Journal of Law, Policy and Globalization
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.148, 2025

Constitutions without Constitutionalism

Peter Atudiwe Atupare, Abdul Baasit Aziz Bamba & Issah Abdul Jalil
University of Ghana School of Law, Legon, Accra.

ABSTRACT
Every matured legal system should aspire to embrace the principle of constitutionalism. It represents a sound hope for a government with justiciable limits on the exercise of legal power. On that account, a mockery of this idea by political actors is a danger to legal restraints on the exercise of power and a potential threat or death to the ideals of human rights. While this clamor for the utility of constitutionalism in the life of states lingers on, how such an ideal is to be conceived and provided for by the legal rules of states remains a fertile area for normative questions. For instance, will the existence of a written constitution in a given state presuppose the existence of constitutionalism in that state? Differently put, does the idea of constitutionalism necessarily emanates from the idea of a written constitution? This paper takes the view that the mere existence of a written constitution does not necessarily signal the existence of the principle of constitutionalism in that state.
KEYWORDS: Constitution, Constitutionalism, Rule of Law, Judicial Review, Human Rights, Separation of Powers, Judicial Independence, Democracy, Limited Government.
DOI: 10.7176/JLPG/148-02
Publication date: June 28th 2025

1. Introduction

The constitution stands as both the foundation and framework of a nation's legal and political existence, shaping its governance, protecting individual liberties, and defining the balance of power among institutions. Yet, the notion of constitutionalism, often misunderstood or superficially considered, carries a deeper meaning and significance. Constitutionalism goes beyond the mere existence of a constitution; it captures the essence of commitment to limit the exercise of governmental power and to uphold the rule of law. This relationship between the constitution as a document and constitutionalism as an ethos forms the key to a successful modern governance.

This essay argues that understanding constitutionalism requires more than an appreciation of legal doctrines; it necessitates an exploration of its philosophical underpinnings, historical evolution, and practical manifestations in various political and legal regimes. By examining constitutionalism not only as a legal necessity but as a guiding principle of governance, the paper advances the idea that constitutions are not merely tools of authority but are instruments of restraint, which ensures that power is wielded responsibly and equitably. The article is structured into three sections. Section I delves into the concept of a constitution, discussing its theoretical foundations and its indispensability in a structured legal order. Section II shifts focus to constitutionalism, unpacking its philosophical origins and examining its core elements, such as the separation of powers, the rule of law, and the protection of fundamental rights. Finally, Section III concludes with a discussion on the possibility of overlaps between constitutions, governance, and constitutionalism by emphasising their role in shaping political regimes.

2. The Constitution – Foundations, theories, and its inherent necessity.

2.1. The Idea of a constitution

The concept of a constitution is a key component of political and legal thoughts. It represents the legal and moral foundation upon which governments are established and operate. However, this characterisation has not always been straightforward. Historically, constitutions were viewed in an empirical or descriptive sense, which denoted the prevailing political arrangements rather than a legal framework within a particular geographical area.[1] Over time, particularly since the revolutionary eras, constitutions have evolved to assume a more normative and prescriptive role, creating legal norms that guide political rule under the dictates of a prescribed law.[2]

It is crucial to acknowledge that even a descriptive constitution is not entirely devoid of legally binding norms that may obligate a sovereign in the exercise of power.[3] This distinction highlights the need to differentiate between constitutionalisation and legalisation, situating each conception in its proper context.[4] A normative

[1] Grimm D. *Constitutionalism, Past, Present and Future* (Oxford University Press , 2016) 3
[2] *Ibid* 3-4
[3] *Ibid* 4
[4] *Ibid* 3

constitution not only legitimises but also prescribes the legalisation of political rule, while a descriptive constitution is often based on fixed moral obligations.[1] Furthermore, the idea of a constitution may manifest in philosophical terms, as a system of government, or as the supreme law of a state.[2] Given the diverse interpretations of the concept, defining a constitution with precision remains a challenging task. Nevertheless, an attempt to propose a working definition is essential in order to relate it to the various conceptions.

To comprehend the true essence of a constitution, one must distinguish between the constitution as an overarching concept and its specific conceptions.[3] For instance, Wheare offers a dual perspective, defining the constitution broadly as "the collection of rules which establish and regulate the government of a country."[4] This broad definition includes both legal and non-legal rules, such as usages, customs, and conventions. Similarly, King introduces the distinction between a small "c" constitution,[5] which encompasses fundamental rules and understandings, and a capital "C" Constitution, often codified as the supreme law.[6]Adding further nuance, Kelsen distinguishes between material and formal constitutions.[7] A material constitution comprises the fundamental rules that govern the creation of legal norms, providing the structural framework for a legal system. These rules provide the structural framework for the legal system by defining how laws are made in order to ensure consistency in their formulation.[8] By contrast, a formal constitution is a codified document explicitly outlining these rules, often regarded with solemnity and containing additional provisions unrelated to lawmaking.[9]

Building on Kelsen, Joseph Raz differentiates between thin and thick concepts which includes the constitutions.[10] The thin constitution focuses on the basic rules defining governmental structure and law-making processes, while the thick constitution incorporates normative elements like rights protection and democratic principles, reflecting the society's moral and political values. Critics like Bellamy and King argue that such conceptualisations[11] fall short of capturing the abstract essence of a constitution, as envisioned by thinkers like Rawls.[12] In response, they propose a more comprehensive definition:

---

[1] Grimm D. Deutsche Verfassungsgeschichte 1776–1866 (Frankfurt am main: Suhrkamp, 3rd edn, 1995) 10

[2] Ratnapala, A. S. 'The idea of a constitution and why constitutions matter' (1999) 15 Policy 3-10; See also International Institute for Democratic and Electoral Assistance (IDEA) 'What is a Constitution? Principles and Concepts' [2014] 1-12 <https://constitutionnet.org/sites/default/files/what_is_a_constitution_0.pdf> accessed 20 November 2024.

[3] Rawls, J. *A Theory of Justice: Original Edition* (Harvard University Press, 1971) <https://doi.org/10.2307/j.ctvjf9z6v> Accessed 18 Nov. 2024. (In explaining the structure of the theory of justice Rawls notes that a concept is a general idea or framework that is shared across various interpretations, while a conception is a specific interpretation or account of that concept. The concept operates at an abstract level, providing a general framework that applies across multiple contexts, while the related concepts are concrete manifestations of the concept, tailored to particular moral, philosophical, or societal viewpoints)

[4] Wheare K. C. *Modern constitutions* (2nd edn, Oxford university press, 1951) 2-3

[5] King *infra* (n 10) 3 Small c "set of the most important rules and common understandings in any given country that regulate the relations among the country's governing institutions and also the relations between that country's governing institutions and the people of that country"

[6] King A. *British Constitution* (1st edn, Oxford University Press, 2009) 1-437

[7] Wedberg A. Cambridge (tr), Kelsen's *General Theory of Law and State* (Harvard University Press, 1946) 1-516 *Cf* Dyzenhaus D., 'The Idea of a Constitution: A Plea for Staatsrechtslehre' in David Dyzenhaus & Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford: Oxford University Press, 2016) 13 14 (Noting the distinction on the basis of 'Formal authorisation rules' and 'Substantive principles')

[8] *Ibid* 124

[9] *Ibid* 124

[10] Raz, J, 'On the Authority and Interpretation of Constitutions: Some Preliminaries', *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford, 2009; online edn, Oxford Academic, 1 May 2009), https://doi.org/10.1093/acprof:oso/9780199562688.003.0013, accessed 25 Nov. 2024.

[11] That is, understanding the constitution through the voice of the scholars: Raz's 'thin sense' Wheare's 'broad sense', King's small 'c' and Kelsen's 'material' constitution.

[12] Bellamy R. and King J. 'Introduction: Of Constitutions and Constitutional Theory' in Bellamy R, King J, (eds) *The Cambridge Handbook of Constitutional Theory* (Cambridge University Press; 2023) 1-900

> "A constitution is the collection of norms recognised and applied by public officials (and citizens) in a given political order, specifying (i) the authority to govern; (ii) basic substantive norms regulating the scope of that authority; and (iii) conditions for creating and applying valid laws".[1]

2.2. Written and Unwritten Constitution

One of the enduring debates in constitutional theory revolves around the relationship between the idea of a constitution and its formal codification. Wheare's conception of the constitution, in its broader sense, emphasises an amalgamation of various rules and principles, which extend beyond codified statutes to include unwritten conventions, common law precedents, and political arrangements.[2] For example, the sovereignty of the King in Parliament exemplifies an unwritten but foundational principle of the British constitution.

However, this inclusive understanding of a constitution has not gone unchallenged. Thomas Paine, a fervent advocate of codification, argued that a constitution must have a tangible and visible existence to hold legitimacy. He asserted, "[a] constitution is not a thing in name only, but in fact. It has not an ideal, but a real existence; and wherever it cannot be produced in a visible form, there is none."[3] In critiquing Edmund Burke, Paine famously stated, "If no written English constitution can be produced, we may fairly conclude that none exists."[4] While Paine's insistence on codification captured the revolutionary essence of the American constitution, it has been met with criticism for its perceived limitations. Critics note that even in the British constitutional framework, which Paine disparaged, numerous elements are codified within statutes.[5] Yet key roles, such as those of the Prime Minister and the Cabinet, remain uncodified, showcasing a blend of formal and informal elements.

Moreover, Paine's proposition that constitutions must precede the formation of government reflects a belief that constitutions should originate from the people rather than the state. While idealistic, this view overlooks the reality that many constitutions emerge from existing governmental frameworks.[6] Additionally, constitutional reform often relies on conventions, judicial interpretations, and evolving political practices to adapt to contemporary needs.[7] For instance, although the U.S. Constitution is lauded as a model of codification, it omits crucial aspects such as the electoral system and judicial review—both of which have acquired constitutional significance through subsequent interpretation and practice.[8]

John Gardner's analysis offers a nuanced perspective, contending that no constitution can be entirely codified. Practices such as desuetude—the refusal to enforce outdated laws—and the evolution of conventions underscore the dynamic nature of constitutional systems.[9] In the United Kingdom, conventions form the backbone of the constitution. However, their role is not purely advisory, as demonstrated in the *Miller (No. 2)* case.[10] In this case, the Supreme Court ruled against the Prime Minister's prorogation of Parliament, finding the act or conduct violative of principles of parliamentary accountability. This landmark decision highlights how conventions can acquire legal significance, challenging A.V. Dicey's classical distinction between unenforceable conventions and enforceable constitutional laws.

---

[1] *Ibid* 8

[2] Wheare (n 8) 2-3

[3] Paine T., *Rights of Man: Being an Answer to Mr. Burke's Attack on the French Revolution* (2nd edn, J.S. Jordan, 1791) 122

[4] *Ibid* (n 15) 123

[5] See Act of Settlement, 1701, the Representation of the People Acts, (1832-1928), and the Human Rights Act, 1998.

[6] Bellamy and King *supra* (n 16) 15-16

[7] *Ibid* 16

[8] *Ibid* 16

[9] Gardner, J. 'Can There be a Written Constitution?' In L. Green and B. Leiter, (eds), *Oxford Studies in Philosophy of Law* (Oxford University Press, 2011) 162-194.

[10] *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [136]-[151].

The contrast between written and unwritten constitutions also informs broader debates on modern constitutionalism.[1] The U.S. Constitution, ratified in 1787, epitomised the concept of a consciously constructed 'higher law,' designed to bind governments to principles rooted in human agency rather than divine authority or common law traditions.[2] This revolutionary model inspired nations worldwide, solidifying written constitutions as symbols of legitimacy.[3] In response, British scholars sought to valorise their unwritten constitution. Ivor Jennings emphasised the significance of conventions,[4] while Dicey introduced the dual concepts of "laws of the constitution," enforceable by courts, and "conventions of the constitution," rules grounded in political ethics.[5] Dicey's framework illuminated that even written constitutions, like the U.S. model, rely on unwritten practices for flexibility and functionality.

