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Redemptive-transformative: Edwin Cameron and the point of the Bill of Rights (as read through the prisms of subsidiarity and pleading priorities)

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[T]he common law ... forms part of our legal system.[1]
Every decision to uphold existing law implies a sacrifice of constitutional reform.[2]

1 Introduction

1.1 Overview

At the time of overthrow of the regime of apartheid rule in South Africa, any claims heard for that regime's good standing in a global clan of liberal constitutional democracies could only have rung hollow. Not so for the regime-type that South Africans then chose as the departing one's successor and antithesis. Plain on the faces of the transitional ('interim') Constitution of 1993[3] and then the 'final' version of 1996[4] is their genetic connection with an historically-speaking liberal tradition of constitutional-democratic government. No doubt these South African instruments depart in signal respects from certain prominent current

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1 *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5 para 122 (Cameron J).

2 A van der Walt 'Normative pluralism and anarchy' (2008) 1 *Constitutional Court Review* 77 at 85.

3 Constitution of the Republic of South Africa Act 200 of 1993.

4 Constitution of the Republic of South Africa, 1996.

models, amply meriting Klare's enduring ascriptions: 'postliberal', 'transformative'.[5] But still we do not think of faulting the first generation of the new South African Constitutional Court[6] for looking to the record of parallel adjudications in Canada, Germany, India, and the United States as a resource or provisional starting point – whether by attraction or repulsion – for judgment in Bill of Rights cases coming before them on a South African clean slate.

According to the view of a leading liberal-minded jurist of our times – whose works stood to a youthful Edwin Cameron as iconic for the idea that the pursuit of the freedom and dignity of each and every human being is intrinsic to the ministry of the law[7] – the choice of South Africans for what I will call the model of bill-of-rights constitutional democracy stands as backdrop to every legal determination since then issuing from a South African court of law. Responsible judicial engagement with a country's laws on the books – so Ronald Dworkin maintained – must always, sooner or later, hook up to ideas the judges hold of animating ends for the scheme of laws that a country has.[8] On that view, any judge of law acting responsibly within the reconstituted South African legal order must always be ascribing some overarching, political-visionary 'point' to South Africa's choice for the regime-conception of bill-of-rights constitutionalism; and that ascription, Dworkin thought, could only in the end be anchored in the judge's own reflection on fundamental ideas of political right and wrong.

It will be my business here to try out this thesis on a portion of the judicial work-product of Edwin Cameron. I will look at judgments falling within South African judicial dialogue over proper administration of the new Constitution's mandate to apply its Bill of Rights 'to all law',[9]

5 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal of Human Rights* 148 at 151-56.

6 T Roux *The politics of principle: The first South African Constitutional Court, 1995-2005* (2013).

7 E Cameron 'Legal chauvinism, executive-mindedness and justice – L C Steyn's impact on South African law' (1982) 99 *South African Law Journal* 38 at 74 and fn 67, citing in this regard R Dworkin *Taking rights seriously* (1978). I am not the only contributor here to notice an affinity of Cameron for Dworkinian liberal ideas: see D Dyzenhaus 'Edwin Cameron and the politics of legal space', this volume at 117-120; K Moshikaro 'Taking legality and just punishment seriously', this volume at 415.

8 R Dworkin *A matter of principle* (1985) 35-36.

9 Section 8(1) of the Constitution.

in a system that continues to recognise the several discrete channels of constitutional, statutory, common and customary lawmaking. The resulting judicial conversation over 'constitutional subsidiarity' (as the topic has come here to be named) addresses seemingly adjectival aspects of South African legal practice: matters of pleading priorities, subject-matter jurisdictional allocations, and the like. Within this discourse over ostensibly procedural matters, I find a clear sign of Edwin Cameron's attribution of a distinctly substantive point to South Africa's choice for bill-of-rights constitutionalism.

I call that point, in a phrase, 'redemptive-transformative'. Notice that my phrase has 'redemptive' modifying 'transformative', not the other way round. Cameron is always clear that the Constitution first and foremost means to instigate, inspire, guide, and oversee a thoroughgoing upheaval in the state of South African society and the powers sustaining it: from racialist and sexist to non-racialist and non-sexist; from closed to open, oligarchic to democratic, stratified to leveled; from cultures of domination and authority to cultures of liberation and justification; from a rule of arbitrary power to a rule of law. 'Transformative', then, is the *mot juste*.

As such (here comes the point) the project can be redemptive, too. Transformation in the legal domain is not necessarily to be equated with total erasure of values recoverable from the past of the country's law. Redemptive strains from a historic tradition of liberal freedom and equality remain, in Edwin Cameron's understanding, a part of South Africa's legal heritage. That heritage does not all go out the window – the baby with the bathwater – by reason of its corruption and betrayal by apartheid-era jurisprudence.[10] In South Africa's post-apartheid transfiguration of the constitutional-democratic tradition – so I take to be the sense of Edwin Cameron – lies an implication of retention for the transformed order of worthy strains from within it.

10 Dyzenhaus, in 'The politics of legal space' (n 7), has likewise noted (from the other end, as it were) the significance in Cameron's thought of a full appreciation of the 'paradox' that 'for law to be effective in enforcing an evil or unjust system, its claim to be at least partially just or to possess at least a partial internal logic of justice must be true' (citing Cameron 'Submission on the role of the judiciary under apartheid' (1998) 115 *South African Law Journal* 436 at 437).

1.2 'Dworkin's thesis' expanded: a constitutional DNA?

Say a country has put firmly into place, as part of a *corpus juris* that also includes statute law and common law, a codified written constitution to serve as the country's 'supreme' or highest rank of law. Say further that this constitution includes a chapter on highest-order rights of persons and citizens, along the lines of Chapter Two, the Bill of Rights, of the Constitution of South Africa, 1996. Call the resulting scheme one of 'bill-of-rights constitutionalism'.

In a constitution drafted for wide acceptance across the congeries of interests, views, and concerns composing a modern free society, the rights-naming clauses in a bill of rights predictably will be framed at levels of generality that leave unresolved, awaiting future determination, their applications to what still will count as major and contested issues of social policy. In consequence – and noticing further that multiple rights listed under general names can seem to point in conflicting directions when invoked in concrete social controversies – applications of the bill as a whole to decisions of cases coming to court cannot always be immediately self-evident from informed and attentive readings of the text. As maintained by Dworkin, any truly responsible constitutional adjudicator will then necessarily be construing and applying the bill's provisions under guidance from some background conception, held by the judge, of the kinds of reasons the country's foundational lawmakers would have had for their choice in the first place for their scheme of bill-of-rights constitutionalism. If and insofar as we take those foundational lawmakers to be the country's people, the judge's attribution of reasons must be to them. But then any historically concrete political collective's such reasons, wrote Dworkin, must be taken to reflect *their* 'prior commitment to certain principles of political justice which, if we are to act responsibly [as judges], must therefore be reflected' in the way we now construe their constitution's prescripts at the point of debatable applications to cases. A judicial reader, Dworkin says, cannot truly show regard for either the text of that constitution or the authorship of those who put it in place without ascribing to that authorship certain 'principles of political morality which in some way represent [for them]

the upshot or point of constitutional practice more broadly conceived'[11] – their constitution's DNA, as we might loosely style it.

Call that 'Dworkin's thesis'. We can decompose it into two aspects. The first is that the directive force to adjudicators from a constitutional bill of rights extends beyond the literal contents of the rights-naming clauses taken one by one, so as to take in as well an integrative, higher-level conception of right government projected by the bill as a whole. A second aspect may be more provocative. It is that responsible constitutional adjudication may require from a judge an attribution of 'point' to the country's very choice for a regime of bill-of-rights constitutionalism, beyond what may already be rotely commonplace and stemming rather from that judge's own reflection on political right-and-wrong and their own appraisal of the country's situation with respect thereto.

We return at the close of this chapter to the first aspect – the implication from an itemised list of rights in a constitutional bill of rights of a higher-order conception of right government for which those stand as incomplete expression – as a part of our summation of Edwin Cameron's attachment of significance to South Africa's post-apartheid re-entry into a globe-spanning tradition of constitutional democracy. The main bulk of our work here will be directed to the second aspect: the attribution of 'point' to the choice for bill-of-rights constitutionalism, beyond what is already literally pre-inscribed or commonplace. My idea here is to run that aspect in reverse, experimentally, as potentially explanatory for an actual judicial work-product. I look to see how it might help bring into focus a set of Cameronian judgments taking positions in the ongoing judicial conversation over the operation, in South African law, of a so-named principle or rule of subsidiarity.

This conversation has features that make it good grist for the experiment. The order of integration of constitutional, statute, and common law in South Africa's one system of law, and related questions of pleading choice and of jurisdictional sorting among South Africa's courts, are the sorts of matters over which one might at first think that well-schooled jurists, *pace* other differences among them of outlook or temperament, should be able to find common cause. Something

11 Dworkin *A matter of principle* (n 8) 35-36. Dworkin soon thereafter would generalise the claim beyond its application to 'constitutional practice' to the larger social practice known as 'law': R Dworkin *Law's empire* (1986) 66.

beyond trivial, then, would seem to be at work in prompting divisions we sometimes see between Cameron's views and those of other judges sitting on these cases. A thread of connection between stances taken by Cameron from case to case may not always be immediately apparent. Such a thread, I will suggest, may lie in an attribution to Cameron of a distinct apprehension of a redemptive-transformative point to South Africa's adoption of its scheme of bill-of-rights constitutionalism.

