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Constitutionalism in Order of American Public Law

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Abstract: Legal norms in the legal order of any state have a hierarchical structure which ends in the basic norm or the constitution. Explanation of this issue through legal effects and American judicial procedure can specify how judicial review is considered as practical manifestation of legal constitution in order of public law across United States. In this research, three problems are examined defining legal and political constitutionalism, distinction between constitutionalism as a legal theory and the "rule of law" as a political idea in the United States and referral to the theoretical and practical origins of American constitutional theory. Accepted norms arisen from the American Constitutionalism has led to the creation of rights as a basic norm for the people, through which people can have the initiative in dealing with the exercise of state power out of the limits of the constitution.

Key words: Constitutionalism, the rule of law, hierarchy of norms, judicial review, the Supreme Court of the United States

INTRODUCTION

Constitutionalism is a multidimensional concept; depending on this point that it can analyze it from philosophical, political or legal outlook it can define different objectives and results for it. Legal dimension of constitutionalism and its impact on legal framing of political institutions and political society have been less likely drawn into attention about founder states of this theory. United States, France and Austria are among these states. In the meantime, the United States has enabled to expand and theoretical and judicial procedure of the constitutionalism.

The major question is "Whether can find the legal theory and practice of constitutionalism in the US which is influenced by political philosophy of rule of law, a position in the general theory of contemporary American legal order?"

Although, the origin of constitutionalism has emerged from political philosophy and political thoughts, it seems that this theory has enabled to make balance in exercise of political power to rule with individual rights and civil liberties when backed by legal sanctions especially judicial supervision and relied on independence of the courts.

What seems important in a study for legal scholars lies on this fact that it must propose a precise definition and distinction between principles of rule of law and constitutionalism in contemporary order of public law of the United States. The disorder that topic "Rule of Law" creates in legal theories has caused the constitutionalism is not known as a well-known thought. In addition, since the debates on these two theories are often mix of English, American , French, German and Austrian ideas in practice they have failed to raise a suitable development in order and thought of public law. Therefore, firstly this study intends to propose a clear division between the political and legal constitution and secondly refer to theoretical origins of the aforementioned theories (rule of law in England) so as to propose a precise definition and distinction between two theories.

THEORETICAL BACKGROUND

With regard to the definition for legal order (legal order or legal system), some scholars believe that such concept indicates a specific logical relationship that links all the legal rules and entities to each other. Therefore, legal order refers to a logical and correlated series of legal entities and legal principles which link them to each other, encompassed philosophical and social ideals of this structure and conducted them (Katouzian). Leon Duguit believes that the rules which guarantee structure of social body are called order. There are other rules for people that have been guaranteed in a social way, relating to the statuses that are received social support. These rules are the constructive basis for legal order of any society (Duguit). Kelsen has interpreted legal system to system of norms and has called the major norm in this system with basic norm (Bix, 407).

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For the first time by Kelsen, concept of basic (fundamental) norm (hierarchie des norms) has been proposed together with concept of hierarchy of norms in the pure theory of law. Kelsen (1947) believes that legal order does not refer to a structure based on alignment between norms in a same level but there is a hierarchy between different levels of legal norms. Validity of any norm relies on a higher norm. This model ends in the presupposed basic norm. This basic norm is the most cause for validity of norms. Basic norm is raised in adjustment with other norms as a result emergence of legal system lies on its hierarchical structure. Hence in order of national law, the constitution is at the most supreme level of positive law (Kelsen, 2005). Kelsen analyzes the hierarchy of norms based on pure theory of law influenced of legal positivism (positivisme juridique).

He has elaborated that the legal theories are required to separate from subjective assumptions and moral prejudices for development of science of law. For this he makes attempt that his theory does not rely on law and natural ethics (Kelsen *et al*., 1992).