Wheare extended this discourse by challenging the perceived dichotomy between written and unwritten constitutions. He argued that all constitutions, whether codified or not, are composites of legal and non-legal rules.[6] Using the British constitution as an example, he highlighted its blend of constitutional statutes, conventions, and shared political understandings. Wheare noted, "what a constitution says is one thing; what happens in practice is quite another."[7] In his view, unwritten constitutions represent the norm, with codified constitutions as exceptions. This reconceptualization questions the assumed supremacy of codified constitutions. Even the American Constitution, often celebrated for its formality, depends on unwritten norms to ensure its effective interpretation and application.[8] In light of Wheare's analysis, the British constitution's adaptability and flexibility offer an inherent value into the nature of constitutional governance by demonstrating the potential for a constitution to balance legal precision with practical evolution through both codified and customary principles.

2.3. The Theory of a Constitution

Arguably, constitutional theory at its core, seeks to articulate the foundational principles that govern the structure, interpretation, and evolution of constitutional systems.[9] This could potentially serve as the intellectual bridge between abstract ideals of governance and the practical realities of political and legal institutions. While constitutional texts often convey a sense of permanence, constitutional theory thrives on the dynamic interaction of ideas, values, and institutions, enabling societies to reconcile their historical legacies with the demands of contemporary governance.[10] Constitutional theory operates across three distinct yet interconnected dimensions: normative, conceptual, and positive.[11] These dimensions collectively form a comprehensive framework for analysing, critiquing, and improving constitutional practices.

Firstly, at its normative level, constitutional theory is prescriptive. It asks what a constitution ought to achieve in terms of justice, liberty, equality, and governance. In this regard, it is more philosophical and less tied to the

[1] See Craig, Paul P., 'Written and Unwritten Constitutions: The Modality of Change' (2021) in Sam Bookman, Edward Willis, Hanna Wilberg and Max Harris (eds), *Pragmatism, Principle, and Power in Common Law Constitutional Systems: Essays in Honour of Bruce Harris*, Forthcoming, Available at SSRN: http://dx.doi.org/10.2139/ssrn.3897906; See also Elkins Z. and Ginsburg T. 'What Can We Learn from Written Constitutions?' (2021) 24 Annual Review of Political Science <https://doi.org/10.1146/annurev-polisci-100720-102911>accessed 4 December

[2] See Barker, Robert S. 'Natural Law and The United States Constitution.' (2012) 66 The Review of Metaphysics 105–30. *JSTOR*, http://www.jstor.org/stable/41635554. Accessed 5 Dec. 2024. (Noting the philosophical and legal underpinnings of the U.S. Constitution by emphasizing its alignment with natural law and also, its deliberate separation from divine authority or traditional common law.)

[3] Reed A. A. 'America's Constitution, Written And Unwritten' (2006-2007) 57 Syracuse L. Rev. 277

[4] See generally Jennings I. *Law and the Constitution* (Univ. of London Press, 1943)

[5] See generally Dicey, A. V *Introduction to the Study of the Law of the Constitution*. (Macmillan, 1961).

[6] Wheare *supra* (n 8) 2-3

[7] *Ibid* 5

[8] Bellamy and King *supra* (n 16) 16

[9] Thomas E. Baker, 'Constitutional Theory in a Nutshell' (2004) 13 William & Mary Bill of rights Journal 60

[10] P W Kahn, 'Community in Contemporary Constitutional Theory' (1989) 99 *Yale LJ* 1 <https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/ylr99&section=12> accessed 5 December 2024.

[11] Bellamy and king *supra* (n 16) 3-5

specifics of a given constitutional order. It's about building or critiquing the frameworks themselves.[1] Similarly, it transcends the specifics of any single constitution to propose universal standards of legitimacy and fairness.[2] For instance, debates about whether constitutions should prioritise majoritarian democracy or the protection of minority rights exemplify normative inquiry.[3] This dimension, arguably, pushes societies to interrogate their highest ideals by challenging them to refine their foundational commitments. It underpins discussions on moral legitimacy, such as the role of constitutions in safeguarding human rights, embedding principles of social justice, or promoting equitable governance.

Secondly, conceptual constitutional theory delves into the fundamental nature of constitutional constructs. It interrogates the essence of concepts such as sovereignty, separation of powers, and constitutional supremacy.[4] For example, it settles questions like: what does it mean for constitutional law to be 'higher law'? How do we reconcile the tension between popular sovereignty and judicial review? These questions are not mere academic exercises, plausibly, they shape the frameworks within which constitutional debates unfold. Conceptual theory transforms abstract terms into analytical tools that clarify and deepen our understanding of constitutional governance.

Furthermore, positive constitutional theory turns its gaze to the real-world operation of constitutional systems. It is descriptive and explanatory, examining how constitutions function in practice, how power dynamics shape their implementation, and how historical contexts inform their evolution.[5]For instance, Bruce Ackerman's dualist theory of constitutionalism, which distinguishes between normal politics and constitutional moments, exemplifies this approach.[6] Positive theory recognizes that constitutions are not just texts but living documents that evolve through interpretation, political negotiation, and social change.

While these three approaches are distinct, they are deeply interconnected. Normative ideals often depend on conceptual clarity for their articulation and on positive insights for their implementation. Likewise, a purely descriptive account of a constitutional system inevitably carries normative implications. Constitutional theory, therefore, is not merely a reflection on law; it is a discipline of balance and integration. It navigates between the aspirational and the actual, the universal and the particular, the abstract and the concrete. Beyond the approaches to the constitutional theories, Alexander develops a taxonomy of the individual constitutional theories to include: Moralist theories; Political theories; Originalist theories; living constitution and Common law theories; Practice-based theories and anti-constitutionalist theories.[7]

The Moralist constitutional theorists posit that constitutions are tools to implement or reflect moral principles. They argue that constitutional provisions, particularly broad ones such as 'due process' or 'equal protection', invite interpreters to incorporate moral reasoning.[8] This school can be further divided into two (2): the left-leaning moralists and the right-leaning moralists. The former includes scholars like Ronald Dworkin[9] and Frank Michelman[10] who argue that interpretations of the constitutional provisions should be rooted in progressive

[1] *Ibid* 2-3

[2] Strauss *Infra* (n 55) 582; See generally Allan T. R. S, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press 2003)

[3] Patrick C. J, 'The Long Road Toward a More Perfect Union: Majority Rule and Minority Rights at the Constitutional Convention' (2016) Government: Faculty Publications, Smith College.

[4] See generally A S John, 'Constitutional Supremacy vs Parliamentary Sovereignty' (2021) 1 Legal Spectrum Journal <https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/lglspuj1&section=11> accessed 5 December 2024.

[5] See generally Hart, H.L.A. *The Concept of Law* (2nd edn, Clarendon Press, 1994) See also Loughlin, M. *The Idea of Public Law* (Oxford University Press, 2003) 186

[6] See Ackerman B. *We the People* (Harvard University Press, 1991)

[7] Larry A. 'Constitutional Theories: A Taxonomy and (Implicit) Critique' (2014) Faculty Scholarship. 11. <https://digital.sandiego.edu/law_fac_works/11> accessed 24 November 2024

[8] *Ibid* 2

[9] Ronald Dworkin, *Law'S Empire* (1986) ch. 10

[10] Michelman F., 'Foreword: On Protecting the Poor Through the Fourteenth Amendment.' 1969 83 Harvard Law Review 7

ideals, such as equality and social justice, aligning with broader political theories like Rawlsian justice.[1] The latter on the other hand harbours people like Hadley Arkes who views the constitution as embodying pre-existing natural law principles, advocating interpretations that align with conservative or libertarian moral values.[2]

Moreover, the originalists, as an approach to constitutional thought, seek to interpret the constitution based on the meaning it held at the time of its enactment. Therefore, as a corollary necessity, at least according to Alexander, the constitution's meaning to a higher degree should approximate and solely rely on the intentions of its framers. This view is generally referred to as the 'original Intent meaning'. On the other hand, there is a proposed variation of the original thought called the 'original public meaning'.[3] Proponents of the latter revision argue that the interpretation of the constitution should to an extent focus on how a reasonable person at the time of enactment would have understood the text.

The political theorists also interpret constitutional provisions through the lens of political theories. They see the constitutional document as a framework that sustains political ideals such as democracy or economic efficiency. The representation-reinforcement theory and the economic-political efficiency theory are advanced as a substratum of the political constitutional theory.[4] Ely argues that the constitution primarily aims to reinforce democratic processes, advocating judicial intervention only to protect political representation.[5] As far as the economic-political efficiency is concerned, its proponents interpret clauses to promote policies that prevent wealth-diminishing government actions, such as overly broad takings.[6]

Furthermore, proponents of the living constitution and Common law theories view the Constitution as a dynamic document, capable of evolving with societal changes.[7] They elucidate more on living constitutionalism by comparing constitutional interpretation to common law development, by emphasising the role of judicial precedents in shaping constitutional norms.[8] Balkin also formented the 'living originalism' approach by blending the originalist and living approaches, arguing that broad constitutional principles can evolve through societal and political movements, with courts ratifying these changes.[9]

Another strand of thought worthy of note is practice-based theories which emphasise the methods and modalities used in constitutional interpretation rather than external moral or political frameworks. For instance, Philip Bobbitt developed the 'modalities of argumentation' by identifying six modalities as distinct tools adopted by interpreters.[10] Others also see constitutional interpretation as a practice shaped by reflective equilibrium, balancing competing intuitions, principles, and precedents.[11]Finally, the anti-constitutionalist scholars question the normative or practical primacy of the Constitution itself. In resolving such confoundedness, some attempt differentiates between a 'thin' constitution of basic principles and a 'thick' constitution of detailed provisions, which favours legislative over judicial supremacy in interpretation,[12] while others also advance 'popular

[1] David A. J. Richards, *Conscience and the Constitution* (1993). See also David A. J. Richards, Foundations of American Constitutionalism (Princeton University Press, 1989) 12–14

[2] Hadley Arkes, *Beyond The Constitution* (Princeton University Press, 1990)

[3] Alexander *supra* (n 44) 19

[4] Coan *infra* (n 85) 852

[5] See generally Ely, J. H. *Democracy and Distrust: A Theory of Judicial Review*. (Harvard University Press, 1980)

[6] See generally Epstein R. A. *Takings: Private Property and the Power of Eminent Domain* (Harvard University Press, 1985)

[7] Strauss *Infra* (n 55) 585

[8] David A. Strauss, *The Living Constitution* (Oxford University Press 2010) *Cf* David A. Strauss, 'What is Constitutional Theory?'(1999) 87 California Law Review 587

[9] Balkin, J. M. *Living Originalism* (Harvard University Press, 2011)

[10] Philip B. articulates his views extensively in two seminal works: *Constitutional Fate* (1982) and *Constitutional Interpretation* (1991). (Noting the six modalities as follows: historical; textual; structural; prudential; doctrinal and ethical)

[11] Mitchell N. B, 'Constitutional Theory and The Rule of Recognition: Toward a Fourth Theory of Law,' in Adler and K. E. Himma, (eds) The Rule of Recognition And The U.S. Constitution (M. D. 2009): 269, 285.

[12] See Tushnet M, *Taking the Constitution away from the courts* (Princeton University Press, 1999)

constitutionalism' by advocating for constitutional interpretation that is rooted in the people's will rather than judicial authority.[1]

2.4. The Legal Necessity of a Constitution

The adoption of a constitution as the fundamental legal framework of a state, at least on the account of Sinani, carries four significant implications.[2] First, it affirms the political and legal subjectivity of an independent and sovereign state within a defined territory. Second, it establishes the basis of the national legal order. Third, it embodies and reflects the sovereignty of the people. Finally, it proclaims, guarantees, and facilitates the realisation of fundamental freedoms and human rights, recognizing them as natural and inalienable rather than privileges granted by the state.

