11

Judicial dissent and the sceptical scrutiny of power

Johan Froneman & Helen Taylor

https://doi.org/10.29053/978-1-0672372-0-2_11

1 Setting out the agenda

Edwin Cameron has never been one to shy away from the moral choice – or the moral responsibility – that the exercise of judicial power entails. Nor do we need a *Festschrift* to figure out what values guided Cameron's exercise of judicial power. Delivering the keynote address to the Association of American Law Schools' Annual Meeting during his final year as a sitting judge on the South African Constitutional Court, he set out his 'agenda' with a degree of candour that may have surprised his audience:

> Of course every judge must have a guiding set of values – and, in this sense, some sort of 'agenda'. Mine are two. They sound simple, though in application they can be enormously difficult. The first is to be suspicious, always suspicious, of power – whether corporate, governmental, trade union, or populist. When power is exercised, its provenance, its licence and its effects must necessarily be subjected to rigorous judicial scrutiny. That scrutiny should, in my view, be skeptical. For it is the powerful who are most able to inflict injustice and most often do. My second guiding principle as a judge is to use my office where I truthfully can in the protection of the weak. Judges should be skeptical of power and they should protect the weak. Beyond that, I hope my oath to uphold the Constitution and its values suffices as a guide to my decisions and pronouncements as a judge.[1]

There is much that could be said about how these two guiding principles find substantive application in Cameron's jurisprudence – from the intricacies of administrative law and delictual liability, to politically charged questions about amnesty, freedom of expression, and animal rights. There is also a striking continuity between Cameron's judicial

1 E Cameron 'South Africa under the rule of law: Peril and promise' (2019) 68 *Journal of Legal Education* 507 at 519.

agenda, if we may call it that, and his personal commitment to using his position of privilege to advocate for the fundamental rights of people living with HIV and AIDS, the LGBTI community, refugees, sex workers, prisoners, and other vulnerable groups.

Our focus here, however, is to explore how Cameron's sceptical scrutiny of power found a voice in judicial dissent. This is not to cast him as a 'great dissenter',[2] at least not in the sense of being an habitual offender. On the contrary, Cameron placed great value on both the process and outcome of reaching consensus with colleagues on the bench, and many of his most celebrated judgments are majority or unanimous decisions of the court. He also recognised that choosing to remain silent can be just as important in some cases as speaking out to voice disagreement.

Why then focus on his dissents? One reason we think it is justified is because his judicial character was not formed as one of deference but rather of principled defiance. As we will seek to show, his moral compass in law – his scepticism of power and his concern for the weak – was forged and developed in an increasing awareness of the evils of apartheid and a commitment to expose its 'nude' legal monarchy.[3] Early in his career, he left his mark as one of those 'outspoken academic commentators [who] tore to shreds the garb of legalism behind which the apartheid judges sought to shield' their moral complicity in the injustices that were meted out through the 'savage efficiency' of the law.[4] Joining the ranks of the judiciary made him no less vocal in his insistence that judges have 'an explicitly value-laden and moral role to play in adjudication'.[5] He recognised that there was no room for complacency under our transformative Constitution, which expressly requires judges to remain vigilant about the normative assumptions and entrenched inequalities of the status quo.[6] His jurisprudence reflects a bold yet humble embrace

2 A phrase said to have been used first to describe Justice John Marshall Harlan due to his numerous dissents in a series of civil rights cases, including *Plessy v Ferguson* 163 US 537 (1896), in which his views were ultimately vindicated by the US Supreme Court more than half a century later.

3 E Cameron 'Nude monarchy: The case of South Africa's judges' (1987) 3 *South African Journal on Human Rights* 338 at 346.

4 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 at 82.

5 E Cameron 'Dugard's moral critique of apartheid judges: Lessons for today' (2010) 26 South *African Journal on Human Rights* 310 at 316.

6 Section 39(1) and (2) of the Constitution of the Republic of South Africa,1996.

of this responsibility, mindful of the risk of 'judicial complicity in institutional and systemic dysfunction that impedes our attainment of shared constitutional goals and aspirations'.[7]

Another reason is that Cameron's suspicion of power emerges as a key fault line for disagreement with his judicial colleagues. A number of his dissents insist on a more searching questioning of government action (or inaction) than his colleagues considered necessary or appropriate in the circumstances. Yet his dissents do not merely illustrate his judicial agenda at work in particular cases: they exemplify his sceptical scrutiny of power. This is because they contribute to a practice of judicial dissent which fosters the conditions that are vital for the sceptical scrutiny of power in a constitutional democracy, namely judicial independence and accountability.

A couple of observations on approach are useful for contextualising the contribution we seek to make to this *Festschrift*. First, we draw inspiration from Cameron's own extra-curial writing to shed light on his approach to judicial dissent. There is a vast and appropriately unruly literature on dissents. It is as a topic of perennial interest to both academics and judges, not least because it defies any neat, unifying theory. A decision to dissent can be peculiarly personal,[8] sometimes offering unique insight into a dissenter's judicial philosophy,[9] but it is also inextricably linked to the particular context of adjudication. While mindful of these complexities, we take our cue from Cameron's own writing to guide our exploration. In doing so, we do not attempt to find a general explanation or justification for judicial dissent, but rather seek to explore how it served as a vehicle for Cameron's judicial philosophy. We consider this a fitting way to celebrate the significant contribution he has made through his academic writing, books and speeches in addition to his jurisprudence from 25 years on the bench.

Second, we focus on a selection of Cameron's judgments rather than attempting a comprehensive or systematic review of his dissents.

---

7 *Mwelase v Director-General for the Department of Rural Development and Land Reform* [2019] ZACC 30 (*Mwelase*) para 70.

8 See 'From consensus to collegiality: The origins of the "respectful" dissent' (2011) 124 *Harvard Law Review* 1305 at 1305 fn 4: 'The first person singular is a relative rarity in judicial opinions, yet it is commonplace in dissenting speech acts. Significantly, Justices do not abandon the first person singular when other Justices join their dissent.'

9 W Brennan 'In defence of dissents' (1985) 37 *Hastings Law Journal* 427 at 428.

Although Cameron was not a prolific dissenter, his approach could be assessed from many different perspectives. Our selection of cases tracks one fault line for disagreement, in order to highlight his contribution to fostering a judicial culture that embraces a healthy scepticism of power and the protection of the weak in a constitutional democracy. In particular, we have chosen cases that illustrate not just a scepticism of executive power, but also of judicial power itself.

We begin in part 2 by drawing out two central themes from Cameron's extra-curial work, particularly his early academic writing, that shed light on his judicial agenda. These threads help us understand not only the source of Cameron's scepticism of power, but also the particular value he places on judicial independence and judicial accountability for enabling the scrutiny of power. Part 3 then turns to consider how the practice of judicial dissent helps foster the conditions for a healthy scepticism of power in a constitutional democracy. Part 4 brings these insights to bear on an exploration of Cameron's dissenting voice in several cases: the *Glenister* decisions,[10] *M&G Media Ltd*,[11] and the line of cases on Afrikaans language beginning with *AfriForum*.[12] In doing so, we observe that what is significant about a number of these dissents is not simply their prescience, but that this prescience was the result of a principled scepticism of power.

2 Early scrutiny by 'this lesser known officer of the court'

Cameron's judicial agenda – to be sceptical of power and to protect the weak – may have been articulated with greater candour towards the end of his tenure on the bench, but these values have long served as his moral compass. Indeed, those attentive to footnotes in Cameron's work will recognise that these twin values may have been nurtured during his early days as a classics student, given the formulation of his judicial manifesto

10 *Glenister v President of the Republic of South Africa* [2011] ZACC 6 (*Glenister II*); *Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa* [2014] ZACC 32 (*Glenister III*).

11 *President of the Republic of South Africa v M&G Media Ltd* [2011] ZACC 32 (*M&G Media Ltd*).

12 *City of Tshwane Metropolitan Municipality v AfriForum* [2016] ZACC 19 (*AfriForum*); *AfriForum v University of the Free State* [2017] ZACC 48 (*UFS*); *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch* [2019] ZACC 38 (*Gelyke Kanse*).

echoes Virgil's *Aeneid*.[13] In this part, we scrutinise Cameron's extra-curial work to trace the origins of his principled scepticism of power. In particular, we draw out two prominent themes from his early writing and experience which help us understand how his judicial agenda has been shaped: (1) the importance of judicial independence and judicial accountability; and (2) the inescapability of moral choice in adjudication and the concomitant moral responsibility to use judicial power as a tool to address injustice and protect the weak.

2.1 Judicial independence and judicial accountability

After his legal studies, Cameron lost no time in turning his critical attention to the state of the South African judiciary. In a series of articles published in the 1980s, Cameron advanced blistering attacks against the executive-minded judges who propped up the apartheid regime. He started at the top, causing a stir with his meticulous but forthright critique of the former Chief Justice, LC Steyn.[14] Daring to question the Chief Justice's dissembling fidelity to the rule of law, Cameron exposed LC Steyn's 'legal chauvinism' and pliancy in shaping legal doctrine to the apartheid agenda of the executive. In many ways, this article set both the tone and topic for the articles that followed. Time and time again, Cameron boldly called out the hypocrisy of a judiciary that claimed to be independent while presiding over the enforcement of an oppressive legal system.

Cameron did not hesitate to take individual judges to task for their part in entrenching executive dogma. In 'Outside funds and judicial rhetoric', he criticised two appellate judges of the Northern Cape Division of the Supreme Court for implying that the accused's legal representatives in *S v Mothlhabakwe*[15] were running a sinister, foreign-funded defence strategy aimed at discrediting institutional authority.[16] In

13 See Cameron 'Judges, justice and public power' (n 4) 95 fn 133, referencing the famous passage in which the grand vision of Roman greatness ends with the cautious reminder, *parcere subiectis, et debellare superbos* (Virgil *Aeneid* VI.853), which Cameron renders as 'to protect the poor and the dispossessed, and to approach those exercising power with wariness'.

14 E Cameron 'Legal chauvinism, executive-mindedness and justice – LC Steyn's impact on South African law' (1982) 99 *South African Law Journal* 38.

15 1985 (3) SA 188 (NC).

16 E Cameron 'Outside funds and judicial rhetoric' (1986) *South African Journal on Human Rights* 330 at 332.

doing so, he argued that Jacobs JP and Rees AJ had fed the 'exaggerated phobia of "outside influence" and militant hostility towards black claims for justice which infuses so much of the white political spectrum'.[17] Cameron acknowledged that judges, operating as part of existing institutions of authority, will invariably be seen as 'aligned with one side in the developing conflict' but insisted that they should 'maintain such autonomy and independence as their inevitable participation in the system permits'.[18] He rightly characterised the judicial rhetoric in *Mothlhabakwe* as 'a disturbing pointer to the real political disposition of some judicial officers' and 'a disquieting mark against the future'.[19]

Steyn J[20] was singled out for his 'judicial endorsement of apartheid propaganda'[21] in *Bloem v State President of the Republic of South Africa*[22] after he offered a 'politically partisan, one-sided and emotive exposition' of the state of emergency declared on 12 June 1986. Following a critical strategy that has more recently been used to great effect in the Feminist Judgments Project,[23] Cameron wrote an alternative preface to the judgment that turned Steyn J's partisan framing on its head. He pointed out how this alternative version would have drawn angry allegations of an emotive, 'unjudicial endorsement of one side of a conflict', yet the partisan commentary actually advanced by Steyn J 'provoked no storm of controversy and resentment'.[24] Tellingly, Steyn J felt he could 'take judicial notice' of the causes of and necessity for the state of emergency, and proceeded with 'an uncompromising endorsement of the official version' that was 'pregnant with the phrases of government policy, official pretexts and authoritarian excuses'.[25] By this time, in 1987, Cameron feared that the Bloem court's unreflective parroting of the prejudices of those in power 'may be symptomatic of a pathology which is already too deep-rooted to eradicate'.[26]

17 Cameron 'Outside funds and judicial rhetoric' (n 16) 333.
18 Cameron 'Outside funds and judicial rhetoric' (n 16) 332.
19 Cameron 'Outside funds and judicial rhetoric' (n 16) 333.
20 MT Steyn here is not to be confused with the Chief Justice, LC Steyn.
21 E Cameron 'Judicial endorsement of apartheid propaganda: An enquiry into an acute case' (1987) *South African Journal on Human Rights* 223.
22 1986 (4) SA 1064 (O).
23 R Hunter, C McGlynn & E Rackley (eds) *Feminist judgments: From theory to practice* (2010).
24 Cameron 'Judicial endorsement of apartheid propaganda' (n 21) 224.
25 Cameron 'Judicial endorsement of apartheid propaganda' (n 21) 225.
26 Cameron 'Judicial endorsement of apartheid propaganda' (n 21) 228.