THE GENERAL DEFINITION FOR CONSTITUTIONALISM

According to the most general definition for constitutionalism it can say that constitutionalism refers to a term which has described a specific form of the system of government in a society in which constitutionalism plays a major role. Since, this definition has a wide range and has ended with different results dependent on this point that whether we raise the issue in the legal area or political science area. For instance, some political scholars believe that constitutionalism refers to a series of political values and ideals that seek to achieve protected freedom from domestic and foreign controls on power of rule. For this it was concluded that constitutionalism act has been proposed at the area of political liberalism issues, making attempt to achieve goals of this political theory (Heywood). Yet, other believe that the constitution refers to an authoritative text encompassing a legal power which assigns structure and principles of limited government. Constitution refers to the norms which stipulate that how the government is organized and how the goals of government are followed up and what are the methods used in favor of those goals (Hall, 2005). In summary such outlooks define "constitutionalism as the conduct of politics in accordance with a constitution" (Hall, 2005).

It seems that such outlooks believe that firstly the issue of constitutionalism in public law must be considered followed by political thoughts and secondly since this theory relies on political thoughts and values, these values and ideals must be considered in judicial law and procedure.

DEFINITION FOR LEGAL CONSTITUTIONALISM AND ITS DIFFERENCE WITH POLITICAL CONSTITUTIONALISM

Constitutionalism as a legal theory puts an emphasis on role and function of the constitution in hierarchy of norms than law as well as supervision on adjustment between general rules and reviewing (control) the constitutionality of laws. This theory has grounded on this idea that the constitution is the best and most supreme guarantee against arbitrary political power. Legal constitutionalism has grounded on the idea for fundamental rights. Nothing is more effective than emphasis on rights instead of focus on political thoughts in progression of the constitutionalism in legal trajectory. Emphasis on rights grants a legal role to the contemporary constitutionalism, through which duty of the constitution is looked as an entity to visualize fundamental law, instead the constitutionalism act represents a fundamental structure for legislation (Bellamy, 2007).

Therefore, it can say that the relationship between constitutionalism and citizens is in this way that the citizens enjoy this rights with have recourse to principles of the constitution that they enable to have the initiative to cope with arbitrary exercise of power.

Sometimes, legal constitutionalism is known as the antithesis of "rule of law" especially in England and America. Since the "rule of law" and conflict with each other in that if democracy oriented constitution example of the "rule of law" and define political democracy majority rule. Hence, rule of law and constitutionalism are in conflicting with each other in case democracy represents rule of law, defined as rule by political majorities. As a result, constitutionalism act is considered as limits on majoritarian democracy.

THE RELATIONSHIP BETWEEN CONSTITUTIONALISM AND RULE OF LAW

The necessity to understand the terms of knowledge lies on precise separation of similar concepts from each other. In British legal order, the term "rule of law" has a wide application especially in basic and administrative law. Significance of this term goes beyond to the extent that some have defined it as the central idea of modern legal system (Slapper and David, 2009). Some believe that

root of constitutionalism returns to this term and both have the same concept. Some Iranian researchers believe that constitutionalism act is the inspiring principle so that constitutionalism act is considered as the recent idea than "rule of law" from historical perspective. As a result there is an authentic relationship between ideas of constitutionalism and rule of law (Markaz Malmiri). Professor Zoller has proposed the French equivalent "le regne du droit" for this term.

RULE OF LAW IN BRITISH LEGAL SYSTEM

However, the use of this British term dates back to Aristotle it seems that such long history for this term is not acceptable, because creation of such long history is the product of interpretation than product of original thought of Aristotle. However, the Greeks were creative in many areas of sciences but never created a legal applied science, deducing that never an independent branch of philosophy centered on law has been recognized. Therefore, it cannot ensure that Aristotle has approached to modern impressions from the term "rule of law" in use of term "isonomia". In addition, some experts believe that isonomia means "equality against the law" rather than the rule of law.

With regard to what mentioned before, we seek to know who was the first English speaker who has used the term "rule of law" in search of this issue.

