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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

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

AUTHORED BY - ANUJ WANKHADE

Abstract

France and South Africa have their practices of constitutionalism informed by different legal traditions. While France draws on civil law, South Africa applies a fusion of common law with Roman-Dutch input that operates under a new transformative constitutional dispensation. This research paper is designed to trace the historical origins of constitutional thought in the two countries so as to reveal their main features and institutional structures that define particulars of constitutionalism. The other will compare the separate pathways through which the two retain constitutional supremacy, rights protection, separation of powers, and judicial review. In both cases, there is a written constitution and an expressed commitment to the rule of law plus popular sovereignty, but the French path demonstrates a proclivity toward codified legal systems, centralisation, and constitutional review meant more for controlling executive power. South African Constitutionalism emerged from an authoritarian regime and thus its disposition is transformational in character, focused on rights, and strongly enforced through judicial means. This draws on how different historical events- the French Revolution and South Africa's democratic transition to different models of constitutionalism, thereby allowing relevant contextualization in the specific national setting. The study can also be helpful for academicians, research scholars, enthusiasts, professionals, policymakers, and government officials.

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

"There are more instances of the abridgement 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.[1] 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.[2] 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 demands for local autonomy and to European integration.[3] 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.[4] 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.[5]

The South African legal system is plural, mixing Roman-Dutch law with English common law and Indigenous customary law.[6] This diversity has its roots deep in the country's rich cultural history and colonial background. The post-apartheid 1996 Constitution was highly

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[1] 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.

[2] *Ibid.*

[3] Sophie Boyron, "*The constitution of France: A contextual analysis*", Bloomsbury Publishing, 2012.

[4] Edward McWhinney, "*Supreme courts and judicial law-making: constitutional tribunals and constitutional review*", pp. 1-324, 1986.

[5] *Ibid.*

[6] 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.

transformative by recognising and protecting various legal traditions, placing customary law within a constitutional framework that prescribes principles of equality and human rights.[7] Customary law remains very significant, especially in the rural areas of South Africa, where it is continually interacting with newer demands for justice based on democratic principles.[8] The South African type of legal pluralism interrupts the dominance of one legal order through the promotion of an accepted form of diversity, constitutionally, unlike more centralised systems.

Historical Development of Constitutionalism

The constitutionalism of the history of France until then was radically transformed by the French Revolution, which put into place the basic principles of modern constitutional law. It came with the 1789 revolution and brought forth concepts: popular sovereignty, parliamentary sovereignty, secularism, and human rights. This meant a change in the political and legal order of France.[9] The Revolutionary constitutions—several early versions, including the 1791 constitution and the establishment of the First Republic—were mere formal affirmations of parliamentary sovereignty as well as. There was also a process of restoration, conflict, and reform in the nineteenth century that further refined this system through events like those in 1830 and 1848.[10]

Furthermore, the process of codification- greatly inspired by Roman law and Enlightenment thought- resulted in the ultimate comprehensive organisation of laws and administrations, keeping the principle of indivisibility of the Republic but now responding to new demands for local autonomy. The 1958 Constitution firmly set this evolution on another track by centring unity while allowing for the gradual development of multilevel constitutionalism under centrifugal forces and demands for European integration.[11] French constitutionalism has historically rotated through cycles of revolution, codification, and stabilisation, thereby placing rights protection and institutional design within a strong unitary state framework but increasingly allowing for pluralistic governance.

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[7] 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.

[8] *Ibid.*

[9] Jenkins, Brian, *Nationalism in France: class and nation since 1789*, Taylor & Francis, 2024.

[10] *Ibid.*

[11] Christopher Pollacco, "*The policy-making process of an emerging polity: a study of the making of a constitutional architecture for Europe*", (2016).

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 influenced by colonial conquest and the imposition of European legal systems, alongside resistance from Indigenous communities.[12] During the apartheid era, efforts to enforce racial segregation and inequality through laws led to revolutionary opposition aimed at dismantling this oppressive system. Once apartheid fell, the codification phase came about with South Africa taking on a transformative Constitution in 1996.[13] This Constitution sets in place values of democracy, human rights, dignity, and the rule of law clearly by recognising the legal pluralism of the country, wherein customary law exists and protection for marginalised groups is safeguarded. It threw out discriminatory laws and brought in novel constitutional mechanisms to harmonise different interests and cultures.