1.3 The South African juridical conversation on subsidiarity

1.3.1 A dialogical judicial posture

An axiomatic supremacy of the Bill of Rights over statute and common law does not necessarily mean the Constitutional Court is to proceed in each case by, first, a step of resolving for itself, in a kind of acoustic separation from what is currently to be found in the statute book or the common law, the Bill's constraints on allowable outcomes in a case before it, and only then, second, a step of testing against that prior in-house resolution the directive content of some or other statute or common-law rule. For the Court to proceed in that way is for it to be setting itself as the sole competent arbiter of constitutional–legal signification. Alternatively, the justices can assume the stance of participants in a dialogic exchange, in which, up for testing, each in the light of the other, are both and simultaneously the justices' own provisional takes on the litigation consequences of some prescript in the Bill of Rights and the takes implicit in enacted statute or subsisting common law, which will sometimes differ from a justice's own initial inclination.

The terms and assumptions for such a posture of receptivity to dialogue depend on whether the engagement would be with statute law or common law. For statute law, the Court then will be taking seriously the constitutional-democratic licensure and standing of parliament as a co-authorised constitutional interpreter. Constitutional government in South Africa is after all to be *democratic* government, the thought may run; a due regard accordingly is owed by the courts to the constitutional-interpretive judgments of the electorally accountable branches of the state; and there is after all wisdom to be gleaned from parliamentary dickering and debate and the resolutions – the confections of principle

with accommodation – to which they lead. Such plainly, as we'll see, has been the Cameronian view.

With common law, the terms of dialogic exchange may reflect what in a prior writing I styled as the gravitational pull of the common-law idea or ideal.[12] A jurist in genuine doubt about the correct application of a constitutional bill-of-rights provision need not, and perhaps should not, routinely overlook the common law as a possible guide. The Constitution does after all enjoin courts to treat the Bill of Rights and the common law as component parts in a single 'system of law, shaped by the Constitution which is the supreme law'.[13] No doubt that injunction is meant very much and strongly as a prod to bring errant or lagging common law into line with the transformative aims of the Bill of Rights. It might also inversely be taken as a prompt for keeping constitutional application in touch with common-law values and tradition. I will be suggesting here that some such conservative vector has inhabited the judicial wisdom of Edwin Cameron.

1.3.2 'Cause of action' choices and priorities

I can now briefly present in outline the South African juridical conversation containing the Cameronian judgments next to be reviewed.[14] Its topic is that of orders of preferment, in South African civil litigation, among bodies of legal-normative materials lodged in three distinctly marked sets of books (so to speak) – constitutional, statutory, and common-law – maintained within the whole body of South African law.[15]

12 F Michelman 'Expropriation, eviction, and the gravity of common law' (2013) 24 *Stellenbosch Law Review* 245 at 247-49.

13 *Ex parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* [2000] ZACC 1 para 44.

14 My following digest of the judicial conversation over subsidiarity and pleading rules is not offered as authoritative. It reflects my own understanding as trimmed to my aims in this chapter. Scholarly commentary is abundant. Groundwork-laying contributions include L du Plessis '"Subsidiarity": What's in the name for constitutional interpretation and adjudication?' (2006) 17 *Stellenbosch Law Review* 207; Van der Walt 'Normative pluralism' (n 2); K Klare 'Legal subsidiarity and constitutional rights: A reply to AJ van der Walt' (2008) 1 *Constitutional Court Review* 129; AJ van der Walt *Property and Constitution* (2012) ch 2.

15 I adopt the somewhat laboured form of expression about 'sets of books' by way of care to avoid the slightest deviation from the precept of the unity of South African law under the Constitution, laid down in *Pharmaceutical Manufacturers* (n 13)

A party to civil litigation in South African courts, seeking a legal prescript upon which to found their claim or defence (their 'cause of action'), will frequently find in more than one of those book-sets a prescript that quite plausibly could serve that need. From which set of books, then, does the litigant draw the prescript on which initially to found their legal claim or defence? What are the guidelines, if any, to dictate an order of choice among them as the right or preferred book-set from which the party should plead and the court correspondingly should frame its merits appraisal of the case? And what are the reasons for any such guidelines?

Enter here the South African lawyers' discourse on a principle, called 'subsidiarity', directing a court to decide on the basis of the applicable prescript which is the more sharply focused on the issues presented by the particulars of that case, in preference to reliance on others framed more generally or abstractly. Standing by itself, that guideline seems both clear and sensible. A major complication arises, though, when the choice falls among prescripts drawn from different ones of our sets of books.

To see the complication, note first that the prescript that's most sharply focused to a particular case might turn out to be one that is sourced in any one of our book-sets. Say, the suit is one for relief against an expulsion from one's home by another's naked use of private force. A constitutional command that 'no one ... be evicted from their home without an order of court'[16] may very well be the most succinctly applicable and decisive legal prescript we will find for this case, by comparison with anything discoverable in statute or common law. But that instance, you may say, is highly abnormal. Much more typically, any Bill of Rights provision arguably applicable to the case at hand (say, 'everyone has the right to have access to adequate housing')[17] will lie toward the pole of abstraction, not specificity. For regulatory specificity, we are attuned to looking rather to statutes. And so you might think that, save for a few exceptional cases, the subsidiarity guideline effectively resolves, as the strongly presumptive order of book-sets from which to plead a cause of action or defence, the

para 44. A fully adequate treatment should have customary law on the table as well, but that is a field that I, regretfully, feel unqualified to enter.

16 Section 26(3) of the Constitution.

17 Section 26(1) of the Constitution.

statute book first, the common law next, and the Constitution only where those sources both prove relevantly blank.

Now comes the complication. A directive to apply the most relevantly focused applicable prescript, from whichever of our book-sets may contain it, cannot stand in isolation from the axiomatic paramountcy of constitutional over statute law and common law, and of statute law over common law. You don't submit a controversy to resolution by a constitutionally defective statute, however exquisitely detailed to fit the very case before you, *instead of* by a more elevated but abstract constitutional norm from which the statute fatally deviates. Neither do you submit a case to resolution by an extant, seemingly tailor-made common-law rule that is out of synch with either an applicable (and constitutionally compliant) statute or with normative emanations from 'the spirit, purport, and objects' of a constitutional right.[18] The directive principle of subsidiarity strictly speaking (go with the more relevantly focused body of law) and the paramountcy principles (constitution over statute over common law) will not always – perhaps they will not normally – all point initially in the same direction.

The upshot from their conjunction has been the emergence, by judicial construction, of a fairly rich assemblage of what we may call rules of cause-of-action selection. We may think of these as pleading rules. They tell us from which of our book-sets an applicant for relief in civil litigation (or a respondent by way of defence) is to draw their pleaded cause of action (or defence), or from which book-set the court is to treat them as having done so. I emphasise that these are rules *of pleading*, not rules of exclusivity of reference in legal argument to material drawn from any of the book-sets. A rule that says you must plead in this case from the statute books, or you must plead from the common-law books, does not preclude you from invoking specifically constitutional values or mandates in your arguments about how the pleaded statute or common-law doctrine applies to the case at hand when properly construed or developed. And conversely (a point of some importance in what is to follow) your pleading from the constitution book, where that is directed or permitted, does not preclude you or the court from adverting to statute

18 Section 39(2) of the Constitution.

law or common law in arguments and deliberations about constitutional applications.

Now, I have been saying there are 'rules' in play about the selection of the book-sets from which to plead. What I really mean, though, is that there are various propositions in play about what the rules are or ought to be. I offer next a rough-and-ready mapping of the debates.

The cases in view here are all, to begin with, ones in which a litigant claims support for their side from some right-naming clause or clauses in the Bill of Rights. Within that set of cases, our conversation distinguishes between treating the Bill of Rights as a regulatory law itself directly attaching legal consequences to party conduct and having the Bill figure in the background, as a set of validity requirements and interpretative guides for the bodies of statute law and common law by which party conduct is directly governed.

The Bill of Rights does undoubtedly figure constantly in the latter way, as a law for other laws, in South Africa's legal system. Indeed parliament from time to time enacts legislation expressly with a view to giving effect in statute law to some right-naming clause in the Bill.[19] Such covering legislation (as I will name it) typically works by laying down a corresponding regulatory code, sometimes also establishing a special administrative or other tribunal or procedure for enforcement. But of course South African courts do not assume that this or that parliamentary proposition for legislation to cover some right or rights declared in the Bill of Rights will necessarily accord in all respects with the Bill's requirements. A court might find such a statute to be constitutionally defective in a way that calls for setting it aside from decision of the case at bar. When it does – a further wrinkle – the effect need not be to allow resort to a direct constitutional cause of action; it might rather be to turn the case over to governance by the common law, if need be

19 As, for example, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('PEPUDA') stands in relation to the right against unfair discrimination guaranteed by s 9(3) of the Constitution and the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') stands in relation to the right to administrative justice guaranteed by s 33. Other examples salient for our work below will include the Rental Housing Act 50 of 1999, enacted in pursuance of the right to have access to adequate housing guaranteed by s 27(1) and the Promotion of Access to Information Act 2 of 2000 ('PAIA') enacted in pursuance of the right of access to information guaranteed by s 32.

suitably developed under the Constitution's gaze. Which of those paths is preferred is a topic alive in our conversation.

