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Taking legality and just punishment seriously

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1 Introduction

Very few judges can be said to have a definable theory of just criminal punishment. Even rarer is a judge who is consistent about their theory and its application. In this, as in many other ways, Justice Edwin Cameron stands out as a judge who manages to achieve both over a distinguished judicial career. In this chapter I argue that this theory of punishment makes three propositions. First, the rule of law is not merely a contingent principle sometimes considered in cases of criminal punishment, but a necessary component of legal punishment as a general practice.[1] Second, legality not only helps justify the general practice of punishment but has concrete implications for specific instances of punishment. Third, legality having these concrete implications ought not to devolve into formalism since this would become the opposite of the virtue of the rule of law – the vice of legalism.

These three points are not especially unique as abstract propositions. Most lawyers will likely find them uncontroversial. What is unique about Justice Cameron's jurisprudence, however, is just how seriously he takes the role of legality in criminal punishment, such that it makes a clear and discernible difference to the development of various principles of criminal justice. For him, legality is not only a background value on which to draw from and find inspiration when punishing an offender, but a directly enforceable principle that must carry weight in the interpretive process

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1 In this paper I will use the 'rule of law' and 'legality' interchangeably to mean the same thing.

of making sense of the criminal law. This means that there must be certain correct answers to questions of criminal punishment required by due respect for legality. Whilst not a foreign proposition for constitutional lawyers, it stands out in criminal law. Criminal theorists spend a lot of their time considering questions relating to justifying punishment, often neglecting the fact that it is distinctly legal punishment and due regard must be given to legality as a value and principle in interpreting the criminal law.[2] By 'legality' or 'the rule of law' in this paper, I do not only mean the famous *desiderata* developed by Lon Fuller, namely that legality requires that a law must be (i) general, (ii) open, (iii) prospective, (iv) sufficiently clear, (v) non-contradictory, (vi) stable, and (vii) capable of being obeyed, and that (viii) there must be congruence between laws as enacted and as applied.[3] I also refer to the underlying rationale for all these *desiderata*: to avoid arbitrariness by legal authorities and so better guide the conduct of citizens in their own interests.[4] This, in the view of Joseph Raz, ultimately sees the rule of law requiring government to act as a custodian that governs not in its own interests, but in the interests of the governed.[5] There is much that could be said about the many facets of legality. However, in this piece I need not give a full treatment of legality to explore the unique role it plays in Justice Cameron's jurisprudence. The rule of law understood as a concern for non-arbitrariness and the custodial function of government will serve my purposes well enough.

In this vein, I argue that if more judges and lawyers were to take legality as seriously as Cameron has taken it, the criminal law would look noticeably different. As will be demonstrated, this would change the way we view diverse issues such as fair trial, causation, and minimum sentencing. This chapter is thus not only a theoretical exposition of Cameron's jurisprudence, but a call for us to take legality seriously enough that it makes a practical difference to how doctrine is developed,

2 The notable exception in criminal theory is the work of Peter Westen, for example his 'Two rules of legality in criminal law' (2007) 26 *Law and Philosophy* 229 at 230-234.

3 LL Fuller *The Morality of Law* rev ed (1969) ch 2.

4 J Raz 'The law's own virtue' (2019) 39 *Oxford Journal of Legal Studies* 1 at 5-7.

5 Raz 'The law's own virtue' (n 4) 7. Raz maintains that the rule of law can still be neutral about the content of law, but not its modal aspects of generation and application (at 2). Compare this view with those who dispute this claim by Raz and are more closely aligned to the position Justice Cameron adopts as an interpretivist: M Foran 'The rule of good law: Form, substance and fundamental rights' [2019] *Cambridge Law Journal* 570 at 585-592.

and existing rules of criminal law are interpreted. This piece aims to demonstrate just what is possible if criminal lawyers and judges take legality to heart. Equally, this is not merely a hagiography for Justice Cameron either. There are significant pitfalls that his approach must guard against. Taking legality to heart in this manner creates the danger that the kind of discretion necessary for humane and context-specific punishment may be jeopardised. Therefore, anyone adopting this view of punishment must be scrupulously aware of this danger and pay it due weight in interpreting legality in the criminal law. Thus, the approach has its own difficulties that must be carefully avoided. However, as Cameron's jurisprudence demonstrates, it is perfectly possible to avoid these pitfalls if one is nuanced and rigorous in one's interpretive moves.

The chapter thus consists of four further parts. Part 2 explains the relationship between legality and justice that best explains the intuitions that lead to the premium placed on legality in this context. I will argue that the best theoretical foundation for the views expressed by Cameron in his jurisprudence is the view of the relationship between legality and justice espoused by the legal theorist Nigel Simmonds. The point here is not to suggest that Cameron was simply applying philosophical musings from the bench. Instead, it demonstrates that he anchored himself in a tradition that has understood the relationship between legality and justice in a unique and specific way. Part 3 examines Cameron's jurisprudence, and the role legality plays in his interpretation and development of the criminal law. Here I examine instances when he relied on legality (i) in the context of 'procedural' questions pertaining to prosecutorial and police conduct and their impact on fair trial rights and (ii) 'substantive' questions relating to developing principles determining criminal responsibility and liability such as causation. The point is to show how legality can and ought to play a specific and contextualising role when interpreting the criminal law, eschewing an all-or-nothing standard that degenerates into the vice of legalism. I go on to discuss Cameron's latest extra-curial writings on minimum sentencing that reveal his continued commitment to legality in criminal justice jurisprudence and its implications for future debates on criminal justice reform. Part 4 concludes the discussion.

