Page 1109 - 1128 **DOI:** *https://doij.org/10.10000/IJLMH.1110521*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 8 | Issue 4

2025

Where does the Unwritten Constitution Fit in the Modern Fabric of Constitutionalism? *Identifying the Tenets of Maximum Constitutionalism in the Unwritten Rules of the UK and the Global Constitution*

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ABSTRACT

The concept of constitutionalism has veritably evolved over the years, from simply reflecting the nature of governance, to limiting the scope of governance as per the accepted rules, and thereafter to ensure that the governance reflects the upliftment of the socio-economic conditions of the individuals. Substantive constitutionalism has traditionally been deemed to mirror the notion of legal constitutionalism, which essentially means the entrenchment of core constitutional values in a written document, with a corollary provision for strong-form judicial review to protect those fundamental values. Political constitutionalism of a jurisdiction like the UK, however, has continued to challenge this notion by effectively incorporating substantive rules of constitutionalism within the realm of its largely unwritten constitution, based primarily on the doctrine of parliamentary sovereignty.

Global constitutionalism, emerging from a decentralized global constitution with largely unwritten rules, has proposed the idea of 'constitutionalism in transit' in the context of an increasingly interconnected global world.

The purpose of this paper is to define and elucidate how the unwritten rules of a nation-state (the UK) and that of the global constitution are able to broadly implement and enforce the contemporary tenets of maximum constitutionalism.

Keywords: *Constitutionalism, unwritten constitution, political constitutionalism, legal constitutionalism, substantive constitutionalism, global constitutionalism*

I. TRACING THE EVOLUTION OF THE NORMS OF CONSTITUTIONALISM

Broadly speaking, '[the] term 'constitution' refers to the principles, rules and laws that

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 [ISSN 2581-5369]

establish and underpin a political system'.[3] The meaning of the term 'constitutionalism', in terms of minimalist or thinner notions of the concept, denotes that a constitution may be understood to mean a foundational legal framework that constrains state authority and defines the rights and obligations between the government and its citizens.[4] However, as scholars have over the ages attempted to attain a deeper understanding of the concept of the term 'constitution', and the tool that assists in realizing its modalities and effectiveness – namely, 'constitutionalism', which the present article in part aims to comprehend and summarize – it becomes amply clear that the meaning and definition of the term 'constitution' is not as simple as defined above.

Starting with a minimalistic understanding of the notion of constitutionalism as described above, on a basic level, the concept can be understood to mean the confidence that societies, through centuries of political development, have vested in constitutional frameworks—written, unwritten, or both—as instruments for restraining governmental power. As rightly pointed out by many scholars, constitutionalism reflects not only the intellectual advancement of humanity in structuring political authority through foundational principles in the form of a constitution but also the hard-earned legacy of prolonged struggle, often marked by the sacrifice of life and property. In other words, it may be described as a 'priceless heritage, which gives man the right to rule himself',[5] a pinnacle, so to speak, of the evolution of the social contract theory.

The earliest descriptions of constitutionalism can be traced back to when limitations over a polity were still being explored. In other words, the origins of constitutionalism can be traced to an era when the character of a constitution was shaped by the locus of sovereign authority.[6]The elementary ideas of the constitution, therefore, as it was in ancient Greece or Rome, denoted the general nature or character of the State.[7]Therefore, it can be said that these were the times when governmental constraints were defined solely by prevailing political ideals—such as democracy or oligarchy—rather than by a codified, overarching body of fundamental law. Laws were subject to moral or political evaluation, but not to scrutiny against a higher constitutional standard.[8] In other words, the constitution was not regarded as

[3] *The UK Constitution*, THE CONSTITUTION SOCIETY, https://consoc.org.uk/the-constitution-explained/the-uk-constitution/ (last visited on 05 June 2025).
[4] *Ibid*.
[5] C. Perry Patterson, *The Evolution of Constitutionalism*, 32(5) MINN. L. REV. (1948).
[6] See WILLIAM A. DUNNING, A HISTORY OF POLITICAL THEORIES: ANCIENT AND MEDIEVAL (Literary Licensing, LLC 2014).
[7] Patterson, *supra* note 5.
[8] CHARLES MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 28-33 (Cornell University Press 1940).

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an instrument of compulsion, a superior norm, or a framework for restraining governmental power.[9]

These were the initial, rudimentary ideas, which, through years of evolution, adaptation, and modification, transformed into the minimalistic or thin notions of constitutionalism, denoting the idea that the constitution is a document that has the power to impose limitations on government actions. Eventually, through further evolution of politics and of the societies, the notion finally attained the thicker attributes of being a higher law, of accepting and promoting the notion of individualism, the protection of human rights, including through judicial review, and of observing the basic principles of separation of powers and the rule of law, as we understand it today.

Minimal constitutionalism, or its thinner variants, can take multiple forms—it may operate within democratic or authoritarian contexts, reflect liberal or post-liberal ideologies, and be expressed either as a legal framework or a political arrangement.[10] Even democratic constitutionalism may manifest through legal or political dimensions, adopting either a conservative or reformative orientation.[11] That is, whatever the nature of the constitution, which may be democratically or otherwise framed, simply informs constitutionalism in that spirit. This would mean that, similar to the foregoing description of the rudimentary understanding of constitutionalism that existed in the 17th or 18th century, under the aegis of minimal constitutionalism also, even an act starkly against the modern and acceptable ideas of rights and personal liberty may not be deemed to be unconstitutional. The idea of minimal constitutionalism, therefore, seems to be inherently faulty, intrinsically giving rise to fundamentally contradictory postulations, such as '[h]ow can a government be legally limited if law is the creation of government?' or '[d]oes this mean that a government can be 'self-limiting'?'.[12]Herein, the concept of thicker constitutionalism has, of necessity, emerged to provide a solution to the self-contradictory problems associated with the minimalistic model of constitutionalism.

