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Overture for Edwin Cameron

Leo Boonzaier

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Edwin Cameron is one of post-apartheid South Africa's most consequential and respected judges. This book seeks to honour him, and to interpret and critique his legacy. It comprises seven short tributes and fourteen scholarly chapters. This introduction provides an overview of Cameron's life and career and highlights key themes that will be discussed in the chapters to come.

1 He came from Pretoria

Edwin Cameron was born in Pretoria in 1953. He grew up in 'a fractured home, a dysfunctional family'.[1] His father, an electrician of Scottish stock, was a 'catastrophic alcoholic',[2] and his Afrikaans-speaking mother lacked the means to support him and his sisters, Laura and Jeanie, who spent several years in a children's home in Queenstown. Cameron attended several primary schools, regularly on the move. In 1962, when Cameron was seven years old, Laura was killed, her bicycle knocked over in Pretoria by a delivery van – an anguishing memory for Cameron in a difficult childhood. Cameron's father, who had been convicted of theft the previous year, attended Laura's funeral accompanied by two prison guards, on release from Zonderwater.[3] The turning point in Cameron's life came when he won a scholarship to Pretoria Boys High School, an esteemed state school founded by Lord Milner in the aftermath of the Anglo-Boer War. Cameron excelled academically, living in a household headed by Jeanie in his final years of school, and won a scholarship from Anglo-American to attend Stellenbosch University. Before taking up

1 Constitutional Court Oral History Project 'Interview with Edwin Cameron' (9 December 2011) 1.
2 Constitutional Court Oral History Project (n 1) 6.
3 E Cameron *Justice: A personal account* (2014) 11-12.

his place, he spent a year as a conscript in South Africa's military.[4] At Stellenbosch, Cameron completed a Bachelor of Arts degree (1974), majoring in Latin and law, and an honours degree in Latin and classical culture (1975), both cum laude. He attended Wilgenhof Men's Residence and became its primarius. For a brief period after graduation, Cameron lectured Latin and classics at Stellenbosch. Then, in 1976, he won a Rhodes Scholarship.

Cameron left South Africa in the wake of the Soweto Uprising and arrived in England – also then in a grim mood, having endured the muddle of the Heath–Wilson years and heading towards its 'winter of discontent'. At Oxford, Cameron had intended to study classics, but changed belatedly to law, a field in which, he hoped, he 'could really make a practical difference to people's lives'.[5] He was a member of Keble College, where his most exacting tutor was the property theorist Jim Harris,[6] who at first taught Cameron singly, in order to accommodate his late change to law, and later alongside Timothy Dutton, who would become a distinguished London silk and Cameron's lifelong friend. Another defining encounter in Cameron's life took place in the spring of 1978, when he was lectured on the *lex Aquilia* by Tony Honoré, then Regius Professor of Civil Law. Cameron completed his BA in Jurisprudence (1978) in five Oxford terms, rather than the usual nine, achieving first-class honours and winning the Jurisprudence Prize. Not for the first time, Cameron's achievements were won despite difficult personal circumstances. He was becoming politically conscious in worsening circumstances for South Africa, had been shaken by the death of Steve Biko in September 1977, and was coming to terms with the recognition that he was gay.

In September 1978, Cameron returned to South Africa to lecture at Wits Law School for nearly three years, teaching Roman Law and Jurisprudence. John Dugard, who had helped to recruit Cameron, was a senior member of the Faculty and its outgoing dean. Johan van der Vyver had just joined Wits after being forced out of Potchefstroom's Law Faculty for his criticism of apartheid security legislation. Both had

4 Cameron *Justice* (n 3) 13.
5 Constitutional Court Oral History Project (n 1) 6.
6 E Cameron 'Foreword' in Timothy Endicott & others (eds) *Properties of law: Essays in honour of Jim Harris* (2008).

published impactful recent books on the then unconventional topic of human rights.[7] JE Scholtens was the most senior still-active member of the Faculty. Cameron's other seniors included Paul Boberg, Louise Tager and June Sinclair (who successively became dean), and the editors of the *South African Law Journal*, Ellison Kahn and David Zeffertt. Nearer to him in age were Jonathan Burchell and Dirk van Zyl Smit, whom Cameron knew from Wilgenhof. Carole Lewis and Etienne Mureinik had joined the Faculty six months prior to Cameron, and became friends.

During his period at Wits, Cameron completed his LLB at the University of South Africa, winning the Johannes Voet Medal. Then he returned to Oxford to read the Bachelor of Civil Law (1982), taking courses in Roman-Dutch law, restitution, human rights, and jurisprudence. Cameron was awarded the Vinerian Scholarship for the best performance in the degree, one of four South Africans to have achieved this feat: the others are Rex Welsh QC, Tony Honoré – who became Cameron's lifelong mentor – and Leonard (later Lord) Hoffmann.

In 1982, at the age of 29, Cameron published his now famous excoriation of former Chief Justice LC Steyn, whose contribution to South African law after his appointment by the apartheid government in 1959, wrote Cameron, 'far from deserving [the] acclaim [and] veneration' which it had received, 'should on balance' be regarded as 'lamentable'.[8] Cameron returned to apartheid South Africa later that year in what he has described as 'flaming activist' mode.[9] He did pupillage in 1983 under Michael Kuper, a senior commercial advocate at the Johannesburg Bar, but took up a position three years later at the Centre for Applied Legal Studies (CALS), a public-interest organisation attached to the Wits Law Faculty that had been founded by Dugard in 1978 after his departure

7 JD van der Vyver *Seven lectures on human rights* (1976); J Dugard *Human rights and the South African legal order* (1978).

8 E Cameron 'Legal chauvinism, executive-mindedness and justice: LC Steyn's impact on South African law' (1982) 99 *South African Law Journal* 38, 40. This was not his first journal publication, however. As a precocious Latin undergraduate he had published 'An analysis of Horace, Odes 3.2' (1973) 18 *Akroterion* 17. See also E Cameron 'Are Dworkin's "principles" really rules?' (1979) 96 *South African Law Journal* 450; E Cameron 'Etiquette, morality and law: The strange case of an unmerited rebuff for natural justice' (1980) 97 *South African Law Journal* 189.

9 Constitutional Court Oral History Project (n 1) 6.

as dean.[10] Cameron's practice was busy. Alongside a steady stream of work in labour and employment law, highlights of Cameron's early years at the bar included *More v Minister of Co-operation and Development*, in which he and Gilbert Marcus, his colleague at CALS, appeared as juniors to Jack Unterhalter SC in a successful bid to invalidate the forced removal of the Bakwena Ba Magopa tribe; *Mathebe v Government of South Africa*,[11] in which Dugard, with Cameron as his junior, thwarted the apartheid government's creation of an Ndebele 'homeland'; and *S v Bruce*,[12] in which Cameron defended a white conscientious objector, David Bruce, and successfully had his stiff sentence overturned by the Appellate Division.[13] Cameron was one of many public-interest lawyers who worked for the defence in the Delmas Treason Trial, which lasted over three years. He was led by Arthur Chaskalson, who became an important mentor. Finally, Cameron appeared as junior to Sydney Kentridge, alongside Ismail Mohamed and others, representing the Sharpeville Six after they had been sentenced to death,[14] and 'played a major role' in securing a reprieve.[15]

Though Cameron has spoken about the difficulties of producing academic work alongside a busy practice in the trying circumstances of 1980s South Africa, his scholarly output was considerable. His best-known works bear Dugard's imprint – Cameron has described himself as one of 'Dugard's acolytes'[16] – seeking to expose the pretensions to neutrality of the apartheid judiciary. Apart from his excoriation of Chief Justice Steyn, he condemned a High Court judge for 'endors[ing] apartheid propaganda' in his judgment;[17] described the apartheid judiciary as a whole as a 'nude monarchy',[18] akin to the clothesless emperor

10 J Dugard *Confronting apartheid: A personal history of South Africa, Namibia, and Palestine* (2018) ch 8.
11 1986 (1) SA 102 (A).
12 1988 (3) SA 667 (A). See too Dugard (n 10) 86-88.
13 *S v Toms; S v Bruce* 1990 (2) SA 802 (A). In the first-named matter, Cameron appeared as junior to DP de Villiers SC representing Ivan Toms.
14 *Safatsa v Attorney-General, Transvaal* 1989 (1) SA 821 (A).
15 Dugard (n 10) 116.
16 E Cameron 'The transition to democracy: Constitutional norms and constitutional reasoning in legal and judicial practice' (2019) 2 *South African Judicial Education Journal* 1, 4.
17 E Cameron 'Judicial endorsement of apartheid propaganda: An enquiry into an acute case' (1987) 3 *South African Journal on Human Rights* 223.
18 E Cameron 'Nude monarchy: The case of South Africa's judges' (1987) 3 *South African Journal on Human Rights* 338.

in Hans Christian Andersen's tale;[19] and implied that Chief Justice Rabie should resign.[20] The following year, he subjected to devastating critique[21] the judgment in *S v Safatsa*,[22] the case of the Sharpeville Six, whose legal team he later joined.[23] From 1978 to 1993, Cameron co-authored the 'administration of justice' chapters in the *Annual survey of South African law* – first with Dirk van Zyl Smit, and later with his colleagues at CALS, Gilbert Marcus and Dennis Davis. Perhaps the bulk of Cameron's writing, however, was on South African labour law, which had been transformed utterly by the unbanning of trade unions in 1979.[24] He co-authored *The new labour law* and *The new Labour Relations Act*, with, among others, Halton Cheadle and Clive Thompson.[25] Other writings, too, mirrored Cameron's legal practice, as when he discussed conscription and conscientious objection.[26] He was promoted to a personal professorship at Wits in 1989.

These were, of course, highly charged times, giving an intensity to the experience of being a cause lawyer and activist – all the more so in Cameron's own case. Upon his return to South Africa in late 1982, he had come out as a gay man and vowed never again to deny or dissemble about his sexual orientation. He threw himself into civic activity, alongside his legal and academic work, as well as into Johannesburg's left-wing social circles. Ferial Haffajee, then a colleague at CALS, described Cameron's annual Christmas parties for 'waifs and strays', 'where a cornucopia of

19 HC Andersen *Hans Andersen's fairy tales: Second series* (1915) 336.
20 Cameron 'Nude monarchy' (n 18) 346.
21 E Cameron 'Inferential reasoning and extenuation in the case of the Sharpeville Six' (1988) 1 *South African Journal of Criminal Justice* 243; E Cameron, G Marcus & D van Zyl Smit 'The administration of justice, law reform and jurisprudence' [1988] *Annual Survey of South African Law* 500, 517. See also E Cameron 'When judges fail justice' (2005) 58 *Current Legal Problems* 83.
22 *S v Safatsa* 1988 (1) SA 868 (A).
23 See n 14 above.
24 Compare Dugard (n 10) 77-78.
25 M Brassey & others *The new labour law: Strikes, dismissals and the unfair labour practice in South African law* (1987); E Cameron & others *The new Labour Relations Act: The law after the 1988 amendments* (1989). See also E Cameron 'The right to a hearing before dismissal – part I' (1986) 7 *Industrial Law Journal* 183; 'The right to a hearing before dismissal – puzzles and problems' (1986) 9 *Industrial Law Journal* 147; 'AIDS: Some problems in employment law' (1991) 12 *Industrial Law Journal* 193.
26 E Cameron 'Conscription' (1991) 2 *South African Human Rights and Labour Law Yearbook* 36. See too E Cameron 'Civil disobedience and passive resistance' in H Corder (ed) *Essays on law and social practice in South Africa* (1988).