Historically, the term "rule of law" has emerged in contrast with the term "the rule of the king" after the so-called" Glorious Revolution" (1689-1688 AD) in the UK (Nergelius: 93). Walter Bagehot 2001 (1826-1877) and Albert Venn Dicey 1889 (1835-1922) are the first scholars who have wrote book about constitutional law in UK. Bagehot has written a book called The "English Constitution" in 1867 AD and Dicey has written a book called "An Introduction to the Study of the Law of the Constitution" 18 years later. Among these two works there is nothing about rule of law in Bagehot's book. Dicey has developed and described this term inspired from Article 39 of Magna Carta (1215 AD) and generality of Aristotle's idea and then entered it into order of British public law and order of common law.

Dicey in introduction part of his book describes that his analysis has been grounded on this presumption that England constitution has two attributes: sovereignty of parliament and rule of law.

Then, Dicey adds that two attributes were emerged in political entities of UK after Norman conquestof England: first the great power that will take over the country which is called authority of state or authority of nation assigned with power of crown in history of England because the king is the source of law and protector of order. Second attribute is supremacy of law.

In describing this part of discussion he has brought a long quotation from the eighth volume of collection of works by Alexis Charles-Henri-Maurice Clerel de Tocqueville (1805-859) and introduced his aim with expression of marvelous outlook of foreign observers who have faced this reality that UK is a state subjected to rule of law. Dicey, quoted from Tocqueville, compares legal system of Switzerland and the United Kingdom (1836 AD).

Tocqueville believes that it cannot compare the United States with Switzerland but it must be compared with Great Britain. He says that we perceive in this comparison that UK much more than Helvetic Republic is affiliated to republic system. Basic differences which exist in entities of two countries especially moeurs include: in most cantons of Switzerland, liberty of the press is very new concept in most cantons, individual liberty has not been guaranteed in any way completely. A person may be arrested and kept in prison without observing any formalities, courts generally do not take debate and have not a full independent status, In most cantons, trial has remained unknown by presence of jury in some cantons, people lacked all political rights till 38 years ago (Dicey, 1927). Tocqueville has introduced five recent differences as the reason for republican system in the UK. One of the results from this part of discussion lies on this fact that Swiss publications are more revolutionary and less pragmatic than British publications due to lack of liberty of press. Further, he believes that there is no love of justice in Switzerland yet this is an important feature in England. Swiss courts have no place in the political structure of country and the impact of public opinion is disregarded. Love for justice, peace and rule are an introduction to the judgment at the area of political issues and perhaps this would be a stable attribute of free people. Tocqueville deduces that liberty more likely derives from customs than laws of the people in UK and US. In Switzerland, liberty derives from rules than customs of the country (Dicey, 1927). Dicey, deduced from point of view of Tocqueville, writes that he has put an emphasis on predominance and supremacy of law as the distinctive attribute of entities in UK. From his point of view, Tocqueville has intertwined the habit of self government, the love of order and a legal turn of mind. All these outlooks have been intertwined so far as they cannot be separated from each other. Yet, if we intend to describe the most tangible attribute of British people's life we will ensure that British people loving the government of law or loving of the supremacy of law (Dicey, 1927). An

interesting point which can be a guide to us for a deep understanding from conceptual area of term "rule of law" lies on this fact that Dicey (1927) considers two equivalents for this term which one is supremacy of law and the other is predominance of law. Dicey has categorized meanings of this term as the attribute of UK constitution at three areas including:

- Government according law
- Equality before the law
- The rights have been announced by means of common law (Dicey, 1927)

After discussion on attributes of rule of law, Dicey has known the reason for use of this term in French term "droit administrative" and believed that such French term has remained unknown for British jurists which rule of law is the only comparable term (Grossberg and Christopher, 2008). Dicey's argument lies on this fact that since citizens can oppose to actions and decisions by the administrative authorities in general courts, rule of law means an investigationin administrative courts in French administrative law. Some believe that however this term is one of the key attributes to understand the difference of the constitution in UK with other European countries, Dicey's outlooks in this analysis refers to extreme nationalism in a tangible way (Slapper and David, 2009).

