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## A COMPARATIVE ANALYSIS OF THE DEVELOPMENT OF CONSTITUTIONALISM IN FRANCE AND SOUTH AFRICA

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### Abstract

*The development of constitutionalism in South Africa and France has been influenced by their distinct legal traditions. France is rooted in civil law, while South Africa blends common law and Roman-Dutch elements, now under a transformative constitutional framework. The research paper aims to explore the historical origins of constitutional thought in both countries, highlighting the main features and institutional structures that define constitutionalism. It also compares how each country upholds constitutional supremacy, protects rights, maintains separation of powers, and conducts judicial review. Although both nations have written constitutions and share commitments to the rule of law and popular sovereignty, France's approach emphasises a codified legal system, centralised authority, and a constitutional review process designed to balance executive power. At the same time, South Africa's constitutionalism stems from a transition from an oppressive regime to a rights-focused, transformative, and judicially enforced legal order. This comparison shows how different historical events, such as the French Revolution and South Africa's democratic transition, created unique models of constitutionalism tailored to their specific national contexts. This study can also be beneficial for academicians, research scholars, enthusiasts, professionals, policymakers, and government officials.*

**Keywords:** Constitutionalism, South Africa, France, Civil Law, Common Law, Roman-Dutch Law, Rule of Law, Judicial Review, French Revolution

*"There are more instances of the abridgment of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations."*– James Madison

The legal system of France is rooted in the civil law tradition, characterised by a codified set of laws and a strong emphasis on written legislation as the primary source of legal authority.<sup>42</sup> Legal rules are also codified, exemplified by the Napoleonic Code, with doctrinal coherence being emphasised. Furthermore, the judiciary is professional and

applies statutory law with limited reliance on judge-made precedent, whereas administrative law constitutes a distinct and well-developed domain with specialised courts.<sup>43</sup> This system is based on revolutionary principles of the unity and indivisibility of the Republic. Over time, French constitutional and administrative law has developed to balance the centralised state power with growing territorial decentralisation and multilevel governance.

The French Constitution of 1958 is an important document that enshrines the indivisibility of the French state and reflects ongoing constitutional reforms that adapt to

<sup>42</sup> John Merryman and Rogelio Pérez-Perdomo, *"The civil law tradition: an introduction to the legal systems of Europe and Latin America"*, Stanford University Press, 2023.

<sup>43</sup> *Ibid.*

demands for local autonomy and to European integration.<sup>44</sup> The legal hierarchy recognises the supremacy of the Constitution, and judicial review mechanisms, particularly the role of the Conseil constitutionnel, ensure that legislation conforms to constitutional principles.<sup>45</sup> Furthermore, the French legal order strongly protects fundamental rights, including procedures safeguarding fair trials, freedom of expression, and human dignity, which have been reinforced through judicial innovations and constitutional reforms, such as the rights protection enacted in 2008.<sup>46</sup>

Whereas the legal system of South Africa is characterised by its pluralistic nature, blending Roman-Dutch law, English common law, and Indigenous customary law.<sup>47</sup> This diversity reflects the country's rich cultural history and colonial background. The post-apartheid Constitution of 1996 stands as a transformative document that recognises and protects multiple legal traditions, ensuring that customary law operates within the framework of constitutional principles such as equality and human rights.<sup>48</sup> While customary law remains essential, especially in rural communities, the legal system consistently seeks to balance traditional norms with modern democratic values.<sup>49</sup> The legal pluralism of South Africa challenges the dominance of a single legal order by fostering a constitutional embrace of diversity, setting it apart from more centralised legal systems.

### Historical Development of Constitutionalism

The historical development of constitutionalism in France is characterised by a significant transformation initiated by the French Revolution, which established the foundational principles of contemporary

constitutional law. The Revolution of 1789 introduced concepts such as popular sovereignty, parliamentary sovereignty, secularism, and human rights, significantly reshaping France's political and legal landscape.<sup>50</sup> However, early revolutionary constitutions, including the Constitution of 1791 and the formation of the First Republic, affirmed parliamentary sovereignty and underscored secularism, despite episodes of upheaval such as the Reign of Terror and counter-revolutionary movements.<sup>51</sup> Following this revolutionary era, the 19th century witnessed phases of restoration, conflict, and reform, notably the Revolutions of 1830 and 1848, which further refined the framework of constitutional governance.<sup>52</sup>