We come then to a second line of putative differentiation among cases, between 'vertical' and 'horizontal'. 'Vertical' are cases of claims brought by non-governmental persons or citizens for relief against exercise of government-held powers, allegedly in contravention of the claimant's constitutional rights.[20] 'Horizontal' are cases of claims of non-government persons of such contravention wrought by other non-government persons.[21] Our pleading-priority conversation appears to move along somewhat different paths depending on whether the case in view is classed as horizontal or vertical.

For cases classed as horizontal, we have to determine first whether the terms of a covering statute appear applicable to decide pro or con the claim for the relief the applicant is seeking in court against the respondent. If so, the applicant is to plead in terms of that statute. If then the covering statute is found *not* to afford the relief the applicant is seeking, they may launch an attack on the statute as constitutionally defective in that respect. If and only if that attack succeeds, that statute will have been cleared out of the way of a common-law or direct constitutional cause of action. All of that seems pretty much settled, at least as a strong presumptive guideline, by judgments to date from the Constitutional Court. Less settled are guides to the choice that then remains between a direct-constitutional and a common-law pleading. On one view reflected in the judgments, the rules limit you then to a common-law cause of action. You can bring in the Constitution 'indirectly' (as the saying goes), insofar as you simultaneously seek from the courts a development of the applicable common-law doctrine in accordance with section 8(3)(a) or 39(2) of the Constitution.[22] On this view, the strongly presumptive

20 See s 8(1) of the Constitution: 'The Bill of Rights ... binds the legislature, the executive, the judiciary and all organs of state.'

21 See s 8(2) of the Constitution: 'A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.'

22 Section 8(3)(a) provides: 'When applying a provision of the Bill of Rights to a natural or juristic person ... a court ... in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right'. Section 39(2) provides: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

guidance for horizontal cases is that (i) not only do you *not get to* the common law except by first working your way through the statute book, but (ii) you *do not ever get past the common law* to a direct constitutional pleading. This view insists, in effect, on strict adherence to the facial instruction of Constitution section 8(3)(a). This view is not, however, a settled one. We will find some judgments quite considerately allowing space, at least sometimes, for a straight-out constitutional pleading in a horizontal case.

For vertical cases, the extant guides are simpler. On no one's view that I know of are direct constitutional causes of action there ruled out. The strong presumptive default still is that you refer your complaint against the state's conduct first to a relevantly covering, constitutionally sufficient statute where there is one. Suppose there is not. A common-law pleading might sometimes then fit your need,[23] but so (obviously) might a direct constitutional pleading. So far as I am aware, the South African judicial conversation to date cannot be said to have set firmly into place any presumptive guidance for which path the vertical-case pleader then should prefer.

By way, then, of brief summation: The judicial conversation to date tilts strongly against – it may absolutely foreclose – any pleading in civil litigation that could have the effect of skipping the case past an opening full engagement with the statute book to either a direct constitutional or a common-law-based claim or defence. That posture holds alike for cases horizontal and vertical. Paths start to diverge at the point where the statute book is found to supply no constitutionally sufficient answer to a claim of legal right or defence. For vertical cases, resort may then be had to either a direct constitutional or a common-law cause of action, with no presumptive guideline for choice yet in place or under debate. For horizontal cases, a debate is up and running over whether or not the case is then mandatorily (whether purely by force of section 8(3)(a) or for other reasons as well) to be submitted to decision as one at common law – that law, if need be, to be developed to give due effect to the spirit, purport, and objects of the Bill of Rights, but still precluding resort to a direct constitutional pleading.

23 See eg *Carmichele v Minister of Safety and Security* [2001] ZACC 22.

2 An assemblage of judgments

2.1 A rough thematic guide

We now take up for examination a series of judgments from the pen of Edwin Cameron. We find Judge, or Justice, Cameron taking positions on a number of questions thrown up by the South African juridical conversation on the priorities and relations of constitution-based, statute-based, and common-law inputs to South Africa's one system of law. The aim is to see what light judgments of Edwin Cameron touching on these matters might have to shed on his putative attribution of a redemptive-transformative point to South African bill-of-rights constitutionalism. The judgments to be reviewed touch variously on themes of:

1. Cause-of-action selection and pleading priorities – how far, if ever, direct constitutional causes of action or defences will be deemed available in horizontal cases, or how far appeals to common-law grounds for relief or defence will be deemed preempted by constitutional or statutory law;
2. Specialisation of competencies within the South African judiciary – how far, if ever, the Constitutional Court will defer to perceived superior competence in a High Court or the Supreme Court of Appeal;
3. Interbranch co-partnership and judicial receptiveness to parliamentary or common-law influence in readings and applications of the Bill of Rights;
4. Judicial activism toward transformation – how far courts will go in reaching out for legal-transformative openings not plainly presented by party pleadings and arguments; and
5. Adjudicative responsiveness to high principles of right government in South Africa, conceived and detected as implicit in the sum of the literal dictates in the severalty of constitutional clauses (Dworkin's thesis).

It would be convenient if the judgments under review could be sorted neatly into piles corresponding to that thematic compilation. Alas, they cannot be so divided, because the themes frequently come commingled in a single case. We will examine the judgments in a roughly chronological

order, taking care to keep track of which of our themes are involved at one point or another in our treatment.

2.2 *Fourie*

Fourie v Minister of Home Affairs[24] came before Cameron JA sitting as a judge of the Supreme Court of Appeal ('SCA'). Paired with another case, it would later come before the Constitutional Court, famously issuing in that Court's declaration of invalidity of both the common law's and the statute-book's exclusions of same-sex couples from marriage.[25] As the *Fourie* matter stood by itself before the SCA, however, Cameron JA, writing for a majority, found himself precluded from such a course despite a plain certainty on his part that both the exclusions were unconstitutional.

The *Fourie* applicants had specifically sought from the courts a development of the common law so as to excise therefrom an unconstitutional exclusion of gay marriage. They pleaded no challenge to applicable statute law.[26] But section 30(1) of the Marriage Act[27] specified for secular marriages a formula using the terms 'husband' and 'wife', thereby apparently precluding a marriage between partners of the same sex. Cameron JA could not address the question of the constitutionality of the Act thus construed, because the applicants had not raised it below. But he also then could not address the common-law question if a finding of unconstitutionality there could bring no concrete relief to the applicants while the Marriage Act stood in the way. In emergency, Cameron JA found a path to the desired common law development. The Marriage Act, section 30(1), he noted, prescribed its husband-wife formula only for marriages *not* officiated under the auspices of a religious denomination. For the latter, the Act allowed the official to use 'the marriage formula usually observed by his religious denomination or organisation'. It was possible that the applicants would choose to solemnise their marriage under ministry of an officer whose denominational formula admitted same-sex couples. The common law

24 *Fourie v Minister of Home Affairs* [2004] ZASCA 132.
25 *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* [2005] ZACC 19.
26 *Fourie* (n 24) para 3.
27 Act 25 of 1961.

then would still stand in the way, though, unless and until developed so as not to. Occasion for such development was thus before the SCA, just as the applicants had pleaded, and Cameron JA's remedial order accordingly accomplished it on the spot.[28]

That course to granting a kind of oblique or partial relief in this case was noticeably proactive on the part of the judge. What may strike one is the apparent impulse it displays toward finding a path, where possible, to conclusive judicial reach-out *now*, sooner rather than later, to the pro-transformative work of revision of the common law. Cameron JA's *Fourie* judgment thus falls squarely under our theme 4 of judicial activism toward transformation. We should note Cameron JA's reference, in this regard, to the instruction of section 8(3) of the Constitution.[29]

2.3 *Lee*

The applicant in *Lee v Minister of Correctional Services*[30] had been held over a stretch of years in Pollsmoor prison. While there confined, he became infected with tuberculosis (TB). His suit against the Minister was in delict, for negligent operation of the prison resulting (he claimed) in his illness. Figuring also in the immediate background, but not as the posited legal ground for recovery, were sections of the Bill of Rights respectively conferring on everyone a right to bodily security and integrity[31] and on every detained person a right at state expense to adequate accommodation and medical treatment.[32] It was common cause that aspects of the operations of Pollsmoor over this period, such as chronic overcrowding of cells and delinquency of safety and testing routines, fell below the applicable common-law standard of care for persons having others in their custody. No evidence, however, was or could possibly have been available to show that the applicant to a certainty would not have contracted TB while at Pollsmoor, were it not for these

28 *Fourie* (n 24) para 49.
29 *Fourie* (n 24) para 4.
30 [2012] ZACC 30.
31 Section 12(2) of the Constitution provides: 'Everyone has the right to bodily and psychological integrity which includes the right ... (b) to security in and control over their body'.
32 Section 35(2) of the Constitution provides: 'Everyone who is detained ... has the right ... (e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.'

lapses of his jailers from a proper standard of care. The state defended on the ground that such deficiency of 'but-for' proof of causation-in-fact must defeat the applicant's suit, applying (as they claimed) the common law of delict as it stood at that time in South Africa.