A constitution, in general, is more than a legal document; it is the foundation upon which the governance of a nation is built while embodying the values and aspirations of its people.[3] As the highest legal authority in a state, a constitution acts as a social contract between the government and its citizens in legitimising the exercise of power by outlining the boundaries within which the state operates. Ridley aptly observes that it is integral in organising the state, defining its authority and limitation to ensure governance within the rule of law.[4]

Additionally, constitutions provide mechanisms for resolving disputes, whether between branches of government or among citizens. The U.S. constitution, as is the case with other written constitutions, through judicial review, ensures that laws align with constitutional principles and societal values, fostering stability and addressing societal conflicts legally rather than through unrest.[5] Beyond that, a constitution also protects individual freedoms and human rights by limiting governmental powers and embedding these rights as inviolable principles.[6]

In emerging democracies, constitutions play a vital role in establishing national identity and unity by codifying shared values and aspirations, serving as symbols of collective agreement and commitment to democratic governance.[7] Ultimately, the legal necessity of a constitution lies in its ability to provide a structured and equitable foundation for governance. It is the cornerstone of the rule of law, a guarantor of human rights, and a tool for ensuring accountability and justice. Reflecting the collective will of a society, constitutions adapt to safeguard the future. Without them, the legitimacy and functionality of any state are fundamentally compromised.

3. Constitutionalism as a 'Spirit' of Restraint

3.1. The Idea of Constitutionalism

Constitutionalism represents one of the fundamental principles of modern governance. It encapsulates the principles that ensure government's authority is exercised within defined limits.[8]In this regard, a country may

[1] Larry D. Kramer The People Themselves: Popular Constitutionalism and Judicial Review 1st edn, Oxford University Press, 2004) 24–34

[2] Sinani, B. 'A critical-legal overview of the concept of constitution as the highest legal- political act of the state in the light of constitutional-juridical doctrine' (2013) 29 Pravni vjesnik, 51-65. <https://hrcak.srce.hr/111324> accessed 23 November 2024

[3] *Tuffour v. Attorney-General* [1980] GLR 637; See also *New Patriotic Party v. Attorney General* (1993-94) 2 GLR 35

[4] F. F. Ridley, 'The Importance of Constitutions' (1966) 19 *Parliamentary Affairs* 312–323, <https://doi.org/10.1093/oxfordjournals.pa.a051363> accessed 24 November 2024

[5] See generally Fallon, Richard H. "Legitimacy and the Constitution." (2005) 118 *Harvard Law Review* 1787–853 <http://www.jstor.org/stable/4093285.>Accessed 5 Dec. 2024.

[6] Darusman Y. M, Wiyono B, and Widodo G. 'The Significance of Good Constitution for Resulting Good Governance and Clean Government' (2019) 19 Jurnal Dinamika Hukum. DOI: 10.20884/1.jdh.2019.19.3.2673

[7] Li-ann Thio, 'Soft constitutional law in nonliberal Asian constitutional democracies' (2010) International Journal of 8 Constitutional Law 766–799 (Noting that constitution shapes generic constitutionalism in regulating public power, securing a polity's fundamental values and reinforcing its national identity)

[8] Douglas D., 'Constitutionalism: A Critical Appreciation and an Extension of the Political Theory of C.H. McIlwain' (1969) Minnesota Law Review. 1159; See also Chhachhar, Varun and Negi, Arun Singh, 'Constitutionalism - A Perspective' (2009) *SSRN Electronic Journal* <https://ssrn.com/abstract=1527888> accessed 24 November 2024

have a constitution but not necessarily constitutionalism. It is not merely about having a constitution but involves adherence to the rule of law, checks and balances, and the protection of fundamental rights. This concept has evolved from historical practices, theories, and experiences that reflect humanity's perennial struggle to balance power and liberty.[1]

The idea of constitutionalism has deep roots in both ancient and modern political thought. Ancient Greek philosophers such as Plato and Aristotle discussed governance structures that align with moral and ethical obligations. Aristotle, for instance, introduced the concept of a mixed government as an ideal balance of monarchy, aristocracy, and democracy to prevent the corruption of any single system.[2] The Romans further institutionalised the principles of constitutionalism by emphasising the role of the people as the ultimate source of law and authority. Roman constitutionalism stressed that governance must adhere to natural law and societal customs, this in effect fosters a culture where rulers were restrained by legal principles.[3]In medieval Europe, constitutionalism evolved as a response to struggles between monarchs and their subjects. Instruments like the Magna Carta symbolised this progression by codifying the idea that even sovereigns were subject to the law. Thinkers such as Thomas Aquinas and John of Paris contributed to the idea that governance should align with natural law and serve the common good.[4]

The modern conception of constitutionalism matured significantly during the enlightenment and the founding of constitutional democracies. [5] The American and French revolutions were pivotal in transforming constitutionalism from a theoretical ideal to a practical governance model. The United States Constitution, in particular, embodied the principles of limited government, federalism, and the separation of powers.[6] The 20th century further enriched constitutional theory, with scholars such as Hayek emphasising on the connection between constitutionalism and individual liberty. Hayek argued that the rule of law underpins constitutionalism by ensuring predictable governance and safeguarding individual rights against arbitrary authority.[7]

Despite its evolution and foundational role in modern governance, constitutionalism faces significant criticism. Critics argue that it serves as a facade for entrenched power structures, masking systemic inequities and falling short in delivering substantive justice.[8] Waldron, for example, expresses scepticism about constitutionalism. He points to its inability to address the power imbalances deeply rooted in society.[9] Furthermore, constitutionalism struggles to keep pace with contemporary challenges such as globalisation, technological innovation, and shifting concepts of sovereignty.

3.2. The Philosophical Foundation of Constitutionalism

Constitutionalism is the principle that governmental authority is derived from and limited by a body of fundamental law.[10] Thus, it embodies the aspiration for governance rooted in legality, accountability, and respect for individual and collective freedoms.[11] The philosophical foundations of constitutionalism are deeply rooted in ideas of sovereignty, the nature of law, and the balance between authority and liberty, which was shaped by centuries of intellectual development spanning from ancient thought to modern democratic theory.[12]

---

[1] See generally Terence C. 'Constitutionalism' *Building Freedom?: Securing Constitutionalism and Civil Liberties in Africa: An Analysis of evidence from the APRM* (2016) South African Institute of International Affair. 20–27. <http://www.jstor.org/stable/resrep25994.8.> Accessed 5 Dec. 2024.

[2] Reynolds, Noel B. 'Constitutionalism and the Rule of Law' (1986). Faculty Publications. 1469 <https://scholarsarchive.byu.edu/facpub/1469> accessed 24 November 2024; See also Sturm (n 47) 220

[3] *Ibid* 6-7

[4] *Ibid* 8

[5] *Ibid* 12

[6] Reynold (n 47) 13

[7] See Hayek F. A. *Law, Legislation, and Liberty* (University of Chicago Press, 1976)

[8] Waldron, J. 'Constitutionalism: A Skeptical View' (2012) No. 10-87 NYU School of Law, Public Law

[9] *Ibid*

[10]Bazezew M. 'Constitutionalism' (2009) 3 Mizan Law Review 358-369 citing Hilaire Barnett, Constitutional and Administrative Law (3rd edn, Cavendish Publishing Limited, 2000) 5

[11] John *supra* (n 41)

[12] Rosenfield M. (ed) *Constitutionalism, Identity, Difference and legitimacy, Theoretical Perspectives* (Durham: Duke University Press, 1994) 4042

An essential element of constitutionalism is the concept of sovereignty. Early theorists like Bodin and Hobbes defined sovereignty as the ultimate authority, but differed on its source and scope. Bodin viewed sovereignty as indivisible and centralised, often residing with a monarch, but also introduced the idea of legal constraints, which would later burgeon as a precursor to constitutionalism.[1] Hobbes, on the other hand, breaking from medieval notions, framed sovereignty as a construct formed through a social contract which emphasises the need for a framework to legitimise authority and preserve the terms of the agreement.[2] Rousseau added a radical democratic dimension, arguing that sovereignty resides perpetually with the people and is inalienable.[3] Governments, acting on behalf of the sovereign people, derive their legitimacy from the collective will.[4]

Constitutionalism also rests on the foundation of the 'primacy of law' theory in that law, not individuals, governs society. This is to ensure that power is both derived from and constrained by a stable, predictable legal framework. In the United States and many modern democracies, the written constitution embodies this principle, with its permanence and clarity serving as safeguards against arbitrary rule. Legal theorists argue that the 'writtenness' of a constitution represents a deeper metaphysical commitment to binding the present to the past's sovereign decisions.[5] Ronald Dworkin's "moral reading" of the constitution adds another layer by situating constitutionalism as a moral enterprise rather than merely a procedural or historical one.[6] To him, the legitimacy of the constitution stems from its ability to reflect deeper principles of justice and equality.[7] However, critics from the positivist tradition, counter that the constitution's authority derives not from inherent morality but from its acceptance as a rule of recognition within a given legal system, highlighting the pragmatic and contingent nature of constitutional authority.[8]

The enduring appeal of constitutionalism lies in its capacity to reconcile the tension between governmental authority and individual liberty; this fine balance reflects foundational debates about the nature and limits of power. Montesquieu's philosophy of dividing governmental functions into separate branches—executive, legislative, and judicial—is a core of constitutionalism which operationalises the enlightenment ideal of liberty within the constraints of governance.[9] Similarly, John Locke's assertion that legitimate authority must respect natural rights to life, liberty, and property reinforces the idea that constitutions exist to preserve pre-political rights while enabling collective governance.[10] In contemporary discourse, constitutionalism incorporates dynamic interactions between enduring legal frameworks and democratic adaptability. Moreover, some scholars advocate for 'democratic constitutionalism,' where constitutional interpretation evolves through dialogue between formal institutions and the public, aligning with pragmatism to ensure that constitutions serve living societies without betraying their foundational principles.[11]

Finally, constitutionalism carries an ethical dimension in its aspiration to institutionalise justice and equality. John Rawls' concept of reflective equilibrium provides a framework for understanding constitutionalism as an ethical pursuit.[12] It suggests that constitutions should align with principles of justice derived from a society's considered judgments, which create a stable yet adaptable moral order. Additionally, constitutionalism addresses

[1] David S. Grewal and Jedediah S. Purdy 'The Original Theory of Constitutionalism' (2017)127 Yale L. J. 664-705 <https://scholarship.law.columbia.edu/faculty_scholarship/2818>accessed 24 November 2024

[2] Tuck R. & Silverthorne M. (eds. & trs) Thomas Hobbes' *On The Citizen* (Cambridge Univ. Press, 1998) 71 see also David Singh Grewal, 'The Domestic Analogy Revisited: Hobbes on International Order' (2016) 125 Yale L.J. 636-38

[3] See generally Richard Tuck *The Sleeping Sovereign: The Invention of Modern Democracy* (2016) 139-41.

