

ISSN: 3048-8702(O)

LLRJ

LEX LUMEN RESEARCH JOURNAL

VOLUME 2 - ISSUE 3

2026

EDITOR-IN-CHIEF: DR. RAZIT SHARMA,

PUBLISHER: MRS. RACHANA

This is an **Open Access** article brought to you by **Lex Lumen Research Journal** made available under the terms of Creative Commons-Attribution Non-Commercial-Share Alike 4.0 International (**CC-BY-NC-SA 4.0**) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium provided the original work is properly cited.

It has been accepted for inclusion in the Journal after Due-review process.

© 2026. LEX LUMEN RESEARCH JOURNAL

CONSTITUTIONALISM IN INDIA, SOUTH AFRICA AND USA

By- Riddhi Mukewar¹

ABSTRACT

Comparative public law has emerged as an important field of legal scholarship that examines constitutional systems, institutional frameworks, and governance structures across different jurisdictions. By analysing similarities and differences among legal systems, comparative public law provides deeper insights into how constitutional principles such as rule of law, separation of powers, judicial review, and protection of fundamental rights operate in diverse political and social contexts. The discipline not only facilitates a better understanding of domestic constitutional arrangements but also encourages the exchange of legal ideas and institutional practices among nations. In an increasingly globalized world, constitutional courts, legislatures, and policymakers frequently draw upon comparative perspectives to address complex legal and governance challenges.

This research paper explores the significance and methodology of comparative public law, focusing on how constitutional principles and institutional mechanisms are interpreted and implemented in different legal systems. It critically evaluates the role of comparative analysis in strengthening democratic governance, improving constitutional

¹ Trainee Intern, Lex Regia LLP, Nagpur.

interpretation, and promoting the protection of fundamental rights. The study also highlights the challenges associated with comparative legal research, including differences in historical context, legal culture, and political structures. Ultimately, the paper emphasizes that comparative public law serves as a valuable analytical tool for understanding constitutional development and for identifying best practices that may inform legal reforms.

KEYWORDS: Comparative Public Law, Constitutional Governance, Judicial Review.

INTRODUCTION:

Constitutionalism is a legal doctrine meaning governments authority which is ascertained by body/set of laws or constitution this on a larger level helps in limiting the powers of the govt. This is an abstract concept having multiple interpretations and meaning but, we can simply understand this as the constitution is a written document and constitutionalism is the culture to follow the constitution in both its letter and spirit. The concept limits the arbitrary acts committed by the govt. C.H. McIlwain iterated "*The idea of constitutionalism is a mechanism of imposing restraint on the arbitrary power of the government, particularly in order to safeguard the liberty of citizens*"².

C.H. McIlwain laid down 2 methods for constitutionalism for public and private spheres first legal limitation/judicial review and second is being politically responsible meaning effective govt. and popular control³. It has been observed that a nation might have a constitution but not follow constitutionalism. A classic example of the statement is UK. Even though Germany had a constitution under Hitlers rule still it failed to follow constitutionalism. At the heart of the principle of

² Vishal Jain, Comparative Study of the Principles of Constitutionalism In India and the USA, (Jan 27, 2023) <<https://bwlegalworld.com/article/comparative-study-of-the-principles-of-constitutionalism-in-india-and-the-usa-463419>>.

³ *Ibid.*

constitutionalism is the doctrine of Rule of Law. Constitutionalism is an analogy/ideology in reference to the constitution.

Constitutionalism is the limitation to government by law. The concept can be better understood as legal standards laid down by the constitution to limit/maintain the powers of the state. It ensures that all the organs of the government are functioning smoothly and neither of them interferes with the functioning of another. While dealing with the concept of constitutionalism the main point encompasses that limiting the power of government should be done either by implementation of statutes or constitutional provisions.

Statement of Problem:

Constitutionalism largely means limiting the power of the govt. through lawful means although all the three countries stand by the principle of constitutionalism. They have different challenges while keeping its spirit alive. The challenges and difficulties that are faced by these nations in preserving the values of constitution in this modern era. Thus this is where the organs of the govt. in these nations play a pivotal role in constantly empowering constitutionalism.

