

**JUDICIAL REVIEW AND FUNDAMENTAL RIGHTS: KEY FEATURES OF
CONSTITUTIONALISM**

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INTRODUCTION

While being perceived as a composed record³ that recommends the plan of government, the Constitution is considered less as a sanction of the relations among social entertainers. The legitimate Constitution subordinates legislative issues to law. Likewise, political arrangements are to be found and defended inside legitimate edges, and arrangements are reached through lawful cycles (for example in protected mediation). Yet, the lawful Constitution doesnot end the private connection among Constitution and constitutionalism: from a material perspective, a constitution is a constitution decisively on the grounds that it fulfils the rudimentary assumptions for constitutionalism. The custom that constitutes formal authoritative records and constitutionalist assumptions are interrelated.

The lawful idea of the Constitution implies that it turns out to be essential for the overall set of laws and needs to fulfil the proper states of present-day law⁴. As a composed authoritative report, it is fit to legal legitimate application. In law-focused present-day states, constitutions accept commonness in the legitimate circle.

Constitutions are legitimately restricting, yet they are more adaptable than a standard rule with restricted ability to figure out what will occur in its name. In numerous regards, they are just casings. Furthermore, it isn't just that the casing is regularly loaded up with sudden substance, yet additionally that the very edge may change its shape. 'The Constitution is just to give a chance through which a framework may create.

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³ The U.K. continues to operate without a written constitution. Similarly, the Hungarian Kingdom of the Austro-Hungarian Monarchy (and until 1945) was without a written constitution, and yet it qualified as a constitutional state in its time, with a number of important statutory documents, charters, and treaties. Today Israel and New Zealand have written bits and pieces of ordinary laws which deal with constitutional issues but without entrenchment.

⁴ According to the advocates of the unwritten constitution, a charter is too rigid, while the constitution that manifests itself in traditions enables a more flexible approach. That the judges have nothing to apply is more of an advantage, because it upholds the separation of the branches of power, inasmuch as it excludes the possibility of government by judges at the same time

CONCEPT OF CONSTITUTION AND CONSTITUTIONALISM

The term ‘constitution,’ or its equivalent in other languages, existed long before modern constitutions emerged. But it designated a different object. Originally, it used to describe the state of the human body, it was soon applied to the body politic, yet not in a normative sense but as a description of the situation of a country as determined by a number of factors such as its geography, its climate, its population, its laws etc. In the eighteenth century, the meaning was often narrowed to the state of a country as determined by its basic legal structure. But still the notion ‘constitution’ was not identified with those laws. Rather, the term continued to describe the state of a country insofar as it was shaped by its basic laws. However, the basic laws themselves were not the ‘constitution’ of the country. ‘Constitution’ remained a descriptive, not a prescriptive, term.⁵

A constitution is a “charter of government deriving its whole authority from the governed.⁶ The constitution sets out the form of the government. It specifies the purpose of the government, the power of each department of the government, the state society relationship, the relationship between various governmental institutions, and the limits of the government.” Today a constitution is easily identified with a legal document of the same name, arranging public institutions of government.

Constitutionalism stands for a set of interrelated concepts, principles, and practices of organizing and thereby limiting government power in order to prevent despotism. It suggests that power may be limited by techniques of separation of powers, checks and balances, and the protection of fundamental rights along a pre-commitment. It seeks to provide adequate institutional design to cool passions without forfeiting government efficiency. By formalizing these solutions in a legally binding instrument (the constitution), constitutionalism provides the necessary limitations of government (sovereign) power and affirms the legitimate exercise thereof.

Constitutionalism is often described as a liberal⁷ political philosophy that is concerned with limiting government. Consequently, it is attacked for weakening the government when the

⁵ D. Grimm, *Types of Constitutions*, 98, in M. Rosenfeld and A. Sajó, eds. *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 100

⁶ Black’s Law Dictionary.