And indeed, in a lecture delivered that same year, Cameron branded South Africa's judges a 'nude monarchy' in a brilliant exposé of their threadbare independence:

> The time is past when the public in South Africa should, like the emperor's loyal citizens in Andersen's tale, resolutely tell themselves that all their judges are clothed when some of them are not. When a judge lays aside his judicial garb of dispassion and enters the arena of pro-government propaganda, his fitness for continued occupation of judicial office must become a legitimate subject of public debate.[27]

Cameron again pointed out particular judges who had 'exposed themselves as naked supporters of the present regime'.[28] This included Steyn J's partisan endorsement of the state of emergency in *Bloem*, Munnik J's deeply compromised role as the puppet head of the presidential commission of inquiry into the funding of an advertisement urging the government to legalise the outlawed African National Congress (ANC), and Rabie ACJ's prolonged incumbency as an 'Emergency Chief Justice' without any attempt by the government to appoint a permanent successor to the office of Chief Justice.[29]

Yet Cameron's concern was that these particular judges were not simply bad apples in an otherwise independent and accountable judiciary. Rather, their partisan rhetoric and conduct reflected a judicial culture that had fallen under the sway of executive influence. Instead of holding the executive to account, the judiciary was lending the legitimacy of the law to apartheid policy. The point of Cameron's article was to call out – like the child in Anderson's tale who broke the silence of the crowd – the hypocrisy of an executive-minded judiciary parading as an independent check on the government.

While Cameron's critique of apartheid judges certainly made its mark in the academic community,[30] his target audience was far broader. His 'Nude monarchy' lecture was not only published in the *South African Journal on Human Rights*, but also in the *Sunday Star*. It was likely this wider circulation that prompted the then Minister of Justice, Kobie

27 Cameron 'Nude monarchy' (n 3) 346.
28 Cameron 'Nude monarchy' (n 3) 340.
29 Cameron 'Nude monarchy' (n 3) 340-346.
30 See, for example, Professor AS Strauss' defensive letter to the editor in 'Correspondence' (1988) 4 *South African Journal on Human Rights* 243, taking issue with Cameron's 'fierce attack' on Steyn J's judgment in *Bloem*.

Coetsee, to issue a press statement condemning this 'lesser known officer of the court who it appears derives some sort of misguided pleasure in denigrating great chief justices'.[31] As his advocacy around the Sharpeville Six[32] illustrates, Cameron could communicate his critical insights as effectively in the popular press[33] as in his academic writing.[34] His interventions in that case met with a backlash from the judiciary, including prompting Chief Justice Rabie to initiate a complaint against Cameron before the Johannesburg Bar Council.[35] More significantly, however, it fuelled the domestic debate and international protests that ultimately stayed the hangings. As Cameron later reflected, the international outcry saved not only the lives of the Sharpeville Six but also 'the South African judiciary from the irremediable ignominy that the deaths of the Six would surely have earned it'.[36]

Cameron undoubtedly intended to provoke a response with his casting of the judiciary as a 'nude monarchy'. However, this was not simply to shock or fuel controversy, but to prompt scrutiny of judicial power. He recognised that public debate – even in the form of heated and noisy disagreement – was essential for holding the judiciary to account. With judicial independence lacking, he insisted that 'the public cannot and should not be hushed' because '[w]ithout our insistence on proper public standards of judicial accountability we stand in danger of losing the institution itself'.[37] Cameron was troubled by a judiciary that not only lacked the necessary independence to hold the government to account, but was itself becoming increasingly unaccountable. Put differently, his concern was not just the nakedness of the judges, but the complicity of a silent crowd.

These twin concerns of judicial independence and judicial accountability feature prominently in Cameron's contributions to debates around South Africa's transition to democracy, and they underpin

31 'Response of the Minister of Justice, Mr Kobie Coetsee, to Mr Edwin Cameron' (1988) 4 *South African Journal on Human Rights* 94.
32 *S v Safatsa* 1988 (1) SA 868 (A).
33 See eg E Cameron 'Verdict that puts our legal system on trial' *Sunday Times* (21 February 1988).
34 E Cameron 'Inferential reasoning and extenuation in the case of the Sharpeville six' (1988) 1 *South African Journal of Criminal Justice* 243.
35 E Cameron *Witness to AIDS* (2005) 26.
36 Cameron *Witness to AIDS* (n 35) 28.
37 Cameron 'Nude monarchy' (n 3) 346.

his subsequent agenda as a judge. He recognised that the problem of judicial accountability would persist in our constitutional democracy, even if it took on a more conventional form: the conundrum of ensuring that judges are answerable for their exercise of power while remaining substantively and formally autonomous from even a democratically elected government.[38] This tension is reflected in Cameron's judicial agenda: the sceptical scrutiny of power not only requires that judges are independent in order to hold the executive to account, but also that the exercise of judicial power itself is subject to rigorous scrutiny.

2.2 Moral choice and moral responsibility

What is so compelling about Cameron's critique of executive-minded judges is that he exposed the legal artifice used to prop up apartheid policy as being both intellectually unsustainable and morally indefensible. He did not simply dismiss judgments out of hand for their partisanship, but showed how they also came up short on their own terms. His analysis of *S v Safatsa*, for example, gives close attention to the evidence and legal reasoning advanced for the convictions of the Sharpeville Six, carefully tracing the missteps in law and logic that led to an unjust outcome.[39] Yet Cameron's case commentaries are doubly devastating because they generate both heat and light: their intellectual clarity is charged with moral outrage at the complicity of the judges. Indeed, as he concluded in his critique of the *Bloem* case, there is a 'necessity for outrage' when judicial power is abused to entrench rather than scrutinise the prejudices of those in power.[40]

This points to a second theme in Cameron's extra-curial writing that helps us understand his judicial agenda: the inescapability of moral choice and moral responsibility in adjudication. As several dissenting academic voices had done before him, Cameron dismantled the intellectual scaffolding of legalism that judges used to build up the legitimacy of apartheid and, crucially, to disclaim their own part in its

38 E Cameron 'Judicial accountability in South Africa' (1990) 6 *South African Journal on Human Rights* 251.
39 E Cameron 'Inferential reasoning' (n 34). See also E Cameron 'When judges fail justice' (2004) 121 *South African Law Journal* 580.
40 Cameron 'Judicial endorsement of apartheid propaganda' (n 21) 228.

injustices.[41] Rejecting the notion that values can be stripped from the law, he argued that

> substantive political and moral values have an inevitable and important part in adjudication, and that the judge's own conceptions thus necessarily influence the outcome of a case. This considerably complicates the process of rendering the judiciary accountable. By denying that value choices are unavoidably made in litigation, particularly litigation involving executive powers affecting basic liberties, conservative judges can evade responsibility for reactionary or executive-minded decisions by claiming that 'the law' left them no choice.[42]

The necessity for outrage arises as a rebuttal of legalism and an insistence that judges bear responsibility for the moral choices implicit in adjudication. It also explains why Cameron made a point of naming and holding individual judges to account for their executive-minded decisions, even though he recognised that ultimately all lawyers and judges who participated in the apartheid system bore moral responsibility for its injustices.[43]

Cameron called attention not only to the inevitability of moral choice in judging, but also to the importance of transparent contestation about values. After all, in criticising judgments like *Bloem*, Cameron's real objection was not the conspicuousness of judicial partisanship but the pretence of neutrality. He argued that judicial candour would allow scrutiny of the moral choices being made by judges:

> Frank statements of political disposition enhance a proper understanding of how judicial power is regarded by those who wield it and elucidate the extent to which covert sympathies may affect judicial inclination or disinclination to intervene where injustice presents itself.[44]

Here again we see the importance of scrutiny for judicial accountability – in this context, for the moral responsibility that judges bear for how

41 See Cameron 'Judges, justice and public power' (n 4) 80: 'I take legalism in its essence to be the attempt ... to eschew moral value in judging – and, with it, the absolution that choiceless, valueless judging seems to bring'.

42 Cameron 'Judicial accountability in South Africa' (n 38) 258.

43 See his personal submission to the Truth and Reconciliation Commission, published as E Cameron 'Submission on the role of the judiciary under apartheid' (1998) 115 *South African Law Journal* 436 at 437-438 (and quoted in relevant part in vol 4 of the TRC's final report); also E Cameron *Justice: A personal account* (2014) 60.

44 Cameron 'Judicial endorsement of apartheid propaganda' (n 21) 227.

they choose to exercise their judicial power, and whether they do so in protection of the weak.

3 Judicial dissent as a vehicle for scrutinising power

Our exploration of Cameron's extra-curial writing has sought to show how his agenda as a judge has been shaped in no small part by his early experience of executive-minded judges who sought to shirk moral responsibility for their complicity in apartheid's injustices. We lifted out key themes that underpin his commitment to scrutinising power: the importance of judicial independence and judicial accountability, and the inevitability of moral choice and moral responsibility in adjudication. We now turn to consider how judicial dissent can help foster the conditions for a healthy scepticism of power in a constitutional democracy. We highlight three of these virtues: first, dissent acts as a safeguard for judicial independence; second, it promotes judicial accountability through reason-giving; and third, it models reasoned and transparent disagreement in a constitutional democracy.

A couple of caveats. First, in making these observations, we are concerned with the general practice of judicial dissent – that is, the established procedure by which judges are allowed to write separately to disagree with the reasoning or result of the majority. We do not suggest that every dissenting opinion will necessarily espouse any or all of these virtues. Indeed, there is no shortage of ill-considered dissents to cast doubt on the universality of dissent's virtues, to say nothing of its potential vices. Our claim here is accordingly a modest one about the benefits to be gained from a system of adjudication that accommodates dissenting judgments, rather than a claim that more dissenting is always better. Second, our primary focus is on the *publication* of dissenting judgments, rather than dissent which remains internal to a court's deliberations. There are, of course, other ways that the virtues we identify can be promoted through the judicial process. Many of these dynamics go unseen by the public, including where a draft dissenting judgment has been prepared but the dissentient ultimately relents after being persuaded to vote with the majority or, conversely, where a draft dissent persuades the majority to change its course and its publication

becomes superfluous.[45] However, the virtues we identify here are most clearly evidenced through a practice in which disagreement is publicly revealed, not only as a minority vote but through the publication of a reasoned dissenting judgment. Given this focus on dissent as public, reasoned disagreement rather than the outcome of a numerical contest, we include in our treatment of dissents those judgments which were written to disagree with an initial majority opinion but which ultimately won majority (but not unanimous) support.

