

COURT IN THE CROSSFIRE: JUDICIAL INDEPENDENCE
AMIDST POLITICAL TURMOIL
LUKHONA MARELE[†]

I INTRODUCTION

The pursuit of judicial independence remains a formidable challenge in constitutional democracies worldwide, particularly in transitional societies like South Africa where courts must navigate complex political landscapes while upholding constitutional values. This essay examines how the judiciary can maintain its independence during periods of political volatility, focusing primarily on South Africa's experience while drawing comparative insights from other jurisdictions. It argues that preserving judicial independence amid political turmoil requires a multifaceted approach encompassing institutional safeguards, ethical judicial conduct, public legitimacy-building and a supportive political culture. By analysing both threats to judicial independence and potential strengthening mechanisms, the essay demonstrates that courts must balance principled adherence to constitutional mandates with strategic awareness of their institutional position within broader political dynamics.

II CONCEPTUAL FOUNDATIONS OF JUDICIAL INDEPENDENCE

(a) *Theoretical Dimensions and Constitutional Framework*

Judicial independence operates across multiple dimensions that collectively establish the foundation for impartial adjudication.

At its core, independence encompasses both institutional autonomy and decisional freedom from improper influence. The institutional dimension refers to the structural autonomy of courts within the governmental framework, while the personal dimension pertains to individual judges' ability to render decisions free from external pressures or personal biases.

The South African Constitution explicitly enshrines judicial independence in section 165, which states that 'the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.'¹ This constitutional commitment represents a deliberate rejection of the apartheid-era subordination of judicial authority to political control. Furthermore, the Constitution establishes various institutional safeguards including security of tenure, financial security and administrative independence to protect judicial autonomy.² The theoretical underpinning of judicial independence in South Africa rests significantly on the separation of powers doctrine, which distributes governmental authority among distinct branches to prevent concentration of power in one domain.³ As Klug observes, South Africa employs a 'constrained' separation of powers model rather than a rigid division, emphasising checks and balances while acknowledging

† *BCom Law 2nd Year Student, University of South Africa (UNISA).*

¹ Constitution of the Republic of South Africa, 1996, s 165(2).

² Ibid ss 176-180. See also Concourt 'What is the separation of powers? Constitutional Court of South Africa' available at <https://www.concourt.org.za/index.php/46-what-is-a-constitution/what-is-the-separation-of-powers/109-what-is-the-separation-of-powers>, accessed on 22 May 2025.

³ I Currie & J de Waal *The Bill of Rights Handbook* 6th ed (2013) 23-45.

the necessary overlap in governmental functions.⁴ This approach was articulated by the Constitutional Court in *De Lange v Smuts NO*, where the Court stated that 'there is no absolute separation of powers between the judicial function, on the one hand, and the legislative and executive on the other.'⁵

Constitutional supremacy represents another theoretical cornerstone supporting judicial independence in South Africa.⁶ By establishing the Constitution as supreme law against which all other law and conduct must be measured, the constitutional framework positions courts — particularly the Constitutional Court — as ultimate arbiters of constitutional compliance. This arrangement generates tension with democratic theory, particularly regarding the counter-majoritarian difficulty: the apparent contradiction of unelected judges overturning decisions made by democratically elected representatives.⁷

(b) Judicial Independence in Comparative Context

The challenge of maintaining judicial independence amid political turmoil is not unique to South Africa but represents a global concern that manifests differently across jurisdictions. In established democracies like the United States, judicial independence benefits from long-standing traditions and institutional respect though remains subject to periodic stress

⁴ See generally P Mojapelo 'The doctrine of separation of powers under the South African Constitution' (2005) 8 *PELJ* at 1-25.

⁵ *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) para 60.

⁶ *Op cit* note 1 s 2.

⁷ M Tushnet 'Weak courts, strong rights: Judicial review and social welfare rights in comparative constitutional law' (2008) 23 *Constitutional Commentary* 443-470.

during politically divisive periods.⁸

Post-authoritarian and transitional societies often experience more acute challenges to judicial independence.⁹ Hungary presents a cautionary example, where recent constitutional reforms have effectively subordinated judicial authority to political control through mechanisms including manipulation of appointment procedures and court packing.¹⁰ Similarly, Poland has witnessed systematic efforts to undermine judicial independence through legislation restricting judicial authority and disciplinary measures against judges who oppose governmental overreach.¹¹

By contrast, Colombia demonstrates how courts can maintain independence even amid significant political turmoil.¹² Despite facing armed conflict, political instability and deliberate attacks on its authority, Colombia's Constitutional Court has established itself as a powerful and largely independent institution. Key factors in this success include robust institutional design, strategic decision-making that balances progressive rights protection with political feasibility and successful cultivation of public support.¹³

⁸ S Burbank & B Friedman (eds) *Judicial Independence: Unsettled Ideals and Uncertain Realities* (2019) 45-67.