[4] G. D. H. Cole (tr) Jean-Jacques Rousseau's *The Social Contract or Principles of Political Right* (2008) <https://www.files.ethz.ch/isn/125486/5017_Rousseau_The_Social_Contract.pdf> accessed 24 November 2024

[5] Randy E. Barnett, 'An Originalism for Nonoriginalists' (1999)45 LOY. L. REV. 611, 617

[6] Andrew Coan 'The Foundations of Constitutional Theory' (2017) Wisconsin Law Review 834 843

[7] *Ibid* (n 60)

[8] Hart *supra* (n 42)

[9] Grewal (n 80) 679

[10] *Ibid* 679

[11] Robert P. & Siegel R. 'Roe Rage: Democratic Constitutionalism and Backlash'(2007) 42 Harv.C.R.-C.L. L. Rev. 373, 374-76 (describing the political and cultural dynamics of "democratic constitutionalism")

[12] Rawls (n 7) 48–51 (explaining the notion of 'reflective equilibrium').

the problem of the tyranny of the majority. Constitutional tools like judicial review and bill of rights serve as ethical checks on the raw exercise of democratic power by protecting minority rights against majoritarian excesses.

3.3. A Thin Account of Constitutionalism

The thin conceptualisation of constitutionalism establishes a minimalist framework for governance, prioritising procedural rules over substantive policy mandates. It is founded on the principle that a constitution should serve as an impartial structure, providing the foundational mechanisms of government without prescribing specific social or economic outcomes.[1] This approach seeks to preserve the sovereignty of democratic processes and enhance a polity's adaptability to shifting political, cultural, and economic contexts.

The thin constitutionalism is rooted in classical liberal democratic theory, and it also values procedural fairness as the bedrock of legitimate governance. Scholars like Robert Dahl and Norberto Bobbio have championed its role in fostering dynamic, open democratic systems. They contend that avoiding the entrenchment of substantive policy preferences in constitutional texts reduces the risks of ideological rigidity and political stagnation.[2] For example, a thin constitution may outline how laws are enacted, elections conducted, and fundamental rights like free speech upheld, while leaving policy development to legislatures and electorates.

One of the prevalent themes central to thin constitutionalism is the principle of neutrality.[3] This model aims to facilitate public discourse and uphold pluralism by refraining from favouring specific social, cultural, or economic ideologies. However, it may be argued that even though it is beneficial for democratic flexibility, such neutrality may leave essential rights and values susceptible to erosion by political majorities that lack foresight or commitment to protecting minority interests.

3.4. A Thick Account of Constitutionalism

Arguably, thick constitutionalism extends beyond mere existence and the procedural functions of a constitution to include substantive principles, values, and objectives within its framework. Unlike thin constitutionalism, which may prioritise mere structures and processes of governance, thick constitutionalism may capture the idea of the constitution being the guardian of core societal values like human dignity, justice, and equality thereby entrenching them beyond the reach of ordinary political fluctuations.[4] This approach reflects a belief that certain rights and principles are too essential to be left vulnerable to transient political majorities.[5]

The rise of thick constitutionalism has been fueled by historical abuses of power, the global recognition of universal human rights, and a broader shift in constitutional thought over the past two decades.[6] Scholars have identified three primary manifestations of this trend.[7] First, there is the irreversible delegation of critical powers to independent institutions, such as central banks and regulatory agencies, which operate beyond direct political control.[8] Second, thick constitutionalism is evident in the supranational integration of constitutional norms, particularly in contexts like the European Union, where powers are delegated to institutions that transcend national sovereignty.[9] Third, the expansion of judicial review through constitutional courts has played a pivotal role in enabling these courts to adjudicate on fundamental rights and professional norms, often prioritising these over policies crafted by legislative bodies.[10]

---

[1] Waluchow W. & Kyritsisc D. 'Constitutionalism' (2001) Stanford Encyclopedia of Philosophy (https://plato.stanford.edu/entries/constitutionalism/> accessed 24 November 2024

[2] Gustavsson S.'Thick and thin constitutionalism' (2010) 112 Statsvetenskaplig tidskrift 56-59

[3] *Ibid* 56

[4] *Ibid*

[5] Dixon R. 'Responsive Constitutionalism in Australia' (2024) 52 Federal Law Review <https://journals.sagepub.com/doi/abs/10.1177/0067205X241280112> accessed 5 December 2024.

[6] Hirschl, Ran. 'The Political Origins of the New Constitutionalism.' (2004) 11 *Indiana Journal of Global Legal Studies* 71–108. *JSTOR*, https://doi.org/10.2979/gls.2004.11.1.71.> accessed 5 Dec. 2024.

[7] Gustavsson *supra* (n 93) 57

[8] *Ibid* 57

[9] *Ibid* 57

[10] *Ibid* 57

The idea of constitutionalism in this particular sense is reflected in constitutions like those of Germany and South Africa, which enshrine commitments to human dignity, anti-discrimination, and social welfare. Scholars have highlighted how institutionalising substantive values provides long-term stability, safeguards minority rights, and shields foundational principles from populist or majoritarian pressures.[1] However, this irreversible delegation and judicialization of politics also raise concerns. Critics argue that thick constitutionalism can constrain democratic agency, rendering constitutions rigid and less responsive to evolving social and cultural needs.[2] Also, arguably, the reliance on active judicial interpretation may risk eroding legislative authority in the long run.

4. The Elements of Constitutionalism

4.1. Supremacy of the Constitution

Constitutional supremacy denotes the legal and normative authority of the constitution as the supreme law of the land.[3] That is, the law, despite its inequities ought to be obeyed as the highest law.[4]As Kelsen theorised, legal systems function as hierarchies, with the constitution positioned as the fundamental norm upon which all other legal rules depend.[5] Thus, as a legal doctrine, its main purpose, arguably, is to limit the arbitrary exercise of power through adherence to the constitutional principles. The constitution's supremacy is both a legal and political reality that governs the hierarchy of legal norms within a state system.[6] Similarly, it extends beyond the ranking of laws, affecting the institutional structures and functions of state organs.[7]

In classical constitutional thought, the idea of supremacy emerged to address the need for a stable, coherent legal framework that limits governmental powers and protects individual rights.[8] Perhaps the overarching aim of designating supremacy to the constitution aids in establishing boundaries within which state institutions operate, constitutional supremacy prevents the abuse of power and enforces accountability. The constitution provides a stable legal framework that governs state actions, prioritising the protection of individual rights over transient political agendas as well as guaranteeing predictability and fairness in governance.[9] In order to maintain its supreme status, a constitution often incorporates mechanisms such as judicial review, constitutional amendments, and supremacy clauses.[10]

Interestingly, different legal traditions approach constitutional supremacy in varied ways. While the United States and Germany exemplify strong constitutional supremacy through robust judicial review, the United Kingdom (UK) historically adhered to parliamentary sovereignty. Surprisingly, the incorporation of European

---

[1] See generally Dworkin, Ronald *Taking rights seriously* (Duckworth, 2009 [1977]); See also Hirschl R. *Juristocracy* (Harvard University Press, 2004)

[2] See Walker N. 'Taking Constitutionalism Beyond the State' (2008) 56 Political Studies <https://journals.sagepub.com/doi/abs/10.1111/j.1467-9248.2008.00749.x> accessed 5 December 2024.

[3] Dragne L. 'Supremacy of The Constitution' (2013) 4 AGORA International Journal of Juridical Sciences 38-41

[4] *The Republic v. Francis Kwame Dumenu And Frank Ntumi; Ex parte Aaron Morny And Godwin Morny* (2018) JELR 67770 (HC) citing Lord Denning in *Mr Bradbury v. Enfield London Borough council* [1967]1 WLR 1311 at 1324 stating that "The law must be obeyed no matter the circumstances even if chaos should result, still, the law must be obeyed".

[5] Wedberg *supra* (n 11) 124 and See also Date-Bah, S. K. 'Jurisprudence's Day in Court in Ghana' 1971 20 The International and Comparative Law Quarterly 315–23. *JSTOR*, <http://www.jstor.org/stable/758033> accessed 21 Nov. 2024.

[6] Dragne (n 72) 40

[7] Limbach J. 'The Concept of the Supremacy of the Constitution' (200) 64 Modern Law Review 1-10

[8] Waluchow and Kyritsis Supra (n 92)

[9] Hedling N. 'The Fundamentals of a Constitution' (International Institute for Democratic and Electoral Assistance,2017)<https://www.idea.int/sites/default/files/publications/the-fundamentals-of-a-constitution.pdf>accessed 5 December 2024

[10] For instance, the German Basic Law empowers the Federal Constitutional Court to ensure compliance with constitutional provisions in safeguarding constitutional supremacy. Similarly, the United States Constitution, through Article 6, establishes itself as the "supreme law of the land," with judicial review acting as a key enforcement tool. In Romania, constitutional supremacy is upheld through strict mechanisms of constitutional review conducted by the Constitutional Court. Cf: Article 1(2) of 1992 constitution of Ghana;Article 1(1) of the Constitution of the Federal Republic of Nigeria 1999. See generally D.C. Dănişor, Romanian *Constitution commented, Title I*. General Principles, (Universul Juridic Publishing House, 2009) 100.

Union law and the Human Rights Act 1998 did not deter UK's allegiance and fidelity to the ideals of parliamentary sovereignty especially in cases where a parliamentary legislation contravenes any of the convention rules.[1]

4.2. Judicial Independence

The independence of the judiciary could be understood both as an institutional and individual autonomy.[2] At the institutional level, it requires a judiciary that operates as a separate and equal branch of government, free from interference by the executive or legislative arms. At the individual level, it mandates that judges perform their duties without fear of retribution or undue influence.[3] This dual aspect necessitates that the judiciary serves as an impartial arbiter in disputes in order to uphold the law and protect citizens from the overreach of other state powers. The concept of separation of powers is fundamental to judicial independence.[4] In that, each branch of government is not only expected to operate independently but also maintain checks and balances on the others. For the judiciary, this means that it must have the authority to interpret and apply the law without interference.[5]

In many democracies, as a way of both limiting and balancing the excesses of power and preventing authoritarian tendencies, courts have the power of judicial review which enables them to nullify laws or executive actions that violate constitutional principles.[6]Another key foundation is security of tenure for judges. Without the assurance of job stability, judges may feel pressured to deliver rulings that align with the interests of those in power.[7]Similarly, adequate compensation and resources for the judiciary prevent external entities from leveraging financial influence to sway judicial outcomes.[8]

Curiously, the act of issuing the prerogative of mercy has its 'first share' of critique in undermining judicial independence.[9]In majoritarian democracies, minority groups may be vulnerable to oppressive legislation or policies. Thus, an independent judiciary may foster societal stability by counterbalancing and reassuring the confidence of the citizens that their rights will be protected, and disputes resolved fairly. In order to allay fears of limiting judicial autonomy, judges could be appointed on transparent and merit-based processes. In that, judges are selected based on their qualifications and integrity rather than political allegiance or some other subjective considerations. Ultimately, an independent judiciary not only fortifies the rule of law but also serves as a guardian of democracy itself.

---

[1] Limbach (n 76) 6

[2] See generally Rehnquist W. H. 'Judicial Independence' (2004) 38 U. Rich. L. Rev. 579 <https://scholarship.richmond.edu/lawreview/vol38/iss3/6accessed> 24 November 2024

[3] United Nation Basic Principles on the Independence of the Judiciary (1985) <https://www.icj.org/wp-content/uploads/2014/03/UN-Basic-principles-independence-judiciary-1985-eng.pdf>accessed 5 December 2024

[4] Clifford Wallace "An Essay on Independence of the Judiciary: Independence from what and why' (2002) 58 NYU Annual Survey of American Law 241 257

[5] *Ibid* 243

[6] *Ibid* 241

[7] Fiss, Owen M. 'The Limits of Judicial Independence' (1993) 25 University of Miami Inter-American Law Review 57–76. <http://www.jstor.org/stable/40176330> accessed 22 Nov. 2024; See also *Emmanuel Noble Kor v. The Attorney-general and Justice Isaac Delali Duose* (2016) JELR 66377 (SC) (Atuguba JSC noting that "In my view, the said contention undermines the concept of judicial independence, which in its nature is not only limited to protecting judges from interference in the exercise of their functions as judges but also extends to affording such judges parity in treatment in their conditions of service such as salaries and retiring benefits"); See also Date-Bah, S. K. 'Judicial Independence and the Rule of Law in Ghana: A Microcosm of West African Commonwealth Jurisdiction' (2025) Commonwealth Legal Education Association – West African Regional Chapter Public Lecture.; *His Lordship Justice Paul Uter Dery And His Lordship Justice Gilbert Ayisi Addo V. The Judicial Council, The Honourable Chief Justice of Ghana And The Attorney General* (2016) JELR 65940 (SC)

[8] See *United States v. Will* (1980) 449 U.S. 200 (Held that Congress had violated Article III in passing legislation which repealed a salary increase already in effect and thus "diminished" the compensation of federal judges.

