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Tributes to Edwin Cameron

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Tribute by Hugh Corder

Oxford, Stellenbosch, and elsewhere*

I sincerely appreciate this opportunity, afforded to me by the editors, to contribute to this *Festschrift* in honour of Edwin Cameron. I do so primarily as a friend who has known Edwin for more than 40 years – yet also in the knowledge that there are many who have known Edwin for longer and more closely than I have. I am happy to share these remarks because I owe him such a large debt of gratitude for what he has done, deliberately and coincidentally, to set and then keep me on track at critical stages of my life. At such moments, Edwin has acted always generously, always with humility, always with high intelligence, both intellectual and emotional, and always with a refined and sometimes wicked sense of humour, accompanied by his self-deprecating giggle. I am sure that my own experience will resonate with those of others.

My first encounter with Edwin was a remote one. In late 1978 I had to decide which Oxford college to apply to, and through a close friend of Edwin then, David Pitman, Keble College was suggested to me, entirely on the basis of Edwin's positive experience there. Keble is an unfashionable college, founded in 1870 in an attempt to widen access to Oxford beyond its traditional class base, with a large undergraduate student body housed in an uncharacteristic red-brick structure on the northern edge of the historic university precinct. The senior law don when I joined Keble was Dr Jim Harris, the legal philosopher. Both he and Professor Tony Honoré made Edwin's and my time at Oxford unforgettable.

* This tribute is adapted from the author's opening remarks at the colloquium in honour of Edwin Cameron held at the University of Cape Town on 2 December 2022.

I was admitted to Keble in October 1979, and two years' later Edwin returned to Oxford to take up the third year of his Rhodes Scholarship to pursue the Bachelor of Civil Law degree, which coincided with the third year of my own doctoral studies. We were housed on the same staircase in college, along with a fellow South African Rhodes Scholar, Jonathan Watt Pringle, and inevitably we spent much time in each other's company. That was a time of great pain and introspection in Edwin's life – the Afrikaans word '*sielewroeging*', or soul-searching, comes to mind – for several reasons, one of which I remember starkly. In early 1982 Edwin's incisively critical assessment of the career of Chief Justice LC Steyn was published in the *South African Law Journal*.[1] His courageous willingness to challenge orthodox thought about the career of Steyn, whose appointment was a primary example of Afrikaner nationalist interference with the judiciary, drew anticipated criticism, but not always from the expected sources, and Edwin was deeply hurt by some of the responses he received. Yet he was not distracted from the typical approach to his studies, and ended up as the Vinerian Scholar for that year, a signal accolade.

Edwin returned to Johannesburg at mid-year, and I followed at its end. I stayed over in his flat in Johannesburg in between flights from London to Cape Town some 42 years ago. (Edwin shared the flat with his cat, and he has reminded me that the said cat distinguished itself by urinating on my sleeping bag during my stay.) Edwin strongly encouraged me to accept any offer of an academic appointment to Stellenbosch Law Faculty, should it be made to me – an important consideration from a Stellenbosch alumnus with a sense of the Faculty's potential, which duly came to fruition in my four-year tenure there from mid-1983.

From then to now, by the nature of events in the law and politics of the 1980s and 1990s, we met from time to time for intense catch-up sessions at gatherings of progressive lawyers, some details of which appear in Edwin's *Justice*.[2] For me, the most significant impact was indirect: as a member of the Technical Committee on Fundamental Human Rights at the Multi Party Negotiating Process in Kempton Park from May 1993. Once it became clear that we would be concerned with

1 E Cameron 'Legal chauvinism, executive-mindedness and justice: LC Steyn's impact on South African law' (1982) 99 *South African Law Journal* 38.
2 E Cameron *Justice: A personal account* (2014) ch 1.

listing the grounds for outlawing unfair discrimination under the right to equality in the transitional Bill of Rights, Edwin put me in touch with Kevin Botha of the Equality Foundation. I remember vividly a telephone conversation in a side-room at the negotiations with Kevin, during which we discussed the best way to introduce, and to respond to arguments against such introduction, the right not to be unfairly discriminated against on the ground of sexual orientation. In the event, I was able easily to gain the support of my committee colleagues, and once the proposal was in the public domain, it was hard persuasively to exclude it. The rest, in that regard, is history.

We know of Edwin's subsequent career as academic, practitioner, and judge: it has often occurred to me that one of the most significantly beneficial decisions made during the brief tenure of President Kgalema Motlanthe was his elevation of Edwin to the Constitutional Court. We have continued to catch up briefly at social and professional gatherings since then; but more significant have been the random unexpected emails or mobile phone messages from Edwin, responding to something that one has done or written, always honest and often particularly timely, which have made a great difference to me. I am absolutely sure that I am not alone in this respect.

Edwin's new roles as Inspecting Judge as well as Chancellor of Stellenbosch University draw him repeatedly into the public domain. I came across one such example in *Die Burger* in November 2022. On the occasion of a dinner to celebrate the centenary of the Department of Afrikaans Nederlands at Stellenbosch, Edwin challenged those present, 'as an Afrikaner' to whom the language was important, to engage in activism in support of Afrikaans in the public domain. He did so unequivocally, yet deeply respectfully and appropriately in the context, ever mindful of other imperatives and interests.

Given advancing age, perhaps a slightly sentimental conclusion is not inappropriate. Around the time that Edwin and my paths crossed in the 1970s, the liberation theologian and leader of the Dominican order, Albert Nolan, published *Jesus before Christianity*[3] – a book both informed by and very influential in student radical politics of the time, both black and white. Nolan died in 2022, at the age of 88. A memorial

3 A Nolan *Jesus before Christianity* (1976).

service in his honour, which I attended, used as its theme this quote from the significant Old Testament prophet, Micah: 'What does the Lord require of you but to do justice, love kindness and walk humbly with your God?'[4] I have long since treasured this prescription and thought it entirely apt to close on this note.

Tribute by John Dugard

Freedom of expression and the 1980s

Most of the chapters in this *Festschrift* rightly focus on Edwin's judicial work, his campaigning for the treatment of HIV/AIDS and his philosophy of law. In this tribute I will focus mainly on his contribution to freedom of expression in the administration of justice. Here, as elsewhere, his legacy is profoundly felt today. I write this tribute as a friend, one who worked with Edwin and admired him, for over forty years.

Let me begin by claiming that I can take some credit for Edwin's career, if only the start. In 1978 when I was Chair of the Governing Committee of the Wits Law School, I was invited by Dirk van Zyl Smit, then a member of staff of the Law School, to meet a potential lecturer. Dirk warned me that he had no South African legal qualification and that some universities would not consider appointing him for this reason. He had only an Oxford BA (Law) degree which I knew meant he was automatically disqualified in the eyes of some of my colleagues. The meeting in Dirk's garden went well. I was immediately taken with young Cameron and determined to appoint him. Not only was he engaging in conversation and obviously well qualified to teach law at Wits but he had a qualification which I failed to disclose to my colleagues. He was, like me, an 'Oud Wilgenhoffer'. That is, Edwin had been a student at Stellenbosch University's oldest men's residence, Wilgenhof, and Primarius to boot. So, I must confess that I was biased in favour of Edwin and delighted that he had impressed my colleagues.

When Edwin joined Wits, law schools in South Africa were beginning to find their voice in opposing apartheid. It had all started in 1966 with

4 Micah 6:8.

an article by Tony Mathews and Ronald Albino, 'The permanence of the temporary: An examination of the 90- and 180-day detention laws',[1] which analysed the way in which judges of the Appellate Division had interpreted the security laws to favour the executive with little regard for individual liberty or the mental health of detainees. This article had presented the editors of the *South African Law Journal,* HR (Bobby) Hahlo and Ellison Kahn, with a dilemma. For years they had approached their task as editors with caution and displayed a determination not to challenge the government or condemn the policy of apartheid. The Mathews/Albino article posed a challenge to their consciences. To their credit, they agreed to publish the article, but were careful to insist on the inclusion of the sentence: 'There is no assertion here that the judges are partial or lack integrity.'[2] Despite this disclaimer, the response was hostile. Chief Justice LC Steyn publicly condemned the article and took steps to ensure that the publisher, Juta, was denied the contract for the publication of the South African consolidated statutes. Instead the contract went to Butterworths which was careful not to publish material critical of the government. In 1969 and 1970, Barend van Niekerk, then a Senior Lecturer at Wits, published two articles in which he showed, on the evidence of replies to a questionnaire sent to advocates, that there was racial differentiation in the imposition of the death penalty.[3] He was charged with contempt of court, castigated by the judge, but acquitted on the ground that he lacked the required intention.[4]

In 1971 I gave my inaugural lecture on 'The judicial process, positivism and civil liberty', in which I argued that South African judges had interpreted the law governing apartheid in favour of the government.[5] Relying on the American school of Legal Realism, I declared that judges had been influenced by an inarticulate premise of racial superiority on questions of race and security. This meant that there was no deliberate intention on their part to interpret the law in a discriminatory manner, that they had been unconsciously misdirected. Shortly afterwards Chief

1 AS Mathews & R Albino 'The permanence of the temporary: An examination of the 90- and 180-day detention laws' (1966) 83 *South African Law Journal* 16.
2 Mathews & Albino (n 1) 37.
3 B van Niekerk 'Hanged by the neck until you are dead' (1969) 86 *South African Law Journal* 457; (1970) 87 *South African Law Journal* 60.
4 *S v Van Niekerk* 1970 (3) SA 655 (T) 659.
5 J Dugard 'The judicial process, positivism and civil liberty' (1972) 88 *South African Law Journal* 181.