Some scholars in this regard are of the view that when it comes to implementing maximum or thicker constitutionalism, any substantive constraint on governmental authority, in the form of constitutional limitations, must first be entrenched within a written constitutional text (even though jurisdictions like the UK have almost completely negated this idea), possess a degree

[9] Patterson, *supra* note 5.
[10] T. Roux, *Defending Liberal Constitutions* (forthcoming, 2023).
[11] Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 SAJHR 146 (1998).
[12] Edward N. Zalta, et al., (eds.) , *Constitutionalism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, (22 May, 2025, 11:30 am), https://plato.stanford.edu/entries/constitutionalism/.

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of rigidity that shields it from alteration by those in power, and ultimately function as a dynamic instrument capable of evolving alongside shifting societal values and principles.[13] Some of the cogent examples of limitations imposed upon a government that may reflect the richer notions of constitutionalism would be – provisions that circumscribe the authority of the various branches of government, prescribe procedural requirements governing both the form and manner of lawmaking, and, most critically, safeguard the civil rights and liberties of individuals.[14]

The fundamental values that would inform the thicker concept of constitutionalism in the sense described above, of course, are something that not all schools of thought or jurisdictions or administrative blocks would agree to in the same sense. This is one of the primary reasons why the existence and acceptability of tenets of the notion of richer constitutionalism continues to be widely debated. For instance, even while rights-based judicial review is broadly accepted, its essential characteristics—particularly its legitimacy and proper form—remain subjects of intense debate, with divergent approaches adopted across different jurisdictions.[15] For instance, some scholars advocate for a "strong-form" model of judicial review, as exemplified by the United States, while others support a "weak-form" approach, such as that found in New Zealand or the United Kingdom. Still others question the necessity of rights-based judicial review altogether, as seen in the Australian context.[16] Nevertheless, it remains a common understanding that judicial review remains an essential characteristic of richer constitutionalism everywhere.[17] Another example of such maximum values could be 'institutional pluralism' – a calibrated equilibrium between state actions that advance individual rights and those that impose necessary constraints on governmental power, reinforced by robust institutional checks and balances.[18]

Lastly, in this regard, it is also important to take into account the two main schools that advocate two slightly different notions of maximum constitutionalism. The first is a more liberal school of thought that supports the view that, in order to foster a relatively uniform global conception of the thick notion of constitutionality, it is imperative that such an understanding rests upon a foundational set of core guarantees and institutions, without

[13] *Ibid*.
[14] *Ibid.*
[15] Tarunabh Khaitan, *Constitutional Directives: Morally-Committed Political Constitutionalism*, MOD. L. REV. (2019).
[16] M. TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW (Princeton University Press, New Jersey 2008); S. Gardbaum, *The New Commonwealth Constitutionalism*, 49 AMJCOMPL 707 (2001); *Ibid*.
[17] Khaitan, *supra* note 15.
[18] Rosalind Dixon, *The New Responsive Constitutionalism*, MOD. L. REV. (2023).

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drawing rigid distinctions between constitutional norms and directives.[19] This would aid in creating a consistent framework for interpreting and applying the concept of constitutionality across different legal systems.[20] That is, this may simply imply that a thick concept of constitutionalism embodies foundational values and principles that are not easily altered and are deemed indispensable to the legitimacy of any legal and political order.[21]

The other school of thought, which is a more conservative school, views constitutional norms as a "thin" form of constitutionalism, while constitutional directives as a “thick” form.[22]This set of scholarship describes this thick set of constitutional commitments as ‘constitutional directives’, corresponding to terms such as, ‘directive principles of social policy’, ‘directive principles of state policy’, ‘goals and principles of state action’, as described varyingly in different constitutional texts.[23] These thick constitutional directives are, in most cases, non-enforceable directives to the State, for the socio-economic upliftment of the society as a whole.

The distinction between constitutional directives as "thick" constitutionalism and constitutional norms as "thin" constitutionalism is, however, not always clear-cut and may often be deemed to be an artificial one. Even though it is true that increasingly within discussions on constitutionalist ideologies, the non-justiciable thick moral commitments (constitutional directives) are receiving more attention from scholars, as deserving of as much constitutionalizing efforts as basic rights,[24] the application and interpretation of both types of constitutional provisions can be influenced by context and evolving societal values. In other words, either of the norms of constitutional norms or constitutional directives may fall into either the thin or thick categories, as per the situation and context.

II. CONSTITUTIONALIST DIVERGENCE BETWEEN THE WRITTEN AND UNWRITTEN FORMS OF THE CONSTITUTION

First and foremost, it needs to be understood that every constitutional system is distinct, shaped by its historical context, constitutional text, and institutional practices—elements that any interpretation of 'constitutionalism' must take into account.

[19] See Elliott Abrams, *Constitutions Thick and Thin*, COUNCIL ON FOREIGN RELATIONS, (May 23, 2025, 12:00 pm) https://www.cfr.org/article/constitutions-thick-and-thin
[20] *Ibid*.
[21] *Ibid*.
[22] Jeff King describes thick moral commitments as constitutional ‘mission statements’. See J. King, *Constitutions as Mission Statements*, in D. J. GALLIGAN AND M. VERSTEEG (EDS.), COMPARATIVE CONSTITUTIONAL LAW AND POLICY: SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 73–102 (Cambridge University Press, 2013).
[23] Khaitan, *supra* note 15.
[24] Khaitan, *supra* note 15.

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The foundational tenet of a standard written constitution is the establishment of a functional distinction between ordinary legislation and the written constitution, the latter occupying a superior position in the legal hierarchy and serving as the foundational basis of constitutionalism.[25]

The origins of the modern written constitution are often traced to the American and French Revolutions. In its earliest connotations, as previously outlined, the term "constitution" referred to the condition or organization of a State, shaped by its historical evolution, natural characteristics, and legal framework. The United States Constitution, adopted in 1787, is one of the earliest examples of a codified constitution, crafted to limit governmental power and protect individual rights.