3.1 Dissent as a safeguard of judicial independence

In considering how the practice of dissent operates as a safeguard of judicial independence, it is useful to recall its historical roots in the common-law tradition. Stretching back almost a thousand years in England,[46] decisions by multi-member courts were made through speeches delivered by each judge *seriatim* (separately) which, taken together, revealed the court's position on a matter.[47] In delivering their decision orally one after each other, it was quite literally impossible for the judges to speak 'with one voice', even if they all agreed with a particular outcome. This process not only accommodated difference and divergence; dissent was inevitable because speeches were delivered without prior deliberation among the judges.[48] The court's judgment did not yield a binary win-lose result, but rather a collection of 'for' and 'against' arguments that needed to be assessed in order to determine the majority view.[49]

This early practice of delivering judgments *seriatim* may not have been conducive to certainty in the law, but it arguably embedded a strong expectation of individual independence in judicial procedure. English reforms in the eighteenth century to shift from separate speeches to a

45 For a rare public insight into these dynamics in particular cases decided by the US Supreme Court, see A Bickel *The unpublished opinions of Mr Justice Brandeis* (1957).

46 It should be noted, however, that dissent was not always valued, or indeed permitted, in England. Up until the early Middle Ages, it was a serious form of judicial misconduct to render a decision in contradiction with the received law. See MH Hoeflich 'Regulation of judicial misconduct from late antiquity to the early middle ages' (1984) 2 *Law and History Review* 79 at 94-95.

47 MT Henderson 'From *seriatim* to consensus and back again: A theory of dissent' John M Olin Law & Economics Working Paper No 363 (2nd series, 2007) at 8.

48 Henderson (n 47) 8; J Alder 'Dissents in courts of last resort: Tragic choices?' (2000) 20 *Oxford Journal of Legal Studies* 221 at 233.

49 Henderson (n 47) 13.

single opinion of the court were short-lived,[50] although the innovation caught on in the United States.[51] American convention has since settled at a 'curious fulcrum' between the English *seriatim* convention and the civilian tradition of delivering a collective decision *per curiam*.[52] Described as a 'middle way' by Justice Ruth Bader Ginsburg,[53] this approach strives for a single opinion of the court, but individual judges sign on personally and may author a separate concurrence or dissent.

The differences between civilian and common-law conventions should not be overdrawn, as there has been an increasing convergence of the two systems in recent practice.[54] This includes a significant shift towards single and co-authored judgments in England and Wales.[55] The *seriatim* tradition waned in the latter part of the twentieth century, particularly with the recognition that certain areas of the law such as

50 When Lord Mansfield became Lord Chief Justice of the King's Bench in 1756, he implemented a new procedure for decision making that was aimed at generating consensus among judges and bringing much-needed clarity to the law. For the first time, the judges deliberated together in the secrecy of their chambers, working through their disagreements to produce a compromise decision which would be delivered as a unanimous and anonymous 'opinion of the court'. However, while Lord Mansfield's broader legal reforms had a lasting impact on commercial practice and precedent in England and Wales, the innovation of issuing a single opinion was discarded at the end of his tenure and the *seriatim* procedure resumed. See further Henderson (n 47) 9-15.

51 However, the *seriatim* tradition did not escape criticism. One cynic was Thomas Jefferson, who described an 'opinion of the court' as being 'huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his own mind, by the turn of his own reasoning': see 'Letter from Thomas Jefferson to Thomas Ritchie (25 December 1820)' in PL Ford (ed) *The writings of Thomas Jefferson* (1899) 171; see further Henderson (n 47) 16-18.

52 AJ Jacobson 'Publishing dissent' (2005) 62 *Washington and Lee Law Review* 1607 at 1609.

53 RB Ginsburg 'Remarks on writing separately' (1990) 65 *Washington Law Review* 133 at 134.

54 At the regional level, for example, the European Court of Human Rights and the International Court of Justice accommodate dissents, while the European Court of Justice does not. At a domestic level, the practice of civil law jurisdictions is varied. Although the publication of dissenting judgments is now fairly widespread, it remains irregular in judicial cultures influenced by French law where the convention of a single anonymous judgment is observed, while at the other extreme one can point to outliers like the Brazilian Supreme Court which follows the *seriatim* tradition. See Alder (n 48) 234-237; VA da Silva 'Deciding without deliberating' (2013) 11 *International Journal of Constitutional Law* 557.

55 See M Arden 'A matter of style' in her *Common Law and Modern Society: Keeping Pace with Change* (2015); M Andenas & D Fairgrieve 'Simply a matter of style? Comparing judicial decisions' (2014) 25 *European Business Law Review* 361.

statutory interpretation and criminal cases[56] may benefit from the clarity and certainty of a single composite speech.[57] The establishment of the UK Supreme Court in 2009 has been accompanied by an increase in single and co-authored judgments on the apex court, even though separate concurring and dissenting judgments remain a familiar feature.[58] The result is that, much like the South African Constitutional Court, judicial decisions can be expressed in different registers, ranging from *seriatim* judgments to a unanimous but anonymised 'judgment of the court'.[59]

These historical developments highlight the individual independence and personal authorship at the heart of the *seriatim* tradition and its continuities with the modern practice of judicial dissent. Flowing as it does from the court's inherent power to regulate its own processes, the practice of dissent embeds independent-mindedness as a norm to be cultivated in adjudication. A split on the court prompts each judge to apply their mind to the opposing arguments before independently deciding which one will receive their concurrence. Thus, irrespective of which judgment one considers to be 'right' (in so far as the law admits of such answers), the accommodation of diverging views should be valued as evidence, even if not proof, of judicial independence. As Justice Zak Yacoob has remarked in the South African context, dissent is 'not something to bemoan', for it would be

56 As suggested by Lord Griffiths in *R v Howe* [1987] AC 417. In the Criminal Division of the Court of Appeal, concurring and dissenting judgments are conventionally excluded: see Lord Neuberger 'No judgment – No justice' BAILII Lecture (20 November 2012) para 26.

57 Lord Kerr 'Dissenting judgments: Self-indulgence or self-sacrifice?' Birkenhead Lecture (8 October 2012) 10.

58 Lord Reed 'The Supreme Court ten years on' (Bentham Association Lecture, University College London, 2019).

59 See eg *R (Miller) v Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41, where the unanimous 'judgment of the court' was co-written by Lady Hale and Lord Reed and delivered by the President herself. In the South African context, compare *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZAC 15, where the unanimous judgment delivered in the name of 'the Court' gave an unequivocal message of what justice demands in the face of a catastrophic political climate of AIDS denialism; and *S v Makwanyane* [1995] ZACC 3, where each judge of the Constitutional Court wrote individually to give their reasons for striking down the death penalty. As Cameron observed in his interview for the Constitutional Court's oral history project, it was a 'very, very clever decision by the Court' to 'let each judge speak individually' so that there were 'eleven different voices each saying in their own way' why the death penalty was unconstitutional: 'Interview with Edwin Cameron' Constitutional Court Oral History Project (16 January 2012) 26-27.

> perturb[ing] indeed if eleven judges of the Constitutional Court agreed with each other judgment after judgment, year after year. This would be an indication of a judiciary that is not sufficiently representative, and lacking the strength required for true independence and impartiality.[60]

Judicial dissent is no guarantee of independence and impartiality, but the opportunity to dissent acts as an important safety valve in deliberative decision making. This is because a dissent manifests disagreement which is only possible where judges are free to make up their own minds. Putting the point more strongly: the judicial oath to apply the law 'impartially and without fear, favour or prejudice' arguably *requires* that judges be allowed to dissent. This is not to ignore the value of reaching consensus, but rather to underscore the close link between a judge's freedom to dissent and their duty to apply the law impartially as a member of an independent judiciary.

3.2 Dissent as the logical culmination of the duty to give reasons

The practice of dissent is not only a vital safeguard for judicial independence, but also a stimulus for reason-giving as a form of judicial accountability. The duty to give reasons for judicial decisions is widely recognised in common-law jurisdictions.[61] Indeed, judicial decisions without reasons are 'scarcely decisions at all',[62] reflected in the fact that a failure to furnish reasons may in itself be grounds for review. In South Africa, there is no express constitutional requirement that judges provide reasons for their decisions, but it is readily accepted to be the ordinary way that judges account for their exercise of public power as a rule-of-law imperative.[63] The publication of reasons also promotes open justice by enabling the public to scrutinise how the court reached its decision.

60 Z Yacoob 'A dynamic Constitution' (opening remarks at Constitution Week, University of Cape Town, 12 March 2012).

61 Current debates grapple with the scope and implications of the duty, rather than its existence *per se*: see generally P Craig *Administrative Law* (2016) 369-376; HL Ho 'The judicial duty to give reasons' (2000) 20 *Legal Studies* 42; J Bosland & J Gill 'The principle of open justice and the judicial duty to give public reasons' (2014) 38 *Melbourne University Law Review* 482.

62 Neuberger (n 56) para 2.

63 *Mphahlele v First National Bank of South Africa* [1999] ZACC 1 para 12 (per Goldstone J). This case is a good example of contestation around the proper scope of application of the duty to give reasons: while affirming the general duty, the Constitutional Court found it is adequate for a court of last resort to dismiss an

Notwithstanding their role as a 'forum for reason',[64] multi-judge courts ultimately make collective decisions by aggregating votes or 'counting heads'. For better or worse, even a bare majority prevails, no matter how vehement or compelling the opposing views.[65] Within this stark statistical reality, the practice of dissent serves as a reminder that the judicial decision-making process in fact combines aggregation and deliberation, since voting is informed by prior deliberation.[66] The reasons supporting the majority view are accordingly only a partial reflection of the court's decision-making process. Publishing the dissenting judgments ensures that minority votes are not merely registered, but that the underlying disagreement is reasoned and accessible to the public. In this way, the transparency of dissent is a counterbalance to the secrecy of internal deliberations, and represents a fuller discharge of the judicial duty to give reasons for decisions.

Far from being 'embarrassing' as a deliberative failure to reach consensus,[67] the publication of dissenting judgments bears out the rigour of the deliberative process by which decisions are reached.[68] The deliberative process is consensus-oriented, of course, but agreement is reached on the basis of reasons given within the collegiate body.[69] The practice of dissent heightens accountability for reason-giving during this process: each judge is not only entitled to give their own view as a matter of judicial independence, they are *required* to give it and support it with reasons.[70] In this context, dissent cultivates reasons-responsiveness by inviting scrutiny and refutation from others. This is likely to improve the quality of the court's reasoning overall, as distinctions are sharpened and arguments refined in the course of articulating disagreement. As Hersch Lauterpacht put it, the possibility of dissent acts as a 'powerful stimulus

application for leave to appeal by way of a short recital indicating that there are no prospects of a different order being granted on appeal.

64 K O'Regan 'A forum for reason: Reflections on the role and work of the Constitutional Court' (2012) 28 *South African Journal on Human Rights* 116.

65 For a provocative critique of majority decision making, see J Waldron 'Five to four: Why do bare majorities rule on courts?' (2014) 123 *Yale Law Journal* 1692.

66 Da Silva (n 54) 565.

67 Waldron 'Five to four' (n 65) 1729.

68 H Botha 'Judicial dissent and democratic deliberation' (2001) 15 *SA Public Law* 321.

69 Da Silva (n 54) 577.

70 Lord Kerr attributes the relatively low dissent rate on the UK Supreme Court to the discipline of holding deliberations directly after a hearing: see Kerr (n 57) 20.

to the maximum effort of which a tribunal is capable'.[71] In this sense, the practice of dissent makes a valuable contribution to the deliberative process as a form of judicial self-regulation.

