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Forms of Protection of Constitutional Rights: A Comparative Study Across USA, India, and South Africa

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ABSTRACT

The evolution of rights and duties throughout history has intentionally or unintentionally left an impression on society through monetary benefits, socio-political changes, and eventually progression of the State as a welfare state. Over time, the evolution of rights occurred through rights being conferred by the State and inherent rights of every human being. In modern times, the most common and important source of rights and duties of every State and individuals governed by the State is enshrined in a “Constitution” of a state. The Constitution provides a guiding principle and a framework for governance of the State and its subjects. Thus, the rights and duties provided in the Constitution must be looked at from time to time to combat current socio-political changes across the globe. Hence, a comparative study of “Constitutional rights” across certain jurisdictions provides a comprehensive understanding of rights and also provides an avenue to amend the Constitution and the Constitutional rights for ultimately striving the State towards a welfare state. In order to uphold the Constitutional rights, it is important to accord certain protection to those rights, therefore a comparative study understanding the forms of protection to Constitutional Rights upholds the sanctity of the Constitutional Rights.

This paper thereby attempts to understand rights, various facets, scope, sources and forms of protection of Constitutional rights across jurisdictions such as the USA, India, and South Africa, and thereby provides a comparative study of various facets of protection of “Constitutional rights” with suggestions across the aforementioned jurisdictions.

Keywords: *Constitutional Right, Form of Constitutional Protection, jurisdictions, Bill of Rights.*

I. INTRODUCTION

It is often observed that rights and duties are two sides of the same coin. The innate nature of rights is often balanced with an obligatory nature of duties. However, the balancing of rights and duties in an idealistic set up gives rise to a welfare state. This attempt to balance rights and duties between individuals and the State is attempted in the form of a “Constitution” of a State.

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The Constitution is a bare skeleton of rights and duties enshrined to individuals and State which also confers power to the State to bring life to such rights through various Constitutional means, such as law making. Thus, the spirit of Constitutionalism embodied through Constitutional law gives rise to Constitutional rights. Constitutional rights are derived through various sources and owe their evolution to the historical and socio-political context of the State.

In recent times, confusions have arisen regarding scope, nature, and enforceability of Constitutional rights in the context of socio-political nature of Constitutional rights. Although these confusions have been clarified by the judiciary since time immemorial, it is important to understand the basic and inherent nature of the Constitutional rights as enshrined in the Constitution, as envisioned by the makers of the Constitution. It is also important to understand the historical context of the Constitutional rights which paves a pathway to sneak into the mindset of the judiciary, if any, to deviate from the historical context to a current socio-political interpretation of the constitutional rights.

The comparative study of constitutional rights provides a literary analysis and study of constitutional rights depending on the current socio-economic conditions, historical context, enforceability of constitutional rights, and implications of enforceability of constitutional rights. The comparative study of forms of protection of constitutional rights across jurisdictions such as the USA, India, and South Africa, helps in understanding the nature and scope of constitutional rights in a federalism, quasi-federalism, and democratic society, and thereby understand the implications of such protections of constitutional rights in upholding the spirit of the Constitution. The comparative study is necessary to understand the globalised nature of socio-political problems and thereby undergo necessary amendments and adopt different kinds of constitutional rights to resolve social conflicts in the present context.

II. CONSTITUTIONAL RIGHTS

With the evolution of Rights, the Rights enshrined in the Constitution are referred to as Constitutional Rights. The Constitution is a binding contract between citizens and the State for establishing government in exchange for Constitutional Rights². The Constitutional rights are enshrined in the Constitution and has a wider ambit and scope to include all rights which are enforceable and unenforceable against the State, thereby comprising a wide ambit and scope as deliberated in the Nehru Report, 1928³. The Constitutional Rights are divided into four sub-

² Constitutional Rights, *Journal of Law, Economics, & Organization*, Vol. 7, No. 2 (Autumn, 1991), pp. 313-333 (21 pages) Published By: Oxford University Press

³ Motilal Nehru, *Nehru Report 1928*, (Sep. 2, 2024, 09.:28 PM), <https://www.constitutionofindia.net/historical-constitution/nehru-report-motilal-nehru1928/>

categories⁴ as follows:

1. Economic Rights- Economic Rights are the Rights which guarantees economic security of citizens of the State. The essence of economic rights includes the Right of a citizen to monetize their work and the Right to earn livelihood. For example, right to work, right to good working environment, right to proper wages etc⁵.
2. Political Rights- Political Rights are the ones which guarantee political freedom and Right to the citizens to form political associations and be part of the socio-political structure of the State. For example- Right to contest elections in a democratic country⁶.
3. Social Rights⁷- Social Rights are the Rights which fulfils social obligations and meets social needs of the citizens. These Rights are propounded to eradicate discrimination and bring social solidarity among all individuals. For example, Right to Equality, right to work, right to life etc.
4. Civil Rights- Civil Rights are the rights, powers, privileges, and immunities provided to citizens of the State to carry out democratic tasks. The civil rights encompass all the rights which are essential for continuance of a democratic State which guarantees Right of livelihood without any discrimination. For example, Right to Vote⁸.

Therefore, the ambit of Constitutional Rights is wide and vast and constitutes further classification of Fundamental Rights, constitutionally enforceable Rights, and Duties and Obligations which comprehensively covers the scope and ambit of Constitutional Rights.

(A) Fundamental Rights/ Bill of Rights

The fundamental rights or the Bill of Rights is a subset of Constitutional rights. The fundamental rights are the inherent or inalienable rights accorded to every human being from the moment they are born. The basic human rights were first enshrined in the Magna Carta 1215⁹. The fundamental rights are the basic human rights which must be provided to every human being for leading a dignified life. The historical background for establishing fundamental rights is

⁴ Sakshi Singh, Difference between constitutional rights and fundamental rights, (Sep. 2, 2024, 09.:28 PM), <https://blog.ipleaders.in/difference-between-constitutional-rights-and-fundamental-rights/>

⁵ United Nations, Economic, social and cultural rights, (Sep. 2, 2024, 09.:28 PM), <https://www.ohchr.org/en/human-rights/economic-social-cultural-rights>

⁶ Schabas, William A., 'Political rights', *The Customary International Law of Human Rights* (Oxford, 2021; online edn, Oxford Academic, 19 Aug. 2021), <https://doi.org/10.1093/oso/9780192845696.003.0008>, accessed 3 Sept. 2024.

⁷ *Ibid.*

⁸ Rebecca Hamlin, Civil rights, (Jul. 29, 2024), <https://www.britannica.com/topic/civil-rights>

⁹ *Supra.*

shrouded in wars and immense misuse of power by the State, for example, the French revolution (1787-1799)¹⁰. Fundamental rights are inalienable rights which cannot be taken away by the State under any circumstances, unless there are certain conditions which threaten the security and sovereignty of the State¹¹. Fundamental Rights or the Bill of Rights enshrines the basic tenets of human life and livelihood and is often developed on the historical backdrop of the State.

The Fundamental rights gain their source from the preamble of the Constitution. For example, in the South African Constitution, the Bill of Rights provided in Chapter 2 of the Constitution, gains their source and validity from the preamble of the Constitution, which provides the objective of abolition of apartheid and establishing a liberal and free State¹². The fundamental rights are not absolute, and the State can provide certain reasonable restrictions or amend or waive the fundamental rights for governance of the State or when the sovereignty of the State is threatened. The reasonable restrictions can be either codified in the Constitution, for example, Article-19 (2) of the Indian Constitution¹³, or the reasonable restrictions can be introduced by judicial interpretations and precedents, as provided by the US Supreme Court in the case of *District of Columbia v. Heller* (2008)¹⁴ relating to law being made by the State to offer reasonable restrictions to prevent misuse of guns.

Thus, the fundamental rights are an inherent and inalienable feature of the Constitution and must be protected for governance of the State. For example, in India, the fundamental rights are provided in Part 3 of the Indian Constitution¹⁵, and the fundamental rights can be amended by the State, except the basic structure of the Constitution. In the USA, the Bill of Rights were introduced in the US Constitution by the first 15 amendments to the US Constitution in 1789¹⁶. The Bill of Rights are absolute and no amendments to the BILL of Rights is possible. In the South African Constitution, the Bill of Rights derives its power from the preamble of the Constitution and provided in Chapter 2 of the South African Constitution¹⁷, and cannot be amended without a “reasonable cause.”