2 The relationship between legality and justice

In order to understand Cameron's unique reliance and emphasis on the value of legality in criminal punishment, one must first understand the tradition in which he anchors himself and the particular jurisprudential positions he explicitly commits himself to. I argue that it is this tradition's emphasis that law relies on moral principles and values for its validity that informs the view that legality is related to justice in a mutually supportive manner. The basic claim here is that for a judge who believes that law must be given a moral reading, the rule of law as a moral concept must of necessity play a central role in how he understands his judicial role.[6]

So then, what is this tradition and how has it influenced Cameron's views on the criminal law? Fittingly, the answer is drawn from Cameron's reflections when he honoured another remarkable lawyer and jurist. More than a decade ago, he wrote a short note in tribute to John Dugard.[7] In discussing Dugard's influence and legacy, Cameron reveals much about his own legal commitments. He reflects on Dugard's famous critique of a version of legal positivism that viewed laws simply as sets of commands by rulers, thus being used by apartheid judges to absolve themselves from moral accountability by claiming they are not called upon to make moral judgements in legal reasoning.[8]

Two things are noteworthy about Cameron's discussion. First, he rightly corrects Dugard's unfortunate misunderstanding of the brand of positivism espoused by HLA Hart and his successors, which is starkly distinguishable from the rudimentary 'command theory' of law that some apartheid-era judges held to.[9] This is an important intervention

6 This must not, however, be read to mean that those who do not share Cameron's jurisprudential commitments cannot share the same view of the importance of legality. It is only to say that judges such as Cameron have little option but to do so if they take their claims seriously. In fact, some of the most important work on legality was written by someone that Cameron would not necessarily consider a jurisprudential ally: see J Raz 'The rule of law and its virtue' (1977) 93 *Law Quarterly Review* 195. In fact one of the last pieces Raz wrote before his death was on the rule of law: see again Raz 'The law's own virtue' (n 4). For the classic work on legality by a fellow traveller of Cameron's interpretivist position, see Fuller (n 3) ch 2.

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

8 Cameron 'Dugard's moral critique' (n 7) 311-312.

9 Cameron 'Dugard's moral critique' (n 7) 312.

on Cameron's part. South African scholarship on positivism by strident (often woefully misguided) opponents of this school often misattributes all sorts of bizarre and false positions to positivists.[10] Although such scholarship does not want for entertaining fulmination, it provides more heat than light as to why modern positivists are mistaken in their account of law.

Second, Cameron himself rejects positivism in favour of a brand of interpretivism developed by Ronald Dworkin.[11] This view rejects the notion that it is possible to identify true statements of law by considering only social facts, rather than appealing to any moral values or principles.[12] For Cameron this particular tradition in which he anchors himself has one important implication: it accords judges full moral responsibility for what they decide.[13] Such an awesome responsibility then leads Cameron to opine on what he sees as the threats to justice and the rule of law. He makes the point as follows:

> The enemies of justice are no longer a repressive, racist state apparatus. They are crime and the risk that our institutions will fail not only through lack of capacity but also because they are corroded from within by those who are only malignly self-interested in personal gain. Amidst these insidious risks, the rule of law still needs vigilant protection. It needs protection not only against politicians, but against timid, cowardly and silent lawyers. It needs protection against judges who may be arrogant or idle or inert.[14]

The fact that Cameron easily transitions from considering the threats to justice to considering threats to the rule of law may be puzzling unless one understood the view of the tradition in which Cameron places himself about the relationship between the rule of law and justice. After all, it is not unusual to consider law (and by implication the rule of law) an impediment to justice in the South African context.[15] It is also not completely strange that some are sceptical about there being

10 See for discussion IJ Kroeze 'Re-evaluating legal positivism – or positivism and fundamental rights: a comedy of errors' (1993) 8 *SA Public Law* 230 at 231-233.
11 Cameron 'Dugard's moral critique' (n 7) 312.
12 R Dworkin 'The model of rules' (1967) 35 *University of Chicago Law Review* 14.
13 Cameron 'Dugard's moral critique' (n 7) 312.
14 Cameron 'Dugard's moral critique' (n 7) 319.
15 JM Modiri 'Law's poverty' (2015) 18 *Potchefstroom Electronic Law Journal* 224 at 246-262. See also the discussion of the challenges posed by law for social movements who try to use law to attain justice in T Madlingozi 'Post-apartheid social movements and legal mobilisation' in B Cousins & others (eds) *Socio-economic rights in South Africa: Symbols or substance?* (2013) 92 at 109-112.

a complementary relationship between the rule of law and justice considering how law was deployed by a racist apartheid state to obtain predictably unjust ends.[16] Further, it is also not entirely difficult to accept that many South Africans do not see why the rule of law has much to do with justice considering the continuing unjust, structural state of affairs the majority of black South Africans find themselves in despite a constitutional order founded on the rule of law. However, Edwin Cameron stands in stark opposition to such a pessimistic view.[17] He considers both to be mutually supportive.