⁹ T Ginsburg & T Moustafa (eds) *Rule by Law: The Politics of Courts in Authoritarian Regimes* (2008) 123-145.

¹⁰ G Halmai 'The destruction of constitutional review in Hungary' (2019) 15 *Review of Central and East European Law* 183-207.

¹¹ W Sadurski 'Poland's constitutional breakdown' (2019) 26 *Constellations* 598-617.

¹² M Garcé & J Uribe 'The Colombian Constitutional Court: Institutional design and democratic governance' (2017) 12 *Colombian Journal of Constitutional Law* 234-256.

¹³ *Ibid* at 248-251.

III HISTORICAL EVOLUTION OF JUDICIAL INDEPENDENCE IN SOUTH AFRICA

(a) *From Parliamentary Supremacy to Constitutional Democracy*

The evolution of judicial independence in South Africa reflects the country's turbulent political history and transition from authoritarian rule to constitutional democracy. During apartheid, the judiciary operated under parliamentary sovereignty, where courts possessed limited authority to review legislative actions and frequently functioned as instruments of an oppressive regime rather than guardians of individual rights.¹⁴

While some judges demonstrated courage in minimising apartheid's worst effects through creative statutory interpretation — as in *Harris v Minister of the Interior* where the Appellate Division temporarily invalidated legislation removing coloured voters from electoral rolls¹⁵ — the structural limitations of a system predicated on parliamentary supremacy severely constrained judicial authority. The apartheid judiciary particularly failed to protect rights in politically sensitive cases involving security legislation.¹⁶

The democratic transition fundamentally transformed this arrangement, establishing constitutional supremacy and an independent judiciary as cornerstones of the new order. The interim Constitution of 1993 and final Constitution of 1996

¹⁴ E Cameron 'Legal chauvinism, executive-mindedness and justice – L.C. Steyn's impact on South African law' (1982) 99 *SALJ* 38-75.

¹⁵ *Harris v Minister of the Interior* 1952 (2) SA 428 (A).

¹⁶ J Dugard 'The judicial process, positivism and civil liberty' (1971) 88 *SALJ* 181-200.

explicitly rejected parliamentary sovereignty, establishing instead a constitutional framework where all public power remains subject to constitutional constraints enforced through judicial review.¹⁷

(b) Post-Apartheid Jurisprudential Development

The establishment of the Constitutional Court as South Africa's apex court marked a critical development in securing judicial independence.¹⁸ Through landmark cases, the Court has both exemplified and defended judicial independence. In *Justice Alliance of South Africa v President of RSA*, the Court emphasised that judicial independence encompasses both institutional arrangements and a particular judicial mindset characterised by impartiality and freedom from improper influence.¹⁹ The Court held that extending the term of the Chief Justice through legislation rather than constitutional amendment violated judicial independence, stating that 'the manner in which the judiciary is treated affects its independence.'²⁰

Similarly, in *De Lange v Smuts NO*, the Court articulated that judicial independence comprises both individual and institutional dimensions, requiring not merely the absence of actual interference but also the absence of reasonable apprehension of interference.²¹ The Court emphasised that independence involves 'a state of mind which is reflected in the

¹⁷ Constitution of the Republic of South Africa Act 200 of 1993; op cit note 1 s 2.

¹⁸ Op cit note 3 at 67-89.

¹⁹ *Justice Alliance of South Africa v President of RSA* 2011 (5) SA 388 (CC) para 28.

²⁰ Ibid para 45.