The constitutional stabilisation phase consolidates and implements principles of the constitution with democratic stability, the protection of rights, and institutional checks and balances, gradually improving. The major challenges, however, lie in the fulfilment of the constitutional promise on paper, particularly in respect of socioeconomic rights and Indigenous legal traditions that have not yet been integrated into the general body of law. Thus, South Africa's path has also been a dynamic interaction between revolutionary transformation and tactical legal codification while striving to found an equitable, inclusive democracy.

Common Elements of Constitutionalism

Constitutionalism, in whatever variant, contains certain essential elements: the Supremacy of the Constitution-the constitution is the highest law and all ordinary laws are subject to it; Rule of Law-Government limited by law, legal certainty, and equality before the law; Separation of Powers-meaning in reality legislative, executive, and judicial functions distributed so as to ensure against concentration of power; Protection of Fundamental Rights-civil and political (and sometimes socio-economic) rights protected; Accountability and Judicial Review Mechanisms-institutions and procedures designed to enforce constitutional limits; and Entrenchment and Amendment Rules-formal processes designed to protect

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[12] Charles Manga Fombad, "*Constitutional reforms and constitutionalism in Africa: Reflections on some current challenges and future prospects*", Buff. L. Rev. 59, p. 1007, 2011.

[13]Heinz Klug, "*Constituting democracy: Law, globalism, and South Africa's political reconstruction*", Cambridge University Press, 2000.

fundamental constitutional norms from facile erosion. Popular Sovereignty and Legitimacy result from democratic processes-consent of the governed forms the basis of legitimate authority. Both France and South Africa have these elements, but with a very different emphasis and institutional structure.

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.[14]

Constitution as a Fundamental Law with Sovereignty: France's Fifth Republic Constitution (1958) is a formal document that establishes the core rules of government.[15] Additionally, incorporates republican ideals and defines the roles and powers of state institutions. The basic texts include the 1789 Declaration, whose preamble and mode of insertion into the body of law give both moral and legal force to rights.[16] It affirmed the supremacy of the people as the fount of sovereignty. Citizenship and participation are treated undifferentiated, though, thereby emphasising the unified French people rather than particular categories. The constitution's view of the French people includes both types of popular sovereignty, direct and indirect, thus keeping a door open for democratic legitimacy.

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.[17] This principle supports the state's unitary structure and territorial organisation, resisting federalism or extensive decentralisation, while permitting limited territorial autonomy.

Government is Unitary but Decentralised: France mainly stays a unitary state, even though reforms of the constitution acknowledge the rise of multilevel constitutionalism. The 1958 Constitution sets up communes, départements, and overseas territories as parts of the

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[14] Martin A. Rogoff, "*Fifty years of constitutional evolution in France: The 2008 amendments and beyond*", The Financial Crisis of 2008.

[15] Sophie Boyron, "*The constitution of France: A contextual analysis*", Bloomsbury Publishing, 2012.

[16] *Ibid.*

[17] J. Jennings, "*Revolution and the Republic: a history of political thought in France since the eighteenth century*", Oxford University Press, 2011.

country that run their affairs through elected bodies.[18] Yet these entities function within a system that easily allows for central government control in the name of unity. The balance between national cohesion and decentralisation has, over time, been struck through amendments to the constitution and court decisions.

The French constitutionalism views the norms that form a hierarchy with the Constitution at its top. Next come the organic laws and then international law, which includes European law by virtue of Article 55.[19] From this emanates an obligation enforceable at all levels of government to respect the supremacy of constitutional principles.

Constitutional Review: Initially, the Conseil constitutionnel conducted mainly a prior reviews (pre-promulgation) of laws on limited grounds, with access restricted to political figures such as the President, the Prime Minister, and parliamentary leaders.[20] 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.[21]

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.[22]

French constitutionalism combines a robust, centralised state structure with a gradual acknowledgement of territorial autonomy and increased rights protections. This approach

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[18] Kenneth Robinson, "*Constitutional reform in French tropical Africa*", Political Studies 6.1, pp. 45-69, 1958.