Furthermore, the tradition of codification, profoundly inspired by Roman law and Enlightenment philosophy, culminated in the systematic organisation of laws and administrative structures, maintaining the principle of the indivisibility of the Republic while adapting to emerging calls for local autonomy. The Constitution of 1958 solidified this progression by balancing centralised unity with the gradual development of multilevel constitutionalism, addressing pressures for decentralisation and European integration.<sup>53</sup> Throughout its history, French constitutionalism has evolved through cycles of revolution, codification, and stabilisation, embedding rights protection and institutional design within a robust unitary state structure, while progressively accommodating pluralistic governance.

The revolutionary stage of constitutionalism in South Africa involved significant political and social changes that challenged the existing order and set the stage for constitutional progress. Early on, the constitutional history of South Africa was

<sup>44</sup> Sophie Boyron, "The constitution of France: A contextual analysis", Bloomsbury Publishing, 2012.

<sup>45</sup> Edward McWhinney, "Supreme courts and judicial law-making: constitutional tribunals and constitutional review", pp. 1-324, 1986.

<sup>46</sup> *Ibid.*

<sup>47</sup> Thomas W. Bennett, "Legal pluralism and the family in South Africa: Lessons from customary law reform", Emory Int'l L. Rev. 25, p. 1029, 2011.

<sup>48</sup> Dennis M. Davis and Karl Klare, "Transformative constitutionalism and the common and customary law", South African Journal on Human Rights 26.3, pp. 403-509, 2010.

<sup>49</sup> *Ibid.*

<sup>50</sup> Jenkins, Brian, *Nationalism in France: class and nation since 1789*, Taylor & Francis, 2024.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> Christopher Pollacco, "The policy-making process of an emerging polity: a study of the making of a constitutional architecture for Europe", (2016).

influenced by colonial conquest and the imposition of European legal systems, alongside resistance from Indigenous communities.<sup>54</sup> During the apartheid era, efforts to enforce racial segregation and inequality through laws led to revolutionary opposition aimed at dismantling this oppressive system. After apartheid ended, the codification stage began with South Africa adopting a transformative Constitution in 1996.<sup>55</sup> This Constitution embedded values like democracy, human rights, dignity, and the rule of law, explicitly recognising the country's legal pluralism, including customary law, and safeguarding protections for marginalised groups. It replaced discriminatory laws and implemented innovative constitutional mechanisms to harmonise diverse interests and cultures.

The stabilisation phase focuses on consolidating and applying constitutional principles, with progress in democratic stability, rights protection, and institutional checks and balances. Nonetheless, challenges remain in fully realising constitutional goals, especially regarding socioeconomic rights and the integration of Indigenous legal traditions into the broader legal framework. Hence, South Africa's journey reflects a dynamic interplay of revolutionary change, strategic legal codification, and ongoing efforts to establish a just, inclusive democracy.

### **Common Elements of Constitutionalism**

Constitutionalism, regardless of its form, encompasses several key elements

the Supremacy of the Constitution, which establishes the constitution as the highest law with all ordinary laws subordinate to it; the Rule of Law, ensuring government actions are limited by law, legal certainty, and equality before the law; the Separation of Powers, distributing legislative, executive, and judicial functions to prevent power concentration; the Protection of

Fundamental Rights, guaranteeing civil, political, and sometimes socio-economic rights; mechanisms of Accountability and Judicial Review, which include institutions and procedures to enforce constitutional limits; and Entrenchment and Amendment Rules, which are formal processes designed to protect fundamental constitutional norms from easy alteration. Popular Sovereignty and Legitimacy derive from democratic processes and the consent of the governed, forming the basis of legitimate authority. While both France and South Africa include these elements, their emphasis and institutional structures differ significantly.