⁷ ‘Liberal’ in this book is used in its nineteenth-century European sense (‘classic liberalism’), meaning emphasis on individual liberty and the free market as an extension of this freedom and designing the defence of liberty

state needs to be strong. Limiting what government can do, however, does not necessarily result in a weaker state. A community may need a government that is strong enough to defend it from its enemies. Beyond this point 'strength' is of little assistance. At first glance a government seems weak where the streets are not safe. But the U.S. is a country with a high incidence of violent crime: is the U.S. a weak state? In certain dictatorships there are policemen around every corner and the crime rate is low, so one would say that these are strong states. Yet, such strength and security are of dubious value where the police use their position to induce fear or extract bribes from the population. In short, strength is not an analytically helpful category for the study of constitutions and governments. Efficiency is a completely different matter.

Viable constitutions are pragmatic. Even revolutionary constitutions reflect concessions and actual compromises that enable the peaceful co-existence of different groups, including minorities and losers. A critical revisionist would say that constitutions are either victors' justice or—more often—dirty deals to protect the interests of elites which feel that they are losing their privileged position or face uncertain political outcomes.⁸ Rights and strong remedies to cure the violations of rights are granted to all, not for the sake of constitutionalism's liberty, but simply in order to protect these elites from being called to account and loss of status in the future. Constitutions may be deals that consolidate the political power of elites. And yet, the resulting constitution may still serve the community as a whole (although often at the expense of certain groups living in that community).

PRINCIPLE OF CONSTITUTIONALISM

Constitutionalism often is regarded as a doctrine of political legitimacy. Constitutionalism *prima facie* requires justification of state actions against a higher law. At its core, this higher law is meant to structure the political process. Yet, as a concept, constitutionalism involves more than mere legality; it aims to posit a wider and deeper criterion of good governance as well as political conventions and norms to be attained in the collective life of a nation. The

against successive threats. Liberalism can be a political philosophy; as a political movement it animated constitution writing and it was a nationalist movement in many nineteenth-century societies. Liberalism is intimately related to constitutionalism. Liberal in U.S. political usage is close to 'progressive', social democratic, or welfarist in the European sense.

⁸ Note that, in contrast to this criticism, many of the contemporary social values which were granted constitutional status and priority are not directly elitist: social rights and anti-poverty and equality programmes in the constitution may be intended by elites to deceive the public, but technically these are not about privileges of the elite of the day

central principle in constitutionalism is the “respect for human worth and dignity. It is by no means a static principle and the core elements identified are bound to change as better ways are devised to limit government and protect citizens, it is the institutionalization of these core elements that matter. Nevertheless, constitutionalism needs to be distinguished from both democracy and the rule of Law.⁹

FUNDAMENTAL RIGHTS AND CONSTITUTIONALISM

“Fundamental rights should be such that they should not be liable to reservation and to changes by Acts of legislature” -Begum AizazRasul¹⁰

What kind of rights would one need in order to ensure freedom in a political system? What follows, if a right is claimed as ‘fundamental’? Who is bound by it? The government, or the citizens, too? And what does ‘being bound’ mean: to honour the claim, or non-interference, or the unconstrained activity of the holder of the right? Or the protection and promotion of the right by the government? Could individuals or the authorities prevent anyone from obstructing an action that is based on a right? Shall the government call to account the violators of such rights? These are some of the questions that a constitution-maker and constitutional practice have to answer regarding fundamental rights.

The constitutional recognition of fundamental rights reflects a presumption in favour of the primacy of liberty. It expresses a social agreement and promises that the government will operate for the sake of free individuals. Fundamental rights are constitutionalized to counter majoritarian and statist bias. Sadly, the value and primacy of freedoms is far from self-evident, especially when it comes to the freedom of others, especially different others (be they intellectuals, sexual or ethnic minorities, or believers of another religion). To stand up for the freedoms of these other’s is hardly ‘natural’. Freedoms are vulnerable, especially where the resulting behaviour is unusual and repellent to traditional feelings. Liberty is not a matter of popularity, modesty, or courtesy. There are important moral reasons to respect freedom and the capacity of humans to choose the good life they like.