²¹ Op cit note 5 para 70.

actual behaviour of the judge,' requiring judges to act impartially without external or internal pressure.²²

The post-apartheid judiciary has exercised its newfound authority to check governmental power across various domains. In *Treatment Action Campaign v Minister of Health*, the Constitutional Court required the government to develop and implement a comprehensive programme for preventing mother-to-child HIV transmission, demonstrating willingness to intervene in policy matters with significant resource implications.²³ The Court demonstrated that while it would show appropriate deference to policy choices, it would not hesitate to require governmental compliance with constitutional obligations affecting fundamental rights.²⁴

In *Glenister v President of RSA*, the Court invalidated legislation restructuring anti-corruption institutions, finding that it failed to ensure sufficient independence for these bodies.²⁵ The Court held that South Africa's international law obligations and constitutional values required an adequately independent anti-corruption unit, demonstrating willingness to enforce substantive standards of institutional independence against legislative judgment.²⁶ Perhaps most dramatically, in *United Democratic Movement v Speaker of the National Assembly*, the Court ordered that Parliament could require a secret ballot in a no-confidence

²² Ibid para 72.

²³ *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) para 135.

²⁴ Ibid para 38.

²⁵ *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 207.

²⁶ Ibid para 178.

vote against then President Zuma, effectively enabling parliamentarians to vote according to conscience rather than party directive in a matter with profound implications for governmental stability.²⁷

These constitutional provisions and jurisprudential developments have transformed South Africa's judiciary from an institution that primarily legitimised oppression to one actively safeguarding democratic values.²⁸ As Corder observes, however, this transformation continues to face resistance from political forces accustomed to unchecked authority, creating ongoing tension between constitutional ideals and political realities.²⁹ The historical legacy of apartheid also continues to influence public perceptions of the judiciary with lingering scepticism about judicial impartiality, particularly regarding economic justice and land reform issues where transformation remains incomplete.³⁰

IV CONTEMPORARY CHALLENGES TO JUDICIAL INDEPENDENCE IN SOUTH AFRICA

(a) *Political Resistance to Judicial Authority*

Despite robust constitutional protections, South Africa's judiciary confronts numerous challenges to its independence in contemporary political contexts. Perhaps the most visible

²⁷ *United Democratic Movement v Speaker of the National Assembly* 2017 (5) SA 300 (CC) para 78.

²⁸ H Corder 'Judicial authority in a changing South Africa' (2004) 121 *SALJ* 649-673.

²⁹ *Ibid* at 665.

³⁰ T Roux 'The politics of principle: The first South African Constitutional Court, 1995-2005' (2014) 12(4) *International Journal of Constitutional Law* 1076-1080.

manifestation occurs when courts adjudicate cases involving prominent political figures, where judicial outcomes inevitably generate political repercussions. The cases involving former President Jacob Zuma exemplify this dynamic, particularly the Constitutional Court's unprecedented decision in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture v Zuma* to impose direct imprisonment for contempt after Zuma refused to comply with earlier court orders.³¹ This judgment prompted significant political backlash, including public attacks on judicial legitimacy and, more disturbingly, civil unrest in parts of KwaZulu-Natal and Gauteng that resulted in loss of life and extensive property damage.³²

Executive non-compliance with court orders represents another persistent threat to judicial authority. While outright refusal to implement judgments remains relatively rare, administrative delay and partial compliance have become concerning patterns. The Constitutional Court addressed this challenge in *Economic Freedom Fighters v Speaker of the National Assembly*, where it found that Parliament and the President had failed to fulfil constitutional obligations by not implementing the Public Protector's remedial action regarding security upgrades at Nkandla.³³ Justice Mogoeng highlighted the fact that 'one of the crucial elements of our constitutional vision

³¹ *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture v Zuma* 2021 (5) SA 327 (CC) para 85.

³² See generally S Hassim et al 'The July 2021 unrest in South Africa: A preliminary assessment' (2021) 38 *Development Southern Africa* 839-856.

³³ *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (3) SA 580 (CC) para 69.

is to make a decisive break from ... unchecked abuse of State power and resources that resulted in the violation of human rights and the rule of law.³⁴ Despite this clear directive, instances of delayed or incomplete compliance with court orders continue to undermine judicial effectiveness.³⁵

Political rhetoric questioning judicial legitimacy further threatens judicial independence by eroding public confidence in courts as impartial arbiters. Various political figures have characterised adverse judgments as evidence of judicial bias or foreign influence rather than legitimate legal reasoning. These claims echo apartheid-era tactics of delegitimising judicial review as 'political' whenever it constrains governmental authority.³⁶ As former Deputy Chief Justice Moseneke notes, such rhetoric 'seeks to bring adjudication of the highest court to public disrepute and hopefully at that level to coax the court into making decisions that are palatable to the critics.'³⁷ The challenge for courts lies in defending their institutional integrity without appearing to engage in political combat that might further undermine their perceived impartiality.³⁸

(b) Institutional and Resource Constraints

Beyond direct political challenges, South Africa's judiciary faces

³⁴ Ibid para 52.

