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On being a lawyer in South Africa: Edwin Cameron and transformative constitutionalism

James Fowkes

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When he was 29, Edwin Cameron published his famous article, 'Legal chauvinism, executive-mindedness and justice', about former Chief Justice LC Steyn.[1] It was 1982. Apartheid was in its final phase. PW Botha was the Prime Minister. Pierre Rabie had just taken over as Chief Justice. Memories were fresh of Barend van Niekerk, who had recently passed away, being sued and convicted for criticising the courts.[2] At the time, Cameron's article was an act of independence and resistance.[3] As he has said of others in that era, such interventions 'required courage of an order that is difficult to appreciate fully in retrospect' especially when most other contemporary scholars treated the courts with such deference.[4]

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 J Dugard 'Judges, academics and unjust laws: The Van Niekerk contempt case' (1972) 89 *South African Law Journal* 271; referring to all three cases Van Niekerk faced, 'In memoriam: Barend van Niekerk' (1981) 98 *South African Law Journal* 402.

3 See also E Cameron 'Outside funds and political rhetoric' (1986) 2 *South African Journal on Human Rights* 330; 'Judicial endorsement of apartheid propaganda: An enquiry into an acute case' (1987) 3 *South African Journal on Human Rights* 223; 'Nude monarchy: The case of South Africa's judges' (1987) 3 *South African Journal on Human Rights* 338; 'Inferential reasoning and extenuation in the case of the Sharpeville Six' (1988) 1 *South African Journal of Criminal Justice* 243; 'Judicial accountability in South Africa' (1990) 6 *South African Journal on Human Rights* 251. See too E Mureinik 'Law and morality in South Africa' (1988) 105 *South African Law Journal* 457, discussing Cameron's criticisms and the response to them.

4 E Cameron 'Academic criticism and the democratic order' (1998) 14 *South African Journal on Human Rights* 107; to similar effect, E Cameron 'Dugard's moral critique of apartheid judges: Lessons for today' (2010) 26 *South African Journal on Human Rights* 310. See also E Cameron 'Lawyers, language and politics –

But when I read the article, far, far away in 2007, I was just able to enjoy it. It was written to engage. Other law articles didn't begin: 'He came from the Free State'. It was rigorous. The citations were long when they needed to be. Everything, it seemed, had been read. I took an indefensibly academic pleasure in footnote 46, correcting the total of how many appellate judgments Steyn had written from 194 to 200 because Cameron hadn't been willing to just accept the numbers given by others and had done his own count.

Perhaps above all, however, it was so wide-ranging, although it took me a few more years and a few more reads to quite realise this. The article did doctrine, of course, deftly covering one area of law after another. It could play the legal scholarly game, in the stylistically formal, Latin-strewn fashion of those against whom it was written. But even across so broad a field, it could play that game with just one hand. Because acquiring command of a legal language is hard, there is always the risk of it becoming the only thing an author can do, and then it becomes a prison. Mastery can lead to myopia. But Cameron's article had capacity and curiosity left over for more. It could build up its portrait of the many elements which really make up a person, and a society.

And in this, it seemed to me, lay not only talent, but a wonderful unwillingness to give a partial answer circumscribed by expectations or genre. Cameron's article was not, to say the least, a conventional tribute. It was not the sort of rote professional biography whose main purpose, in offering kind words about a retiring member of a professional community, is to congratulate all the other members of that community for having chosen the same noble career path, the author not least among them. But nor was it just a critical provocation, based on handful of examples, that had done enough to be an article. It was not just the partial verdict of one area of legal specialisation, for example, or even several, that raised a question. It was so much more than merely publishable. For what the article was after was an actual answer: all things considered, in our legal community and our society, what should we make of LC Steyn and the vision of law for which he stood? And having decided that this was the question that needed answering, it went off and did what was needed to answer it.

In memory of JC de Wet and WA Joubert' (1993) 110 *South African Law Journal* 51 at 60-65.

For me, back in 2007, this was a revelation, albeit one that I didn't fully understand yet. Later on, I'd think more about how I'd had to stumble across Cameron's piece on my own. I'd wonder how I'd got to the end of my law studies – 2007 was my final year – without someone telling me to read it, or indeed anything like it. But at the time, it just gave me a thrill. Back then, when I was 22 and looking about myself, Cameron's article was one of two or three pieces of writing I read that made me want to do legal scholarship: that made me want to try and write something like *that*, one of these days.

1 Expectations

This contribution – I rush both to disavow the pretension and also, discreetly, to lower my present bar of success – is not that thing. (I failed at the first fence by not beginning with: 'He came from Pretoria'). But this piece shares with Cameron's article an interest in how a lawyer, as part of a legal community, decides what kind of lawyer to be.