While a human or fundamental right claim indicates priority, the basis for the claim remains contested. At the time when fundamental rights were incorporated into the U.S. Constitution or the 1789 French Declaration, they may have had a narrow scope, but they were considered a matter of unconditional respect of the individual stemming from the nature of man (human

⁹ *Supra* Note 6

¹⁰ Constitutional Asembly Debates, 264 Vol. VII, 1948.

being) or the nature of things (natural law). In a modern and also a much earlier (medieval) approach, these rights emanate from the equal dignity of humans that is to be unconditionally respected in the political community. Or, in a different perspective, all human beings have human rights simply by virtue of their existence as equal moral beings.¹¹

The moral reading of fundamental rights blames the alternative consequentialist understanding as undermining the primacy of the individual who shall be the only measure of humans. Interestingly, there are certain justifications in international human rights law which refer to an instrumental concept of human rights, granting rights a status that is nevertheless hard to undermine on standard consequentialist grounds. For example, the Preamble to the Universal Declaration of Human Rights construes human rights as indispensable against barbarism: ‘disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind.’ Likewise, the French Declaration stated already in 1789 ‘that the ignorance, neglect, or contempt of the rights of man is the sole cause of public calamities and of the corruption of governments’. These arguments indicate how human (fundamental) rights fit into the programme of constitutionalism as anti-despotism.

WHAT DO THE FUNDAMENTAL RIGHTS IMPLY?

What follows from the constitutional requirement that freedom is the rule, and its limitation is the exception? As a minimum, it means respect of the maxim: “That Which Is Not Forbidden Is Permitted”. Legislation must respect liberty. The government must have good, valid, even compelling reasons, if it wishes to prohibit a conduct. It can regulate, restrict, or prohibit what in itself does not harm anyone only if it is specifically authorized. The constitutional recognition of rights changes the nature of the political discourse and legitimate action. Certain arguments which are disrespectful of the fundamental rights are difficult to make, and become easy prey to the argumentum ad Hitlerum: who praises censorship, denies the importance of independent courts, or praises racial discrimination will be compared to Hitler, a parallel which should have (or at least used to have in principle) annihilating effects for the targeted position. Human rights operate as conversation stoppers, representing the ultimate incontestable common values of the political community. Even censors have to stand up for freedom of speech and introduce restrictions only in the name of facilitating a better

¹¹ ‘The source of human rights is man’s moral nature . . .’ J. Donnelly, *Universal Human Rights in Theory and Practice*, 3rd ed. (Cornell University Press, 2013) 15.

exchange of ideas. The contemporary attempts to dethrone human rights are intended to change the prominent cultural power of the fundamental rights.

The fundamental rights bind the State, but what does this bond mean? To a certain extent the government has a duty to guarantee the enforcement of the rights connected with liberty. Where a public actor hampers the exercise of a liberty, the government shall remedy this by giving effect to liberty and (perhaps) eliminating the causes of the curtailment by calling to account those who violated the fundamental right. But, the contours of the obligation are not at all clear. Does the individual have a right to compensation, if her constitutional rights are violated, but no further law specified these rights? Is there further compensation, if these rights were violated by an entity or individual acting in the name of the government? And what if they are infringed by a private actor? It took a long time (and legislative enactment) for the Constitution to become the legal basis for damages for constitutional torts, even in the U.S. where ordinary judges read the Constitution with perseverance.

Rights are rights, but sovereignty is sovereignty, since the days when the king could do no wrong. The binding force of constitutional rights means also that the government shall follow it in its own actions. The state's duty to respect rights does not necessarily entail legal responsibility for the disregard of a right even if it seems to be a logical necessity. Constitutional pragmatism does always follow logic, especially where tradition supports immunity.

LIMITING FUNDAMENTAL RIGHTS?

