and mores of those whom they control. In one sense, in any case, the inverse is valid. Protected arrangements ought to be intended to neutralize exactly those parts of a nation's way of life and custom that are probably going to create hurt through that nation's customary political cycles. There is an enormous distinction between the dangers of damage looked by a country submitted by culture and history to free business sectors, and the relating dangers in a country submitted by culture and history to standardized savings and general state protection.

Some have contended that the connection between a nation's constitution and its public character may shift extraordinarily. Subsequently, Mark Tushnet has differentiated the Indian Constitution, which he describes as very eliminated from the nation's personality, to the US Constitution, which he guarantees communicates the public character. Does this imply a nation like the United States ought to be less defenseless to sacred transfers than one like India? Or on the other hand does it essentially recommend that nations are available to various types of transfers, contingent upon how intently their constitution is connected to their public character? Protected impact or transfers can be either certain or negative. As Andrzej Rapaczynski determines with regards to getting from the United States: By 'positive impact' I mean the selection or change of a legitimate idea, convention, or foundation demonstrated in entire or to a limited extent on an American unique, where those dependable know about the American point of reference and this mindfulness has some influence in their choice. A model is the selection of the American kind of federalism in Australia, or the impact of American First Amendment teachings on the free discourse law of Israel. By 'negative impact,' I mean a cycle in which an American model is known, thought of, and dismissed, or in which an American encounter apparent as bothersome is utilized as a contention for not following the American model. Instances of this sort of impact are given by the

Indian choice not to remember a fair treatment proviso for the Indian constitution, or the depiction of legal audit as a traditionalist American organization in forestalling its foundation in France in the primary portion of the twentieth century. Regardless, impacts and transfers will in general reflect change as opposed to simple replicating. For instance, the Indian dismissal of a fair treatment statement originated from a consideration of the US involvement with revering meaningful property standards in the mid twentieth century. Although this translation of the Due Process Clause was renounced in the United States in the 1930s, the Indian composers, acting in the last part of the 1940s, considered the US experience and explicitly picked to reject property fair treatment rights from their new constitution to guarantee against rehashing the US Lochner experience. Maybe the most overwhelming undertaking defying the comparativist is that of appropriately assessing likenesses and contrasts. Starting appearances may not demonstrate accurate. Partially, as basic scholars have cautioned, comparativists may overestimate similitudes for philosophical reasons. Günther Frankenberg has censured standard comparativists as 'Somewhat English Eurocentric' paternalists inclined to forcing Western authoritative methodologies regarding the matter and has described near law as 'a postmodern type of triumph executed through lawful transfers and harmonization strategies'.

On the other hand, the comparativist may overemphasize contrasts and subsequently neglect to concentrate on more significant likenesses. Also, the last disappointment may either be because of a disappointment of translation in light of a lacking handle of an unfamiliar established culture or to a philosophical inclination. Once joined onto an alternate sacred framework, transfers can develop, advance, or decay. Development and advancement are standard inside household protected frameworks and it is hence obvious that an imported established unit or complex ought to do similarly while adjusting to the new soil into which it has been embedded. Decay, interestingly, may originate from a transfer being a slip-up or for the most part vital with the bringing in country having plans out and out not the same as those built up in the sending out nation. A striking case of decay, that may have initially laid on mixed up ID and frequently later astutely appropriated for key objects, is the almost verbatim importation of US partition of forces and federalism by some Latin American nations. Strikingly, these transfers of a framework gave to a division and decentralization of forces to protect 'balanced governance have on numerous events been mixed toward virtual presidential fascism with full centralization of all powers. In aggregate, sacred transfers, both positive and negative, assume a focal job in established plan and arrangement. An appropriate handle regarding the matter is hence fundamental for the two members and eyewitnesses taking part in similar established investigation.

Boundaries of the Field: A significant inquiry raised by the development of the field of near established law is step by step instructions to characterize the external limits of the wonder to be contemplated. The investigation of relative established law, most researchers concur, is something unmistakable from the investigation of near private law or non-sacred law, yet researchers additionally vary essentially by the way they draw this qualification. Besides, the undeniably worldwide setting of constitution-production, in which standards are created across outskirts, requires some thoughtfulness regarding the relationship among constitutions and worldwide law. Maybe the most direct manner by which to characterize the sacred space is by reference to the content of lawful instruments that are explicitly marked by their drafters as 'protected'.

This is the methodology taken, nearly by need, by those researchers in the field who do enormous scope experimental work. It is additionally a methodology often embraced by researchers occupied with additional subjective exploration: the most clear instances of this are found generally in those parts managing questions identifying with established plan and update, however such an approach is additionally a significant definitional beginning stage for a few later sections, for example, A subsequent methodology centers around the possibility of entrenchment, or how much certain legitimate standards are invulnerable from change by normal instead of super-lion's share authoritative measures, either as an issue of authoritative document or political show. While formal entrenchment may regularly agree with a book based methodology (for example regardless of whether a standard is remembered for a composed archive named protected), different standards can be casually settled in as a common sense matter, and thus may be viewed as established in some sense. An attention on the entrenchment rule may offer very particular answers with regards to the extent of the similar sacred field. Hardly any commitments to the Handbook in truth embrace this methodology, nonetheless, likely since it is troublesome in about a short part to give point by point thought to the degree to which such casual shows exist. The more practical, and characterizes the sacred area by reference to the job of constitutions in both 'checking' and 'making' government power.

Maybe the most grounded proof of this methodology by these creators is their consideration regarding resolutions, for example, the UK Human Rights Act 1998, New Zealand Bill of Rights 1990 and the 1992 Israeli Basic Law on Human Dignity and Liberty, without itemized request concerning the casual entrenchment of such instruments. Another sign is the treatment of constitutions, or

constitutionalism, as having a characteristically 'supportive of rights' direction: this is certain, for instance, in concern recommendation that global law may have an 'anti-constitutional' measurement in the counter psychological warfare setting , and recommendation that sacred instruments will in general display a characteristic rather than simply instrumental responsibility to singular rights. This sort of teleological way to deal with the meaning of the field which he marks 'worldwide constitutionalism "as venture" however in doing so eventually proceeds to propose an utilitarian meaning of the 'established' space, whereby protected standards are characterized by reference to their job in distributing political force. A fourth methodology is more sociological and open-finished, and connected to the manner by which public entertainers comprehend local legitimate standards as protected. the exchange among established and conventional locale on the structure and extent of protected rights; yet additionally conflicts that huge work despite everything stays to be finished by researchers in the field.

A focal inquiry practically the entirety of the supporters of the Handbook or manual take up is the degree to which, in different sacred sub-fields, one watches examples of established closeness or then again even union after some time. For certain legislators, this is generally an issue of recognizing examples of sovereign similitude, or contrast, inside a specific sub-gathering of nations. These creators' cautious furthermore, severe thought of the constitutional situation in various nations makes it testing to address the issue of union on a really worldwide scale Notwithstanding, in any event, for these creators, the diverse established models or originals they distinguish may propose in any event some conditional decisions about worldwide established examples.

Different legislators unequivocally point to think about how much there is general consecrated closeness or union, in a specific zone, over the globe. The most widely recognized example that writers in the Oxford Handbook distinguish is one of expansive closeness at a theoretical protected level, along with huge heterogeneity or polarization (for example closeness just among nations in a specific sacred sub-gathering, and not over diverse sub-gatherings of nations) at a more concrete or explicit degree of established correlation. For instance, in chapters, Readers noticed that while practically all nations around the world presently incorporate conventional arrangement for established change , the recurrence and capacity of formal sacred change shifts essentially across nations, as does the manner by which nations' constitutions make it more hard for governing bodies to pass sacred corrections rather than customary enactment. Ginsburg notes both an example of wide similitude across nations with regards to the life expectancy or continuance of constitutions most constitutions for most nations kick the bucket very youthful, yet there is noteworthy local and other variety in both the watched and anticipated pace of perseverance.

In investigating inquiries of sovereign personality and enrollment, Scholar proposes significant shared traits across nations by way they have fashioned a 'sacred personality' after some time, by facing different wellsprings of disharmony inside their own sacred framework or conventions, yet additionally notes significant contrasts among nations in the pretended by sacred content, history, and various foundations and understandings of constitutionalism.

Upcoming Chapters distinguishes a comparable example in protected reactions to indigenous people groups: she noticed the manner by which, in each of the three nations she considers, there has been a time of 'legitimate regard for indigenous people groups' power and authority over their land' trailed by a time of retreat in the state's ability to perceive enforceable commitments towards indigenous individuals; a later time of extended rights-based acknowledgment, followed by political backfire; and the diligence of significant contrasts on more explicit protected inquiries, for example, the status of arrangements with indigenous people groups, issues of sway and jurisdictional control. Also, recognize an example of without a doubt, exceptionally theoretical likeness among nations in their meaning of citizenship and the limits of the constitution: it shows that Australia, Canada and Israel all offer a semi sacred way to deal with the guideline of citizenship, when contrasted with the unequivocally sacred methodology taken in the United States, yet they likewise show that the locales shift enormously by the way reader will realize the connection between legal meanings of citizenship and protected standards.

In addition, Crisis and Opportunity the opening of national legal orders to supra and international law, especially the law of the European Union and perhaps also the ECHR, has triggered a process of change, not only in national constitutional law, but also in its scholarship. Many believe that national constitutional law has even entered a new era. This change is, first of all, of a thematic nature: new provisions in national constitutional law, such as integration clauses, have attracted the attention of constitutional scholars, and traditional teachings, for example on sovereignty or democracy, have been rethought in light of the challenges of European law.

The change is also structural, wherein lies its true nature: thus, the discipline frees itself from the exclusive linkage to a specific source of law, that is, the domestic constitution; it develops new perspectives; comparative law gains in importance; a European level for institutionalized scientific exchange, career, reputation, and publication unfolds; and a European area of constitutional scholarship appears on the horizon. However, as definite as the existence of change may be, the diagnoses remain unsure as to what exactly is changing, what recommendations should

be made, and how one should react; and the prognosis is unclear as to what gestalt will permit the discipline to re-stabilize within the European legal area. One can already observe changes in scholarly styles, distribution of attention, public and private institutions, the media, reputational dynamics, and career paths, and perhaps even changes in loyalties and scholarly, political, and social identities.