Justice Steyn gave an address at the annual conference of the Association of Law Teachers of South Africa to mark his retirement from the Bench in which he attacked my inaugural lecture – without naming the author. He declared that judges had considered laying charges of contempt of court but that the author had been smart in suggesting that judges had not deliberately ruled in favour of the executive but had done so negligently and subconsciously. The failure to state that judges had intended to favour the executive meant that it would be difficult to succeed on a charge of contempt of court.[6]

It became clear that the judiciary was now determined to suppress academic criticism that challenged the judiciary in its application of the racist and repressive laws of the apartheid regime, and that the obvious weapon was the contempt of court power, which embraced scandalising the courts and making statements that might interfere with pending matters. But there were other instruments, too, that might be employed to silence critics. In 1972 Barend van Niekerk was convicted, not for contempt of court, but of attempting to defeat or obstruct the course of justice, when he gave a speech criticising the judiciary's failure to reject the evidence of detainees held for prolonged periods and subjected to mental torture under the security laws.[7] Chief Justice Ogilvie Thompson made it clear, in upholding the conviction in the Appellate Division, that judges had a wide discretion to stifle criticism of the judiciary by using the contempt of court power and the crime of attempting to obstruct or defeat the course of justice.[8]

It was in this environment that Edwin wrote his critique of the jurisprudence of LC Steyn, published in the *South African Law Journal* in 1982.[9] LC Steyn, it must be recalled, served sixteen years on the Appellate

6 J Dugard *Confronting apartheid: A personal history of South Africa, Namibia and Palestine* (2018) 53.

7 *S v Van Niekerk* 1972 (3) SA 711 (A).

8 Shortly before the *Van Niekerk* case, Chief Justice Ogilvie Thompson delivered a speech in which he warned that contempt of court powers were essential to preserve the administration of justice. See his 'Address to the centenary celebrations of the Northern Cape Division', published in (1972) 89 *South African Law Journal* 32.

9 E Cameron 'Legal chauvinism, executive-mindedness and justice – LC Steyn's impact on South African law' (1982) 99 *South African Law Journal* 38. For contemporaneous comments on this article, see A van Blerk 'The irony of labels' (1982) 99 *South African Law Journal* 365; D Dyzenhaus 'LC Steyn in perspective' (1982) 99 *South African Law Journal* 380. David Dyzenhaus renews the dialogue in 'Edwin Cameron and the politics of legal space', this volume, ch 4.

Division, twelve of which were as Chief Justice (1959–72); participated in many of the major decisions on race and security of that time; and was largely instrumental in setting the course for undue deference to the executive on the part of South African judges. He was widely viewed, at least by the government and most lawyers, as a judicial icon, an ornament to the South African legal traditions, a judge beyond reproach. In his article, titled 'Legal chauvinism, executive-mindedness and justice – LC Steyn's impact on South African law', Edwin accused Steyn of engaging in a legal campaign to purify South Africa's system of Roman-Dutch law by excluding recourse to English decisions that had long been accepted in South African law, and of displaying executive-mindedness and an absence of a sense of justice ('*regsgevoel*') in his interpretation of race and security laws. For him, South African law was to reflect the ideology of the National Party, its purpose to create a society in which English legal influence was removed and an apartheid state was established.

Edwin's article did not suggest that Steyn had been guided by an inarticulate, subconscious premise in ruling in favour of the executive. Nor could it be said that, like Barend van Niekerk's 1969 article on the death penalty, it failed to show an intent to be contemptuous. Edwin's contempt for Steyn was forthright and unambiguous. Steyn, he declared, had been appointed to an appeal court that had gained a reputation for fairness and championing fundamental rights but '[h]e did not leave it so'.[10] His contribution to South African law was 'lamentable'.[11] He was an 'executive-minded' man of 'parsimonious intellect'.[12] He was 'able to manipulate concepts, rules and even the processes of logic in order to attain judicially results he thought desirable'.[13] He saw the judge's role as purely 'mechanical' in order to absolve the judiciary of responsibility for its decisions.[14] His sense of justice was 'lacking in generosity'[15] and he supported 'legislative racialism'.[16] The only explanation for Steyn's judicial record is that he 'was manifestly in sympathy with legislative enactments enforcing a regime of separation and discrimination in South Africa'.[17]

10 Cameron (n 9) 75.
11 Cameron (n 9) 40.
12 Cameron (n 9) 40.
13 Cameron (n 9) 67.
14 Cameron (n 9) 60.
15 Cameron (n 9) 62.
16 Cameron (n 9) 74.
17 Cameron (n 9) 68.

Did Edwin's article constitute contempt of court as it was understood by the South African judiciary of that time? Did it scandalise the courts? Did it serve to defeat the course of apartheid justice, premised as it was on race discrimination and political repression? Did it defeat the administration of apartheid justice more than the statements of Barend van Niekerk in 1972? It is difficult to argue that it did not. Edwin had exposed the prime architect of the judicial structure of apartheid as an emperor without clothes. The ideal of judicial independence based on a mechanical interpretation of the law, which sought to give full effect to the intention of parliament with no regard for its consequences, was shown to be a fig leaf designed to conceal judicial support for the apartheid legal order. Judged by the judicial standards of the day, Edwin was undoubtedly in contempt of court.

Why was Edwin not prosecuted? Was it because LC Steyn had died in 1976 and the article was criticism of him alone? No. This could not have been the reason. Although Edwin's article took the form of an attack on LC Steyn and his jurisprudence, it was essentially an attack on the judicial interpretation of the law of apartheid under his leadership. Most judges of that time were guilty of applying the law in the same way.

Was it because judicial attitudes had changed? Again, no. There can be no suggestion that judges had become more tolerant of criticism by 1982. Personal experiences testified to this. In 1981 I was visited by the heads of the security police and Criminal Investigation Department of Grahamstown, who flew to Johannesburg to interview me at the direction of Judge President Cloete. He charged that I had committed contempt of court in remarks I made on the decision of the Eastern Cape Division, which had rejected a complaint that the people of Ciskei had not been consulted on independence, reasoning that its independence had been approved by a sovereign parliament.[18] My comment in the local press that this was a 'brutal statement of parliamentary sovereignty'[19] was viewed as contemptuous. I confessed that I had been correctly reported and that I stood by my comment. Nothing came of this complaint but its purpose to intimidate was clear. In 1983 I had a similar experience when Judge Solomon laid a complaint of contempt of court against me. In passing sentence on two white men convicted of killing a black woman

18 *Mpangele v Botha* 1982 (3) SA 638 (C).
19 *Daily Dispatch* (20 November 1981).

in East London, the judge had said 'I take into account that the woman was black. If the boot were on the other foot, if two black men did this to a white woman, I would have had to deal with them more severely.' I commented that white judges 'should be particularly careful when making these kinds of comments which tend to violate the confidence that the man in the street has that all people are equal in the eyes of the law.'[20] Again I was visited by a senior police officer who wanted to know whether I had indeed made this statement. Again there was no prosecution.

Was it because apartheid had become more benign in the 1980s? No. The 1980s were a turbulent time for South Africa. A state of emergency prevailed for much of the decade, the security laws were consolidated, and race discrimination remained the foundation of the legal order. Politicians were likewise still determined to protect the judiciary against accusations of unfairness in the application of the race and security laws and to maintain the image of the courts as independent appliers of the law.

I have two explanations for the failure to prosecute Edwin. First, Edwin's article was not an unreasoned tirade. It was a brilliant, careful and thorough analysis of Steyn's principal judicial decisions on Roman Dutch law, security and race which led to the conclusion that his chauvinistic approach to the law, his executive-mindedness and his absence of a sense of justice contributed to the resurgence of Afrikaner nationalism and the establishment of an apartheid state. It was written in the style and best traditions of legal scholarship with a meticulous analysis of the legal reasoning employed by Steyn. To have prosecuted Edwin would have been an attack on scholarship.

Second, any prosecution of Edwin would have been compelled to argue that Steyn's approach to law was the correct judicial course for judges to pursue. It would have been necessary to show that in their search for the intention of the legislature in the interpretation of race and security laws judges were to give effect to the apartheid ideology of the National Party. The basic premise of such an argument would have been that an attack on LC Steyn was an attack on all judges because they too – if they fulfilled their judicial function properly – were party to the

20 *City Press* (15 May 1983).

Steyn's vision of the law. This would inevitably have placed the apartheid legal order itself on trial. The government could not afford this at a time when it continued to insist that judges were completely independent and South Africa respected the rule of law.