Thus, although constitutional ideas can be traced back to earlier times, it was during the 17th and 18th centuries that constitutionalism emerged as a distinct political doctrine, centred on the primacy of codified rules and the principle of separation of powers.

In light of the above, the unwritten nature of certain constitutional systems has prompted considerable scholarly debate over whether such frameworks can truly be classified as constitutions in the conventional sense.[26]

In modern constitutional practice, written constitutions have become the prevailing model, with unwritten constitutions remaining rare and exceptional. Therefore, a pertinent preliminary question is why a given society opted for an unwritten constitutional model to shape its political system.[27]Understandably, the explanation lies in a complex interplay of historical, social, and economic factors unique to the particular State.

In the United Kingdom (UK), the 1689 Bill of Rights marked a pivotal moment by curbing monarchical authority and significantly strengthening the role of Parliament.[28]The prevailing circumstances led the dominant social and political classes to reject the notion of a written constitution, as such a document might constrain their governing authority. Instead, they favoured a powerful Parliament, which remained within their sphere of influence.[29]

Moreover, scholars frequently observe that codified constitutions tend to emerge in the aftermath of significant historical disruptions, such as revolutions, independence movements,

[25] Paul Craig, *Written and Unwritten Constitutions: The Modality of Change*, in 1 SAM BOOKMAN, EDWARD WILLIS, ET AL., PRAGMATISM, PRINCIPLE, AND POWER IN COMMON LAW CONSTITUTIONAL SYSTEMS: ESSAYS IN HONOR OF BRUCE HARRIS (Larcier Intersentia 2022).
[26] Mark Graber, Sanford Levinson, et al., *Introduction*, in MARK GRABER, SANFORD LEVINSON, ET AL., CONSTITUTIONAL DEMOCRACY IN CRISIS? 8 (OUP, 2018).
[27] Craig, *supra* note 25.
[28] Craig, *supra* note 25.
[29] Craig, *supra* note 25.

military defeats, or the disintegration of prior regimes.[30] None of these events ever occurred in the UK, which can be attributed as one of the reasons for its uncodified constitution.[31] As will be explained later, the unwritten nature of the UK constitution has suited perfectly to its polity and social and economic stability, so much so that even in terms of the need for the existence of maximum constitutionalism, the unwritten constitution is very well serving its rights-based purposes.

It is widely acknowledged that unwritten constitutions can impose constraints on governmental power comparable to those found in written constitutions, and such principles are equally recognized and upheld by legal and political actors. What then is the real difference between the elements of constitutionalism of a written and an unwritten constitution, respectively?

The primary difference between the constitutional elements of written and unwritten constitutions lies in their 'form, sources, and flexibility'. Written constitutions are consolidated into a single codified document that serves as the authoritative source of constitutional law, whereas unwritten constitutions develop organically through long-standing customs, conventions, and judicial precedents, rendering them less formal but more adaptable. The two principal differences drawn between the two systems of constitutions by scholars are a) that they diverge in terms of the degree to which each form of constitution is anchored in written text, and b) the degree to which each constitutional form is regarded as distinct from, and hierarchically superior to, ordinary legislation.[32]

Concerning the differing potency and authority of written and unwritten constitutional forms, it is important to acknowledge that even the most meticulously drafted written constitution relies fundamentally on political will, or what some scholars refer to as "constitutional commitment". In its absence, a written constitution risks becoming merely a formal document, devoid of genuine constitutionalism.[33]

Secondly, it is important to recognize that an "unwritten constitution" is, in fact, partly written and partly unwritten—much like written constitutions—except that, in the former, no single document holds canonical or supreme legal status.

In other words, not all constitutional principles are explicitly laid down even in written constitutions. That is, there is always an unwritten element in all written constitutions,

[30] *What is the UK Constitution?*, THE CONSTITUTION UNIT – UCL, (17 June, 2025, 9:30 am) https://www.ucl.ac.uk/constitution-unit/explainers/what-uk-constitution.
[31] *Ibid*.
[32] Craig, *supra* note 25.
[33] See A. Kavanagh, *The Ubiquity of Unwritten Constitutionalism*, 21(4) I-CON (2023).

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sometimes even more detailed than their written counterparts. These may encompass matters intentionally excluded by the original drafters of the constitution, as well as provisions that necessitate further development through interpretation, institutional practice, or evolving constitutional norms.[34] Prime examples of the same may be the right to vote in the U.S.[35] or the "Basic Structure Doctrine" in India. Writers such as Prof. Paul Craig write in this regard that the inclusion of recognized constitutional norms within a canonical text does not fully or definitively capture the complete substance of even a written constitution.[36]

With regards to the difference concerning the extent to which each of the constitutional forms is palpably separate from and superior to ordinary laws, it's essential to note the processes through which the constitutional contents in each of the constitutional forms are framed.[37]

The basis of the UK written constitution, for example, is the core constitutional value of 'parliamentary sovereignty'. The concept of parliamentary sovereignty has somehow elevated itself from the domain of ordinary statutes, in terms of modality and functionality.[38] In other words, the normative foundations informing such a constitutional arrangement diverge significantly from those underpinning conventional written constitutions. In systems governed by a written constitution, the scope of ordinary politics is constrained by constitutional boundaries. By contrast, in systems like that of the UK, where the constitution remains unwritten, the sphere of ordinary politics tends to be expansive and largely unconstrained.