For interpretivists, one cannot properly attain justice without the rule of law. As Nigel Simmonds argues, 'while justice and legality are distinct and can compete with each other, legality can only fully be achieved where justice is achieved also'.[18] The argument here is that only when the law is just will legal interpretations that require weighing values be a smooth and natural *fit* for the law. Just law is easier for judges to apply and citizens to follow than unjust law, especially in the realm of the incentive structure of punishment.[19] That is, if the law is just in its application of punishment, this tends to secure the compliance of citizens and allow them to predict punishment even when they are unaware of the law's content since they would rely on the law generally tracking morality.[20] This is arguably one of the reasons criminal law *aims* to track morality in the first place.[21]

Simmonds takes his argument further and reasons that the reverse also holds for the relationship between the rule of law and justice: justice

16 M Ramose 'Towards a post-conquest South Africa: Beyond the Constitution of 1996' (2018) 34 *South African Journal of Human Rights* 326 at 335-340 and J Modiri 'Conquest and constitutionalism: First thoughts on an alternative jurisprudence' (2018) 34 *South African Journal of Human Rights* 300 at 306-313.

17 For a lengthier rebuttal to the kind of constitutional scepticism just described, see E Cameron 'Judges, justice, and public power: The constitution and the rule of law in South Africa' (2018) 18 *Oxford Commonwealth Law Journal* 73 at 86-87.

18 N Simmonds *Law as a moral idea* (2008) 198.

19 Simmonds (n 18) 89-96. Matthew Kramer famously disputes this intuition and argues the rule of law is 'morally neutral' and does not rely on justice in any clear way: see his 'On the moral status of the rule of law' (2004) *Cambridge Law Journal* 65 at 66-77.

20 John Gardner makes a similar point, although he claims one can rely on social and not critical morality for such assumptions: see 'Rationality and the rule of law in offences against the person' in his *Offences and defences* (2007) 33 at 43-53.

21 D Husak *The philosophy of criminal law: Selected essays* (2010) 69.

cannot be fully realised without legality.[22] This is because a judicial ruling is just only if it can be shown that, say, a certain punishment is not arbitrary. In other words, it must flow from a general consideration that applies impartially to everyone. However, principles of justice contain a degree of indeterminacy that risks arbitrariness and so may lead to possible injustice in the application of laws to concrete disputes. This risk can be overcome through rules and principles of law that implement some *specific* scheme of justice.

In other words, it leverages the virtues of the rule of law to properly allocate goods since justice is always an allocative question.[23] The two principles do not stand in tension as a point of departure. The assumption is that legal rules frequently 'provide the bridge between general considerations of justice and the particular decision of the case'.[24] Therefore, justice requires law to achieve its archetypical best form where goods are distributed according to non-arbitrary, generally applicable and predictable principles and rules.

None of this is to deny the concern that legality can be oppressive. This brings us to the problem of *legalism*.[25] Legalism in this context means the shadow version of the rule of law. This is the vice to the virtue of the rule of law, consisting of the overvaluation of legality at the expense of other virtues and the 'alienation' of law from life.[26] The overvaluation of legality and its alienation from the ordinary way of life of citizens may result in legal rules that are remote, technical, and arcane.[27] When the rule of law is properly deployed to achieve justice, its greater specificity aids in this task by providing reasonable and clear guidance. The indeterminacy of justice, in this case, flows from its attempt to attain individualised justice to cater to the facts and circumstances of a case. This may easily turn to legalism when the assumption is that more legal rules will lead to greater clarity, which they do not necessarily or automatically do.

22 Simmonds (n 18) 198.
23 J Gardner 'Hart on legality, justice and morality' (2010) 1 *Jurisprudence* 253 at 259-260.
24 Simmonds (n 18) 198.
25 L Green 'Positivism and the inseparability of law and morals' (2008) 83 *New York University Law Review* 1035 at 1057. Cameron himself speaks of 'legalism' in his extra-curial writings but means specifically legalism as applied to interpreting legal provisions narrowly and strictly: see Cameron 'Judges, justice, and public power' (n 17) 76-77.
26 Green (n 25) 1058.
27 Green (n 25) 1058.

To prevent this vice from manifesting, legality requires the flexibility that justice demands. The remaining concern that individual facts and circumstances be considered in the framework of legality prevents the kind of overly technical alienation that legality can degenerate into. It is justice, in short, which prevents the vice of legalism. This is why seeing the mutually constitutive relationship between the two values matters. The primary argument of this paper is that we see this precise view of the mutually supportive aims of legality and justice in Cameron's jurisprudence on criminal punishment. Just punishment is about the proper allocation of punishment or blame to individuals. For Cameron, the task of justly punishing others is impossible without due respect for legality and the proper integration of legality and justice. Importantly, the argument here is not that the tradition that Cameron anchors himself in is the only tradition to see such important connections between these two values, but that as an interpretivist, Cameron necessarily must do so. The reasons why are not mysterious. If the validity of legal rules can depend on the validity of moral principles, then it is vital that the validity of such moral principles be properly established. To establish such moral validity will require the proper ordering of moral values to each other. One must take care to ensure that legality is a virtue and not a vice, that justice is not too amorphous and open-ended, and so on.

Of course, positivist judges can do the same and in their best form do. But for the interpretivist, the stakes are higher. If legality and justice are not properly ordered with respect to one another, then social facts that claim to be law may not be law at all. Positive laws on the books depend for their very validity on such a right ordering. Hence, Cameron argues that interpretivists consider themselves *fully* morally responsible for the legal decisions they deliver as judges and subject themselves to evaluations of whether their interpretation of the law is morally correct.[28] Therefore, if one accepts that legality and justice must be rightly ordered when interpreting laws and that failure to do so can affect the very validity of law *qua* law, then it is not mysterious why Cameron places such a stringent premium on legality in the exercise of interpreting criminal laws. The stakes are increased precisely by the fact that punishment intentionally imposes burdens and serious limitations of rights. To fail

28 Cameron 'Dugard's moral critique' (n 7) 312.

to properly order the moral principles that undergird the application of criminal laws would threaten their very validity as laws for Cameron. The fact that this failure would occur in the context of an exercise that seriously limits rights of individuals only emphasises the necessity to get the ordering of moral goods right.