Research Objectives:

1. To understand the concept of constitutionalism in Indian context and its effectiveness in the modern times
2. To analyse the approaches adopted by USA and South Africa to keep the principle of constitutionalism alive
3. To evaluate the impact of effectiveness of the doctrine of constitutionalism in reference to India, USA and South Africa
4. To provide suggestions to achieve the true spirit of constitutionalism in India, USA and South Africa

Research Questions:

- Whether the doctrine of constitutionalism has discovered its true spirit in India?
- How has the concept of constitutionalism evolved in the United States and South Africa and what factors have most significantly influenced this evolution?
- How does the constitutional frameworks of India, the USA, and South Africa differ in their approaches to federalism, separation of powers, and the protection of fundamental rights?
- How can these countries achieve the principle of constitutionalism in the modern times?

Hypothesis:

In the modern era the definition of the term's liberty, equality and autonomy have evolving interpretations. India, USA and South Africa all these nations are trying to ensure to its citizens utmost liberty, equality and autonomy. Although, the approaches remain different to achieve constitutionalism since there remains difference in their historical context, political evolution, and socio-economic factors, influencing governance and power distribution at local and national levels.

Research Methodology:

The researcher for this particular paper has adopted doctrinal method of research. The researcher puts to use descriptive and analytical methods of reasoning to write the paper. Through this research paper, the researcher does a comparative analysis of the principle of constitutionalism in India, USA and South Africa. There has been use of primary resources such as Constitutions and precedents/case laws as well as secondary sources like books, articles, research journals.

Scope and Limitations:

The scope of the comparative study on Constitutionalism in India, the USA, and South Africa includes determining the historical evolution, structural framework, and foundational principles of governance in each country. The study helps in analysing how unique each of the constitutions is: the USA from a revolution

emphasizing individual liberties, India from a colonial struggle prioritizing diversity and inclusivity, and South Africa from a post-apartheid transformation focusing on reconciliation and social justice. It also includes comparing the structure of governance, such as the federalism in India and the USA, and South Africa's unitary system with decentralized features. Judicial review and constitutional supremacy form central jurisprudence to understand how each country's judiciary protects the constitution and upholds the rule of law. Fundamental rights, such as the emphasis on civil liberties in the USA, social and economic rights in South Africa, and the blend of both in India, offer key points of comparison. Additionally, the study makes an attempt to explore how constitutional flexibility is reflected in the amendment processes, where India and South Africa happen to have more flexible constitutions compared to USA rigid constitution.

Although, the study also encompasses certain limitations as the timeframe of constitutional development differ vastly: the USA's constitution dates back to 1789, while India's and South Africa's are relatively recent, making direct time-based comparisons difficult. The socio-political environments of the three countries are also distinct, with India's diversity, the USA's focus on individualism, and South Africa's history of apartheid, potentially leading to varied interpretations of similar constitutional principles. Another limitation is the contrast in socio-economic contexts, as South Africa's focus on socio-economic rights may not be easily comparable to the USA's emphasis on civil rights. The availability of legal sources and interpretations might also restrict the study, as some case law or judicial opinions may be subject to ongoing debates. Additionally, the cultural and ethical dimensions in each country, such as the collective rights emphasized in India and South Africa versus the individual rights focus in the USA, may present challenges for direct comparison. Finally, differences in legal traditions, with the USA following common law, India blending common law with indigenous principles, and South Africa combining Roman-Dutch law with common law, add further complexity to

the analysis. These limitations should be acknowledged to ensure a balanced and nuanced comparative study.

Review of Literature:

Books:

- Nuzhat Parveen Khan in her book “Comparative Constitutional Law”⁴ addresses the differences and similarities in legal systems in particular to the principle of separation of power, constitutional structure and judicial review along with fundamental rights. She does this in a comparative model and adopts an analytical approach for the same.
- James McClellan, in his book “Liberty, Order, and Justice: An Introduction to the Constitutional Principles of American Government (2000)”⁵ has discussed the principle of Rule of Law in the American context and elaborated on the basic principles of American Constitutionalism. Its author makes it easier to bridge the gap between philosophical and legal foundations shaping American constitutionalism.

Articles:

- Prof. (Dr.) Mahendra Pal Singh in his article “Constitutionalism in India in Comparative Perspective”⁶ has largely addressed the formation of constitution in India. And a broad discussion on the concept of constitutionalism in India. He discussed certain key points which build the bed rock of the Indian constitutionalism. The features which shape the constitutional values in India. And the challenges India has faced while adopting the principle.