One can state that the advent of a European legal area inspires innovative constitutional theories and strengthens interdisciplinary. Because, in principle, the law of the European Union has uniform effect in each member's constitutional order, one can expect here to observe the most advanced Europeanization in constitutional scholarship. In fact, constitutional scholarship everywhere is aware of this challenge, and Union law has been integrated everywhere as part of mandatory university course-work. Usually, Union law is not only offered in an introductory specialized class, but also integrated in the teaching of various bodies of law. It would be worthwhile to study whether this instruction in its present form fosters a European identity in the future bar. Many constitutional scholars were not satisfied with merely retracing the developments. Instead, constitutional scholarship provides a platform for many voices critical of Europeanization, calling for a slowing or redirecting of the process.

This fulfils both the discipline's societal function of contemporary critic and its practical function of intervening in the law's course of development. Often, categories of constitutional law, such as sovereignty or democracy, provide terminological points of reference for public discourse on the implications of European integration. In some states, only constitutional law, prepared by scholarly articles, could ultimately enable the formation of political opposition, which otherwise could find no voice in the political establishment. In a pluralist democracy, this scholarly engagement confirms the public role of this body of scholarship, thereby strengthening its functional legitimacy.

The constitutional impact of the ECHR is quite different for two main reasons. First, some states derive much of their domestic fundamental rights protection from the ECHR's provisions, whereas in other countries the autonomous fundamental rights of the national constitution fulfil this role. Secondly, the legal status of the Convention varies under different national constitutions: the ECHR does not in contrast to Union law determine its own status in domestic law. As a consequence, its role in research and university instruction among the member states is quite heterogeneous. For example, the ECHR has difficulty in finding its place in Germany along the spectrum of scholarly attention, and it stands at the periphery of the required legal curriculum. Here, though, Germany appears to be rather the exception that proves the rule: most domestic scholarship incorporates the ECHR in constitutional doctrine relating to national fundamental rights. And this holds true, a fortiori, when the ECHR's provisions substantively fulfil the role of constitutionally guaranteed fundamental rights: then academic study of the ECHR is not reserved to international law scholarship but becomes one of the main objects of constitutional scholarship. From the perspective of the European area of research and that of the European legal area, the question arises: have the rights of the ECHR, the jurisprudence that deals with them, whether in the European Court of Human Rights, the European Court of Justice, or national courts, and the relevant legal scholarship begun to form a lingua franca in the discourse on fundamental rights in the European legal area? This, in turn, confronts domestic constitutional scholarship, wherever the ECHR does not yet have a leading role, with a crucial question: should it continue its specific path of conceptual, doctrinal, and terminological development, guarding its identity, or instead join the European convoy for purposes of European cohesion, not least in order to gain a voice? Because fundamental rights have such a central role, the answer to this question will have deep implications for each and every part of constitutional law and the legal order in general. At least as varied as the respective role of the ECHR is the role of comparative law in the national systems of constitutional scholarship. In German constitutional law after the Second World War, some of the most important works had recourse to the law of the United States.

Comparative law's minimal influence may also be partially due to the occasionally held conviction that Germany's constitutional law is the best in the world: if so, little can be learned from foreign law. It is no accident that only as late as 2005 was a German-language textbook on comparative constitutional law published (having been penned by an Austrian!). A parallel situation unfolded in the United Kingdom, where both of the fundamental texts celebrate British constitutional law as the world's best: Bagehot with respect to the Constitution of the United States, and Dicey with French public law in mind. In Sweden, as well, right up to the threshold of European Union membership, constitutional scholarship remained under the spell of the national constitution. In the early 1990s, the situation began to alter. The 'second phase' of German public law saw an increase in the importance of intra-European comparative constitutionalism. Comparative law also made gains in the United Kingdom, albeit with less of a European connection than an interest in English-speaking, common law countries. The Swedish accession to the European Union even led to an international reorientation of Swedish public law, both as to content, for instance a new emphasis on separation of powers, and as to formal aspects, such as an increase in English-language

publications. In most other states, comparative law has for a much longer period played an important role in national constitutional studies, counting as an essential part of proper constitutional scholarship. Comparative law has been constitutive of both Greek and Polish public law since the early nineteenth century, with an accordingly strong academic emphasis. France's new system of constitutional scholarship includes a constituent comparative law component, facilitating a distancing from the dominant tradition of thought which has emphasized administrative law. Thus, an epoch of comparative law is dawning in the European legal area. This leads to the prognoses.

The various legislations arrive at comparable resolutions with regards to inquiries of constitutional structure. With regards to administrative chief relations that 'despite the fact that worries over the established detachment of forces are broadly common in other equitable republics, the particular US worry with the conflation of administrative [and executive] power, and the attending responsibility of authorization of this division of forces by the government legal executive, has neglected to increase a lot. In the setting of protected crisis systems, moreover I recommend that the example in popularity based social orders 'has perpetually been [one based on] "models of convenience", and that, in many vote based systems, there is 'unequivocal sacred reference to crises', yet that there are additionally both away from to this example of express established guideline, (for example, in the US, Japan and Belgium) and furthermore critical contrasts among nations in their way to deal with addresses, for example, which foundations are approved to announce a crisis, and by what implies; regardless of whether to receive a unitary or staggered approach to the meaning of crises; and the impacts of announcing a crisis, especially on the pleasure in singular rights. Comparative constitution is the most well-known example that distinguish the wide closeness at a theoretical protected level, along with huge heterogeneity or polarization (for example likeness just among nations in a specific sacred sub-gathering, and not over distinctive sub-gatherings of nations) at a more concrete or explicit degree of protected correlation. For instance, in upcoming note of that while practically all nations around the world presently incorporate proper arrangement for protected alteration , the recurrence and capacity of formal established change shifts essentially across nations, as does the manner by which nations' constitutions make it more hard for councils to pass sacred corrections instead of conventional enactment.

I have noted that both an example of wide closeness across nations with regards to the life expectancy or perseverance of constitutions most constitutions for most nations bite the dust very youthful, however there is huge local and other variety in both the watched and anticipated pace of perseverance., in investigating inquiries of protected character and participation, I proposes significant shared characteristics across nations by the way they have produced a 'protected character' after some time, by going up against different wellsprings of disharmony inside their own protected framework or customs, yet in addition notes significant contrasts among nations in the pretended by protected content, history, and various foundations and understandings of constitutionalism.

In general Sense Comparative Constitutional Law is the study of differences and similarities between the laws (legal systems) of different countries. More specifically, it involves the study of the different legal "systems" (or "families") in existence in the world, including the common law, the civil law, socialist law, Canon law, Jewish Law, Islamic law, Hindu law, and Chinese law. It includes the description and analysis of foreign legal systems, even where no explicit comparison is undertaken. The importance of comparative law has increased enormously in the present age of internationalism, economic globalization, and democratization. Comparative law is an academic discipline that involves the study of legal systems, including their constitutive elements and how they differ, and how their elements combine into a system.

Comparative civil law studies, for instance, show how the law of private relations is organized, interpreted and used in different systems or countries. The purposes of comparative law are:

- ✓ To attain a deeper knowledge of the legal systems in effect.
- ✓ To perfect the legal systems in effect.
- ✓ Possibly, to contribute to a unification of legal systems, of a smaller or larger scale.

Several disciplines have developed as separate branches of comparative law, including comparative constitutional law, comparative administrative law, comparative civil law (in the sense of the law of torts, contracts, property and obligations), comparative commercial law (in the sense of business organizations and trade), and comparative criminal law. Studies of these specific areas may be viewed as micro or macro comparative legal analysis, i.e. detailed comparisons of two countries, or broad-ranging legal studies of several countries.

The Concept of Constitutionalism:

Scholarly and strategy commitment with constitutions and constitutionalism have generally been worked around implicit structures inside which legitimated action can happen. My writing proposes both the confusion of a great part of the conversation and proposes a philosophical system that catches the suspicions about which constitutionalist talk has developed. Constitutionalism at

one time could be said to include the investigation of the idiosyncrasies of the remarkable residential protected system through which government was comprised and power regulated. No more. This exposition inspects the current talk of constitutionalism. That talk uncovers the current constitutionalism that constitutions are truly grounded either in national law and the remarkable will of a regionally characterized demos, is currently tested by a view that protected authenticity requires similarity with an arrangement of widespread standards grounded in an elaboration of the mores of the network of countries. Customary patriot constitutionalism searches internally for its philosophy just as its measuring stick for estimating others. Transnational constitutionalism looks to the normal protected customs of the network of states buttressed by universal standards and associations.

The value preserved within a constitutional state was process, and the prerogatives of the legislature. “The Rechtsstaat principle contemplates government according to law and allows a remedy to be obtained in an impartial administrative court for governmental violations of the law. The right to obtain such relief, however, must be granted by the legislature, either in the form of a general grant or by specifically enumerating the type of violation for which a remedy may be obtained.” This idea remains a foundational element of the constitutions and underpins the nascent international system as well. “In most national communities, a law draws support from its having been made in accordance with the process established by the constitution, which is the ultimate rule of recognition.” No one was particularly fussy about the content of those constitutions. Democracy, for example, so important in modern understanding of constitutionalism, was viewed as a choice that might be rejected in whole or in part. It was the memorialization and institutionalization of political power that marked constitutions. It was the territorial borders of a state that marked its limits. Constitutions could be declared the product of a fiduciary obligation to ancestors for the protection of subjects. The constitutionalist assumptions are infrequently challenged yet serve to isolate gatherings of states based on such a regulating assumptions on which the state is composed patriot, transnational, common law, religious, or Marxist Leninist assumptions. Constitutions without authenticity are no constitution by any means, and authenticity is an element of values, which thus fill in as the establishment of constitutionalism. It is through the development of those qualities structures that worldwide law has come to assume an undeniably significant job. Dynamic character of the idea. Constitutionalism that constitutions are honestly grounded either in household law and the one of a kind will of a regionally characterized demos, is presently tested by a view that established authenticity requires similarity with an arrangement of all inclusive standards grounded in an elaboration of the mores of the network of countries. Conventional patriot constitutionalism searches internally for its belief system just as its measuring stick for estimating others.