In some early constitutions rights were worded as if they were absolutes. However, the 1789 French Declaration clearly admits the possibility of limitations. Article 2 declares liberty, property, security, and resistance to oppression as imprescriptible and natural human rights. To be 'imprescriptible and natural', however, does not mean to be 'exempt of restriction'. The rights of man were to be determined by law. But the 1789 Declaration goes further. It names the grounds for restriction: not to harm others, be compatible with the rights of others, no abuse.¹² These limitations are accepted as compatible with the imprescriptible character of

¹² Because of political resistance at this stage, when it comes to religion the 'established Law and Order' is the limit.

the natural rights as the right to liberty, property, security,¹³ and resistance to oppression (Article 2).¹⁴

That the details of fundamental rights protection are defined by legislation is a source of constitutional problems. By its very nature, a legal definition means delimitation. Definitions include some and exclude others, therefore, it is important to know who sets the definitions, as this is the same person who decides on the exclusions. The legislative branch which is entrusted with setting out the details on the protection of fundamental rights (or of governmental obligations associated with rights) is also endowed with the duty to express and protect the common good or public interest. Views regarding the relation between individual rights and other constitutional interests often collide and people are trained to believe that public interest is above the private, although this maxim is missing from constitutions and for good reasons.

When it comes to fundamental and human rights, constitutions speak of rights and not interests. To claim that the public interest shall prevail against the private interest does not answer the dilemma of restricting fundamental rights: here an actual fundamental right protecting the freedom of an individual is curtailed by a putative public interest.

A right can be formulated as absolute: arguably in the U.S., as formulated by the ‘First Amendment’, free speech can be understood as absolute. Dignity is understood as inviolable in this sense, for example, in Germany, but it remains difficult to apply, as it offers little judicially applicable guidance.¹⁵ The German Basic Law (and many other constitutions) define several distinct reasons for the restriction of fundamental rights. The scope (and hence the limits) of many rights are subject to definition by law (but subject to proportionality). Moreover, specific restrictions may apply to the military, and laws regarding defence may restrict freedom of movement and the inviolability of the home. Finally, the fundamental rights of those who abused specific fundamental rights can be forfeited by the Constitutional Court. Sometimes the restriction of rights has no separately attached condition.

¹³ Security (sûreté) as personal freedom means that no one can be arbitrarily arrested and convicted.

¹⁴ ‘Imprescriptible’ or ‘unalienable’ does not mean that the rights cannot be limited; it means that people cannot resign from these rights. For example, a man cannot become a slave of his own accord

¹⁵ Ch. McCrudden, Human Dignity and Judicial Interpretation of Human Rights, 19 *European Journal of International Law* (2008) 655. The inviolable and supreme dignity of the person as a right is practically never used directly by the German Constitutional Court for deciding cases.

For example, when people assemble in public places, it has to be without arms and peaceful.¹⁶

JUDICIAL REVIEW AND CONSTITUTIONALISM

The literal meaning of the terminology judicial review refers to the revision of the decree or sentence of an inferior court by a superior court. It has a more specialized importance in public law, especially in nations having a composed constitution which are established on the idea of restricted government. The tenet of legal audit has been begun and created by the American Supreme Court, despite the fact that there is no express arrangement in the American Constitution for the legal survey. In *Marbury v. Madison*¹⁷, the Supreme Court clarified that it had the force of legal survey. Justice George Marshall said, "Absolutely each one of the individuals who have outlined the composed Constitution examine them as framing the basic and foremost law of the countries, and thus, the hypothesis of each such Government should be that a demonstration of the assembly, offensive to the Constitution is void".

The fair-minded organization of equity (the 'ability to pass judgment') requests the protection of the legal branch from the political branches (the assembly and the leader)¹⁸. This was a long way from unimportant in the eighteenth century: in prior occasions in the European governments judging and law-production both served an undifferentiated equity. To exacerbate the situation, courts were frequently the apparatuses of illustrious absolutism and a wellspring of join. Despite this practice, the legal executive has gotten generally acknowledged as the third part of force in America. Yet to be determined sought after by means of detachment of forces the legal executive most importantly fills in as a beware of different branches. As it is less political than different branches, and it doesn't order its own assets, it is the 'most un-risky one.