The majority judgment at the Constitutional Court rejected that defence. It confirmed that the law must impose *some* requirement of a showing of causal probability, beyond a mere speculative inference of likelihood of a consequential connection between the respondent's lapse and the applicant's injury, in order to avert an excessive and unfair explosion of transfers of ordinary risks of harm to the shoulders of the state and others exposed to suit. Still the majority found in some recent common-law decisions a guarded relaxation of the formerly rigid demand for a showing of but-for causation, to a point where the applicant's suit could succeed by persuasion of a judicial fact-finder that the substandard conditions of his confinement were 'a more probable cause of his tuberculosis than that which would have been the case had he not been incarcerated under those conditions'.[33] Moving right ahead, then, to apply this more relaxed standard to the record before it, the majority issued an order holding the Minister liable in delict.[34]

Writing for a minority in dissent, Cameron J disagreed that the common law to date had evolved beyond the historic demand for a showing of but-for causation for claims of injury by a respondent's failure of due care.[35] He agreed that the interests of justice, as duly informed by the Bill of Rights, required a development of the common law beyond that inflexible stance.[36] Having in view, however, the problem of control for undue expansion of exposure to liability, he maintained that the requisite development should not be undertaken *ab initio* by the Constitutional Court, but rather 'should start in the High Court and should involve full assessment of the intricacies of a system of risk-based compensation'.[37] Cameron J recalled, in this regard, the reference in *Carmichele* to the value of 'close and sensitive interaction between,

33 *Lee* (n 30) paras 55, 73-74. For close examination of prior variation and development of the causation element in the common law of negligence, see A Fagan 'Causation in the Constitutional Court: *Lee v Minister of Correctional Services*' (2014) 5 *Constitutional Court Review* 104.
34 *Lee* (n 30) para 77.
35 *Lee* (n 30) para 89.
36 *Lee* (n 30) paras 100-101, 113.
37 *Lee* (n 30) paras 79, 97.

on the one hand, the High Courts and the Supreme Court of Appeal which have particular expertise and experience in this area of the law and on the other hand this Court'.[38] Accordingly, Cameron J would have ordered the case remitted to the High Court for consideration, 'in the light of the findings of ... this judgment,' of the precise preferred manner of common-law development.[39]

An idea of a division of labour between the Constitutional Court – itself a creature of the transformative Constitution – and the retained generalist judiciary (so to label them) starts coming into view. To the new-minted Constitutional Court, on this idea, falls a chief responsibility to notice and sing out when the common law stands in need of development in keeping with the Constitution's transformative mission; while to the old established generalist judiciary falls the main responsibility then to chart a corresponding course of development most in keeping with the common-law fabric as a whole. Evidently it was a perception of the density, as we may say, of that common-law fabric – a perception of a systematicity across its innumerable intersecting normative vectors and guidances – that cautioned Cameron J against overhasty or less-than-fully-expert ripping into that fabric.[40]

Implicit in such a stance would have had to be also some level of confidence on the part of Cameron J in a deep-lying tendency of the common law (shorn, as he wrote in *Paulsen,* of 'unsightly excesses')[41] to steer toward truly justice- and dignity-serving norms and resolutions.[42] On view, then, in Cameron J's *Lee* judgment are both theme 3 of a circumspect regard for the common-law and theme 2 of jurisdictional cross-deference in the multi-curial network of the South African judiciary.

38 *Carmichele* (n 23) para 62.
39 *Lee* (n 30) para 116.
40 I pause here just to note that the later expansion of the Constitutional Court's jurisdiction beyond 'constitutional matters' need not at all be taken as rejection of this division of labour. See Cameron J's judgment for a unanimous Court in *Tiekiedraai Eiendomme (Pty) Limited v Shell South Africa Marketing (Pty) Limited* [2019] ZACC 14 paras 19-20, refusing leave to appeal on exactly that division-of-labour ground.
41 *Paulsen* (n 1) para 27.
42 We might count this an expression of both what I have called the 'compass gravity' and the 'system gravity' of the common law in South African legal culture: see Michelman (n 12) 247-249.

But then what about the theme 4 of judicial activism so manifest in *Fourie?* In *Lee*, circumspection in regard to common-law tinkering would have led Cameron J (had he been writing for a majority) to make the applicant start all over again at the High Court level, and then once more up the ladder of appeals, rather than let his claim, already years in the processing, be now finally resolved on the spot. And how would that square, you might ask, with Cameron JA's alacrity in *Fourie* for a reach into the common law, on the spot by his own appellate court without any remand to the High Court with direction (as he later would propose in *Lee*) to take up the common-law reform issue 'in the light of the findings of ... this judgment'? Two seemingly conclusive reconciliations come quickly to mind. First, the SCA deciding *Fourie* was itself the head court of the generalist judiciary to whose common-law expertise Cameron J's *Lee* dissent would have returned the question of appropriate development of the law of delict. Second, there was in *Fourie* not the slightest possibility of doubt about either the transformative necessitation of a development of the common law of marriage or the form it must take – those matters having virtually been settled by a prior string of Constitutional Court decisions applying section 9(3)'s express prohibition of sexual-orientation-based discrimination.[43]

2.4 *KwaZulu-Natal Joint Liaison Committee*

As envisaged by national and provincial legislation, independent schools in Kwazulu-Natal (as elsewhere) rely in normal course on subventions from provincial government to help meet their annual operating expenses. In KwaZulu-Natal, the provincial Department of Education sends out advance notifications of expected subsidies for an upcoming school year, to which the schools then advert in preparing their annual budgets. Such notification was sent out in 2008 listing expected subvention amounts for 2009. Owing to constraints on provincial resources and appropriations, the Department later determined that the funding levels projected in that notice would have to be materially reduced. It so notified the schools, but not until after the date set by regulation for the first tranche of payments for 2009 had passed with no payment forthcoming. An association of independent schools then

43 *Fourie* (n 24) paras 13-14.

went to court seeking financial relief against provincial authorities for the resulting shortfalls in their budgets. Their pleadings and arguments at the High Court reflected solely a private-law claim based on an alleged contract arising out of the 2008 notification from the Department to the schools. That claim was rejected by the High Court (and then again by the SCA refusing appeal).

In a majority judgment for the Constitutional Court, Cameron J agreed that a breach-of-contract claim could not be sustained on the facts of the case.[44] He did not ask whether common private law might have supported some proximate promise-based claim (such as one grounded on foreseeable reliance or defeat of legitimate expectations). Rather, he endorsed a general *public-law* ground for awarding relief, based on considerations of transparency, accountability, and rationality in government.[45] From what appears in the judgment, I find it hard to say whether the legal norm thus invoked might have been drawn by Cameron J from Constitution section 1(c)'s recital of 'the rule of law' as a founding value of the state (the judgment nowhere so states), or rather was drawn from the common law. Cameron J did write that the principle he applied 'is by no means new to our law,' citing in support an Appellate Division decision from a time preceding the adoption of the current Constitution[46] – thus to my mind suggesting that he may have traced its footing to the common law.[47] We would thus see here in play our theme 3 of the common law as repository of high principles of (post-transformative) right and proper government.

We would simultaneously see in play our theme 4 of pro-transformative judicial activism. As resolutely insisted in a dissenting judgment from Zondo J,[48] Cameron J's readiness thus to grant relief at the Constitutional Court, on a basis not pleaded or argued below, was a clear departure from established, normal procedural protocol. That

44 *KwaZulu-Natal Joint Liaison Committee v MEC, Department of Education, KwaZulu-Natal* [2013] ZACC 10 paras 35-36.
45 *KZN Joint Liaison* (n 44) paras 58, 63.
46 *KZN Joint Liaison* (n 44) para 48, quoting *Dilokong Chrome Mines (Edms) Bpk v Direkteur-Generaal, Departement van Handel en Nywerheid* 1992 (4) SA 1 (A).
47 C Hoexter 'The enforcement of an official promise: Form, substance and the Constitutional Court' (2015) 132 *South African Law Journal* 208 at 226 finds a resonance of Cameron J's public-law principle with English common-law doctrines of 'substantive enforcement' and 'legitimate expectation'.
48 *KZN Joint Liaison* (n 44) para 160.

departure has been sympathetically explained as reflecting a readiness on the part of Cameron J to go some distance toward discard of formalities carried over from pre-constitutional times where those would stand unnecessarily in the way of substantive justice – a generally speaking pro-transformative stance.[49]