[19] 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.

[20] Gerald L. Neuman, "*The Brakes that Failed: Constitutional Restriction of International Agreements in France*", Cornell Int'l LJ 45, p. 257, 2013.

[21] *Ibid.*

[22] 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.

adapts traditional principles to meet modern governance challenges.

Constitutionalism and Its Features in South Africa

Legal Pluralism and Recognition of Indigenous Law: The constitutional architecture of South Africa affirms the phenomenon of legal pluralism, i.e., the existence and operation of more than one or multiple legal orders, for example, state law plus Indigenous customary law.[23] This system has been designed with the intention towards respect cultural and legal diversity within different heritages of the nation. Though it has recognition of Indigenous legal traditions, it poses great challenges toward harmonisation between constitutional values, especially principles relating to human rights and equality. Legal pluralism is another expression through which modern constitutions have accommodated alternative systems of legality beneath the supremacy of constitutions.[24]

Transformative constitutionalism: South African constitutionalism is based primarily on the notion of transformative constitutionalism. The 1996 post-apartheid Constitution does not merely have the character of a legal document but constitutes a transformative initiative, which should redress historical wrongs and promote an inclusive society.[25] It explicitly guarantees fundamental rights- comprising equality, human dignity, and socio-economic rights- in explicit terms and embraces social change at a more general level as part of its express purpose. Transformation thus strengthens the constitution as an instrument for attaining social justice and democratisation, thereby offering Indigenous peoples and other marginalised groups empowerment within the constitutional dispensation.[26]

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.[27] 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

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[23] Muna B. Ndulo, "*Legal pluralism, customary law and women's rights*", Southern African Public Law 32.1, pp.1-21, 2017.
[24] *Ibid.*
[25] 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.
[26] *Ibid.*
[27] 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.

and legislation, encouraging respect for diversity and human dignity.

Rule of Law and Separation of Powers: The South African constitutional system grounds itself very firmly in the rule of law and in the separation of powers, accounting for responsibility and against abuse of power.[28] It provides for independent institutions to oversee government conduct and to protect constitutionalism. The type of checks and balances that the Constitution defines is intended to give effect to democracy, having regard to ensuring that each arm of government acts within its own sphere.[29]

Inclusion and Participatory Governance: The Constitution aims to foster inclusivity and active participation in governance, especially for Indigenous peoples and marginalised communities.[30] It has established structures, such as advisory bodies and Indigenous courts, to give Indigenous voices a platform in legislative and policymaking processes.[31] 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 South African Constitution enacted textual supremacy and entrenchment; therefore, it became the ultimate law, overriding any conflicting legislation or government action.[32] The Constitutional Court is empowered to nullify any law inconsistent with constitutional provisions against even all forms of entrenchment.[33] Entrenchment protects several values by requiring different forms of supermajorities or provincial approvals for amendments in various ways to be described as protecting rights to humans, democracy, and Indigenous traditions,[34] thus writing South Africa's transformative constitutionalism that aims to right wrongs while protecting minority interests into the Constitution. Whereas the supremacy of France's constitution has been accompanied by a far more flexible procedural

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[28] 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.
[29] *Ibid.*
[30] *Ibid.*
[31] *Ibid.*
[32] Siri Gloppen, "*South Africa: the battle over the constitution*", Routledge, 2019.
[33] *Ibid.*
[34] Elai Katz, "*On amending constitutions: the legality and legitimacy of constitutional entrenchment*", Colum. JL & Soc. Probs. 29, p. 251, 1995.

entrenchment system,[35] although there is a requirement either for parliamentary supermajority support or a referendum on an amendment to allow more room for political change, the French Constitutional Council may review laws but cannot stop a constitutional amendment from going forward, emphasising political control, plus stability and adaptability; France prioritises political process over judicial enforcement, which makes it much easier to change fundamental principles.[36]

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.[37] The Constitution of South Africa, adopted in 1996, arose from a transition from apartheid to an inclusive democracy.[38] It aims to address injustices, protect marginalised groups, and promote social justice, reconciliation, and human rights through institutional reforms and recognition of diversity.[39]