That Edwin's article persuaded the prosecuting authorities to abandon their policy of silencing critics of the judiciary, as it had done in the days of Barend van Niekerk, was confirmed by Edwin's later actions. His crusade against the death sentences imposed on the 'Sharpeville Six' in the late 1980s was reminiscent of Barend van Niekerk's campaign against the death penalty in the late 1960s.[21] The language he used to criticise the Appellate Division's decision confirming these death sentences was, however, more powerful (contemptuous?) than Barend's. He described the decision as a miscarriage of justice 'symptomatic of the extremities apartheid was inflicting on the legal system'.[22] Chief Justice Rabie's angry response was, however, not to initiate legal action against Edwin but instead to request the Johannesburg Bar Council to take disciplinary action against him – a request that failed.[23] The year before, Edwin had incurred the wrath of the Minister of Justice, Kobie Coetzee, when he criticised three judges – MT Steyn, Munnik, and Rabie – for misconduct amounting to collusion with the apartheid regime.[24] Instead of initiating or threatening contempt proceedings, however, the Minister of Justice was satisfied with a personal attack on Edwin and the comment that this criticism was 'distasteful and improper'.[25] There was no suggestion of legal action.

The failure to take action against Edwin for his forthright comments on the judiciary's complicity in upholding the apartheid regime confirms that his article on LC Steyn in 1982 was a turning point. The freedom

21 E Cameron 'Verdict that puts our legal system on trial' *Sunday Times* (21 February 1988); E Cameron 'Inferential reasoning and extenuation in the case of the Sharpeville Six' (1988) 1 *South African Journal of Criminal Justice* 243. For a recent account of the case, see T Grant *The Mandela brief: Sydney Kentridge and the trials of apartheid* (2022) 129 ff.

22 E Cameron *Witness to AIDS* (2005) 25 cited in G Marcus 'Courage, integrity and independence: Edwin Cameron's contribution to the law' (2019)(Aug) *Advocate* 24 at 25.

23 Marcus (n 23) 25; E Cameron *Witness to AIDS* (n 22) 26.

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

25 Cameron *Witness to AIDS* (n 25) 26.

that legal academics and the media today enjoy to criticise and comment on judicial decisions and conduct can be traced back to that moment.

Edwin's contribution to justice in South Africa has been immense. The progressive interpretation of the Constitution, the treatment of HIV/AIDS, prison reform, opposition to apartheid in its final decade and the development of an enlightened jurisprudence are but some of Edwin's achievements. To this litany of good works must be added freedom of expression – in particular, the freedom to hold the judiciary accountable for their actions through language that calls a spade a spade.

Tribute by Carole Lewis

Bridging the divide between two courts

This is a tribute to my very dear friend and colleague, Edwin Cameron. Edwin was elevated to the Supreme Court of Appeal in 2001. He had before then been a judge in the Gauteng Division of the Supreme Court for some five years. And even before then, both an academic and a practising member of the Johannesburg Bar. Our careers and our personal lives had been closely intertwined since 1978, when he joined the Wits Law School, having recently graduated with a BA in law, first class, from Oxford. At the time, I was a lecturer in law at Wits, appointed earlier in that year.

In September 1978, Professor John Dugard, who was then the head of the School of Law, advised me that a brilliant Oxford graduate who had just returned to South Africa, was thinking of joining the academic staff at Wits. From the sound of Edwin's amazing curriculum vitae – a brilliant undergraduate degree and Latin honours from Stellenbosch, and a BA (first class) at Oxford, as a Rhodes Scholar – I envisaged a bookish nerd. So when Edwin popped his head into my cubicle (a tiny office) I was astonished to see a very tall and attractive man. Edwin and I have slightly different recollections of this first meeting. I recall saying drily that I was supposed to persuade him to teach Roman Law. I don't remember what I said exactly but it did the trick. He was appointed as a lecturer though he did not have a South African law degree. But he could, and did, teach Roman Law and Jurisprudence.

Between us, we revolutionised the teaching of Roman Law. Instead of standing in front of a class of about 200 bored students, we wrote lecture

notes which we distributed at the beginning of each academic year. We each wrote about half the notes and they were typed by a secretary in the then new law clinic. They were a masterpiece! We divided the students into classes of no more than 20 and gave tutorials instead of lectures. The notes were publishable, but Edwin and I never thought of that.

Edwin also had a mischievous streak. Together with Gilbert Marcus, Edwin wrote a set of new 'rules' for the law library, rendering comical Ellison Kahn's attempt to stop academic staff from taking books out of the library. Their spoof made their younger colleagues laugh uncontrollably.

When Edwin returned to Johannesburg after finishing the BCL at Oxford (having distinguished himself and attaining the honour of the Vinerian Scholarship) he went to do his pupillage at the Johannesburg Bar. He practised at the bar for a short period, gaining the admiration, affection and trust of legal luminaries like Rex Welsh, Arthur Chaskalson, and Sydney Kentridge. John Dugard, the founder and director of the Centre for Applied Legal Studies (CALS), then recruited him, together with Gilbert, Halton Cheadle, Paul Benjamin, Nicholas (Fink) Haysom, Clive Thompson, and other clever young lawyers who were dedicated to the defence of human rights. They became known as Dugard's 'Young Turks'. While doing outstanding work at CALS, they also engaged in private practice and were never to be found when John sought them out. To make matters worse, Halton, Clive and Fink established their own attorneys' firm to practise public interest and labour law. They ran between the firm and CALS, and Dugard's frustrations grew. The affection he felt for them, and they for him, never changed, however.

When democracy dawned in South Africa in 1994, Edwin was soon appointed as an acting judge to chair a commission of enquiry, and shortly after that was appointed as a judge in the Gauteng South Division of the Supreme Court, as it was then known. I sorely missed regular contact with him at Wits, but we remained close friends. When I was later appointed as a judge (in 1999), it seemed that we were destined to work in the same place. But Edwin moved on quickly: having acted as a judge in the Constitutional Court (CC), he was appointed as a judge of appeal in the Supreme Court of Appeal (SCA) in 2001. I joined him again, as an acting judge of appeal, in 2002. Because we were both exiled from home, Johannesburg, living during court terms in Bloemfontein, we spent a great deal of time in each other's company – for lunch in our respective homes, for suppers with colleagues, for tea on Sundays in the

Free State Botanical Gardens. We chatted, of course, about domestic matters, about politics, both national and at our court, but also about the law and how it should take shape in a constitutional dispensation. More often than not, Robert Nugent, who had started at the SCA at the same time as Edwin did, would be with us and would debate legal issues with Edwin and me: we both benefitted enormously from that.

At the end of 2008, in the interregnum when President Mbeki had been ousted by the ANC, before President Jacob Zuma was appointed, President Kgalema Motlanthe appointed Edwin to the CC on the recommendation of the Judicial Service Commission. It was a happy appointment for the CC, and a sad loss to the SCA. But it was a position that Edwin had always wanted.

His appointment also presented opportunities for bridging tensions between the two courts. Edwin and I had often talked about the anomaly that there were two 'apex courts' each with constitutional jurisdiction, but working more or less in parallel, rather than within a clearly defined hierarchy. These anomalies certainly gave rise to tensions between the two courts that we both thought could and should be avoided.[1]

In 2009, shortly after his appointment to the CC, Edwin and Kate O'Regan (still a member of the CC at that time) were in contact with appeal judges in the United Kingdom about a Judicial Exchange between appellate judges in the UK and in South Africa. I do not remember, and possibly never knew, about the origin of their discussions. But they culminated in an extremely fruitful exchange of views in Edinburgh, Scotland, in June 2009. The CC and the SCA were asked to send five delegates each to Scotland. The appeal judges of the United Kingdom came from various courts, including the House of Lords (before it became the Supreme Court), the Court of Appeal, the Irish Court of Appeal, and the Scottish Court of Session. The CC delegates were the Deputy Chief Justice, Dikgang Moseneke, and Justices O'Regan, Nkabinde, Sachs, and Skweyiya. I do not recall why Edwin was not a delegate. The SCA judges were Deputy President Harms and Justices Brand, Cloete, Lewis, and Mthiyane.

1 I expressed my views in an article published at the time: C Lewis 'Reaching the pinnacle: Principles, policies and people for a single apex court in South Africa' (2005) 21 *South African Journal on Human Rights* 509.

We were all required to present papers for deliberation beforehand, on a range of topics. And then there were debates on the papers over three days, much of which centred on the differences in jurisprudential approaches of the CC and the SCA, and the apparent tensions between the two courts. So much so that at the end of the second day, Lord Hope of Craighead suggested that we spend the third day – a Sunday – discussing our differences in the hope of reaching some meaningful understanding, with the UK judges mediating.