⁴ Nuzhat Parveen Khan, *Comparative Constitutional Law*, 2nd Edition (2019).

⁵ James McClellan, *Liberty, Order, and Justice: An Introduction to the Constitutional Principles of American Government* (3rd Edn. 2000).

⁶ Prof. (Dr.) Mahendra Pal Singh in his article, *Constitutionalism in India in Comparative Perspective*, Volume 11 Issue 4 (2018).

- Greg Russell in his article “Constitutionalism: America and Beyond”⁷ discussed the history of constitutionalism in America and its orientation in American Context. The key features that American constitution has adopted to uphold and maintain the principle of constitutionalism in the country. the thoughts of the founders and their contribution in establishing a governance system which had a long way to go. The concept in the modern era and how it has been evolving with the emergence in the society.
- Abantika Ghosh in her article “Constitutionalism In India And The US: A Comparative Study”⁸ talks about the Indian constitutions history similarly discussed about the American Constitutions history. Defining and observing the differences in the approaches and the similarities both the democracies follow. By and large the doctrine of constitutionalism in both the nations has evolved greatly. But both the countries are trying to incorporate the principle at their own pace and time.
- Vishal Jain in his article “Comparative Study of the Principles of Constitutionalism In India and the USA”⁹ talks about the meaning and scope of the term constitutionalism the features of constitutionalism. In Indian context as well as American context along with case laws of both the nations to establish the concept of constitutionalism. The author has given his own point of view in terms of existence between constitution and constitutionalism.

DOCTRINE OF CONSTITUTIONALISM IN INDIAN SPIRIT:

India is known as the largest democracies it is a diverse country both culturally and economically. It follows a written constitution which derives its foundation from the

⁷ American Institute in Taiwan, *What is Democracy?* (2017), <<https://web-archive-2017.ait.org.tw/infousa/zhtw/DOCS/Demopaper/dmpaper2.html>>.

⁸ Abantika Ghosh, *Constitutionalism in India and the US: A Comparative Study*, Desi Kaanoon (July 25, 2020), <<https://desikaanoon.in/constitutionalism-in-india-and-the-us-a-comparative-study/>>.

⁹ *Supra* note 1.

principles of rule of law. Constitutionalism in India has taken inspiration from old scriptures and mythological works. The concept of legal rights and sanctions was primarily discussed in the Vedas and Upanishads. The teachings of wrong and right and the sanctions were levied from ancient times. The evolution of socio-economic rights was developed wherein no discrimination on the basis of caste, creed, sex, place of birth. These values have been precisely captured by Article 14 and 15¹⁰. Although India faced a lot of difficulties during multiple events such as emergency and the freedom for independence that led to delay in parliamentary elections, democratic elections for Parliament in coordination with State Legislatures have frequently been undertaken elected governments even at the village and municipal levels since mid-1990s and helped in upholding the aspect of constitutionalism, without which legal aspect i.e. protection of the constitutional rights by courts could not be able to sustain constitutionalism. The Indian Supreme Court in the case of *I.R. Coelho v. State of Tamil Nadu*¹¹, held that “Constitutionalism is a legal principle that requires control over the exercise of governmental power to ensure that the democratic principles on which the government is formed shall not be destroyed”.¹² In an attempt to define constitutionalism, Louis Henkin explained the essential elements of constitutionalism i.e., “(i) government according to the constitution; (ii) separation of power; (iii) sovereignty of the people and democratic government; (iv) constitutional review; (v) independent judiciary; (vi) limited government subject to a bill of individual rights; and (vii) controlling the police.”

Initially India had to face difficulties while establishing the separation powers among the organs of the govt. i.e. legislature and the executive and judiciary but eventually everything seemed cordial and as such no collision took place between them, although certain exceptions remained except wherein the question of commitment to constitutionalism was in question. By reading texts of various

¹⁰ India Const. art. 14,15.

¹¹ *I. R. Coelho v. State of Tamil Nadu*, AIR 2007 SC 861.