Some others believe that it is wrong to accept the idea that theory "rule of law" in the 19th century has enabled to resist against discretionary power. Yet, the current regulatory system can be a reflection of the spirit of the theory of Dicey (opposition to arbitrary power) (Ackerman and Lindseth, 2010). In addition this group believes that theory of rule of law has been grounded on structural basis which has the ability for adjustment with parliamentary systems, faced failure in presidential system of this theory. This is due to this fact that Prime Minister (Chief Executive) is the chairman of the majority party in Parliament (Ackerman and Lindseth, 2010). Some also believe that Dicey's analysis for the term "rule of law" has raised deviation in comparative law. For this, after a study on different outlooks on rule of law, some have deduced that dimensions of the concepts from this term changes like chameleon (Fenwick, 2003). It is better to pay attention to historical history of general and political use of this term. Since, this term neither relates to meaning of rule nor meaning of law it must be examine under framework of role of law and rule concerning aspect of political ethics to assure the precise balance between rights and powers in the relationships between people and government in free and civilized society (Carroll, 2009). For this, some have deduced that rule of law is the opposite point of government interests and benefits. Individual liberty outperforms the logic of power. Equality among citizens is more important than defense from prerogative (Vallet). In general, it seems that it is better to use the term "rule of law" merely at the area of administrative law in Romano-Germanic legal system and use constitutionalism act as the rule of constitution at the area of basic law.

CONSTITUTION IN BRITISH LEGAL ORDER

In British legal order, the term "constitution" refers to the history of this land and the development of its institutions. This term is currently used in this concept and engaged in this issue that how the government is organized and how the assignments are accomplished (Schultz, 2014). The British people called the period of constitution making to the years between 1100-1485 AD. The most important attribute of this period lies on this fact that a new structure is found in entities of government in UK and most of the major attributes of judicial, administrative and legislative attributes of UK are depicted (White, 1925). Lord Bolingbroke (1678-1751), a British writer at the 18th century has defined the British constitution in this way: it refers to an assemblage of laws, entities and customs which have been originated from certain fixed principles of reason; it has been conducted to certain fixed objects of public good to dominate the general system relevant with what has agreed in the society to be dominated (Hall, 2005). It seems that such definition considers basic law rather than the constitution in general concept from perspective of political knowledge. For this it is better to take more hesitation in translation of the title of the books by Bagehot and Dicey to Persian language. It must not just take accuracy and hesitation in translation of titles of these books but also translation of the terms of constitution in the texts relating to UK's political and legal order.

Constitutionalism act in US's legal order: Since, the 17th century, the term "constitution" was emerged in political discourse as a term which defines structure of polity or arrangement of governmental institutions (Hall, 2005). Yet, in the 18th century, a new definition was proposed for the term "constitution" in United States. Constitution is considered as the written fundamental law which redefines creation, organization, authority and range of government in the constitution of United States (Schultz, 2014). During revolution of US (1765-1783), the American people's impression from the concept of constitution has been a permanent political law and polity. However, this

theoretical invention does not end all the debates on meaning of this term, it caused defining the constitution as different forms, principles and procedures for government restriction (Hall, 2005). American people have gone beyond so far as they argued in criticism on British legal order that if the parliament develops the British constitution and changes the fundamental law through legislation, UK has not the real constitution. An important distinction between American constitution and British constitution has been grounded on this point that however the constitution has granted power, granting power does not mean absolute balance of power or legislation with delegation of power. Thereby, the American people have raised a distinctive attribute for the constitution which is legal superiority to legislative enactments and other sources of ordinary law (Hall, 2005).

At the area of law of United States, the constitution has often associated two issues: proper method for interpretation of constitution and role of Supreme Court in restricting legislation (Goodin *et al*., 2007). For this it can say that the constitution in United States has been influenced of thoughts of American scholars on one hand and developed in judicial procedure of Supreme Court of United States on the other hand. Works by Cooley (1880) (1824-1898) and McIlwain (2005) (1871-1968) are the most important samples that have influenced legal thought of the constitutionalism and the verdict by the judge, John Marshall (1755-1835) in Marbury v. Madison 5 US. 137 (1803), argued 11Feb. 1803, decided 24 Feb. 1803 by vote of 5-0 has been the first and the most important sample which has influenced legal practice.