Judicial Review: In France, the main place for judicial review is the Conseil constitutionnel. It does prior checks on laws before their official start to make sure they match with the Constitution.[40] This is typically started by political leaders such as the President, Prime Minister, or members of parliament, making it hard for regular people to join directly. Before 2010, citizens could not bring constitutional challenges against laws, but since March 2010, with the introduction of "priority preliminary ruling on the issue of constitutionality" (QPC), there has been more access allowed for individuals to challenge a law's constitutionality during court proceedings, though still less than in South Africa.[41] The French review looks mainly at the form and procedure of statutes, not substantive rights, plus keeps separate constitutional review from normal judicial scrutiny. On the opposite side, South Africa runs a full-scale

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[35] *Ibid.*

[36] Alistair Cole, "*Governing and governance in France*", Cambridge University Press, 2008.

[37] Lorenzo Zucca, "*Safeguarding Democracy: The Role of Mixed Constitutions in Preventing Authoritarian Drift*", Available at SSRN 5063178, 2024.

[38] 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.

[39] *Ibid.*

[40] Martin M. Shapiro, "*Judicial review in France*", JL & Pol. 6, p. 531, 1989.

[41] *Ibid*.

judicial review system based in the Constitutional Court that reviews all legislation and government action for conformity with the constitution.[42] The coverage is more extensive; any party can bring a constitutional challenge, and the Court can protect rights against government infringement by remedying actions. It has both abstract and concrete review jurisdiction, whose decisions are binding on lower courts. This facilitates transformative constitutionalism and socioeconomic rights through participatory, accessible justice.[43] Thus, South Africa's model puts substantive rights plus inclusivity ahead of France's limited model that focuses on procedure.

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.[44] 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.[45] 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.[46] They are enforceable rights. The courts have already set themselves in a very active mode of interpretation within the transformative constitutionalism, essentially addressing the wrongs overlooked in the past and pushing for equality. The constitution demands that every law and act comply with it and allows remedies like structural interdicts to be applied; this builds up a strong culture of rights, which involves participatory citizenship plus social justice, much more than France's limited approach.

Separation of Powers and Institutional Balance: The French formula comprises a semi-presidential system with clearly stated powers and two great heads: the directly elected

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[42] 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.

[43] *Ibid*.

[44] James E. Beardsley, "*The Constitutional Council and Constitutional Liberties in France*", The American Journal of Comparative Law, pp. 431-452, 1972

[45] David Landau, "*The reality of social rights enforcement*", Harv. Int'l LJ 53, p. 189, 2012.

[46] 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.

President, with much power that includes appointing the Prime Minister, dissolving Parliament, and directing foreign and defence policies;[47] and a Prime Minister responsible to Parliament who administers the domestic side of government. Such an arrangement is meant to ensure effective checks while allowing room for effectiveness in governance, thus making the Parliament Executive-oriented most of the time. The Conseil constitutionnel comes into play by reviewing laws for the protection of the Constitution and ensuring that balance is maintained in power. It requires cooperation between different branches in one unified branch of an indivisible republic.[48]

The parliamentary system of South Africa falls under its transformative constitutional order, wherein an explicit separation of powers exists.[49] While the President is elected by the National Assembly, he or she acts both as head of state and government. The judiciary, particularly the Constitutional Court, operates independently to review legislation and actions taken by the executive, as it relates to the protection of rights enshrined in and upholding the Constitution.[50] Since there are checks and balances in the country, abuse of power by any arm of government is prevented, thereby promoting good democratic governance. This paper adopts a system similar to that found in federations, emphasising cooperative governance and judicial activism, whereby authority is exercised at different levels: national, provincial, and local simultaneously.

Conclusion

France and South Africa demonstrate the impact of history, culture, and politics on constitutionalism. France evolved from revolutionary ideals through Napoleonic law and the Fifth Republic to create a system of constitutionalism with legal exactness, administrative continuity, and an empowered executive who protects core freedoms founded in republican values. South African constitutionalism came out of a negotiated destruction of apartheid; it is thus intentionally transformative: the Constitution favors a rights-based disposition backed by an activist Constitutional Court and ancillary institutions to ensure accountability as well as social justice.