Transnational constitutionalism looks to the normal sacred customs of the network of states buttressed by global standards and associations. The prize for both protected conservatives and transnationalists is control of the mechanics for characterizing constitutions, making a decision about them real, and making frameworks to implement basic originations of legitimate constitution making through global law. However, both rising constitutionalist talk, and the improvement of qualities rich administration frameworks proposes that an vitalizing philosophy additionally underlies constitutionalism all in all, a more extensive and more essential philosophy than those that support the specific values variations of patriot, transnational, religious and realist constitutionalism.

The object of this chapter is to draw from out of current practice and talk a working portrayal of the Meta philosophy that is constitutionalism all in all. That definition proposes the attributes of constitutionalism as beginning as an arrangement of scientific classification and legitimation that is grounded in a lot of regulating presumptions about which means and reason for government. These essential assumptions produce a philosophy of considerable and cycle impediments on state power, the substance of which is the standard focal point of constitutionalist banter. The constitutionalist assumptions are infrequently challenged yet serve to partition gatherings of states based on such a regulating assumptions on which the state is composed—patriot, transnational, normal law, religious, or Marxist Leninist assumptions. Constitutions without authenticity are no constitution by any means, and authenticity is a component of values, which thus fill in as the establishment of constitutionalism. It is through the development of those qualities structures that global law has come to assume an undeniably significant job.

England has been experiencing a period of significant sacred change in the wake of the measures instituted since 1997 in compatibility of the change plan of the Blair Government. Specifically those firmly associated with the governmental issues of sacred change normally attest the essential significance of sacred modernization for the future success and political congruity of the nation. However even a careless assessment of what has been said in the established discussion of ongoing years is sufficient to uncover how freely and ambiguously individuals talk about 'the constitution' and 'protected issues'. This stems partially from the way that the British constitution isn't to an enormous degree communicated in the classifications of authoritative and possibly enforceable legitimate standards, however gets rather primarily from the proceeding practices of

establishments and the ends drawn from them. This presents upon it something of the subtlety innate in all conventional codes of conduct just as delivering it an exceptionally political issue, to such an extent that it is frequently difficult to recognize what implies to be a Constitutional articulation based on what is in truth close to a declaration of a passing political inclination.

It is unequivocally in light of the fact that there is so much vulnerability and equivocalness in discussing the British constitution that it is attractive to introduce any investigation of what have so far been viewed as the chief highlights of that constitution and of the manners by which it is currently being changed with a few thought of constitutions all in all, of what is associated with having a constitution, and with that method of considering the requesting of social life which has frequently been alluded to as constitutionalism. Such a starting conversation may likewise have the upside of moving us away from the parochialism influencing such a great amount of contention about the constitution in England, advising us that, while Britain has certain uncommon established attributes, there are numerous different social orders which show hints of our eccentricities as well.

Once upon a time it was unnecessary to look beyond constitutions. Each represented the highest expression of the individual will of a political community, sovereign to the extent it could defend (and project) that sovereignty among the community of nations. A state was “conceived of as itself the sole source of legality, tall those laws which condition its own actions and determine the legal relations of those subject to its authority.” The principal focus was on lawfulness the adherence by functionaries to the rules and processes through which state power was organized and expressed. “A constitution allots the proper share of work to each and every part of the organism of the State, and thus maintains a proper connection between the different parts; while on the other hand, the Sovereign exercises his proper functions in accordance with the provisions of the constitution.” Lawfulness required government to be taken strictly in accordance with law but did not limit the range of lawful assertions of government power. Lawfulness rule of law was tied to avoidance of the tyranny of the individuals invoking state power, but not to the regulation of the substantive ends for which that power might be invoked. This was nicely bound up in German notions of the rule state.

Definition of Constitutionalism: Constitutionalism is descriptive of a complicated concept, deeply embedded in historical experience, which subjects the officials who exercise governmental powers to the limitations of a higher law. Constitutionalism proclaims the desirability of the rule of law as opposed to rule by the arbitrary judgment or mere fiat of public officials ... Throughout the literature dealing with modern public law and the foundations of statecraft the central element of the concept of constitutionalism is that in political society government officials are not free to do anything they please in any manner they choose; they are bound to observe both the limitations on power and the procedures which are set out in the supreme, constitutional law of the community. It may therefore be said that the touchstone of constitutionalism is the concept of limited government under a higher law.

The foundations of current liberal constitutionalism in the feeling of an assemblage of thoughts defending restricted government by assent and the standard of law are to be found predominantly in England, all the more explicitly in the political experience of the seventeenth century. This was an age of lawful, political, strict and philosophical contention about the terms on which the common request of society should rest. However as an unmistakable difference to this previous frequently energetic concern with attempting to characterize the 'essentials' of a worthy constitution, the present day British established custom has at any rate from around 1867, the date of the principal release of Walter Bagehot's popular paper The English Constitution, been described by a to some degree severe logic comparable to determining the standardizing states of the constitution and by something moving toward disdain for any genuine worry with the investigation of 'basics' rather than portrayal of 'what really occurs'.

The essential explanation behind this disregard of principled contention about the terms on which the constitution rests is that it has for well longer than a century been characterized by bid to broadly acknowledged institutional practices and congruities the utilizations of Parliament, the working acts of the bureau and government divisions, the shows of the government, the acts of the courts and the patience of judges, the shows overseeing the direct of government workers and, most as of late, the association and lead of ideological groups. Consequently established talk turned out to be basically observational depiction with a touch of history and good judgment tossed in to give it body. Bagehot, whose impact end up being suffering, built up a ground-breaking point of reference for such a spellbinding treatment of the constitution in wording of 'how things work', in other words what legislators and a portion of those related with them do inside specific institutional settings.

An auxiliary explanation behind the inclination against efficient standardizing pondering the constitution has been the relative scarcity for the vast majority of the twentieth century of lawful or jurisprudential commitments to investigation of what the constitution sums to. Essentially this has been a result of the way that the constitution has not been communicated or seen principally in legitimate classifications, what's more, for an assortment of reasons has not been the object of much lawful or juridical understanding. There has, along these lines, been minimal material accessible on

which to construct an elective comprehension of the constitution. It is against this foundation of trust in the congruities of institutional practices also, in the limit of open officeholders to communicate the conventional propensities alongside their 'bumbling significant premises' from one age to another that the detachment to the quest for dynamic inquiries concerning the establishments of the constitution can best be perceived.

To the extent that there has been principle, at that point it has added up to minimal more than the attestation of an inborn British limit with respect to logic and institutional transformation. As per this perspective on the issue there is little to be picked up from bringing up major issues about the presuppositions on which practice may be held to rest. It is much better essentially to trust to the capacity to adjust established practices in light of changes in conditions and to make such thoughts supporting restricted government by assent and the standard of law are to be found mostly in England, all the more explicitly in the political experience of the seventeenth century. This was an age of lawful, political, strict and philosophical contention about the terms on which the common request of society should rest. However as an unmistakable difference to this previous regularly enthusiastic concern with attempting to characterize the 'basics' of a satisfactory constitution, the current British protected convention has at any rate from approximately 1867, the date of the primary release of Walter Bagehot's popular paper The English Constitution, been portrayed by a to some degree fierce sober mindedness comparable to determining the regulating states of the constitution and by something moving toward scorn for any genuine worry with the investigation of 'basics' rather than portrayal of 'what really occurs'.

The fundamental explanation behind this disregard of principled contention about the terms on which the constitution rests is that it has for well longer than a century been characterized by offer to broadly acknowledged institutional practices and coherencies the utilizations of Parliament, the working acts of the bureau and government offices, the shows of the government, the acts of the courts and the patience of judges, the shows administering the direct of government employees and, most as of late, the association and lead of ideological groups. Along these lines established talk turned out to be basically exact portrayal with a touch of history and good judgment tossed in to give it body. Bagehot, whose impact end up being suffering, built up an amazing point of reference for such an elucidating treatment of the constitution in wording of 'how things work', in other words what legislators and a portion of those related with them do inside specific institutional settings.

An optional explanation behind the predisposition against methodical standardizing pondering the constitution has been the relative lack for a large portion of the twentieth century of legitimate or jurisprudential commitments to examination of what the constitution sums to. Essentially this has been an outcome of the way that the constitution has not been communicated or seen basically in lawful classes, what's more, for an assortment of reasons has not been the object of much legitimate or juridical understanding. There has, hence, been minimal material accessible on which to assemble an elective comprehension of the constitution. It is against this foundation of trust in the progressions of institutional practices furthermore, in the limit of open officeholders to communicate the customary propensities alongside their 'garbled significant premises' from one age to another that the lack of interest to the quest for unique inquiries regarding the establishments of the constitution can best be perceived. To the extent that there has been regulation, at that point it has added up to minimal more than the affirmation of a natural British limit with respect to sober mindedness and institutional transformation. As per this perspective on the issue there is little to be picked up from bringing up principal issues about the presuppositions on which practice may be held to rest.

Protected investigation of associations in global legitimate space can't mean cheerfully relocating the old style hypotheses, developed in the support of the cutting edge state. There is a significant issue of fit. It is, today, moderately basic to catch wind of constitution past the express the constituent instruments of universal associations are frequently alluded to as their constitutions, and every so often even as parts of a unified world constitution. This talk on the constitutions of universal associations or the "worldwide constitution" frequently offers ascend to a method of study of the activities of those body's natural to the household talk, in light of describing activities as established or unlawful. The thought is that an unlawful activity one taken by any association in overabundance of its assigned forces or in repudiation of express cutoff points in the association's constituent instrument must be perceived as ultra vires , invalid and void. 8 However, it is likewise regularly recognized that considering the expansive constituent instruments of certain worldwide associations, and the general absence of protected survey in the greater part of them, it is difficult faction to know precisely which activities of universal associations are unlawful. Further, when their ultra vires nature is clear, in what manner can such acts be nullifi ed or voided? Who gets the chance to state when, and how much?

In the midst of the entirety of the discussion about constitutions on the global plane, it is in some cases diffi clique to perceive how the protected examination bears calculated organic product. If the issue is an especially intensive confl ation that happens in the sending of the idea of a constitution in global lawful talk, between the systematic evaluation of lawfulness (i.e., the legitimacy

of activities under the constitution) and the political situation of constitutionalism—the possibility that an association depended with forces of administration ought to be built in such a route as far as possible the maltreatment of those forces.