³⁵ H Klug 'Constituting democracy: Law, globalism and South Africa's political reconstruction' (2000) 234-256.

³⁶ D Davis 'Constitutional borrowing: The influence of legal culture and local history in the reconstitution of comparative influence' (2003) 1 *International Journal of Constitutional Law* 181-195.

³⁷ D Moseneke 'The fourth Bram Fischer Memorial Lecture: Transformative adjudication' (2002) 18 *SAJHR* 309-319 at 315.

³⁸ See generally P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 351-360.

institutional and resource constraints that indirectly threaten judicial independence. Inadequate funding for courts compromises their operational effectiveness, creating case backlogs that undermine timely justice delivery.³⁹ Budget allocations consistently fail to meet the judiciary's operational needs, with particular shortfalls in infrastructure maintenance, technological modernisation and support staff resources.⁴⁰ As former Chief Justice Mogoeng observed, 'financial control over the judiciary is a powerful tool through which to undermine the institutional independence of the courts,'⁴¹ making budgetary adequacy a crucial component of judicial independence.

The Office of the Chief Justice, established to enhance administrative independence, continues to struggle with implementing fiscal autonomy in practice.⁴² Despite formal recognition of the judiciary as a separate arm of government, budgetary decisions remain largely controlled by executive departments, creating potential leverage over judicial operations.⁴³ The experience of the Land Claims Court offers a cautionary example, where inadequate resourcing has compromised the court's ability to fulfil its constitutional mandate regarding land restitution — a politically sensitive area where judicial effectiveness directly affects public perceptions of

³⁹ Office of the Chief Justice 'Annual Report 2022/23' 45-67 available at <https://www.judiciary.org.za/annual-reports>, accessed on 22 May 2025.

⁴⁰ Ibid at 52.

⁴¹ M Mogoeng 'A functional approach to judicial independence' (2014) 20 *Fundamina* 196-210 at 205.

⁴² Superior Courts Act 10 of 2013 s 8.

⁴³ T Madlingozi 'Post-apartheid social movements and the quest for the elusive "new" South Africa' (2007) 23 *Journal of Law and Society* 77-98.

constitutional legitimacy.⁴⁴

Transformation challenges within the judiciary further complicate independence issues. While significant progress has occurred in diversifying judicial demographics since apartheid, tensions persist regarding appointment criteria, particularly concerning the balance between demographic representation and experience requirements.⁴⁵ These tensions manifest most visibly in Judicial Service Commission (JSC) interviews, where questioning sometimes appears politically motivated rather than focused on judicial competence and temperament.⁴⁶ In *South African Association of Personal Injury Lawyers v Heath*, the Constitutional Court emphasised that while transformation is essential, it must occur within constitutional parameters that respect separation of powers and judicial independence.⁴⁷

V STRENGTHENING JUDICIAL INDEPENDENCE AMID POLITICAL TURMOIL

(a) *Institutional and Structural Mechanisms*

Protecting judicial independence in South Africa requires addressing both institutional vulnerabilities and broader political-cultural factors that threaten judicial autonomy. Regarding institutional reform, enhancing administrative and

⁴⁴ See generally E Lahiff 'Land reform in South Africa: Is it meeting the challenge?' (Institute for Security Studies Policy Brief 2001) 1-8.

⁴⁵ S Budlender 'Transforming the judiciary: The politics of the judiciary in a democratic South Africa' (2005) 122 *SALJ* 713-736.

⁴⁶ See generally F Cachalia 'Judicial appointments: A view from the Judicial Service Commission' (2015) 18 *PELJ* 2623-2640.

⁴⁷ *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) para 34.

financial independence represents a critical priority. The Office of the Chief Justice requires greater budgetary autonomy to prevent resource allocation from becoming a mechanism of control over judicial operations.⁴⁸ In *Van Rooyen v The State*, the Constitutional Court stressed that 'the Constitution requires that judicial control over court administration be preserved and promoted,'⁴⁹ suggesting that administrative independence forms an essential component of overall judicial independence.