¹² *Ibid* 10.

scholars we can understand that mere presence of constitution does not guarantee constitutionalism. If we have to observe the adherence to the principle of constitutionalism in India the true spirit of constitutionalism can be seen in the Indian constitutionalism in the “*preamble, fundamental rights, directive principles, special provisions in Part XVI, Fifth and Sixth Schedules and the right of free and fair regular elections from the national to village level governance*”. Constitutionalism in the Indian context can be understood by the current trend of the judicial interpretations which hold the true spirit of constitutionalism. Constitutionalism can be traced via three periods in India’s development i.e. ancient, medieval modern. The spirit of brotherhood was developed in India in the early 90’s when the British ruled and prior to that when the Mughals ruled. The concept of transformative constitutionalism in India can be traced by to the CAD wherein all the framers of the constitution unanimously agreed on making sure that there pertains deep rooted structural inequalities that is our Indian society/culture and thus constitution as a document plays an important role in addressing these inequalities and uprooting them. Back in the day one such change that was made to overcome the same was reservations for SC’s and ST’s. This concept has largely been developed which in turn makes an aim to keep up with the changing trends in the society and accordingly update the constitution.

Two main features of transformative constitutionalism are that firstly it endeavours to remove all types of discrimination and stereotype which exists in the society or may develop in the coming years and secondly it aims to achieve complete utilisation of human resource in reference to interactions those are positively social in nature with each other and not the state. We can by and large say that India has a transformative constitution as it is always improving in terms of its democratic values by adopting the change in the social trends. There have been several judgments in the past which have catered to societal interest significantly. The judiciary has been given with great responsibility to keep the constitutional document relevant even in the modern times. The judges have to carefully interpret

the judgements while keeping in mind the constitutional values which surrounds our democracy. Some ground-breaking judgments such as *Indian Young Lawyers Association v. State of Kerala*¹³, *Vishaka v. State of Rajasthan*¹⁴ or *Supriyo v. Union of India*¹⁵ and *Shayara Bano v. Union of India*¹⁶. The then chief justice of India in the case *Navtej Singh Johar* recognised *Tc “The Indian Constitution is a great social document, almost revolutionary in its aim of transforming a medieval, hierarchical society into a modern, egalitarian democracy and its provisions can be comprehended only by a spacious, social- science approach, not by pedantic, traditional legalism. The whole idea of having a Constitution is to guide the nation towards a resplendent future. Therefore, the purpose of having a Constitution is to transform the society for the better and this objective is the fundamental pillar of transformative constitutionalism.”*¹⁷ These judgments reflect the transformative nature of the constitution in both its letter and spirit. Each passing day the concept of liberty, equality and freedom is evolving and thus this makes it significant to adopt to transformative constitution. Article 21 has been interpreted to involve several other fundamental rights which were previously not recognised. Each passing day is a testament for creation and delivery of a new judgment which expands the horizons of the constitutional values. In today’s time especially in the Indian context law goes hand in hand with the societal needs and its reality and it has to evolve accordingly otherwise it will no longer remain relevant at this exact point the concept of transformative constitutionalism steps in.

EVOLUTION OF CONSTITUTIONALISM IN UNITED STATES AND SOUTH AFRICA FROM THE FOUNDING ERA TO THE PRESENT DAY:

In the US context political science scholar Greg Rusell explains constitutionalism as *“Constitutionalism or rule of law means that the power of leaders and government bodies is*

¹³ *Indian Young Lawyers Association v. State of Kerala* (2019) 11 SCC 1.

¹⁴ *Vishaka v. State of Rajasthan* (1997) 6 SCC 241.

¹⁵ *Supriyo v. UOI* AIR (2018) SC 4321.

¹⁶ *Shayara Bano v. UOI* AIR 2017 SC 4609.

¹⁷ *Navtej Singh Johar v. UOI* (2017) 9 SCC 1.

limited, and that these limits can be enforced through established procedures"¹⁸. The American constitution remains the first ever written constitution at the same time the shortest constitution containing 7 articles. It talks about a government that aims at doing good for the society whilst conserving individual rights. When we go into the roots of constitutionalism we can understand that England was the first wherein liberalism as a concept was realised. The idea of rule of law and that king will also be subjected to law was iterated. Although with the passage of time the concept of modern constitutionalism can in picture. Where it was believed that those who fund the govt. through payment of taxes should be govt. representatives. The subjects of liberty, freedom and equality pertinently floated in England in the 1689 Bill of Rights, which later came to be adopted by American Declaration of Independence in the year 1776 and in the French Declaration of the Rights of Man in 1789 which eventually spread across Italy, Germany and other parts of the world.