The subject of what an association can or can't do under its order will in general be mistaken for the topic of what the association ought to have the option to do regardless of whether certain activities would be authentic or just. These inquiries are not indistinguishable. Wrongness and shamefulness ought not to be mistaken for wrongdoing; maybe much more significantly, legitimateness alone doesn't essentially render an activity real or just. At the end of the day, the ethos of constitutionalism doesn't really light up whether a comprised association is acting "naturally" under its order, nor does an established activity essentially comport with constitutionalism.

Different Era of Constitutionalism:

Ancient constitutionalism: The origins of constitutionalism can be traced to ancient Greece particularly in the writings of Politics, Nicomachean Ethics, and Constitution of Athens by Aristotle. Aristotle states that “the politician and lawgiver is wholly occupied with the city-state, and the constitution is a certain way of organizing those who inhabit the city-state”. His general theory of constitutions is set forth in Politics III. He described the concept of constitutionalism as the “arrangement of the offices in a polis.” Roman law expanded on Aristotle’s basics including the notions of generalized equality, a universal regularity, and a hierarchy of types of laws. In the Roman Empire, the word Constitution, in its Latin form became the technical term for acts of legislation by the emperor. Later the Church borrowed it and applied it to ecclesiastical regulations for the whole Church or for certain provisions. This term came back in to use in the later middle ages as applicable to secular enactments also. Therefore, it is not uncommon to find other words such’ lex’ or ‘edictum’ used in equivalent terms and at times interchangeably with the term ‘constitutio’. Constitutionalism in this era claimed acceptance through religion and tradition. Constitutional frameworks were quoted to spring up from divine sources while emerging laws of those days were legitimized as a return to the “ancient constitution.” It was not until the fall of Holy Roman Empire due to the wars of the Reformation that it became inevitable to look out for a new basis of order and stability.

“Even in an imposition of a new constitutional order, novelty could always be legitimized by reference to an alleged return to a more or less fictitious “ancient constitution.” It was only in Italy during the Renaissance and in England after the Reformation that the “great modern fallacy” (as the Swiss historian Jacob Burckhardt called it) was established, according to which citizens could rationally and deliberately adopt a new constitution to meet their needs.

I need to propose a way to deal with analyzing a sacred framework dependent on recognizing two related yet adroitly particular points of view. I propose that a constitution, and all forces practiced compliant with it, ought to be all the while seen what's more, surveyed from a juridical viewpoint (accentuating legitimacy and the pecking order of standards) and a political point of view (underlining the dissemination of intensity the division of abilities among the organs, governing rules and audit). These focal points enlighten various realities about the activity of intensity inside an established framework.

The first asks whether specific standards are substantial in accordance with the regularizing progression of the sacred framework at the end of the day whether they have been declared under right methodology (procedural legitimacy), and whether they have or have not been proclaimed in abundance of the standard giving organ's assigned skills under the constitution (intra/ultra vires). The subsequent viewpoint evaluates the activity of the association and its organs by underscoring powers rather than the chain of command of standards: instead of ask into legitimacy, it inspects how the capabilities for producing, deciphering, and applying legitimate standards are portrayed, separated, checked, adjusted, furthermore, investigated. In the event that the fi rst perspective asks whether a standard is unavoidably substantial, the second approaches how the specific framework accommodates the creation, understanding, furthermore, use of standards, so as to welcome examination of the nature of the constitution from the viewpoint of political hypothesis: e.g., in light of relative exact examination under the rubric of good administration, the absolutely regularizing language of equity, or the somewhat experimental and mostly regularizing sociological classification of authenticity.

The French and American constitutions, it could be written for the establishment of a government apparatus embracing certain higher values or, like the British constitution, represent unwritten but still binding higher law articulated through the organs established for that purpose. The law of the constitution, then, could be understood essentially as a theoretic of higher law grounded in the power of uniquely constituted and inward-looking political communities. But, in the aftermath of the Second World War and in the context of the construction of an institutional framework for discourse (and action) among the community of nations, values have become important in constitutions, and the ability of states to insulate themselves from the influence of others has been substantially reduced. Emerging from that war were the beginnings of a consensus

that values matter in the establishment of constitutions, that such values were superior in authority to any peculiarities of national sentiment, and that they could be enforced.

The modern trend has been to distinguish between constitutionalism and constitution. Their relationship has become common place enough that their parameters are assumed. Thus, for example: Constitutions, in contrast, are premised on the acceptance of state power as legitimate. If significant strife exists on the ground or the government is not accepted by the people, then the constitution may become a "façade constitution." A façade constitution can declare aspirational principles and adopt power structures for government, but such provisions and principles are ineffective and potentially delegitimized because they are not followed in practice. A constitution without legitimacy is no constitution at all. It is outside the law in the sense that it ought to be respected by the community against which it is applied. "Insurgency, by definition, undermines a shared constitutionalism. Rory Stewart perhaps puts it best: 'It did not matter what human rights were enshrined in documents if your local sheikh, party leader, or policeman could still beat you up on the street corner.' Legitimacy is a function of values, which in turn serve as the foundation of constitutionalism. Constitutionalism thus might be understood as a systematization of thinking about constitutions grounded in the development since the mid twentieth century of supranational normative systems against which constitutions are legitimated. Communities of nations can rely on that systematization to legitimate, in turn, their actions against non-legitimate governments under principles of international law, or against which the populace can legitimately rebel.

Constitutions are distinguished from constitutionalism the latter serving as a means of evaluating the form, substance, and legitimacy of the former. Constitutionalism is grounded in the emergence of a transnational culture of values, it is not clear which of those value systems is legitimate. More importantly, perhaps, it is unclear which of those value systems is privileged above the others. I have suggested that a sort of transnational constitutionalism has sought to claim the privilege of arbitrating constitutional values (and thus constitutional legitimacy). That system is transnational and secular. It is grounded in the development of a single system designed to give authoritative expression to the customary values of the community of nations that together make up the values systems of constitutionalism and constitutional legitimacy. But rival systems of constitutionalism have emerged, the most potent currently being those grounded in the normative systems of Universalist religion.

Modern Constitutionalism: Constitutionalism in today's sense is much different than original Roman interpretation. Constitutionalism declares a certain set of rights and is considered to be a prerequisite for a successful democracy. This includes procedural stability, accountability, and representation, division of power, and openness and disclosure. Constitutionalism plays a major function in today's western legal cultures and is a necessity for modern legal structures Constitution limits absolute power. This is achieved by placing conditions on the use of that power, by requiring the sharing of power with those subject to it through a process of debate, and by establishing limits which the law may not violate. No government, President or Monarch, no institution of law or enforcement, should be allowed to exist and to function without a constitution. No one should exercise power over others unless that power and the conditions of its use have been strictly defined. In the words of Thomas Paine: "government without a constitution is power without right". For example, the constituent act of the people entrusts certain definite powers to their government, "enumerated powers" as we term them, it is a necessary inference that this government cannot exercise any powers not so "enumerated." All constitutional government is by definition limited government. We may not agree that these limits are necessarily "antecedent" in the sense of that term that Paine had in mind, but for everyone they must be in some sense "fundamental," and fundamental not merely because they are basic, but because they are also unalterable by ordinary legal process. There are written and unwritten Constitutions. The Constitution of India is written. The Constitution of the United States of America is the shortest written Constitution while the English constitutional tradition is on the other hand unwritten and that appears to be not too demanding with regard to catalogues to necessary elements of Constitutionalism.

Constitutionalism also is a form of political thought and action that seeks to prevent tyranny and guarantees the liberty and rights of individuals on which free society depends. It is based on the idea that government can and should be limited in its powers, and that its authority depends on enforcing these limitations. In this regard, constitutionalism is a political theory concerned with the architectural structure and basic values of the society and the government. It aims to make the world comprehensible and, to some extent, controllable. Historically, it is preoccupied with the problem of power, particularly the power of those who would rule, especially when that rule might be arbitrary". Constitutionalism, then, could be understood as the expression of a set of abstract moral principles. It suggests certain principles of right and justice which are entitled to prevail on the basis of their own intrinsic excellence, altogether regardless of the attitude of those who wield the physical resources of the community.

Core Features of Constitutionalism: There are two core features of Constitutionalism is described below-

1. Fundamental law and legitimacy of government: One of the most salient features of constitutionalism is that it describes and prescribes both the source and the limits of government power derived from fundamental law. William H. Hamilton has captured this dual aspect by noting that constitutionalism "is the name given to the trust which men repose in the power of words engrossed on parchment to keep a government in order."

Moreover, whether reflecting a descriptive or prescriptive focus, treatments of the concept of constitutionalism all deal with the legitimacy of government. One recent assessment of American constitutionalism, for example, notes that the idea of constitutionalism serves to define what it is that "grants and guides the legitimate exercise of government authority". Similarly, historian Gordon S. Wood described this American constitutionalism as "advanced thinking" on the nature of constitutions in which the constitution was conceived to be a "set of fundamental rules by which even the supreme power of the state shall be governed." Ultimately, American constitutionalism came to rest on the collective sovereignty of the people, the source that legitimized American governments.

2. Civil rights and liberties: Constitutionalism is not simply about the power structure of society. It also asks for a strong protection of the interests of citizens, civil rights as well as civil liberties, especially for the social minorities, and has a close relation with democracy.

The Constitution and Constitutionalism: There is a distinction between a government with a constitution and constitutionalism and a government with constitution without constitutionalism. Every political system has a constitution whether it is a constitutional system or not. In this sense, the constitution is no more than a description of the makeup or composition of a political system. It portrays the way a polity is constituted, that is, how its foundation is set forth, its first principles articulated, its character shaped, and its government organized and operated. The fact that a political system has such a constitution even if it is a formally written document does not mean it meets the standard of constitutionalism. Under the standard of constitutionalism, governments must themselves be bound by rules. To implement this standard, a constitution that reflects the principles of the constitutionalism will serve as a higher law. This higher law establishes and limits government in order to protect individual rights as well as to promote the common good. Instances of constitution without constitutionalism can be seen in some African states.