Deliberation may ultimately yield consensus if the dissentient is won over by the strength of the opposing argument. If not, the interaction teases out the sticking points in debate and the basis for dissent should be clearer. Seen in this way, a decision to dissent is the logical culmination of the duty to give reasons. As Lord Kerr explains, what should impel a judge to dissent is a 'conviction that the majority has simply got it wrong or, and this is not necessarily the same thing, that what he is convinced should be the outcome of the case is right'.[72] At its heart, a dissent registers scepticism of the majority view, providing a reasoned judgment as to why these doubts could not be dispelled despite the certainty of the majority.[73] These doubts may prove to be well founded, but the prospect of ultimate vindication – 'an appeal to the brooding spirit of the law, to the intelligence of a future day'[74] – is not what should motivate a dissent. As Lord Kerr suggests, the reality is usually far more prosaic, and the future far more fickle, than such high-flown characterisations of dissent would have us believe.[75] Put most simply, a dissent is reasoned disagreement with the majority view. This may sometimes require fierce independent-mindedness and self-sacrifice to go against the majority but, to borrow Cameron's words, judges must speak out with both 'courage and reason'.[76]

Even if we accept that dissent promotes reason-giving during internal deliberations, it may appear counterintuitive to allow publication of an opinion which then casts doubt on the outcome of those deliberations. After all, the majority view is the authoritative pronouncement of what the law is, and the existence of dissent does not detract from that finality. A dissent in a court of last resort is therefore not only futile, so the argument goes, but also harmful as it creates uncertainty in the law and undermines the authority of the majority opinion. In South Africa,

71 H Lauterpacht *The development of the law by the International Court of Justice* (1958), quoted in Alder (n 48) 240.
72 Kerr (n 57) 16.
73 Kerr (n 57) 8-9, 16.
74 This is Chief Justice Stone's famous description of dissent in a 1928 letter to Columbia University, quoted in Kerr (n 57) 7.
75 Kerr (n 57) 7-8, 14-15.
76 Cameron 'Dugard's moral critique of apartheid judges' (n 5) 318.

one of the most vocal proponents of this view has been former President Jacob Zuma. In February 2012, shortly after the Constitutional Court's split decision in *Glenister II*,[77] the then President posed the question:

> How could you say that judgment is absolutely correct when the judges themselves have different views about it? ... There are dissenting judgments. You will find that the dissenting one has more logic than the one that enjoyed the majority. What do you do in that case?[78]

More recently, he relied on a dissenting judgment of the Constitutional Court to challenge the constitutionality of the majority judgment, thereby calling into question the authority and finality of the court's decision.[79]

It is true that there is an important distinction between the reasons a judge may have for dissenting and the question whether the publication of a dissenting judgment is justified in the circumstances.[80] There is also much to be said for judicial restraint in cases where there is special significance in unanimity on an issue. But judiciously holding one's tongue in a particular case is quite a different thing from enforced silence. For starters, disagreement does not disappear in the absence of a published dissent. Nor does unanimity provide assurance that a judgment is 'absolutely correct', even if we assume such certainty is attainable. The question to be asked is accordingly whether disagreement should be made transparent rather than suppressed.

Far from invariably weakening the authority of the majority, transparent disagreement can foster public confidence in the court's decision. First, it is the prospect of a published dissent that incentivises the majority to have not only the winning argument, but also the

77 *Glenister II* (n 10), to be discussed later.

78 'Interview with Jacob Zuma' *The Star* (February 2012). See further P de Vos 'An unambiguous attack on constitutional democracy' *Constitutionally Speaking* (14 February 2012); C Hoexter 'The importance of dissent: Two judgments in administrative law' (2015) *Acta Juridica* 120 at 121; D Bilchitz 'Humility, dissent and community: Exploring Chief Justice Langa's political and judicial philosophy' (2015) *Acta Juridica* 88 at 93-94.

79 See *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* [2021] ZACC 28 and the split decision which preceded it in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State v Zuma* [2021] ZACC 18.

80 Kerr (n 57) 8-9.

strongest argument.[81] In this way, the practice of dissent can strengthen the majority position by inviting refutation of opposing arguments and showing the cogency of the reasoning that ultimately prevailed. Second, a split decision can be conducive to clarity in the law, because attention is drawn to the nuances on which disagreement turns. Reasons can often be understood better when they are placed alongside, and engage with, contrary lines of argument. Thus if we accept that the quality of the court's reasoning is one source of its legitimacy,[82] then the clarity and cogency to be gained through the practice of dissent may enhance, rather than undermine, public confidence in the court's decision.

3.3 Dissent as a model of reasoned disagreement in a democracy

So far we have drawn out how the practice of dissent safeguards judicial independence and promotes judicial accountability – essential conditions to enable courts to scrutinise power in a constitutional democracy. But the practice of dissent also helps foster a broader legal and political culture that respects – and demands – an independent and accountable judiciary that engages in transparent and reasoned disagreement. Recall in this regard that Cameron's concern in 'Nude Monarchy' was not only the nakedness of the judges, but also the complicity of the silent crowd.[83] In his retelling of the classic tale of the emperor without clothes, former Chief Justice Pius Langa draws out its lessons for the value of dissent in a democracy.[84] On the one hand, he observes that courageous dissenting voices are needed to challenge leaders who ignore their obligations and want to hear only praise, not criticism.[85] On the other hand, he uses the story to warn 'the rest of us' against 'a susceptibility to conform, to submit to peer pressure, to populism, to political correctness, and to a reluctance to think for oneself'.[86] The former Chief Justice's lessons speak powerfully of the necessity of dissent for cultivating a democratic culture in which leaders are scrutinised, minority views are heard, and criticism is voiced openly.

81 Da Silva (n 54) 583.
82 Da Silva (n 54) 559.
83 Cameron 'Nude monarchy' (n 3) 346.
84 P Langa 'The emperor's new clothes: Bram Fischer and the need for dissent' (2007) 23 *South African Journal on Human Rights* 362. See further Bilchitz (n 78) 95-96.
85 Langa (n 84) 364.
86 Langa (n 84) 364.

The practice of judicial dissent affirms the value of critical challenge to majority opinion and demonstrates what independent-minded and reasoned disagreement looks like in a democracy. In a very concrete way, it contributes to what Etienne Mureinik famously described as a shift away from apartheid's 'culture of authority' to a new constitutional order based on a 'culture of justification' in which 'every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command'.[87] This extends to the exercise of judicial power, and we have already drawn attention to how the practice of dissent reinforces the judicial duty to give reasons in justification of decisions made. But judicial dissent also holds broader value as it models a form of critical contestation and reasoned disagreement that can inspire our democratic practice of dissent.

This is particularly valuable at a time when democracy is under strain and political discourse is increasingly polarised, with little fidelity to fact or reason. As Cameron observed in 2010, 'unfortunately reason and truthfulness appear to be getting a hard time in our country at present'.[88] In this, South Africa is by no means alone. Writing in the American context, Jeremy Waldron has warned that truth is increasingly being treated as personal 'opinion' or, worse, something one simply 'holds, asserts and disseminates for political advantage'.[89] In contrast to this kind of cheap trade in the truth – what he describes as 'damned lies' that are a 'libel on democracy'[90] – Waldron points to particular contexts that place special importance on truth-telling. In courts, for example, a heightened commitment to veracity is signalled through formal markers such as the oath or affirmation taken by witnesses,[91] the ethical duties that lawyers bear as officers of the court, and the judicial oath taken by presiding officers. In Cameron's own extra-curial writing, there is a strong insistence on the importance of 'truthful' and 'honest' judges.[92]

87 E Mureinik 'A bridge to where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31 at 32.
88 Cameron 'Dugard's moral critique of apartheid judges' (n 5) 318.
89 J Waldron 'Damned lies' NYU Public Law and Legal Theory Research Paper No 21-11 (2021) 26.
90 Waldron 'Damned lies' (n 89) 24.
91 Waldron 'Damned lies' (n 89) 22, 29.
92 See eg E Cameron 'Safeguarding the Constitution and the rule of law' (speech at the Fourth Congress of the Conference of Constitutional Jurisdictions of Africa, 25 April 2017) para 91.

Despite – or perhaps because of – the priority placed on truth-telling in legal discourse, courts have not remained above the fray. On the contrary, where courts have been called upon to rule on constitutional questions that have profound political consequences, their decisions have sometimes been met with unreasoned condemnation and the judges themselves with personalised abuse.[93] In a context of deep political division, it is tempting to think that judicial dissent will only polarise debate further. Yet stifling dissent in an attempt to assert the court's authority may be counterproductive during times of democratic strain.[94] Instead, the practice of judicial dissent should be embraced as a way to reinvigorate and deepen our understanding and practice of democracy[95] by demonstrating robust disagreement within a discourse committed to veracity and reason-giving. Judges may not relish criticism, but the practice of dissent shows, as Lord Denning famously said, that '[w]e do not fear criticism, nor do we resent it'[96] – whether this criticism comes from members of the public or colleagues on the bench.

4 Voicing scepticism through dissent

So far, we have explored how Cameron's moral compass was set with reference to his early experience of executive-minded apartheid judges who failed to scrutinise the powerful or protect the weak. We also unpacked the ways in which the practice of judicial dissent is conducive to a healthy scepticism of power by promoting independent-minded, accountable, and reasoned disagreement. In this section, we bring these insights to bear on Cameron's own dissenting voice as a judge. Many of Cameron's judgments, whether majority or minority opinions, demonstrate that he often insisted on a more searching scrutiny of power than some of his colleagues, but we focus here on a selection that illustrates different

93 For example, senior UK judges were branded 'enemies of the people' by the *Daily Mail* after deciding *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768.

94 For example, limiting the scope for judicial dissent has been used by the Polish government to curb the power of the courts: see D Landau & R Dixon 'Abusive judicial review: Courts against democracy' (2020) 53 *UC Davis Law Review* 1313 at 1345.

95 M Loughlin 'The contemporary crisis of constitutional democracy' (2019) 39 *Oxford Journal of Legal Studies* 435 at 453.

96 *R v Commissioner of Police of the Metropolis ex parte Blackburn (No 2)* [1968] QB 150 at 155.

ways in which his scepticism found a distinctive voice in dissent. First, we trace the fault line of disagreement in the *Glenister* case, as arguably the most compelling example of how his principled scepticism of power culminated in a dissent. Second, we draw out how his disagreement in *M&G Media Ltd* was premised on a warning that blind trust in judicial power is no substitute for transparent public scrutiny of executive power. This leads us to ask, finally, whether his dissent in *AfriForum* and the subsequent series of cases about Afrikaans language rights register an increasing scepticism about the exercise of judicial power itself.

4.1 Confronting the 'stark realities of power' in *Glenister*

The Constitutional Court's succession of judgments in the *Glenister* cases has been the subject of considerable debate ever since they were handed down: *Glenister I* in October 2008,[97] *Glenister II* in March 2011,[98] and *Glenister III* in November 2014.[99] The 'intense political contest'[100] underlying the litigation – namely the disbanding of the Directorate of Special Operations (DSO, or 'Scorpions') as a specialised crime-fighting unit located within the National Prosecuting Authority, and its replacement with the Directorate of Priority Crime Investigation (DPCI, or 'Hawks') as a new unit within the structures of the South African Police Service (SAPS) – has only gained in significance in the intervening years. The striking down of the new arrangements in *Glenister II* drew the ire of the ruling party[101] and, as already noted, the split decision prompted President Zuma to question the logic of judicial dissent on the basis that he preferred the minority view.[102]

The legal import of the Constitutional Court's decisions has been no less enduring or contested. As Cameron commented shortly afterwards,

97 *Glenister v President of the Republic of South Africa* [2008] ZACC 19 (*Glenister I*).
98 *Glenister II* (n 10).
99 *Glenister III* (n 10).
100 Cameron 'Safeguarding the Constitution' (n 92) para 29.
101 The dissolution of the Scorpions was an express resolution adopted at the ANC's national conference in Polokwane in 2007 which took place against the backdrop of President Thabo Mbeki's ousting as leader of the party and Jacob Zuma's rise to power. The then Secretary General of the ANC, Gwede Mantashe, said the majority judgment 'seeks to cast aspersion on the work of parliament' and 'ventures into political weighting of views': see Mpumelelo Mkhabela 'ANC's Mantashe lashes judges' *The Sowetan* (18 August 2011).
102 This was also discussed in *Glenister III* (n 10) para 138 (Froneman J).