III. Understanding the Essence and Modalities of the UK's Unwritten Constitution

In discussions of unwritten constitutionalism, the most frequently cited examples are the United Kingdom, New Zealand, Israel, and Canada—jurisdictions notable for lacking a single, codified constitutional text that holds formal supremacy over all other laws.[39] Rather than consolidating the foundational rules of governance within a single authoritative text, constitutional or higher-order norms are distributed across various legal and political institutions. These may be found in statutes, case-laws, customary law, for example, the

[34] Craig, *supra* note 25.
[35] The extent to which the right is now recognized in the U.S. (as secured by the Federal Constitution), stems from judicial decisions drawing on the constitutional amendments, its structure and history, and on its recognition by various State constitutions and statutes. See DAVID S. LAW (ED.), CONSTITUTIONALISM IN CONTEXT (Cambridge University Press, 2022).
[36] Craig, *supra* note 25.
[37] Craig, *supra* note 25.
[38] Craig, *supra* note 25.
[39] John Gardner, *Can There Be a Written Constitution?*, OXFORD LEGAL STUDIES RESEARCH PAPER NO. 17/2009 (May 8, 2009).

tikanga in Aotearoa New Zealand, etc.[40]

As we discussed earlier, an unwritten constitution is a system of governing norms wherein no single canonical text can be identified. How easy, then, is it to look into the accepted norms and principles, which form the basis of such a legal system? These norms and principles are dispersed across a wide range of sources—including historical traditions, constitutional conventions, and case law—none of which are easily identifiable or systematically organized.

Taking our chosen example of the UK in this regard, the guiding constitutional principle is that of parliamentary sovereignty. In earlier periods, sovereignty was vested in Parliament, or more precisely, in the monarch acting in conjunction with Parliament, and the English Bill of Rights was seen as a legal instrument that curtailed the authority of the Crown.[41] Nonetheless, despite the absence of formal constitutional constraints, acts of the British Parliament were often subject to allegations of un-constitutionalism when perceived to contravene fundamental historical principles that formed the basis of British governance.[42]

Contemporary British scholars, nevertheless, contend that the interplay between the UK's constitutional form and its constitutional culture has given rise to a condition in which even fundamental constitutional principles remain somewhat opaque. This is largely attributed to the historically limited number of judicial decisions explicitly engaging constitutional questions—a trend that, however, appears to be shifting in recent years.[43]

Nevertheless, as previously discussed, both the judiciary and political institutions acknowledge the rule of law, parliamentary sovereignty, and the separation of powers as foundational principles that give life to the constitution.[44] These principles coexist with—and are, to varying extents, embodied in—the many constitutional conventions that largely regulate the conduct and powers of political institutions and actors.[45]

To understand how Parliamentary sovereignty in Britain constitutes its unwritten constitution, it is preliminarily essential to understand the meaning and circumference of the term "Parliamentary sovereignty" in the UK's context.

Parliament's dual role as both the supreme legislative body and the highest court of the land in

[40] Dean Knight & Mihiata Pirini, *Ellis, Tikanga Maori and the Common Law: Relations between the First, Second and Third Laws of Aotearoa New Zealand*, Pub. L. 557 (2023).
[41] DAVID S. LAW (ED.), CONSTITUTIONALISM IN CONTEXT (Cambridge University Press, 2022).
[42] *Ibid*.
[43] Se-Shauna Wheatle, et al., *The Legal and Political Dimensions of Unwritten Constitutional Norms and Principles*, UK CONSTITUTIONAL LAW ASSOCIATION, (17 June, 2025, 11:00 am) <https://ukconstitutionallaw.org/2024/05/29/se-shauna-wheatle-and-roger-masterman-the-legal-and-political-dimensions-of-unwritten-constitutional-norms-and-principles/>.
[44] *Ibid.*
[45] *Ibid*.

the UK during the initial years had consolidated its claim to sovereignty. Additionally, the philosophical writings of thinkers like Thomas Hobbes—particularly his concept of the people vesting authority in an all-powerful Leviathan—bolstered the idea of concentrating ultimate authority in a single entity, exemplified in this case by Parliament.

Gradually, it was shown by the eminent scholars of the time that the Parliamentary sovereignty "would not jeopardise rights and liberties valued by the people".[46]This was because the doctrine of absolute Parliamentary sovereignty was ultimately derived from the "political theory of balanced constitutionalism" as propounded by Blackstone.[47] This "balanced constitutionalism" can in part be attributed to the notion of "Separation of Powers" that was then observed in England.[48]

The validity and rationality of Parliamentary sovereignty as a cogent constitutional order was further reaffirmed by the theory of A.V. Dicey, in his theory of rule of law, which at its core drew on the argument that a duly elected Parliament as an institution "represented the most authoritative expression of the will of the nation".[49] Parliament would control the executive, and, therefore, could not pass laws contrary to the "will of the nation".[50] Consequently, the traditional need for constitutional safeguards against legislative or executive overreach, such as an entrenchment of the protection of judicial review in a written document, was deemed unnecessary.[51]

IV. THE UNWRITTEN CONSTITUTION AND THE THICKER NOTIONS OF CONSTITUTIONALISM

The concept of an unwritten constitution in the UK rests fundamentally on the doctrine of Parliamentary Sovereignty, premised on the assumption that Parliament would refrain from enacting unconstitutional laws, and that any such laws, if enacted, would be swiftly repealed. However, according to many contemporary scholars, the notion above has not been as easy to implement in practice.[52]

The issues that have been raised with the efficacy of the UK constitutionalism are three-fold -

[46] 5 GERALD STOURZH, FUNDAMENTAL LAWS AND INDIVIDUAL RIGHTS IN THE 18TH CENTURY CONSTITUTION 2 – 3 (Claremont Institute 1984).
[47] James Harrington, *The Commonwealth of Oceana*, in JGA POCOCK (ED.), THE POLITICAL WORKS OF JAMES HARRINGTON (Cambridge University Press, Cambridge, 1977).
[48] 16 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 146, 153 (Cadell and Butterworth 1825).
[49] 10 AV DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (Macmillan, London 1959). See Craig, *supra* note 25.
[50] *Ibid.*
[51] *Ibid*.
[52] Craig, *supra* note 25.