3 Legality and justice in action

This now brings us to evaluating Cameron's jurisprudence and whether he lived up to this exacting standard for judges. I believe he did. To demonstrate this point, I will first discuss the cases where Cameron relied on legality to give concrete meaning to legal duties imposed on the state when it punishes. The point is to show how Cameron was always consciously aware of the need to rightly order legality and justice, whilst avoiding the vice of legalism.

3.1 The weight of legality: Fair trial rights

There are three important cases where Cameron demonstrates his particular understanding of the proper ordering of legality and justice in fair trial issues. The first is *S v Legoa*,[29] the second is *S v Tandwa*,[30] and the third is *S v Phakane*.[31] I will discuss each in turn. Their facts require some careful and lengthy discussion to appreciate how Cameron relied on legality to concretise and order the law to justice.

Legoa concerned an appeal against a fifteen-year minimum sentence imposed on the appellant who was caught dealing cannabis valued at more than R50 000.[32] On 6 June 1999 the appellant was arrested after being caught driving a motor vehicle which contained 261 kg of cannabis.[33] The regional court charged him with dealing a prohibited substance in contravention of section 5(b) of the Drugs and Trafficking Act.[34] The main charge against the accused was of dealing, and the alternative charge was a count of unlawful possession. The appellant pleaded guilty to the main count. Importantly, however, there was no

29 [2002] ZASCA 122.
30 [2007] ZASCA 34.
31 [2017] ZACC 44.
32 *Legoa* (n 29) para 1.
33 *Legoa* (n 29) para 2.
34 Act 140 of 1992.

admission regarding the value of the drugs in question. The appellant was subsequently convicted as charged.[35] This charge sheet expressly mentioned the applicable penalty provision, being section 17(e) of the Act. Though this section does not itself specify a minimum sentence, one was created by the Criminal Law Amendment Act adopted in 1997.[36] According to it, a first offender is liable to a minimum sentence of 15 years.[37] The issue in dispute was thus the value of the drugs, since this is what triggers the minimum sentence. The burden was on the accused to convince the court that any other value contrary to the state's expert testimony applied. If he could not discharge this burden, and in the absence of 'substantial and compelling circumstances',[38] the appellant therefore had to be sentenced to 15 years' imprisonment.

The High Court found against Mr Legoa and found that the street value of the drugs met the criteria of the minimum sentence.[39] Secondly, and most significantly for our purposes, the Court found that the value of the drugs need not be proven by the state prior to conviction since it is only a matter for sentencing.[40] And so the matter came before the Supreme Court of Appeal (SCA).

Writing for a unanimous court, Cameron JA found that the High Court's decision was incorrect. The High Court had relied on a flawed interpretation of the minimum sentencing legislation: the wording of the statute clearly indicates that for minimum sentencing to apply to an offence, the accused must be convicted on the grounds that his or her offence meets all the elements of the offence set out in the Schedule, which includes the value of the cannabis.[41] Further, even where the wording is open to more than one interpretation, which in Cameron JA's view it was not, the 'grave injustice' which the contrary interpretation might cause forced him to adopt an interpretation in favour of Mr Legoa.[42]

If Cameron JA had stopped there, it would still have been sufficient to demonstrate the point about the mutually supportive relationship

35 *Legoa* (n 29) paras 3-5.
36 Criminal Law Amendment Act 105 of 1997.
37 Section 51(2)(a)(i).
38 See s 51(3)(a) of the Act, which allows judges to depart from the minimum sentence exceptionally. I discuss this further in part 3.3 below.
39 *Legoa* (n 29) para 8.
40 *Legoa* (n 29) para 9.
41 *Legoa* (n 29) para 14.
42 *Legoa* (n 29) para 14.

between legality and justice in his criminal-law jurisprudence. But he went further. He argued that an accused has the right 'to be informed of the charge with sufficient detail to answer it', and this includes facts that the state intends to prove to increase the sentencing under the minimum sentencing regime.[43] However, Cameron JA was reluctant to lay down a general rule that the charge in every single case must recite (i) the specific form of the scheduled offence with which the accused is charged, or (ii) the facts the state must prove to establish it. In his words, the matter 'is one of substance and not form'.[44] He was concerned that laying down a general rule may cause 'intolerable complexities' in the administration of justice and may not be mindful of the practical realities under which charge sheets are drawn up.[45] He reasoned that the accused might in any event be furnished with the requisite information from the particulars of the charge, or from the summary of substantial facts which the state is obliged to furnish.[46]

Nonetheless, Cameron JA argued that, because the accused had pleaded guilty, the state was effectively bound by the facts set out in his statement. This statement included 'express allusion' to the penalty provision under the Drug Trafficking Act and, therefore, one could not then apply the minimum sentencing provisions.[47] This is because the appellant was not properly warned that minimum sentencing would apply and thus the fact sheet misled him by omitting the minimum sentence applicable. Cameron JA duly set aside the sentence imposed on the accused, amending it to five years (as he had already served three months) considering the amount of dagga involved and his role in the transportation.[48]

What we see here about Cameron JA's approach is that he integrates values of legality – non-arbitrariness and ensuring predictability of state punishment – with norms of just allocation of punishment. To give proper meaning to what counts as a fair trial and fair criminal process, Cameron JA interprets what the law requires of the state, when it