Constitutionalism in legal thoughts: Cooley in the book "The General Principles of Constitutional Law in the United States of America" regarding definition of constitution believes that it refers to a series of rules and principles that the authorities of the sovereignty are enforced through it. The constitution has value when it is consistent with conditions, demands and ideals of people. In addition, value of the constitution is to have stability, continuity and stability against tumult altogether. However, any government has its own constitution, the term "constitutional government" encompasses those predefined principles or rules assigned to the authorities to enforce sovereignty authorities. Cooley (1880) believes that however number of the governments with constitutionalism act is not still abundant, they have kept increasing.

Charles Howard McIlwain in the book "Constitutionalism: Ancient and Modern" in 1940 has examined different meanings of constitutionalism act in two separate chapters. Firstly, he has paid attention to meaning of constitutionalism act in modern era, introduced the modern ear since outbreak of the French Revolution in 1789 AD. Quoted from Arthur Young, he has said that he believes in the French people's impression about constitution that they have forged a new term and benefited from it in such a way that if there exists a pudding constitution it must be prepared according to the cookbook. Quoted from Thomas Paine on significance of the constitution, he believes that the constitution does not refer to the practice of government, but refers to the practice of people who establish government such that the government without the constitution is the power without right, i.e., "a constitution is not the act of a government but of a people constituting a government and a government without a constitution is power without right." The constitution is superior to government and government is the creator of the constitution (McIlwain, 2005).

He has concluded at the end of this chapter that the constitutionalism act has a basic attribute: legal limitation on government. He has believed that arbitrary rule is considered antithesis of the constitutionalism act. As a result, the government with constitutionalism act is considered against despotic government. He has remarked that the political responsibility has emerged gradually as the second attribute of the constitutionalism act (McIlwain, 2005). He has described the trajectory of change in different meanings of the term "constitution" since the ancient age in the next chapter. McIlwain has believed that the early meanings for this term refer to the practice of establishment or assignment of an order as well as the order for establishment. McIlwain has deduced that creation which determines nature of anything might be exercised to the body of mind of the man. In the Roman Empire, this word has been found with a technical concept and used as acts of legislation by the emperor. That church borrowed this meaning from Roman law and used it as the meaning of ecclesiastical regulations for the whole church or for some particular ecclesiastical province. In the middle ages, a step is taken to enforce the customary legislation through the church or maybe books on Roman law (McIlwain, 2005). Since that age till several later ages, the term "constitution" has been being used as the meaning of special administrative rules in the same meaning that the roman jurists perceived. This term has been being used to detect difference between these specific rules and ancient custom, not considered in its modern meaning. McIlwain has believed that modern meaning of this term lies on the whole legal framework of the state, appeared in works of authors since the 17th century (McIlwain, 2005).

In evaluation of modern meaning of this term, he has deduced that the term "Politeia" in ancient Greek language and the term "De Re Publica" in Latin language have approached to modern meaning of constitution (McIlwain, 2005). Ultimately, he has deduced that such conceptual developments in the constitutionalism act have associated to sematic transformations in natural law (McIlwain, 2005).

He believed that the fundamental weakness of constitutionalism act in the middle ages derives from the deficiency which returns to lack of any performance bond for it for which it can take threat or enforcement of revolutionary force against the monarchy that had trampled the rights of peasantry as a solution (McIlwain, 2005). He has believed that the rules without performance bond are not sufficient to protect from liberty of peasantry (McIlwain, 2005). However, history of constitutionalism act encompasses a series of instabilities (McIlwain, 2005). The constitution can maintain the balance between power and right where by the modern theory of sovereignty is as the result of recognizing this reality which says the total balance cannot be maintained (McIlwain, 2005).