[9] *Elikplim Agbemava v. Attorney-General and Alfred Tuah-Yeboah v. Attorney-General and Nana Asante Bediatuo v. Attorney-General* (2018) JELR 67382 (SC) citing Francis T. Ready 'Pardon for Contempt' (1929) 5 Notre Dame Law Review

4.3. Rule of Law

The rule of law, as an element of constitutionalism, embodies the principle that governance must be conducted according to established legal norms rather than arbitrary or discretionary power.[1] In other words, this principle ensures that laws, not individuals, govern society. The concept has evolved through the contributions of political philosophers and constitutional frameworks in the revolt against arbitrary rule.[2] Aristotle favoured the primacy of laws over rulers. He advocated for governance guided by reason rather than personal whims.[3] John Locke, on the other hand, argued that the government derives its legitimacy from a social contract where individuals consent to governance in exchange for the protection of their natural rights. For Locke, laws must be enacted by a representative legislature and made public to ensure clarity and predictability, allowing individuals to understand their obligations and protections.[4] His ideas laid the groundwork for modern constitutionalism by emphasising that government power must serve the common good while respecting individual liberties.

In the 19th century, A.V. Dicey provided a more formal articulation of the rule of law. He identified three essential elements: the supremacy of law over arbitrary power, equality before the law, and the reliance on judicial decisions to protect individual rights.[5] These principles focus on the universality of law—that no one, including government officials, is above it. Dicey's insights highlight the judiciary's pivotal role in ensuring that governments remain accountable and within the confines of legal authority.

Currently, the principle of the rule of law transcends national borders and has been enshrined in global frameworks. For instance, the Universal Declaration of Human Rights (1948) (UDHR) recognizes the rule of law as fundamental to safeguarding human rights and preventing tyranny.[6] Friedrich Hayek further advanced this principle, emphasising that laws should be general, equal, and certain. He stressed that independent judicial review is critical in preventing government overreach and maintaining a balance between state power and individual freedoms.[7]Joseph Raz, also offered a pragmatic perspective on the rule of law. He described it not as a panacea for all societal issues but as a framework ensuring that laws are clear, public, and relatively stable.[8] Raz emphasised that the rule of law operates to guide individual behaviour and constrain the arbitrary exercise of power. In his view, the rule of law strengthens legal systems by ensuring accessibility, predictability, and independence, creating a fertile ground for justice to thrive.

The integration of the rule of law into constitutionalism demonstrates its role as a safeguard for democracy and individual freedoms. Constitutionalism, which seeks to limit governmental powers through a structured legal framework, finds its essence in the rule of law. Together, they ensure that governance respects the rights of individuals, upholds equality, and fosters accountability. Ultimately, rule of law is not merely a legal doctrine but an integral part of constitutionalism that underpins democratic governance.[9] It demands that both rulers and the ruled are bound by the same laws, providing a framework for justice, fairness, and equality.[10] In Raz's words,

---

[1] Valcke, A. 'The Rule of Law: Its Origins and Meanings (A Short Guide for Practitioners)' (2012). Encyclopedia of Global Social Science Issues, ME Sharp publishing, (Forthcoming) <https://ssrn.com/abstract=2042336>accessed 23 November 2024

[2] *Ibid* 1-10

[3] See generally Aristotle & Sinclair, T. A. *The politics* (Baltimore, Penguin Books, 1962)

[4] Richard Tuck *The Rights of War And Peace: Political Thought And The International Order From Grotious to Kant 140-225* (Oxford University press, 2001)

[5] A. V. Dicey *Introduction to the study of the law of the Constitution* Author: (5th edn Macmillan Company, 1897)

[6] Valcke *supra* (n 121) 9

[7] *Ibid* 10

[8] Raz, J. 'The Rule of Law and its Virtue', *The authority of law: Essays on law and morality* (Oxford, 1979; online edn, Oxford Academic, 22 Mar. 2012), <https://doi.org/10.1093/acprof:oso/9780198253457.003.0011> accessed 22 Nov. 2024.

[9] Frimpong K. & Agyeman-Budu K. 'The rule of law and democracy in Ghana since independence: Uneasy bedfellows?' (2018) 18 African Human Rights Law Journal 244-265

[10] See *New Patriotic Party v Inspector-General of Police* [1993-94] 2 GLR 459.(The Court, in this case, invalidated provisions of the Public Order Decree (NRCD 68) that imposed prior restraints and restricted individuals' ability to freely exercise their constitutional right to assembly. This included participation in processions and demonstrations, which the Court found to be in violation of Article 21(1)(d) of the Constitution.)

the rule of law should remain a practical tool for restraining power, ensuring that law itself governs society, and fostering the trust necessary for a just and orderly society.[1]

4.4. Separation of Powers

The concept of separation of powers contemplates the operationalisation of the idea that the concentration of governmental power in a single authority is a threat to liberty. Again, just as with the other elements of constitutionalism discussed above, it aims to prevent tyranny and promote good governance by ensuring that legislative, executive, and judicial functions are divided among distinct branches of government.[2]

The concept of separating powers within government had its roots in classical political thought which predates modern constitutionalism. Aristotle, in his seminal work *Politics*, identified three elements of governance: deliberative, executive, and judicial functions.[3] He argues that a balanced state depends on their harmonious functioning. More importantly, his analysis did not advocate for a rigid division but laid the groundwork for later theorists to refine the idea. The modern articulation of separation of powers, however, began with John Locke in the 17th century. He distinguished between legislative and executive powers, later adding the "federative" power responsible for foreign policy. Locke's rationale for separating these powers stemmed from his commitment to individual liberty and his belief that concentrated power was inherently dangerous.[4] His insights were foundational for the enlightenment-era development of constitutional theory. Consequently, Montesquieu built on Locke's idea by offering the most systematic and influential account of the separation of powers in his 18th-century. Montesquieu also proposed a tripartite system of governance, that is, the legislative, executive, and judiciary. He argued that liberty could only be preserved when "there is no abuse of power".[5]

Separation of powers has played a significant part in refining the ideals of constitutional systems worldwide. In the United States, for instance, the concept is applied with remarkable rigour. The framers of the U.S. Constitution were deeply influenced by Montesquieu's writings and sought to construct a system where powers were not only separated but also balanced. James Madison eloquently defended this structure, by asserting that ambition must be made to counteract ambition.[6] The resulting architecture divided governmental authority among Congress, the President, and the Judiciary, thus creating a system where each branch had both distinct powers and the ability to check the others. This has led to a long-lasting, but often contentious, struggle for institutional power.

In contrast, the United Kingdom operates under a system of parliamentary sovereignty where the separation of powers is less rigid. Walter Bagehot famously described the British model as a 'fusion of powers' particularly between the executive and legislative branches.[7] The executive (Prime Minister and Cabinet) is drawn from the legislature (Parliament), thereby creating an interdependent relationship between these organs which often differs quite starkly from the American model. The judiciary, however, remains distinct, particularly after the establishment of the Supreme Court of the United Kingdom in 2009. In Ghana, it can be said that "the contemplation of the concept of separation of powers is the [absence of] interference of one branch in the affairs of the other."[8] Most notably, the Ghanaian application of the doctrine is rather flexible as opposed to the rigidity of its application in the American system.[9]

Despite its manifestly significant role, the concept of separation of powers has not been without criticism. Jeremy Bentham argued that strict separation was impractical and inefficient. He emphasised the need for

[1] Valcke *supra* (121) 12

[2] Aristotle and Sinclair (n 123)

[3] Waldron J. 'Separation of Powers In Thought and Practice?' (2013) 54 Boston College Law Review 433 434

[4] *Ibid* (n 133) 447

[5] B. Montesquieu, Spirit of Laws, BK. 11, CHS. 1--7, 20; See also Zia Akhtar 'Montesquieu's Theory of the Separation of Powers, Legislative Flexibility and Judicial Restraint in an Unwritten Constitution' 2023 4 Amicus Curiae, Series 2 552-577

[6] Madison J. *The Federalist Papers* (particularly No. 47 and No. 51)

[7] Bagehot, W. *The English Constitution* (1st edn, Cambridge University press, 2012 [1867]).

[8] *Tsikata v. Attorney-General* (2002) JELR 68280 (SC)

[9] *Asare v Attorney-General* (2015) JELR 68987 (SC)(Wood, CJ notes that In today's modern and complex world, it is generally believed that the strictly rigid and absolute application of the separation of powers doctrine is impracticable)

functional interdependence to ensure that governments could act decisively in the face of pressing challenges.[1] Similarly, Hans Kelsen, criticised the focus on separation as outdated, he instead advocated for a shared ideal of function and power as well as a legal hierarchy governed by a constitutional court.[2] Carl Schmitt went further by alluding that the separation of powers is ill-suited for crises. In his view, sovereignty ultimately collapses into the executive during emergencies which eventually render the concept ineffective.[3]Schmitt's critique has sparked significant debate, particularly in the context of the expanded powers often granted to executives during wartime or national emergencies.[4]

In the face of these issues, some national systems, such as those in Ghana, France, Germany, and India, adopt hybrid approaches. These nations often incorporate elements of both rigid separation and practical overlap in allowing some room to promote the need for governmental efficiency. Ultimately, separation of powers is not merely theoretical but a practical ideal that seeks to ensure accountable governance and to preserve liberties against tyranny. While its implementation varies across constitutional systems, its underlying purpose remains universal.

4.5. Human Rights

The foundation of human rights lies in natural law theory, which advances that certain rights are inherent to human beings by virtue of their humanity.[5] These rights, over the years, have grown to be enshrined in both national constitutional texts and international law. John Locke articulated the idea of categorising life, liberty, and property as natural rights that no government may infringe upon. This notion was further reinforced by the universalist conception of rights in the writings of Kant and Rousseau.[6] For instance, Kant argued for the primacy of individual autonomy and dignity through his formulation of the categorical imperative. Thus, every individual ought to be treated as an end in themselves rather than a means to achieving a particular end. Subsequently, the formalisation of these rights was witnessed in their codification into the constitutional systems during the American declaration of independence (1776) and the French Declaration of the Rights of Man and of the Citizen (1789). These documents, by extension, give legitimacy to the government in so far as they have the commitment to protect these rights.

Perhaps the events of war and authoritarianism in Europe have heightened global attention to human rights, while developments in Africa, particularly in South Africa during the apartheid regime, and general military adventurism into politics have also played a significant role in shaping constitutional protections. In fact, the aftermath of World War II prompted a renewed focus on human rights by embedding them within constitutional frameworks. For instance, the German Basic Law (1949) explicitly incorporates fundamental rights, perhaps, reflecting a response to the atrocities committed under the Nazi regime.[7] Similarly, South Africa's 1996 Constitution includes an expansive Bill of Rights, which not only recognises civil and political rights but also economic, social, and cultural rights in addressing historical injustices of apartheid.[8] Besides, the development of supranational frameworks [9] has further institutionalised the relationship between human rights and

[1] Madison no 47 (n 136) 239

[2] Kelsen (n 11) (Advocates for a hierarchical legal framework instead of strict separation.