### **Constitutionalism and Its Features in France**

Constitutionalism in France is defined by a firm dedication to popular sovereignty, the indivisibility of the Republic, secularism, and the rule of law. These principles have their roots in the revolutionary events of 1789 and have been reinforced and formalised through subsequent constitutional reforms, especially the Constitution of 1958.<sup>56</sup>

Constitution as a Fundamental Law with Sovereignty: France's Fifth Republic Constitution (1958) is a formal document that establishes the core rules of government.<sup>57</sup> Additionally, incorporates republican ideals and defines the roles and powers of state institutions. The constitutional framework is supported by foundational texts like the 1789 Declaration, whose preamble and legal integration bestow moral and legal authority to rights.<sup>58</sup> It asserts the supremacy of the people as the origin of sovereignty. Nonetheless, citizenship and participation are viewed uniformly, emphasising the unified French people over distinct groups. The constitution's view of the French people encompasses both direct and indirect forms of popular sovereignty, thereby maintaining democratic legitimacy.

<sup>54</sup> Charles Manga Fombad, "Constitutional reforms and constitutionalism in Africa: Reflections on some current challenges and future prospects", *Buff. L. Rev.* 59, p. 1007, 2011.

<sup>55</sup> Heinz Klug, "Constituting democracy: Law, globalism, and South Africa's political reconstruction", Cambridge University Press, 2000.

<sup>56</sup> Martin A. Rogoff, "Fifty years of constitutional evolution in France: The 2008 amendments and beyond", *The Financial Crisis of 2008*.

<sup>57</sup> Sophie Boyron, "The constitution of France: A contextual analysis", Bloomsbury Publishing, 2012.

<sup>58</sup> *Ibid.*

Indivisibility of the Republic: Article 1 of the French Constitution explicitly declares the Republic to be indivisible, reinforcing a tradition that dates back to the Revolution.<sup>59</sup> This principle supports the state's unitary structure and territorial organisation, resisting federalism or extensive decentralisation, while permitting limited territorial autonomy.

**Unitary but Decentralised Government:** France primarily remains a unitary state, but constitutional changes have recognised the growth of multilevel constitutionalism. The 1958 Constitution establishes territorial entities such as communes, départements, and overseas territories, which manage their affairs through elected assemblies.<sup>60</sup> However, these entities operate within a framework that favours central government oversight to preserve national unity. The ongoing tension between maintaining national cohesion and decentralisation has been regularly addressed through constitutional amendments and judicial decisions.

**Hierarchy of Norms and Supremacy of the Constitution:** French constitutionalism establishes a clear hierarchy of norms, with the Constitution at the top, followed by organic laws and international law, including European law under Article 55.<sup>61</sup> This structure guarantees consistent enforcement of constitutional principles throughout all levels of government.

**Constitutional Review:** Initially, the Conseil constitutionnel conducted mainly a priori reviews (pre-promulgation) of laws on limited grounds, with access restricted to political figures such as the President, the Prime Minister, and parliamentary leaders.<sup>62</sup> Over time, the review process has expanded: reforms now allow some post-enactment challenges and

broader access, including a procedure for individuals to submit priority constitutional questions. However, France's constitutional review remains distinct from traditional common-law judicial review, as it is concentrated and institutionalised and interacts with other mechanisms, such as the Conseil d'état for public law and the Cour de Cassation for civil and criminal law.<sup>63</sup>

**Rights Protection and Access to Justice:** The French constitutional system safeguards essential rights, including freedom of movement, healthcare, and human dignity. Reforms, including those in 2008, have enhanced citizens' procedural safeguards and their ability to seek constitutional review, promoting a culture of rights protection supported by institutions such as the Conseil constitutionnel and the Defender of Rights.<sup>64</sup>

French constitutionalism combines a robust, centralised state structure with a gradual acknowledgement of territorial autonomy and increased rights protections. This approach adapts traditional principles to meet modern governance challenges.

### **Constitutionalism and Its Features in South Africa**

**Legal Pluralism and Recognition of Indigenous Law:** The constitutional system of South Africa recognises legal pluralism, allowing multiple legal orders, such as state law and Indigenous customary law, to coexist.<sup>65</sup> This framework aims to respect and incorporate the country's diverse cultural and legal traditions. Although Indigenous legal traditions are acknowledged, challenges remain in balancing them with constitutional values, particularly regarding human rights and equality. Legal pluralism exemplifies a broader trend in which modern constitutions aim to accommodate

<sup>59</sup> J. Jennings, "Revolution and the Republic: a history of political thought in France since the eighteenth century", Oxford University Press, 2011.