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first, the so-called "*under-constitutionalized nature of the UK unwritten constitution*"[53], as claimed by many contemporary scholars,[54] second, the "*restrictive nature of judicial review*" that exists in the UK, and third, the "*absence of the concept of a 'higher law*".

With regards to the so-called "under-constitutionalized nature" of the UK constitution, many scholars have highlighted the fact that even though it is widely accepted that the principles of parliamentary sovereignty, rule of law, and separation of powers form the bedrock of UK's constitutionalism, the concepts nevertheless do not have a clear meaning attached to them.[55]

For example, in the UK, the manner in which parliamentary powers are exercised is considered as significant as the validity of the legislation once enacted.[56] The case of *Miller v. Cherry* is particularly significant in this context, as the UK Supreme Court held that the 2019 prorogation of Parliament—intended to extend the negotiation period between the UK and the EU over the terms of Brexit—was unlawful, as it contravened the constitutional principles of parliamentary sovereignty and accountability.[57] Moreover, the distinction between political norms and their legal counterparts—and the extent to which both are grounded in shared constitutional foundations—remains a subject of considerable scholarly debate.[58]

When it comes to the limited power of judicial review placed in the judiciary, which is also an essential arm of the concept of the rule of law, one of the primary contentions that is always made in the case of the UK is that the idea of absolute parliamentary sovereignty inevitably raises the presumption that "the standards of constitutional propriety or legality represented by the rule of Law must have a subservient status".[59] Judicial inquiry into the nature and extent of parliamentary sovereignty in the UK inevitably invites concerns regarding potential judicial overreach.[60] There has often been a hard choice that the polity has often faced – that between parliamentary absolutism and the necessity of judicial review.[61] Consequently, more often

[53] Craig, *supra* note 25 at 283.
[54] Craig, *supra* note 25; Se-Shauna, et al., *The Stakes of the Unwritten Constitutional Norms and Principles Debate in the UK*, VERFBLOG (05 June, 2025, 09:55 am) https://verfassungsblog.de/the-stakes-of-the-unwritten-constitutional-norms-and-principles-debate-in-the-uk/.
[55] Se-Shauna, et al., *The Stakes of the Unwritten Constitutional Norms and Principles Debate in the UK*, VERFBLOG (05 June, 2025, 11:00 am) https://verfassungsblog.de/the-stakes-of-the-unwritten-constitutional-norms-and-principles-debate-in-the-uk/.
[56] *Ibid.*
[57] Se-Shauna, *supra* note 43.
[58] Se-Shauna, *supra* note 55.
[59] T.R.S. Allan, *Constitutionalism at Common Law: The Rule of Law and Judicial Review*, CAMB. L. J. (2025).
[60] *Ibid.*
[61] In *Privacy International* (*R. (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2020] A.C. 491, at [209]), Lord Sumption remarks, 'In the absence of a written constitution capable of serving as a higher source of law, the status of Parliamentary legislation as the ultimate source of law is the foundation of democracy in the United Kingdom. The alternative would be to treat the courts as being entitled on their own initiative to create a higher source of law than statute, namely their own decisions'.

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than not a weak-form judicial review is what is accepted and preferred in the context of the UK.

The UK is a well-known example of political constitutionalism. However, contemporary constitutional theorists argue that, although a surface-level distinction appears to exist between political and legal norms, many unwritten constitutional principles—particularly in the UK context—straddle both domains. As a result, particularly the political norms evolve and are enforced through a range of mechanisms, including parliamentary oversight, executive decision-making, and political discourse, much like their legal counterparts.[62]It is also significant to observe that, in addressing norms of political conduct, courts often engage with and adjudicate upon associated constitutional principles by invoking the legal dimensions embedded within those political norms.[63]This interrelationship between the legal and political dimensions of the unwritten constitution seems to answer the question of the existence of maximum constitutionalism within the UK polity in the affirmative.[64]

Strictly speaking, the key difference between legal and political constitutionalism lies in the answer to the question – which institution holds the principal duty of upholding and ensuring compliance with the constitution, the judiciary or the political branches? In the UK, political constitutionalism is reflected in a system where mechanisms such as parliamentary sovereignty, democratic accountability, and open political discourse serve as the chief safeguards of limited and responsible governance, rather than reliance on a rigid legal constitution or robust judicial review as the ultimate interpreter of constitutional norms.

The United States serves as the quintessential example of legal constitutionalism, where a codified constitution—supplemented by both written and unwritten legal norms and conventions—is regarded as higher law, entrusted to legal institutions, particularly constitutional courts, for interpretation and enforcement.[65]

By contrast, a political conception of constitutionalism views the constitution as intrinsically embedded within the structure and functioning of the political system, as well as in the practical operation of its institutions and processes.[66]

Political constitutionalists, therefore, standing at the other end of the spectrum, criticize the idea of legal constitutionalism as it permits judges to assume political functions without

[62] Se-Shauna, *supra* note 43.
[63] Se-Shauna, *supra* note 43.
[64] Se-Shauna, *supra* note 43.
[65] R. BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY (Cambridge University Press, 2007).
[66] *Ibid*.

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democratic legitimacy or accountability, effectively allowing them to be the arbiters of their authority.[67]

Conventional scholarship has often equated substantive constitutionalism with legal constitutionalism—that is, constitutional principles enforceable through judicial mechanisms. However, this assumption, which effectively denies political constitutionalism any substantive constitutional content, has been challenged and refuted by the foregoing analysis.