When set up, the legal executive can be and will be more free in its activities of the other two branches than those can at any point be of one another. Until it goes to the requirement of legal choices, the legal executive is best off being left alone by different branches, given that its states of activity are managed and its accounts are accommodated. Constitutionalism attempts to restrict the potential for invasion with moderate achievement, however where

¹⁶ The need for the protection of public order led to the introduction of such measures in the Belgian Constitution as early as 1831.

¹⁷ (1803) 1Cranch 137.

¹⁸ Ch.-L. Montesquieu, *The Spirit of the Laws* [1748], A. M. Cohler, B. C. Miller and H. S. Stone, trans. and eds. (Cambridge University Press, 1992) 157. The power to judge is not equal to the two other powers.

lawmakers are adequately partitioned they will depend on sacred statutes and even implement those standards¹⁹.

The institutional plan of legal arrangements and association has become more intricate as of late with decent requests for the responsibility of the legal executive. Legal responsibility sounds contradictory to legal freedom and fair-mindedness from the start. However, when the established assurance of legal freedom prevails with regards to protecting the legal executive from different branches, an arrangement for life is hard to shield notwithstanding wild negligence for proficient guidelines or broad defilement on the seat.

While the legal executive is intended to keep out of the political space, the goal of capability clashes and political race questions, legal survey of managerial activity, and protected arbitration fill in as minds the forces and desires of the political branches.

UNITED STATE OF AMERICA

Judicial Review in the United States alludes to the force of a court to survey the defendability of a resolution or settlement, or to survey a regulatory guideline for consistency with a rule, a deal, or the actual constitution. Article III of the U.S. Constitution expresses, "the legal force of the United States, will be vested in Supreme Court, and in such second rate courts as the Congress may every now and then appoint and build up... the legal force will stretch out to all cases, in law and value, emerging under this Constitution, the laws of the United States, and deals made, or which will be made, under their position... In all cases influencing representatives, other public pastors and representatives, and those where a state will be party, the Supreme Court will have unique locale. In the wide range of various cases under the watchful eye of referenced, the Supreme Court will have re-appraising ward, both as to law and actuality, with such special cases, and under such guidelines as the Congress will make."

Along these lines, legal audit as perceived in the U.S.A., lays on a basic establishment. The Constitution is the incomparable law, which was appointed by individuals, a definitive wellspring of all political power. It presents restricted forces on the public authority. In the event that the public authority intentionally or unwittingly violates these limits, there should be some authority capable to hold it in charge, to upset its unlawful endeavour, and

¹⁹ Federalist No. 78 (Hamilton), 464, in A. Hamilton, J. Madison and J. Jay, *The Federalist Papers* [1787–8] (Mentor, 1961) 465. Least dangerous—'to the political branches'

consequently to vindicate and protect intact the desire of individuals as communicated in the Constitution, courts practice this force.

In *Marlbury v. Madison*²⁰ Justice Marshall made legal survey not just the main foundation of the established superstructure, and yet the most critical of the American commitment to the craft of the public authority. Also, this precept was the brainchild of Justice Marshall who stated that judges are coordinated by the actual constitution, made vow to help the constitution, which comprises of the foremost rule that everyone must follow. It is an obligation put upon judges to survey any law which is repulsive to the constitution. The Supreme Court affirmed this force of legal inspecting over both government and the State laws in *Fletherv. Peck* and in this manner got for itself the part of boss mediator and authority of constitution.

Judicial review in the United States refers to the power of a court to review the constitutionality of a statute or treaty, or to review an administrative regulation for consistency with a statute, a treaty, or the constitution itself. Article III of the U.S. Constitution states, *“the judicial power of the United States, shall be vested in Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish...the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority...In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.”*

INDIA

Under the constitution of India, powers are restricted in the two different ways. First and foremost, there is the division of power between the Union and the States. Parliament is capable to pass laws just as for those subjects which are ensured to the residents against each type of administrative infringement. Furthermore, the Supreme Court remains in a special position wherein it is able to practice the force of evaluating authoritative establishments both of parliament and the state governing bodies.