<sup>60</sup> Kenneth Robinson, "Constitutional reform in French tropical Africa", Political Studies 6.1, pp. 45-69, 1958.

<sup>61</sup> Vincent Kronenberger, "A New Approach to the Interpretation of the French Constitution in Respect to International Conventions: From Hierarchy of Norms to Conflict of Competence", Netherlands International Law Review 47.3, pp. 323-358, 2000.

<sup>62</sup> Gerald L. Neuman, "The Brakes that Failed: Constitutional Restriction of International Agreements in France", Cornell Int'l L.J 45, p. 257, 2013.

<sup>63</sup> Ibid.

<sup>64</sup> Doron Shulztiner and Guy E. Carmi, "Human dignity in national constitutions: functions, promises and dangers", The American Journal of Comparative Law 62.2, pp. 461-490, 2014.

<sup>65</sup> Muna B. Ndulo, "Legal pluralism, customary law and women's rights", Southern African Public Law 32.1, pp.1-21, 2017.

alternative legal systems without compromising constitutional supremacy.<sup>66</sup>

**Transformative Constitutionalism:** South Africa's constitutionalism is characterised by its focus on transformative constitutionalism. The 1996 post-apartheid Constitution goes beyond being just a legal document; it serves as a transformative initiative aimed at addressing historical injustices and promoting an inclusive society.<sup>67</sup> It explicitly enshrines fundamental rights, such as equality, human dignity, and socio-economic rights, and embodies a broader goal of systemic social change. This transformative approach reinforces the constitution's role as a driver for social justice and democratisation, ensuring marginalised groups, including Indigenous peoples, are empowered within the constitutional framework.<sup>68</sup>

**Protection of Fundamental Rights:** Central to South Africa's constitutional framework is the strong safeguarding of fundamental rights. The Constitution features a comprehensive Bill of Rights that defends both individual freedoms and collective rights.<sup>69</sup> This approach guarantees the protection of personal liberties while upholding the rights of historically disadvantaged groups. The Constitution promotes a rights-based model that guides governance and legislation, encouraging respect for diversity and human dignity.

**Rule of Law and Separation of Powers:** The South African constitutional system firmly upholds the rule of law and the separation of powers to ensure accountability and prevent misuse of authority.<sup>70</sup> It establishes independent bodies to review government actions and safeguard constitutional principles. The checks

and balances within the Constitution are designed to support democratic governance and ensure each branch of government functions within its assigned domain.<sup>71</sup>

**Inclusion and Participatory Governance:** The Constitution aims to foster inclusivity and active participation in governance, especially for Indigenous peoples and marginalised communities.<sup>72</sup> It has established structures, such as advisory bodies and Indigenous courts, to give Indigenous voices a platform in legislative and policymaking processes.<sup>73</sup> These mechanisms demonstrate a wider dedication to participatory democracy and acknowledge the significance of Indigenous self-determination within the national system.

### **Constitution as Fundamental Law: Comparative Analysis**

**Textual Supremacy:** The Constitution of South Africa establishes textual supremacy and entrenchment, serving as the ultimate law that overrides conflicting legislation and government actions.<sup>74</sup> The Constitutional Court enforces this by striking down laws that breach constitutional provisions, including entrenched ones.<sup>75</sup> Entrenchment protects key values like human rights, democracy, and Indigenous traditions, often requiring supermajorities or provincial approval for amendments.<sup>76</sup> This reflects South Africa's commitment to transformative constitutionalism, which aims to correct injustices and safeguard minority rights. In contrast, France also upholds constitutional supremacy but has a more flexible, procedural entrenchment system.<sup>77</sup> Amendments require a parliamentary supermajority or referendum, making political shifts easier. The French Constitutional Council reviews laws but cannot block constitutional amendments, emphasising political control, stability, and adaptability.

<sup>66</sup> *Ibid.*

<sup>67</sup> Elsa Van Huyssteen, "The Constitutional Court and the redistribution of power in South Africa: Towards transformative constitutionalism", *African studies* 59.2, pp. 245-265, 2000.

<sup>68</sup> *Ibid.*

<sup>69</sup> Charles Fombad, "An overview of the constitutional framework of the right to social security with special reference to South Africa", *African Journal of International and Comparative Law* 21.1, pp. 1-31, 2013.