¹⁰ The Editors of Encyclopaedia Britannica, French Revolution, (Jul. 29, 2024), <https://www.britannica.com/event/French-Revolution>

¹¹ M.P. Jain, *Indian Constitutional Law*, 5th Edn., 2003, Rep 2004, Wadhwa Publication Nagpur,

¹² *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America*, 2009, Vol. 42, No. 4 (2009), pp. 552-575

¹³ Indian Const., art. 19.

¹⁴ *District of Columbia v. Heller* (2008) 554 U.S. 570 (2008)

¹⁵ *Supra*.

¹⁶ *Supra*.

¹⁷ Constitution of the Republic of South Africa, (Sep. 2, 2024, 09.:28 PM), <https://www.gov.za/sites/default/files/images/a108-96.pdf>

(B) Constitutionally enforced Rights

The Constitutionally enforced Rights are the Rights which are given by the Constitution to the State and individuals for efficient governance of the State. These rights are not inherent in nature, but these rights are provided by the Constitution to the State and the individuals of the State for maintaining peace and enhancing the socio-political lifestyle of the State. These rights can be amended by the State at any time without giving a “reasonable cause”¹⁸. However, the unbridled restrictions of Constitutionally enforced rights are not advised. The remedy for violation of these rights is provided in the Constitution and the aggrieved party can seek remedy in the Constitutional Courts. These rights are protected by the Constitution enhancing the quality of life of the individuals and also give power to the State to function efficiently. Example, Article 1- Right to Vote is conferred to individuals and Article 1, Section-2- Right to collect taxes is conferred to the State in the US Constitution. Similarly, Article 326- Right to Vote is conferred to individuals, and Article 265-268- Right to collect taxes is conferred to the State in the Indian Constitution. These Rights are socio-political in nature and any law being made by the State to curtail the same is also subjected to the tests established by the Constitution, such as “due process of law” or “procedure established by law” or the “test of reasonableness”¹⁹.”

(C) Duties

The duties are non-enforceable obligations on the individuals and State for providing a “harmonious governance.” Duties are non-enforceable in the Constitutional Courts and merely embodies the spirit of the Constitution. In the USA, the State does not particularly impose any duties on the individuals and the State. The duties are merely certain moral and civic rights which are provided by the US immigration department²⁰ to the citizens for establishment of “good governance”. However, these are non-enforceable and violation of duties does not warrant any legal action. On the contrary, Indian Constitution provides certain duties on the State and the individuals as provided in Part 4 (Directive Principles of State Policy) and Part 4A (Fundamental Duties)²¹ respectively. Although these duties are obligatory in nature, fulfilment of these duties brings the State one step closer towards a “welfare state.” In the South African Constitution, the duty and obligation are only conferred on the State or the municipal government to undertake developmental activities as provided in Section-153²² of the South

¹⁸ Vol. 7, No. 2 (Autumn, 1991), Dennis C Mueller, Constitutional Rights, Journal of Law, Economics, & Organization, pp. 313-333, Autumn, 1991.

¹⁹ *Supra*.

²⁰ US Citizenship and Immigration Services, (Sep. 2, 2024, 09.:28 PM), <https://my.uscis.gov/citizenship/information>

²¹ Indian Const. Part IV.

²²Section 153, South African Constitution, <https://www.justice.gov.za/legislation/constitution/saconstitution-web->

African Constitution. Thus, the duties provide a pathway for achieving a harmonious governance and also makes the State and the individuals accountable for their actions in the society.

III. PROTECTION OF US CONSTITUTIONAL RIGHTS

(A) Domestic Protection of US Constitutional Rights

In order to understand the protection provided to the Constitutional Rights, it is important to note that the Constitutional Rights itself protects and guarantees individual rights of the individuals of the State. Therefore, in order to protect the individual rights, it is of utmost importance that the Constitutional Rights must be protected by a legal or statutory basis to prevent abuse of power of the State, in the context that the individual rights are not abridged to satisfy the State's interest²³.

The US Constitution provides protection to the Constitutional Rights, specifically the Bill of Rights in Amendment X²⁴ of the US Constitution as follows:

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” The legal scholars, jurists, and the judiciary has provided several interpretations of this amendment, however the common thread which binds all the interpretations states that, the for the protection of the Constitutional Rights, the States can formulate laws. The States can include both federal government and the state governments. The rationale of the tenth amendment is clearly explained by Chief Justice John Marshall of US Supreme Court opined that, *“Tenth Amendment prohibits Congress from “commandeering” the states—that is, directly compelling them to enact or enforce a federal regulatory program²⁵.”* Therefore, the Constitutional provisions provide safeguard that any law made by the Federal government violative of the Constitutional rights need not be necessarily implementable by the State governments and thereby guarantees protection of the Constitutional Rights being violated.