But that is not the only arguable departure from established protocol we may notice in this judgment. A decision by a state agency to recalibrate a subsidy owing to financial constraint seemingly should register as an instance of administrative action. By the protocol of subsidiarity – so argued the respondents – the applicants in this case ought accordingly to have sought relief under PAJA. Cameron J was aware of this wrinkle in the case. He ran it, however, in reverse gear. By reason, he said, of the applicant's choice *not* to proceed under PAJA, no record was made on issues germane to a PAJA-based claim, thus precluding his own Court from consideration of such a claim. If that left the applicant's case to stand or fall with a direct constitutional or common-law ground for relief, the choice to take that chance was one the applicant was free to make. 'The applicant', wrote Cameron J, 'is master of the process it has initiated.'[50]

This seems a debatable move, and so our theme 1 of pleading priorities is also in play here (if somewhat *sub silentio*). Section 33 of the Constitution guarantees to everyone a right to administrative action that is 'lawful, reasonable and procedurally fair'. PAJA plainly is legislation enacted to give effect to that guarantee. The protocol of subsidiarity accordingly says that any complaint of administrative action failing that standard must deal with PAJA first, before any further resort may be had to constitutional or common law. Seemingly, therefore, it would have been incumbent on the Constitutional Court, before proceeding further with the case, to decide whether the gist of applicant's complaint did or did not fall under that class of complaints.[51] This the judgment of Cameron J did not do. It rather simply allowed a pleading choice by an applicant – in effect, to navigate around the statute book in search of a legal ground of relief – to avert normal application of the rule of

49 Hoexter (n 47) 212-16.
50 *KZN Joint Liaison* (n 44) para 34.
51 C Hoexter *Administrative law in South Africa* 2 ed (2012) 120; M Murcott & W van der Westhuizen 'The ebb and flow of the application of the principle of subsidiarity – Critical reflections on *Motau* and *My Vote Counts*' (2015) 7 *Constitutional Court Review* 43 at 44-45.

subsidiarity. But does not such an allowance go far to subvert the general pleading rule?[52] Is pro-transformative judicial activism here prompting deviation from the normal rule of pleading-priority?

Cameron J would want an answer to that question. Here is how I think it must go. *Sometimes* a given instance of government action will be aptly describable *both* as an incursion on rights secured by the Bill of Rights *and* as a deviation from South African high principles of right government subsisting side-by-side with the Bill, as common public law. A demand for regularity and procedural fairness in the conduct of state administration – the topic of Constitution section 33 and PAJA – does not fully exhaust demands for transparency, accountability, and rationality in government action that also are ensconced in our law, under (say) a rubric of 'legality'. An act of government found to breach the wider legality values might or might not be found also to transgress the section 33 requirements.[53] If not, legislation (PAJA) expressly designed to secure values of the narrower type cannot be read to squeeze out of our public-law heritage its more general principles of protection and furtherance of values of the wider type.

Just so, I conclude, must have been the view of Cameron J in *KZN Joint Liaison Committee.* If so, his judgment there should register as simultaneously pro-transformative and common-law regarding – a clear manifestation, thus, of the redemptive-transformative strain I have suggested informs his thought about the point of bill-of-rights constitutionalism in South Africa. In the polluted bathwater we are commissioned to throw out, there's sometimes a baby we are commissioned to save.

2.5 *My Vote Counts*

In *KZN Joint Liaison Committee*, a judgment of Cameron J would have excused a litigant from pleading in the High Court a claim of unconstitutional legislative action, where the subsidiarity protocol quite

52 Hoexter 'The enforcement of an official promise' (n 47) 220-21, 223.

53 Murcott & Van der Westhuizen (n 51) 49-51 suggest that an 'administrative law' case subject to review for compliance with a principle of legality might or might not fall under the head of 'administrative action' in terms of PAJA and s 33 of the Constitution.

arguably would have required it. He did so again, in a different context, in *My Vote Counts*.[54]

The Constitutional Court is set up mainly as an appellate tribunal, sitting to review considered judgments already entered by at least one and typically two courts below, based on records – often extensive and detailed – made at trial in the High Court. As an exception, the Court is vested by section 167(4)(e) of the Constitution with an exclusive jurisdiction over any claim that parliament or the President 'has failed to fulfil a constitutional obligation'. In *My Vote Counts* it had to be decided whether the grievance pressed by the applicant there – that parliament had failed to impose a wide-ranging financial-disclosure law on political parties – fell under that special allowance to file directly with the Constitutional Court. Cameron J for a minority held that it did and would have gone on to rule on the merits in the applicant's favour.[55] The majority held that it did so in form, but that the rule of subsidiarity nevertheless required exclusion of the case from the original jurisdiction of the Court as plotted by section 167(4)(e).[56]

Briefly to set up the case: Section 19(3)(a) of the Constitution provides that 'every adult citizen has the right to vote' in elections for any legislative body. Section 32(1)(b) provides that everyone 'has the right of access' to any information that is held by another and that 'is required for the exercise or protection of any rights'. Section 32(2) provides that 'national legislation must be enacted to give effect to' the right to information affirmed by section 32(1)(b). The statute book at the time of suit included PAIA. Section 50(1) of PAIA could be read to support a citizen's self-initiated demand to a political party for a specified record concerning that party's funding.[57] No legislation imposed a more

54 *My Vote Counts NPC v Minister of Justice and Correctional Services* [2015] ZACC 31.

55 *My Vote Counts* (n 54) paras 118-120.

56 *My Vote Counts* (n 54) para 193.

57 Section 50(1) of PAIA provides:
'A requester must be given access to any record of a private body if –
(a) that record is required for the exercise or protection of any rights;
(b) that person complies with the procedural requirements in this Act relating to a request for access to that record; and (c) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.'
I do not here go into debates over whether political parties qualify as 'private bodies' to which this section applies, or over whether a demand for mandated systemic disclosure meets the standard of need laid down by s 32(2). The issues I look at here arise regardless of eventual resolutions of those questions.

general obligation for what we may call 'systemic' disclosure, meaning a standing legal requirement for periodic publication by parties of listings of contributors and amounts, where any citizen could read them at any time. Claiming that legally mandated systemic disclosure is a true requirement for the exercise by citizens of their constitutionally guaranteed right to vote, the applicant in this case (a civil society organisation) sued for a judicial order declaring parliament's failure to legislate such a mandate into law a violation of the obligation imposed by section 32(2). That quest was no doubt justiciable. Was it, however, properly lodged in the first instance at the Constitutional Court, under special cover of section 167(4)(e), as a claim of parliamentary failure to fulfill a constitutional obligation? Or should it rather be classed as a claim against the constitutionality of PAIA (owing to that statute's omission of mandate to systemic disclosure) which as such ought to have been lodged initially at the High Court level?

The parliamentary respondents, supported by a majority in the Constitutional Court, took the latter view. The real bone of contention between the parties in this case, they reasoned, is the scope of the 'right to vote' as granted by section 19(3)(a) of the Constitution. The applicant's case depends on a claim that the scope of that right is such that legally mandated systemic disclosure of party finances is (in the terms of section 32(1)(b)) 'required for [its] exercise'. *Parliament*, however, has taken an opposite view. That follows from parliament's own representation in this case that *it* regards PAIA as legislation giving complete fulfilment to its duty under section 32(2), to legislate a mandate for disclosure of information required for exercise of the section 19(3)(a) voting right. The applicant's complaint thus reduces – so reasons the majority – to a claim of violation of its section 32(1)(b) right (of access to information required for exercise of the right to vote) by enactment of PAIA with no provision for systemic disclosure. But a claim of violation of a constitutional right by an Act of parliament falls outside section 167(4)(e)'s special allowance of direct access to the Constitutional Court. Rather (and directly to the contrary), all such claims fall under an established rule requiring all complaints of constitutional-right violation by the government to be presented first for full examination by the High Court and the SCA.

Cameron J's own judgment presented all of this with full and perfect clarity.[58] How did he respond? Not by talking down in any way the rule requiring full lower-court examination of claims of violation by government of constitutional rights. His judgment carefully reviews and affirms the reasons behind that rule.[59] As he explained, those reasons connect to the Constitution's evident aim for a cultivation of 'comity' and 'cooperative partnership' between parliament and the judiciary, in the work of 'fulfilling' and 'giving life to' constitutional rights.[60] Courts accordingly ought to have a due regard for the particular capacities and perceptions of parliament in the furtherance of this work (which, it's important to note, may always entail a policy-heavy consideration of how competing factors of justice and social need could warrant limitation of a right, as provided by section 36(1) of the Constitution).[61] That will normally entail an extended, respectful engagement with parliamentary thinking for which a full High Court trial will be apposite.