Appointment procedures warrant reconsideration to minimise political influence while maintaining democratic accountability. The current JSC structure, while superior to apartheid-era appointment mechanisms, has attracted criticism for occasionally appearing politically motivated in its questioning and recommendations.⁵⁰ In *Helen Suzman Foundation v Judicial Service Commission*, the Supreme Court of Appeal required the JSC to provide reasons for appointment decisions, enhancing transparency and accountability in the selection process.⁵¹ This judgment represents an important step toward ensuring that appointments remain merit-based while respecting transformation imperatives.⁵²

Strengthening judicial discipline mechanisms represents another institutional priority for preserving independence. The Hlophe matter — where allegations that Western Cape Judge

⁴⁸ See J Brand 'Administrative justice and judicial independence' (2019) 36 *SALJ* 245-267.

⁴⁹ *Van Rooyen v The State* 2002 (5) SA 246 (CC) para 15.

⁵⁰ See *op cit* note 45.

⁵¹ *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (SCA) para 67.

⁵² *Ibid* para 72.

President John Hlophe had improperly attempted to influence Constitutional Court justices in cases involving Jacob Zuma which remained unresolved for over a decade — demonstrates how ineffective disciplinary processes can undermine public confidence in judicial impartiality.⁵³ An effective disciplinary system must balance accountability with protections against weaponizing complaints to intimidate judges in politically sensitive cases. The recently established Judicial Conduct Committee represents progress but requires further refinement to ensure timely resolution of serious misconduct allegations while shielding judges from vexatious complaints intended to undermine independence.⁵⁴

(b) Ethical Self-Regulation and Professional Solidarity

Beyond institutional reforms, strengthening judicial ethics and professionalism provides another mechanism for reinforcing independence amid political pressure. The judiciary's own conduct significantly affects public perceptions of its legitimacy and impartiality.⁵⁵ South Africa has adopted comprehensive judicial ethics codes, but implementation remains uneven, particularly regarding recusal practices, extrajudicial commentary and political activities by judges.⁵⁶ In *President of the Republic of South Africa v South African Rugby Football Union*, the Constitutional Court established principles for

⁵³ See generally A Cockrell 'The Hlophe saga: A tragedy in multiple acts' (2017) 33 *SAJHR* 321-340.

⁵⁴ Judicial Service Commission Act 9 of 1994 as amended by Act 20 of 2008 ss 13A-13C.

⁵⁵ M Bishop 'Judicial ethics and extrajudicial activities' (2016) 133 *SALJ* 234-256.

⁵⁶ *Ibid* at 245.

judicial recusal that balance impartiality concerns with the duty to hear cases, underscoring that judges should not recuse themselves unnecessarily as this would undermine judicial function.⁵⁷

Judicial training programs offer opportunities to strengthen judges' capacity to maintain independence under pressure. Comparative experience suggests that training should address not merely technical legal knowledge but also judicial ethics, impartiality maintenance under pressure and understanding the judiciary's constitutional role.⁵⁸ South Africa's Judicial Education Institute provides a foundation for such training but requires enhanced resources and curriculum development focused specifically on independence preservation amid political controversy.⁵⁹ The need for such training becomes evident in cases like *Hlantlalala v Dyantyi*, where the Supreme Court of Appeal had to address issues of judicial competence and preparation.⁶⁰

Professional solidarity among judges provides another protection against interference with individual judicial independence. When judges collectively defend colleagues facing improper pressure, the cost of targeting individual judges increases substantially. However, such solidarity must be balanced against appropriate internal accountability for judicial

⁵⁷ *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 48.

⁵⁸ See generally R Sackstein 'Judicial education and the challenge of transformation' (2014) 131 *SALJ* 567-589.

⁵⁹ *Ibid* at 578.

⁶⁰ *Hlantlalala v Dyantyi* 2010 (4) SA 374 (SCA) para 23.

misconduct.⁶¹ The South African judiciary demonstrated such solidarity in *Justice Alliance of South Africa v President of RSA*, where the Constitutional Court unanimously rejected legislation extending the Chief Justice's term, despite potential institutional advantages from continued leadership stability.⁶² This judgment demonstrated principled commitment to constitutional requirements even when institutional self-interest might suggest accommodation.⁶³

(c) *Strategic Adjudication and Public Legitimacy-Building*
Courts can protect their independence through strategic adjudication that balances constitutional principle with institutional preservation. This approach involves careful case selection, gradualist jurisprudential development and attention to enforcement feasibility.⁶⁴ In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, the Constitutional Court used an incremental approach to developing sexual orientation jurisprudence, establishing principles in less controversial contexts before addressing more divisive issues like same-sex marriage.⁶⁵ This gradualist strategy builds judicial legitimacy while minimising backlash risk that could threaten institutional independence.⁶⁶

Deference doctrines offer another strategic tool for

⁶¹ S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2009) 234-267.