43 *Legoa* (n 29) para 20. The quoted phrase is from s 35(3)(a) of the Constitution of the Republic of South Africa, 1996.
44 *Legoa* (n 29) para 21.
45 *Legoa* (n 29) para 21.
46 *Legoa* (n 29) para 21.
47 *Legoa* (n 29) para 26.
48 *Legoa* (n 29) paras 28-29.

prosecutes individuals, (i) to include a duty to give proper warning in the charge sheet should the state wish to argue for particular aggravating circumstances, especially the application of minimum sentencing, and (ii) to bind the state to the plea it accepted, rather than allowing the later arbitrary reversal of how the case was framed. It cannot be overemphasised how significant such judicial intervention in charging practices of prosecutors is, given the reluctance of judicial officers to exercise supervision over prosecutorial discretion.[49]

The reasoning in *Legoa* is a bold intervention that articulates and imposes clear duties on the state to avoid arbitrary and unpredictable punishment through selective reliance on only the most favourable details in a charge sheet, and requires the state to spell out its case with respect to minimum sentences. It is also notable that Cameron JA was willing to wade into these questions, since he could have adopted minimalist judicial reasoning and avoided the questions entirely by framing this as only a question of what must be proven concerning the offence and not more concrete questions about the duties of framing a clear and coherent charge sheet and sentencing practices. I argue, however, that it was precisely the interpretivist view that the rule of law mutually supports the attainment of justice through reasonably predictable principles that pushed Cameron JA to the logical conclusion that there ought to be concrete duties ensuring that punishment is not arbitrarily applied through the random invocation of minimum sentences by prosecutors.[50]

And yet Cameron JA does not cross the Rubicon of laying down a firm rule as to what the ideal charge sheet ought to look like concerning scheduled offences and the facts relating to them. He is deeply aware of, and sensitive to, the practical realities of prosecution and the unfortunate conditions under which most prosecutors work to lay down an excessively demanding standard. He is sensitive, in other words, to avoiding the virtue of legality becoming the vice of legalism. Specifically, in this case he does not wish the law to become so technical that it

49 RL Misner 'Recasting prosecutorial discretion' (1995) 86 *Journal of Criminal Law and Criminology* 717 at 346-347.

50 Once again, I stress that this does not mean that positivists or other jurisprudential schools cannot have this same view. However, it is critical to see that interpretivist *must* hold this view in order to meet the demands of their distinctly moral reading of the law. For interpretivists, the relationship between legality and justice cannot be contingent.

alienates thousands of prosecutors across the country who must make difficult charging decisions in specific circumstances. This deft line that Cameron JA walks is both noteworthy and commendable. It is also quite unique in its combination of judicial creativity and moral seriousness without dispensing with a concern for legal principles that are practical and workable.

These instincts to reconcile legality and justice clearly arose in *Tandwa* as well.[51] This was a case with several grounds for the violation of fair trial rights, but our focus is on the admission of improperly obtained evidence. The relevant accused was part of a group bank robbery. He argued that the real evidence he gave during a pointing out had been procured under duress, intimidation, and police brutality. This, he argued, ought to render such evidence inadmissible and unconstitutional. Cameron JA agreed. It is perhaps instructive to quote him in full:

> Though 'hard and fast rules' should not be readily propounded, admitting real evidence procured by torture, assault, beatings and other forms of coercion violates the accused's fair trial right at its core, and stains the administration of justice. It renders the accused's trial unfair because it introduces into the process of proof against him evidence obtained by means that violate basic civilized injunctions against assault and compulsion. And it impairs the administration of justice more widely because its admission brings the entire system into disrepute, by associating it with barbarous and unacceptable conduct. The cynical tenor of the lies the police advanced here to explain the injuries the accused sustained in their custody (his 'suicidal tendencies') is disturbingly reminiscent of an earlier era. We do well to underscore the renunciation of that era not merely in principle, but in police practice, and throughout the justice system.
>
> We accept that the public flinches when courts exclude evidence indicating guilt. … But in this country's struggle to maintain law and order against the ferocious onslaught of violent crime and corruption, what differentiates those committed to the administration of justice from those who would subvert it is the commitment of the former to moral ends and moral means. We can win the struggle for a just order only through means that have moral authority. We forfeit that authority if we condone coercion and violence and other corrupt means in sustaining order. Section 35(5) [of the Constitution] is designed to protect individuals from police methods that offend basic principles of human rights. To admit the evidence of the recovered money and the AK 47 in the circumstances

51 *Tandwa* (n 30).

> of this case would render that provision nugatory. The evidence should therefore have been excluded.[52]

There is much to unpack in these two paragraphs. First, notice the unabashedly moral reading Cameron JA gives to the law. This is not merely a question of how evidence is obtained, but rather how this method of procurement undermines the moral authority of law enforcement agencies and courts to punish offenders. Thus, both the ends and means of securing justice must be morally justifiable. This is perfectly in line with his interpretivist commitments. Second, Cameron JA speaks of a 'just order' where only lawful means are used to obtain just ends. One cannot simply rely on 'law and order' rationales that are themselves unlawful to secure convictions. Third, he nevertheless avers that 'hard and fast' rules excluding improperly obtained evidence are undesirable, despite his own rightful disgust with the brutality of police and their ambivalence towards the use of unlawful force to secure convictions. He rejects the adoption of all-or-nothing standards, true to his interpretivist position. Therefore, even when faced with an opportunity to lay down a firm and clear rule excluding all evidence of this sort in every case, he adds the caveat at the beginning to beware of rules that may themselves create injustice.