Cameron J, having affirmed these considerations, says they do not apply – so neither does the principle they support – where, as here, the applicant for relief has no interest in retraction of any statute, is not seeking to evade any statute's demands upon them, but to the contrary wants parliament to proceed more aggressively down its regulatory path than it has done so far.[62] Now, it is no doubt true that where parliament simply has not taken up for consideration the question of legislation on a given topic (here it would be the need for mandated systemic disclosure of party finances in support of the right to vote), there is no occasion for the kind of extended engagement with parliamentary thinking that a High Court trial provides. How does that apply, though, to a case like this one, where the real bones of contention – so parliament insists – are substantive disagreements over how much access to party-funding information is promised by a guarantee of the 'right to vote', and what sort

58 *My Vote Counts* (n 54) paras 65-67.
59 *My Vote Counts* (n 54) paras 61-63.
60 *My Vote Counts* (n 54) para 62.
61 The majority points expressly to the bearing here of the limitation clause: *My Vote Counts* (n 54) paras 173, 175.
62 *My Vote Counts* (n 54) paras 71-73, 89-91. Supporting views are found in R Cachalia 'Botching procedure, avoiding substance: A critique of the majority judgment in *My Vote Counts*' (2017) 33 *South African Journal on Human Rights* 138 at 147-49; Murcott & Van der Westhuizen (n 51) 63-64.

of limitations on access may be warranted by competing constitutionally weighty concerns?[63]

Cameron J's response to that question has at first glance the same sort of disconcertingly formalistic look we noticed in his indulgence of litigant pleading choice in *KZN Joint Liaison Committee*. The applicant, he says, *chooses* between framing their case as one posing constitutional objection against some actively injurious positive content of some parliamentary enactment *or* as one complaining of a passive failure of parliament to enact legislation on some constitutionally mandated topic.[64] Of course that won't work unless the case is one in which either classification could plausibly be advanced, and furthermore the topic is one of the few on which the Constitution mandates enactment of supportive legislation. But still it would be unnerving to think that Cameron J would endorse so formalistic a doctrine even for that limited set of cases.

We must read him as though he does not. His point is that a litigant's choice to plead a failure of obligation to enact has a consequence beyond that of swinging open the gate to original jurisdiction at the Constitutional Court. Why, after all, should that choice *be allowed* to swing that gate? Cameron J's answer is: *because* pleading in that form commits the litigant to arguing and the Court to deciding in terms transcending those brought into play by an ordinary challenge to the constitutionality of this statute or that one, for active invasion of this or that specified constitutional right. A claim brought under section 167(4)(e) of failure to perform an obligation necessarily is addressed not to any one specific enactment such as PAIA but to the statute book as a whole. It correspondingly is grounded not simply or solely in some specified constitutional right such as the right to vote but in the Constitution's more comprehensive conception of a democratic and egalitarian form of government and society. And *that*, says Cameron J, is 'precisely the kind of [claim], going beyond a critique of existing legislative provisions, and evoking the true depth of the Constitution's vision, that section 167(4)(e) gives [the Constitutional] Court special jurisdiction to hear'.[65]

63 One thinks of Klare's prescient warning: '[I]n order to apply [the principle of subsidiarity], a court must be able to distinguish rights enforcement claims from constitutional challenges. Drawing that distinction will be easy in many cases, but not in others.' See Klare 'Legal subsidiarity' (n 14) 138.

64 *My Vote Counts* (n 54) paras 90-91; Murcott & Van der Westhuizen (n 51) 62.

65 *My Vote Counts* (n 54) para 92.

Thus, in the conception advanced by Cameron J, the vesting of a special jurisdiction in the Constitutional Court to decide complaints of failure to fulfill constitutional obligations corresponds to a difference he detects between the hurts persons suffer from incursions on various rights as named in the rights-naming clauses, and the hurt to them from government's departure from the Constitution's implicit higher vision for a democratic and egalitarian form of government and society. Section 167(4)(e) is the Constitution's confirmation that claims of the latter kind merit a judicial hearing, but also that they evoke a kind of argument and determination for which the Constitutional Court bears a special capacity and responsibility.

We see in symbiotic play here both theme 5, or Dworkin's thesis, and theme 2 of specialisation of competencies within the South African judiciary. Think back to Cameron J's dissenting judgment in *Lee*. We have seen how that judgment reflected, in the thought of Cameron J, a differentiation of special callings and capacities of the High Courts and the SCA in relation to those of the Constitutional Court. With his judgment in *My Vote Counts* comes an enrichment of that line of thought. Insofar as the case at bar presents occasion for reminder or clarification of the point of the system as a whole of Bill of Rights constitutionalism in South Africa, it is the Constitutional Court that comes to the fore. Insofar as the case then presents occasion for development of the common law in line with the Court's instruction, the labouring oar reverts to the judicial generalists of the High Court and the SCA.

2.6 *Maphango*

The case of *Maphango v Aengus Lifestyle Properties Ltd*[66] arose from a dispute between a private landlord and its tenant under written lease of space that the tenant occupied as her home.[67] The lease was for an initial one-year period and then for an indefinite term to follow, expressly made subject to termination at any time by either party on short written notice to the other. Also included was a clause specifically stipulating the amounts by which the rent might be raised from year to year over any

66 [2012] ZACC 2.

67 Having on a prior occasion offered a more extended account of this case – see Michelman (n 12) 254-61 – I present here a compacted version to focus on the themes of this chapter.

period of continuation of the lease. At a certain point after expiration of the initial year, the landlord, having duly served the stipulated notice of termination, went to court in quest of an order of eviction. The tenant, defending, branded as unlawful the landlord's exercise of the lease's at-will termination clause for the sole purpose (affirmed by the landlord) of freeing up the property for lease at a higher rental than the contractual rent-escalation clause would have allowed it to charge to a tenant under the subsisting lease.

The tenant had available for consideration a number of possible lines of legal support for her position, among them: (i) a claim for direct application to the landlord's conduct of the negative aspect of the right to housing guaranteed by section 26(1) of the Constitution,[68] and (ii) a claim from the common law of contract, either as that law currently then stood or as it might stand to be developed under pressure from the Bill of Rights.[69] The tenant's case further – although it seems somewhat mutedly or secondarily[70] – recited a claim for statutory protection in terms of the Rental Housing Act.[71]

As matters eventually were sorted out by a judgment of Cameron J for a Constitutional Court majority, judgment went for the tenant on the basis of statute law: specifically, a reading of the Act to say that no final judicial action on the landlord's application for eviction could occur before both parties had enjoyed a clear opportunity to place the matter before a provincial Rental Housing Tribunal (provided for by the Act), for its determination of whether the landlord's pursuit of eviction here would be an 'unfair practice' as defined and prohibited by the Act.[72] The judgment in that way by-passed an occasion plausibly offered by this case for what would have seemed a pro-transformative development of the common law of contract. It did so on its own motion

68 The section reads: 'Everyone has the right to have access to adequate housing.' For the negative aspect, see *Jaftha v Schoeman; Van Rooyen v Stoltz* [2004] ZACC 25 paras 31-34; *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19 para 34.

69 *Maphango* (n 66) paras 21, 31-33, 100.

70 See *Maphango* (n 66) paras 3, 23.

71 Act 50 of 1999.

72 See *Maphango* (n 66) paras 47, 52, 56, 67-68. Thus the crux of the resulting order was its paras 2 ('The appeal is postponed.') and 3 ('Any of the parties may, if so advised, lodge a complaint in terms of [the Act] with the Gauteng Rental Housing Tribunal on or before [a stated date].')

– the tenant having not herself urged any such course[73] – and against non-paltry complications of statutory interpretation that would have to be overcome.[74] Theme 1 of cause-of-action priorities and theme 4 of pro-transformative judicial activism are thus at least implicitly in play in this judgment. They are suppressed, however, in favour of what becomes the judgment's dominant theme 3 of judicial co-partnership with parliament in the implementation of the Bill of Rights.

By way of explaining the judgment's by-pass of a pro-transformative development of the common law, Cameron J took pains to classify the Rental Housing Act as a prime instance of the state taking legislative measures to fulfill a right in the Bill of Rights.[75] He inveighed against 'allowing litigants to ignore legislation that applies to an agreement between them'.[76] Interestingly, he made no mention of any subsisting rule or principle of subsidiarity. One could wonder why not. Was it perhaps because the rule so far in place precluded resort to a *direct constitutional* pleading where a covering statute also was in place but not a resort to a *common-law* pleading? But then we still need a reason why this particular case should preferentially be channeled to the statute.