The tensions arose not only from differences in legal theory, but also from differing approaches to judgment writing and delivery. The SCA was at that stage accustomed to delivering unanimous judgments, or where there was dissent, with dissenting judgments, within a court term. The CC, on the other hand, took very much longer than a term in which to produce a judgment, and there were often several concurrences and dissents. Indeed, Justice Sachs had brought with him to Edinburgh multiple copies of the five judgments that had recently been handed down in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*.[2] He explained at the meeting that members of the court had felt so strongly about the issue (the right to housing) that they had each written their views as concurrences. After the Judicial Exchange, there was another hearing by the CC in the same matter because the order first made had proved impossible to implement.

The other source of tension was the fact that judges of the CC were infinitely better resourced than those of the SCA. Each CC judge had assigned to him or her a personal assistant and two researchers (at least). They had their own internet server, which was under the control of the administrators and the librarians of the court, and a magnificent library. On the other hand, the SCA judges, about 20 in 2009, had the benefit of three legal researchers between them. Many judges shared secretarial services. And the SCA was subject to the control of the Department of Justice and its regional minions. We had to fight for access to the internet, for more researchers, for our own internet server and for each pencil or pen that we required. In our view, with our much heavier workload, we needed at least the same, if not better, resources as the CC judges had. There was, certainly in my time at the SCA, no sight of that.

2 [2009] ZACC 16.

But to return to Edinburgh in 2009: the South African judges present had what I perceived to be an excellent discussion on the Sunday of the Exchange and agreed to meet again, with all members of the two courts present, once back in South Africa. Regrettably that did not happen. While I and Justices Moseneke and O'Regan tried to set up a meeting, that became possible only in 2011 when a newly renovated and extended Supreme Court of Appeal had been built. Many CC judges were expected to come to the opening, and to celebrate the centenary of the court of appeal in 2010. Justice O'Regan had retired by then and Justice Mogoeng had recently been appointed as Chief Justice, and discussion of judicial differences was not for him a priority. The meeting of judges was scheduled for barely 30 minutes and nothing of consequence was discussed.

So we continued on our different paths again.[3] Different approaches to almost every area of the law have continued to manifest since 2011. One of the areas where tensions between the SCA and the CC has been most apparent is in relation to private law, and in particular, contract. Debates have raged, both in the SCA and the CC, as well as in academic writings, as to how best to balance competing considerations of equality and fairness, on the one hand, and commercial certainty on the other within the constitutional framework.[4] During our time together on the SCA, Edwin was prescient about how the law should transform (I was more conservative). He wrote some of the ground-breaking judgments in the law of contract that found their way to the CC. In his concurring judgment in *Brisley v Drotsky*,[5] Edwin offered a clear and enduring articulation of the way in which contract law might be changed by constitutional rights and underlying values. He said:

> All law now enforced in South Africa and applied by the courts derives its force from the constitution. All law is therefore subject to constitutional control, and

3 Though the anomalous 'twin apex' system was indeed swept away by the Constitution Seventeenth Amendment Act 72 of 2012, which came as a surprise to me and my colleagues at the SCA, it did not bridge the divide between the two courts and may even have aggravated it.

4 I had contributed to these as a legal academic in, for example, C Lewis 'The demise of the *exceptio doli*: Is there another route to contractual equity?' (1990) 107 *South African Law Journal* 26; C Lewis 'Towards an equitable theory of contract: The contribution of Mr Justice EL Jansen to the South African law of contract' (1991) 108 *South African Law Journal* 249.

5 [2002] ZASCA 35.

> all law inconsistent with the Constitution is invalid. That includes the common law of contract, which is subject to the supreme law of the Constitution. The Bill of Rights applies to all law and binds the Judiciary no less than the Legislature, the Executive and all organs of state. In addition, the Constitution requires the courts, when developing the common law of contract, to promote the spirit, purport and objects of the Bill of Rights.[6]

In *Napier v Barkhuizen*,[7] Edwin would go on to affirm that the Constitution applies horizontally (as between private parties as well as between the State and private parties), and that inequality of bargaining power could be a factor in 'striking down a contract on public policy and constitutional grounds'.[8] In both *Brisley* and *Napier*, however, Edwin cautioned that the fact that a term might be unfair or operate harshly did not in itself entail a constitutional infringement, invalidating a term in the parties' contract. Judges, he said, do not have a general jurisdiction to declare contracts invalid because of what they perceive to be unjust, or 'imprecise notions of good faith'.[9]

Edwin's approach would be adopted by the CC, when a majority of the Court upheld his judgment in *Barkhuizen*.[10] Nonetheless, litigating parties seeking to evade contractual provisions have relied opportunistically on aspects of *Barkhuizen* to pursue arguments that good faith underlies every contract, seeking to escape liability where strict compliance on the basis that its terms are unreasonable or unfair. In *Bredenkamp v Standard Bank of South Africa*,[11] the SCA (with Harms DP as author) sought to stem the tide by clarifying that *Barkhuizen* was not authority for the principle that fairness is a freestanding requirement for the exercise of a contractual right. The CC refused leave to appeal against the SCA's decision, and its correctness has not apparently been questioned. It was not, however, the last word on the question whether an unfair provision in a contract could render the provision unconstitutional and thus unenforceable. Numerous post-*Bredenkamp* decisions, both of the SCA and the CC, have touched on the way in which to deal with the competing considerations of fairness and equity,

6 *Brisley* (n 5) paras 88-91.
7 [2005] ZASCA 119.
8 *Napier* (n 7) para 8.
9 *Napier* (n 7) para 7.
10 *Barkhuizen v Napier* [2007] ZACC 5.
11 [2010] ZASCA 75.

on the one hand, and commercial certainty on the other. Perhaps the most important was the CC decision in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*.[12] For it has introduced, albeit obiter, a fresh suggestion that there may be some free-floating notion of good faith that underlies all contracts. That decision was not unanimous. But both the majority judgment (by Moseneke DCJ, concurred in by Edwin, amongst others) and the dissent by Yacoob J, suggest that fairness may trump legal certainty. This suggestion was entrenched further by the Constitutional Court in *Botha v Rich*,[13] whose controversial features have been well-documented by my SCA colleagues.[14] I suspect that the tension between decisions of the SCA and the CC in so far as contracts are concerned has not yet been resolved, despite the attempts of the majority in the CC in *Beadica 231 CC v Oregon Trust*.[15] I wrote the SCA judgment in that matter,[16] and another contributor to this volume, my friend Dennis Davis,[17] took quite a different view in the High Court.[18]

In my view, the dicta in *Barkhuizen*, both in the SCA and the majority decision in the CC by Ngcobo J, remain as valid and binding as they have done for nearly 20 years. And they do not neglect the imperatives in the Constitution, section 8 in particular, that bind the courts: they have developed the common law to the extent possible, given the facts before them. The notion of public policy being invoked to render contracts invalid or unenforceable has been clearly extended by the invocation of the constitutional rights that bind everyone, as Edwin made clear in his two SCA judgments. At the time, I did not fully understand Edwin's decision to write separately in *Brisley*, only to reach the same outcome as the main judgment co-authored by his three colleagues. But I now grasp the significance of his judgment and of the way he began it. He signaled a fundamental change of approach, and sought to broker a synthesis

12 [2011] ZACC 30.
13 *Botha v Rich NO* [2014] ZACC 11.
14 M Wallis 'Commercial certainty and constitutionalism: Are they compatible?' (2016) 133 *South African Law Journal* 545; FDJ Brand 'The role of good faith, equity and fairness in the South African law of contract: A further instalment' (2016) 27 *Stellenbosch Law Review* 238.
15 [2020] ZACC 13.
16 *Trustees for the time being of Oregon Trust v Beadica 231 CC* [2019] ZASCA 29.
17 See D Davis 'Quo vadis the Constitutional Court's jurisprudence in private law?', this volume, ch 14.
18 *Beadica 231 CC v Trustees for the time being of the Oregon Trust* [2017] ZAWCHC 134.

between the established common law favored by his SCA colleagues and the reformist approach of the CC. I believe he effectively laid the basis for subsequent decisions, in both of these courts on which he sat, and that not much has changed since then.

Tribute by Dikgang Moseneke

Friends and colleagues at the Constitutional Court

Much has been rightly written about the sheer academic brilliance, jurisprudential excellence and tenacious social activism that Justice Edwin Cameron has displayed, particularly over the years of his judicial term. The ample and glowing tributes about his life and work in this commemorative publication are well-deserved and due. Mine is a modest personal tribute. I can hardly sing adequate praise to the larger-than-life Edwin Cameron. My piece does not pretend to be a systematic and thoughtful appreciation of the immense contribution Edwin has made to our nascent jurisprudence and to his advocacy on HIV/AIDS and sexual orientation issues. I may correctly add that Edwin's contribution to our country extends to institutional leadership in the academy and higher education – a role he continues to play at the University of Stellenbosch after his extended leadership of Council at the University of the Witwatersrand.

I choose to write as friend, admirer, and as a colleague on the Constitutional Court. As I do so, I am intrigued by how Edwin's life and mine started poles apart only to intersect fortuitously. Our lived experiences sometimes diverged only, in later times, to converge in the most beneficial if not remarkable ways.