Glenister II attracted 'lavish praise and acclaim on the one hand, and mordant criticism on the other'.[103] Some of the more trenchant academic criticism has targeted what Cameron himself acknowledges to be the decision's 'far-going and dramatic importation of international law duties into South African law'.[104] Here we focus on how Cameron's judgments in *Glenister II* and *Glenister III* reflect his principled scepticism of power: an insistence that 'the stark realities of power' require an independent anti-corruption agency that is outside of executive control, irrespective of who the current incumbents of political office happen to be. Although only *Glenister III* was strictly speaking a dissent, we cover *Glenister II* not only because it lays the groundwork for the later dissent but also because Cameron's judgment, co-authored with Moseneke DCJ, was written in a dissenting voice: it expressed disagreement with the first judgment of Ngcobo CJ but ultimately garnered majority support. When viewed together, *Glenister II* and *Glenister III* expose more clearly the rationale for the split on the court which, in the second case, left Cameron in the minority.

4.1.1 Glenister II

Of course, the *Glenister* story began before Cameron was appointed to the Constitutional Court. In *Glenister I*, Langa CJ delivered a unanimous decision which declined to intervene in parliamentary affairs when the executive had merely initiated, rather than enacted, legislation

103 E Cameron 'Constitutionalism, rights and international law: The *Glenister* decision' (2013) 23 *Duke Journal of Comparative and International Law* 389 at 407. Pierre de Vos welcomed it as a 'brave and brilliant' decision and a 'monumental judgment in defence of the poor': P de Vos '*Glenister*: A monumental judgment in defence of the poor' *Constitutionally Speaking* (18 March 2011). By contrast, Ziyad Motala said the majority opinion 'fundamentally ignores the [constitutional] text and separation of powers', and brands it 'a low water mark in South Africa's constitutional jurisprudence': Z Motala 'Divination through a strange lens' *Sunday Times* (27 March 2011). Given our focus on reasoned disagreement, it is worth noting that this prompted a response from Pierre de Vos in 'How not to criticise a court judgment' *Constitutionally Speaking* (28 March 2011).

104 Cameron 'Safeguarding the Constitution' (n 92) para 40. For a flavour of the debate, see J Tuovinen 'What to do with international law? Three flaws in *Glenister*' (2013) 5 *Constitutional Court Review* 435; F Sucker 'Approval of an international treaty in parliament: How does section 231(2) "bind the republic"?' (2013) 5 *Constitutional Court Review* 417; B Meyersfeld 'Domesticating international standards: The direction of international human rights law in South Africa' (2013) 5 *Constitutional Court Review* 399.

to disband the DSO.[105] It was therefore with heightened anticipation that the ripened challenge reached the Constitutional Court in *Glenister II*. The key constitutional question to be decided was whether the government has an obligation to establish and maintain an independent anti-corruption unit. In answering this question, the court was split as to the source of that obligation and its domestic implications, and as to whether the new anti-corruption unit was adequately independent to meet those obligations. Its 'controversial'[106] decision is reflected in the 4:5 split on the court: the first judgment written by Ngcobo CJ was the minority opinion, after the dissent co-authored by Cameron J and Moseneke DCJ gained three concurrences.

The formalism of Ngcobo CJ's reasoning in support of his conclusion that the government's chosen model passes constitutional muster makes for a striking foil to the majority's scepticism. First, Ngcobo CJ advances a sequential analysis of constitutional procedure to neatly resolve any separation of powers conflicts: the executive binds the Republic on the international plane, the legislature incorporates those obligations into domestic law, and the judiciary ensures these domesticated statutory obligations are upheld. International law obligations to combat corruption which have not passed through the legislative process are accordingly kept neatly out of the court's reach in domestic disputes about the content of constitutional obligations. Second, Ngcobo CJ casts the disbandment of the Scorpions and establishment of the Hawks as a 'policy decision' entailing 'political judgments', thereby taking the sting out of the judicial task in scrutinising whether the new arrangements meet the constitutional demand for effectiveness.[107] Despite acknowledging that exposure to political influence could undermine the effectiveness of an anti-corruption unit,[108] the minority finds its hands are tied because ministerial oversight of the police is a 'constitutional imperative'.[109]

The point of departure for the second judgment is a recognition of the pressing need and rationale for combating corruption in our constitutional democracy. Cameron J and Moseneke DCJ identify the

105 *Glenister I* (n 97).
106 Cameron 'Safeguarding the Constitution' (n 92) para 41.
107 *Glenister II* (n 10) paras 65-67.
108 *Glenister II* (n 10) para 127.
109 *Glenister II* (n 10) para 130.

scheme of the Constitution as the 'primal source'[110] of the obligation to establish an independent anti-corruption unit because 'corruption in the polity corrodes the rights' in the Bill of Rights and thus 'necessarily triggers the duties section 7(2) imposes on the state'.[111] In concluding that the state's duties under section 7(2) can only reasonably be fulfilled through an independent entity that effectively combats corruption, the majority contends that this obligation is reinforced – rather than reverse engineered – by the state's international law obligations.[112]

The second judgment also disagrees with Ngcobo CJ on the question whether parliament afforded the DPCI an adequate measure of autonomy. Cameron J and Moseneke DCJ's assessment of the safeguards on the DPCI's independence shows a principled scepticism of the power from which an anti-corruption unit must be sufficiently insulated. They identify two main features that cause the new arrangements to lack adequate independence. First, employees of the new unit – and the head of the DPCI in particular – are given no specially entrenched security of tenure, to protect them against the threat of removal for failing to yield to pressure in a politically unpopular investigation or prosecution. Second, cabinet-level control over the DPCI exposed the new unit to the 'plain risk of executive and political interference on investigations and on the entity's functioning'.[113] The majority was at pains to explain that their sceptical stance towards ministerial oversight was a principled one:

> Again, we should not assume, and we do not assume, that the power will be abused. Our point is different. It is that senior politicians are given competence to determine the limits, outlines and contents of the new entity's work. That in our view is inimical to independence.[114]

This scepticism of executive power over the DPCI was shared by the majority of the nine-member bench, rendering Ngcobo CJ's first judgment the minority opinion. Yet the more immediately divisive issue in *Glenister II* was the source and domestic impact of the state's obligation to establish and maintain an independent anti-corruption

110 *Glenister II* (n 10) para 175.
111 *Glenister II* (n 10) para 200.
112 *Glenister II* (n 10) paras 200-202.
113 *Glenister II* (n 10) para 229.
114 *Glenister II* (n 10) para 234.

body. The majority's controversial bridging of the dualist–monist divide in international law was, as Cameron later described it, a 'radical innovation' that 'sought to mould public power in the public interest'.[115] However, once the majority settled this question as it did, it was clear the structure and functioning of the DPCI were not sufficiently insulated from political influence to satisfy this constitutional demand for independence. In making this determination, the majority did not apply a requirement of full judicial independence, nor did it rule out that some measure of executive involvement could pass constitutional muster. The majority was not pushed on these outer parameters because it was the considerable extent of executive control in the new arrangements, and 'the largeness with which its shadow looms in the absence of other safeguards, that is inimical to the independent functioning of the DPCI'.[116]

4.1.2 Glenister III

The permissible extent of executive involvement was the subject of closer scrutiny in *Glenister III*, where the court was required to decide if the amended legislative scheme regulating the DPCI complied with the constitutional obligation to establish and maintain an adequately independent anti-corruption agency.[117] In this third round challenge to the government's new anti-corruption unit, Glenister persisted with his fundamental objection to a legislative scheme that located the DPCI within the SAPS, while the Helen Suzman Foundation took issue with specific provisions in the amended legislation.[118] As *Glenister II* had refrained from prescribing how the shortcomings in the DPCI should be remedied, the Court was now tasked with marking the government's homework.

The Court reached consensus on most aspects of the DPCI's structure and functioning as reflected in the majority decision of Mogoeng CJ (with whom six judges concurred without qualification). However, there was a splintering of opinion on specific procedural and substantive

115 Cameron 'Safeguarding the Constitution' (n 92) para 43.
116 *Glenister II* (n 10) para 244.
117 *Glenister III* (n 10) para 2.
118 *Glenister III* (n 10) paras 5-6.

questions which resulted in five further judgments.[119] One of these was a partial dissent by Cameron J, with Froneman J and Van der Westhuizen J concurring, on ministerial involvement in appointing the head of the DPCI. While the outcome in *Glenister III* was less controversial than *Glenister II* as a matter of aggregate votes, the variety of opinions reflects the richness of the Court's deliberation in reaching its decision. The reasoned, transparent disagreement among the judges offers valuable evidence of independent, accountable adjudication on a politically charged issue.

Continuing the trend set in *Glenister I* and *Glenister II*, the first judgment in *Glenister III* was written by the incumbent Chief Justice.[120] Mr Glenister's application for leave to appeal was dismissed as an attempt to have a second bite at the cherry; Mogoeng CJ considered the permissibility of locating the DPCI within SAPS to have been settled by *Glenister II*. The Helen Suzman Foundation was granted leave by the Court, but the majority dismissed all grounds of appeal challenging the DPCI's financial control, integrity testing, conditions of service, and coordination by cabinet.[121] Although less sympathetic than the High Court, the majority did confirm the unconstitutionality of provisions regulating the extension of tenure of the head and deputy head of the DPCI, the suspension and removal of the head of the DPCI, and the jurisdiction of the DPCI. In all three respects, Mogoeng CJ considered the DPCI insufficiently protected from political influence as a result of extensive ministerial powers and the outsized role of the national commissioner of SAPS.

Looking beyond these specifics, what is most striking about the majority judgment is its tone towards the government's efforts to combat corruption. In this respect, it represents a significant shift from the first judgment of Ngcobo CJ in *Glenister II* – not simply attributable to the

119 This included a partial dissent by Froneman J (Cameron J concurring) on leave to appeal and striking out in respect of Mr Glenister's application; a partial dissent by Nkabinde J on the ministerial discretion to prescribe measures for testing the integrity of DPCI members; and two separate judgments by Van der Westhuizen J and Madlanga J explaining their respective alignment with the preceding judgments.

120 In *Glenister I*, *Glenister II* and *Glenister III*, the first judgments were penned by Langa CJ, Ngcobo CJ, and Mogoeng CJ respectively.

121 Nkabinde J's partial dissent parted ways with the majority on the discrete issue of integrity testing.

differing styles and outlook of two Chief Justices, but reflecting the Court's changing self-conception of its role vis-à-vis the executive and legislature in the three intervening years. Mogoeng CJ opens his judgment in late 2014 with the recognition that '[a]ll South Africans across the racial, religious, class and political divide are in broad agreement that corruption is rife in this country and that stringent measures are required to contain this malady before it graduates into something terminal'.[122] He closes the majority judgment with an equally sobering assessment of the government's reforms of the DPCI, finding that much has been done to 'water down its primary area of focus' and reassign control over the scope of its activities from the president to the minister and the national commissioner.[123] He warns that these regressive reforms add to 'deepening concerns about the willingness to live up to the declared commitment to fight corruption more decisively' and are '[r]egrettable having regard to the apparent reluctance to strengthen the DPCI as directed by this Court'.[124] These sentiments were shared by the whole Court, and the partial dissents only go further in finding that the reforms fall short in other respects too.