Another form protection of Constitutional Rights by protection of interests of collective individuals or groups is the evolution of the Public Interest Litigations (PIL)²⁶. The foundational principle is collective protection of individual rights or constitutional rights. The surmounting

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²³ *Supra.*

²⁴ *Ibid.*

²⁵ *New York v US*, 505 U.S. 144, 161 (1992) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981))

²⁶ Arthur Dyevre & Giulio Itzcovich, Edited by Andras Jakab, *Comparative Constitutional Reasoning* 737-739 (Cambridge University Press, (2017)).

racial and discriminatory policies of the State between whites and blacks in US compelled people to question their Constitutional Rights. In the light of Rosa Parks²⁷ incident and impending civil war situations between the States, the public interest litigation breathed a ray of new hope. The first case of PIL addressed civil rights and constitutional rights issues of a community in the case of *Brown v. Board of Education*²⁸. The Supreme Court held that, “*racial segregation in public schools violated the Fourteenth Amendment to the Constitution, which prohibits the states from denying equal protection of the laws to any person within their jurisdictions. The decision declared that separate educational facilities for white and African American students were inherently unequal*²⁹.”

Thus, the Public Interest Litigations aims to empower disadvantaged groups of the society and provide them with a justiciable tool to enforce their constitutional rights³⁰. Therefore, PIL serves as a statutory medium of enforcing constitutional rights of masses and thereby acts as a protector of Constitutional Rights.

(B) Judicial Protection of US Constitutional Rights

The judiciary is regarded as the custodian of the Constitution and protector of the Constitutional Rights. One of the mediums through which the judiciary has protected the Constitutional Rights of the individuals is through the power of “Judicial Review.” The power of judicial review was developed in the US through the case of *Marbury v. Madison, 1803*³¹. The Supreme Court held that the “*because the Constitution clearly states that it is the supreme law of the land and because it is the province of the judiciary to uphold the law, the courts must declare state laws and even acts of Congress null and void when they are inconsistent with a provision of the Constitution. The same principle holds with regard to executive actions contrary to the Constitution.*”

However, there is a limitation to the power of judicial review by the Supreme Court in the US pertaining to constitutional disputes in 4 main areas³² as follows:

1. the relations between the states and the national government,
2. the separation of powers within the national government,

²⁷ History.com Editors, Rosa Park, (Feb. 20, 2024), <https://www.history.com/topics/black-history/rosa-parks>

²⁸ *Brown v. Board of Education*, **347 U.S. 483 (1954)**

²⁹ <https://www.britannica.com/event/Brown-v-Board-of-Education-of-Topeka>

³⁰ Mary McClymont, Stephen Golub, Many Roads To Justics, The Ford Foundation, (Sep. 2, 2024, 09.:28 PM), https://www.law.nyu.edu/sites/default/files/upload_documents/Hershkoff%20%26%20Hollander%2C%20Rights%20into%20Action%20-%20Public%20Interest%20Litigation%20in%20the%20United%20States.pdf

³¹ *Marbury v. Madison* **5 U.S. 137 (1803)**

³² Matthew F. Shugart, David Fellman, Judicial Review in the United States, (Aug. 29, 2024), <https://www.britannica.com/topic/constitutional-law/Judicial-review-in-the-United-States>

3. the right of government to regulate the economy, and
4. individual rights and freedoms.

Therefore, the Judiciary has upheld the concept of separation of powers to such extent that even the judiciary is subjected to certain restrictions to prevent abuse of power.

a. International Protection extended to US Constitutional Rights

The Constitutional Rights of a country is subject to its domestic social and political conditions, as well as, consonant with international relations and standards. Any unbridled constitutional rights, if violative of international treaties or standards is highly criticized in global arena, thereby hampering trade relations. One such example of protection of Constitutional rights of individuals is through international treaties. One of the most common examples is the Universal Declaration of human rights 1948³³ which accords protection to all human rights and any constitutional or statutory rights violative of the basic tenets of human rights is considered unconstitutional.