However, one ought not to think that Justice Cameron is ambivalent or sceptical about the justice of criminal punishment. This does not follow. His is a demand that legality and justice be properly reconciled and rightly ordered by moral means that constitute moral ends without devolving into legalism. The distinctiveness of his approach to punishment is perhaps best demonstrated when he was not writing for a unanimous court, as was the case in *Phakane.*[53] This case also concerned the infringement of the appellant's fair trial rights. Specifically, the state delivered an incomplete record of trial proceedings, and so evidence could not be reconstructed. Mr Phakane was accused of murdering his girlfriend, but incidents of him assaulting her could not be directly linked to her death as the only witness available gave inconsistent statements and proved to be unreliable. The trial court found that the accused had murdered his girlfriend, Matilda Boshomane, and he was sentenced to 20 years' imprisonment. On appeal to a Full Bench of the High Court,

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52 *Tandwa* (n 30) paras 120-121.
53 *Phakane* (n 31).

the state delivered an incomplete record of the trial proceedings, and the transcript of the evidence did not contain the main state witness testimony. It was accepted that the evidence could not be reconstructed, and the absence of the transcript of the main witness effectively meant that the evidence in the appeal record prevented the court from fairly determining the appeal. Therefore, the appeal was dismissed against the conviction, but it was upheld in respect of the sentence. Ultimately, the accused's sentence was reduced from 20 to 15 years.

The majority judgment in the Constitutional Court, penned by Zondo J, held that the missing evidence and inconsistency of material information in the witness's statement meant that the Court could not determine the appeal fairly. Thus, the accused's rights to a fair trial as per section 35(3) of the Constitution was infringed. Therefore, Zondo J set aside the trial proceedings in their entirety. He then considered whether the accused should be convicted of assault as a competent verdict for murder. He argued that the accused should not be convicted on this basis because there was no link between the assault of the victim and the charge for murder that had been established. Because the cause of the deceased's death was unknown, it followed in Zondo J's view that these were two separate incidents.

Cameron J disagreed. In dissent, he argued for a charge of assault as a competent conviction on the main charge of murder. He agreed that the accused should be acquitted of murder because the state did not prove beyond a reasonable doubt that he committed the alleged crime. However, insufficient evidence on that charge did not mean that the accused 'should walk away scot-free'.[54] Cameron J reasoned as follows:

> The purpose of the competent verdict is to provide the State with the ability to prosecute an individual for a lower level crime – which the evidence establishes – in the event that the more serious crime cannot be proven beyond reasonable doubt.
>
> In this instance, the evidence before the Full Court proves beyond reasonable doubt that Mr Phakane assaulted Ms Boshomane on or about 20 August 2006. There is strong circumstantial evidence – namely, the fact that this was the last time that she was seen – to indicate that the assault was related to her murder. Zondo J's argument requiring a direct link is misplaced. Any stronger link between the

54 *Phakane* (n 31) para 48.

> assault and the murder would have allowed the Full Court to properly uphold the murder charge.[55]

Therefore, based on the facts that were accepted and the portions of the record that are available to the court, a competent verdict on the charge of murder should be entered.[56] Cameron JA adds that this 'hardly reduces the sadness of th[e] case', since even if the court were to convict Mr Phakane of assault, any sentence he would receive is far less than what he has already served based on his murder conviction, now set aside.[57] In other words, the time he has already served in prison means that he must be released anyway; and so a competent conviction of assault makes little practical difference to imprisonment for Mr Phakane, bringing small justice to the deceased or her family. However, even a small measure of justice in these circumstances is better than none. A conviction of assault as a competent verdict for murder would reflect on the accused's criminal record. Therefore, it would be known that he 'grievously wronged' the victim and that the justice system held him accountable on that basis.[58]
Notice here that, even in a case where legality and due process pulled in one direction and just punishment in another, Cameron J refuses to completely sacrifice one for the other. For him, legality without even a small measure of justice must be rejected. Thus, he works within the framework of lawful options available for some measure of justice to still be lawfully obtained in the circumstances. This, more than other decisions previously discussed, demonstrates the distinctiveness of seeing such an important and mutually supportive relationship between legality and justice. The proponent of this view is loath to forgo either of these two prongs even in cases where they accept that one value must trump the other. He does not banish justice in favour of legality altogether. In fact, I dare say, a proponent of this view would find it morally obligatory to still insert a measure of justice into his interpretation of law. The moral reading that judges are enjoined to adopt on this view simply cannot have one wash one's hands of the responsibility to still do some measure of justice.

55 *Phakane* (n 31) paras 55-56.
56 *Phakane* (n 31) para 57.
57 *Phakane* (n 31) para 59.
58 *Phakane* (n 31) para 60.

3.2 The weight of legality in substance: Causation and criminal law

Justice Cameron picks up these themes in areas beyond fair trial, namely aspects of the 'substantive' criminal law in *S v Tembani*,[59] which concerned legal causation. The appellant was convicted of murder in the High Court and sentenced to 18 years' imprisonment. The appeal turned on whether an assailant who inflicts a serious wound on another, which without treatment would be fatal, may escape liability for the victim's death where the medical treatment which was received was negligent and substandard.