To sum up, he deduced that the rule must be protected against arbitrary will which the only entity which can protects from the rule is the judiciary. Determination of the legal limits for power of rule and protection from this limitation through independent courts must not cause defense from undermining the government. According to what can be inferred from history of developments in constitutionalism act among all the studies there is nothing worse than extreme in doctrine of separation of powers and excessive use of supervision and balance. What we need is entire political responsibility of the government against people and the people for positive actions of government under framework of its authorities in addition to creation of negative legal restrictions to enforce power of government (McIlwain, 2005).

Constitutionalism act in judicial procedure: Basic tenet of constitutionalism that is judicial review is the most important practical result of constitutionalism (Mountjoy, 2009). This principle is created first by John Marshall, the judge and Chief Justice of the United States in Marbury v. Madison, 5 US 137 (1803). Marshall in this case raises this problem whether a law inconsistent with the constitution can transform to the law of the state? He argues thatsuch question is quite significant for the United States.

He has argued in this case that the law which contradictory to the constitution is null and void. As a result, the court has the power to monitor all acts of congress to know whether they are in compliance with the constitution or not, for which the court can examine whether the constitution has been observed in them or not (Hall, 2005).

In Gibbons v. Ogden, 22 US 1 (1824), the Supreme Court ruled that if the federal law is in conflict with state law, the federal law will be supreme. In Dred Scott v. Sandford, 60 US 393 (1857), court interpreted the Constitution in this way that such document does not consider the slaves as the citizens of the United States, but considers the slaves as the properties of the kings;this intensified rise of American Civil War.

In 1896, the court raised doctrine of "Separate but Equal" in Plessy v. Ferguson, 163 US 537 (1896). The issue of case had been started in this way that Hummer Plessy was started by the police on charges of refusing to leave the train to which arrival of Colored People were banned. According to Louisiana law, Plessy was among the colored people because he was one-eighth black. The court ruled that Jim Crow laws do not violate the constitution so far as the states have the separate but equal behavior.

In 1954, the court ruled in the case "Brown v. Board of Education of Topeka, 347 US 483" that there is no place for doctrine of "separate but equal" at the area of public education, under which desegregation was started in public schools. The 10 years later in 1964, the Civil Rights Act of 1964, prescribed racial equality as Federal law.

In 1964, the court ruled in case "New York Times Co. v. Sullivan, 376 US. 254 (1964)" that public officials must prove bad faith for granted for victory in defamation case. This case has been regarded as one of the key rules of the court concerning press liberty.

In United States v. Nixon, 418 US. 683 (1974), the court ruled that neither separation of powers nor needing to confidentiality can confirm unqualified presidential immunity to judicial process. In this case, Nixon as the president has made huge effort to prove this immunity in order not to force to take isolation due to water gates candal. The court rejected this claim due to unconstitutional power play as universally agreed upon it. Later, impeachment proceedings were started and Nixon resigned two weeks later.

In the Regents of the University of California v. Bakke, 438 US 265 (1978), the court upheld use of race as one of many factors in college admissions.

In Bush v. Gore, 531 US 98 (2000), the court ruled the recount of ballots of the presidential election was not feasible because it violated the Equal Protection Clause.

In Kennedy v. Louisiana, 554 US 407 (2008), accordance with 8th Amendment, the death penalty is

unconstitutional for the crime of rape of a child. In such cases death penalty is "cruel and unusual punishment".

In Shelby County v. Holder, 570 US (2013), the court struck down the section 4(b) of the Voting Rights Act of 1965. It is unconstitutional because it no longer reflects contemporary conditions.

In King v. Burwell 576 US (2015), the court ruled health care law can make nationwide tax subsidies to help poor and middle-class people buy health insurance. It upheld a key provision of the Affordable Care Act, allowing subsidies on federal marketplaces in 34 states to continue.

It seems that all these decisions to protect the rights of people in the constitution that is protection of the civil liberties and individual rights in a modern and now post modern society, at the same time have not been abandoned the rule of law as a legal authority of the government. Furthermore, the court prevents elective and majority dictatorship on the basis of legal constitutionalism as constitutional democracy.