Another interesting instance is the Constitutional Right enshrined in Amendment-2 of the Bill of Rights³⁴ of the US Constitution providing Right to bear arms by the citizens. This right is not just constitutionally protected and upheld by the US Supreme Court, but has given rise to the Arms Trade Treaty³⁵ which lays down ethical trade practices in arms dealing and also lays down standards of legally bearing arms by citizens. Hence, the Constitutional rights of the citizens is protected domestically and internationally by various legal mechanisms.

IV. PROTECTION OF INDIAN CONSTITUTIONAL RIGHTS

(A) Domestic Protection of Indian Constitutional Rights

The Constitutional rights provided in Part 3 of the Indian Constitution is addressed as the fundamental rights. The fundamental rights are the sacrosanct rights of the individuals, irrespective of their citizenship of India. The Fundamental Rights are coveted and protected in the preamble of the Constitution which enshrines protection of the human rights and values. The same is constituted in the basic structure of the Constitution as held by Jaganmohan Reddy, J., in the case of *Kesavananda Bharati Sripadagalvaru and Ors v State of Kerela and Ors*³⁶, “Preamble of the Constitution and the constitutional provisions into which they were translated,

³³ *Supra.*

³⁴ Constitution of the United States, Second Amendment.

³⁵ Daryl G. Kimball, The Arms Trade Treaty At a Glance,(May 2023), <https://www.armscontrol.org/factsheets/arms-trade-treaty-glance>

³⁶ 1973 4 SCC 225

such as sovereign democratic republic, parliamentary democracy, and three organs of the state are coveted in the basic structure of the Constitution”.

Apart from the preamble, the Supreme Court has propounded the “basic structure doctrine” which essentially curtails the power of the legislature to amend the Constitution and the fundamental rights to prevent abuse of power. The “basic structure doctrine” is held as the inherent core of the Constitution and any amendments to the same will violate the very spirit and soul of the Indian Constitution. One of the highlighted aspect of the basic structure doctrine is the protection of the fundamental rights as listed by *Hegde, J., and Mukherjea, J.*, “*The sovereignty of India, the democratic nature of the polity, the nation’s unity, the core elements of the individual freedoms secured to its citizens, and the mandate to create a welfare state*”³⁷.” Therefore, the power of the legislature under A-368 to amend the Constitution is curtailed with respect to the fundamental rights which secures individual freedom to the citizens.

Moreover, the Constitution forbids the legislature to make any laws contravening the fundamental rights of the citizens as provided in Article 13 (2) of the Indian Constitution and the same has been iterated by the Supreme Court in the case of *Gopalan v State of Madras*.

Another provision provided in the Constitution is the power conferred to the Constitutional Courts to remedy violations of fundamental rights through five writs of writ of habeas corpus, writ of certiorari, writ of quo warranto, writ of Prohibition and writ of Mandamus as provided in Article-32 (2) of the Indian Constitution. Therefore, the Constitution itself acknowledges the importance of the fundamental rights and guarantees constitutional remedies to prevent violation of the same.

(B) Judicial Protection of Indian Constitutional Rights

The power of judicial review is an inherent feature of the Constitution and the same Judiciary is the custodian of the Constitution and Constitutional rights. The power of judicial review is enshrined in the Constitution as a form of original jurisdiction of the Supreme Court of India as per Article-32³⁸ of the Indian Constitution and of the High Court and Supreme Court as per Article-226³⁹ of the Indian Constitution. The power of judicial review is also conferred on the Supreme Court as an appellate jurisdiction under Article-132 and 136⁴⁰ of the Indian Constitution.

³⁷ Rachit Garg, Basic structure of Indian Constitution, (Aug. 8, 2022), <https://blog.iplayers.in/basic-structure-of-indian-constitution/>

³⁸ *Supra.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

The power of judicial review acts as a preventive mechanism to limit overreach of the legislature into the domain of infringing fundamental rights of the citizens. However, the power of judicial review is not absolute and is subjected to the “test of reasonable restrictions” as provided in Article-19. Moreover, the power of judicial review in India is guided by the following principles⁴¹:

1. Curbing the influence of Court- These scenarios occur due to swaying of judicial judgements to uphold the legal agenda in light of the political and socio-economic condition of the society and international pressures. A recent example of the same is decriminalization of homosexuality⁴² in India despite being major setback and outcry from certain segment of the society.