One could speculate here about a possible tactical explanation for this choice on the part of Cameron J. The facts of this case might not have struck every justice as presenting occasion for a pro-progressive development of the common law. A switch of the case onto the statutory track would then have been a way to offer a prospect of relief for the tenant on which a majority of the Court could coalesce.[77] But still Cameron J's judgment would want a public justification for the switch, and one that he himself could endorse as good legal-institutional policy. The judgment does indeed provide such justification. It speaks partly in the general terms of inter-branch comity and collaboration, but also and more pointedly in terms of a quite specific appreciation for parliament's handiwork in the particular instance of the Rental Housing Act. Cameron J's judgment

73 *Maphango* (n 66) para 48: 'In my view, neither the landlord nor the tenant fully appreciated the force of the Act's provisions in litigating their dispute.'
74 The complications are briefly described in Michelman 'Gravity' (n 12) 255-256.
75 *Maphango* (n 66) para 34.
76 *Maphango* (n 66) para 48.
77 Van der Walt *Property and Constitution* (n 14) 60 notes that the bearing of a s 26 negative obligation on common-law development has to take into consideration 'a large number of variables that may swing individual cases in one or another direction'.

commends the Act's achievement as 'a complex, nuanced and potentially powerful system for managing disputes between landlords and tenants', and furthermore as a system which 'takes account of market forces as well as the need to protect both tenants and landlords' and is 'acutely sensitive to the need to balance the social cost of managing and expanding rental housing stock without imposing it solely on landlords', while at the same time 'not [ignoring] the need to protect tenants'.[78] In sum:

> In my view this dispute is best approached through the generous and powerful mechanisms the Act offers to both sides to the dispute. I express no view on whether the landlord was entitled at common law to cancel the leases, nor on whether, if it was so entitled, the common law should be constitutionally developed to inhibit that power.[79]

Well and good. But was Cameron J, then, by implication, comparatively downgrading the capacity of common-law adjudicatory methods to arrive at a comparably nuanced, practical, generous, and just response to the situation here presented? How should we square that with the view he apparently took in *Lee* of the density and subtlety of the common law, its embedded accumulation of wisdom, setting up the role of the Constitutional Court to demand and elicit from the system's main custodians of common-law science their due attentions to needs for transformationally requisite developments?

Answers are not hard to find. No one in *Lee* was anticipating any possibility of a parliamentary takeover from the common law of a general codification of delict law or of the negligence component thereof; those were and would remain common-law business *par excellence*. The problem in *Lee* from Cameron J's standpoint was the conjunction of plain need for a common-law shakeup with mistrust of the Constitutional Court's capacity to engineer that on its own without prior input from focused consideration by the generalist courts. By contrast, before him in *Maphango* was the more particular field of law to govern rental-housing practice – a field that he saw as not only technically intricate but furthermore as ripe for the kind of complex, pragmatic, inevitably compromised regulatory engineering for which legislation (including creation of and delegation to specialised administrative tribunals) is widely thought to have the advantage over a common-law jurisprudential

78 *Maphango* (n 66) paras 49-50.
79 *Maphango* (n 66) para 55.

style (broad principles to be further specified by judicial learning for application to variations in case-types as they come along). In *Maphango*, Cameron J checked to see whether the Rental Housing Act should in fact be commended as a realisation of the legislature's presumed superior capacities for the kind of regulatory invention the context required. He found that it should, to such an impressive degree that he doubted (such would be the implication) that common-law vocabulary and technique could likely do as well or better.

2.7 *Pridwin*

The respondent in this case,[80] Pridwin Preparatory School, is a strictly private school receiving no form of state subvention. The applicants, AB and CB, were parents of two elementary-level learners who had been admitted to attendance at the school pursuant to a formal agreement between it and AB. This standardised written 'parent contract' contained a clause empowering the school, upon specified advance notice to contracting parents – at the school's option, 'for any reason' – to terminate their contractual relationship and along with it their learners' continued admission to the school. The contract form contains no further procedural stipulation regarding such action by the school – as, say, for reception of representations by or on behalf of learners regarding the latter's own interests or needs.

Owing to a highly disruptive breakdown of relations between AB and staff of the school (for which the fault clearly lay with AB) and pursuant to the terms of the parent contract, the headmaster gave notice to AB to terminate the contractual relationship covering his sons' attendance at the school. The headmaster claimed, without contradiction, to have given full consideration to the learners' interests and needs in reaching his decision. His action, however, was peremptory in the sense of not having set aside some occasion for representation on the learners' behalf regarding their interests and needs.

By the time the case came to court, the learners had taken up enrollment at a different private school, and neither AB's pleadings nor his contentions in the lower courts showed any sign of a pursuit

80 *AB v Pridwin Preparatory School* [2020] ZACC 12. I have here laid out the case reduced to lowest terms for our concerns in this chapter.

by him of a remedy in the form of his sons' readmission to learning at Pridwin. AB's sole remedial request was for an order declaring invalid, as contrary to South African law, the peremptory action of the headmaster in expelling the learners. A question of mootness thus hangs, as we'll see, over a division of judgments at the Constitutional Court.

The Court agreed unanimously that a termination of the contract by the headmaster, having the consequence of an expulsion of the learners from the school, without provision for some occasion for representation from the learners or on their behalf, of their interests specifically with regard to basic education, could not qualify as lawful conduct in a South African legal order including the guarantees in sections 28(2) and 29(1)(a) of the Bill of Rights.[81] All further used language in their judgments describing that conclusion as a 'direct horizontal application' of the Bill of Rights.[82] The justices divided, however, over two questions: Can the Court reach that conclusion without *also* passing on the legal bindingness, under that same Bill of Rights, of a parent contract exposing primary learners to peremptory expulsion from their current school of attendance? Should the Court be resolving this case in the applicants' favour otherwise than on the basis of a constitutionally requisite development of the common law of contract?

A majority judgment authored by Theron J answered yes to those questions. Cameron J and Froneman J, in a co-authored judgment, disagreed. I summarise the contrasting positions respectively taken by the majority and by Cameron J and Froneman J.

In the view of the majority, the Court's focus could be strictly on the peremptory action of the headmaster to expel the two learners from primary-level learning at his school. By force of sections 28(2) and 29(1)(a) of the Bill of Rights, applied to natural and juristic persons as directed by section 8(2) of the Constitution, such conduct having such an effect cannot stand as lawful or hence as legally effective in this country. That is all the Court was asked to decide. Questions of the constitutional compatibility of the cancellation-by-notice term in the parent contract were *obiter* the instant controversy. Assuming (without deciding) an

81 Section 28(2) reads, 'A child's best interest are of paramount importance in every matter concerning the child', and section 29(1)(a) protects 'the right to a basic education'.

82 *Pridwin* (n 80) paras 130, 184-85 (Theron J, for the majority); 67-68, 90 (Nicholls AJ); 219 (Cameron J and Froneman J).

absence of constitutional objection to inclusion of that term as such, it is the headmaster's *specific act of peremptory execution* of that term, and only that specific act, that attracts legal scrutiny by the Court.

The majority judgment expressly forbore to rest its finding of that act's illegality on anything in the statute book or the common law.[83] For aught one can tell, then, that judgment granted applicants their requested relief – declaration of the illegality of the peremptory action of the headmaster in expelling the learners – on the basis of a direct constitutional cause of action. We may note that the majority judgment so proceeding makes no reference to section 8(3) of the Bill of Rights.

Cameron J and Froneman J took a different view of what the Court was bound to decide.[84] First, where no one is seeking readmission of the learners to the school, any question of Constitution-based objection to the specific action of the headmaster to expel them is moot.[85] Owing, however, to widespread reliance of South African families (elite and non-elite) on independent schools, put together with the widespread use by these schools of the parent-contract form with its expulsion-on-notice clause and the crucial bearing of such clauses on children's education rights and needs, the interests of justice here weigh in favour of entertaining the claim for non-compatibility of that clause with South African law.[86] But *the only* claim, then, properly before the Court is that of AB for declaratory relief in regard to the compatibility with the Bill of Rights of law giving effect to that clause.[87]

Second, in an absence of discovery either in our statute book or in our common law to date of a rule against peremptory expulsion of a learner under cover of a parent contract, section 8(3)(a) of the Constitution plainly and simply mandates common-law development as the avenue

83 *Pridwin* (n 80) paras 74, 92.

84 My account here of Cameron J's position draws from his having signed on to not just one but two dissenting judgments: one from Nicholls AJ for four justices including Cameron J and Froneman J, the other a supplementary dissent co-authored by Cameron J and Froneman J for the two of them alone. I cannot say that the very compact supplemental dissent is crystal clear on all the points that follow; M Finn 'Befriending the bogeyman: Direct horizontal application in *AB v Pridwin*' (2020) 137 *South African Law Journal* 591 at 606-607 is not wrong to find in it some measure of obscurity. But still their ambition to bring the following points to light seems tolerably plain to me.

85 *Pridwin* (n 80) para 218 (Cameron J and Froneman J).

86 *Pridwin* (n 80) paras 56-57 (Nicholls AJ).

87 *Pridwin* (n 80) para 215 (Cameron J and Froneman J).

of application of the Bill of Rights to the contractual activity of the respondents, the respondent headmaster and the school (respectively a natural and a juristic person). Accordingly, the Court's promulgation here of the requisite new legal rule is to be understood, in terms of that direction, as a development of the common law.[88]

Third, AB having suggested no basis for a claim of the learners' rights of attendance at the school apart from his own parent contract with it,[89] the apposite common-law development must be of the law of contract, to the effect of blanking out from the parent contract its termination-by-notice clause as written. Such action by the Court necessarily engages the question the majority professes to exclude from its consideration, of the permissibility or validity in our constitutional-legal order of that clause. Accordingly, the appropriate order in this case would be the one proposed in the opinion of Nicholls AJ, declaring both that 'a child's basic education should not be terminated without following a fair procedure' *and* that the termination-by-notice clause in the parent contract 'is unconstitutional, contrary to public policy and unenforceable to the extent that' it would excuse the school from that obligation.[90]

Fourth (Cameron and Froneman JJ take care to add), in the balance between the children's rights here at stake and the normal demand of contract law for adherence to agreements voluntarily made, the new rule passes muster under the usual 'limitation' test of section 36(1),[91] applied here as prescribed by section 8(3)(b).[92] The common-law principle

88 *Pridwin* (n 80) para 216 (Cameron J and Froneman J). One may wonder, then, why the judgments signed by Cameron J and Froneman J speak of their stance as one confirming a 'direct application' of the Bill of Rights. L Boonzaier 'Contractual fairness at the crossroads' (2021) 11 *Constitutional Court Review* 229 at 270-71 provides a possible explanation, in terms of a usage of the expression 'direct application' to signify that the norm being applied (even if through the channel of statutory interpretation or common-law development) is the command itself of the Bill of Rights (here of sections 28(2) and 29(1)) as distinguished from some broader value supposedly underlying those commands.