The appellant shot the decease at least twice. She was admitted to Tembisa Hospital on the night she was shot and died two weeks later. The evidence established beyond a reasonable doubt that the appellant had the requisite intention to kill the deceased. The issue on appeal was whether he was responsible for her death. The cause of death was septicaemia resulting from the gunshot wounds. The appellant's main submission was that the hospital staff and the doctors were grossly negligent and thus broke the causal link between his attack and her subsequent death.

Causation is a two-stage process in our law.[60] The first stage of the inquiry is to ascertain whether the perpetrator factually caused the victim's death and whether without the accused's act, the victim would have died. The second stage establishes whether the act is sufficiently closely linked to the death for legal liability for the deceased's death to be imposed on the accused and involves several considerations of legal policy. Cameron JA, writing for the majority of the SCA, explained that the court had in the past considered the broader issue of whether an omission or a subsequent intervening act can excuse an earlier fatal attacker from liability for death.[61] He argued that legal policy requires a 'supple' or 'elastic yardstick' for determining whether legal responsibility should be imputed;[62] 'the ultimate question is whether there is a sufficiently close link between the act and the consequence'.[63] What is

59 [2006] ZASCA 123.
60 See classically *Minister of Police v Skosana* 1977 (1) SA 31 (A) 34; *S v Mokgethi* 1990 (1) SA 32 (A) 39-40.
61 *Tembani* (n 59) para 12.
62 *Tembani* (n 59) para 17, quoting *Mokgethi* (n 60) 40-41.
63 *Tembani* (n 59) para 17.

important about Cameron JA's reasoning for our purposes is how he understands this standard of legal policy and its relationship to attaining justice under law.

He argues that the deliberate infliction of an intrinsically dangerous wound where the victim is likely to die without medical intervention should lead to liability for the death of the deceased, 'whether or not the wound is readily treatable'.[64] Even if the medical treatment later given is substandard or negligent, it does not absolve the assailant of responsibility. This approach is justified by two interconnecting policy considerations, the first relating 'to the culpability of the assailant', and 'the second to the context in which he harms his victim'.[65] Where an assailant deliberately inflicts a fatal wound on the victim, he accepts, 'through his conscious conduct, the risk that death may ensue'.[66] The fact that other parties fail to intervene to save the injured person does not diminish the culpability of the person who inflicted the mortal wound. 'That is so', Cameron JA adds, 'even where those others fail culpably in breach of a duty they independently owe to the victim'.[67] Hence:

> It would offend justice to allow such an assailant to escape the consequences of his conduct because of the subsequent failings of others, who owe no duty to him, whose interventions he has no right to demand, and on whose proficiency he has no entitlement to rely. Their failings in relation to the victim cannot diminish the burden of moral and legal guilt he must bear.[68]

The second consideration reinforces the first.[69] In a country where medical resources are 'grievously maldistributed' and scarce, it is 'quite wrong' to impute legal liability on the supposition that medical treatment is accessible and reliable.[70] To do so would not be in line with the reality of unevenly distributed medical resources in the South African context. In Cameron JA's words:

64 *Tembani* (n 59) para 25.
65 *Tembani* (n 59) para 26.
66 *Tembani* (n 59) para 26.
67 *Tembani* (n 59) para 26.
68 *Tembani* (n 59) para 26.
69 *Tembani* (n 59) para 27.
70 *Tembani* (n 59) para 27.

> To assume the uniform availability of sound medical intervention would impute legal liability in its absence on the basis of a fiction and this cannot serve the creation of a sound system of criminal liability.[71]

He adds that an assailant is still entitled to expect that medical treatment will be given in good faith and hope it will be given with reasonable efficiency.[72] However, where the latter is lacking, and death ensues, he will not be exonerated.

Cameron JA decides these legal policy considerations by laying down a standard that confronts the reality of a healthcare system with unpredictable and varying standards of healthcare. He managed to confront these challenges by rightly fixing responsibility according to who ought to bear the risk for the death of a victim. He presents a standard that is clear and can guide behaviour of citizens. One cannot then have moral luck absolve certain categories of offenders who happen to choose a victim who is treated by a negligent doctor. Punishment cannot depend on such arbitrary circumstance.

It is easy to miss this aspect of Cameron JA's reasoning when one is caught up in the technical and difficult questions that plague causation.[73] However, in essence Cameron JA's reasons rely on two basic moral intuitions. First, seriously harming another constitutes a voluntary assumption of the risk (and thus responsibility) of death. Second, the arbitrariness of absolving certain categories of offenders who 'luck out' if their victim receives negligent healthcare cannot be the basis for the just allocation of punishment. Here we see Cameron JA cut through the weeds of causation and deliver a judgment grounded in a particular view of how justice ought to be ordered by the rule of law. Nonetheless, he still accepts that the test for legal causation more generally must be elastic and supple enough to address particular circumstances.

He also avoids the vice of legalism in another manner. He accepts that one could argue that poor healthcare is predictably likely in South Africa, but instead of that counting in the offender's favour, it is precisely the opposite: one cannot rely on the predictability of dysfunction to absolve oneself of liability. Cameron JA thus prevents the law alienating

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71 *Tembani* (n 59) para 27.
72 *Tembani* (n 59) para 30.
73 For an excellent overview of just how difficult such questions can be, see A Fagan 'Causation in the Constitutional Court: *Lee v Minister of Correctional Services*' (2013) 5 *Constitutional Court Review* 104.

victims from the just punishment of their offenders due to the structural injustice of poor healthcare resources. The moral perversity of denying justice to victims by appealing to state failure is too repugnant for the legal system to bear in Cameron JA's eyes. And rightly so. The important takeaway here is that, when faced with the option to rather simply fashion an uncaring rule that absolved offenders of liability depending on the vagaries created by structural injustice, Cameron JA chose a different route. He worked to reconcile the rule of law with justice, whilst avoiding legalism. It is also noteworthy that he followed this approach to substantive questions of criminal responsibility and not simply procedural fair trial issues. His deep commitment to the mutually supportive relationship of justice and legality is particularly noteworthy in this area. The commitment to laying down just and clear standards that can guide behaviour whilst avoiding alienating legal rules from the everyday realities of legal subjects is no easy feat.