²⁰ 1803 U.S. LEXIS 352

Legal audit is an extraordinary weapon in the possession of judges. It involves the force of a court to hold illegal and unenforceable any law or request dependent on such a law or some other activity by a public power which is conflicting or in struggle with the essential tradition that must be adhered to. Truth be told, the investigation of sacred law might be portrayed as an investigation of the teaching of legal survey in real life. The courts have ability to strike down any law, in the event that they trust it to be illegal.

"Article 372 (1) builds up the legal survey of the pre-protected enactment comparatively. Article 13 explicitly pronounces that any law, which repudiates any of the arrangement of the part III of the Constitution of India for example, the principal rights will be void. The equivalent has additionally been seen by our Supreme Court. The Supreme and High courts are comprised of the defender and underwriter of Fundamental Rights under Articles 32 and 226. Articles 251 and 254 say that if there should arise an occurrence of in steadiness among association and State laws, the State law will be void."

In any case, in a few cases, it has held that the Supreme Court can go about as the caretaker, protector of privileges of individuals and popularity based arrangement of government just through the legal audit. In *Keshwanandbharti v. State of Kerala*²¹, it was held that the "judicial review is an 'essential component' of the constitution and can't be altered. The extent of legal review is adequate in India, to make the Supreme court an incredible organization to control the movement of the executive and legislature."

Under Indian Constitution, legal survey can advantageously be ordered under three heads²²:

(i) "Judicial review of Constitutional Amendments.- This has been the topic of thought in different cases by the Supreme Court; of them worth referencing are: *Shankari Prasad case*²³, *Sajjan Singh case*²⁴, *Golak Nath case*²⁵, *KesavanandaBharati case*, *Minerva Mills case*²⁶, *Sanjeev Coke case*²⁷ and *Indira Gandhi case*²⁸. The trial of legitimacy of Constitutional corrections is adjusting to the essential highlights of the Constitution".

²¹ AIR 1973 SC 1461.

²² Justice Syed Shah Mohammed Quadri, "Judicial Review of Administrative Action", 6 SCC (Jour) 1 (2001).

²³ *Shankari Prasad Singh Deo v. Union of India*, AIR 1951 SC 458.

²⁴ *Sajjan Singh v. State of Rajasthan*, AIR 1965 SC 845.

²⁵ *Golak Nath v. State of Punjab*, AIR 1967 SC 1643.

²⁶ *Minerva Mills v. Union of India*, AIR 1980 SC 1789.

²⁷ *Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd.*, (1983) 1 SCC 147.

(ii) "Judicial review of Legislation of Parliament, State Legislatures just as Subordinate Legislation. - Judicial survey in this classification is in regard of authoritative capability and infringement of central rights or some other Constitutional or administrative restrictions";

(iii) "Judicial review of Administrative Action of the Union of India just as the State Governments and specialists falling inside the importance of State. It is important to recognize legal survey and legal control. The term legal audit has a prohibitive meaning when contrasted with the term legal control. Legal survey is administrative, as opposed to restorative in nature"²⁹.

COMPARATIVE STUDY OF JUDICIAL REVIEW BETWEEN INDIA AND U.S.A.

The extent of Judicial Review in India is to some degree surrounded when contrasted with that in the U.S.A. In India the principal rights are not so comprehensively corded as in the U.S.A. furthermore, limits there on have been expressed in the actual Constitution and this assignment has not been left to the courts. The constitution creators "received this methodology as they felt that the courts may think that it is hard to work act the constraints on the crucial rights and the equivalent should be set down in the actual constitution". The constitution producers additionally felt that the Judiciary ought not be raised at the degree of 'Super assembly', whatever the support for the strategies logy received by the constitution creators, the unavoidable aftereffect of this has been to limit the scope of legal survey in India.