The main flashpoint for substantive disagreement concerned ministerial control over the appointment of the head of the DPCI. The question was whether entrusting this appointment to the executive alone, without parliamentary approval, sufficiently insulated the DPCI from undue political influence. Significantly, Mogoeng CJ considered the location of the anti-corruption unit to be irrelevant to this assessment of the appointment of the DPCI leadership, on the basis that this would 'constitute an indirect and indefensible shifting of the *Glenister II* goal posts in relation to location'.[125] Cameron J authored the dissenting judgment on this point, finding that the consolidation of power to appoint the head of the DPCI in the minister and cabinet erodes the anti-corruption agency's independence to an impermissible degree. While convincing two colleagues, Cameron J's insistence on the need for greater insulation of the DPCI from executive influence failed to win over a majority of the court. Notably, this included his co-author

122 *Glenister III* (n 10) para 1.
123 *Glenister III* (n 10) para 106.
124 *Glenister III* (n 10) paras 106-107.
125 *Glenister III* (n 10) para 74.

in *Glenister II*, Moseneke DCJ, even though the interpretation of their earlier judgment was the subject of some disagreement.

In contesting the concentration of appointment power in the minister, Cameron J's principled scepticism of power is on full display. While *Glenister II* recognised the need for special protections to insulate an anti-corruption agency from undue political influence, Cameron J is pressed in *Glenister III* to justify his heightened suspicion of executive control over the hiring and firing of anti-corruption officials. The 'crucial point', he argues, is a recognition of the inherent tension created by executive involvement in anti-corruption appointment processes:

> [T]he more the institution's mandate threatens political office-bearers, the greater is the risk of political weight being brought to bear on its appointments. Where the institution's core mandate is to investigate crimes committed by political office-bearers, the risk may become severe.[126]

It is therefore the nature of corruption – as an abuse of entrusted power – that calls for increased vigilance about the risks of undue political influence in the DPCI's appointment processes.

Recognising that executive involvement in this context carries an inherent risk of abuse, Cameron J turns to consider what safeguards can adequately insulate the DPCI from undue influence. Without discountenancing executive involvement, Cameron J explains that its risks can be mitigated through 'a balanced appointments process that diffuses the power of selection and appointment among various stakeholders'.[127] Similarly, the additional requirement of parliamentary approval is 'no panacea' but does promote the transparent and accountable exercise of executive power:

> It forces the appointment process out of the executive's impenetrably private deliberations into the fresh light of the parliamentary chamber, whose proceedings are publicly accessible, and where they are ripe for dissection and disputation by every person in the country.[128]

Cameron J concludes that the impugned appointment process not only lacks these critical safeguards, but in fact aggravates the inherent risk of political influence by consolidating power in 'a single, politically

126 *Glenister III* (n 10) para 154.
127 *Glenister III* (n 10) para 155.
128 *Glenister III* (n 10) para 166.

prominent office-bearer, or in a close-knit group of government executives who may have a shared interest in finding a compliant appointee'.[129]

Cameron J's dissent in *Glenister III* shows prescient insight into the dangers of concentrated executive control over the leadership of an anti-corruption agency. The litigation spawned by the appointment of Berning Ntlemeza as national head of the DPCI speaks for itself.[130] Thus while *Glenister* was indeed a 'radical innovation' that 'sought to mould public power in the public interest', Cameron subsequently observed in 2017:

> *Glenister* also showed the limits of the Court's power. The courts cannot ensure that politicians appoint people of vigour, honesty and truthful purpose to the corruption-busting unit. Right now, we are in the middle of a controversy about one appointment – that of the head of the corruption-busting unit. ... The dispute illustrates that courts have the power to draw the lines within which power is exercised – but not to exercise power itself.[131]

This sobering reflection brings us back to the sceptical impulse that drives Cameron J's dissent in *Glenister III*. As he was at pains to explain, his scepticism of executive control over DPCI appointments is premised on an appreciation of the inherent risk of abuse rather than a distrust of 'any particular group of political incumbents' or current office-holders: 'It reaches beyond incumbency to the stark realities of power, to which we are all prone'.[132] The significance of Cameron J's dissent in *Glenister III* is therefore not simply its prescience, but that this prescience flowed from his fidelity to a principled scepticism of power.

---

129 *Glenister III* (n 10) para 155.

130 See *Helen Suzman Foundation v Minister of Police* [2015] ZAGPPHC 4, declaring invalid and setting aside the suspension of Lieutenant General Anwa Dramat and the appointment of Ntlemeza as head of DPCI; *Sibiya v Minister of Police* [2015] ZAGPPHC 135, finding that Ntlemeza's decision to place Major General Shadrack Sibiya on precautionary suspension was taken 'in bad faith and for reasons other than those given' (para 31); *Helen Suzman Foundation v Minister of Police* [2017] ZAGPPHC 151, declaring invalid and setting aside the appointment of Ntlemeza as head of DPCI on the grounds that he 'lacks the requisite honesty, integrity and conscientiousness to occupy the position of any public office, not to mention an office as ... important as that of National Head of the DPCI' (para 36); *Ntlemeza v Helen Suzman Foundation* [2017] ZASCA 93, refusing leave to appeal the Gauteng High Court judgment setting aside Ntlemeza's appointment on the basis that he was not a fit and proper person.

131 Cameron 'Safeguarding the Constitution' (n 92) paras 96-97.

132 *Glenister III* (n 10) para 156.

4.2 Cautioning rare recourse to secret judicial examination: *M&G Media Ltd*

Through a bold flexing of judicial muscle, *Glenister* achieved 'a dramatic vindication of the capacity of law to oversee political and parliamentary power'.[133] As we have seen, this was driven by a scepticism of executive influence over a weakened anti-corruption agency. In *M&G Media Ltd*, Cameron J's dissent not only insists on the sceptical scrutiny of executive power, but also cautions against blind trust in courts as a check on it. With a scepticism echoed in a number of his other judgments,[134] Cameron J resists a resort to processes that close down opportunities for public scrutiny – especially where this risks the complicity of courts in a failure to hold executive power to account.

The legal questions in *M&G Media Ltd* concerned public access to information held by the state, and the court's role in scrutinising the reasons given for the release or refusal of that information.[135] The factual background was a political minefield: the undisclosed information was the report of two senior judges who had been tasked by President Thabo Mbeki to assess certain constitutional and legal issues relating to the 2002 presidential election in Zimbabwe.[136] The report of their visit was not released to the public, prompting the publisher of the *Mail & Guardian* newspaper to request access to this record in terms of section 11 of the Promotion of Access to Information Act[137] (PAIA).

The government refused to grant access to the report, citing two grounds on which this information was exempt from release under PAIA: first, that disclosure would reveal information supplied in confidence by or on behalf of another state or international organisation,[138] and second, that the report had been prepared to assist the President with the formulation of executive policy on Zimbabwe.[139] After an internal appeal met with the same response, M&G Media turned to the courts for relief. Their challenge met with early success, as neither the High Court nor

133 Cameron 'Constitutionalism, rights and international law' (n 103) 408.
134 See his dissents in *Unitas Hospital v Van Wyk* [2006] ZASCA 34; *Centre for Child Law v Media24* [2019] ZACC 46.
135 *M&G Media Ltd* (n 11) paras 5 (Ngcobo CJ), 78 (Cameron J).
136 *M&G Media Ltd* (n 11) para 1.
137 Act 2 of 2000.
138 Section 44(1)(b)(ii) of PAIA.
139 Section 44(1)(a) of PAIA.

the Supreme Court of Appeal was convinced that the refusal to disclose the report was justified on the grounds advanced.[140] Approaching the Constitutional Court, the government not only argued that the lower courts had erred in finding it had failed to discharge this burden of proof, but also pointed out that 'its hands were tied' in how it could justify this refusal to the media house.[141] More specifically, the government argued that the exemptions themselves precluded further explanation: it could not provide additional information to justify its refusal without referring to the confidential contents of the report sought to be protected from disclosure.

The majority judgment, written by Ngcobo CJ, affirms the importance of open and accountable government while showing some sympathy for the evidential challenges of justifying the validity of exemptions from the release of state records. Setting out the constitutional and legislative framework governing public access to information, Ngcobo CJ explains that disclosure is the default rule under this regime and an exemption is the exception. He ties the rationale for this position to the founding values of the Constitution, observing that '[i]t is impossible to hold accountable a government that operates in secrecy'.[142] While this much was uncontroversial, the Court was split on the approach to testing the validity of exemptions from the general rule of disclosure – in particular, the extent to which judges should take a 'judicial peek'[143] at the contested record to determine whether the information is being justifiably withheld from the public.

In navigating disputes over the validity of exemptions claimed by the state, the majority sought to be mindful of the evidential challenges faced by both parties. On the one hand, Ngcobo CJ recognises that the information asymmetry between the parties makes it difficult for the requesting party to refute the state's claims to an exemption.[144] It is for this reason that the burden of proof falls squarely on the state, as the holder of the information, to establish that the exemption claimed is in

140 *M&G Limited v President of the Republic of South Africa* [2010] ZAGPPHC 43; *President of the Republic of South Africa v M&G Media Ltd* [2010] ZASCA 177.
141 *M&G Media Ltd* (n 11) para 4.
142 *M&G Media Ltd* (n 11) para 10.
143 This phrase apparently originated from M&G Media's counsel in the litigation: see *M&G Media Ltd* (n 11) para 124 fn 111.
144 *M&G Media Ltd* (n 11) para 34.

fact justified. On the other hand, Ngcobo CJ expresses some sympathy for the constraints on the state in discharging this evidentiary burden. Clearly, the state must do more than simply recite the statutory language of PAIA or supply the court with *ipse dixit* affidavits asserting that the information falls within the exemption. Significantly, however, Ngcobo CJ finds that the sufficiency of evidence will turn on the nature of the exemption relied on by the state. This determination should account for the fact that the state is precluded from making 'any reference to the content of the record' in support of an exemption.[145]

The majority characterises section 80 of PAIA as a mechanism intended to ameliorate these challenges of producing and refuting evidence. By taking a 'judicial peek' at the contested record, the court is placed in a position to test the validity of the exemptions without jeopardising the confidentiality of its contents. Ngcobo CJ notes that this is a discretionary power afforded to the courts as a 'legislative recognition that, through no fault of their own, the parties may be constrained in their abilities to present and refute evidence'.[146] Most importantly for understanding the disagreement on the Court, Ngcobo CJ advocates for the assertive exercise of the court's examination powers where there is doubt as to whether an exemption is rightly claimed.[147] This is not to supplement the state's case or make out a case for the requesting party, but rather to ensure the court has the information it needs to discharge its role responsibly. Applied to the facts of the case, the majority found that the 'judicial peek' was the appropriate way to resolve the lower courts' doubts about the validity of the exemptions in circumstances where the state had not advanced an acceptable justification for its refusal.[148] Rather than examining the contested record itself, however, the majority remitted the matter to the High Court.

Ngcobo CJ's readiness to resort to the 'judicial peek' sparked further debate within the Court. Both Yacoob J and Froneman J wrote separately to concur in the majority outcome but moderated or clarified their position on the conditions for invoking the court's power in section 80 of PAIA. At one extreme, Yacoob J embraced the exercise of section

145 Sections 25(3)(b) and 77(5)(b) of PAIA. See also *M&G Media Ltd* (n 11) para 35.
146 *M&G Media Ltd* (n 11) para 42.
147 *M&G Media Ltd* (n 11) para 46.
148 *M&G Media Ltd* (n 11) para 55.