The former Apartheid regime of South Africa had a constitution without constitutionalism. Also, General Sani Abacha of Nigeria, Idi Amin of Uganda, Jeane Bedel Bokassa of the Central Africa Empire (now Republic), Marcias Nguema of Equatorial Guinea as well as Gnasingbe Eyadema of Togo had constitutions in one form or the other. But as we all know, these so-called constitutions were devoid of constitutionalism. More importantly, though some of them could be claimed to be legal documents, they were certainly not legitimate. In fact, the so-called constitutions were instruments for terrorizing the poor and the weak, legitimating corruption and privatization of the state, and rationalizing the suffocating of civil society and subservient relationships with imperialism.

Why were these constitutions illegitimate even if legal? The truth is that they were not compacted through a truly open and democratic process that paid attention to the dreams, pains, and aspirations of the people, their communities, and constituencies. In fact, most of these were directly imposed constitutions or elite-driven processes that treat the people and their ideas with disrespect, if not contempt. The hallmark of this constitution is that they were never subjected to popular debates or referenda. If at any point the constitutions were subjected to public debates, such debates were often brief, carefully monitored and manipulated. The documents, either in draft or final forms, were never made available to the people.

As a comparative Fact think that if referenda were called, the results were rigged in favour of the state and its custodians. In some cases, the reports of constitutional commissions were simply ignored after elaborate ceremonies aimed at diverting public attention and convincing donors and the international community that something positive was being done about democracy.

In Nigeria, not only were general and presidential elections conducted without a constitution, but also the draft was never widely debated, seen or voted upon by the people. Even after the presidential election, the government continued to keep the constitution a secret and away from the Nigerian people. In an open demonstration of military arrogance and insensitivity to the popular will, the General Abdul salami Abu bakar junta refused to release the constitution even after the military ruling council spent three days “putting finishing touches” to what was supposed to be a peoples’ document. In Uganda, Idi Amin turned the state to police state; the constitution remained meaningless throughout his time until his government was overthrown. Gnasingbe Eyadema of Togo was not left out, the constitution was amended to give way for family succession. It is not surprising therefore that constitution in postcolonial Africa has never been taken as sacred. This disdainful attitude to constitution in Africa militates against its being properly employed to serve the course of democracy. A nation’s constitution should be its most valued document. Preparing it is a sacred and weighty undertaking that should not be addressed in isolation of the people. Nothing is more important in the political culture and history of a nation than the constitution by which its citizens are ruled. However, the constitution does not really occupy a pride of place in the life of the

contemporary states in Africa be it under the military or civilian regime. Under a military rule, the constitution is simply ignored except where it is needed by the military elite to give a similitude of legitimacy to some policies. Almost the same attitude to the constitution is shown by political leaders in Africa. The African elites in their quest for absolute power have no qualms about subverting the constitution and manipulating it to serve the interests of small elites. Consequently, what we have in many countries has been constitution without constitutionalism. The effect of constitution without constitutionalism.

Political problems: They relate to actions and in-action on the part of those who are in authority. The listed items include: lack of action by government and its agencies on reported cases of act of indiscipline, corrupt government officials, political fanaticism, lack of concern for people's welfare, Conflicting rules and regulations, Poor management of resources and Lack of good government. Noncompliance of members with rules and regulations, resulting in disorderly behavior and impunity is the order of the day. Culture of violence is been instituted in the system. The government survives on the control of the means of violence, thus any agitation is often met with official violence. This has affected the political society to the extent that politicians often result to the use of violence as an instrument for achieving their goals in state.

Today the struggles for political power and control of state resources have brought instability in term of peace and social order to most developing countries. In addition to this, many African were made to feel that they are second rate citizen, possibly because of their political alignment. A non-member of the ruling party becomes target for attack in the long run; many were either assassinated or incarcerated. Furthermore, those areas that fail to support the ruling party were usually left undeveloped which accounted for uneven development of many areas in the world.

No citizen who feels estranged by the government under which he lives can give to that government that instructive loyalty which is the outward and visible sign of true patriotism. Constitution without constitutionalism also extends its tentacle to the area of religion. Religion environment which was regarded as a sacred place of morality have been polluted because the lack constitutionalism in the state make it possible for people of diabolical mind to seize the opportunity to practice their nefarious activities.

Religious as an institution supposed to teach moral and decent behavior to its adherents. If religious values promote the human good by its emphasis on the good of the community then, the modern religious value arising from religions in Africa should promote sustainable and integral development. James D Wolfensohn former President of the World Bank foresaw the need for closer collaboration of the World Bank and other development institutions with religion and remarked: Religion is an omnipresent and seamless part of daily life, taking an infinite variety of forms that are part of the distinctive quality of each community. Religion could thus not be seen as something apart and personal. It is, rather, a dimension of life that suffuses whatever people do. Religion has an effect on many people's attitudes to everything, including such matters as savings, investment and a host of economic decisions.

It influences area we had come to see as vital for successful development, like schooling, gender quality, and approaches to health care. In short, religion could be an important driver of change, even as it could be a break to progress. As a result of such dialogue there is a realization that the religious faith of people help shape their view of development and their life in general. Religion provides the unifying power that grounds the socio-political, economic, technological, cultural and moral dynamics of a culture. But in a situation where by the adherent of ideology have bye bass the tenant of the idealist and politicize the profane, missing idealism with politics and as well as committing sacrilege because the state is lawless, then religion that supposed to teach moral and decent behaviour to its adherents now become the sources of indiscipline, lack of proper religious moral teachings, lack of fear of God, lack of commitment to religious tenets, lack of disciplined religious upbringing, hatred of rival religious or religious sects member and religious fanaticism.

Management Slacks: Poor management on the part of those at the helm of affair is another cause of indiscipline. Many opportunists find themselves at the corridor of power because their party is at the center. Many of this people are inefficient and could not deliver. Some of them often disgrace the government of the day because as poor are they are often overzealous and power drunk. The constitution is not being taking to consideration before chosen them and they see no reason why they should live by that constitution. And constitutionalism which should serve as constrain is absent in the state, what do we expect; there is bound to be maladministration of things in the state which may not pave way for the smooth running of the state.

Motivational problem: Act of indiscipline, lawlessness, act of impunity is not a motivational factor for the citizen in the state instead it discourages people. Motivation is a force driving people to do things, it is a drive which is variously linked with wages, instinct, purposes, goods, desires, wants, needs, and action behind every behaviour is a motive, therefore all behaviour to motivate, it is looked at as an involvement of the physiological and social aspect of human beings. Basically, motivation means an individual needs, desire and concepts that cause him or her to act in a particular manner, our interest in motivation is basically with respect to work, it is driven towards achieving certain

objectives in an organization and sometimes regarded and a tool which may be in form of financial incentive such as provision of housing scheme for staff, health scheme, recreation center and end of the year bonus, promotion. Some countries give more attention to motivational system because it always contributes to the improvement of state productivity. Here lack of motivation of all types in work within the state is listed as a cause of acts of indiscipline.

Furthermore, disregard to societal values and norms are other consequences of constitution without constitutionalism. Norms are not law but a way of life that has been adhered to by a group of people and it has been accepted and transmitted from generation to generation. Adherence to this rule is voluntary but the society has a way of sanctioning erring individuals who indulged in any of the following: Gross unfaithfulness, dishonesty, laziness, lack of commitment to organization and nation, anxiety to attain great height without works worth unnecessary haste going to nowhere, lack of trust. Sanctions by way of punishment are not expected to be different from the general mode of thought in other societies. There are many types of sanction or punishment just as we have it in other societies which are meted out to offenders. The nature of the offence should be proportional to the type of sanction or punishment meted to the offender. "Obviously, no offender escapes punishment in society while this is true, no one was made a scapegoat for the offence he has not committed; doing so amounts to incurring the wrath of the ancestors".

Sanction here is expected to serve as a deterrent to others. When a society values and norms are respected and taking to cognizance, the erring individual would try as much as possible not to go against the acceptance values and norms of the society; thus individual we abstain from any unwelcome behavior that may tarnish the image of the society but constitution without constitutionalism will promote disrespect to norms and values of the society and it may not be able to perform it expected function in the society.

Military as an institution: the military as an institution in many countries had jettison their role as a professional who should maintained and secure the territorial integrity of their country but instead taken over the government they are expected to protect. They rule by decree, though they claim that it is a legal document, but certainly not legitimate. In fact, decrees are instruments for terrorizing the poor and the weak, legitimating corruption and privatization of the state, and rationalizing the suffocating of civil society and subservient relationships with imperialism. But as we all know, these so-called constitutions were devoid of constitutionalism.

Judiciary as an institution: This relate to the functioning of the legal and judicial systems in countries. Solid judicial institution can enhance sustainable development. In a country where legal/judicial environments in consonant with the indices that can instigate development the following attribute of judicial legal content will be obvious. There will be independence of the judiciary, proper enforcement of laws, incorrupt law enforcement agents, lack of corruption in the judicial system, and fast process of trial and good welfare for the judges.

In addition to this, to make the work of governance easy; the constitution of the country must be the one that we accommodate constitutionalism. Constitution with constitutionalism we enhance the sustainability of development in a country. In State what we have instead is constitution without constitutionalism. The functioning of the legal and judicial systems in states are worrisome. The legal/judicial environments in those countries are as follows:

1. lack of independence of the judiciary
2. lack of proper enforcement of laws
3. corrupt law enforcement agents
4. corruption in the judicial system
5. Very slow process of trial and lack of good welfare for the judges that made many of them to take bribe and bypass judgment.

Leadership based problem:

In an ideal society, leaders are expected to be role model. But the problem with countries without constitution and constitutionalism has remained the issue of bad leadership. The leaders lack discipline and the citizens are following suit. Legal (Constitutional non- directive) leaders have always been known for not obeying the constitution, since the constitution itself lacks merit. The colonialists have already set in place a bad example of governance. As an example Africa lack good leadership that will confront this dilemma and thus take Africa out of its debilitating condition. Leadership is observed to be the most critical, such that many depict the continent as "a faraway place where good people go hungry, bad people run government, and chaos and anarchy are the norm." More so, it has been rightly observed that under "the various oppressive authoritarian regimes which countries have had the misfortune to chafe under for the greater part of its post-colonial history, Africans have been treated to a bastardization of constitutionalism and growing impotence of the judiciary in the face of countless acts of impunity, executive lawlessness and economic brigandage by praetorian guards that had imposed themselves on the political landscape of the nation".