people would gather at his Brixton home to great merriment'.[27] The merriment must have felt fleeting. In 1985, two months before PW Botha declared the first State of Emergency, Cameron was infected with HIV. He was diagnosed in December 1986. At that stage, AIDS had no treatment. Cameron kept his HIV-status secret and 'hoped against hope that [he] would escape the spectre of death'.[28]

Then, in the early 1990s, after years of intensifying repression and state violence, the system of apartheid collapsed. The African National Congress was unbanned in 1990, and the first Convention for a Democratic South Africa began at the end of 1991. For Cameron, professional milestones followed. In early 1992, the fourth edition of Tony Honoré's monumental text on *The South African law of trusts* appeared,[29] with Cameron now his selected co-author.[30] On 27 October 1992, Cameron gave his inaugural lecture at Wits.[31] In it, he argued that gays and lesbians ought to be expressly protected by the new constitution then being formulated, and that such protection was indeed a vital 'test case' for 'the integrity of the constitution-making process' and central to South Africans' 'search for transformation'.[32] His lecture helped to consolidate an emerging consensus among the key negotiating parties that sexual orientation should feature expressly in the new bill of rights.[33] And thus Cameron's academic work – together, inevitably, with some backchannel lobbying[34] – secured a world first: explicit protection for gays and lesbians in the constitutional equality clause of the 1993 Interim Constitution (and later in the final Constitution of 1996). Cameron's bar work continued in the meantime. In *Jansen van Vuuren NO v Kruger*,[35]

27 F Haffajee 'Edwin Cameron: The judge who made the invisible visible' *Daily Maverick* (20 August 2019).
28 E Cameron 'Forty years of AIDS: Equality remains central to quelling a still-potent epidemic' *UNAIDS* (1 December 2021).
29 T Honoré & E Cameron *Honoré's South African law of trusts* 4 ed (1992).
30 See E Cameron 'Memorial tribute to Professor Tony Honoré' (2019) 136 *South African Law Journal* 817.
31 The lecture became E Cameron 'Sexual orientation and the Constitution: A test case for human rights' (1993) 110 *South African Law Journal* 450.
32 Cameron 'Sexual orientation and the Constitution' (n 31) 451, 472.
33 'Cameron 'Sexual orientation and the Constitution' (n 31) 450; see also K Botha & E Cameron 'Sexual orientation' (1994) 5 *South African Human Rights Yearbook* 281.
34 R Spitz & M Chaskalson *The politics of transition: A hidden history of South Africa's negotiated settlement* (2000) 404.
35 1993 (4) SA 842 (A).

which was decided two months before the Interim Constitution was drafted and is still one of the most important judgments on civil claims for privacy-infringements, Cameron was successful in recovering damages on behalf of a man whose doctor had, in breach of confidence, disclosed his HIV status to colleagues. March 1994 saw the publication of *Defiant desire*, edited by Cameron and Mark Gevisser, a 'celebration' of gay and lesbians lives – as well as a call to arms in the struggle to ensure that the constitutional protections for gay rights were effectively implemented.[36] On 27 April 1994, South Africa held its first democratic elections. On 10 May, Nelson Mandela became president.

In October 1994, two weeks after taking silk, Cameron was appointed to judicial office by Dullah Omar, Mandela's Minister of Justice.[37] His first task was to chair a commission of inquiry into illegal arms dealing that took place in the years shortly before the transition. The South African National Defence Force and its procurement agency, Armscor, had been illicitly selling arms, often in defiance of international law, to a number of questionable regimes and rebel groups (pertinently to Yemen, which was then, as now, gripped by civil war). The Cameron Commission reported in June 1995, and again later that year, and did much to expose the unreformed South African National Defence Force's (SANDF's) clandestine attempts to prop up minority rule around the globe even after its demise within South Africa.[38] The Commission is nowadays largely forgotten, swallowed up by more notorious later allegations of corrupt arms dealing even by members of the Mandela government, but was credited by Human Rights Watch with setting the terms of the public debate that followed.[39]

This job done, Cameron became a full-time judge of the Witwatersrand Local Division (now the South Gauteng High Court), a short drive from his home in Brixton. The highlight of his time at

36 M Gevisser & E Cameron *Defiant desire* (1994). Cameron contributed a chapter titled 'Unapprehended felons', which discusses the legal regulation of gay and lesbian lives in South Africa.

37 'News on the judiciary' [1995] *Consultus* 61-62. Initially Cameron was appointed as an acting judge, with his permanent appointment effective from 1 January 1995.

38 See further S Brummer 'SA's arms dealing underworld' *Mail & Guardian* (2 June 1995); L Duke 'Arms deals by S. Africa detailed' *Washington Post* (26 July 1995). The other commissioners were Vincent Maleka and Laurie Nathan.

39 Human Rights Watch 'South Africa: A question of principle: Arms trade and human rights' (2000) 12.5 pt III. And see now Open Secrets 'Profiting from misery: South Africa's complicity in war crimes in Yemen' (2021) 30-31.

the High Court was *Holomisa v Argus Newspapers*,[40] which dealt at a formative moment with the 'horizontal application' of the Interim Bill of Rights and freedom of speech in the law of defamation. There were other judgments of interest. In constitutional matters, Cameron J endorsed a wide reading of the Interim Constitution's (IC's) standing provisions in *Beukes v Krugersdorp*;[41] and a more strikingly wide reading of its right of access to information provision in *Van Niekerk v Pretoria City Council*[42] and *Le Roux v Director-General of Trade and Industry*,[43] which entail that the state has a duty to provide a potential litigant with information that might help him to assert his delictual and contractual (and not only constitutional) rights against a private third party (and not only against the state itself). Inevitably for a High Court judge, Cameron J also decided a steady stream of criminal matters.[44] And finally, he gave several judgments in labour law,[45] and was speedily promoted to sit on the Labour Appeal Court (usually alongside Johan Froneman, who had been Cameron's contemporary at Stellenbosch, and John Myburgh, the Judge President).

Cameron's best-known academic work during this period centred on two related issues. The first was the role of the South African judiciary under apartheid. Cameron, again, criticised its pretensions to neutrality and urged the honest admission of its vices. Cameron made submissions on this topic to the Truth and Reconciliation Commission,[46] and regretted the choice made by the leadership of the apartheid judiciary

40 1996 (2) SA 588 (W).
41 1996 (3) SA 467 (W).
42 1997 (3) SA 839 (T).
43 1997 (4) SA 174 (T).
44 See, for example, *S v Dandiso* 1995 (2) SACR 573 (W); *S v Marx* 1996 (2) SACR 140 (W); *S v Maselela* 1996 (2) SACR 497 (W); *S v C* 1996 (2) SACR 503 (T); *S v Malatji* 1998 (2) SACR 622 (W); *S v Kgampe* 1998 (2) SACR 617 (W); *S v Meaker* 1998 (2) SACR 73 (W); *S v Van Dyk* 1998 (2) SACR 363 (W); *S v Ndlovu* 1998 (1) SACR 599 (W); *S v Kidson* 1999 (1) SACR 338 (W); *S v Post* 2001 (1) SACR 326 (W).
45 *McCullogh v Kelvinator Group Services of SA (Pty) Ltd* 1998 (4) SA 814 (W); *National Union of Metalworkers of SA v The Benicon Group* (1997) 18 ILJ 123 (LAC); *East Rand Proprietary Mines v United People's Union of SA* (1996) 17 ILJ 1134 (LAC); *Fulcrum Engineering v Chauke* (1997) 18 ILJ 679 (LAC); *National Construction Building and Allied Workers Union v M F Woodcraft (Pty) Ltd* (1997) 18 ILJ 165 (LAC); *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd* (1999) 20 ILJ 321(LAC).
46 Published as E Cameron 'Submission on the role of the judiciary under apartheid' (1998) 115 *South African Law Journal* 436. See also Cameron *Justice* (n 3) 58-61.

not to appear before it. Second, Cameron looked ahead, appraising the role of law and the judiciary in the new era. He anticipated a halting and difficult constitutional project, given both the scale of South Africa's challenges and the scepticism towards law and legal processes that its citizens had acquired during apartheid.[47] His writings make two main proposals to ensure that judges would be both valuable and accountable in the new era: that they should eschew the pretension to neutrality, and embrace, instead, generous and value-laden adjudication; and that legal scholars and practitioners should be plain-speaking and ferocious in their criticism of the judiciary.[48]

In 1999, Cameron was nominated by the Judicial Service Commission for appointment to the Constitutional Court, a signal compliment to him at the age of 46 and after just four years on the bench. However, his appointment was rejected by Thabo Mbeki, then Deputy President, who felt the appointee should be black; Sandile Ngcobo, later to become Chief Justice, was appointed instead.[49] (Cameron has said this was the obviously correct decision.)[50] Cameron was therefore appointed to the Constitutional Court only temporarily, rather than permanently, serving as an acting justice for a one-year period starting in July 1999, during which he penned two majority judgments: *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill*,[51] an important judgment on s 79 of the 1996 Constitution and national and legislative competences; and *SACCAWU v Irvin & Johnson Limited*,[52] in which Cameron AJ, writing for the majority of the Court (but with Mokgoro and Sachs JJ dissenting), refused an application for the recusal of two judges of the Labour Appeal Court. He also co-authored a

47 E Cameron 'Rights, constitutionalism and the rule of law' (1997) 114 *South African Law Journal* 504, 505-9.

48 E Cameron 'Lawyers, language and politics – In memory of JC de Wet and WA Joubert' (1993) 110 *South African Law Journal* 51; 'Academic criticism and the democratic order' (1998) 14 *South African Journal on Human Rights* 106.

49 See for contemporaneous press coverage J Steinberg 'Mbeki backs black judge' *Business Day* (1 June 1999); C McGreal 'Mbeki under fire for veto on judge' *The Guardian* (2 June 1999).

50 Constitutional Court Oral History Project (n 1) 26.

51 *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* [1999] ZACC 15.

52 *South African Commercial Catering and Allied Workers Union v Irvin & Johnson Limited Seafoods Division Fish Processing* [2000] ZACC 10.

dissent, with O'Regan J, in *S v Manamela*,[53] which defended the reverse onus imposed statutorily on possessors of stolen goods. During his acting stint, Cameron sat on a number of the great foundational Constitutional Court cases, including *National Coalition (No 2)*,[54] *Dawood*,[55] *Hyundai*,[56] *Chief Lesapo*,[57] *Christian Education*,[58] *Pharmaceutical Manufacturers*,[59] and *Grootboom*.[60]

In 1999, when Cameron had appeared before the Judicial Service Commission, he announced publicly that he was living with HIV. He was the first and is still the only public office-holder in South Africa to do so, although the country has one of the highest infection rates in the world. Cameron had become gravely ill with AIDS in the mid-1990s, while working as a High Court judge, but had his health miraculously restored by anti-retroviral treatments – at that stage, still new and totally unaffordable except to the very well-off. This experience gave him considerable new impetus for his HIV/AIDS activism, mindful that only the good fortune of his judges' salary had allowed him to escape death. And, despite his judicial office, Cameron became an important critic of the AIDS-denialism of Mandela's successor as President, Thabo Mbeki, whom he accused at the International AIDS Conference in Durban in July 2000 of 'irresponsibility bordering on criminality'.[61] A major contribution to the rollout of South Africa's public antiretroviral treatment program was, of course, *Treatment Action Campaign*, litigation

53 *S v Manamela* [2000] ZACC 5. They did so partly on the basis that '[o]ur society asserts individual moral agency and it does not flinch from recognising the responsibilities that flow from it' (para 100), and both judges have underscored the importance of this point extra-curially: see C O'Regan 'The three Rs of the Constitution: Responsibility, respect and rights' in F du Bois (ed) *The practice of integrity: Reflections on Ronald Dworkin and South African law* (2004) 88-89; Cameron 'Memorial tribute' (n 30) 823.