80 powers as a matter of course and even doubted whether the court could responsibly discharge its judicial duty to determine the validity of an exemption *without* examining the contested record. In doing so, he pushes back against the suggestion that this would draw the court into a dubious entanglement with state secrecy, arguing instead that his approach is in fact 'more invasive of the state power of secrecy'.[149] Sitting at the other extreme of the majority coalition, Froneman J was anxious to ensure the conditions for resorting to judicial examination are tightly drawn. His brief concurrence accordingly aligns with the core of Ngcobo CJ's *ratio*, which confines the 'judicial peek' to addressing constraints on producing evidence or questions about the severability of evidence.[150]

Rejecting the full spectrum of majority opinion, the dissent adopts a more sceptical stance towards both the state's evidential constraints and the court's section 80 powers. Cameron J (with the support of fellow dissentients Jafta J, Nkabinde J and Van der Westhuizen J) takes issue with the majority's ready resort to secret judicial examination in circumstances where the state had failed to discharge its burden of proof. Unlike the majority's more sympathetic assessment of the state's evidential difficulties, the dissent finds that the state failed to advance even a plausible basis for the exemptions it claimed. In this regard, Cameron J approaches the 'invocation of the "hands-tied" argument with reserve', observing that this was not relied on at the time of the refusal but rather belatedly inserted as a 'formulaic incantation' in affidavit evidence.[151] The plausibility of the state's excuse was further undermined by its failure to explain the absence of – let alone to produce – readily available evidence from those who could easily have testified to the validity of the exemptions claimed.[152] With this evidence so 'grievously lacking',[153] Cameron J concludes that the state had failed to plausibly raise an exemption that the court should consider testing by invoking its section 80 powers.

The dissent's view was therefore that the court should not resort to secret examination of the contested record where the state has quite clearly failed to discharge its evidentiary burden. Cameron J offers two reasons

149 *M&G Media Ltd* (n 11) para 73.
150 *M&G Media Ltd* (n 11) para 77.
151 *M&G Media Ltd* (n 11) para 114.
152 *M&G Media Ltd* (n 11) paras 115-118.
153 *M&G Media Ltd* (n 11) para 80.

for this 'cautious approach'[154] to the invocation of section 80 powers. First, judicial examination of the contested record should not substitute or supplement the burden of proof that PAIA explicitly places on the state to establish that it has properly invoked an exemption. The 'judicial peek' should instead only be used as a 'last resort' in those exceptional circumstances where the state has discharged its evidential burden but doubt remains as to its validity; in this way, judicial power is exercised only 'to amplify access, and not to occlude it'.[155] Second, the inquisitorial and secret nature of the 'judicial peek' runs counter to the administration of justice through adversarial and open court proceedings. Rather than fostering public confidence in the judiciary through transparent and reasoned decision making, secret examination of the record could ground a 'fear that courts may assist in suppressing information' to which the public is entitled.[156] Indeed, Cameron J considers that 'the risks inherent in resorting to secret judicial examination are so grave that it should be avoided if at all possible'.[157]

As in *Glenister III*, Cameron J's sceptical dissent proved prescient: on remittal of the matter, both the High Court and Supreme Court of Appeal held that the contents of the report did not justify reliance on the exemptions claimed by the state.[158] The report was subsequently released and published in the *Mail & Guardian*.[159] In *M&G Media Ltd*, however, Cameron J is not only suspicious of the state's 'hands-tied' excuse for justifying its refusal, but also sceptical of the 'judicial peek' as a safeguard against the abuse of exemptions to withhold information from the state. In cautioning 'rare recourse'[160] to this exercise of secret judicial power, Cameron J insists that it should only be used to facilitate greater openness and access to information, rather than to close down public scrutiny of decision making. Like *Glenister III*, the lesson is that diluting power can mitigate the risk of its abuse, but even safeguards can

154 *M&G Media Ltd* (n 11) para 125.
155 *M&G Media Ltd* (n 11) para 127.
156 *M&G Media Ltd* (n 11) para 130.
157 *M&G Media Ltd* (n 11) para 129.
158 *M&G Media Ltd v President of the Republic of South Africa* [2013] ZAGPPHC 35; *President of the Republic of South Africa v M&G Media Ltd* [2014] ZASCA 124.
159 S Khampepe & D Moseneke 'Report on the 2002 Presidential Elections of Zimbabwe' *Mail & Guardian* (14 November 2014).
160 *M&G Media Ltd* (n 11) para 128.

fail. Judicial power is one important check on governmental power, but it is no substitute for transparency in decision making.

4.3 Turning sceptical scrutiny on judicial power in the 'Afrikaans cases'

Has the sceptical scrutiny of the exercise of power in Cameron J's dissents ever extended to questioning the exercise of the judicial power of the Constitutional Court itself? In this section, we suggest that it has. We then examine whether this 'internal' scrutiny of the Constitutional Court's own exercise of judicial power accords with the goals or consequences that we have identified as crucial to Cameron J's sceptical scrutiny of power and concern for the protection of the weak. Again, we suggest that it does. And, lastly, we look at the effect this internal scrutiny has had within the Constitutional Court, as well as in the public debate about its role in our democracy.

The cases we discuss deal with topics that remain contentious: Afrikaner cultural traditions and the use of Afrikaans as a medium of instruction in schools and universities. In *AfriForum*, Cameron J wrote a joint dissent with one of the authors of this piece and in *UFS* he concurred in a dissent by the same culprit.[161] In both cases, the dissents differed from the majority on, first, a procedural point which had, in the dissenters' view, the secondary effect that the Court ventured into final decisions on vital aspects that should have been preceded by a broader democratic debate. Although Cameron J authored only one of these dissents and concurred in the other, the series of 'Afrikaans cases' traces an initial fault line in the Constitutional Court which was later resolved in *Gelyke Kanse*[162] and *Chairperson of the Council of Unisa v AfriForum NPC*[163] (*Unisa*). We examine how these early dissents shaped the consensus position subsequently reached by the Court.

4.3.1 AfriForum

In the *AfriForum* case, the Tshwane City Council had taken a decision to replace old street names in Pretoria with ones more reflective of the

161 Both cases were cited in n 12.
162 See again n 12.
163 [2021] ZACC 32.

constitutional transformation of our country. This created vehement opposition from a number of Afrikaans people and organisations, including AfriForum. As a partial compromise pending further efforts at resolving the issue, the City agreed to erect street signs which showed the new names above the now crossed-out old ones. The further negotiations came to naught, and the City decided to go ahead with the permanent removal of the old street names. AfriForum sought and obtained a temporary interdict prohibiting the removal of the crossed-out old street names below the new names, pending the determination of a review of the City's original decision to remove the old names and replace them with new ones. One of the main grounds of review was that a proper deliberative process had not been followed in coming to that decision. The City approached the Constitutional Court for leave to appeal against the granting of the temporary interdict and for the temporary order to be set aside.

The Constitutional Court split on racial lines. The majority judgment, penned by Mogoeng CJ, granted leave and upheld the City's appeal. Jafta J wrote a separate concurrence. Cameron J and Froneman J wrote a joint dissent. Two issues divided the Court. The first was the appealability of the interim order. The second was whether the irreparability of harm as a requirement for the grant of a temporary interdict was satisfied by AfriForum. For the present it is not necessary to comment on the correctness of the outcome, but first to note that it did not bear on the proper scope of the City's constitutional and statutory powers. As Cameron J and Froneman J put it:

> The interdict does not order the new names to be removed. It seeks merely to preserve the situation existing at the time the main review application was brought in December 2012. That was that the street or road signs with both the new names and the crossed-out old names below them should remain. So, until the review application is heard and finally determined, there is no infringement of any constitutional or legislative competence of the [City]. It is entirely free to determine the names of streets and roads. The new names are there for all to see, with the crossed-out ones indicating what the old names were.[164]

So, in the view of the dissenting judges, the grant of the temporary order simply did not impinge on the City's constitutional or legislative

164 *AfriForum* (n 12) paras 101-102.

competence – and hence, contrary to the reasoning of Mogoeng CJ,[165] leave to appeal should not have been granted.[166] The dissent's scepticism is directed, then, not at the City's powers, but at the Constitutional Court's own exercise of judicial power to force premature closure on what should be a democratic debate.

Having used its judicial authority to hear an appeal that the joint dissent found unwarranted, the majority judgment of Mogoeng CJ, and its concurrence by Jafta J, then went further to make what the dissent considered to be a final and definitive judgment that 'any reliance by white South Africans, particularly white Afrikaner people, on any historically-rooted cultural tradition finds no recognition in the Constitution, because that history is inevitably rooted in oppression'.[167] In doing so, Mogoeng CJ's majority judgment interpreted the constitutional goal of 'unity in diversity' as subordinating diversity to unity: the diversity of South Africa, he said, 'ought to highlight the need for unity rather than reinforce the inclination to stand aloof and be separatist'.[168] Despite personal agreement with many of the majority's sentiments about the need for transformation to promote unity, Cameron J and Froneman J nevertheless assert that these changes are not for a court to predetermine:

> The Constitution allows the Executive and Legislature at national, provincial and local levels to formulate policies, legislate them into law, and execute and administer them when so done. They may choose to do so by changing the names of cities, towns and streets to reflect our diversity. Or they may decide not to do so. The Constitution allows them to make their own choice; it does not prescribe what choice to make. *And the Constitution certainly does not allow the Judiciary to prescribe those choices.*[169]

So, once again, it is the Constitutional Court's own exercise of its judicial power that comes in for critical and sceptical scrutiny.

That may be so, it might be argued, but how can one possibly suggest that Afrikaners, beneficiaries of apartheid, can qualify for Justice

165 See especially para 43, holding that the interim order was appealable because it violated the separation of powers.

166 See also *AfriForum* (n 12) para 116: 'Perhaps then the thrust of the first judgment is that intervention on appeal will be countenanced only where the objection to the renaming impedes the transformation to which the Constitution commands our society.'

167 *AfriForum* (n 12) para 130, citing the judgment of Jafta J para 164.

168 *AfriForum* (n 12) para 7.

169 *AfriForum* (n 12) paras 136-138 (emphasis added).

Cameron's second moral guideline in adjudication, that of 'protection of the weak'? The answer given by the dissent in *AfriForum* is that Afrikaners are not the only people who may be excluded from the ironically rigid requirement of unity and inclusivity that the majority demands.[170] There was, Cameron J and Froneman J suggest, a better way for the Constitutional Court to have exercised its judicial power:

> [R]ecognition and tolerance of difference, even radical difference, is what, in our view, the Constitution demands of us. It is not consonant with the values of the Constitution to deny constitutional protections to people because of the content of their beliefs, views and aspirations.[171]

The value of protecting the weak thus may mean, paradoxically, that even the previously privileged should be entitled to protection. While, on the facts, the joint dissent may have protected a powerful and privileged group, at the level of principle its vision of 'unity in diversity' is aimed at ensuring that no persons or groups are marginalised by a majority's exclusionary view of unity. Rather than impose one vision of unity, the dissent insisted that '[t]he Constitution is broad and inclusive enough for our unity in diversity to survive even by recognising and including those who differ radically and wrongly' from the majority.[172]

4.3.2 UFS language case

This stark and unfortunate stand-off along racial lines in the Constitutional Court continued and was solidified in the *UFS* case. Mogoeng CJ again wrote for the majority and this time Cameron J merely concurred (with Pretorius AJ) in Froneman J's dissent. The majority attained the same negative result for the continued use of Afrikaans as a medium of instruction at the university as it did for the protection of potential cultural and associational rights of Afrikaners in *AfriForum*, but this time in the opposite manner. In *AfriForum* it used procedure – granting leave to appeal extraordinarily against a temporary order – in order to make a final decision on the merits of a constitutional issue that had not yet finally been determined in the lower courts. In *UFS* it did the opposite. It refused leave to appeal, without an oral hearing,

170 *AfriForum* (n 12) paras 130-132.
171 *AfriForum* (n 12) para 160.
172 *AfriForum* (n 12) para 158.

which had the effect that it deferred to, and endorsed, the decision of the University on the merits of an important constitutional issue. In both cases, however, a procedural point was used, which had, in the view of the dissenting judges, the secondary effect that the Constitutional Court ventured into final decisions on important constitutional issues which should have been preceded by a broader democratic debate.