The dearth of good leadership in postcolonial Africa "is inversely proportional to the widespread poverty, not only of ideas about running the societies and states, but also the impoverishment of the populace". More crucially, however, the failure of the African state to properly manage its affairs is partly responsible for it. This circumstance is additionally aggravated by the ethical debauchery of the general public. Unscrupulous directs or demonstrations of indiscipline are the most significant issue standing up to nations. This demonstration of indiscipline has eating profound to the textures of the general public. The ethical intuition of many have long dead to the degree that they are prepared to do anything for the sake of cash, anyone that remain on their way could be eliminate freely. A ton of open assets have been gone through trying different things with structures, projects and cycles that could prompt good recharging. These structures and projects have been now and again worked to the detriment of clouding the substance they were intended to advance. This has seemingly originated from the nonappearance of a couple of crucial fixings fundamental for moral recovery to happen, including genuine bigotry against debasement since the critical monetary state of the greater part make social indecencies like defilement to flourish and lawmaker with free admittance to open assets are in acceptable situation to impact the individuals who are monetarily ruined to participate in political savagery by actuating them with cash.

The nonappearance of constitutionalism in our constitution gives space for endemic defilement or profiteering by the decision elites and protection from straightforwardness, responsibility and political portrayals. This remembers wide spread loss of mainstream certainty for state foundations and cycle. The political leaders of the nation may opposing the open announcement of his advantages as the constitution and set of principles request.

The individuals from public get together, lead representatives and all lawmakers get unbalanced compensation which can be portrayed as criminal. Lead representatives choose more uncommon counsels than the territories where guidance is really required. Nobody thinks anything the administration says and everyone concurs that the government officials are among the most degenerate and corrupt on the planet.

There is likewise a vanishing of fundamental state works that serve the individuals, including crumbled framework, complete loss of motion of the wellbeing division at all levels, consistent cross country power disappointment and the chaperon adverse consequences for all segments of the economy; unavoidable joblessness, in this manner creating expanded outfitted burglary cutting over all periods of our kin, crippling vagrancy; retrogressive instructive projects and approaches. Likewise utilizing the state mechanical assembly for organizations that serve the decision elites, for example, the security powers, presidential staff, national bank, strategic administrations, and customs and assortment offices. These are at present the standard in numerous nations in the world.

There are more police officers ensuring lawmakers in countries than are accessible for typical police obligations. The common assistance has been demolished by transforming it into an instrument in the possession of lawmakers by making the top post political arrangement. Each adjustment in the common help has been to build the intensity of lawmakers over government workers and carry them under their influence to eliminate the significant job they play in checking debasement and keeping up fidelity in open workplaces.

Absence of Adequate Security is another region where constitution without constitutionalism has taken cost for nations. The hardware of law authorization is certainly frail and as long as the police power is feeble regarding workforce and preparing, brutality and instability will keep on flourishing.

Moreover, where security operators are favoring one side, undermining their position, brutality will be inescapable in light of the fact that individuals will lose trust in them to ensure their advantage and subsequently bring laws into their hands. The circumstance in most non-constitutional nations is so most exceedingly terrible to the degree that the brutality is being executed within the sight of military and police staff or by the military and police work force themselves. They help and abet very much positioned individual in the general public who perpetrated political savagery and go unpunished while rebuffing other people who carried out similar wrongdoing however are less amazing individuals from the general public, in this way expanding the issue of political viciousness in the general public. Cases of ruthless killings in political decision period are various. The most heartbreaking and upsetting part of the episodes is that these occurrences as a rule either occurred within the sight of police officers and fighters or quickly answered to them, we recently found that no capture would be made and no examinations would be completed. The situation made from the different episodes recorded so far gave the feeling that a few people were stopping the chance of this unlawfulness to wreck lives and properties of most Africans and Asians.

Absence of adherence to the standard and guideline set down in the constitution has prompted the rise of ethnic civilian armies in certain nations in part of nation, for instance in Nigeria and India; the ethnic civilian armies speak verbally and even straightforwardly on the condition of country. Some even went to the degree of participating in encounter with the state security powers in compatibility of their objectives and targets; they have various objectives and desires. For instance,

the development for the endurance is out to secure the enthusiasm of the constitutional fact, most particularly the resources misuse and ecological debasement of their territory.

Standards of the Constitutionalism and the Constitutional Framework: A political framework whether it has a proper constitution or not, will mirror the standards of constitutionalism just when its forces and organizations are restricted to the conditions of the constitution which mirror the fundamental standards of commission and trusteeship. In such manner, the constitution assumes the job of "higher law". The way that a political framework has a constitution, regardless of whether it is an officially composed record doesn't imply that it satisfies the guideline of constitutionalism. Under the norm of constitutionalism, governments must themselves be limited by rules. To actualize this norm, a constitution that mirrors the standards of constitutionalism will fill in as a higher law. This higher law builds up and restricts government so as to ensure singular rights.

Thus, the estimation of a constitution with constitutionalism lies in the way that it offers significance to the connection between the state and the residents and this constantly realizes the truly necessary social request. In this manner, the establishment of a reasonable social request in any general public depends on the heartfelt connection between the state and the residents as built up by the constitution. At the point when the empowering condition is noticeable, there will be a productive implicit understanding. Mueller perceives the critical capacity of the constitution when he depicts it as "a type of implicit understanding among residents characterizing the principles inside which the general public functions".

A further look uncovers that implicit understanding is value-based. It gives a circumstance, where individuals are more lenient toward each other to live joyfully. It is a groundbreaking understanding based on trust, giving a spot where residents can turn out to be completely human by having a character that is pull in regard for other people. In such manner, any constitution without constitutionalism may make a disengagement between the state and the residents, making it progressively hard for the residents to depend on the state. Accordingly, the general public turns into a field of different clashes and advancement of regular great is in this way yielded. For Africa to push ahead there is the need to advance toward constitution with constitutionalism. The legislature and its organizations should make a move on revealed instances of demonstration of indiscipline, degenerate government authorities, political obsession, and absence of worry for individuals' government assistance, Conflicting guidelines and guidelines and Poor administration of assets. The administration make essential move on any individual that neglect to agree to decide and guidelines that may bring about misconduct and exemption inside the state.

General observation of the Constitutionalism: Constitutionalism is sometimes regarded as a synonym for limited government. On some accounts, this doctrine is associated in its turn with minimal or less government. But that is only one interpretation and by no means the most prominent historically. A more representative general definition would be that constitutionalism seeks to prevent arbitrary government. At its most generic level, arbitrariness consists in the capacity of rulers to govern wilfully that is, with complete discretion and to serve their own interests rather than those of the ruled. Constitutionalism attempts to avoid these dangers by designing mechanisms that determine who can rule, how and for what purposes. However, constitutional traditions differ as to what precisely counts as an arbitrary act and which mechanisms offer the best defence against their occurring. The classical, neo-republican tradition of political constitutionalism identifies arbitrariness with domination of the ruled by their rulers, and seeks to avoid it by establishing a condition of political equality characterized by a balance of power between all the relevant groups and parties within a polity, so that no one can rule without consulting the interests of the ruled. The more modern, liberal tradition identifies arbitrariness with interference with individual rights, and seeks to establish protections for them via the separation of powers and a judicially protected constitution. Both traditions are present within most democracies and can be found side by side in many constitutions.

- The first tradition focuses on the design and functioning of the democratic process, including the selection of electoral systems and the choice between presidential or parliamentary forms of government, of unitary or federal arrangements, and of unicameralism or bicameralism. Although the detailing of these procedural mechanisms and the relations between them usually forms the bulk of most constitutional documents, their constitutional importance has come to be eclipsed in legal circles.
- The second tradition emphasises the specification and judicial protection of the different competences of the political system and of constitutionally entrenched rights by a constitutional court. However, political theorists and scientists disagree on whether these two traditions are complementary, mutually entailed or incompatible. The second is often seen as necessary to the theory and practice of constitutionalism in various particular Contexts, there are currently competing general accounts of the place of Constitutional Law in Legal System. It is running from a non-existent to a comprehensive role for constitutional Law.

The first position has come to be known as “Political Constitutionalism” where it has become a well-theorized and articulated response to the perceived trend towards its opposite “Legal Constitutionalism”. Although aiming to secure to constitutionalism traditional negative functions of limiting political power, although by exclusively political rather than legal means, political constitutionalism also aspires to provide space for the more positive function of promoting Constitutionalist values, such as individual autonomy and equal concern and respect.

Traditional directions of the Political Constitutionalism: From Mixed Government to Representative Democracy The theory of mixed government originated with ancient thought and the classification of political systems on the basis of whether One, a Few or Many ruled. According to this theory, the three basic types of polity - monarchy, aristocracy and democracy - were liable to degenerate into tyranny, oligarchy and anarchy respectively. This corruption stemmed from the concentration of power in the hands of a single person or group, which created a temptation to its abuse through allowing arbitrary rule. The solution was to ensure moderation and proportion by combining or mixing various types. As a result, the virtues of each form of government, namely a strong executive, the involvement of the better elements of society, and popular legitimacy, could be obtained without the corresponding vices. Three elements underlie this classic theory of mixed government.

First, arbitrary power was defined as the capacity of one individual or group to dominate another that is, to possess the ability to rule them without consulting their interests. To be dominated in such an arbitrary way was to be reduced to the condition of a slave who must act as his or her master wills. Overcoming arbitrariness so conceived requires that a condition of political equality exists among all free citizens. Only then will no one person or group be able to think or act as the masters of others. Second, the means to minimize such domination was to ensure none could rule without the support of at least one other individual or body. The aim was to so mix social classes and factions in decision-making, that their interests were given equal consideration, with each being forced to ‘hear the other side’ . To quote another republican motto, `the price of liberty is eternal vigilance’, with each group watching over the others to ensure none dominated them by ignoring their concerns. Third, the balance to be achieved was one that aspired to harmonies different social interests and maintain the stability of the polity, preventing so far as was possible the inevitable degeneration into one of the corrupt forms of government. Thus, mixed government provides a model of constitutionalism as consisting in the institutions that structure the way decisions are taken. Although elements of the theory can be found in Aristotle’s Politics, the locus classicus is Book VI of Polybius's Histories. He underlined its prime purpose as providing mechanisms whereby no individual, body or group could rule alone, thereby curbing the descent into tyranny, oligarchy or anarchy.