54 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17.

55 *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8.

56 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* [2000] ZACC 12.

57 *Lesapo v North West Agricultural Bank* [1999] ZACC 16.

58 *Christian Education South Africa v Minister of Education* [2000] ZACC 11.

59 *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* [2000] ZACC 1.

60 *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19.

61 Quoted in P Sidley 'Fighting inequalities in AIDS treatment' (2002) 324 *British Medical Journal* 192.

brought by an organisation directly traceable to the AIDS Law Project, founded by Cameron in the early 1990s,[62] and which culminated in the Constitutional Court's famous 2002 judgment[63] which Cameron has celebrated ever since.[64] All this was recounted in his memoir, *Witness to AIDS*, published in South Africa in mid-2005.[65] The book flowed from Cameron's appearance at the Durban Conference. He wrote much of it on a sabbatical at All Souls College, Oxford, in 2003. By the end of 2005, the book had been published in the United Kingdom and the United States; in the years after, it was translated into German and Chinese. It received endorsements from close allies, like Zackie Achmat and Sydney Kentridge, as well as from celebrities like Nadine Gordimer and Elton John. In his foreword to the book, Mandela described Cameron as 'one of South Africa's new heroes'.[66]

The late 1990s and early 2000s was also a period of rapid and often heady change for the rights of gays and lesbians. Cameron's inaugural lecture had predicted,[67] correctly, the consequences of constitutional inclusion: decriminalisation of sodomy,[68] prohibitions on workplace discrimination,[69] and the legalisation of same-sex civil partnerships.[70] Cameron participated, as a judge, in the last-mentioned of these, giving the majority judgment in the SCA in *Fourie v Minister of Home Affairs* in 2004.[71]

Cameron's other work at the SCA was varied. Unlike the rarefied Constitutional Court, whose docket is selective and focused on large constitutional and human-rights questions, the SCA is at the coalface. Cameron's work-rate there was considerable: during his eight years on the court, he wrote 75 judgments that were reported (and no doubt many others), acquiring a reputation for both shrewd blackletter lawyering and creative moral suasion. Then, on 1 January 2009, Cameron was

62 D Moyle *Speaking truth to power: The story of the AIDS Law Project* (2015).
63 *Minister of Health v Treatment Action Campaign (No. 2)* [2002] ZACC 15.
64 See below n 202.
65 E Cameron *Witness to AIDS* (2005).
66 N Mandela 'Foreword' in *Witness to AIDS* (n 65) 8.
67 Cameron 'Sexual orientation and the Constitution' (n 31) 470-471.
68 *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15.
69 Employment Equity Act 55 of 1998 s 6; *Satchwell v President of Republic of South Africa* [2002] ZACC 18.
70 *Minister of Home Affairs v Fourie* [2005] ZACC 19.
71 *Fourie v Minister of Home Affairs* [2004] ZASCA 132.

appointed permanently to the Constitutional Court after all – a windfall bounty from the short presidency of Kgalema Motlanthe.[72] When he joined the Court, it stood at a watershed: nine months after his arrival, he was joined by Johan Froneman, Chris Jafta, Sisi Khampepe, and Mogoeng Mogoeng, so that almost half the bench was brand new; and the changeover had additional significance because the outgoing quartet whom they replaced – Chief Justice Pius Langa and Justices Yvonne Mokgoro, Kate O'Regan, and Albie Sachs – were the last of the judges who had been appointed to the Court upon its foundation in 1994.[73] The story of Cameron's time there is thus the story of a Court in a new era. He quickly became one of its most distinguished and capable judges, recognised as a leader of the Court's progressive wing.[74] But we will not say more about Cameron's judicial output for the time being: that is the task of the rest of the book.

2 Some themes

This book is about Edwin Cameron *qua* judge. But it cannot avoid going beyond that. For one of the most remarkable things about Cameron is that he was not only a judge. His judging bled into his activism and his activism into his judging, his philosophy on the bench informed and was informed by his philosophy off it, he advanced his causes through means both legal and non-legal, and he scrambled the norms of judicial propriety and discretion when the circumstances demanded an approach more outspoken. In post-apartheid South Africa, his is the canonical story of a great judge who – more than that – has led a great life.

Cameron's candour about his personal story, which he laid bare to public scrutiny, is completely exceptional. Most of the biographical details set out in part 1 are known to us because he told us. In *Witness to AIDS* and elsewhere, he spoke of how he contracted HIV during unprotected gay sex, and of the tormenting onset of AIDS. In doing so, as David Bilchitz reminds us in his tribute, Cameron knowingly exposed

72 Cameron had refused to apply for appointment to the Court during the presidency of Thabo Mbeki, because of the outspoken stand he had taken against him.

73 Cameron himself had replaced Tholie Madala, another member of the Court's first cohort.

74 R Calland *The Zuma years: South Africa's changing face of power* (2013) 284-285, 460, 463.

himself to prejudice, so that he might make more possible a proud and authentic life for others.[75] In Cameron's next book for the popular press, *Justice: A personal account*, he wrote of the traumas of his childhood and of his family's shameful brushes with the law.[76] He sought to show how the law shapes human lives, including his own, and how it was the power of social and state intervention – and the fortuity of his own whiteness – that allowed him to reinvent himself 'in the guise of a clever schoolboy'[77] and go on to academic and professional achievement. Many will have read Cameron's disarmingly personal and at times mischievously frank interviews.[78] Some will have witnessed his candour first-hand, even on august public occasions when he might rather have stayed safely cloaked by the trappings of his office. Willy Mutunga and Joel Ngugi, in their tribute, write of Cameron's revelation of his sexual orientation and HIV status to a wide-eyed audience of Kenyan judges.[79] I have been at public lectures where Cameron's sensitivity to the internal dimensions of human experience brought audience members to tears. As Lwando Xaso puts it in her tribute, 'Justice Cameron remained human first'.[80]

How should we understand Edwin Cameron's career as a judge within the context of a life marked by much more than only judging? This is the cue for James Fowkes's essay, the first in the book, which provides a *tour d'horizon* of Cameron's accomplishments that shows how his judging occupies only part of a much wider terrain.[81] Cameron's career, suggests Fowkes, is marked by a special appreciation that the judicial role has limits. In the next chapter, David Dyzenhaus returns to a formative debate between him and Cameron in the early 1980s.[82] Its foundational question: how, if at all, can a lawyer or judge behave ethically in a legal system that does not? This question had clarion significance in

75 D Bilchitz 'Equal citizenship of the vulnerable', this volume at page 73.
76 Cameron *Justice* (n 3).
77 Quoted in R Steyn 'Justice Edwin Cameron, an activist' *Financial Mail* (5 March 2014).
78 This chapter draws with special regularity on his illuminating interview for the Constitutional Court Oral History Project (n 1).
79 W Mutunga and J Ngugi 'Edwin Cameron as justice teacher and missionary', this volume at page 61.
80 L Xaso 'Edwin Cameron as humanist and world-builder', this volume at page 67.
81 J Fowkes 'On being a lawyer in South Africa: Edwin Cameron and transformative constitutionalism', this volume, ch 3.
82 D Dyzenhaus 'Edwin Cameron and the politics of legal space', this volume, ch 4.

the circumstances of apartheid South Africa, and amongst the young staff and students of the Wits Law Faculty, but Dyzenhaus traces its significance into the present.

The remaining chapters of the book are more squarely focused on Cameron's judicial output. Their account will inevitably be partial, leaving out issues of importance. Still more patchy and partial will be the following reflections, in which I as co-editor try, with diffidence, to summarise certain key themes that emerge in the book, and thus to orient the reader through Justice Cameron's oeuvre and the discussions that follow.

Perhaps we can start with a relatively obvious point: that Edwin Cameron's intellectual ability and lawyerly qualifications are of the highest possible calibre. His student resumé – LLB gold-medallist, Rhodes Scholar, Vinerian Scholar, influential academic author before leaving his 20s – dazzles on all conventional metrics and foretells rapid ascension to the highest levels of professional success and accomplishment. His contributions during the 1980s, both as advocate at the Johannesburg Bar and scholar at the Wits Law School, presume remarkable savvy and industry and wisdom. And his prominent path-setting roles on the High Court, Supreme Court of Appeal, and Constitutional Court owe a great deal to the sheer force of his intellect. Perhaps more than any other post-apartheid South African jurist, he has elicited acclaim as 'the greatest legal mind of his generation' and similarly hackneyed (though not unjust) appellations.

Cameron's contributions to South African law are significant and wide-ranging. He has given leading judgments in constitutional, administrative, and human-rights law; company, labour, and criminal law; evidence and remedies; property and trusts; contract and delict; as well as on basic concepts like precedent,[83] horizontality,[84] the public-private distinction,[85] and the Constitutional Court's jurisdiction.[86]

83 *True Motives 84 (Pty) Ltd v Madhi* [2009] ZASCA 4.
84 *Holomisa* (n 40).
85 *Logbro Properties CC v Bedderson NO* [2002] ZASCA 135; *Association of Mineworks and Construction Union v Chamber of Mines of South Africa* [2017] ZACC 3.
86 *Mbatha v University of Zululand* [2013] ZACC 43; *Sali v National Commissioner of the South African Police Service* [2014] ZACC 19; *Jordaan v City of Tshwane Metropolitan Municipality* [2017] ZACC 31; *Tiekiedraai Eiendomme (Pty) Ltd v Shell South Africa Marketing (Pty) Ltd* [2019] ZACC 14.