CONCLUSION

It seems that the term "rule of law" has appeared with extensive, multifaceted, complicated and ambiguous concepts in British legal order that has complicated the understanding of this term for the non-British jurists. Then, specific phenomenon of British legal order has been elaborated. In British legal order, rule of law is antithesis of the rule of the king.

In American legal order, constitutionalism and rule of law are similar in one aspect because both have ended in restriction on rule of law and officials. But it is of great importance that the British theory of rule of law has grounded on this assumption that the law (statute, act of parliament) indicates will of people as a result any law as a legal ordermust be followed. It seems that rule of law can be used in two general and particular concepts. In general concept, rule of law implies order of norms in social relationships among person. In particular concept, rule of law implies following the laws as legal orders registered in positive law. Following is the common point in these two concepts, deduced that rule of law implies that no one is above rule and all the ones are obliged to follow the rules of law as the certain norms.

American constitutionalism as a legal constitutionalism believes that a legal order as a rule can be enforced and obeyed which has not negated the principles of the constitution as the most supermen will of people. Thus, we cannot create under the will of the people and claims to "rule of law", the totalitarian regime.

On the other hand, if we accept that, one of the origins of American Constitutionalism can be influenced of British political structure and the British theorists such as Dicey and Bagehot, yet gradually American Constitutionalism proposed a separate way and different interpretations for English rules of common law, under which it can say that American structure of constitutional law differ from British structure of constitutional law. The founder of the constitution of the United States have been influenced of the ideas of philosophers, revolutionaries and French lawyers rather than British political structure. Legal structure of common law in Britain has been in a way that issuance of a document prescribed with the constitution has not been found with legal significance, yet issuance of a document based on legal principles prescribed with constitution in United States outperforms establishment of the political structure. It seems that currently constitutionalism act in Britain has remained in political doctrine derived from political thoughts, yet this theory has transformed to an important legal theory in the United States. Legal constitutionalism has enabled to raise a stable development in legal order of United States through creativity and innovation together with proper understanding of structure of common law, whereby the abnormal centralization of political power is avoided on one hand and arbitrary will of revolution and public tumult are avoided on the other hand.

However, the constitutionalism is considered as a new historical theory than theory of "rule of law" it seems that constitutionalism has seemed more important in thought and practice in United States due to significance of the constitution as the superior and basic law. In this regards, it can assign constitutional democracy to American legal order.

Constitutional democracy in United States has enabled to transform the rules and acts of parliament to the orders from cohesive legal and purposive thought, helping to achieve the goals mentioned in the constitution.

Constitutionalism and constitutional democracy refers to the principles and methods based on the constitution. The factors such as separation of powers, autonomy of the judiciary, due process to fair hearings for those charged with criminal offences and compliance with individual rights are mentioned as the constructive elements of liberal democratic system. Capability of American legal and political institutionslies on an organic relationship between constructive elements of the legal order which have been raised based on constitutionalism act because constitutionalism has enabled to raise a

modern, logical and organic relationship between pillars of legal order of the United States. It seems that such thing is impossible due to wide theory of rule of law.

For this, it can deduce that constitutionalism in United States has enabled to raise the assemblage of rights for people as the basic norms through which people have their initiative against courts.

An emphasis on restriction of government and authorities through maintenance of superiority of the constitution are the basic thought in Supreme Court from the early of establishment till the 1980s. This outlook has been most likely emerged in "United States v. Nixon, 418 US 683 (1974)". This case can be introduced as the beginning of period for American "Contemporary constitutionalism" (Graber, 2015) or Postmodern constitutionalism. Then, the postmodern general theory of the court has developed to protection for social justice in the context of civil liberties, freedoms and individual rights supported and adopted by the constitution.

In finally, the legitimacy of the authority of all structure of the government derives from the people and is limited by a body of fundamental law that mentioned and organized in the constitution. The two fundamental duty of the court are in defence and protection of the validities of the constitution; preservation of the superiority of the principles of the constituion.

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