Polybius regarded the republican constitution of ancient Rome as exemplifying this theory. Thus, the consuls provided the monarchical element; the senate the aristocratic; while the popular element was represented by the Tribunes of the People, the Plebeian Council and the electoral, judicial and legislative powers the people could exercise directly. As he noted, the key feature of Roman republican government was that each of these three groups exercised slightly different powers but required the cooperation of the others to do so. So consuls might exercise war powers, yet needed the senate to approve generals, award them triumphs and provide the necessary funds, while the people approved treaties and could try high officials and generals for misconduct.

Meanwhile, the more executive elements possessing the most discretion were further weakened by their power being shared between multiple office holders, dependent on election, and of short duration. Thus, there were two Consuls each able to veto the other’s decisions, ten Tribunes with similar countervailing powers and so on, with none able to hold office for more than a year. The resulting need for different groups to work together was summarized in the slogan Senatus Populusque Romanus (‘The Senate and the Roman People’, frequently abbreviated to SPQR. In reality, though, their relationship was far from harmonious, with the patrician element largely predominating except when factional disputes led a given group among them to seek the support of the plebeians.

The conflict between social classes was given greater emphasis by Machiavelli, whose Discorsi offered a radical version of the Polybian argument. He observed how all polities contain two classes, the nobles (grandi) and the people (popolo), whose desires conflict. However, he claimed their discord, far from being destructive, actively promoted 'all the laws made in favour of liberty'. For each was led to promote freedom by virtue of seeking ways of checking the arbitrary power of the other. However, like Polybius, Machiavelli believed all systems ultimately became corrupted and degenerated into either tyranny or anarchy – the balance of power merely served to stave off this inevitable cycle. The seventeenth and eighteenth centuries brought three main changes to the doctrine.

The first, explored below, was the development of the separation of powers as a variation on the doctrine of mixed government. The theory of mixed government involves no clear distinction between the different branches of government. Executive, legislative and especially judicial tasks

were shared between the different social classes and exercised by all the government bodies. Indeed, the popular element exercised certain legislative and judicial functions directly through plebiscites and as jurors. The second, was a change in the type of 'balance' mixed government was supposed to achieve. The classic theory took the idea of the `body' politic literally. Just as bodily health was said to rely on a sound physical constitution and a balanced diet and way of life, so the health of the polity depended on a sound constitution that achieved a 'natural' balance between the various organs and 'humours' of the political body. As we saw, in line with this organic imagery the aim was to hold off the inevitable degeneration and corruption of the system. Balance was a static equilibrium, designed to maintain the status quo. However, the seventeenth and eighteenth century saw a new, more dynamic notion of balance, inspired by Newtonian physics and based on mechanics and physical forces. In this conception, balance could involve a harnessing of opposed forces, holding them in a dynamic equilibrium that combined and increased their joint power.

The change can be seen in the notion of the 'balance of trade', which went from being an equal exchange of goods between states to become a competition between trading nations that encouraged their mutual productivity and innovation. In this account, the 'cycle of life', where growth was followed by decay, became replaced by the idea of progress, in which change and transformation had positive connotations. The third development drew on these two. This was the idea that political 'balance' now consisted in the competition between government and a 'loyal' opposition. As parties evolved from simple factions and patronage networks among rivals for office, and became electoral machines defined as much by ideology and social composition as by the personal ambitions and interests of the political class, they became the organs of this new type of balance. In keeping with the older theory of mixed government, one of the virtues of parties was their ability to mix different social classes and interests and combine them around a common program. Indeed, just as economic competition led rival firms to compete over price, innovate and explore untapped markets, so electoral competition led rival parties to compete over policy efficiency and effectiveness, devise novel forms of delivery and focus on areas appealing to different sections of the electorate. This modern form of political constitutionalism proves constitutional in both form and substance. Equal votes, majority rule and competitive party elections offer a mechanism for impartially and equitably weighing and combining the views of millions of citizens about the nature of the public good. And in making politicians popularly accountable, it gives them an incentive to rule in non-arbitrary ways that respond to the concerns of the different minorities that form any working majority, thereby upholding both rights and the public interest rather than their own. Meanwhile mixed government has developed in new ways through federal and convocational arrangements that likewise seek to ensure different kinds of interest are involved in the policy and law-making process on an equal basis. Yet nobody would deny the systems of most democracies are far from perfect, and it has become increasingly common to look to the other constitutional tradition to rectify these problems.

Traditional Directions of the Legal Constitutionalism: this view was shaped by the experience of the English, American and French revolutions. The separation of powers developed out of the theory of mixed government during the English civil war of the mid seventeenth century. In 1642 Charles I belatedly invoked the doctrine of mixed government to defend the joint rule of Monarch, Lords and Commons as implied by the notion that Parliament meant all three (the doctrine of 'King in Parliament' as the sovereign body of the realm). His execution posed the problem of how to control government in a society without distinctions of rank. Dividing the executive, legislative and judicial functions between three distinct agencies appeared to provide a response to this dilemma. However, it took some time to evolve. Although Book XI Chapter VI of Montesquieu's The Spirit of the Laws has been credited with offering a definitive statement of the doctrine, his account still bore the hallmarks of its origins in the system of mixed government - not least because of its being based on an analysis of the British parliamentary system and the respective roles of Monarch, Lords and Commons within it. The functional division also remained far from clear cut, with the judicial branch and function still imperfectly differentiated from the other two. Only with the drafting of US constitution and debates surrounding it, most notably the Federalist Papers, did the doctrine emerge in its mature form.

The underlying rationale of this separation is that individuals or groups should not be `judges in their own cause'. The division between the three branches aims to ensure that those who formulate the laws are distinct from those entrusted with their interpretation, application and enforcement. In this way, law-makers are subject to the same laws and so have an incentive to avoid self-interested legislation and to frame it in general terms that will be equally applicable to all. These laws then guide the decisions of the executive and judiciary, who because they are similarly under the law also have good reason to act in an impartial manner. Separating functions also brings the efficiency gains associated with the division of labour. In particular, the activity of the legislature is made less cumbersome through devolving more short-term decisions to an executive branch capable of acting with greater coherence and dispatch. On its own, it is unclear how effective this separation is. Not only are the four functions hard to distinguish clearly, but unless a different group operates each branch there is nothing to prevent their acting in concert. However, four other theoretical

developments accompanied the shift from mixed government to the separation of powers that changed its character.

First, mixed government had been challenged earlier by theorists of sovereignty, such as Bodin and Hobbes, who regarded the idea of dividing power as incoherent. The separation of powers came into being in a context shaped by the notion that at some level power had to be concentrated, and in the context of the English, American and French revolutions the natural assumption was to shift the sovereign power of the monarch to the people as a whole. Second, the notion of the people as a whole was likewise new. Previously, the 'people' had simply meant the 'commons' or the 'many'. The whole people became the authors of the constitution, which as the embodiment of their will became itself sovereign over the will of any subdivision of the people, including a majority. Third, as a corollary, constitutions became entrenched written documents expressing a 'higher' law, which could only be amended by the people as a whole or some super-majority that could plausibly be said to represent their will. Fourth, notions of rights became key aspects of the constitution. Initially rights were no more an intrinsic part of the separation of powers than they had been of mixed government. Notoriously, the bill of rights was an appendix to the US constitution, which had previously been confined to describing the system of government. Nevertheless, the securing of individual rights gradually became the goal of all constitutional arrangements.

These four developments but particularly the last two had a tremendous impact on constitutionalism and proved crucial in moving it in a legal and especially a judicial direction. Within the 'pure' theory of the separation of powers all three branches were co-equal. As with the theory mixed government, the aim was to prevent any one section of society dominating another by obliging each to collaborate with the others. If anything, the legislative power was logically prior to the others producing in the US scheme federal and bicameral arrangements within the legislature that harked back to the doctrine of mixed government and a clear division between the legislature and executive. As we noted, the distinctiveness of judicial functions was weak in the doctrine of mixed government and slow to emerge in the theory of the separation of powers. However, making a legal document sovereign only challengeable by the sovereignty of the people as a whole inevitably empowered the judiciary, particularly given the comparative length of judicial appointments and their relative isolation from electoral pressures by contrast to the other branches. The judiciary now decided the competences of the various branches of government, including their own, and set limits not only to the processes of government but also to its goals with regard to individual rights. These features have come to define modern constitutionalism and are reflected in all the constitutional arrangements of post-war democracies. Yet they also coexist with forms of political constitutionalism and mixed government. It remains to explore their respective advantages and disadvantages, and the tensions between them.

Comparison between Political and Legal Constitutionalism:

An entrenched, rights-based and justifiable constitution is said to ensure stable and accountable government, that obliges legislatures and executives to operate according to the established rules and procedures and above all prevents their sacrificing individual rights to administrative convenience, popular prejudices, or short-term gains. Given no working constitutional government has not been also a working democracy, few analysts believe constitutions can restrain a genuinely tyrannical government. Rather, the aim is to prevent democratic governments from falling below their self-professed standards of showing all equal concern and respect. So, a legal constitution is seen as a corrective to even a foundation for a working political constitution. Yet, it remains a moot point whether it performs its appointed task any more effectively or legitimately. Democratic governments are said to be prone to overreacting to emergency situations, sacrificing civil rights to security, and pandering to either electorally important, yet unrepresentative, minorities or the populist sentiments of the majority. Insulated from such pressures, a court can be more impartial while its judgments are bound by constitutional law. However, others contend these supposed advantages turn out to be disadvantageous. Going to law offers an alternative to entering the political realm, yet access is more restricted than voting and the costs of a case as prohibitive to most ordinary citizens as founding a new party.

Meanwhile, it allows those with deep pockets to fasten on to a single issue that affects their interests without the necessity of winning others around to their point of view. Courts may be restricted to the law in their judgments – but what does that mean? Is the law to be found in the text of the constitution, the original intentions of those who drafted it, the objective meaning of the principles, the common understandings of the people? Words are open to multiple meanings, so textualism hardly proves that binding on judgments while semantics seems an odd way to decide difficult moral and political issues. The intentions of the drafters are unlikely to be consistent or that knowable, and may well be inappropriate in contemporary conditions. Being bound by the past favours the status quo and those privileged by current arrangements, thereby hindering progressive reform. If the principles behind the constitution are universal and timeless, then it could be applied

to any and all situations. Yet, legal philosophers - no less than citizens - disagree whether such principles even exist, let alone what they might require in particular cases. Appealing to a popular consensus will not resolve that problem, for it is either unlikely or better provided by a political constitutionalism that consults popular views directly.