This range is reflected in the topics of our various chapters, most of which are loosely organised by subject area. Cora Hoexter covers administrative law.[87] Sandra Fredman discusses Cameron's contribution to socioeconomic rights.[88] Khomotso Moshikaro writes on criminal justice.[89] Dennis Davis hails Cameron's contribution to the law of contract.[90] Michael Mbikiwa and Liam Minné discuss his free-speech jurisprudence, especially in defamation.[91] Helen Scott writes on the law of trusts, to which Cameron made major contributions as both a scholar and a judge.[92] Frank Michelman and I, from opposite ends of the collection, try to tie together some diverse subject-matter strands in Cameron's jurisprudence.[93] Even then, there has proved to be no room in the book for some hefty contributions: one thinks of *Fakie*,[94] still a leading judgment on contempt of court, for example; and Cameron's robust take on hearsay evidence in *S v Ndhlovu*,[95] which was rudely overturned some years later.[96] His contribution to labour law might have justified a further chapter of its own. His magisterial judgment on land rights in *Salem Party Club*,[97] too, will have to wait for due consideration elsewhere. Nor did any of our contributors have the fortitude to discuss Cameron's 88-paragraph judgment on national legislative competencies in *Liquor Bill*.[98]

Of course, this is to mention only the majority judgments that Cameron authored. As Johan Froneman and Helen Taylor remind us in

87 C Hoexter 'Transformative adjudication in administrative law: The revolutionary jurisprudence of Edwin Cameron', this volume, ch 6.
88 S Fredman 'Adjudicating socioeconomic rights: A lasting legacy', this volume, ch 9.
89 K Moshikaro 'Taking legality and just punishment seriously', this volume, ch 12.
90 D Davis 'Quo vadis the Constitutional Court's jurisprudence in private law?', this volume, ch 14.
91 M Mbikiwa & M Minné 'Edwin Cameron and the protection of political speech', this volume, ch 13.
92 H Scott 'Comparative models and their limitations: Edwin Cameron's impact on the law of trusts and unjustified enrichment', this volume, ch 15.
93 L Boonzaier 'Three stages of Cameron constitutionalism', this volume, ch 5; F Michelman 'Redemptive transformative: Edwin Cameron and the point of the Bill of Rights (as read through the prisms of subsidiarity and pleading priorities)', this volume, ch 16.
94 *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52.
95 [2002] ZASCA 70.
96 *Mhlongo v S; Nkosi v S* [2015] ZACC 19.
97 *Salem Party Club v Salem Community* [2017] ZACC 46.
98 *Liquor Bill* (n 51).

their chapter, one should not overlook his role in dissent.[99] Perhaps his most impactful dissenting judgment was *My Vote Counts*:[100] though not carrying a majority, it has come to be recognised as our leading judgment on the doctrine of subsidiarity,[101] and its conclusion that parliament has a constitutional duty to enact legislation requiring the disclosure of private political-party funding is now the law.[102] Froneman and Taylor also discuss Cameron's dissents in the racially charged *AfriForum* and 'university' cases, on which Nomfundo Ramalekana in her chapter provides a different and more critical perspective.[103] Sandra Fredman hails Cameron's separate (though technically not dissenting) judgment in *Dladla*.[104] And Carole Lewis in her tribute notes the significance of Cameron's separate judgment in *Brisley v Drotsky*,[105] which has proved a landmark in our constitutionalised law of contract.[106] Finally, David Bilchitz reminds us[107] that Cameron's dissent in *Openshaw* is a foundational contribution to South African animal law.[108] And the list can go on. Hardnosed commercial practitioners might have preferred it if Cameron's solo dissent in *Paulsen v Slip Knot* had prevailed.[109] Delict scholars would certainly have preferred his dissent in *Lee*.[110]

99 J Froneman & H Taylor 'Judicial dissent and the sceptical scrutiny of power', this volume, ch 11.

100 *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31.

101 See *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku* [2022] ZACC 5; *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* [2022] ZACC 44; M Murcott & W van der Westhuizen 'The ebb and flow of the application of the principle of subsidiarity – Critical reflections on *Motau* and *My Vote Counts*' (2015) 7 *Constitutional Court Review* 43. See also F Michelman (n 92) 541-546; L Boonzaier (n 92) 191-192; N Ally 'Making accountability work: Reflections on Edwin Cameron's accountability jurisprudence', this volume, at page 242-245.

102 *My Vote Counts NPC v President of the Republic of South Africa* [2017] ZAWCHC 105; *My Vote Counts NPC v Minister of Justice and Correctional Services* [2018] ZACC 17.

103 N Ramalekana 'The (mis)appropriation of human rights, norm-spoiling, and white supremacist backlash in South African minority rights litigation', this volume, ch 10.

104 *Dladla v City of Johannesburg* [2017] ZACC 42.

105 [2002] ZASCA 35.

106 C Lewis 'Bridging the divide between two courts', this volume, at page 50; also Boonzaier (n 92) 158-165.

107 D Bilchitz 'Equal citizenship of the vulnerable' (n 75) 75.

108 *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* [2008] ZASCA 78.

109 *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5.

110 *Lee v Minister of Correctional Services* [2012] ZACC 30.

Cameron's jurisprudence is celebrated across a spectrum that is remarkably wide given the provocativeness of its core tenets. His vision of law is encompassing, imaginative, and avowedly value-based. Hoexter describes it as 'anti-formal'.[111] His writings repeatedly skewer holy cows like 'legalism' – the attempt to insulate legal reasoning from moral judgement – whose impact on South Africa was, he says, 'nearly catastrophic'.[112] Three of our chapter contributors – David Dyzenhaus, Khomotso Moshikaro, and Frank Michelman – note that Cameron's judicial philosophy is inspired by Ronald Dworkin, by whom he was lectured at Oxford. Indeed, Cameron hailed Dworkin's theory of adjudication in the *South African Law Journal* at the age of just 26, upon his arrival to lecture law at Wits after his first Oxford stint. 'It is my belief', wrote the young Cameron, 'that no more exciting and creative vision of law and of the adjudicative process has been offered in recent years than that of Ronald Dworkin.'[113] On this view, judges are to look beyond the posited legal rules and extract and act upon the deeper-lying moral principles that justify them. In Cameron's words:

> [I]n every borderline or contested case, principles and values (and not pre-cast rules) determine the outcome – and it is the judge, in grappling to find the correct answer to the case before her, who must weigh the importance of every principle and value, and thereby come up with the right answer.[114]

The key virtue of Dworkin's theory, for Cameron, is that it makes 'substantive decisions' by judges – that is, the application of principles of 'morality' – central to the judicial function, and thus opens the way for judges to develop an approach to this function that is 'responsible and articulate'.[115] This is not a grudging and uncomfortable concession to the background role of morality in law. It is saying that judging is first and foremost about moral principle, and that cultivating moral sensitivity and vision is what being a judge is foremost and fundamentally about.

111 Hoexter (n 87) at 200.
112 E Cameron 'Judges, justice, and public power: The constitution and the rule of law in South Africa' (2018) 18 *Oxford University Commonwealth Law Journal* 73, 80.
113 Cameron 'Are Dworkin's "principles" really rules?' (n 8) 459.
114 E Cameron 'Dugard's moral critique of apartheid judges: Lessons for today' (2010) 26 *South African Journal on Human Rights* 310, 312.
115 Cameron 'Are Dworkin's "principles" really rules?' (n 8) 459.

In this moralised vision of law, the place of legal doctrine is inevitably subordinate, as Cameron was happy to accept.[116] It rarely places ultimate constraints on judges. Certainly it did not place ultimate constraints on Judge Cameron, who has said frankly that in almost no case in his judicial career did he experience the law as an obstacle to the conclusion he thought right.[117] Like Lord Denning, who was still in his pomp as Master of the Rolls when Cameron trained at Oxford, he does not say, 'I regret having to come to this conclusion, but I have no option'.[118] Rather, writes Denning:

> There is always a way round. There is always an option – in my philosophy – by which justice can be done.[119]

For Denning, so for Cameron: he, too, could always find a way round. True, his judgments are often learnedly immersed in case law. But they never get lost in it. His course through the legal materials is set by an argument, a moral principle. One can feel them bending before it.

But of course, though this philosophy deprives legal doctrine of some authority, it does not aim to diminish or denigrate the legal endeavour. It contains none of the debunking cynicism of American Legal Realism, nor of its stepchild Critical Legal Studies (though the latter is still pressed into service across much legal discourse in constitutional South Africa).[120] To the contrary, Cameron's work – and Dworkin's and Denning's – seeks to show the value of law and of courts and of judging *despite* the inevitable indeterminacy of the rules and doctrines they are bound to apply. Its intellectual roots lie in postwar Anglo-American theoretical writing that sought to defend legal processes – and above all the muscular judicial review practised by the Warren Court – against both radical sceptics on the left and reactionaries on the right.[121] Dworkin became, in time,

116 For a recent account of his views, see Cameron 'The transition to democracy' (n 16).
117 True, on occasion he admitted that the result he thought right had changed: see Boonzaier (n 93) 196; Mbikiwa and Minné (n 91) 463 fn 182.
118 AT Denning *The family story* (1981) 208.
119 Denning (n 118) 208.
120 See eg W le Roux & K van Marle 'Critical Legal Studies' in CJ Roederer & D Moellendorf (eds) *Jurisprudence* (2004). Crucially, Karl Klare foregrounded Critical Legal Studies in his pivotal essay: see his 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.
121 N Duxbury *Patterns of American jurisprudence* (1995) ch 4.

this movement's most illustrious exponent.[122] His work seeks to connect law more closely to its underlying values, urges moral sensitivity in those who practice it, and advances principles which, even if they should not be accepted merely because of the authority which posited them, carry an authority of a different kind: the authority of reason. The challenge, for Dworkin and his ilk, is to show that this hopeful defence is not misplaced – to show that law and judging, despite their austere and aloof appearance, do indeed serve these ends, and make our collective governance more reasonable and worthy of respect.

In the circumstances of apartheid, this challenge might seem insurmountable. But in fact, as Cameron remarked in 1979, Dworkin's theory ought to be embraced by South African lawyers as particularly apposite.[123] It dovetailed with the inspiring work of John Dugard,[124] giving heft and vigour to the techniques he had been urging: judges should reach for sound principles of liberty, deeply woven into the South African legal system, and use them to tame and temper the unjust apartheid statutes that had been recently superimposed on top. Dworkin's theory is therefore hopeful – and it commended itself to Cameron for this reason. It carved out a valuable role for public-interest organisations, morally intent advocates, and liberal judges even in apartheid South Africa.[125] Despite the wickedness of the legislation that had been enacted, the legal system also contained a deeper repository of moral principles, and the task of lawyers and judges was 'to make of them the best that we can'.[126]

122 In a pertinent respect, Dworkin's common image (and self-image) as an upstart opponent of Hart's jurisprudence tends to mislead, since both Hart and Dworkin were committed to defending the moral value of law as a crucial but limited aspect of liberal democracy. (Cameron resisted his fellow Dworkinians' tendency to caricature Hart: see Cameron 'Dugard's moral critique' (n 114) 312; 'Judges, justice, and public power' (n 112) 82 fn 59.)

123 Cameron 'Are Dworkin's "principles" really rules?' (n 8) 459.

124 As Dyzenhaus reminds us, however, Dugard himself was no Dworkinian: see Dyzenhaus (n 82) 117.

125 Cameron 'Dugard's moral critique' (n 114) 314; E Cameron 'Fidelity and betrayal under law' (2016) 16 *Oxford University Commonwealth Law Journal* 346 at 353-356.

126 E Mureinik 'Law and morality in South Africa' (1988) 105 *South African Law Journal* 457, 459. To be sure, it was a matter of debate whether this is the true implication of Dworkin's theory even in gravely unjust legal systems: does not his commitment to 'fit' and 'coherence' with the existing legal materials entail that, at least beyond some point, judges are duty-bound to further even unjust principles? This question was much-discussed among philosophers of law, and manifested

Those are the words of Cameron's friend and colleague Etienne Mureinik, who in 1988 offered a mature statement of Dworkin's relevance in South Africa.[127] The following year, Dworkin convened a conference near Oxford on the future of the rule of law in South Africa, attended by a number of anti-apartheid and left-leaning judges and lawyers, including Cameron and Mureinik; John Dugard and three other contributors to this book, Hugh Corder, Dennis Davis, and Dikgang Moseneke; and Arthur Chaskalson.[128] This cohort became all the more energised by Dworkin's theory with constitutional transition now visible on the horizon. They foresaw, as Michelman wrote later, 'South Africa's coming urgent need for a jurisprudential path away from Westminster positivism and Roman-Dutch formalism', and 'grasped the providential aptness to that need of Dworkin's work'.[129] In 2003, when Chaskalson was Chief Justice, he analysed the new Bill of Rights in similar terms.[130] He implied that the Constitution and its value-laden provisions had given licence to adjudication, Dworkin-style. It was a 'moral document',[131] placing at the foundation of the South African legal order the moral principles that Dworkin's work had sought to foreground, and which judges were now formally required to apply.[132] There could be no shying away, in the new era, from Herculean and morally committed judging.