Drawing from the foregoing arguments, therefore, it can veritably be said that the UK's constitution has both legal and political components. For example, the UK Constitution incorporates key mechanisms for the legal protection of constitutional rights, notably through its accession to the European Convention on Human Rights and the enactment of the Human Rights Act 1998 (HRA 1998). This is also known as a positive political constitutional model for the protection of rights. The HRA 1998 grants courts the authority to assess legislation for conformity with the rights set out in the European Convention on Human Rights. However, this review takes a "weak-form" approach, whereby courts cannot invalidate legislation but may instead interpret it compatibly with the Convention, or issue a declaration of incompatibility.[68]

Concerning the aforementioned flaw of the absence of a "higher law" in the UK constitutionalism, the idea behind the concept, as noted by some of the leading scholars, is that "there can be no higher laws other than the laws that emerge from a duly constitutive and constitutional political process".[69]

V. THE IDEA OF GLOBAL CONSTITUTIONALISM

Global constitutionalism may be broadly understood as a normative framework for analysing global law and governance through the lens of constitutional or constitutionalist principles.[70]The notion of a 'global constitution' has likewise been characterised as a foundational order of principles within the framework of positive law, marking a paradigm shift from traditional concepts of the law of nations to an emerging body of global law.[71]

The transformation of international law into a normative legal order structured hierarchically—with a foundational, higher law aimed at protecting the well-being of individuals—has been described by many scholars as the "constitutionalization of

[67] J. Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346–1406 (2006).
[68] *Ibid*.
[69] Bellamy, *supra* note 65.
[70] Anne Peters, *Global Constitutionalism: The Social Dimension*, in TAKAO SUAMI ET AL. (EDS.), GLOBAL CONSTITUTIONALISM FROM EUROPEAN AND EAST ASIAN PERSPECTIVES 277-350 (CUP 2018).
[71] *Ibid.*

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international law."[72] In this context, constitutionalization refers to the transformation of the international legal order—from one grounded primarily in principles like state sovereignty and consensualism—to a global legal framework that recognises and incorporates the foundational values and principles of constitutionalism.[73]

However, given the fundamental differences between the global and national orders, constitutionalist principles must be adapted and reinterpreted to suit the distinct context of the global legal system.[74] The objective of this part is to understand to what extent this modification would apply to the concept of constitutionalism as we presently understand it, and how far the values of thick constitutionalism would apply to the concept of global constitutionalism.

We could start with the question of what would constitute the "World Constitution"? Like most national constitutions, it may be said to be a combination of written and unwritten rules.

It would be simpler to begin with the premise of whether the United Nations (UN) Charter (described hereafter as "the Charter") and/or the Vienna Convention on the Law of the Treaties (VCLT), 1969 can be deemed to be a world constitution in the traditional sense, as they both play crucial roles in the international legal order and are sometimes referred to as having constitutional characteristics.

Talking specifically about the Charter, the central question that arises is whether the Charter, along with the body of law developed by the organization, offers constitutional guidance in articulating and addressing the normative values that inevitably arise from the process of global integration.[75]

Viewing the Charter as the constitution of the international community would present a profound shift toward centralized legal authority, potentially undermining the traditional doctrine of state sovereignty in international relations.

As constitutionalism is mainly about democratic governance and respect for individual rights, the constitutionalization of the Charter, which includes ideals embodied in most democratic constitutions, may be considered to be complementary to national constitutional traditions.[76]

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[72] J. KLABBERS, A. PETERS, ET AL., THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW (Oxford University Press, 2011).
[73] Anne Peters, *supra* note 70.
[74] Anne Peters, *supra* note 70.
[75] Ronald J. Macdonald, *The Charter of the United Nations as a World Constitution*, in INTERNATIONAL LAW ACROSS THE SPECTRUM OF CONFLICT: ESSAYS IN HONOUR OF PROFESSOR L. C. GREEN ON THE OCCASION OF HIS EIGHTIETH BIRTHDAY 263-300 (Newport, Naval War College 2000).
[76] HERMANN MOSLER, THE INTERNATIONAL SOCIETY AS A LEGAL COMMUNITY (Sijthoff & Noordhoff 1980).

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The Charter can be regarded as a treaty of universal reach, enjoying near-universal membership, and primarily codifying principles of customary international law—principles that are widely accepted by States, binding *erga omnes*, and in many instances, recognised as *jus cogens* norms.[77]As many prominent scholars in the field put it, the Charter encapsulates nearly all of the core principles that underpin contemporary international law.[78]

The VCLT, 1969, again, while not directly establishing a global constitution, provides significant inputs into the development of global constitutionalism by laying the groundwork for international law and treaty relations. One of the most notable developments in international law is the increasing reliance on multilateral treaties as its principal source (Art. 38(1)(a) of the Statute of the International Court of Justice (ICJ)).[79]

Despite some of the centralized legal sources delineated above, it is widely acknowledged among international legal scholars that the international legal order is fundamentally decentralized, lacking a unified constitutional framework.[80] To support this argument, the UN, which is the main source of authority in this regard, has not succeeded in achieving either systemic integration or centralized authority.[81]

In this regard, many scholars are of the view that the inherent characteristics of global constitutionalism are quite distinct from constitutionalism in the national context, and therefore, the former has to be understood and analyzed in that manner. Firstly, in this regard, it needs to be noted that the UN was never conceived as an institution designed to establish a world government.[82] Further, it is to be noted that not all international law falls under the jurisdiction of the UN, nor does the Charter serve as the exclusive legal foundation for the entirety of international law.[83]

Nonetheless, many scholars contend that the Charter exhibits a defining feature of constitutional instruments—namely, the principle of supremacy.[84] In other words, akin to a national constitution, the Charter enjoys normative supremacy (under Article 103), overriding even later-in-time treaties that would otherwise prevail under the "last in time" principle

[77] Ronald J. Macdonald, *supra* note 75.
[78] KARL ZEMANEK, THE LEGAL FOUNDATIONS OF THE INTERNATIONAL SYSTEM 47 (Martinus Nijhoff 1997).
[79] Karolina Milewicz, *Premises and Promises of International Law: An Empirical Analysis of Treaty Commitment (1945 – 2007)*, PAPERS-134 WORLD TRADE INSTITUTE – PHD THESIS (2009).
[80] M.W. Doyle, *A Global Constitution? The Struggle Over the UN Charter*, NYU SYMPOSIUM (2010).
[81] *Ibid*.
[82] *Ibid*.
[83] *Ibid*.
[84] *Ibid*.