Edwin like me, was born in Pretoria. We are both on the wrong end of 70 years of living having been born some four to five years apart. This is another way of saying we were nurtured under racial and other backward oppressions. We were meant to be deferent, stunted, unimaginative and compliant. That did not happen. We turned out quite different, restless and recalcitrant. Each of us mounted a rebellion against his upbringing albeit each in a unique manner. Surprisingly, our life orbits in time collided only to end up at the same place – the Constitutional Court.

Although born of a needy family, Edwin lived on the leafy side of Pretoria East and went to the prestigious Pretoria Boys High School.

About the same time, I lived in the dusty end of Pretoria West and went to Hofmeyr High School. To decode this: white people lived in the east and black people lived in the west of Pretoria. Edwin went to Pretoria Boys High School but on a scholarship. His father was in prison and his mother could not afford school fees. His native intelligence stood him in good stead as he moved on to study at Stellenbosch University. Later he won the Rhodes Scholarship to attend Oxford University.

I was removed from Hofmeyr High School by state securocrats and imprisoned on Robben Island where I ended up studying law. The curious part of these converging lines is that Edwin returned to South Africa to complete his LLB at the University of South Africa and I returned from Robben Island to complete my LLB also at the University of South Africa. So we unknowingly ended up sharing an *alma mater*. Of course, we did not know each other nor was there cause for the paths of our lives to cross. On his terms, Edwin joined the legal profession; so did I, each on his own setting.

When I read Edwin's autobiography, *Witness to AIDS,*[1] I had not yet met its author. I was totally consumed by the detailed agony of the account of a man who had just announced to our world that he was gay and was living with HIV. Then infection amounted to a death warrant. The virus, at the time, was decimating large populations in our country and elsewhere on our African continent. Being openly gay then was not a badge of honour. I read *Witness to AIDS* with considerable personal fear and apprehension for Edwin, as he grappled with his own affliction and the agony of lingering death that he and all those living with the virus had to make peace with.

As I put *Witness to AIDS* down, I knew that I had to meet Edwin Cameron in person. I had to share with him the parallels between his and my destitute childhood. I needed to tell him that I grew up in prison as he grew up in an orphanage. I needed to share my admiration for his steadfast resolve and courage in the face of adversity. None of these considerable obstacles had stood in the way of his stellar academic achievement, his practice as an advocate and his activism in favour of others similarly situated. I deeply respected his openness about his sexual

1 E Cameron *Witness to AIDS* (2005).

orientation, his infection and the consequences, good and bad, that he had to embrace.

Our paths crossed again when Cameron practiced as an advocate at the Johannesburg Bar and I practiced at the Pretoria Bar. As he litigated the complex political and social issues of the time, so did I. I took silk in 1993 and he took silk in 1994.

Cameron was appointed by President Motlanthe to the Constitutional Court from January 2009. I had been at the Court for seven years and I was serving as the Deputy Chief Justice. Edwin's reputation as a progressive jurist of the highest order preceded him. When he arrived at the Constitutional Court, he was renowned to have one of the finest legal minds of his generation, and correctly so. As fate would have it, he was allocated chambers on my floor. He became my neighbour for the seven years that were to follow. This meant that, in addition to court sittings and judges conferences, our paths crossed frequently on our floor. We inevitably became friends and conversed about most things. My respect and admiration for him was not misplaced.

The rule and convention that, as judges, we were not free to discuss the outcome of any case before it was argued before the Court was unbending. But after hearing a matter, Edwin would often pop in, or I would visit his chambers for long and incisive discussions about the optimal outcome of a case and even more importantly the underlying judicial reasoning for the outcome contended for. We agreed most times but also disagreed even though our respective world views and '*regsgevoel*' were more aligned than not. When our views diverged, I often quipped: 'Cameron, I am emphatically heterosexual and you seem to choose differently'. He would not lash back but look at me with meek humour.

It is well known that during the tempestuous years of the Zuma administration, Edwin and I co-authored the judgment of *Glenister v President of the Republic of South Africa*.[2] In the order we fashioned, we struck down the amendments of the National Prosecuting Act[3] and the South African Police Service Act[4] on the grounds that both pieces of legislation failed to create an adequately independent anti-corruption unit. The underlying jurisprudential message was no more than that our

2 *Glenister v President of the Republic of South Africa* [2011] ZACC 6.
3 National Prosecuting Authority Amendment Act 56 of 2008.
4 South African Police Service Amendment Act 57 of 2008.

institutions of state, starting with the legislature, bear the duty to battle public corruption and, to that end, must have an independent corruption fighting agency. The decision flew in the face of the attitude of the ruling African National Congress of the time, that was hellbent on disbanding the corruption fighting agency known as the Scorpions.

Unsurprisingly, *Glenister* provoked vast response, both kind and unkind from the politicians and citizens alike. As many applauded the reasoning and outcome, the ruling elite called Edwin and I 'counter-revolutionary' and 'revisionist'. I now dare to say, if the ratio of *Glenister* had been heeded by the ruling elite, we may have averted or reduced the pervasive misgovernance, malfeasance and corruption in the public and private spaces of our country. However, this is hardly the moment to write gleefully that 'we told you so'. Rather, our country and its people now need to rev up their courage and hope, as we resume the journey toward a more equal and just democracy.

On a lighter note, many commentators on *Glenister*, at law schools and elsewhere often wanted to know which parts of the judgment were authored by Edwin and which by me. On that, Edwin and I are sworn to secrecy. It would be quite disingenuous to unscramble the fried egg. We did not compose the judgment in impermeable silos.

I remember proclaiming publicly that Edwin and I were jurisprudential soulmates. His worldview and mine shared much of our desire, for an open, equal and socially just society. Even so, I have resisted dealing with any of the compelling judgments that Edwin has written. In most I have concurred and in some I have dissented.

As I come to the end of my tribute, I cannot but express my deep respect for Edwin having been openly gay since the 1980s when our world then was truly backward. Even when he became a judge, at his interview he openly proclaimed that he was gay. That placed him in a very special position to clear the overgrowth of prejudice and backwardness towards gay and lesbian people. It afforded him the opportunity to be that quintessential leader of the gay and lesbian movement not only for our country and continent but for the whole world. Throughout his life, he has championed the cause of gay and lesbian expression and injected it with enormous intellectual rigour and human rights ethos.

That explains why for many years that he has been my colleague up to now, I have attended with Edwin, Treatment Action Campaign and other HIV/AIDS functions. I have publicly supported his sheer tenacity

and honesty around his life and how he openly lived with his partner, Nhlanhla, in a way that is exemplary. I may have only a little fewer 'I am HIV Positive' T-shirts than Edwin.

Edwin holds ample awards and honours across many universities around the world. Like me, after his retirement, he was awarded the Order of the Baobab in Gold, South Africa's highest civilian honour for his contribution to the judicial system, as well as his 'tireless campaigning against the stigma of HIV and AIDS and the rise of lesbians, gay, bisexual, transgender, queer, intersex and asexual community'.

Having run out of accolades for my dear friend and judicial partner, I will borrow from our departed President Nelson Mandela the accolade that Edwin Cameron is a new hero of South Africa.

Tribute by Willy Mutunga and Joel Ngugi

Edwin Cameron as justice teacher and missionary

Justice Edwin Cameron means many things to many people, as this volume attests: the erudite judge, the innovative doctrinalist, the transformative jurist. For us, we think of Justice Cameron as a Justice Teacher in the esteemed Paulo Freire's conception: a lead learner in a dialogical community where mutual and reverse learning occurs and new knowledge is produced during the engagement.[1] True to Freire's pedagogical approach, Justice Cameron 'taught' even when he was not in front of a room expounding ideas; indeed, he taught most effectively when he was not consciously doing so. We conceive of two pedagogically effective and transformative ways in which Justice Cameron taught judges abroad – in Kenya in particular – about transformative constitutionalism. First, he powerfully taught through the art of personal narratives. Second, he taught through his performative actions as a missionary of transformative constitutionalism and an advocate for reverse learning.

From 28 October to 1 November 2013, the Kenya Judiciary Training Institute partnered with the Kenya Legal and Ethical Issues Network (KELIN), a non-governmental organisation, to host the Judicial Dialogue on HIV, Human Rights, and the Law in Eastern and Southern

1 P Freire *Pedagogy of the oppressed* (1968).

Africa. The Dialogue was an opportunity for hands-on experience-sharing between members of the judiciary comprising of both Judges and Magistrates and representatives of judiciaries from twelve countries across Eastern and Southern Africa on the multifaceted legal and human rights issues raised by the HIV epidemic in Africa. In what was evidently shocking to most judges and magistrates attending, the event was organised in a way that the judicial officers would benefit from the lived experiences of key populations affected by HIV/AIDS. As such, the dialogue uniquely benefited from the perspectives of a widow, orphan and key populations living with HIV. Judicial officers had a chance to listen to the life experiences of a sex worker, a gay man and injecting drug user on their interaction with the judicial system and the challenges they face.