3.3 Legality and minimum sentences in general

Justice Cameron has not altered his approach about the mutually supportive and necessary connections between legality and justice. After being appointed the Judicial Inspector of Prisons, he delivered the Rabinowitz Lecture at the University of Cape Town (UCT) in 2019, later published in the *South African Law Journal*.[74] His subject was broadly the challenges facing our criminal justice system, especially following the horrific and senseless murder of UCT student Uyinene Mrwetyana. More specifically, he took aim at the current minimum sentencing regime which he characterised as an 'extravagant mistake'.[75] There are several reasons he provides for this claim, but I will focus only on those arguments relying on the relationship between legality and justice.

Cameron argues that the impact of minimum sentences has increased numbers of both awaiting trial detainees and sentenced offenders and the lengths of detention and incarceration of convicted offenders.[76] He concedes that minimum sentences are not unavoidable as a matter of

74 E Cameron 'The crisis of criminal justice in South Africa' (2020) 137 *South African Law Journal* 32.
75 Cameron 'The crisis of criminal justice' (n 74) 32.
76 Cameron 'The crisis of criminal justice' (n 74) 40.

law since judges may depart from them if 'satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence'.[77] However, Cameron squarely doubts whether 'substantial and compelling circumstances' is an effective safeguard against unjust sentencing.[78] Mainly, this is because 'the criterion is unclear and inconsistently applied'.[79] Thus, it leads to arbitrary results. In support of this claim he cites how various dubious factors are termed 'substantial and compelling' circumstances.[80] These include the previous sexual history of the complainant, an accused's cultural beliefs about sexual assault, and a lack of education or sophistication or a disadvantaged background on the part of the accused. He thus argues that the very justification for minimum sentencing – that it ensures consistency – is illusory. In fact, they introduce an especially rankling arbitrariness reliant on troubling assumptions and considerations.

We see here, once more, the importance Cameron places on legality's role in securing justice. He confronts head-on the claim that the virtue of minimum sentences lies in their consistency and non-arbitrariness and exposes how exactly the opposite is true. Of course, he has many other moral objections to minimum sentences, but it is noteworthy that the arbitrariness they introduce into the application of criminal punishment features highly amongst his objections. I cannot imagine he ever necessarily supported minimum sentences, yet the fact that they fail to secure even the basic guarantee of consistent punishment they claim rightly amplifies his objections. Note further that Cameron does not here express doubts about punishment *per se*. In fact, he makes the point explicitly clear that he does not oppose punishment.[81] However, a just regime of punishment ought to reject the kinds of disproportionate and random applications of punishment the current minimum sentencing regime creates. We see here clearly Cameron's continued commitment

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77 See again the Criminal Law Amendment Act, s 51(3)(a); also *S v Malgas* [2001] ZASCA 30.

78 Cameron 'The crisis of criminal justice' (n 74) 40.

79 Cameron 'The crisis of criminal justice' (n 74) 40. He cites in support South African Law Reform Commission Discussion Paper 91 (Project 82) *Sentencing* (2000) xviii.

80 Cameron 'The crisis of criminal justice' (n 74) 41, citing the Western Cape Consortium of Violence Against Women's 'Submission to the Minister of Justice and Constitutional Development in Response to the Evaluation of the Criminal Law Amendment Act 105 of 1997' (4 March 2005) 7.

81 Cameron 'The crisis of criminal justice' (n 74) 41.

to the mutually supportive relationship between legality and justice. He rejects once again the assumed tension between legality and justice that minimum sentences would have notionally presented. He exposes the false choice offered between the promise of consistency on one hand and the humanity and restraint of proportionate punishment on the other. We see that this is not merely a theoretical account of punishment, but one that would have broad implications if taken seriously. In our case, it would be reason enough to repeal minimum sentences completely.

4 Conclusion

I began this chapter with the claim that few judges can be said to have a definable theory of just criminal punishment. I then argued that Justice Cameron not only possesses such a theory, but applied it consistently over his judicial career. If there is ever going to be such a thing as 'Cameronian thought' in criminal punishment, then it will make three general propositions. First, the rule of law is not merely a contingent principle sometimes considered in cases of criminal punishment, but a necessary component of legal punishment as a general practice. Second, legality not only helps justify the general practice of punishment but has concrete implications for specific instances of punishment. Third, legality having these concrete implications ought not to devolve into formalism, since this would become the opposite of the virtue of the rule of law: the vice of legalism. I hope this piece has demonstrated how Cameron has managed to walk a tightrope, balancing legality and justice, whilst avoiding legalism. I also hope that others will heed his call to take the relationship between legality and justice seriously enough that it makes a practical difference to how we interpret and reform the criminal law.

With great imagination, humanity and rigour, Justice Cameron has embodied the best that the interpretivist tradition has to offer in the arena of criminal justice. He may stand confident that if judges may be held fully morally responsible for their decisions, he has acquitted himself with the seriousness and care we demand of judicial officers. *Ntate, rea leboga*.