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practically in South Africa in the debate between Dugard and Raymond Wacks about whether judges should resign: see R Wacks 'Judges and injustice' (1984) 101 *South African Law Journal* 266; J Dugard 'Should judges resign – A reply to Professor Wacks' (1984) 101 *South African Law Journal* 286; R Wacks 'Judging judges: A brief rejoinder to Professor Dugard' (1984) 101 *South African Law Journal* 295. See also D Dyzenhaus 'Judges, equity, and truth' (1985) 102 *South African Law Journal* 295, and his contribution to this book (n 82). Cameron sided with Dugard, and was adamant that judges should not resign, but should use their power to do what good they can – even though that inevitably means dirtying their hands and being complicit in an unjust system. See eg Cameron 'Dugard's moral critique' (n 114) 315.

127 E Mureinik 'Dworkin and apartheid' in H Corder (ed) *Essays on law and social practice in South Africa* (1988) at 206-209.

128 Du Bois (n 53) xiii.

129 F Michelman 'The Constitution, social rights and reason: A tribute to Etienne Mureinik' (1998) 14 *South African Journal on Human Rights* 499 at 506.

130 A Chaskalson 'From wickedness to equality: The moral transformation of South African Law' (2003) 1 *International Journal of Constitutional Law* 590.

131 Chaskalson (n 129) 599.

132 Dworkin himself commented on the relevance of his work to South Africa in his 'Keynote address' in Du Bois (n 53). See also his brief reply to Chaskalson in R Dworkin 'Response to overseas commentators' (2003) 1 *International Journal of Constitutional Law* 651.

Cameron's judgments are peppered with references to Dworkin's work.[133] And Cameron has continued to defend his account of the judicial role, now orthodox in South Africa,[134] in which creative moral choice is not only required but to be 'openly embraced'.[135] In Cameron's career, Dworkin's insistence on value-laden adjudication was there from the first, and it was there to the last.

Another hallmark of Cameron's judgments, and another suggestive parallel with Denning, is his famous use of language. He writes plainly, cutting to the heart of things. This was a product of rare talent, but did not always come without effort. I remember him at his desk in chambers, huddled before a draft judgment, intoning George Orwell's advice ('Never use a long word where a short one will do'; 'If it is possible to cut a word out, always cut it out').[136] Yet Cameron would surely not be content with Orwell's aperçu that 'Good prose is like a windowpane',[137] aiming only to make itself invisible, so that the reader sees without mediation to the ideas underneath. Language is no mere conduit. It is to be played with and delighted in, turned over and tickled and thrust forth with relish. Two of our chapter contributors recall the memorable language of Cameron's attack on LC Steyn, written when he was only 29: James Fowkes delights in its bold opening line ('He came from the Free State'),[138] which I have cribbed for the first heading in this introduction; Dennis Davis remembers Cameron's devastating summation of Steyn's character (he 'had a towering but parsimonious intellect').[139] And Cameron's judgments have given us some of the best-known turns of phrase in post-apartheid law. In *Brisley v Drotsky*, he told us that the Constitution requires the courts to approach their task of striking down contracts 'with perceptive restraint'[140] – a phrase so often quoted that

133 eg *Holomisa* (n 40) 608E; *AMCU* (n 84) para 34 fn 28.
134 Naturally, there is some debate about its virtues: see eg D Davis 'Dworkin: A viable theory of adjudication for the South African constitutional community?' and A Fagan 'Section 39(2) and political integrity' in Du Bois (n 53); T Roux 'Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference?' (2009) 20 *Stellenbosch Law Review* 258.
135 Cameron 'Judges, justice and public power' (n 112) 87. See also 'The transition to democracy' (n 16).
136 G Orwell 'Politics and the English language' (1946).
137 G Orwell 'Why I write' (1946).
138 Fowkes (n 81) 80.
139 Davis (n 90) 480.
140 *Brisley* (n 105) para 94.

our courts now call it the 'perceptive restraint principle'[141] – and that freedom of contract, in a memorably graphic phrase, is to be 'shorn of its obscene excesses'.[142] Cameron's defence of *stare decisis* is similarly evocative: without precedent, he wrote in *True Motives*, '[t]he courts would operate in a tangle of unknowable considerations, which all too soon would become vulnerable to whim and fancy.'[143] (Riffing on the same point a decade later, he added: 'The courts would operate without map or navigation.')[144] And which public lawyer does not know, perhaps by heart, Cameron's maritime metaphor from *Kirland*?

> Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline.[145]

See, too, Cameron's enthusiasm for adverbs and adjuncts. A judgment might be 'invincibly cogent',[146] the scope of a legislative provision 'emphatically and deliberately wide',[147] a witness's testimony 'radically mistaken',[148] while another's was 'soundly-grounded supposition'.[149] One party's concerns were 'dismally warranted',[150] we might be told, since the other party had a duty it had 'signally failed' to fulfil.[151] (His enthusiasm could be infectious: 'clamantly', an eccentric adverb brought to the Court by Cameron, now appears in at least two of Justice Madlanga's judgments.)[152] He favoured an occasional neologism, such as when, in *Snyders v De Jager*, he castigated his colleagues for the 'floribundant' judicial declarations they had defied.[153] And observe, finally, his fond

141 *Beadica 231 CC v Trustees for the time being of the Oregon Trust* [2020] ZACC 13 para 42.
142 *Brisley* (n 105) para 94.
143 [2009] ZASCA 4 para 100.
144 *Ruta v Minister of Home Affairs* [2018] ZACC 52 para 21.
145 *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* [2014] ZACC 6 para 82
146 Cameron 'Legal chauvinism' (n 8) 61.
147 *Ruta* (n 144) para 39.
148 *Salem* (n 97) para 97.
149 *Salem* (n 97) para 107.
150 *Mwelase v Director-General, Department of Rural Development and Land Reform* [2019] ZACC 30 para 45.
151 *Land and Agricultural Development Bank of SA v Parker* [2004] ZASCA 56 para 14.
152 *Slip Knot* (n 109) para 31; *Minister of Constitutional Development v South African Restructuring and Insolvency Practitioners Association* [2018] ZACC 20 para 78.
153 *Snyders v De Jager (interim relief)* [2016] ZACC 52 para 50.

use of Denning-like staccato: 'Yes.'[154] 'And rightly.'[155] 'Well, precisely.'[156] 'But wait!'[157] 'No. Definitely not.'[158] 'None at all. Never.'[159] Cameron judgments are instantly recognisable. They are also fun.

Even so, Cameron would no doubt agree with Orwell that writing plainly is not a matter of mere good taste or even rhetorical power. It has a political point. Judges' decisions, and the reasons for them, must be made transparent to the public whom they serve – to the 'ordinary folk', in Denning's hokey phrase.[160] 'To the public', Cameron writes, 'we represent the face and the force of the law. This imposes on us high responsibility: a responsibility to carry the law through to those whom it affects in a way that will command their respect and acceptance'.[161] Judges must perform their functions in a way that is 'comprehensible to those in relation to whom we exercise our power'.[162] Cameron has therefore condemned judgments that are 'prolix and inaccessible',[163] and according to his friend Gilbert Marcus 'he detests pomposity and pretension'.[164] A Cameron judgment typically starts with either a clear and direct statement of the legal question in it ('At issue is …')[165] or a vivid evocation of the human story that gave rise to it ('In the early hours of Friday morning…';[166] 'The applicant, Mr Ruta, is a national of Rwanda';[167] 'On the edge of the Highveld escarpment in Mpumalanga, northeast of

154 *Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape* [2015] ZACC 33 at paras 97, 142.
155 *Kirland* (n 145) para 102.
156 *Kirland* (n 145) para 83.
157 *Ruta* (n 142) para 15.
158 *Electronic Media Network Ltd v e.tv (Pty) Ltd* [2017] ZACC 17 para 100.
159 *Salem* (n 97) para 95.
160 Lord Denning 'The price of freedom' (1955) 41(11) *American Bar Association Journal* 1011.
161 E Cameron 'A single judiciary: Some comments' (2000) 117 *South African Law Journal* 141, 142.
162 Cameron 'The transition to democracy' (n 16) 17.
163 Cameron 'Dugard's moral critique' (n 114) 317.
164 G Marcus 'Courage, integrity and independence: Edwin Cameron's contribution to the law' (2019)(Aug) *Advocate* 24.
165 *Powell NO v Van der Merwe* [2004] ZASCA 25; *National Credit Regulator v Opperman* [2012] ZACC 29 para 92; *Merafong City Local Municipality v Anglogold Ashanti Limited* [2016] ZACC 35; *AMCU* (n 84); *e.tv* (n 158) (with Froneman J) para 89; *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch* [2019] ZACC 38.
166 *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* [2007] ZASCA 70.
167 *Ruta* (n 144).

Middelburg and to the east of Groblersdal, lies the farm …').[168] After all, law is for people, and must be made transparent to them. And there is a perennial danger, in the face of lawyerly abstraction, that a case's human stakes will be forgotten. The judge must therefore demonstrate to others – and to himself – the basic values and human interests that underlie the verbiage. This could be a salutary part of the process of judging and of judgment-writing: it could help one to escape an impasse, to help one find the way through a stubborn legal problem. 'If in doubt', Cameron might say, 'tell the story.'

But what stories did Cameron tell? And which moral principles guided his Herculean efforts? Not all judges have fixed and discernible substantive commitments, or not ones that can be neatly described in a few paragraphs or even a book. But, as Froneman and Taylor remind us, it is not hard to identify what Cameron's values are, because he has told us.[169] Channelling Virgil's *Aeneid*, which one imagines him poring over as a precocious classics student, Cameron repeats for us the counsel given to Aeneas by his father: the judge's role is 'to protect the poor and the dispossessed, and to approach those exercising power with wariness'.[170] *Parcere subiectis et debellare superbos*. Or, as one might also say – in a phrase that was applied to Cameron by his first cohort of students at Wits some 44 years ago – his role is 'to comfort the afflicted and afflict the comfortable'.[171]

First, then, 'protect the weak'.[172] One can easily use this precept to tell a story of Cameron's judicial career (but even more so of his extra-judicial career – of which more later). We may first pick up the thread in the 1990s when, typically for a High Court (and Labour Appeal Court) judge, his regular output saw him upholding the rights of workers unfairly dismissed by their corporate employers[173] and of offenders

168 *Prinsloo v Ndebele-Ndzundza Community* [2005] ZASCA 59.
169 Froneman & Taylor (n 99) 366.
170 E Cameron 'South Africa under the rule of law: Peril and promise' (2019) 68 *Journal of Legal Education* 507 at 519.
171 T Leon 'Cameron sets high bar for successor in SA's top court' *Sunday Times* (25 August 2019) 22. The phrase comes from the journalist and humourist FP Dunne: see his *Observations by Mr Dooley* (1902) 240.
172 Cameron 'South Africa under the rule of law' (n 170) 519.
173 *NUMSA v Benicon* (n 45); *East Rand Proprietary Mines* (n 45); *Fulcrum Engineering* (n 45); *NCBAWU v Woodcraft* (n 45). See also *CWIU v Plascon* (n 45).