The Dialogue began with a reception cocktail. The distinguished participants had gathered on the beautiful gardens of Safari Park and had an opportunity to mingle over pre-dinner drinks. They were all on tenterhooks to hear from the keynote speaker at the reception, Justice Cameron. As expected, he gave an eloquent off-the-cuff speech. Truly reflecting the progressive theme that the personal is political, Cameron pivoted his speech on his lived reality: he revealed to shocked participants that he was HIV-positive. He told the participants that he was diagnosed in December 1986, but that he had been on antiretrovirals (ARVs) for more than 16 years, and had an almost undetectable viral load. He was, therefore, living testimony of the effectiveness of ARVs and the possibility of living a robust life as a person living with HIV. Most participants had not imagined that one of the most respected members of the South African Constitutional Court could be HIV-positive. One could see and hear perspectives changing, hard-held positions shifting, hearts softening. The 'shock' pedagogy of the Dialogue was clearly working!

The following morning, Edwin stood to give the official keynote address. After reminding the distinguished participants that he was a person living with HIV, he now began by revealing that he was also a gay man, and, ipso facto, a gay judge. He then proceeded to speak about how stigma and fear associated with HIV/AIDS has been one of the biggest impediments in dealing effectively with the epidemic. He urged members of the judiciary present to assert their crucial role in advancing justice through use of evidence-based judgments. He noted that those with HIV do not speak publicly about their condition, especially

those of high standing in society, due to the shame and fear. He further challenged the forum on how judges, magistrates and lawyers deal with an epidemic where the fear and shame is of such a large magnitude. He stressed that the institutional role of the judiciary is to bear the light of reason and apply the methodology of evidence-based judgments. Even as the participants pondered over his well-reasoned and eloquently delivered keynote, the initial shock of the participants was palpable: for the second consecutive day, Edwin had managed to educate, touch lives and transform judicial attitudes through a powerful admixture of narration of his personal life and professional learning.

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Both Karl Klare, a scholar of South African constitutional law,[2] and Pius Langa, a former Chief Justice of the country,[3] have defined and written on South Africa's transformative constitution. Transformative constitutions and their transformative jurisprudence collectively capture the idea of fundamental societal change through the instrumentality of law.[4] Along the same lines, Justice Edwin Cameron writes that his book, *Justice: A Personal Account*, is about South Africa's 'most inspiring and hopeful feature – its big-spirited visionary Constitution'.[5] He also narrates the fundamental transformation of South Africa 'under the world's most generous-spirited Constitution'.[6] When judges and academics seek to breathe life into transformative constitutions, and their consequent implementation, such accolades are not in vain. They express ideological and political commitment to both abstract and practical visions of such constitutions. Justice Cameron says the following of the South African Constitution:

2 See KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

3 P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 351.

4 S Liebenberg *Socioeconomic rights: Adjudication under a transformative constitution* (2010) 24-25. See also A Bogdandy & R Urueña 'International transformative constitutionalism in Latin America' (2020) 114 *American Journal of International Law* 403 at 405-408, 440-442.

5 E Cameron *Justice: A personal account* (2014) 7.

6 Cameron (n 5) 7.

> It has helped all South Africans understand and embrace our diversity as people, and our equal entitlement to rights, if together we are to build a just society. In this way, the Constitution lights the path to that just society.[7]

Edwin did not speak directly to this issue when he was in Kenya. He did not have to. He must have known how the jurisprudence from the Constitutional Court of South Africa was glorified in the Kenyan courts. He must have known that he had been brilliantly preceded by his colleague, Justice Albie Sachs, who was present at the inauguration of the Supreme Court of Kenya and went on to serve with distinction on the country's Judges and Magistrates Vetting Board.

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Justice Cameron's visit and interventions have not been in vain. In particular, he has breathed life into the struggles of the Kenya LGBTIQ+ movements for inclusion, human dignity, enjoyment of the whole gamut of human rights, and non-discrimination. The courts have been the primary site for these struggles. But they have taken on contours that may surprise outsiders. For Kenya is a Christian country, and 'the supremacy of the Almighty God' is acknowledged in the first line of our Constitution. Accordingly, Kenyan courts have brought God into the promotion and protection of the gay rights of the Kenyan people. There has been a struggle between a narrow and rigid Christian view, which rejects homosexuality as a sin, and a more encompassing vision, which seeks to show love and empathy for all fellow human beings.

This latter vision may be traced to the writings and preachings of Archbishop Desmond Tutu,[8] and his theological position has been endorsed, in our view, by statements of the judges of the Kenya Court of Appeal in *Non-Governmental Organizations Co-ordination Board v Eric Gitari*.[9] The question before the Court was whether the decision of the Non-Governmental Organizations Co-ordination Board not to register an NGO representing the interests of a Kenyan community of LGBTIQ+ persons was lawful. Parties supporting the Board's decision relied on religious texts in the Bible and the Quran to argue that the

7 Cameron (n 5) 229.
8 Compare D Tutu *God is not a Christian, and other provocations* (2011).
9 *Non-Governmental Organizations Co-ordination Board v Eric Gitari*, Civil Appeal No. 145 of 2015 (Court of Appeal of Kenya at Nairobi, 22 March 2019).

actions sought by the NGO were a sin. After losing at the High Court,[10] which held that it was constitutionally impermissible discrimination to refuse to register the Organization, the Board appealed to the Court of Appeal. The appeal was dismissed by a narrow 3:2 majority. Justice Koome, one of the judges in the majority and now the Chief Justice of Kenya, summed up the Court's view by stating that those who sin against the religious texts should be left to be dealt with by God's judgment, but not by the interpretation of Constitution and the law.[11] She added: 'The Constitution is the equalizer, it allows everybody to be and if some people are sinners, God will deal with them, no one can judge for Him.'[12]

Judges of Appeal Musinga JA and Nambuye JA dissented. Justice Musinga's dissent has this very troubling assertion:

> Our law, as it currently stands, does not permit homosexual and lesbian sexual practices, just as it outlaws sexual escapades between adults and children. It would be unthinkable, for example, for paedophiles to argue that they are entitled to freedom of association without discrimination on the basis of their sexual preferences and therefore demand registration of, say, 'paedophiles Human Rights Protection Association.'[13]

We can imagine how the late Archbishop Tutu would respond to Justice Musinga's comparison of gay people to paedophiles, and therefore criminals of the worst kind. His retort would be: justice is not homophobic; God is not homophobic; you do not own God; and your oath of office requires you to have no bias, ill-will, prejudice, or religious influence – so help you God!

Another brilliant South African, an eminent jurist, Justice Albie Sachs, who faced a similar challenge in a judgment on same-sex marriage, would counsel as follows:

> [T]he toughest part of the case for me was not purely technical; it was to take religion seriously as part of public life, and to respond to both the gay and lesbian community and the religious communities in a balanced, principled and carefully reasoned way. All had the right to feel that their claims and convictions had been subjected to thoughtful and sensitive inquiry.[14]

10 *Eric Gitari vs Non-Governmental Organizations Co-ordination Board*, Petition No. 440 of 2013 (High Court of Kenya, 24 April 2015).
11 *Gitari* (n 9) para 52 (Koome JA).
12 *Gitari* (n 9) para 52 (Koome JA).
13 *Gitari* (n 9) para 89 (Musinga JA).
14 A Sachs *The strange alchemy of life and law* (2009) 240.

And Justice Cameron himself, together with Archbishop Tutu's daughter, has said:

> We decry the use of religion as a tool of repression and shame, and as a weapon of any form of subjugation. The promise of religious faith is liberation and hope. ... Justice, religion and African culture are all deeply concerned with the well-being of the individual because they all recognise that a flourishing society can only exist when all members of the society can flourish.[15]

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With a grant from the Ford Foundation in South Africa the superior courts in the Kenyan Judiciary were able to have exchange programs of judges and law clerks. Through this exchange program our superior courts were able to access the jurisprudence of South African courts, particularly the Constitutional Court. Our law clerks participated in this program and we can vouch for its usefulness. It was also through the work of the Kenya Judiciary Training Institute (now known as the Kenya Judicial Academy) that we were honoured to invite Justice Cameron. The reverse learning between the two judiciaries (and also between us and the judiciaries of India and Colombia) taught us how the development of jurisprudence in the Global South can be enriched by narratives such as Edwin's.

We believe that reverse learning between the judiciaries of the Global North and Global South will take time, for various reasons. There is, however, no reason reverse learning between African judiciaries and those of the Global South should not become robust. Indeed, we believe that is how reverse learning between the Global North and South will be likely; we have to start with Africa, where progressive jurisprudence exists but is not sufficiently glorified or highlighted. A progressive pan-African Jurisprudence should be the goal of the African judiciaries. That will advance the kind of reverse learning and pedagogically effective judicial education, in aid of transformative constitutionalism, of which Justice Cameron was a champion.

15 E Cameron & M Tutu van Furth 'Stop using religion and law to oppress LBTQIA+ people – we all deserve love, respect and protection' *Daily Maverick* (14 July 2024).