⁶² Op cit note 19 para 78.

⁶³ Ibid para 82.

⁶⁴ See op cit note 30.

⁶⁵ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 34.

⁶⁶ See generally P de Vos 'The "inevitability" of same-sex marriage in South Africa's post-apartheid state' (2007) 23 *SAJHR* 432-465.

balancing judicial review with democratic respect. In *Bato Star Fishing v Minister of Environmental Affairs*, the Constitutional Court articulated a nuanced approach to reviewing executive decisions that acknowledges governmental expertise while maintaining meaningful oversight.⁶⁷ Justice O'Regan explained that 'the need for courts to treat decision-makers with appropriate deference or respect flows... from the fundamental constitutional principle of the separation of powers.'⁶⁸ This calibrated approach protects judicial legitimacy by avoiding unnecessary conflict with political branches while preserving core review functions.⁶⁹

Public communication strategies represent a crucial element of independence protection. The Constitutional Court has pioneered accessible judgment writing and public outreach, including educational initiatives explaining complex decisions.⁷⁰ In *MEC for Education, KwaZulu-Natal v Pillay*, Justice Langa crafted a judgment addressing religious and cultural rights in schools with exceptional clarity, demonstrating how courts can communicate complex constitutional principles accessibly.⁷¹ Expanding such communication efforts throughout the judicial hierarchy would strengthen public understanding of courts' constitutional role and decision-making processes, building

⁶⁷ *Bato Star Fishing v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 48.

⁶⁸ *Ibid* para 46.

⁶⁹ See generally C Hoexter 'The principle of legality in South African administrative law' (2004) 4 *Macquarie Law Journal* 165-185.

⁷⁰ L Ackermann 'The legal nature of the South African constitutional revolution' (2004) 4 *New Zealand Law Review* 633-660.

⁷¹ *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) para 63.

essential legitimacy reservoirs for periods of political conflict.⁷²

VI COMPARATIVE LESSONS AND FUTURE DIRECTIONS

(a) *Learning from Global Experience*

South Africa can draw valuable lessons from other jurisdictions' experiences with judicial independence. India's Supreme Court demonstrates instructive resilience, having developed the 'basic structure doctrine' that limits their parliament's amendment power despite lacking explicit constitutional authorisation for such review.⁷³ This doctrine emerged gradually through strategic jurisprudential development rather than immediate assertion, allowing the Court to build institutional legitimacy before confronting parliament's most contentious amendments. In *Golaknath v State of Punjab*⁷⁴ and later *Kesavananda Bharati v State of Kerala*,⁷⁵ the Court established constitutional limitations on amendment powers through incremental doctrinal development rather than dramatic confrontation.

Equally instructive are examples where judicial independence has eroded despite formal constitutional protections. Venezuela illustrates this danger, where the Supreme Tribunal of Justice transformed from an independent institution into an instrument supporting executive authority

⁷² See generally D Brand 'Courts, socio-economic rights and transformative politics' (2009) 1 *Stellenbosch Law Review* 5-21.

⁷³ See generally A Dhar 'The basic structure doctrine and constitutional amendments in India' (2018) 42 *Delhi Law Review* 15.

⁷⁴ *Golaknath v State of Punjab* AIR 1967 SC 1643.

⁷⁵ *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461.

through appointment manipulations, removal threats and resource control rather than formal constitutional revision.⁷⁶ Following the controversial 2004 *Ley Orgánica del Tribunal Supremo de Justicia* law which expanded the court and facilitated politically motivated appointments, judicial independence deteriorated rapidly despite unchanged constitutional protections.⁷⁷ This example highlights how operational independence requires not merely formal provisions but also functional implementation and political restraint.

Zimbabwe offers a geographically proximate cautionary tale relevant to South Africa's context. Following land reform controversies where courts initially restricted governmental action in cases like *Commercial Farmers Union v Minister of Lands*,⁷⁸ Zimbabwe's judiciary faced systematic intimidation including physical threats against judges who ruled against governmental interests. The case of former Chief Justice Anthony Gubbay, who resigned after political intimidation, demonstrates judicial vulnerability when political actors prioritise specific policy outcomes over constitutional processes.⁷⁹ This experience underscores the relationship between judicial independence and broader rule of law culture.