The American constitution takes inspiration from the principles of social contract theory which was given by eminent jurist Hobbes, Locke and Rousseau. This theory explains that some rights will be given to the society while some will be exercised by the govt. in Federalist paper 2 it has been quoted that "*the individual relinquishes certain natural rights to society if government is to have requisite power to act in order to secure the common good.*" The preamble to the American constitution contains a word "*more perfect union*" this symbolises the need to evolve each day so as to bring in its ambit all the aspects of liberty, equality and autonomy so as to make the country a more perfect union. Some aspects of constitutionalism in the reference of USA are:

Rule of Law – The term as it reads suggests that law is supreme and no one is above law principle given by A.V Dicey. This principle was taken by Americans from England known as "*government of law not of men*". It was believed that rule of law was the foundation of the social order in America. This principle was understood by America as if the society is governed by set of unbiased rules instead of group of

¹⁸ *Supra* note 6.

individuals there is less chance of the people of the society becoming victims of arbitrary action or authoritarian rule. The principle applies equally to not just the local citizens but also to the rulers and governors. By way of this principle a shield was created over individuals' rights and liberties.

Separation of Power - Since the realists had to defend the American constitutionalism at this point James Madison stepped in and iterated in Federalist paper 51 that the "*government must be able to control the governed.*" And therefore it remains important to create a system of checks and balances. Thus the three organs of Govt. i.e executive, legislative and judiciary were separated to ensure unfettered functioning of each branch. This made the national government stronger and capable of overpowering state govt. Although they eventually overlap due to checks and balances which is the beauty of the system. We can understand this from an example the congress has the power to make laws while the president holds the power to check it by president's veto. Which can be overruled by a 2/3 vote in both houses of Congress.

The president has the authority to appoint all federal judges, ambassadors, and other high government officials, but all appointments must be approved by the Senate. Laws will only be implemented when passed by both houses of Congress. In the USA SC has ultimate authority to declare acts of both executive and legislative as unconstitutional. Which makes judicial review a crucial aspect as seen in the case of *Marbury v. Madison* (1803)¹⁹. In *Dr. Bonham's Case* (1610)²⁰, Coke propounded the principle of judicial review, "*claiming that judges had a right, when interpreting Acts of Parliament, to declare them null and void if they conflicted with established principles of law and justice*". The principle of judicial review does not have its essence in the written constitution of USA but is a product of multiple judicial pronouncements.

¹⁹ *Marbury v. Madison* 5 U.S. (1 Cranch) 137 (1803).

²⁰ *Thomas Bonham v College of Physicians*, 8 Coke Reports 113b, 77 ER 646.

Federalism – In USA the founders aimed and were absolute on the thought that the power needs to be spread among different levels i.e. national and state. The failure to materialise Articles of Confederation (1781-87) led to creation of constitutional convention. In the US constitution the word confederation meant sharing of power by national and several states. Although the national government had supremacy in certain areas although the states also enjoyed administration power and were protected in many ways. State governments, are primarily responsible for managing their own finances as well as enacting and implementing laws in a variety of sectors affecting state inhabitants. Secondly, states were provided protection by their representation in the US Senate, with 2 senators per state, regardless of size. Thirdly, the Electoral College, the body that legally elects the President of the United States, was to be made up of electors chosen by the states, with each state receiving at least three delegates. Fourthly, the Constitution's amending procedure reflected state concerns, as any amendment to the Constitution must be approved by 3/4 of all state legislatures and 2/3 of members of both houses of Congress. This was done to maintain the system of checks and balances.

Individual Rights - The Preamble of the US Constitution expresses *“to form a more perfect union, to provide for the common defence, to establish justice, and secure the blessings of liberty for present and future generations”*²¹. The declaration of rights also talks about inalienable rights inherently given to all human beings no one could take away. The constitution previously did not give any recognition to individual rights the reason being that the constitution framers felt that individual rights needed no specific reference since the powers so new govt were limited in nature. Eventually the 9th amendment to the US constitution protected the fundamental rights. The bill of rights refrains the govt. from violating certain individual rights, freedom of speech and religion. Also congress cannot make any religion official. Almost 2/3 of the Bill of Rights is created in such a manner to safeguard the rights of persons who are

²¹ U.S. CONST. pmb1.

potentially suspected or have any accusations in their name. These rights involve due process of law, fair trials, freedom from self-incrimination and from also being held twice in jeopardy for the same crime.