Tribute by Lwando Xaso

Edwin Cameron as humanist and world-builder

It was late afternoon on a random day. Justice Cameron's chambers were quiet but not without their undercurrent of exciting energy. Walking into the Cameron chambers every morning never got old to me. In fact, I did not even need an alarm clock the year I clerked for Edwin: I just sprang out of bed eager to make the most of my year. On this afternoon, I think his personal assistant, Elizabeth Moloto, had left for the day. My fellow law clerks must have been in their offices. I walked over to Edwin's office with a pile of papers on a matter we had to discuss. There he was behind his desk looking studious with his rectangular glasses sitting on the bridge of his nose.

I sat down and he turned his attention to me. In the middle of our discussion on one of our cases, he stops and looks at me with those intense eyes. He realises that it's the middle of the year and my clerkship with him will be over soon. He then asked me a simple question, 'What are your plans after you leave the Court?'. Quite excitedly I told him that I plan to go back to corporate practice for one of the top firms in the country and I hoped to make so much money to afford a beach house and a driver. Cameron took off his glasses and rubbed his eyes and looked back me with a hint of disappointment and said 'that is not what I meant. I meant, what are you going to do for others?' I was stunned. I had never been asked that before and had no answer for him. People had always asked me what I did for a living; they were so enamoured, like I was, by accolades and titles that it never occurred to them or to me to ask what Martin Luther King Jr defined as life's most urgent and persistent question: 'what are you doing for others?' Here was a man with a laundry list of accomplishments, a Justice of the Constitutional Court, an author and a global icon hailed by Nelson Mandela himself as one of South Africa's new heroes, and still all of these things were not about him – it was about being of service to others. Since that moment in his chambers all those years ago, I have been trying my best to live the question.

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> Mr Chairman, if I may be semantic for a moment, I think that the concept of gay rights is a misnomer, it would be like speaking of black rights or Venda rights for

> the Bavenda. I think the more precise concept is non-discrimination in the case of gays and lesbians. I am not merely being semantic about that ... I believe that the most profound promise of the Constitution is a promise of non-discrimination in a society which has been very deeply afflicted by discrimination and constructed upon it ... So, my answer is that it is a much broader commitment, and within that commitment the black people on the Court, the women on the Court, the bisexual or homosexual people on the Court, I think that there is a shared commitment to a much larger vision than one which would be encompassed by a notion of gay rights.[1]

This was then Adv Edwin Cameron's response to the question 'how would you respond if gay rights issues were to come before the Court?' – a question posed by Adv Wim Trengove on the first occasion Cameron was interviewed for possible appointment to the bench of the Constitutional Court on 3 October 1994. Within this answer is the essence of Justice Cameron's judicial philosophy. When asked about the singular, Justice Cameron responds with an appeal to the collective: an appeal to a larger vision which embraces those who had been, by design, left out. His response underpins an ability to locate himself and his humanity within the collective. An ability that is not only theoretical but lived, and which I experienced intimately whilst clerking for him in 2011.

The Cameron chambers was an intersection of a motley bunch from every background, race, gender, sexual orientation, religion, class, ethnicity, nationality, and politics. The invitation or perhaps necessity of difference underpins the genius so well recognised in Justice Cameron. An invitation extended and perhaps informed by his own unorthodox and contradictory identity as Afrikaner yet British. White, yet poor. White, yet gay. Male, yet gay. White, but unshielded from life's harsh tragedies that saw him displaced at an orphanage in the Eastern Cape. And much to his credit these tragedies fostered not a resentment against an 'other', nor an appeal to or enforcement of his full power of his whiteness, nor was it an impetus of a separation from his humanity. But rather the traumatic experiences of his formative years nurtured an empathy, a connectedness to all the unfree and to a life of activism that would not only free him, but all those who knew and felt the weight of oppression. His is a freedom hitched to the larger vision of freedom of all people, not just of white gay people. A freedom that is multipliable

1 Judicial Service Commission 'Interview with Edwin Cameron' (3 October 1994).

not divisible. The Cameron I know is a humanist who considers the condition of all human beings as the starting point for serious moral and philosophical inquiry.

It is evident that people from across the spectrum have left a mark on Cameron, and he on them. And he has certainly left a lasting mark on me. I watched him intellectually wrangle and dance with his colleagues that included, amongst others, a blind Justice Zak Yacoob; a former Robben Island prisoner, Deputy Chief Justice Dikgang Moseneke; African royalty, Justice Bess Nkabinde; and one of the first black women to start her own law firm, Justice Sisi Khampepe. I witnessed the eleven justices bridge the gaps between dissents and collectively refine majority judgements, seeking to make a path to that larger vision of non-discrimination and inclusion that Justice Cameron invoked all those years ago in that first interview.

In his green robe, Justice Cameron remained human first. Seeking not to judge but to understand. His judicial philosophy is defined by this imperative to deeply understand the human condition no matter how seemingly far removed it is from his because for as long as it is human, it is relatable to him. He is the only person I have ever worked for who asked about my parents daily. He showed a deep interest in my culture, home life and childhood. He did not pretend to understand it all, and sometimes he even confessed his own biased stereotypical thoughts. It was this honesty that cultivated a trust between us. He is not your typical 'white liberal' who deems himself the hero and saviour of the underling. He recognises all the ways he needs saving too – something he profoundly admits in his 2015 Bram Fischer lecture when he says, 'We, too, are all soiled by moral compromise, every one of us'.[2]

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Prior to clerking for Cameron, I had no interest in prison reform. This was until a prison visit that we undertook in 2011 changed everything. On that visit I realised there was a humanity alive in Cameron that was dead in me. And by the end of that visit Cameron had helped restore a part of my humanity. He modelled an empathetic and responsive

2 E Cameron 'Fidelity and betrayal under law' (2016) 16 *Oxford University Commonwealth Law Journal* 346 at 360.

leadership that is the antidote to our polarity. He taught me that law has to be invoked together with an expansive sense of humanity for radical change.

According to section 99 of the Correctional Services Act 111 of 1998, a judge of the Constitutional Court, Supreme Court of Appeal or High Court, and a magistrate within his or her area of jurisdiction, may visit a correctional centre at any time. In line with this provision, in 2009, the Constitutional Court judges, at the behest of Cameron, instituted a prison visits and monitoring programme. The programme became operational in 2010. The purpose of the programme is for judges, who are often seen as our 'highest citizens', to visit and inspect correctional centres, and then compile a report recording observations and findings about the correctional centre based on the inspection. At the time, I was not particularly looking forward to our prison visit. Out of all of the human rights issues I cared about, prison conditions were an unranked issue on my list of priorities. So, with scepticism and doubt in tow, Justice Cameron, my fellow law clerks, and I set off on our journey to the Northern Cape to visit two prisons. At that time, I did not fully understand why prisons were a priority to Cameron. At that time, I had not known yet that when Cameron was a child, his father had been imprisoned at Zonderwater. And following the death of his older sister Laura, his father attended the funeral accompanied by two prison guards. Cameron wrote later:

> [T]his first encounter with the law, as it held my father captive to exact accountability for a wrong he had committed against society, left in me a deep layering of thought and emotion. What was the law? In what lay its power? Was it only an instrument of rebuke and correction and subjection? Or could it be more?[3]

As we walked through the prison complex, I felt unsafe and stuck close to Cameron to shield me from any possible danger. Cameron walked through each section engaging all the inmates with no fear and, most importantly, no judgement. He listened intently to each inmate's grievance while I concentrated on not being left behind. I was ashamedly, out of step with my judge and quite fragile that day – wholly unsuitable for this mission. I was ashamed of my fear because it confirmed how lowly

3 E Cameron *Justice: A personal account* (2014) 12.

and inhumane I regarded the prisoners, and doubly ashamed because I knew my posture was a poor reflection of Cameron's values. As the inmates spoke, I realised that what they wanted was not unreasonable: they wanted access to books, newspapers, telephones, and medication. Basic human rights. As I watched Cameron take interest in the needs of the prisoners, my fear dissipated and I found the courage to emulate his example.

Towards the end of our inspection, we were told that lunch had been prepared for us by two inmates. I asked the official what these inmates had been imprisoned for and he simply replied: 'Rape'. I began to panic at the idea of being served food by two rapists. Even though I had had a positively transformative experience, I could not stomach the idea eating a meal prepared by the hands of two rapists.

As we walked to the dining area, I was thinking of every excuse to decline the food. The officials seated us in a private dining room and the plates of food were brought out. I watched as Cameron enthusiastically devoured the food, while I sat there contemplating what to do. Then I turned towards the kitchen and saw something that changed everything. It was the two chefs (rapists) looking back at us with nervous, expectant faces. They were childlike. I imagined the anxiety they must have felt preparing a meal for a Constitutional Court judge. They were looking at us, maybe more specifically looking at Cameron, for approval, and for positive judgment from the outside world from which they had been banished. When I realised that a simple act of enjoying their meal could make a difference in how they viewed their own rehabilitation and redemption, I had to reciprocate the effort they had made in the same way Cameron did. Not only did I eat the meal, I asked the officials to pass on my compliments. Thanks to the example set by Cameron, I left that prison a little freer from my own self-righteousness and inhumanity.