[3] Schmitt, C. *Political Theology* (MIT Press, 1922) Noting the various challenges of the separation doctrine during states of emergency.)

[4] *Asare v Attorney-General* [2003-2004] SCGLR 823 (See the remarks of Klutse JSC)

[5] See generally Tasioulas, John, 'On the Foundations of Human Rights', in Rowan Cruft, S. Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights*, Philosophical Foundations of Law (Oxford, 2015; online edn, Oxford Academic, 2015), https://doi.org/10.1093/acprof:oso/9780199688623.003.0002, accessed 26 Nov. 2024.

[6] Rosseau emphasised the necessity of aligning governance with the general will while respecting individual freedoms. See Cole *Supra* (n 82)

[7] German basic law, 1949, art 1

[8] Constitution of the Republic of South Africa, 1996, Chapter 2.

[9] See generally: 1. United Nations (UN) System (Universal Declaration of Human Rights (UDHR) (1948), International Covenant on Civil and Political Rights (ICCPR) (1966) and International Covenant on Economic, Social, and Cultural Rights (ICESCR) (1966)) 2. European System a. European Convention on Human Rights (ECHR) (1950)(Enforced by the European Court of Human Rights (ECtHR) and European Social Charter (1961, revised 1996): Focuses on social and economic rights) 3. Inter-American System (American Declaration of the Rights and Duties of Man (1948), American Convention on Human Rights (ACHR) (1969) and Enforced

constitutionalism. In contemporary discussion, there is a proliferated requirement to include the LGBTQ+ community into the human rights discussion. However, some countries have remained unbending to acceding to such cries.[1]

4.6. Judicial Review

Any legal system striving for maturity should recognize judicial review as an essential pillar of constitutionalism. In this regard, Judicial review exemplifies the idea that no authority, however powerful, stands above the law. Arguably, it ensures that the actions of government remain tethered to the constitution, which represents the supreme legal standard. Judicial review is the power of courts to assess the legality of acts by the executive, legislative, or other state actors. If such acts conflict with the constitution, courts can declare them invalid.[2] This power is the lifeblood of constitutional supremacy. Without it, constitutional guarantees risk becoming hollow promises, devoid of enforcement or effect. However, the role of judicial review extends beyond mere invalidation of unconstitutional acts. It acts as a forum for resolving fundamental questions about the allocation of power between branches of government and the balance between individual rights and public interests. For instance, in England and Wales, judicial review often centres on whether administrative decisions have been made lawfully, rationally, and fairly, reflecting the principle that governance must be justifiable in the eyes of the law.[3]

More often than not, *Marbury v. Madison* is cited as the authority for the courts having the power to declare a statute unconstitutional in the United States.[4] Chief Justice John Marshall, in that case, proclaimed that it is "emphatically the province and duty of the judicial department to say what the law is."[5] This pronouncement set a long-standing precedent that has since been adopted and adapted by various legal systems worldwide. It could be argued that Judicial review operates on several principles. First, it upholds the separation of powers by ensuring that no branch of government exceeds its authority. Second, it enforces checks and balances, preventing arbitrary exercises of power. Third, it protects individual rights, ensuring that laws and policies comply with constitutional guarantees.

The scope of judicial review varies between jurisdictions. In some systems, it is broad and allows the exercise of 'judicial supremacy' where courts can review a broad range of executive and legislative actions.[6] In other jurisdictions, it is narrower and focuses on specific areas such as fundamental rights.[7] The nature of judicial review depends on the constitution's structure, the judiciary's independence, and the political culture of the state. Judicial review can take different forms. In countries with a centralised model, such as South Africa and Germany, specialised constitutional courts handle constitutional questions. In decentralised systems, like the United States, ordinary courts at all levels can exercise judicial review. Both models may have considerable strengths and weaknesses, but their effectiveness depends on the judiciary's integrity and the public's trust.

Despite its effectiveness, the prevalence of judicial review in a constitutional system attracts some minor apprehensions. For instance, it could be argued that judicial review undermines democratic principles by giving

by the Inter-American Court of Human Rights, it safeguards civil and political rights and promotes reparations for violations.) 4. African System (African Charter on Human and Peoples' Rights (ACHPR) (1981), Maputo Protocol (2003) and African Children's Charter (1990))

[1] See generally in Ghana: Prince Obiri-Korang v. Attorney General (2024) JELR 112342 (SC); Kenya: Non-Governmental Organisations Coordination Board v. EG, Attorney General, AMI, DK, Kenya Christians Professional forum & Katiba Institute (2019) JELR 94033 (CA)

[2] Rubin, A. B. 'Judicial Review in the United States' (1979) 40 La. L. Rev. 67 <https://digitalcommons.law.lsu.edu/lalrev/vol40/iss1/6> 25 November 2024

[3] See generally Carol Harlow and Richard Rawlings, *Law and Administration* (3rd edn, CUP 2009) 66

[4] Saikrishna B. P. and John C. Y. 'The Origins of Judicial Review' (2003) 70 University of Chicago Law Review 887

[5] *Marbury v. Madison* (1803) 5 U.S. 137

[6] National Judicial Academy 'Judicial Review- Scope, Ambit and Dimensions' (2018) <https://nja.gov.in/Concluded_Programmes/2018-19/P-1110_PPTs/13.Sunday%20Club%20talk%20(Judicial%20Review).pdf> accessed 26 November 2024

[7] See generally Richard M. Re 'Narrowing Precedent In The Supreme Court' (2014) 114 Columbia Law Review 1861

unelected judges excessive power.[1] This concern, which could be labelled as the 'counter-majoritarian difficulty', would suggest that judicial review may conflict with the will of the majority. However, this apprehension could be assuaged if one looks at the role of the judiciary not as source of power but rather as a counterweight to potential majoritarian tyranny.[2] A constitution exists not just to reflect popular will but to limit it when it threatens fundamental principles.[3] Moreover, the potential of political interference, judicial activism, or excessive deference to other state organs could undermine the legitimacy of the judiciary.[4] As such, courts must strike a delicate balance between activism and restraint, in order to ensure they respect legislative intent while upholding constitutional values.

It is worth noting that Judicial review is not inherently synonymous with constitutionalism. Its existence in a legal system does not automatically guarantee a culture of constitutional respect. For judicial review to thrive, it must be accompanied by a broader commitment to the rule of law, respect for institutions, and a vigilant civil society. A mature legal system, therefore, must nurture judicial review alongside the other principles of constitutionalism to ensure that the constitution remains a living, enforceable instrument of justice.

5.0. Bridging Principles and Practice – Constitutionalism in Governance and Political Regimes.

The ideas of the constitution and constitutionalism are integral to the governance of modern states, yet they are often conflated or misunderstood. Generally, a constitution is viewed as a formal document or a set of principles that establishes the framework of government as well as outlining the distribution of powers, and defining the rights of citizens. In contrast, constitutionalism is an ethos, represents a practice of principle that ensures the government operates within the limits of the constitution and upholds the rule of law, justice, and accountability. While the presence of a constitution (either written or unwritten) is a prerequisite for constitutionalism, the two concepts are distinct, particularly when examined through the lens of "thin" and "thick" accounts.

A 'thin' account of constitutionalism focuses on the mere existence of a constitution, that is a codified or uncodified document outlining the structure of government and basic legal principles. From this perspective, having a constitution is sufficient for constitutionalism. However, this is an overly simplistic view. A 'thick' account of constitutionalism, on the other hand, emphasizes not just the existence of a constitution but also its quality of the limiting or disabling rules or provisions, their effective implementation, adherence to its principles, and the limitation of arbitrary power. This thick account highlights the relationship between the constitution as a legal framework and constitutionalism as a normative ideal.

Many authoritarian regimes possess well-crafted constitutions with provisions for fundamental rights and checks on power.[5] However, these rights often remain theoretical rather than practiced, failing to achieve constitutionalism in the thicker sense. The mere existence of a constitution does not guarantee constitutionalism. History provides numerous examples where constitutions have been disregarded, manipulated, or used as tools of oppression rather than instruments of justice and restraint.[6] The Soviet Union had a series of constitutions, including the celebrated 1936 'Stalin Constitution', which granted rights to free speech, assembly, and religion on paper.[7] However, these rights were systematically ignored in practice. The Soviet regime operated through centralized control, suppressing dissent and disregarding the constitutional limits on power.[8] Constitutionalism was absent despite the formal existence of a constitution.

---

[1] Waldron 'The Core of the Case Against Judicial Review' (2006) 115 The Yale Law Journal 1353

[2] *Ibid*

[3] Elliot B. 'What is a Constitution? Principles and Concepts: International IDEA Constitution-Building Primer' (2017) <https://www.idea.int/sites/default/files/publications/what-is-a-constitution-primer.pdf>accessed 5 December 2004

[4] Wallace *Supra* (n 115) 243

[5] Ginsburg T. & Simpser A., 'Introduction, Chapter 1 of Constitutions in Authoritarian Regimes' (2014) University of Chicago Public Law & Legal Theory Working Paper No. 468. <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1912&context=public_law_and_legal_theory>accessed 5 December 2024

[6] IDEA (n 6) 7

[7] Jingyuan Q. 'A Brief Research on 1936 Soviet Constitution under Joseph Stalin' (2011) 2 The Macalester Review <http://digitalcommons.macalester.edu/macreview/vol2/iss1/7>accessed 26 November 2024

[8] *Ibid* 4

In Ghana, the classical case of *Re Akoto*[1] illustrates this narrative. In this case, the court was tasked to determine the constitutionality of the Preventive Detention Act, 1958 with the 1960 Constitution. The court, in refusing to uphold the argument of the plaintiffs that their detention was unlawful under the said Act, reasoned that, the then President of Ghana, Kwame Nkrumah had the power to detain without trial persons he believes to have acted in a way that was prejudicial to the security of the state. The constitutionality of the impugned Act was attended to by the Ghanaian court in this case in a manner that priority was not given to fundamental legal values such as rights. Though the court's view did not offend any positive law, it basically ignored a thicker account of constitutionalism. That is, the implication by this account, which includes the effective application of constitutional norms, is necessary to distinguish between states that merely have constitutions and those that uphold constitutionalism. History teaches us that constitutionalism requires more than a document; it demands a culture of accountability, strong institutions, and a commitment to the rule of law.

Constitutionalism, generally, is a tool for political stability in ensuring the rule of law and the limitation of governmental power. As discussed earlier, traditionally, scholars classify political regimes, whether democratic, authoritarian, or military, based on theoretical frameworks. However, such classifications can be reductive and fail to capture the nuanced relationship between political regimes and constitutionalism as practiced. A deeper analysis reveals that constitutionalism should not merely serve as a theoretical benchmark but as a lens through which the practical realities of governance are examined. Political regimes, whether military or multiparty democracies, provide compelling case studies to analyze how constitutionalism operates in reality, revealing that the effectiveness of a regime is less about its classification and more about its practical fidelity to the rule of law, institutional accountability, and protection of individual rights.

Military regimes are often dismissed as antithetical to constitutionalism.[2] This notion is primarily due to the fact that they are associated with coups, authoritarianism, and a lack of democratic and institutional accountability.[3] The military dictatorship of Myanmar, for example, provides a compelling narrative that lends credence to this reality.[4] However, examples from history and contemporary governance show that some military regimes have upheld legal principles in creating functional systems of governance. For instance, in Ghana under Jerry Rawlings, initially a military leader, constitutional principles began to take root after the 1981 coup. Though Rawlings ruled with an 'iron hand' initially, he eventually transitioned Ghana into a stable multiparty democracy under the 1992 Constitution. During this period, the military regime exhibited certain aspects of constitutionalism, including respect for legal processes and the progressive adoption of democratic norms.