2. Imposition of Judicial Self Restraint- In this instance the Court itself imposes self-restraint on its power to gain legitimacy of the issue before making any judicial pronouncement to avoid hasty and rash decision. In recent time, the Babri Masjid⁴³ case which is landmark judgement on the violation of fundamental rights was provided with a sound legal rational despite of its insurmountable delay.

3. Supporting majoritarian view of the political scenario- In certain situations, the judiciary has to align with the majority political view of the reigning government to maintain peace and sovereignty of the society. Although this is widely criticised, but the implication of alignment of mind of legislature and judiciary can promote a united front with respect to international relations.

Thus, the power of judicial review safeguards the fundamental rights of the citizens.

a. International Protection extended to Indian Constitutional Rights

India has ratified numerous international covenants and treaties to ensure protection of the fundamental rights in domestic and international arena. Few international treaties ratified by India are as follows⁴⁴:

1. India ratified the International Covenant on Civil and Political Rights (ICCPR) in 1979⁴⁵, demonstrating its commitment to upholding civil and political rights

⁴¹Chilton, Adam S., and Mila Versteeg. “Courts’ Limited Ability to Protect Constitutional Rights.” *The University of Chicago Law Review*, vol. 85, no. 2, 2018, pp. 293–336. *JSTOR*, <https://www.jstor.org/stable/26455909>. Accessed 3 Sept. 2024.

⁴² Navtej Singh Johar vs Union Of India Ministry Of Law, AIR 2018 SUPREME COURT 4321

⁴³ M Siddiq (D) Thr Lrs v Mahant Suresh Das & Ors, CA 10866-10867/2010

⁴⁴ Manmeet989, India and International Human Rights Treaties, (Sep. 2, 2024, 09.:28 PM), <https://www.legalserviceindia.com/legal/article-15689-india-and-international-human-rights-treaties.html>.

⁴⁵ International Covenant on Civil and Political Rights.

as enshrined in the treaty. This affirmed recognition of fundamental rights such as the right to life, freedom of speech and expression, freedom of religion, and the right to a fair trial.

2. India ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1979⁴⁶, affirming its commitment to promoting and protecting economic, social, and cultural rights. By ratifying ICESCR, India recognized the rights enshrined in the treaty, including the right to work, the right to education, the right to an adequate standard of living, and the right to the highest attainable standard of health which is now an alienable right covered under Article-21 of the Constitution.
3. India ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1993⁴⁷, pointing towards its commitment to eradicate discrimination against women and promotion of gender equality. By ratifying CEDAW, India recognized the rights enshrined in the treaty, including the right to equality before the law, the right to non-discrimination, and the right to participate in public and political life. India's ratification of CEDAW signifies its dedication to ensuring that women have equal opportunities and access to resources, enabling them to participate fully in all aspects of society.

Thus, India has given utmost importance to its international obligations and has secured protection of fundamental rights in domestic and international arena.

V. PROTECTION OF SOUTH AFRICAN CONSTITUTIONAL RIGHTS

(A) Domestic Protection of South African Constitutional Rights

The Constitution of South Africa is a recent Constitution with unambiguous provisions, and the same detailing the provisions of Constitutional rights, or the Bill of Rights and consequently the responsibility imposed on the Courts and the legislature to protect these Constitutional Rights under various circumstances.

1. The first responsibility is imposed on the State to protect and affirm the Bill of Rights on all citizens as stated in Section- 7(2)⁴⁸ of the South African Constitution,

⁴⁶ International Covenant on Economic, Social and Cultural Rights, UN General Assembly resolution 2200A (XXI), (Dec. 16, 1966), <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>

⁴⁷ Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979, United Nations General Assembly, (Dec. 18, 1979), <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women>

⁴⁸ Constitution of the Republic of South Africa.

provided as follows: “*The state must respect, protect, promote and fulfil the rights in the Bill of Rights*”. Therefore, the Constitution provides an extreme burden and responsibility on the State to ensure that the Constitutional rights are protected while forming any legislations. It is interesting to note that this provision actually holds the State accountable to protect the Constitutional rights of the citizens, which is in stark contrast to the Indian and the US constitution. Therefore, the South African Constitution inadvertently makes the State as the protector of the Constitutional rights of the citizens, making the State mindful of its constitutional obligation and duty to protect the Bill of rights of the citizens while forming any legislation.