punished unduly harshly by the criminal justice system.[174] But we also see it in his strikingly wide approach to the right to freedom of information, which greatly assists those seeking justice for wrongs committed against them.[175] And these strands can then be traced through Cameron's tenure on the SCA. In *Unitas Hospital v Van Wyk*, discussed further by Nurina Ally in her chapter,[176] Cameron sought to take his approach to freedom of information forward to help a widow pursuing a claim for her husband's wrongful death, but could not sway the majority.[177] And he gave important judgments alleviating criminal sentences, especially of child offenders[178] – while elsewhere asserting the rights of victims, including in his feelingful dissent in *S v Marx*, which condemned his colleagues for disbelieving a child rape victim's testimony because she had continued to associate with the accused after his alleged crime.[179] As this duality suggests, it is sometimes a matter of difficulty to decide who is the vulnerable party who needs judicial protection. Cameron controversially withheld it from straitened debtors when they were unduteously seeking to evade responsibility, as he saw it, from their own free choices.[180] And the dilemma arises most acutely, perhaps, in the context of affirmative action, where the redress of past wrongs to one group causes new harms to others – and Nomfundo Ramalekana's differing reading of this predicament is reflected in her critical take on Cameron's judgments in cases like *SAPS v Barnard*.[181] Yet although applying the precept 'can be enormously difficult', as Cameron acknowledges,[182] there can be no doubting its enduring presence in his work. *Murray v Minister of Defence* is a luminous and innovative judgment extending employees' workplace protections.[183] Other vulnerable parties who benefited from his SCA

174 *S v Dandiso* (n 44); *S v C* (n 44); *S v Van Dyk* (n 44).
175 *Van Niekerk* (n 42); *Le Roux v DG* (n 43).
176 Ally (n 101) 240.
177 *Unitas Hospital v Van Wyk* [2006] ZASCA 34.
178 *S v N* [2008] ZASCA 30. See also *S v Scheepers* [2005] ZASCA 100.
179 *S v Marx* [2005] ZASCA 67. See also *S v Abrahams* 2002 (1) SACR 116 (SCA), which raises related themes. For more on the dilemma in balancing the rights of offenders and victims, see Moshikaro (n 89).
180 See again *Paulsen* (n 109); also *Brisley* (n 105). The connection with *Manamela* (n 53) is self-evident.
181 *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23, discussed in Ramalekana (n 103).
182 Cameron 'South Africa under the rule of law' (n 170) 519.
183 [2008] ZASCA 44, discussed for eg in P Benjamin 'Braamfontein versus Bloemfontein: The SCA and Constitutional Court's approaches to labour law'

jurisprudence include indigenous land rights claimants in *Prinsloo v Ndebele-Ndzundza Community*;[184] aggrieved social grant claimants struggling to litigate in the famous class-action case of *Ngxuza*;[185] and wrongfully evicted shack dwellers in *Tswelopele*,[186] for whom Cameron devised a now eponymous special remedy.[187] And it also includes animals, to whose capacity for pain and suffering Cameron drew attention in his poignant and prescient dissent in *Openshaw*.[188] In his time at the Constitutional Court, one detects some old and some new themes. *Centre for Child Law v Minister for Justice and Constitutional Development* is a classic on the rights of child offenders.[189] His judgment in *AMCU v Chamber of Mines* is self-consciously linked to the struggles of organised labour.[190] *Stellenbosch Legal Aid Clinic* gives precious relief to debtors against the draconian enforcement measures used against them.[191] *Salem Party Club v Salem Community* is likely to prove a landmark in the historicised recognition of indigenous land rights.[192] And *Mwelase*, too, delivered on the day of Cameron's retirement, takes a major (and controversial) step to ensure that state dysfunction does not prevent the realisation of land reform.[193]

[2009] *Industrial Law Journal* 757.

184 *Prinsloo* (n 168), which was soon endorsed by the Constitutional Court in *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12.

185 *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza* [2001] ZASCA 85, upholding a judgment of Froneman J reported as *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 609 (E).

186 *Tswelopele* (n 166), endorsed by the Constitutional Court in *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* [2012] ZACC 26.

187 The remedy responds to an unlawful eviction by allowing a court to order the restoration of the property to its former state (and not merely its return to the person evicted). See eg ZT Boggenpoel 'Revisiting the *Tswelopele* remedy' (2020) 137 *South African Law Journal* 424.

188 *Openshaw* (n 108), endorsed by the Constitutional Court in *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* [2016] ZACC 46.

189 [2009] ZACC 18.

190 *AMCU* (n 85).

191 *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* [2016] ZACC 32.

192 *Salem* (n 97).

193 *Mwelase* (n 150). The case drew immediate attention for its robust order: see eg R Maphosa 'Are judicial monitoring institutions a legitimate remedy for addressing systemic socioeconomic rights violations?' (2020) 36 *South African Journal on Human Rights* 362; G Mukherjee & J Tuovinen 'Designing remedies

This brings us to Cameron's second precept: 'be suspicious, always suspicious, of power'.[194] This inevitably overlaps with the first precept, since to disrupt power is *ipso facto* to protect those vulnerable to it. But there is a difference. In reading down criminal asset forfeiture provisions,[195] and voiding unlawful search warrants,[196] we doubt that Cameron was motivated by the relief that his judgments brought to the suspected criminals involved.[197] His motivation was something more elementary, about the need for propriety and method and scrupulousness in state conduct. Cameron holds government to high standards – and said as much in *Kirland*. The state is subject, he wrote, to a 'higher duty' than the rest of us: 'It is the Constitution's primary agent. It must do right, and it must do it properly.'[198] This quest for duteous and legally bounded governance has an importance in Cameron's philosophy that is hard to overstate. Throughout his career, he foregrounded 'the rule of law' in his writings, often using it almost interchangeably with 'constitutionalism'.[199] Indeed, he has said in terms that the purpose of our constitutional project 'is to elaborate and defend a conception of the rule of law'.[200] We are all seeking, in other words, to subdue the powerful and subject them to the shared standards and public values that are embodied in our law. That project has an importance that is partly intrinsic; it can be elaborated and defended on its own.

Nevertheless, the most compelling reason to be suspicious of public power is to ensure that it is exercised so as to help, rather than to harm, those most vulnerable to it – those circumstances, in other words, where Cameron's first and second precepts overlap. And it is here that the judiciary's achievements should be most keenly celebrated. The two judgments that Cameron thought most important in the history of the

for a recalcitrant administration' (2020) 36 *South African Journal on Human Rights* 386.

194 Cameron 'South Africa under the rule of law' (n 170) 519.

195 *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd* [2004] ZASCA 37.

196 *Powell* (n 165).

197 And see, for example, *Manamela* (n 53) and *National Director of Public Prosecutions v Elran* [2013] ZACC 2 for clear significations that he saw value, in appropriate contexts, in tough police powers.

198 *Kirland* (n 145) para 82.

199 Cameron 'Rights, constitutionalism and the rule of law' (n 47); 'Judges, justice, and public power' (n 111); 'South Africa under the rule of law' (n 170).

200 Cameron 'Dugard's moral critique' (n 114) 318.

Constitutional Court were *Treatment Action Campaign*,[201] decided in 2002, and *Economic Freedom Fighters*,[202] on which Cameron himself sat in 2016.[203] In the first case, the damaging and irrational denialism of the Mbeki government was trumped by the Chaskalson Court's now famous 'reasonableness' standard. This the Court had newly devised, to general (but certainly not universal) acclaim, as a mechanism to uphold and enforce socioeconomic rights, and without these innovations it is hard to imagine a court being able to second-guess the government's policy on the provision of antiretrovirals. In the second of these cases, the self-interestedly and dishonestly corrupt appropriation of public money by then President Jacob Zuma, who had evaded accountability to all other independent institutions, was finally given its quietus by the Mogoeng Court. Parliament should have held Zuma to account, but it did not. The Public Protector tried to, but her recommendations were not thought binding. So the Court beefed them up. Mogoeng CJ's judgment pulls no punches. It led to Zuma's demise.[204]

And of course there is *Glenister II*,[205] which had come at the earlier end of Zuma's presidency. It is a judgment that Cameron co-authored with one of our tribute writers, Dikgang Moseneke, and which draws attention from more of our chapter authors than any other.[206] In it, a dramatic Dworkinian innovation allowed Moseneke DCJ and Cameron J to hold – though the Constitution nowhere discusses the topic – that parliament was constitutionally required to enact and to maintain a 'sufficiently independent' anti-corruption unit. Similar innovations were involved in *KZN Joint Liaison*, one of Hoexter's 'anti-formalist'

201 *Treatment Action Campaign* (n 63).
202 *Economic Freedom Fighters v Speaker of the National Assembly* [2016] ZACC 11.
203 The judgments are discussed inter alia in E Cameron 'Law in the struggle for truth' (2003) 120 *South African Law Journal* 1 at 5-6; 'What you can do with rights' (2012) 2 *European Human Rights Law Review* 147 at 153-156; *Justice* (n 3) ch 4; 'South Africa under the rule of law' (n 170) 513-515; Cameron 'Judges, justice, and public power' (n 112) 88-91.
204 See eg S Woolman 'A politics of accountability: How South Africa's judicial recognition of the binding legal effect of the Public Protector's recommendations had a catalysing effect that brought down a president' (2016) 8 *Constitutional Court Review* 155.
205 *Glenister v President of the Republic of South Africa* [2011] ZACC 6.
206 See Boonzaier (n 93) 171-176; Ally (n 101) 246-252; Fredman (n 88) 294-298; Froneman & Taylor (n 99) 387-391; Michelman (n 93) 555-557. The litigation now also has its own book: see P Hoffman (ed) *Under the swinging arch: Perspectives on the Glenister anti-corruption cases by those who fought them* (2023).

judgments,[207] discussed also by three other contributors.[208] And Cameron participated in the expansion of constitutional power in *Kirland*, in which he held, with inspiration drawn from the great SCA case of *Oudekraal*,[209] on which he had sat ten years earlier, that organs of state are subject to legal and processual restraint even as they seek to undo their own unlawful decisions.[210] Gilbert Marcus, in his chapter, discusses the importance of Cameron J's majority judgment in *Kirland* and the long counter-offensive waged against it by the aggrieved dissentient, Jafta J.[211] Froneman and Taylor trace the second precept onwards into Cameron's dissents in cases like *Helen Suzman Foundation* and *M&G Media Ltd*.[212] And I suggest in my chapter that the precept emerges also in private law, where Cameron worked to make government contracts and tender processes fully accountable to law.[213]

Constitutionalism, in this story, is above all a vehicle for bringing public power to heel: it is a set of standards that enlivens the power of courts and allows them to hold accountable even those organs of state which, under apartheid, were sovereign. Hence the core of Cameron's project is to expand the Constitution's reach, so that more and more formerly unaccountable exercises of power are made subject to public standards stated in law and to reasoned deliberation by judges and those party to the proceedings before them, and so that government is not allowed to have the final, unaccountable say. And when he writes, in *Jordaan*, that 'virtually all issues ... are, ultimately, constitutional',[214] we should read him in this same light: the importance of saying that the Constitution reaches each and every dispute is that it means the ultimate

207 See Hoexter (n 87) 206.

208 *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal* [2013] ZACC 10. Discussed in Boonzaier (n 93) 177-180; Ally (n 101) 231-235; Michelman (n 93) 538-541.