Froneman J's dissent in *UFS* would have preferred granting leave to appeal, including a further order calling for evidence and argument on the substantive issues.[173] This would have ensured reasoned, transparent debate on the 'unfinished business' raised by the case – what Sachs J once memorably described as 'a genuinely-held, subjective fear that democratic transformation will lead to the down-grading, suppression and ultimate destruction of the Afrikaans language and the marginalisation and ultimate disintegration of the Afrikaans-speaking community as a vital group in South African society'.[174]

As in *AfriForum*, the dissent in *UFS* is sceptical of the majority's exercise of its judicial power in using procedure to attain the objective of prematurely closing the democratic debate on important constitutional issues by judicial fiat. And this – albeit not directed at the executive and legislative powers of government, but internally at the Constitutional Court's own judicial power – is, we suggest, still in accordance with Justice Cameron's first general concern: be sceptical of the exercise of power of any kind. What makes it more contentious is that he used this sceptical scrutiny, or concurred in its use, in order to protect a predominantly white minority, the beneficiaries of our divided racial past. In doing so, we believe he acted with principled consistency, for the reasons identified earlier in relation to the *AfriForum* case. The next question is what effect his principled consistency had on the Constitutional Court itself and the broader public democratic debate.

4.3.3 Judicial harmony?

The next Afrikaans language case in the Constitutional Court, *Gelyke Kanse*, saw no split. Cameron J wrote the main judgment, concurred

173 *UFS* (n 12) paras 82, 126.

174 *UFS* (n 12) para 120, quoting Sachs J in *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* [1996] ZACC 4 para 48.

in by all. Mogoeng CJ and Froneman J wrote additional concurrences. The tone of all the judgments was collegial, respectful, and exhibited a deeper understanding and tolerance of the diversity of our society. Is it too far-fetched to say that this was at least partially the consequence of the earlier dissents?

Cameron J's main judgment reaffirmed *Ermelo*[175] and *UFS* on the meaning of section 29(2) of the Constitution,[176] but it also looked to broader considerations. He reaffirmed the recognition of Afrikaans as 'one of the cultural treasures of South African national life' in *Gauteng Provincial Legislature*[177] – and while Afrikaans may not be one of the 'historically diminished' indigenous languages that section 6(2) of the Constitution envisages, it was nevertheless entitled to protection under section 6(4).[178] Cameron J also noted that the power of English as a global language 'seems relentlessly hostile to minority languages, including Afrikaans'.[179] Stellenbosch University's language policy, although it reduced the role of Afrikaans, did not abolish its use. Its constitutionality was upheld.

The last case we refer to, *Unisa*, was delivered after Cameron J left the Constitutional Court. Two aspects deserve mention. The first is that, in the Supreme Court of Appeal, Maya P wrote the unanimous judgment in both English and isiXhosa[180] – a first in an appellate court in our legal history, as far as we are aware. This historic resort to a judgment in the indigenous language of isiXhosa alongside English can also be seen as one of the fruits of the preceding reasoned – even if very heated – disagreement on the contentious topic of language and cultural rights. More fruits were to come.

175 *Head of Department; Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32.

176 Section 29(2) reads in relevant part: 'Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable.'

177 *Gauteng Provincial Legislature* (n 174) para 49.

178 *Gelyke Kanse* (n 12) para 46. Section 6(4) provides: 'The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.'

179 *Gelyke Kanse* (n 12) para 48.

180 *AfriForum NPC v Chairperson of the Council of the University of South Africa* [2020] ZASCA 79.

The judgment in the Constitutional Court, written by Majiedt J, was unanimous.[181] Justice Cameron describes its account of the significance of Afrikaans in a co-authored piece of post-judicial writing:

> The judgment declares that 'it is necessary' to put Afrikaans 'in proper perspective' so as to 'correct the false narratives concerning its origins, development and present position.' ... Majiedt J articulates the complex history of Afrikaans: its origins are a farrago of different races, cultures, nationalities and social classes, embracing indigenous and enslaved people. Signally, Afrikaans is not intrinsically oppressive. Through grotesque apartheid policies, 'Afrikaans *became* the language of the oppressor.' But this 'exclusive "white history" replaced the forgotten "Black" history of *our* language'.
>
> Furthermore, Majiedt J notes that Afrikaans may be considered a 'heterogeneous "rainbow" language' that is 'spoken today by more Black people than white people'. And that 'it is spoken by Black people not only in the so-called "coloured" townships, but also in many African townships.' Afrikaans transcends social class: 'the language of prince and pauper alike', it exists in both academic and everyday parlance. ... [Majiedt J] recognis[es] the 'cost' and 'threat' to indigenous languages. As English continues to pervade, universities 'as intellectual hubs of transformative constitutionalism must lead the charge for decolonisation of language'.[182]

There was also a clear contrast between the facts of *Unisa* and those in *UFS* and *Gelyke Kanse*, which led to a different outcome:

> Since Unisa is an institution of distant learning, segregated lectures and marginalised or stigmatised students are not in issue. The Court concludes that Unisa's decision to eliminate Afrikaans as a language of instruction fails constitutional muster, in absence of proper process and regard for section 29(2).[183]

The public reaction and comment in the media on the judgments in which Cameron J partook in *AfriForum*, *UFS* and *Gelyke Kanse* were varied, some critical and some favourable.[184] That was to be expected,

181 *Unisa* (n 163).

182 E Cameron & others 'Rainbows and realities: Justice Johan Froneman in the explosive terrain of linguistic and cultural rights' (2022) 12 *Constitutional Court Review* 261 at 283-284 (citations omitted).

183 Cameron & others (n 182) 284.

184 For example, JM Modiri 'Race, history, irresolution: Reflections on *City of Tshwane Metropolitan Municipality v AfriForum* and the limits of "post"-apartheid constitutionalism' [2019] *De Jure* 27; MM Mokgokong & MR Phooko 'What has the Constitutional Court given us? *AfriForum v University of the Free State*' [2019] *Obiter* 228; S McGibbon & I Abdullah 'Belonging in the New South Africa: Justice Froneman's Search for a Fundamental Constitutional Identity for the

and welcomed, in a vibrant democracy. Unfortunate, though, was the baseless personal attack on Cameron J for his participation in the *Gelyke Kanse* matter and subsequent appointment as Chancellor of Stellenbosch University.[185] This incident, which resulted in a complaint laid with the Judicial Service Commission, brings us full circle to Cameron's first disciplinary incident before the Johannesburg Bar Council, and how the unreasoned, personalised attacks of this kind can be contrasted with the kind of reasoned, transparent disagreement that is healthy for a democracy as discussed in part 3 above. The position taken by Cameron J in *Gelyke Kanse* also underscores how his earlier dissents in *AfriForum* and *UFS* were based on principled grounds, rather than siding in partisan fashion with the particular group at issue.

5 Conclusion

In his more recent extra-curial work, Cameron has often reflected on the devastating impact of legalism in apartheid South Africa (and elsewhere in Southern Africa), but always with its lessons for the present in mind.[186] Of course, South Africa now has a written Constitution that

People of South Africa' (2022) 12 *Constitutional Court Review* 289; and further N Ramalekana 'The (mis)appropriation of human rights, norm-spoiling, and white supremacist backlash in South African minority rights litigation', this volume, ch 10.

185 We consider it necessary for the historical record to be set straight in this collection celebrating Cameron's immense contribution to our law and civil society. After he formally stepped down from the bench on 20 August 2019, Cameron J's judgment in *Gelyke Kanse* was handed down, with the concurring judgments by Mogoeng CJ and Froneman J. Gelyke Kanse had lost. This triggered a furious reaction from the senior counsel who appeared for Gelyke Kanse, and his attorney, who appear to have anticipated that their arguments would prevail. Persons sympathetic to them thereupon laid a complaint with the Judicial Service Commission (JSC), charging that Cameron had improperly accepted nomination as Chancellor of Stellenbosch University while the litigation was pending. In adjudicating the complaint, Zondi JA, on behalf of the JSC, took account of a formal letter to Cameron from senior counsel representing Gelyke Kanse that, even though judgment was pending, they expressly licensed his candidature for the Chancellorship. Zondi JA also noted that, thereafter, they had forfeited an opportunity, proffered by the Constitutional Court through its Registrar, to scrutinise in full all the contacts and correspondence between Cameron and all the litigants. In these circumstances, the allegation of impropriety was dismissed. This conclusion mirrored in all its details the conclusion that had been reached by retired Cape High Court (and acting Supreme Court of Appeal) Judge Burton Fourie in clearing both Cameron and the University of impropriety.

186 Cameron 'Judges, justice and public power' (n 4); 'Fidelity and betrayal under law' (2016) 16 *Oxford University Commonwealth Law Journal* 346; 'When judges fail

serves as an 'objective, normative value system'[187] for regulating public power and gives judges 'an explicitly value-laden and moral role to play in adjudication'.[188] Far from eliminating moral choice from adjudication, the transformative impulse of the Constitution invites moral contestation: it calls for judges to constantly challenge and question the status quo, and to leverage the law as a tool for substantive justice. This may generate strong disagreement and hard choices about how best to realise constitutional values, but Cameron insists this moral contestation should be faced head on:

> [I]f the Constitution and rule of law are to survive, it will not be by judges and lawyers taking recourse to minimalist or 'legalist' notions of lawyering and judging that disclaim the moral choices they are required to make. If that struggle is to be won, moral engagement and moral choice in expounding constitutional values and protecting constitutional mechanisms will have to be openly embraced.[189]

Thus, although judges in democratic South Africa operate within the normative framework of the Constitution, the lesson Cameron carried with him was that there is no room for moral complacency. He was ever conscious of the moral burden of adjudication, grappling with the choices it presents and looking to ensure judicial power is exercised to address injustice and protect the vulnerable. As he observed in the judgment he handed down on the day of his retirement, the Court's failure to intervene in the context of an activist Constitution risks 'judicial complicity in institutional and systemic dysfunction that impedes our attainment of shared constitutional goals and aspirations'.[190]

This brings us back to Cameron's commitment to the sceptical scrutiny of power. Scepticism embraces the systematic questioning and testing of ideas and values; it admits doubt and dissent.[191] In recognising that adjudication inevitably entails moral choice, Cameron cautions against complacency and over-confidence in adjudication. Judges in South Africa have a bold mandate to ambitiously pursue constitutional

---

justice' (n 39).

187 *Carmichele v Minister of Safety and Security* [2001] ZACC 22 para 54.

188 Cameron 'Dugard's moral critique' (n 5) 316.

189 Cameron 'Judges, justice and public power' (n 4) 87.

190 *Mwelase* (n 7) para 70.

191 This reflects the Greek etymology, *skeptomai*, meaning to think, consider, or inquire. In this sense, it should be distinguished from Cameron's description of 'constitutional sceptics' in *Justice: A personal account* (n 43) ch 7.

values, but they should approach this task with humility, recognising their fallibility in wielding these powers.[192] Cameron's scepticism therefore includes a willingness to turn scrutiny on oneself as a judge, and to welcome questioning and challenge from others.

192 Cameron 'Judges, justice and public power' (n 4) 96; 'When judges fail justice' (n 39) 594.