Similarly, Thailand has a long history of oscillation between military and civilian governments. Although many of its military juntas have disrupted constitutional rule, others, like the 2014 coup led by General Prayut Chan-o-cha, claimed to act in the name of constitutional restoration.[5] While Prayut's government faced criticism for stifling dissent, it operated within a framework of interim constitutional laws and emphasized the drafting of a new constitution. Also, Egypt under President Anwar Sadat adhered to legal principles that facilitated a degree of institutional accountability in fostering economic reforms and political stability. In these cases, a claim can therefore be made that military regimes also offer a demonstrable adherence to constitutionalism. On that account, a regime's lack of adherence to principles of constitutionalism is not directly nor inherently tied to the structure of the regime but rather to its leaders' political will and commitment to governance norms.

On the other hand, democratic systems are often, theoretically, aligned with constitutionalism and are normally seen to be immune to constitutional violations due to their emphasis on pluralism, accountability, and the rule of law. However, a closer look into practice reveals that multiparty democracies can also fail to uphold constitutional principles. In Hungary, for instance, under Prime Minister Viktor Orbán, a democratically elected government has systematically eroded constitutional safeguards through constitutional amendments and the

[1] [1961] GLR 523-535
[2] IDEA (n 6) 7
[3] *Ibid* 7
[4] Lindsay M. 'Myanmar's Troubled History: Coups, Military Rule, and Ethnic Conflict' (council on foreign relation,(2022)<https://www.cfr.org/backgrounder/myanmar-history-coup-military-rule-ethnic-conflict-rohingya>accessed 26 November 2024
[5] Yang, X. 'The impacts of the 2014 Coup on Thailand's relations with the People's Republic of China and the United States of America' (Chulalongkorn University Theses and Dissertations (Chula ETD), 2023)

concentration of power.[1] Orbán's regime is seen to have undermined judicial independence, curtailed media freedom, and manipulated electoral laws to entrench his party's dominance.[2] Despite being a democracy in name, Hungary demonstrates how constitutionalism can falter in practice when leaders prioritize power consolidation over the rule of law.

Moreover, India too which is, arguably, often hailed as the world's largest democracy, has faced criticisms for executive overreach and judicial complacency, particularly in recent years.[3] The weakening of institutions and undermining of constitutional safeguards raise concerns about the disparity between democratic ideals and their practical realization.[4] In a similar vein, some countries[5] like Nigeria, a multiparty democracy, has constitutional provisions that are frequently subverted by corruption and elite capture, resulting in weak enforcement of the rule of law.[6] These examples demonstrate that the presence of democratic structures does not automatically guarantee constitutionalism; it is the commitment to practice, not classification, that matters.

Ultimately, a political economic analysis of the respective political regimes reveals that economic priorities, institutional capacity, and public accountability significantly influence adherence to constitutional principles. Military regimes in South Korea during the 1960s and 1970s, for instance, adhered to constitutional norms to a degree that allowed for rapid industrialization and institutional stability, eventually transitioning into a democratic system.[7] Conversely, some democracies in the Global South, despite their classification, have struggled with constitutional adherence due to economic instability, weak institutions, and elite dominance.[8] In both contexts, the practice of constitutionalism is influenced by the political economy of governance, that is whether the regime prioritizes equitable resource distribution, institutional integrity, and public trust.

It is therefore important to note that constitutions, as mere constitutions, meant nothing for people oppressed by visionless leaders. The quality of governance of a state is not dependent on the mere presence of a constitutional document. Governance, if it must be proper and legitimate, should prioritise the welfare of the governed, the enforcement of the rule of law, equality, justice and fundamental human rights and freedoms. This cannot be achieved without recourse to constitutionalism. The concept of governance must thus be disciplined by the principles of constitutionalism. A constitution that takes away the spirit and material elements of constitutionalism is a denial of governance properly conceived.

---

[1] Miklós BánkutiGábor HalmaiKim Lane Scheppele 'Hungary's Illiberal Turn: Disabling the Constitution' (2012) 23 Journal of Democracy 138

[2] Hailey J. A. 'Wrestling The fourth arm of Democracy: Hoe the Orban Regime undermined media Independence In Hungary' (thesis, University of North Carolina 2017)

[3] Chietigj B. 'How India's democracy shapes its global role and relations with the West' (Chatham House, 9 May 2024)<https://www.chathamhouse.org/2024/04/how-indias-democracy-shapes-its-global-role-and-relations-west>accessed date 5 December 2024

[4] Siegle J. 'Overcoming Dilemmas of Democratisation: Protecting Civil Liberties and the Right to Democracy' (2012) 81 Nordic Journal of International Law 506

[5] Take Kenya for example also, a multiparty democracy that has grappled with constitutional violations despite its robust legal framework. The 2017 Kenyan elections saw the Supreme Court annul a presidential election, citing irregularities—a testament to the strength of constitutional checks and balances. However, the subsequent disregard for court orders by political actors and repeated electoral malpractices highlight the gap between constitutional ideals and practical adherence

[6] See generally Okibe H. B. 'Corruption And Democratic Governance in Nigeria: An Incompatible Marriage For National Development' (2020) 13 African Journal of Politics and Administrative Studies (AJPAS) 69

[7] See generally Hellmann O. 'South Korea's Democracy and the Legacies of the Developmental State' In Croissant A, Hellmann O, (eds) *Stateness and Democracy in East Asia*. (Cambridge University Press; 2020)47-70.

[8] See generally Danielle R. 'Strong Democracy, Weak State: The Political Economy of Ghana's Stalled Structural Transformation', in Xinshen Diao, and others (eds), *Ghana's Economic and Agricultural Transformation: Past Performance and Future Prospects* (Oxford, 2019; online edn, Oxford Academic, 24 Oct. 2019

6. Conclusion

The principle of constitutionalism is the lifeblood of any matured legal system. It ensures that power is exercised within justiciable limits and in alignment with the ideals of justice, equity, and human rights. While the constitution provides the structural framework for governance, constitutionalism breathes life into it by transforming static rules into dynamic practices that protect individual freedoms and institutional accountability. The relationship between the two is neither automatic nor guaranteed; the existence of a written constitution does not inherently presuppose the presence of constitutionalism.

History and contemporary examples reveal the fragility of constitutionalism in the face of political actors who prioritize power over principle, often subverting legal restraints for personal or partisan gain. This stresses more on the importance of cultivating a political and legal culture committed to the rule of law, judicial independence, and public accountability. Without this commitment, the most meticulously drafted constitution risks becoming a hollow document, unable to fulfill its promise of justice and equality.

As this paper has shown, constitutionalism is not merely a theoretical ideal but a practical necessity for meaningful governance. It transcends the formalities of written constitutions, requiring societies to fix its principles into the fabric of governance and public life. Achieving this, demands strong legal institutions, active civic engagement, and a shared understanding of constitutionalism as a collective responsibility. In the end, the true measure of constitutionalism lies not in the existence of a constitution but in its consistent application to limit power, protect rights, and promote the rule of law by an independent judiciary through apolitical BAR.

REFERENCE

1. Ackerman B. *We the People* (Harvard University Press, 1991)
2. Allan T. R. S, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press 2003)
3. Andrew C. 'The Foundations of Constitutional Theory' (2017) Wisconsin Law Review 834 843
4. Aristotle & Sinclair, T. A. *The politics* (Baltimore, Penguin Books, 1962)
5. Bagehot, W. *The English Constitution* (1st edn, Cambridge University press, 2012 [1867]).
6. Balkin, J. M. *Living Originalism* (Harvard University Press, 2011)
7. Barker, Robert S. 'Natural Law and The United States Constitution.' (2012) 66 The Review of Metaphysics
8. Bazezew M. 'Constitutionalism' (2009) 3 Mizan Law Review 358-369
9. Bellamy R. and King J. 'Introduction: Of Constitutions and Constitutional Theory' in Bellamy R, King J, (eds) *The Cambridge Handbook of Constitutional Theory* (Cambridge University Press; 2023) 1-900
10. Carol H. and Richard R., *Law and Administration* (3rd edn, CUP 2009) 66
11. Chietigj B. 'How India's democracy shapes its global role and relations with the West' (Chatham House, 9 May 2024
12. Clifford W. "An Essay on Independence of the Judiciary: Independence from what and why' (2002) 58 NYU Annual Survey of American Law 241 257
13. Cole G. D. H. (tr) Jean-Jacques Rousseau's *The Social Contract or Principles of Political Right* (2008)
14. Craig, Paul P., 'Written and Unwritten Constitutions: The Modality of Change' (2021) in Sam Bookman, Edward Willis, Hanna Wilberg and Max Harris (eds), *Pragmatism, Principle, and Power in Common Law Constitutional Systems: Essays in Honour of Bruce Harris*,
15. Danielle R. 'Strong Democracy, Weak State: The Political Economy of Ghana's Stalled Structural Transformation', in Xinshen Diao, and others (eds), *Ghana's Economic and Agricultural Transformation: Past Performance and Future Prospects* (Oxford, 2019; online edn, Oxford Academic, 24 Oct. 2019
16. Dănişor D.C., Romanian *Constitution commented, Title I*. General Principles, (Universul Juridic Publishing House, 2009) 100.
17. Date-Bah, S. K. 'Judicial Independence and the Rule of Law in Ghana: A Microcosm of West African Commonwealth Jurisdiction' (2025) Commonwealth Legal Education Association – West African Regional Chapter Public Lecture.; *His Lordship Justice Paul Uter Dery And His Lordship Justice*

Gilbert Ayisi Addo V. The Judicial Council, The Honourable Chief Justice of Ghana And The Attorney General (2016) JELR 65940 (SC)

18. Darusman Y. M, Wiyono B, and Widodo G. 'The Significance of Good Constitution for Resulting Good Governance and Clean Government' (2019) 19 Jurnal Dinamika Hukum.
19. David A. Strauss, *The Living Constitution* (Oxford University Press 2010)
20. David A. Strauss, 'What is Constitutional Theory?'(1999) 87 California Law Review 587
21. David A. J. Richards, *Conscience and the Constitution* (1993). See also David A. J. Richards, Foundations of American Constitutionalism (Princeton University Press, 1989) 12–14
22. David S. Grewal and Jedediah S. Purdy 'The Original Theory of Constitutionalism' (2017)127 Yale L. J.
23. David S. Grewal, 'The Domestic Analogy Revisited: Hobbes on International Order' (2016) 125 Yale L.J. 636-38
24. Dicey A.V *Introduction to the study of the law of the Constitution* Author: (5th edn Macmillan Company, 1897)
25. Dixon R. 'Responsive Constitutionalism in Australia' (2024) 52 Federal Law Review Douglas D., 'Constitutionalism: A Critical Appreciation and an Extension of the Political Theory of C.H. McIlwain' (1969) Minnesota Law Review. 1159
26. Dragne L. 'Supremacy of The Constitution' (2013) 4 AGORA International Journal of Juridical Sciences 38-41
27. Dworkin, Ronald *Taking rights seriously* (Duckworth, 2009 [1977])
28. Dyzenhaus D., 'The Idea of a Constitution: A Plea for Staatsrechtslehre' in David Dyzenhaus & Malcolm
29. Elkins Z. and Ginsburg T. 'What Can We Learn from Written Constitutions?' (2021) 24 Annual Review of Political Science
30. Elliot B. 'What is a Constitution? Principles and Concepts: International IDEA Constitution-Building Primer' (2017)
31. Ely, J. H. *Democracy and Distrust: A Theory of Judicial Review*. (Harvard University Press, 1980)
32. Epstein R. A. *Takings: Private Property and the Power of Eminent Domain* (Harvard University Press, 1985)
33. Fallon, Richard H. "Legitimacy and the Constitution." (2005) 118 *Harvard Law Review* 1787–853
34. Fiss, Owen M. 'The Limits of Judicial Independence' (1993) 25 University of Miami Inter-American Law Review 57–76.
35. Frimpong K. & Agyeman-Budu K. 'The rule of law and democracy in Ghana since independence: Uneasy bedfellows?' (2018) 18 African Human Rights Law Journal 244-265
36. Gardner, J. 'Can There be a Written Constitution?' In L. Green and B. Leiter, (eds), *Oxford Studies in Philosophy of Law* (Oxford University Press, 2011) 162-194.
37. Ginsburg T. & Simpser A., 'Introduction, Chapter 1 of Constitutions in Authoritarian Regimes' (2014) University of Chicago Public Law & Legal Theory Working Paper No. 468.
38. Grimm D. *Constitutionalism, Past, Present and Future* (Oxford University Press , 2016)
39. Grimm D. Deutsche Verfassungsgeschichte 1776–1866 (Frankfurt am main: Suhrkamp, 3rd edn, 1995)
40. Gustavsson S. 'Thick and thin constitutionalism' 2010) 112 Statsvetenskaplig tidskrift 56-59
41. Hadley Arkes, *Beyond The Constitution* (Princeton University Press, 1990)
42. Hailey J. A. 'Wrestling The fourth arm of Democracy: Hoe the Orban Regime undermined media Independence In Hungary' (thesis, University of North Carolina 2017)
43. Hart H.L.A. *The Concept of Law* (2nd edn, Clarendon Press, 1994)
44. Hayek F. A. *Law, Legislation, and Liberty* (University of Chicago Press, 1976)
45. Hedling N. 'The Fundamentals of a Constitution' (International Institute for Democratic and Electoral Assistance,2017)
46. Hellmann O. 'South Korea's Democracy and the Legacies of the Developmental State' In Croissant A, Hellmann O, (eds) *Stateness and Democracy in East Asia*. (Cambridge University Press; 2020)47-70.