209 *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] ZASCA 48.

210 *Kirland* (n 145).

211 G Marcus 'Curbing the abuse of power: *Kirland* and the struggle for its acceptance', this volume, ch 8.

212 *Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa* [2014] ZACC 32; *President of the Republic of South Africa v M&G Media Ltd* [2011] ZACC 32. Discussed in Froneman and Taylor 'Judicial dissent and the sceptical scrutiny of power' (n 99) 387-401.

213 Boonzaier (n 93), discussing *Logbro* (n 84); *Olitzki Property Holdings v State Tender Board* [2001] ZASCA 51; *Minister of Finance v Gore NO* [2006] ZASCA 98. See also Ally (n 101) 253-257.

214 *Jordaan* (n 86) para 8.

standards contained in it are always there, always to hand, ready to be drawn upon by a conscientious judge as a means to hold power to account. 'Be ye never so high', the judge can say, 'the law is above you.'[215]

This central strand of Cameron's philosophy puts him at the vanguard of what is surely the dominant trend in South African constitutionalism post-apartheid, and perhaps the dominant trend in world constitutionalism over the last half-century, in which constitutions become a vehicle to serve a general project of bringing political power under judicial control. At the heart of these is a canonical South African idea, formulated by Mureinik: the replacement of a 'culture of authority', in which public power is deferentially accepted just in virtue of the authority of the power-holder, with a 'culture of justification', in which all exercisers of public power have a duty to explain their decisions, which should be accepted only when justified.[216]

On this approach, rights discourse is not so much about the precise legal content generated by particular rights provisions, but about the *Ur*-right to which they all boil down, 'the right to justification'.[217] Mureinik himself was happy to put his cards on the table: 'The formal content of a bill of rights is often less useful', he wrote, 'than the fact that it brings under scrutiny the justification of laws and decisions.'[218] To activate constitutional review, in other words, does not bring off the shelf a set of 'pre-cast rules', to borrow Cameron's term,[219] that determinately settle the bounds of what the decision-maker may, or may not, do. Its cardinal importance, instead, is that the decision will, through judge-led

215 *Gouriet v Union of Post Office Workers* [1977] 1 QB 729 at 762 (Lord Denning MR), quoting Thomas Fuller.

216 E Mureinik 'A bridge to where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31. For valuable commentary, see eg D Dyzenhaus 'Law as justification: Etienne Mureinik's conception of legal culture' (1998) 14 *South African Journal on Human Rights* 11; M Cohen-Eliya & I Porat 'Proportionality and the culture of justification' (2011) 59 *American Journal of Comparative Law* 463.

217 M Kumm 'The idea of Socratic contestation and the right to justification: The point of rights-based proportionality review' (2010) 4 *Law & Ethics of Human Rights* 142; R Forst *The right to justification: Elements of a constructivist theory of justice* (2011).

218 E Mureinik 'Beyond a charter of luxuries: Economic rights in the Constitution' (1992) 8 *South African Journal on Human Rights* 464, 471. For more on Cameron's account of what rights-discourse can achieve, see especially Cameron 'What you can do with rights' (n 203).

219 See n 114 above.

deliberative processes, be submitted to a general 'test of public reason'.[220] On this view, there is nothing to fear, and much to be gained, from the loose and open-ended balancing and proportionality tests that pervade modern constitutional law. And the standard of 'reasonableness', though on one view unacceptably formless and squishy, becomes in Cameron judgments a kind of constitutional standard *par excellence*.[221]

There are many purposes one might achieve by subjecting public power to rigorous judicial scrutiny, and many ways in which morally intent judges might use their oversight for good. Nurina Ally frames her chapter through the concept of public 'accountability', noting diverse ways in which Cameron's jurisprudence sought to achieve it.[222] To begin with, there is inherent value in requiring that powerholders explain themselves: that is the culture of justification's most basic lesson. As Cameron put it in *e.tv*, 'Where there is no explanation there is no reason, and where there is no reason there is arbitrariness and irrationality.'[223] Respecting the dignity of citizens means that, when power is wielded over them, they are allowed to ask 'why?' But one hopes that accountability will have instrumental benefits as well – that it 'would improve the quality of government', as Mureinik argued, 'because any decisionmaker who is aware in advance of the risk of being required to justify a decision will always consider it more closely'.[224] Even if conscientious judicial scrutiny does not have this effect *ex ante*, it can do so *ex post*. Government's having to explain to a court, and to the claimants, why its policy was reasonable can 'sh[i]ne a bright, cold light on the policy' that reveals its flaws and leads to willing improvement, as O'Regan J put in in *Mazibuko v City of Johannesburg*[225] – a judgment very often criticised

220 M Kumm 'The turn to justification: On the structure and domain of human rights practice' in A Etinson (ed) *Human rights: Moral or political?* (2018) 251-254. As Martin Loughlin puts it, with an edge of cynicism, the modern ideology of constitutionalism replaces 'the rule of rules with the rule of reason', see his *Against constitutionalism* (2022) 5.

221 *Holomisa* (n 40) 617-618; *Glenister* (n 205); *Dladla* (n 104) paras 74-78.

222 Ally 'Making accountability work' (n 101).

223 *e.tv* (n 158) para 98.

224 Mureinik 'Beyond a charter of luxuries' (n 218) 471.

225 *Mazibuko v City of Johannesburg* [2009] ZACC 28 para 163.

for its deferential approach,[226] but one which Cameron defended.[227] It was wrong, he thought, to underrate the inherent benefits of reasoned deliberation through legal processes, and to assume that government must always be goaded, and its decisions displaced, by court orders.[228] However, where government's good intentions 'have repeatedly failed to translate into effective, rights-affirming practical action' – *Mwelase* again[229] – then it is necessary to make a robust and far-reaching (or, in the view of the dissentients, over-reaching) judicial order. And on occasion the government does not have good intentions at all, but is wilfully seeking to undermine liberal constitutionalism – and then one needs, as in *Glenister*, the most Herculean response of all, in which Cameron made great inroads into the legislature's freedom of action. So there is no doctrinaire approach to the separation of powers on show here. But *Mwelase* and *Glenister*, one feels, are the exception: typically, the court does its job by bringing reason to bear – and need not go further. This entails some modesty, again, about the limits of the judicial role, as well as an attunement to the proper purview of the democratic organs, with which the judiciary is in dialogue. Hence Sandra Fredman understands Cameron's approach to judging through the lens of 'deliberative democracy':[230] even as the judge elaborates and defends his own vision of the good society, he does so mindful that others, above all through parliament and its agents, have the right to have their own say. This is a delicate process that does not allow one to insist, in advance, that courts should always be brave and bold. The judiciary's rightful institutional role 'will be continually defined and redefined' in response to the demands of each new challenge as it arises.[231]

226 See eg P de Vos 'Water is life (but life is cheap)' *Constitutionally Speaking* (13 October 2009); S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) at 467; M Wesson 'Reasonableness in retreat?' (2011) 11 *Human Rights Law Review* 390; S Wilson & J Dugard 'Taking poverty seriously: The South African Constitutional Court and socio-economic rights' (2011) 22 *Stellenbosch Law Review* 664.

227 Cameron *Justice* (n 3) 270; 'A South African perspective on the judicial development of socio-economic rights' in L Lazarus, C McCrudden & N Bowles (eds) *Reasoning rights: Comparative judicial engagement* (2014) 336-337.

228 Compare the classic analysis in K Roach & G Budlender 'Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable?' (2005) 122 *South African Law Journal* 325.

229 *Mwelase* (n 150) para 42.

230 Fredman (n 88) 292-296.

231 *Mwelase* (n 150) para 47, citing Liebenberg (n 226) 70.

Even so, the unmistakable overall implication of Cameron's philosophy is that our post-apartheid judiciary will – it should and it must – appropriate to itself greater relative power, so that it can keep the governmental branches properly in check. And indeed he celebrated precisely those judgments, like *TAC*, *Glenister*, and *EFF*, where concerns about judicial power are most acute.[232] This then raises an obvious difficulty, or perhaps a 'paradox' (to borrow a term Cameron used widely to describe the role of law in South Africa, pre- and post-apartheid).[233] After all, judges are not angels, as Cameron's experience in the 1980s had made him acutely aware. They, like any other powerful actor, may abuse their power – the very power that constitutionalism demands them progressively to accrue.

How, then, is his motto – 'be always sceptical of power' – to be turned against judicial power itself? Electoral accountability, by design, is off the table in the case of institutionally independent judges. So who will guard the guardians, and how? The textbook answer might be: judges are accountable to law. Their role is modest, for their power is closely constrained, in a way that politicians' is not, by fidelity to statute, precedent, text, and tradition. But that answer is surely unattractive, or at the very least incomplete, to a judge with Cameron's expansive philosophy – to a judge who insists that adjudication is intensely moral; who subordinates all disputes to the indeterminate and value-laden provisions of the Bill of Rights; who believes, with Denning, that there is always a way around the doctrine.

But there is another answer, implicit in Cameron's career: judges are to be held to account by relentless and courageous criticism – by scholars, the legal community, and the public. Cameron has often provided it himself. As we saw, he first did so in his devasting attack on LC Steyn, and continued to castigate the apartheid judiciary throughout the decade. His unbridled criticisms shocked the legal establishment. As Dugard argues, in his tribute to his mentee in this book, Cameron only

232 See for discussion J Fowkes 'Informal constitutional change in unlikely places: The case of South Africa' in X Contiades & A Fotiadou (eds) *Routledge handbook of comparative constitutional change* (2020) 425-427; L Gildenhuys 'Esoteric decision-making: Judicial responses to the judicialisation of politics, the Constitutional Court and *EFF II*' (2020) 36 *South African Journal on Human Rights* 338.

233 E Cameron 'Rights, constitutionalism, and the rule of law' (n 47) 506; 'Our legal system – Precious and precarious' (2000) 117 *South African Law Journal* 371 at 371-372; 'Judges, justice, and public power' (n 112) 83.

fortuitously escaped prosecution for contempt of court.[234] Of course, the apartheid judiciary was in many ways a special case. But Cameron saw early that the importance of forthright criticism of the judiciary would be no less important post-apartheid. During the transition, Cameron continued to criticise the judiciary and draw lessons for its future.[235] He also began to lay out an explicit philosophy about criticising judges. In 1993, he condemned the overly polite and indirect and deferential style of most South African commentators – Bobby Hahlo and Ellison Kahn, doyens of the Wits Law Faculty, were the epitome[236] – and praised those who had been willing to criticise the apartheid judiciary with candour and forthrightness. This included not only those with an avowed political purpose in doing so, like Dugard, Tony Matthews, and Barend van Niekerk, but also Stellenbosch's foremost doctrinal scholar and '*enfant terrible* of the judiciary', JC de Wet.[237] In 1998, Cameron tackled the role of 'Academic criticism in the democratic order' in an article which paid tribute to Etienne Mureinik in the wake of his death.[238] It was closely indebted to Mureinik's essay on 'Law and morality in South Africa', which had been published a decade earlier[239] – and which was inspired, in turn, by Cameron's forthright criticisms of the judiciary in the 1980s.[240] Cameron wrote in his article that the '[t]he heritage of criticism, inquiry and challenge is a precious one, to be nurtured and maintained' in the new era.[241] Indeed, would-be critics had acquired 'an important new responsibility'.[242] For even as the joy of the transition was still in the air, Cameron presaged that complacency and hubris would take hold among South Africa's new elites.[243] Political cant and dead

234 Dugard 'Freedom of expression in the 1980s', this volume, ch 2. See also Mureinik 'Law and morality' (n 126) for a contemporaneous account.
235 Cameron 'Submission on the role of the judiciary' (n 46).
236 Cameron 'Lawyers, language and politics' (n 48) 60. See also Dyzenhaus 'Edwin Cameron and the politics of legal space' (n 82) 32.
237 Cameron 'Lawyers, language and politics' (n 48) 51.
238 Cameron 'Academic criticism' (n 48).
239 Mureinik 'Law and morality' (n 126). For an even stronger example, see Mureinik's exchanges with Prof JR du Plessis and Malcolm Wallis, published as 'Correspondence' (1989) 5 *South African Journal on Human Rights* 507; (1990) 6 *South African Journal on Human Rights* 112.
240 Mureinik 'Law and morality' (n 126) 462.
241 Cameron 'Academic criticism' (n 48) 109.
242 Cameron 'Academic criticism' (n 48) 108.
243 See too E Cameron 'Appellate advocacy' (1998) 11 *Consultus* 145.

dogmas would set in. And it would be for the next generation of intent and even intemperate critics to unsettle them.