After his retirement from the Constitutional Court in 2019, Cameron was appointed as the inspecting judge of the Judicial Inspectorate for Correctional Services in 2020 and his stated priority was to 'start very modestly. Go in and listen.'[4] This modesty is constantly and consistently expressed by Cameron towards prisoners, because he understands that prisoner rights are human rights.

4 C Amato 'Edwin Cameron's fight for humane prisons' *Mail & Guardian* (30 November 2019).

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Despite his herculean legal career, in which he has wielded the law as an instrument of change, the greatest wisdom Cameron has imparted on me is recognising law's limits. His life is defined by various pillars for transformation: law is but one. In every aspect of his life and role beyond that of judge, Cameron is an active citizen. He has started non-profit organisations, he is a patron for countless organisations, he has fostered children in need and sent them to school, he has written consequential books, he is a tireless speaker always championing his values, and he has travelled the world teaching. Cameron does all of this because, despite his reverence for the law, he knows that, in his own words:

> Law cannot ensure that men (and they are mostly men) will not subordinate the instruments of government for evil, nor can it guarantee that they will not use them for illicit wealth accumulation. It cannot stop corruption. It cannot engender human trust and affection and reliance.[5]

That is a function of something else, not the law. It is the function of our humanity.

The Constitutional Court bench may have lost a great jurist, but our country is fortunate to still benefit from this world builder and humanitarian. May we all seek to emulate this relentless ethicist, compassionate strategist and caring human being. And let his life's work call us to answer life's most urgent question – 'what are you doing for others?' – as generously and courageously as he has.

5 E Cameron 'What you can do with rights' [2012] *European Human Rights Law Review* 147 at 159.

Tribute by David Bilchitz

Equal citizenship of the vulnerable*

> This disease will be the end of many of us, but not nearly all, and the dead will be commemorated and will struggle on with the living, and we are not going away. We won't die secret deaths anymore. The world only spins forward. We will be citizens. The time has come.
>
> Bye now.
>
> You are fabulous creatures, each and every one.
>
> And I bless you: More Life.
>
> The Great Work Begins.[1]

I begin with these final, moving words by Prior, one of the chief protagonists in Tony Kushner's play Angels in America, as they encapsulate for me the contribution that Justice Edwin Cameron has made to my own life and that of tens of thousands, if not millions, of South Africans. As a young religious Jewish boy struggling with my same-sex sexuality and growing up in apartheid South Africa, what seemed to lie ahead of me was a secret life in the shadows, of being an 'unapprehended felon', as Justice Cameron aptly described it in his inaugural lecture as a Professor at Wits University.[2] Yet, that very academic intervention together with his tireless campaigning (together with a number of iconic activists) helped create an alternative future: one in which sexual orientation was officially recognized in section 9(3) and (4) of our Constitution as a protected characteristic on the basis of which neither the state nor private bodies could discriminate. Justice Cameron did not just speak theoretically about the rights of LGBTQ+ persons – he opened himself to prejudice by coming out at a time where social acceptance was much more limited than it is today. He knew in his bones that being gay did not make him less than anyone else and had the confidence to assert strongly the dignity of LGBTQ+ people, that we are citizens worthy of equal concern and respect. That is a reality that the Constitutional Court

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* This tribute is adapted from an oral tribute delivered at the special Constitutional Court hearing on 20 August 2019, the date of Justice Cameron's retirement from the Court.

1 T Kushner *Angels in America: Part two: Perestroika* (1993) 280.

2 E Cameron 'Sexual orientation and the Constitution: A test case for human rights' (1993) 110 *South African Law Journal* 450 at 455, drawing on RD Mohr *Gays/justice: A study of ethics, society, and law* (1988) 108.

has, in a series of remarkable decisions, helped to bring about legally from its initial decision decriminalising sodomy[3] to the ground-breaking decision that paved the way for the recognition of same-sex marriages in South African law.[4] Yet, in spite of these legal landmarks, it is a reality that many LGBTQ+ persons still struggle to attain equal recognition in some communities in South Africa, across our continent and in the world in general. In this context, Justice Cameron is a beacon and role model: representing the possibility of living an authentic life on one's own terms and demanding treatment as a full equal.

In the same closing speech of Angels in America, Prior refers to a fountain in Jerusalem named Bethesda. As one of the characters, Belize, explains, '[i]f anyone who was suffering, in the body or the spirit, walked through the waters of the fountain of Bethesda, they would be healed, washed clean of pain'.[5] The fountain had run dry, but Prior envisions a time when its waters will flow once again. After centuries of sickness, South Africa needs the healing waters of Bethesda.[6] Justice Cameron has sought to provide very concretely both physical and psychological healing to the many people scarred by disease, discrimination and injustice in our country. He has also known the fear of death hanging over him, and bravely chose to disclose his HIV-positive status despite his own personal struggles that he documented so movingly in his book *Witness to AIDS*.[7] He did so not for any personal gain but in the hope of finding a way to ensure that millions of South Africans were able to shed the psychological stigma of HIV/AIDS. He also has strongly advocated for the millions of South Africans living with this disease to be able to gain access to the life-saving treatment that, at one time, was denied to them by the South African government. In this quest, he has, together with organisations like the Treatment Action Campaign, helped to save millions of lives and bring healing waters to our country.[8]

3 *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15.
4 *Minister of Home Affairs v Fourie* [2005] ZACC 19.
5 *Angels in America* (n 1) 279.
6 In a literal sense, see H Phillips *Epidemics: The story of South Africa's five most lethal human diseases* (2012).
7 E Cameron *Witness to AIDS* (2005).
8 The landmark Constitutional Court judgment *Minister of Health v Treatment Action Campaign* [2002] ZACC 15 helped to dismantle the 'sham' justifications for refusing a roll-out of anti-retroviral treatments.

Justice Cameron's concern for every individual is not bounded by race or gender, by religion or class, or, indeed, whether one holds South African citizenship or not. After his retirement as a judge, he has focused his energies tirelessly on advancing the fundamental rights of prisoners in his capacity as head of the Judicial Inspectorate for Correctional Services. His compassion is so extensive that it goes beyond the human species too. In a case dealing with animal cruelty during his time at the Supreme Court of Appeal, Justice Cameron was prepared to dissent from a majority judgment that offered little protection for their interests.[9] In his judgment, he found, groundbreakingly, that animal welfare statutes recognise that non-human animals are –

> sentient beings that are capable of suffering and of experiencing pain. And they recognise that, regrettably, humans are capable of inflicting suffering on animals and causing them pain. The statutes thus acknowledge the need for animals to be protected from human ill-treatment.[10]

In a globally precedent-setting judgment, the Constitutional Court built on these statements to recognise that 'the rationale behind protecting animal welfare has shifted from merely safeguarding the moral status of humans to placing intrinsic value on animals as individuals'.[11]

Equality on the basis of sexual orientation, the right to healthcare, and the intrinsic value of animals are just some of the facets of Edwin Cameron's massive contribution to the advancement of the law. These are some of the areas of my own academic research which have been strongly enriched by his writings, judgments, and advocacy. Indeed, achieving rights involves, as Prior suggests, 'great work'. And Justice Cameron has been prepared not only to deploy his considerable intellectual abilities to this task but also to help build the institutions necessary to achieve these goals.

One of these is an institution of which I have been the director since 2009, namely, the South African institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC). It was formed by Justice Laurie Ackermann of the Constitutional Court – another

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

10 Openshaw (n 9) para 33, cited by the Constitutional Court in *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* [2016] ZACC 46 para 56.

11 *National Society* (n 10) para 57.

judicial colossus, who sadly has recently passed away – with the vision of creating a world-class research institute to generate original research relating to its areas of focus, engage with the work of the Constitutional Court and hopefully inform it. Justice Cameron served from early on in SAIFAC's life as a trustee and, in that capacity, played a critical role in its transition from a stand-alone institution to its home now as a centre of the University of Johannesburg. I have had the privilege to report to and engage with Justice Cameron in this capacity: our interactions showed me another dimension of this great judge and human being. He is indeed someone who is an institution-builder, who combines both a capacity to determine an end goal with the practical ability to make the necessary adjustments to realise that goal. Justice Cameron recognises the value of academic research in its own right and its ability to inform and guide practice and judgments. The work Justice Cameron did for SAIFAC is just a small part of the many institutions he has been part of building – and I want to pay tribute to the important role he has played, not only as a judge, but in both academic life and civil society.

A famous saying from my Jewish religious tradition states that 'it is not your duty to finish the work; but you are not free to desist from it'.[12] Edwin Cameron has been prepared, with every fibre of his body, to contribute towards advancing a South African society where the dignity, equality, and freedom of every individual is respected. His contribution is immense and I have no doubt that there is more to come. In the words of Prior, I wish Justice Cameron 'more life', and tremendous quality of life, in the years to come.

12 See *Ethics of the ancestors* 2:16 (my translation).