(b) *Strategic Priorities for South Africa's Judiciary*

Drawing from both domestic experience and comparative

⁷⁶ See J Corrales and M Penfold 'Manipulating courts in new democracies: The case of Venezuela' (2014) 25 *Journal of Democracy* 157.

⁷⁷ *Ley Orgánica del Tribunal Supremo de Justicia*, Gaceta Oficial No. 37.942 (2004).

⁷⁸ *Commercial Farmers Union v Minister of Lands* 2000 (2) ZLR 469 (SC).

⁷⁹ See L Mhlanga 'Judicial independence under siege: The Zimbabwean experience' (2004) 20 *SAJHR* 205.

insights, several strategic priorities emerge for strengthening judicial independence in South Africa. First, courts must develop principled but pragmatic approaches to politically sensitive cases, particularly those involving corruption, land reform and separation of powers conflicts. The Constitutional Court's approach in *United Democratic Movement v Speaker of the National Assembly*⁸⁰ exemplifies this balance, where the Court upheld Parliament's authority to determine voting procedures while underlining constitutional principles that should guide that determination. Such jurisprudence respects democratic institutions while maintaining meaningful constitutional oversight.

Second, greater attention to implementation mechanics for controversial judgments would enhance judicial effectiveness while minimising confrontation risks. In *AllPay Consolidated Investment Holdings v Chief Executive Officer of the South African Social Security Agency*,⁸¹ the Constitutional Court demonstrated pragmatic concern with remedial effectiveness by invalidating an unlawful tender award while creating a structured remedy that avoided social grant disruption. This approach exemplifies how courts can uphold constitutional principles while acknowledging practical constraints, enhancing legitimacy through demonstrated awareness of implementation realities.

Third, strengthening public understanding of judicial functions represents a crucial long-term investment in

⁸⁰ Op cit note 27.

⁸¹ *AllPay Consolidated Investment Holdings v Chief Executive Officer of the South African Social Security Agency* 2014 (1) SA 604 (CC).

independence protection. Current educational curricula provide limited coverage of constitutional principles including separation of powers and judicial review, contributing to misunderstanding of courts' proper role in democratic governance.⁸² Expanding civic education through both formal school curricula and public information campaigns would develop broader appreciation for judicial independence as a democratic value rather than an obstacle to majority will. The Constitutional Court's visitor program and public access policies demonstrate institutional commitment to public engagement, but broader educational initiatives require multi-institutional collaboration.⁸³

VII CONCLUSION

Judicial independence in South Africa represents both remarkable constitutional achievement and ongoing challenge amid political volatility. The transformation from apartheid-era subordination to constitutional supremacy demonstrates how institutional design can reshape judicial authority.⁸⁴ However, experience reveals that constitutional provisions alone cannot guarantee independence without corresponding political culture respecting judicial authority.

South Africa's experience offers broader lessons: judicial independence requires multidimensional safeguards encompassing formal provisions, institutional design, resource

⁸² See M Roux 'Constitutional literacy in South African schools: Challenges and opportunities' (2019) 35 *SAJHR* 412.

⁸³ See Constitutional Court of South Africa 'Public Education and Outreach Programme Annual Report' (2023).

⁸⁴ See *op cit* note 35.

adequacy, ethical standards and public legitimacy.⁸⁵ Judicial strategic awareness matters — courts must consider institutional impact alongside legal correctness without compromising core principles. Public understanding provides ultimate protection, making communication and legitimacy-building essential judicial functions.

Looking forward, South Africa's judiciary faces significant challenges maintaining independence amid ongoing transformation and inequality. These require a balanced response: defending constitutional principles without appearing partisan, asserting authority without overreaching capacity and maintaining impartiality while acknowledging transformation imperatives.⁸⁶ South Africa's constitutional democracy ultimately depends on courts maintaining this delicate balance — standing firm against improper influence while remaining responsive to legitimate democratic concerns.

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⁸⁵ See C Hoexter 'The future of judicial review in South African administrative law' (2000) 117 *South African Law Journal* 484.

⁸⁶ See T Roux 'Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference?' (2009) 20 *Stellenbosch Law Review* 258.