Within this vigorous debate, courts occupy a position that is to some extent special. They have a duty that is more general and pervasive than other public institutions to articulate the reasons for their decisions.[244] Rationality is courts' currency – their only currency – and if they fail to decide rationally they must pay a special price. Even the Constitutional Court, though its decisions cannot be appealed, is accountable, writes Cameron, 'to the ultimate court of reason'.[245] Conversely, courts have a special duty to criticise others when they have failed in their public tasks: some of Cameron's most devastating prose is reserved for government ineptitude.[246] And judges must, in the laws they make, hold open space for others to engage in vigorous public contestation. This is the kernel of Mbikiwa and Minné's chapter in this book,[247] which shows that Cameron's landmark judgments on freedom of speech – above all *Holomisa*,[248] *McBride*,[249] and *DA v ANC*[250] – defend the value of this freedom, distinctively, as a means of holding government to account.

Cameron took on all these roles, and more, and was unafraid to play the gadfly himself, even after he joined the bench. In 2010, in paying tribute to Dugard, he reemphasised the importance of scholarly criticism, and offered a stinging assessment of the Court he had just joined:

> In its first 15 years, the Constitutional Court has been treated with much deference. Many South African legal academics have been too politically correct to challenge its decisions with unbridled courage. ... This dearth of rigorous

244 Mureinik 'Law and morality' (n 126) 461.
245 Cameron *Justice* (n 3) 185.
246 In *Ngxuza* (n 185) para 15, for example, Cameron JA writes that the state's conduct of its litigation against the aggrieved social grants claimants 'speaks of a contempt for people and process that does not befit an organ of government under our constitutional dispensation'. Its approach 'was contradictory, cynical, expedient and obstructionist. It conducted the case as though it was at war with its own citizens, the more shamefully because those it was combatting were in terms of secular hierarchies and affluence and power the least in its sphere.' And in *Mwelase* (n 150) para 41, the Department of Rural Development and Land Reform received a similar rebuke. Its conduct was 'outrageous and disturbing', or rather worse than that: it showed 'sustained, large-scale systemic dysfunctionality and obduracy', which had 'profoundly exacerbated the intensity and bitterness of our national debate about land reform' and 'lies at the heart of [a] colossal crisis'.
247 Mbikiwa & Minné (n 91).
248 *Holomisa* (n 40).
249 *The Citizen 1978 (Pty) Ltd v McBride* [2011] ZACC 11.
250 *Democratic Alliance v African National Congress* [2015] ZACC 1.

> surveillance has contributed to some weakness in the Court's jurisprudence. ... [It] may have allowed the Court to come to think it could do anything.[251]

This is strong stuff. It shows that, for Cameron, judges must have a thick skin – their public office requires it.

But there is danger here in focusing on the judiciary: for the points go much wider. All public actors, without exception, deserve plain-speaking and clear-sighted criticism. (Even Bram Fischer does not escape censure.)[252] And the criticism should come not only from judges and other authority figures, but anyone well-placed to provide it. We are all of us – 'academic, legislators, politicians, the public and the courts' – engaged in the same 'joint interactive rational inquiry', writes Cameron; all of us are therefore equally responsible for pursuing 'the values of reason and truthfulness'.[253] Undoubtedly, Cameron would want to underscore here the importance of NGOs and civil-society groupings, whose central role in both pre- and post-apartheid law he frequently applauded.[254] Yet ultimately he would not want to confine the importance of criticism and dissent only to specific institutions or roles. Each one of us, he would say, is an important participant in the public square, of which the courts are just one, not-all-that-special part. The same debate and contestation that takes place within courts should also take place outside it. Cameron often hailed the importance of South Africa's voluble and easily dissatisfied citizenry – since it is only they, in the end, who can ensure their leaders are accountable and responsive.[255]

And again, as Fowkes reminds us, Cameron would be the first to recognise the judicial role's limits. His forthrightness tested and transcended them. Most famous is his public condemnation, in defiance of norms of judicial propriety, of then President Mbeki and his AIDS denialism.[256] But the examples are numerous – as where he fired devastating broadsides at the minimum sentencing legislation and other over-criminalising statutes that, as a judge, he was duty-bound

251 Cameron 'Dugard's moral critique' (n 114) 317.
252 Cameron 'Fidelity and betrayal' (n 125).
253 Cameron 'Dugard's moral critique' (n 114) 318.
254 See especially his discussions of the *Treatment Action Campaign* litigation, cited at n 203 above.
255 Cameron *Justice* (n 3) 276, 280; E Cameron & M Taylor 'The untapped potential of the Mandela Constitution' [2017] *Public Law* 382; Cameron 'Fidelity and betrayal' (n 125) 357.
256 See notes 61-66 above.

to apply,[257] or, more generally, in his pervasive candour about the role of human frailties and the moral sentiments in adjudication. In other respects, too, Cameron was no cloistered judge. Deciding cases was only one part of his job. Another side of him, as we all know, was his work as an activist. And it is a remarkable feature of his career that he has managed (paradoxically, one might say) to maintain both the highest respect of the legal establishment and his status as a progressive icon and rabble-rouser on behalf of the stigmatised. As the *New York Times* observed in 2009, this genteel and distinguished legal intellectual has always been 'an unlikely rebel'.[258]

He is also a committed constitutional evangelist, educating the public about the Constitution and legal system at a packed schedule of lectures and interviews and other public-facing engagements. But his evangelism is hard-headed. It does not reflect naïve optimism, nor stray into mythmaking about the South African miracle, in the way that other constitutional enthusiasts sometimes do. Right from the start of the constitutional era, Cameron urged realism about the scale of our challenges.[259] He rejects self-satisfied South African exceptionalism.[260] And he would say to those who complained despondently in the wake of the Zuma era that fixing South Africa had proved so difficult, 'But what right did you have to think it would be easy?'

This is not fatalism on his part. In fact, one might think of it as optimism. But, if so, it is of Gramsci's kind: pessimism of the intellect, in other words, but optimism of the will.[261] *Blymoedigheid*, as earnest Afrikaners say – a word Cameron would repeat half-jokingly at the end of a difficult day in chambers. Certainly, Cameron defends the liberal constitutional order against populists and naysayers; and true, also, that

257 Cameron 'Rights, constitutionalism, and the rule of law' (n 47) 509; E Cameron 'Imprisoning the nation: Minimum sentences in South Africa' (Dean's Distinguished Lecture, University of the Western Cape, 19 October 2017).

258 CW Dugger 'In South Africa, a justice delayed is no longer denied' *New York Times* (23 January 2009).

259 Cameron 'Rights, constitutionalism and the rule of law' (n 47); 'Appellate advocacy' (n 243).

260 Eg Cameron & Taylor (n 255); E Cameron & L Boonzaier 'Venturing beyond formalism: The Constitutional Court of South Africa's equality jurisprudence' (2020) 84 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 786 at 837-838.

261 A Gramsci 'Address to the anarchists' *L'Ordine Nuovo* (3 April 1920). Though Gramsci credited the phrase to Romain Rolland, Gramsci himself has become more closely associated with it as a result of its use in his *Prison notebooks*.

he often makes a point of noting the successes that have already been attained.[262] But the point of doing this is not to revel in our achievements. It is to find the conviction needed to take further action, in the hope that we might realise the fragile promise of the constitutional order we have inherited. We have a duty to persist, he would say, until we have done so.[263] And there is always, always more to do.

3 Conclusion

Cameron retired from the Constitutional Court on 20 August 2019, 25 years after his appointment to the bench. Since then, public accolades have continued to flow. In 2021, he was appointed Supreme Counsellor of the Baobab, South Africa's highest civilian honour, '[f]or his contribution to the judicial system and tireless campaigning against the stigma of HIV and AIDS' and for gay rights.[264] In the same year, he was awarded an honorary doctorate – his seventh – by Stetson University in Florida. Predictably, however, Cameron has still found plenty to do. No quiet retirement for him. If anything, leaving the bench has freed him up to be an even more visible and forthright participant in South African public life. Since 2020, he has served as the head of the Judicial Inspectorate for Correctional Services (JICS), in which capacity he has continued to agitate for prison and criminal justice reform,[265] and as a famously hands-on Chancellor of Stellenbosch University. In the last two years, he has headlined national newspapers for his central role in ventilating the news of Thabo Bester's escape from prison,[266] and for his intervention in the controversial decision to close Wilgenhof, his student residence at

262 Cameron *Justice* (n 3) ch 7; Cameron & Taylor (n 255) 386-389.
263 Cameron 'Fidelity and betrayal' (n 125) 360.
264 P Baleni 'Presidency announces recipients of National Orders' (10 November 2021).
265 See for a flavour of his contributions C Amato 'Edwin Cameron's fight for humane prisons' *Mail & Guardian* (30 November 2019); E Cameron 'The crisis of criminal justice in South Africa' (2020) 137 *South African Law Journal* 32; 'Our prisons are falling apart' *News24* (29 July 2023). Cameron is currently co-writing a book on prison reform.
266 See for comprehensive treatment M Damons & D Steyn *The Thabo Bester story* (2023).

Stellenbosch.[267] And he has continued to take on other causes, both local and international.[268] Long may it continue.

At the time of writing, Cameron remains the head of JICS, and is a judge on the Botswana High Court. He lives in Johannesburg with his partner, Nhlanhla Mnisi.

267 The saga has a long history, culminating in a report by a panel headed by retired Constitutional Court Justice Johann Kriegler. The report vindicated the substance of the allegations that Cameron had made against Stellenbosch University's leadership, but also criticised the extent of his involvement in the University's affairs: see J Kriegler, T Mosia & K Pillay 'Report on the changes to the Wilgenhof Panel Report' (29 November 2024) para 64.18.

268 See for a sample: E Cameron 'The President of Magdalen prosecutes a homophobic case to deny LGBTIQ persons in the Cayman Islands equal rights' *OxHRH blog* (29 January 2021); Brief of *amicus curiae* Edwin Cameron in support of petitioner-appellant, *Nonhuman Rights Project v Breheny*, APL 2021-00087 (1 October 2021); 'Sex work: where criminal law has no place' *GroundUp* (24 January 2023); 'We should act against lawyers who undermine the Constitution' *GroundUp* (22 July 2024).