<sup>70</sup> Heinz Klug, "Accountability and the Role of Independent Constitutional Institutions in South Africa's Post-Apartheid Constitutions", *NYL Sch. L. Rev.* 60, p. 153, 2015.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> Siri Gloppen, "South Africa: the battle over the constitution", Routledge, 2019.

<sup>75</sup> *Ibid.*

<sup>76</sup> Elai Katz, "On amending constitutions: the legality and legitimacy of constitutional entrenchment", *Colum. JL & Soc. Probs.* 29, p. 251, 1995.

<sup>77</sup> *Ibid.*

France's approach prioritises political processes over judicial enforcement, offering greater flexibility in changing fundamental principles.<sup>78</sup>

**Different Historical Mandates:** The French Constitution results from a republican and revolutionary tradition, aiming to establish a stable democratic republic after monarchical and imperial rule. Based on Enlightenment ideas, it seeks popular sovereignty, individual freedoms, and the rule of law within a centralised state. Since 1958, the Fifth Republic's Constitution has balanced executive and parliamentary powers to ensure stability and unity and to reinforce republican ideals amid crises.<sup>79</sup> The Constitution of South Africa, adopted in 1996, arose from a transition from apartheid to an inclusive democracy.<sup>80</sup> It aims to address injustices, protect marginalised groups, and promote social justice, reconciliation, and human rights through institutional reforms and recognition of diversity.<sup>81</sup>

**Judicial Review:** In France, judicial review mainly occurs before the Conseil constitutionnel, which conducts a priori review of legislation before promulgation to ensure compliance with the Constitution.<sup>82</sup> Usually initiated by political figures like the President, Prime Minister, or parliamentarians, this process restricts direct citizen participation. Before 2010, citizens couldn't challenge laws constitutionally, but the introduction of the "priority preliminary ruling on the issue of constitutionality" (QPC) since March 2010 has expanded access, allowing individuals to challenge law constitutionality of laws during judicial proceedings, though less than in South Africa.<sup>83</sup> France's review mainly examines the form and procedure of statutes rather than substantive rights, with a clear distinction between

constitutional review and ordinary judicial scrutiny. In contrast, South Africa has a comprehensive judicial review system centred in the Constitutional Court, which can examine all laws and government actions to ensure constitutional alignment.<sup>84</sup> Access is more widespread; anyone can initiate a constitutional challenge, and the Court safeguards rights and holds the government accountable. Its jurisdiction covers both abstract and concrete review, producing binding decisions that lower courts must follow. This promotes transformative constitutionalism and socio-economic rights, emphasising participatory, accessible justice.<sup>85</sup> Consequently, South Africa's model prioritises substantive rights and inclusivity, in contrast to France's limited, procedure-focused approach.

**Rights and Their Enforceability:** In France, constitutional rights stem from the 1958 Constitution's Preamble, the 1789 Declaration of the Rights of Man and Citizen, and fundamental laws, including civil liberties such as liberty, property, and equality, as well as social rights such as healthcare and environmental protection.<sup>86</sup> Historically, these rights were procedural and difficult to enforce, with limited review by the Conseil constitutionnel, restricting citizen enforcement. Reforms in 2008 and 2010 improved protection, but rights remain somewhat abstract, relying more on legislation and judicial interpretation than direct enforcement.<sup>87</sup> France emphasises the indivisibility of the Republic, balancing rights with state unity. In South Africa, the post-apartheid Constitution features a broad Bill of Rights that covers civil, political, and socio-economic rights, including housing, healthcare, and social security.<sup>88</sup> These rights are enforceable, with courts actively interpreting

<sup>78</sup>Alistair Cole, "Governing and governance in France", Cambridge University Press, 2008.

<sup>79</sup> Lorenzo Zucca, "Safeguarding Democracy: The Role of Mixed Constitutions in Preventing Authoritarian Drift", Available at SSRN 5063178, 2024.

<sup>80</sup> Kristin Henrard, "Post apartheid South Africa's democratic transformation process: Redress of the past, reconciliation and 'unity in diversity'", The Global Review of Ethnopolitics 1.3, pp. 18-38, 2002.