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reflected in Article 30 of the VCLT.[85] However, the Charter's supremacy is not absolute; it applies only to those provisions that impose binding "obligations," primarily in the realm of international peace and security.[86]

Another feature aligning the Charter with constitutional instruments is its perpetual character.[87] In other words, the Charter is not subject to revocation by its member states acting unilaterally or collectively.[88] Furthermore, unlike the majority of treaties, States are not permitted to make reservations to the Charter to limit its legal applicability to themselves.[89] The Charter is also notably resistant to amendment, requiring the convening of an international conference and the approval of two-thirds of the entire UN membership, including the assent of all five permanent members of the Security Council, as stipulated in Article 109 of the Charter.[90]

Lastly and most importantly, the Charter is "institutionally supranational", in the sense that it enables binding decisions to be made without requiring the ongoing consent of all Member States. Like many national constitutions, it allocates authority among the principal organs of the United Nations—namely, the Security Council, General Assembly, Secretariat, and International Court of Justice—which perform quasi-executive, legislative, administrative, and judicial functions, respectively. Notably, Article 100 affirms the Secretariat's commitment to institutional independence in carrying out its responsibilities.[91]

Nonetheless, as stated above, a prevailing view among scholars is that the global constitutional order remains predominantly unwritten, given the absence of a single, codified constitutional instrument governing global law.[92] They argue instead that the global constitution emerges from a composite of sources drawn from both international legal instruments and domestic constitutional traditions.[93]This is, therefore, a complex blend and consequent interplay between written and unwritten rules.[94]

The interplay between the written and unwritten aspects of global constitutionalism is further

[85] *Ibid*.
[86] *Ibid*.
[87] *Ibid*.
[88] *Ibid*.
[89] *Ibid*.
[90] *Ibid*.
[91] *Ibid*.
[92] Ruth Houghton, *Locating Unwritten Constitutional Norms in Global Constitutionalism*, VERFASSUNGSBLOG ON MATTERS CONSTITUTIONAL, (30 June, 2025, 12:20 pm) https://verfassungsblog.de/locating-unwritten-constitutional-norms-in-global-constitutionalism/#:~:text=If%20there%20is%20a%20global,constitutional%20norm%20in%20global%20constitutionalism.
[93] *Ibid*.
[94] *Ibid*.

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multilayered. Meaning that it affects the relationship between individuals, States, and international law.[95] In other words, global constitutionalism is not confined to emphasizing the role of the individual in international law; it also advances a broad set of constitutional principles intended to inform the interpretation and application of international law at the domestic, regional, and international levels.[96] These constitutional principles include *human rights*, *democracy*, *the rule of law*, *constituent power*, *separation of powers*, *proportionality, and subsidiarity*.[97]

To explain the unique characteristic of the global constitutionalism further, it is important to first elucidate briefly how the individual plays a central role in global constitutionalist approaches to international law.[98] The central tenets of global constitutionalism include its emphasis on the individual as a subject of international law, which enables it to reject the traditional notion that international law is grounded solely in sovereign consent. It further promotes the accountability of international law and contributes to its ongoing humanization.[99]

The recognition of individual dignity and equality lies at the core of global constitutionalist approaches to understanding—and reinterpreting—State sovereignty.[100] States, as institutional entities, derive their value not merely from exercising effective control over territory and population, but from being—or aspiring to be—constitutionally structured to reflect equal concern and respect for all individuals.[101]

State sovereignty and an international legal order grounded in consent should not be viewed as ends in themselves. While respect for state consent remains significant in international law, it is justified only insofar as it reflects the collective will of individuals organized as a political community. Thus, a renewed conceptualization of sovereignty must prioritize the individual and affirm the principle of political equality among persons.[102]

By re-conceptualizing sovereignty, we are also in a way re-conceptualizing global

[95] Başak Çalı, *Global Constitutionalism and the Individual*, in ANNE PETERS, ET AL., (EDS.), THE INDIVIDUAL IN INTERNATIONAL LAW: HISTORY AND THEORY (Oxford, 2024).
[96] *Ibid.*
[97] Antje Wiener et al., *Global Constitutionalism: Human Rights, Democracy and the Rule of Law*, 1 GLOBCON 1-15 (2012); Anne Peters, *Proportionality as a Global Constitutional Principle*, in ANTHONY F. LANG AND ANTJE WIENER (EDS.), HANDBOOK ON GLOBAL CONSTITUTIONALISM 248-64 (Cheltenham: Edward Elgar 2017); Anthony F. Lang Jr and Antje Wiener, *A Constitutionalizing Global Order: An Introduction*, in ANTHONY F. LANG JR AND ANTJE WIENER (EDS.), HANDBOOK ON GLOBAL CONSTITUTIONALISM 1-20 (Cheltenham: Edward Elgar 2017).
[98] Başak Çalı, *supra* note 95.
[99] Başak Çalı, *supra* note 95.
[100] Başak Çalı, *supra* note 95.
[101] Başak Çalı, *supra* note 95.
[102] Başak Çalı, *supra* note 95.

constitutionalism. This entails the democratization of multilevel governance structures to secure individual participation in both domestic and international law-making processes.[103] This process of democratization encompasses various contexts, including the exercise of public authority by States over non-citizens within their borders; the extraterritorial reach of State actions that substantially impact individuals beyond national frontiers; the discharge of State responsibilities toward refugees; and the governance roles undertaken by international organizations.[104]