89 As pointed out by N Ally & D Linde '*Pridwin*: Private school contracts, the Bill of Rights, and a missed opportunity' (2021) 11 *Constitutional Court Review* 275 at 293, the majority judgment of Theron J 'acknowledges [at para 98, that] the impugned conduct takes place in terms of the contract'.

90 *Pridwin* (n 80) para 219.

91 *Pridwin* (n 80) para 217.

92 Providing that a court giving effect to a right in the Bill, against a natural or juristic person, by development of the common law as prescribed by s 8(3)(a), 'may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).'

of contractual autonomy, they thus imply, stands in a kind of parallel with the clauses of guarantee in the Bill of Rights. Like them, it stands always subject to adequately justified limitation, notwithstanding an appreciation of it as also vital for human dignity and freedom.

In this reasoning, theme 4 of pro-transformative judicial activism, theme 3 of regard for the common law as a heritage of freedom, and theme 1 of pleading priorities are all interactively in play. The common-law principle of *pacta sunt servanda* demands due attention – and our justices mean from a *pro*-transformative standpoint – in any resolution of ostensible jostling or with bill-of-rights guarantees. That view is what prompts their objection to the majority's erasure of the contract-law issue from its resolution of this case, in apparent contravention of the command of section 8(3)(a) of the Constitution. That erasure evades the limitation analysis enjoined by sections 8(3)(b) and 36(1) and the need thus posed to weigh the *pacta* principle as a subsisting, value-bearing part of South African law.

How strictly and literally, then – this is the pleading-priority issue – will the Court read the facially apparent instruction of section 8(3)(a) of the Constitution *always*, in a horizontal case, to channel applications of the Bill of Rights through statute law or common law construed, amended, or developed as occasion requires? Cameron J and Froneman J would appear to take that instruction in full earnest, whereas the majority judgment of Theron J in *Pridwin* rather cavalierly disregards it.[93] Now, opinions may differ over the net upshot, for the Constitution's transformative ambition, of an insistence on channelling the impact of the Bill of Rights in horizontal litigation, where not covered by statute, *always* through common-law review and reform. On one side of the balance would weigh the importance attached to a continuing – more-or-less a daily – subjection of the country's continuing main reservoir of ordinary private law to pro-transformative re-inspection.[94] On the other side would weigh the setbacks that such a habitual consultation with the common law might sometimes put up against the most dedicatedly

93 See *Pridwin* (n 80) para 130 (judgment of Theron J): 'This Court should not avoid direct horizontal application where it appears to be the most appropriate means of resolving a constitutional dispute.'

94 Van der Walt *Property and Constitution* (n 14) 35, 81, 85; D Davis & K Klare 'Transformative constitutionalism and the common and customary law' (2010) 26 *South African Journal on Human Rights* 403; Finn (n 84) 595.

transformation-minded applications one could think of for clauses in the Bill of Rights.[95] Which way the net balance goes would seem to be anybody's guess. What are not guesses, though, are that insistence on common-law channeling of Bill of Rights applications does force possibly redemption-worthy common-law wisdom into view for due consideration, and that Cameron J has apparently leaned to that way of taking instruction from section 8(3)(a).

3 Dworkin's thesis in full flower: *Glenister II*

The case of *Glenister v President of the Republic of South Africa*[96] is not one falling within the conversation on the relations of constitutional, statute, and common law in South Africa's one system of law. A look at the Constitutional Court's judgment there can nevertheless serve fittingly as capstone for our extraction, from the judicial work of Edwin Cameron, of a redemptive-transformative outlook on South Africa's choice for a bill-of-right-constitutional form of a government regime.

Does the Constitution impose upon the state a judicially cognisable obligation to establish and maintain an organisational unit for detecting, exposing, and prosecuting corruption in state operations, with staffing and command authority strongly insulated from oversight by other governmental power-holders? In *Glenister II*, a majority judgment co-authored by Moseneke DCJ and Cameron J concluded that it does.[97] In that judgment, two lines of reasoning converge to support that conclusion. One line adduces international agreements expressly imposing such an obligation, to which South Africa is party. The judgment looks to specific provisions of the Constitution to conclude that the obligation thus accepted has entered into the judicially cognisable, domestic positive law

95 Van der Walt 'Normative pluralism' (n 2) 84-85, 88-89. Boonzaier (n 88) 273 thus explains the *Pridwin* majority's insistence on a direct constitutional cause of action for AB, bypassing the common-law-development route. The Court, offers Boonzaier, can in that way 'decide contractual disputes in a constitutional idiom ... which does not require the same engagement with and indeed deference to the [*pacta sunt servanda*-bound] jurisprudence of the SCA.'

96 [2011] ZACC 6.

97 That conclusion laid the ground for upholding a challenge to the constitutional adequacy of existing anti-corruption legislation, over a dissenting judgment from Ngcobo CJ.

of South Africa.[98] The other line bases that conclusion on a deduction from the transformative disposition of the Constitution as a whole.

As noted by Moseneke DCJ and Cameron J, the Constitution does not anywhere 'in express terms command that a corruption-fighting unit should be established'; rather, the Constitution's 'scheme as a whole imposes a pressing duty on the state' to do so.[99] Corruption, the judgment explains, disenables the state from respecting, promoting and fulfilling fundamental rights and freedoms.[100] It furthermore defeats accountability, responsiveness, and transparency of government and the intended uses of public resources.[101] Corruption, in sum, 'blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project'.[102]

The judgment accordingly concludes that 'the scheme of our Constitution points to the cardinal need for an independent entity to combat corruption'.[103] What is more, it does so 'even leaving to one side for a moment the Republic's international law obligations'.[104] Thus plainly manifest in the judgment is the idea – the first aspect of Dworkin's thesis – that the Constitution as a whole is to be read as a projection of a cognisable vision for right government, which projection takes effect as law along with the clauses composing it.

We must not, however, lose sight of how Moseneke DCJ and Cameron J's judgment would leave aside the global-law input to the case not totally but only 'for [the] moment'. 'It is possible,' declares that judgment, 'to determine the content of the obligation section 7(2) imposes on the state without taking international law into account'.[105] So when we do take that law into account, are we then gratuitously infiltrating alien rulership into our own basic law? Not at all, says the judgment. Rather, under instruction from section 39(1)(b) of the Constitution , we are 'respecting

98 *Glenister II* (n 96) paras 179-97.
99 *Glenister II* (n 96) para 175.
100 *Glenister II* (n 96) paras 175, 177.
101 *Glenister II* (n 96) para 176.
102 *Glenister II* (n 96) para 166.
103 *Glenister II* (n 96) para 200.
104 *Glenister II* (n 96) para 200. And again: 'Even without international law, these legal institutions and provisions point to a manifest conclusion. It is that, on a common sense approach, our law demands a body outside executive control to deal effectively with corruption.'
105 *Glenister II* (n 96) para 201.

the careful way in which the Constitution itself creates concordance and unity between the Republic's external obligations under international law, and their domestic legal impact'.[106]

Implicitly but plainly, the message is that in looking to the Constitution for its higher-visionary project, we are to have in view conceptions of right government rooted in a wider community of values in which South Africa counts herself participant. The repository of guides for a post-liberation South African law – signaled in part by the Constitution's evident buy-in to the bill-of-right-constitutional governmental form – consists not merely in a distinctive Roman-Dutch-cum-English *corpus juris* recoverable from South Africa's particular legal history but reaching also to a wider constitutional-democratic (or dare one say 'liberal'?) tradition in which that *corpus juris* is seen to participate.

'Postliberal', Karl Klare has most incisively and indelibly named the Constitution.[107] The stamp fits perfectly the Constitution's character of a decided departure and advancement from prior liberal models, as luminously shown by Klare. Edwin Cameron surely would agree, perhaps reserving only that the 'post' in 'postliberal' signifies supersession in the way of a rectification and advancement, not in the way of a displacement, of a core regard for the freedom, equality, and dignity of every person.

106 *Glenister II* (n 96) para 201. Section 39(1)(b) of the Constitution provides that 'when interpreting the Bill of Rights, a court, tribunal or forum must consider international law.'

107 Klare 'Legal culture and transformative constitutionalism' (n 5) 151-56.