The other features that uphold constitutionalism in America can be observed as the fact that constitution is in the hands of the people. It holds the power of being more than just a document with substantive rules and procedures. Thomas Paine wrote "*A constitution is not the act of a government, but of a people constituting a government, and a government without a constitution is power without right.*" This principle is envisaged in Americas preamble which starts with "*We the People*". In today's time the terms justice, liberty, due process or equal protection have been given new evolved connotations. The Bill of Rights has its essence in the fundamental rights which are inalienable and if the govt. encroaches on them it will by and large affect the humanity. The rights have been created to give birth to free govt. and the arrangement in the society and through statues and precedents. The constitutions stands as a self-regulating document adhering to process to enforce legal rights and maintain standards of living in the country.

In the modern time even though the country envisages a democratic set up the representatives/leaders chosen may be inefficient, corrupt, irresponsible and having other interests which make such governments undesirable although they cannot be called undemocratic. There have been examples of leaders who have been elected democratically but have ruled the nation in an autocratic manner violating the constitutional values. The challenge for the next century may be to make democracy safe for the world.

South Africa is a constitutional democracy meaning constitution is the supreme law of the land. Parliament cannot pass a law that stands against or violates the constitution. The constitution can be modified only when 75% of the members of the NA and 6 out of 9 provinces in the National Council agree. In South Africa the Constitution sets out the country's values, people's rights and the functioning of the

legislature and parliament and the courts. Six institutions have been established to support the democracy.

The values of South African constitution involve: *“Human dignity, the achievement of equality, and the promotion of human rights and freedoms • non-racialism and non-sexism - this means that there may be no discrimination on the grounds of race or sex “• the rule of law and the Constitution as the supreme law - this means everything need to be in consonance with the law • a vote for every adult citizen, one national voters' roll for all citizens, regular elections and a multi-party system of democratic government”*.

The bill of Rights is the 2nd chapter of the constitution it protects rights of the people and not just the citizens. It guarantees socio-economic rights such as housing right, food water, healthcare. The rights contained in the Bill are:

- 3.1 *“Everyone is equal before the law*
- 3.2 *Affirmative action may be taken to achieve greater equality*
- 3.3 *No unfair discrimination is allowed*
- 3.4 *Everyone has the right to freedom*
- 3.5 *Everyone has freedom of religion, belief, opinion and expression*
- 3.6 *Everyone has political rights.”²²*

Separation of power is a crucial aspect of constitutionalism. The govt. has been for the same reason divided in legislature, executive and judiciary. The government has been divided at local, provincial and national level. This spheres of govt. have different functions and authorities. The govt. therefore establishes 6 institutions to support democracy that is:

- 6.1 *“The Public Protector – who investigates conduct of state officials on publics behalf, does not include court’s decision*
- 6.2 *The Human Rights Commission - promotes the protection and development of human rights*

²² S. AFR. CONST. ch. 2.

6.3 *The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities - promotes respect for the rights of cultural, religious and linguistic communities.*

6.4 *The Commission for Gender Equality - promotes the protection, development and achievement of gender equality.*

6.5 *The Auditor-General – established to check how the money of the taxpayers has been spent by the state and its organs²³*

6.6 *The Independent Electoral Commission - to manage national, provincial and municipal elections and ensure that these elections are free and fair”*

The term ‘transformative constitutionalism’ is very frequently associated with South African constitution wherein Dikgang Moseneke, the then Deputy Chief Justice of South Africa stated that “*it is perhaps in keeping with the spirit of transformation that there is no single understanding of transformative constitutionalism*”. In *Road Accident Fund v. Mdeyide*²⁴ case the African court asserted on the purpose to have transformative constitutionalism in South Africa: “ *One of the most important purposes of this transformation is to ensure that, by the realization of fundamental socio-economic rights, people disadvantaged by their deprived social and economic circumstances become more capable of enjoying a life of dignity, freedom and equality that lies at the heart of our constitutional democracy*”. The aim of transformative constitutionalism is to achieve the needed change in the society through constitutional reforms.