It must, in any case, be yielded that the American Supreme Court has burned-through its ability to decipher the constitution generously and has made so exhaustive a utilization of the "fair treatment of law condition that it has gotten in excess of a more translator of law. Be that as it may, took great consideration not to epitomize the fair treatment of law proviso in the constitution". Actually, the composers of the Indian constitution chose to exemplify the term 'methodology set up by law'. It can refute laws in the event that they disregard

²⁸ *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1.

²⁹ M.P. Jain and S.N. Jain, *Principles of Administrative Law: An Exhaustive Commentary on the Subject Containing Case-law Reference* (Indian & Foreign) 1779 (Wadhwa and Company Nagpur, New Delhi, 6th edn 2007).

arrangements of the constitution however not on the ground that they are terrible laws. As such the Indian Judiciary including the Supreme Court is anything but a Third Chamber asserting the ability to sit in judgment on the strategy encapsulated in the enactment passed by the lawmaking body.

In this way, in the expressions of Justice Cardozo, the central worth of legal survey rather lies "in making vocal and perceptible thoughts that may somehow be hushed, in giving them congruity of life and of articulation, in controlling and coordinating the decision inside the cut-off points where decision officers."³⁰

CONCLUSION

Constitutionalism is a matter of taste and manners. There can be an invitation in the constitution that 'the conduct of government be transparent' (Ethiopia, Article 12(1)), but such words make little difference, if the rulers believe that they can do anything without any explanation. Contemporary constitutions exist on the foundations of a set of beliefs and commitments. Constitutional expectations are to be shared by the power holders and their constituency. As a result, a long-term perspective, applicable to future governments, emerges that is not limited to drafting technicians and politicians, but is deeply connected with public politics, with such problems and political conflict involving the people that require lasting institutional solution.

Constitutionalism is supposed to answer the question: how do we 'construct enduring forms of political order? The fate of revolutionary power sharing will depend on many things besides constitutional creativity; culture, economics, and geopolitics will make a tremendous difference. Nonetheless, the creative role of constitutionalism is easy to underestimate . . .'³¹

Constitutionalism, written into law, does not replace the cement of society, but it is an important active ingredient of the cementing compound. Government may have a leading role in integrating society; and in such cases additives become particularly important.

British constitutionalism survives without a written constitution.³² There, so the canonical contemporary doctrine insists, judges cannot review the constitutionality of statutes, the majority of civil liberties and fundamental rights are not guaranteed by entrenched protective

³⁰ B.N. Cardozo, *The Nature of Judicial Process*, 94 (Universal Law publishing Co. Pvt. Ltd., 2004).

³¹ B. Ackerman, *The Future of Liberal Revolution* (Yale University Press, 1992) 3 (emphasis added).

³² For a less enthusiastic home-grown appraisal see K. D. Ewing, *Bonfire of the Liberties. New Labour, Human Rights, and the Rule of Law* (Oxford University Press, 2010).

laws, and—at least in theory—Parliament can reshape the political system whenever it desires. Without idealizing the political system that seems to prevail in the United Kingdom, one can assume with near certainty that the withdrawal of constitutional freedom is out of the question in that country.

For constitutional provisions to be meaningfully and effectively operative there must be institutional and cultural machinery, which is partially created by the constitution itself, to implement, enforce and safeguard the constitution. Judicial Review is one of the key components in implementing and safeguarding the spirit of Constitutionalism. An independent judiciary, independent constitutional review, and the notion of the supremacy of law all work together to ensure that the letter and spirit of the constitution are complied with in the working of a constitutional government. Constitutionalism is the philosophy of the constitution, which imposes limitation upon the exercise of power. So, the overall view can be concluded in the words of Frankfurter, J. that Judicial review, itself a limitation on the popular government, is a fundamental part of our constitution.

SUGGESTIONS:

1. “The first thing that needs to be done is to codify the law on the subject of Judicial Review.
2. The trend at present is to vest jurisdiction with new institutions of administrative nature but it is not clear what will happen to the concept of Judicial Review and how the independence of the administrative institutions will be protected.
3. The concept of Judicial Review at times has assumed political overtones; the amendments so often made to the Constitution have raised challenges before the Judiciary as to what it should do when they are challenged before them”.