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[47] Matthew Søberg Shugart, "*Semi-presidential systems: Dual executive and mixed authority patterns*", French politics 3.3, pp. 323-351, 2005.
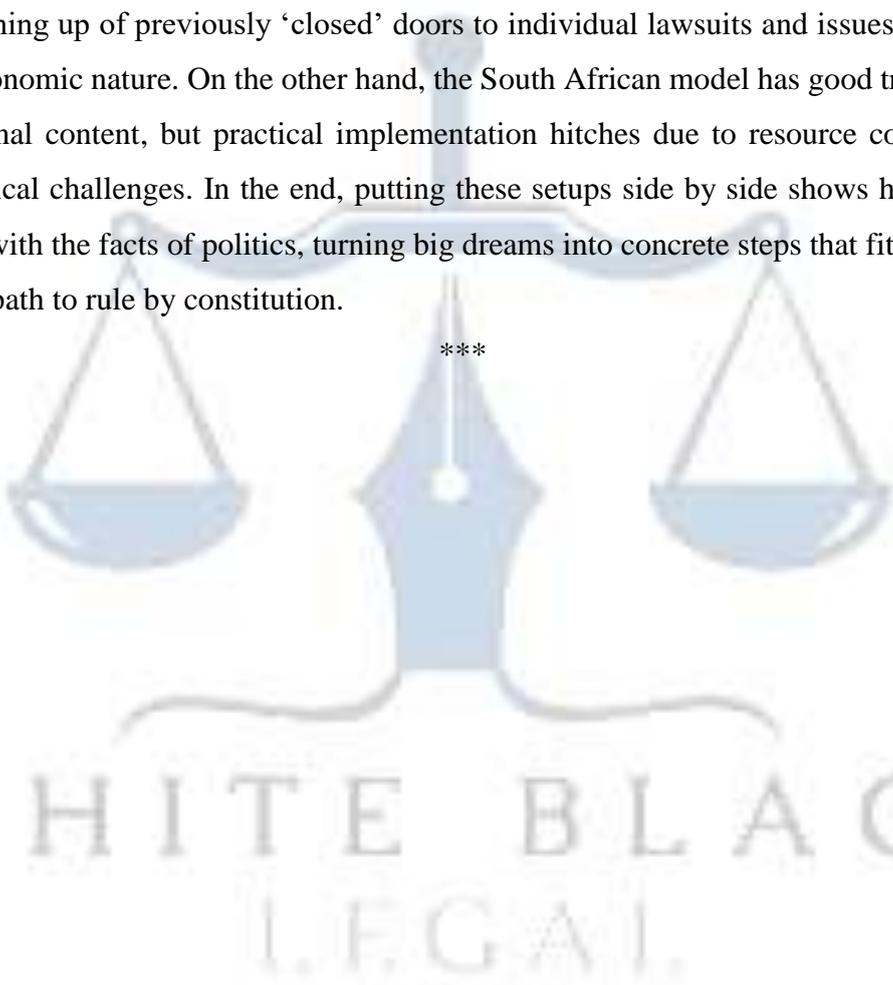[48] Elisabeth Zoller, "*French constitutionalism*", Henri Capitant Law Review, 2018.
[49] Francois Venter, "*The limits of transformation in South Africa's constitutional democracy*", South African Journal on Human Rights 34.2, pp. 143-166. 2018.
[50] *Ibid*.

This comparison proves that constitutionalism is not a fixed, standardised model but rather an adjustable system. While France's civil-law background focuses on codification and centralisation, thereby creating a particular method of judicial review and protection of rights, South Africa, inspired by the noble goals of remedy and democratisation, merges common-law adjudicatory techniques with progressive constitutional principles for promoting substantive equality and dignity.

The French system provides for stability and legal consistency, notwithstanding the recent opening up of previously 'closed' doors to individual lawsuits and issues pertaining to a socio-economic nature. On the other hand, the South African model has good transformative constitutional content, but practical implementation hitches due to resource constraints and other political challenges. In the end, putting these setups side by side shows how rules link law ideas with the facts of politics, turning big dreams into concrete steps that fit each nation's particular path to rule by constitution.

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