South Africa has taken a wonderful initiative named as the Constitutionalism Fund. This is to promote and Advance Constitutionalism in South Africa it is collaboration between The Atlantic Philanthropies (known by the name Social Change Initiative), the Ford Foundation and The Open Society Foundations, who have invested US\$25 million for grant making over a 10-12-year period. The objectives of CF is firstly to promote and advance constitutionalism. Secondly, To advance transformation the

²³ *Ibid.*

²⁴ *Road Accident Fund v. Mdeyide*, 2011 (2) SA 26 (CC).

field and other institutions. Thirdly, to advance and promote sustainability in the field and its institutions²⁵.

DIFFERENCE IN APPROACHES IN CONSTITUTIONAL FRAMEWORKS OF INDIA, THE USA, AND SOUTH AFRICA IN REFERENCE OF FEDERALISM, SEPARATION OF POWERS, AND THE PROTECTION OF FUNDAMENTAL RIGHTS:

The scope of Judicial review in India in comparison to USA is restricted. In Indian context if the Indian judiciary finds that the law is unconstitutional it can scrap the law the US judiciary happens to enjoy more liberty in terms of rejecting law. somewhat constricted as compared to the U.S. Moreover the Indian Constitution stands by “procedure established by law” and not “due process of law”. In the USA, the principles of separation of powers is practiced by division of Legislature, the President, and the Judiciary which is capsulated in Article I, II, III of the American Constitution. This practice of separation of powers is supplemented with system of checks and balances. Even though the American Constitution swears through this principle, there is no express mention of the same. In India, the principle of separation of powers is given in Article 50 of the Constitution. Although at times the three organs happen to perform each other’s functions as and when time commands. Meaning thereby that doctrine has not been put to practice rigorously in either of the nations.

From the Indian constitution it can be understood that the fundamental rights under part III have been given in a more detailed format in comparison to that of Bill of Rights of the other two nations. All of these rights are subject to certain reasonable restrictions. The Bill of Rights, which is different from the Fundamental Rights, works by the due process principle. One more peculiar thing that can be observed is that the Bill of Rights cannot be suspended under any circumstances, in contravention to Fundamental Rights which can be suspended at the time of a

²⁵ Constitutionalism Fund, <<https://www.constitutionalismfund.co.za/>> (last visited Oct. 4, 2024).

national emergency. India and South Africa happen to remain similar as both the countries cannot pass a law in violation of the nation's constitution being the supreme law of the land.

SUGGESTIONS AND CONCLUSION:

India - In the Indian context the courts must understand that in order to follow the path of transformative constitutionalism they should not compromise on their originality. It thus becomes important to look back on the constitutional values as well as the issue in hand. Since these precedents later become founding stones for the time to come. As the courts in certain cases for that matter in NALSA have granted rights it always does not satisfy the answer it also becomes important to ensure that slowly but steadily the inequalities also are removed.

USA - The U.S courts have always any time they are faced with a case which involves discrimination or inequality proactively jump onto the problem and found solution to deal with the case but have not taken steps to implement it and cancel it at the root cause. Inclusion is great but equality is moreover a greater good.

South Africa - S.A recognises T.C in many forms one being in the form of structural changes the various machineries and institutions it has set up to maintain and preserve its democratic structure. The constitutional court here lacks to achieve T.C through inclusion.

To conclude, some ideas and aspects of the birth of the idea of constitutionalism are similar in both India and USA. Both India and USA have a written constitution which recognises fundamental rights starting with a preamble. On one hand India has a parliamentary democracy whereas USA has presidential one. All the three nations provisions and laws, rules to govern the citizens in their respective countries. Separation of power go hand in hand with the concept of checks and balances. One of the reasons is because all the separate organs are being looked after by the same set of people. Regardless of separation of powers and rule of law there have been

instances wherein the leaders have been caught indulging in corruption or other political or economic scams. We can observe that the Supreme/Apex courts of both India and the USA have time and again given utmost importance to the principle of Rule of law through various judicial precedents. We can understand that by and large constitution can exist without constitutionalism but not vice versa, although this is not the truth. Constitution and constitutionalism are both important and supplement when it comes to a democracy.