The risks of judicial review becoming arbitrary itself rather than a block on arbitrariness. As legal constitutionalism has spread, establishing itself not just in former authoritarian regimes but also in the UK and commonwealth countries where political constitutionalism had hitherto held sway alone, so empirical scholarship has highlighted these drawbacks. More often than not legal constitutionalist arrangements have been introduced by hegemonic groups fearing political challenges to their position, with the record of the new regimes faring no better overall on civil rights and, from an egalitarian perspective, rather worse on social and economic rights. Whereas political constitutionalism responds to majority views for enhanced and more equal public goods, legal constitutionalism has invariably inhibited such reforms on grounds of their interfering with individual property and other rights. Nor has it upheld political constitutional arrangements particularly well for example, blocking campaign finance limits in many jurisdictions. Of course, important exceptions exist, with the progressive rulings of the Warren Court in the US offering an apparent contrast to the free market decisions of the Lochner era. However, these decisions largely reflected sustained, national, majority opinion and only became effective when backed by legislative rulings and executive action. At best legal constitutionalism proves only as good as the political constitution, at worst it inhibits its more equitable and legitimate working.

The Basic differences between the Constitution and Constitutionalism: The concepts of constitution and constitutionalism refer to the legal framework of a country. While constitution is often defined as the "supreme law of a country," constitutionalism is a system of governance under which the power of the government is limited by the rule of law. Constitutionalism recognizes the need of limiting concentration of power in order to protect the rights of groups and individuals. In such system, the power of the government can be limited by the constitution and by the provisions and regulations contained in it – but also by other measures and norms. In order to understand the two concepts – as well as their similarities and differences it is important to understand their history and evolution. The idea of constitution has changed significantly compared to the first examples seen in ancient Greece, while the concept of constitutionalism has grown around the principle that the authority of the government is derived from and limited by a set of rules and Laws. Constitution has also been defined as:

- ✓ Basic norm (or law) of the state;
- ✓ System of integration and organization of norms and laws; and
- ✓ Organization of the government.

The constitutionalism is a doctrine that a government's authority is determined by a body of laws or constitution. Although constitutionalism is sometimes regarded as a synonym for limited government, that is only one interpretation and by no means the most prominent one historically. Generally Constitutionalism refers to efforts to prevent arbitrary Government. The idea of constitutionalism involves the proposition that the exercise of governmental power shall be bounded by rules, rules prescribing the procedure according to which legislative and executive acts are to be performed and delimiting their permissible content Constitutionalism becomes a living reality to the extent that these rules curb the arbitrariness of discretion and are in fact observed by the wielders of political power, and to the extent that within the forbidden zones upon which authority may not trespass there is significant room for the enjoyment of individual liberty.

Therefore, constitutionalism's emphasis includes its enabling aspect. Thus, a "sphere of autonomy" must be interpreted broadly to include,

a) Recognition of the needs of distributive justice
b) State's relationship with the individual cannot be perceived entirely in negative terms
c) The State has a positive role to play in terms of ensuring the basic needs of citizens.

This approach shifts the focus from protection against others to foster autonomy rather to undermine it. The measures are required to assure the basic needs of all citizens to take part in political and social life. The government is granted with the people's power 'sovereignty', on trust, in order to serve the public (by the people for the people). It gives formal powers to act on behalf of their citizens which later become the 'government authority' upon electoral appointment. There are several consequences flowing from these basic principles

1. The supremacy of the constitution
2. Restrains or limits on power by the Rule of Law, Independence of the judiciary and Separation of powers
3. Unsuppressed and boundless the Fundamental Rights
4. Limits on majoritarianism (Majoritarianism is a political philosophy/ agenda that asserts the majority of a country's population is entitled to a primacy in society and has a right to make decisions affecting the society).
5. Importance of constitutional legitimacy

Similarities between the Constitution and Constitutionalism: Constitution and constitutionalism are overlapping concepts, although the first refer to a written body of laws and legislation and the second is a complex principle and system of governance. Some of the similarities between the two include: Both refer to the limits and features of the system of governance of a country. Constitutionalism would not exist without a constitution, and a constitutional way of governing a country requires limits and boundaries to the central authority; Both influence the actions of both government and population. Besides providing a framework for political and institutional structure, the constitution sets out the main rules that all citizens should respect. Furthermore, ruling in a constitutional manner means that the government applies the regulations outlined in the constitution to limit and manage the citizens' acts – always respecting individual and collective rights;

Both protect and preserve individual and collective rights, preventing the central government from abusing of its powers and infringing on the citizens' basic freedoms; and Both have evolved and significantly changed during the last few centuries, benefiting from the spread of democratic ideals and becoming key features of the majority of Western countries. The main difference between constitution and constitutionalism lies in the fact that the constitution is generally a written document, created by the government (often with the participation of the civil society), while constitutionalism is a principle and a system of governance that respects the rule of law and limits the power of the government. Most modern constitutions were written years ago, but laws and norms had already been evolving and mutating for centuries, and continue to do so. The constitution (and laws in general) is a living entity that should adapt to the changing features of the modern world and of modern societies. Failing to adapt the constitution – without losing its core principles and values may lead to an obsolete and unadoptable governance system. Other differences between the two concepts include:

Constitutionalism is based on the principles outlined in the constitution or in other core legal documents but it is also a principle of its own. The idea of constitutionalism is opposed to the concept of authoritarian and despotic rule and is based on the belief that the power of the government should be limited in order to prevent abuses and excesses; the constitution is often a written document, while the principles of constitutionalism are generally unwritten. Both constitution and constitutionalism evolve with the promulgation of democratic ideals although they do not always proceed at the same speed. There can be a constitutional form of governance – that respects the rights of the citizens and promotes democratic values even though the national constitution is outdated. At the same time, an inefficient democratic government may not be able to rule in a constitutional way, despite the existence of a constitution.

Concluding Remark:

A constitution is an official document that contains provisions that determine the structure of the government and of the country's political institutions, and that sets out regulations and limits for government and citizens. Conversely, constitutionalism is a system of governance defined in opposition to constitutionalism and authoritarianism. Constitutionalism is a principle that recognizes the need to limit the power of the central government, in order to protect basic right and freedoms of the population. Therefore, both concepts are linked to the idea of limiting the power of the government and somehow creating boundaries for the acts of the citizens as well – but they are very different in nature. Constitutions, which are a key feature of today's western societies, have evolved during centuries and continue (or should continue) to adapt to the changing nature of societies and political systems. Both constitution and constitutionalism are tied to the idea of democracy and provide the legal framework for citizens to enjoy individual and collective rights. The constitution is the basic law and backbone of a country, while constitutionalism is the system of governance based on the constitution or on other core documents and constitutional principles. In a constitutional system, the authority of the government depends on its compliance with the limitations under the law, which are often contained in the national constitution.

Differ on whether such standards exist, not to mention what they may require specifically cases. The idea that engaging a mainstream agreement will settle that issue is regularly limited by the individuals who accept that political constitutionalism counsels famous perspectives legitimately. Pundits of legal survey have contended, at that point, that it hazards turning out to be discretionary instead of being a square on intervention. As lawful constitutionalism spread, setting up itself in previous tyrant systems as well as in the United Kingdom and Commonwealth nations where political constitutionalism had until now held influence alone, a few researchers featured disadvantages. Pundits of lawful constitutionalism have contended that it has been presented by domineering gatherings dreading political difficulties to their position.

They battle that while political constitutionalism reacts to larger part sees for improved and more equivalent open merchandise, legitimate constitutionalism has repressed such changes on grounds of their meddling with singular property and different rights. Obviously, significant special

cases exist, with the dynamic decisions of the Warren Court (1953–69) in the United States offering an evident difference to the free market choices of the Lochner time (1897–1937). Difference over the benefits of legitimate and political constitutionalism stays a focal component of 21st-century political talk. In line with the previous statement of this chapter it is important to ensure the best outcome, the decisions taken during the initial stages of constitution regarding both the process of constitutional change and the substantive issues to be framed are particularly critical. Some of the critical process questions are often the following:

- The scope of change;
- The use of interim and transitional devices;
- Transitional justice issues;
- Democratic representation during the process;
- Popular participation; and
- The role of external actors.

At lastly, the origins and development of "constitutionalism" can be traced to its roots in the 18th Century enlightenment and the Bourgeois Revolutions in the US and Europe. This overview will show that at present the meaning of constitutional government appears to overlap strongly with the idea of the "rule of law" and also has influenced the chosen organization of the state (its format, e.g. republicanism, federalism, parliamentary,) and the values of a society (Liberty, Social and Economic aims like public welfare, human rights etc. (see Human Rights). Taken in this sense Constitutional Government is both a principle for organizing public life and a framework (of reference) for assessing the sustainability of a political system. It can be considered as one of the building blocks of not only organizing a society, but also as being crucial for understanding how and to what extent national government contributes to sustainable conditions of society.

Additionally, Resolving transitional justice claims satisfactorily can complicate the already challenging task of establishing a constitutional culture after conflict or in the midst of deep division. Concerns may include the following: How should we deal with the past? How can we learn to coexist with former oppressors and perpetrators of crimes? How can we reconcile and forgive? After conflict, practitioners may have to heal divisions between former rulers, combatants, victims of human rights violations and their sympathizers, whether family, friends or civil society organizations. Such healing may require an outlet for mass anger and trauma, and a process to uncover the historical facts that have led to victimization, perhaps as a component of a larger process of reconciliation or of a substantive justice solution for crimes and violations. The practical challenge is to rehabilitate an entire society successfully without tearing the country apart, particularly when the conflict has stalemated, without a clear victor, forcing a negotiated settlement. Inclusive representation during constitutional construction has been an ideal. In theory, it is an important factor in the legitimacy of the process. Democratic constitution building has been associated with stability as well as broadly acceptable outcomes that imply that the constitution is likely to enjoy political will for its implementation, and hence its endurance.

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