2. The second responsibility to protect the Constitutional right is imposed on the citizens of South Africa to take cognizance of their Bill of rights and hold the State accountable in an instance of violation of the Bill of Rights. The same is stated in Section-38⁴⁹ of the South African Constitution which grants the right to “anyone” to approach the Court to enforce the Bill of Rights and thereby ensure that Constitutional rights are protected in absentia of an “interested party”.
3. The third responsibility is entrusted on the competent court to advocate, upheld and protect the Constitutional Rights in light of the values and historical significance of South Africa as provided in Section-39⁵⁰ of the South African Constitution. This makes it an onerous responsibility of the judiciary to act as a custodian of the constitutional rights and to interpret the Constitutional Rights to abrogate past atrocities.

(B) Judicial Protection of South African Constitutional Rights

The making of the Constitution was not a singular act, but consisted in a prudent exercise sometimes referred to as "**transformative constitutionalism**". It was marked by an intermediate stage involving the inauguration of an interim Constitution and two core safeguards to ensure that the substance of the final Constitution lived up to its intended standard: the so-called *Constitutional Principles and the Certification Procedure*. In order to protect and promote the Constitutional Rights and the philosophies of the Constitution, the Constitutional Court conceded that *the adjudication of socio-economic rights may have budgetary implications, but it pointed out that the enforcement of civil and political rights is important for*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

elimination of historical torture, in the First Certification Judgement case⁵¹.

Furthermore, the Court responded to concerns over the justiciability - or rather the supposed lack of justiciability - of the constitutional provisions on socio-economic rights, affirming that "*these rights are, at least to some extent, justiciable*" and that, at the very minimum, they could be "*negatively protected from improper invasion*". The Certification Procedure thus attested to the legitimate presence of socio-economic rights in the final text of the Constitution which entered into force in 1997⁵². This solidified the role of judiciary in protecting the spirit and principles of Constitutionalism and thereby protect the Constitutional rights of the citizens.

a. International Protection extended to South African Constitutional Rights

The international laws and treaties provide a protection towards enforcement of the Bill of Rights as the continuance of State's international obligation to follow customary laws and international laws being a member state of the United Nations. The same has been iterated by the Constitutional Court of South Africa in *S v Makwanyane*⁵³ case, stating "*In the context of section 35(1) public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights and the European Court of Human Rights and in appropriate cases, reports of specialized agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights]. . . . In dealing with comparative law, we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.*"

Thus, the interpretation of the Constitutional Court iterates that international law must be considered to protect the Constitutional rights, however such protection must be in the context

⁵¹ 1996 (CCT 23/96) ZACC 26

⁵² Arthur Dyevre & Giulio Itzcovich, Edited by Andras Jakab, *Comparative Constitutional Reasoning*, Cambridge University Press, 600-609 (2017)

⁵³ *S v Makwanyane* 1995(3) SA 391 (CC), 1995 (6) BCLR 665 (CC)('Makwanyane') at paras 34, 35 and 39

of the Constitution of the South Africa.

VI. CONCLUSION

The constitutional rights guarantee freedom and individuality of each and every citizen in their respective State. A comparative study across jurisdictions provides insights into the similarity of legal protections provided to enforce the Constitutional Rights, at the same time shreds insight into possible reasons of certain strict or liberal measures of protection of Constitutional rights based on historical context of the States. The following Conclusions can be drawn from the above study:

1. Constitutional Rights are enshrined in consonance with international obligations, natural law theory, ease of governance of the State, and for providing accreditation for powers of the State.
2. The Fundamental Rights, on the other hand are developed to guarantee individual, inherent rights subject to historical background, socio-economic context and condition of the country, and enforceability of the Rights for achieving an idealist welfare state.
3. The States have adopted the Constitutional Rights within a guiding framework and various socio-economic and political issues are adjusted in the ambit of said framework.
4. The judicial interpretation of the Constitutional Rights is also subject to political conditions of the State, and often subject to legislative actions of the State.
5. The forms of protection of Constitutional Rights are provided in the Constitution in the form of original and appellate jurisdiction, however the test of protection of Constitutional Rights is developed by the judiciary in socio-political and historical context of the State.
6. The protection of Constitutional Rights depends upon the socio-legal and socio-political contexts of the States, however, the basic tenets of human rights must be protected in any instances of protection of Constitutional Rights.