47. Hilaire Barnett, Constitutional and Administrative Law (3rd edn, Cavendish Publishing Limited, 2000) 5
48. Hirschl R. *Juristocracy* (Harvard University Press, 2004)
49. Hirschl, R. 'The Political Origins of the New Constitutionalism.' (2004) 11 *Indiana Journal of Global Legal Studies* 71–108.
50. Jennings I. *Law and the Constitution* (Univ. of London Press, 1943)
51. Jingyuan Q. 'A Brief Research on 1936 Soviet Constitution under Joseph Stalin' (2011) 2 The Macalester Review
52. John A.S, 'Constitutional Supremacy vs Parliamentary Sovereignty' (2021) 1 Legal Spectrum Journal
53. Kahn P. W, 'Community in Contemporary Constitutional Theory' (1989) 99 *Yale LJ*
54. Kenya: Non-Governmental Organisations Coordination Board v. EG, Attorney General, AMI, DK, Kenya Christians Professional forum & Katiba Institute (2019) JELR 94033 (CA)
55. King A. *British Constitution* (1st edn, Oxford University Press, 2009)
56. Larry A. 'Constitutional Theories: A Taxonomy and (Implicit) Critique' (2014)
57. Larry D. Kramer The People Themselves: Popular Constitutionalism and Judicial Review 1st edn, Oxford University Press, 2004) 24–34
58. Loughlin, M. *The Idea of Public Law* (Oxford University Press, 2003) 186
59. Limbach J. 'The Concept of the Supremacy of the Constitution' (200) 64 Modern Law Review 1-10
60. Lindsay M. 'Myanmar's Troubled History: Coups, Military Rule, and Ethnic Conflict' (council on foreignrelation,(2022)
61. Madison J. *The Federalist Papers* (particularly No. 47 and No. 51)
62. Miklós BánkutiGábor HalmaiKim Lane Scheppele 'Hungary's Illiberal Turn: Disabling the Constitution' (2012) 23 Journal of Democracy 138
63. Mitchell N. B, 'Constitutional Theory and The Rule of Recognition: Toward a Fourth Theory of Law,' in Adler and K. E. Himma, (eds) The Rule of Recognition And The U.S. Constitution (M. D. 2009): 269, 285.
64. Michelman F., 'Foreword: On Protecting the Poor Through the Fourteenth Amendment.' 1969 83 Harvard Law Review 7
65. Montesquieu B., Spirit of Laws, BK. 11, CHS. 1--7, 20; See also Zia Akhtar 'Montesquieu's Theory of the Separation of Powers, Legislative Flexibility and Judicial Restraint in an Unwritten Constitution' 2023 4 Amicus Curiae, Series 2 552-577
66. National Judicial Academy 'Judicial Review- Scope, Ambit and Dimensions' (2018)
67. Okibe H. B. 'Corruption And Democratic Governance in Nigeria: An Incompatible Marriage For National Development' (2020) 13 African Journal of Politics and Administrative Studies (AJPAS) 69
68. Paine T., *Rights of Man: Being an Answer to Mr. Burke's Attack on the French Revolution* (2nd edn, J.S. Jordan, 1791) 122
69. Patrick C. J, 'The Long Road Toward a More Perfect Union: Majority Rule and Minority Rights at the Constitutional Convention' (2016) Government: Faculty Publications, Smith College.
70. Philip B. *Constitutional Fate* (1982) and *Constitutional Interpretation* (1991).
71. Prince Obiri-Korang v. Attorney General (2024) JELR 112342 (SC);
72. Randy E. Barnett, 'An Originalism for Nonoriginalists' (1999)45 LOY. L. REV. 611, 617
73. Ratnapala, A. S. 'The idea of a constitution and why constitutions matter' (1999)
74. Rawls, J. *A Theory of Justice: Original Edition* (Harvard University Press, 1971)
75. Wheare K. C. *Modern constitutions* (2nd edn, Oxford university press, 1951)
76. Raz, J. 'The Rule of Law and its Virtue', *The authority of law: Essays on law and morality* (Oxford, 1979).
77. Raz, J, 'On the Authority and Interpretation of Constitutions: Some Preliminaries', *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford, 2009)
78. Reed A. A. 'America's Constitution, Written And Unwritten' (2006-2007) 57 Syracuse L. Rev. 277
79. Rehnquist W. H. 'Judicial Independence' (2004) 38 U. Rich. L. Rev. 579
80. Reynolds, Noel B. 'Constitutionalism and the Rule of Law' (1986).

81. Richard M. Re 'Narrowing Precedent In The Supreme Court' (2014) 114 Columbia Law Review 1861
82. Richard Tuck *The Sleeping Sovereign: The Invention of Modern Democracy* (2016) 139-41.
83. Richard Tuck *The Rights of War And Peace: Political Thought And The International Order From Grotious to Kant 140-225* (Oxford University press, 2001)
84. Ridley F. F., 'The Importance of Constitutions' (1966) 19 *Parliamentary Affairs* 312–323.
85. Robert P. & Siegel R. 'Roe Rage: Democratic Constitutionalism and Backlash'(2007) 42 Harv.C.R.-C.L. L. Rev. 373, 374-76
86. Ronald Dworkin, *Law'S Empire* (1986)
87. Rosenfield M. (ed) *Constitutionalism, Identity, Difference and legitimacy, Theoretical Perspectives* (Durham: Duke University Press, 1994) 4042
88. Rubin, A. B. 'Judicial Review in the United States' (1979) 40 La. L. Rev. 67
89. *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [136]-[151].
90. Saikrishna B. P. and John C. Y. 'The Origins of Judicial Review' (2003) 70 University of Chicago Law Review 887
91. Schmitt, C. *Political Theology* (MIT Press, 1922)
92. Siegle J. 'Overcoming Dilemmas of Democratisation: Protecting Civil Liberties and the Right to Democracy' 128. (2012) 81 Nordic Journal of International Law 506
93. Sinani, B. 'A critical-legal overview of the concept of constitution as the highest legal- political act of the state in the light of constitutional-juridical doctrine' (2013)
94. Tasioulas, John, 'On the Foundations of Human Rights', in Rowan Cruft, S. Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights*, Philosophical Foundations of Law (Oxford, 2015)
95. Terence C. 'Constitutionalism' *Building Freedom?: Securing Constitutionalism and Civil Liberties in Africa: An Analysis of evidence from the APRM* (2016) South African Institute of International Affair. 20–27.
96. Thomas E. Baker, 'Constitutional Theory in a Nutshell' (2004) 13 William & Mary Bill of rights Journal 60
97. Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford: Oxford University Press, 2016)
98. Tuck R. & Silverthorne M. (eds. & trs) Thomas Hobbes' *On The Citizen* (Cambridge Univ. Press, 1998)
99. Tushnet M, *Taking the Constitution away from the courts* (Princeton University Press, 1999)
100. Valcke, A. 'The Rule of Law: Its Origins and Meanings (A Short Guide for Practitioners)' (2012). Waldron, J. 'Constitutionalism: A Skeptical View' (2012) No. 10-87 NYU School of Law, Public Law
101. Waldron 'The Core of the Case Against Judicial Review' (2006) 115 The Yale Law Journal 1353
102. Waldron J. 'Separation of Powers In Thought and Practice?' (2013) 54 Boston College Law Review 433-434
103. Walker N. 'Taking Constitutionalism Beyond the State' (2008) 56 Political Studies
104. Waluchow W. & Kyritsisc D. 'Constitutionalism' (2001) Stanford Encyclopedia of Philosophy (https://plato.stanford.edu/entries/constitutionalism/> accessed 24 November 2024
105. Wedberg A. Cambridge (tr), Kelsen's *General Theory of Law and State* (Harvard University Press, 1946)
106. Yang, X. 'The impacts of the 2014 Coup on Thailand's relations with the People's Republic of China and the United States of America' (Chulalongkorn University Theses and Dissertations (Chula ETD), 2023)

Case Law

1. *Akoto and 7 others* [1961] GLR 523-535
2. *Asare v Attorney-General* (2015) JELR 68987 (SC)
3. *Asare v Attorney-General* [2003-2004] SCGLR 823

4. *Emmanuel Noble Kor v. The Attorney-general and Justice Isaac Delali Duose* (2016) JELR 66377 (SC)
5. *Elikplim Agbemava v. Attorney-General* (J1/05/2017) [2024] GHASC 23
6. *Marbury v. Madison* (1803) 5 U.S. 137
7. *Nana Asante Bediatuo v. Attorney-General* (2018) JELR 67382 (SC)
8. *New Patriotic Party v. Attorney General* (1993-94) 2 GLR 35
9. *New Patriotic Party v Inspector-General of Police* [1993-94] 2 GLR 459.
10. Prince Obiri-Korang v. Attorney General (2024) JELR 112342 (SC);
11. *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [136]-[151].
12. *The Republic v. Francis Kwame Dumenu And Frank Ntumi; Ex parte Aaron Morny And Godwin Morny* (2018) JELR 67770 (HC)
13. *Tsikata v. Attorney-General* (2002) JELR 68280 (SC)
14. *Tuffour v. Attorney-General* [1980] GLR 637
15. *United States v. Will* (1980) 449 U.S. 200

International/Regional Documents

1. African Charter on Human and Peoples' Rights (ACHPR) (1981)
2. African Children's Charter (1990)
3. American Convention on Human Rights (ACHR) (1969)
4. European Convention on Human Rights (ECHR) (1950)
5. International Covenant on Civil and Political Rights (ICCPR) (1966)
6. International Covenant on Economic, Social, and Cultural Rights (ICESCR) (1966)
7. Inter-American System (American Declaration of the Rights and Duties of Man (1948)
8. International Institute for Democratic and Electoral Assistance (IDEA) 'What is a Constitution? Principles and Concepts' [2014]
9. Maputo Protocol (2003)
10. United Nation Basic Principles on the Independence of the Judiciary (1985) <United Nations (UN) System (Universal Declaration of Human Rights (UDHR) (1948)