<sup>81</sup> *Ibid.*

<sup>82</sup> Martin M. Shapiro, "Judicial review in France", *JL & Pol.* 6, p. 531, 1989.

<sup>83</sup> *Ibid.*

<sup>84</sup> Dennis M. Davis, "Transformation and the Democratic Case for Judicial Review: The South African Experience", *Loy. U. Chi. Int'l L. Rev.* 5, p. 45, 2007.

<sup>85</sup> *Ibid.*

<sup>86</sup> James E. Beardsley, "The Constitutional Council and Constitutional Liberties in France", *The American Journal of Comparative Law*, pp. 431-452, 1972

<sup>87</sup> David Landau, "The reality of social rights enforcement", *Harv. Int'l LJ* 53, p. 189, 2012.

<sup>88</sup> Jerome A. Singh, Michelle Govender, and Nilam Reddy, "South Africa a decade after apartheid: realising health through human rights", *Geo. J. on Poverty L. & Pol'y* 12, p. 355, 2005.

them within transformative constitutionalism, aimed at addressing past injustices and promoting equality. The Constitution requires laws and actions to align with these rights, and remedies such as structural interdicts are available, fostering a vibrant rights culture that emphasises participatory citizenship and social justice, in contrast to France's more limited approach.

Separation of Powers and Institutional Balance: The French system features a semi-presidential structure with defined powers and two prominent leaders: the directly elected President, who holds significant authority, such as appointing the Prime Minister, dissolving Parliament, and directing foreign and defence policies.<sup>89</sup> The Prime Minister, responsible to Parliament, handles domestic affairs. This setup aims to balance power and ensure effective governance, though Parliament often aligns with the executive branch. The Conseil constitutionnel reviews laws to safeguard the Constitution and maintain the balance of power. The system promotes cooperation among branches within a unified, indivisible republic.<sup>90</sup> South Africa's parliamentary system is rooted in its transformative constitutional order, which provides for a clear separation of powers.<sup>91</sup> The President, elected by the National Assembly, serves both as head of state and government. The judiciary, particularly the Constitutional Court, functions independently to oversee legislation and executive actions, protecting rights and upholding the Constitution.<sup>92</sup> Checks and balances foster stability, prevent abuses of power, and support democratic governance. The system emphasises cooperative governance and judicial activism in a federal-like structure, distributing authority across national, provincial, and local levels in a decentralised manner.

<sup>89</sup> Matthew Soberg Shugart, "Semi-presidential systems: Dual executive and mixed authority patterns", French politics 3.3, pp. 323-351, 2005.

<sup>90</sup> Elisabeth Zoller, "French constitutionalism", Henri Capitant Law Review, 2018.

<sup>91</sup> Francois Venter, "The limits of transformation in South Africa's constitutional democracy", South African Journal on Human Rights 34.2, pp. 143-166. 2018.

<sup>92</sup> *Ibid.*

## Conclusion

France and South Africa showcase how constitutionalism is influenced by history, culture, and political factors. France's development from revolutionary principles to Napoleonic law and the Fifth Republic has established a model of constitutionalism focused on legal precision, administrative stability, and a strong executive, while also safeguarding fundamental freedoms rooted in republican values. Conversely, South Africa's constitutionalism emerged from a negotiated dismantling of apartheid and is intentionally transformative: its Constitution emphasises a rights-based approach, reinforced by an active Constitutional Court and various institutions that ensure accountability and promote social justice.

This comparison demonstrates that constitutionalism is not a rigid, one-size-fits-all model but an adaptable framework. France's civil-law tradition emphasises codification and centralised control, resulting in a distinctive approach to judicial review and rights protection. Conversely, South Africa, motivated by the moral aims of redress and democratisation, blends common-law adjudicatory techniques with progressive constitutional principles to enhance substantive equality and dignity.

Both systems possess strengths and encounter challenges; France's model promotes stability and legal consistency but has traditionally limited options for individual lawsuits and socio-economic disputes; South Africa's transformative Constitution has expanded rights and judicial protections but faces difficulties in practical implementation due to resource constraints and political complexities. Ultimately, comparing these systems highlights how constitutional frameworks connect legal principles with political realities, turning high ideals into institutional practices that embody each country's unique journey toward constitutional governance.