In a way it may said that the concept of constitutionalism that we understand in the national context cannot be adapted into the global sphere *ut est*. Global constitutionalism may also be understood as an aspirational process, wherein certain elements of international law exhibit constitutional significance, while in other areas such features are only beginning to emerge or are absent.[105] As many scholars have aptly observed, the objective is not to establish a centralized global government, but rather to constitutionalize a system of global governance that is polyarchic and operates across multiple levels.[106]

In other words, how much of the idea of global constitutionalism can be translated into reality – including ensuring the rule of law, protecting human rights, and fostering democratic governance – is uneven. Nevertheless, global constitutionalism, in an increasingly interconnected global world, has become more of a practical necessity than just a theoretical problem. In other words, global constitutionalism is a necessity, with or without a constitution, as the boundaries between domestic and international law have been progressively blurred.[107]

In response to this necessity, constitutionalism—as a dynamic process—has extended constitutional structures beyond the nation-state, into multiple layers and fora of global and transnational governance.[108] It reflects the extent to which public international law and constitutional law have mutually influenced and shaped one another over time.[109]

Invoking the thicker concepts of constitutionalism, the changing structure of the international legal system, with increased focus on the rights of individuals, is in contemporary parlance

[103] Başak Çalı, *supra* note 95.
[104] Başak Çalı, *supra* note 95.
[105] Anne Peters, *supra* note 70.
[106] Anne Peters, *The Merits of Global Constitutionalism*, 16 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 404 (2009). See generally, Başak Çalı, *supra* note 95.
[107] Thomas Cottier, et al., *The Prospects of 21st Century Constitutionalism*, in 7 A. VON. BOGDANDY (EDS.), MAX PLANCK YEARBOOK OF UNITED NATIONS LAW, 261-328 (Brill 2003).
[108] *Ibid.*
[109] *Ibid.*

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referred to as "constitutionalization of public international law".[110]

VI. CONCLUSION

The evolution of the concept of constitutionalism over the years, marking, delineating, and defining the efficacy not just of the national constitutions, but also the global legal order, has been remarkable. The idea of maximum constitutionalism has broadly been accepted as comprising core contemporary fundamental values, such as the protection of basic human rights and liberties, and the existence of separation of powers, rule of law, and judicial review, marking a distinct transition from the minimal constitutionalism ideas that had been the accepted norm in the past. In other words, there has been almost a universal acceptance in the global politics as much as in the global society of the fact that the existence of constitutionalism does not simply denote that the letter of a supreme text is being followed. It rather means that what is being followed must fulfill the ideals of political and social justice, within the meaning attached to the terms in the modern individualistic context.

One of the primary inferences attached to such a constitutionalism is that its core principles must be entrenched in a written document, which must be difficult to amend by the common processes. The unwritten constitution in this parlance presents itself as a riddle as to how exactly it might fit into the contemporary design of constitutionalism. As has been discussed in the paper, the rarity of the existence of such unwritten constitutions, as compared to their written counterparts, which appear to be the norm, fuels the intensity and difficulty of the riddle further.

However, as we have seen during the foregoing discussions, all the debate around the meaning of constitutionalism ultimately boils down to the issue of 'the will to implement the constitution'. While discussing constitutionalism, especially in the context of the UK, it has become amply clear that as long as the constitutional ideals, developed painstakingly over time, are in place, and they are being substantially enforced through democratically sound political institutions, there is a complete blurring of written and unwritten, as well as legal and political forms of constitution and constitutionalism.

Nevertheless, it remains noteworthy that for real constitutionalism to exist in a polity governed by a largely unwritten constitution, there also needs to exist concurrently a highly evolved social, economic, and political structure in such a polity. In other words, for developing democracies, there cannot be a replacement for a written constitution, containing firmly entrenched within it the core, maximum constitutional values, and a strong-form

[110] *Ibid.*

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judicial review, for constitutionalism, in its actual sense, to exist within them. Despite arguments against legal constitutionalism, in reposing undemocratic authority in the judiciary, ultimately, if the constitution is to be considered as the Kelsen's grundnorm, it is always easier to identify and interpret it if it is located in a written instrument, rather than in the political will, which even though more democratic, may easily end up flouting those very democratic principles for its political needs.

The unwritten global constitution, on the other hand, is a whole other discussion. This is not to imply that the nature of such a constitution is very different from national constitutions. Some of the central treaties under international law, such as the UN Charter and the 1969 VCLT, constitute most of its core values. There are also unwritten aspects of international law, which are observed as rules by the global community, giving the global constitution a more layered outlook, similar to national constitutions. The global constitution also has other characteristics similar to those of national constitutions, such as the feature of supremacy, through concepts of *jus cogens*, and *erga omnes*, difficulty to amend, and the primacy of individual rights, as the global order continues to make a distinct transition from complete dependency on State sovereignty to a more individualistic, human-rights-driven approach.

The divergence, however, takes place concerning constitutionalism. The absence of a central authority that can oversee the implementation of the normative global order places global constitutionalism very differently from national constitutionalism. It positions global constitutionalism as a transitional, process-oriented endeavour rather than an established reality.

Constitutionalism is a varied and layered phenomenon, much like the constitutions on which they are based. It may thrive where the source of governmental power or the grundnorm might not be situated in a single locale and may end up being completely meaningless in a society with a well-codified written constitution. In the end, it may best be described only as a process, rather than a reality. In conclusion, it may be stated that constitutionalism, whether grounded in a written or unwritten constitution, should not be understood in absolutist terms or binary oppositions, but rather as a nuanced and evolving process marked by degrees and gradations.[111]

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[111] *Ibid*.

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