Today, the prevailing idea in the South African legal community is transformation: in the form of transformative constitutionalism, and also in the form of criticism of that concept by those who see it as insufficient. Transformative arguments pose a fundamental challenge to some more traditional or passive conceptions of lawyering. But for those who are convinced about this fundamental point, what these arguments pose is a question. If you wish to be a transformative lawyer, if you believe that this is what your constitution and your society and your conscience ask of you, what should you do? What, exactly, should you try to be? It is this question, simple to state and difficult to answer, that this chapter is about.

The answers are also sometimes inevitably personal. It is therefore fortunate that, as we will see, my argument about what Cameron's career tells us in relation to this question is a mirror image of the argument he made about Steyn's. The promise that my verdict will be the reverse is the only thing potentially redeeming my unauthorised appropriation of Cameron's career to serve my own argument as he used Steyn's in the service of his. Cameron was wise enough to appropriate someone who was (a) dead, and (b) about to be criticised in sufficiently strong terms that etiquette would have been the least of his concerns. I have not had the same foresight. I should therefore perhaps say that I have no idea whether he would endorse the arguments I am going to make,

or the characterisations of his career I will offer. I cannot even claim to know him well personally. What I do know is almost entirely based on watching his example from a junior distance, and on what he has written, including about himself. I can only hope that the value in thinking about how he has chosen to be a lawyer excuses the presumption that this exercise involves.

So why, with that said, is my argument a mirror image? Cameron's point about Steyn was really a point about the legal community that chose to venerate Steyn. If you have a set of criteria for what makes a good lawyer or a good judge, and those criteria yield an admiring answer when applied to LC Steyn's career in South Africa, then, said Cameron, there is something wrong with your criteria. Steyn's supporters were not wrong on the facts, exactly. Steyn *was* a very able jurist, and a rigorous, independent judge, as Cameron made no bones about acknowledging. Instead, his supporters were wrong about which facts to treat as relevant, and about how to assess those facts. Being willing to celebrate Steyn showed there was something rotten in their idea of judging.

Now suppose, instead, that we derived our standard of good judging from the thinking of our own times. Suppose, more precisely, that we drew them from the expectations of some of the more progressive or radical parts of South African scholarship, whether under the banner of transformative constitutionalism or just transformation itself. And suppose, finally, that we applied those standards, not to Steyn, but to Edwin Cameron. It seems to me that if we do so, then we will find that Cameron – even Cameron – falls short of these expectations. And that should make us stop to think. If we are trying to decide on the measure of a lawyer and a judge, we should be suspicious if, in the view of a powerful section of his legal community, LC Steyn passes with flying colours. And we should be suspicious if, in the view of a powerful section of *his* legal community, Cameron seemingly fails.

First, *does* he fall short? Let us consider a few points. Edwin Cameron was appointed to the bench with effect from 1 January 1995, among the very first judges appointed by Nelson Mandela as President. The 8997 days of his judicial career span the post-1994 constitutional effort. If, as some argue, that constitutional effort has been woefully insufficient or indeed has failed, then this has happened on his watch. He is among those

over whom hangs that question mark, or that verdict.[5] Furthermore, although no-one could call him a conservative or a minimalist judge in either substance or method, he has nevertheless diverged from some prominent expectations of radical and progressive scholarship on transformation. Most flatly, he has never, as a judge, disavowed the law–politics distinction. He has never written a judgment in which he stepped out of the traditional expectations of the office and openly explained the personal and moral views that informed his verdict. I will have more to say about Karl Klare's canonical paper later on, because Cameron's career can be seen as an exercise in giving effect to its spirit by means Klare's article did not consider. But this was how Klare thought transformative judges should write judgments, and Cameron did not do it.[6]

Cameron would also fall short of expectations in some less clearcut ways, that are more matters of degree. Any observer would place him on the more progressive and active side of the bench generally or the Constitutional Court specifically, as other contributions to this symposium reflect.[7] But he has nevertheless not implemented standard items from the transformative wish list. He has not, for example, pursued a minimum core conception of socioeconomic rights. Instead, he has pushed back against the standard criticisms of the reasonableness approach, retaining, alongside his awareness of the need to act, a measure of his initial caution about judicial action in this context,[8]

5 On this scholarly view, which also has a growing political salience, see n 25 below; on Cameron's acknowledgement of the question mark, if not the verdict, see n 34 below.

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

7 See eg C Hoexter 'Transformative adjudication in administrative law', this volume at page 199: 'as a judge, Edwin Cameron responded boldly, bravely and often brilliantly to the challenge of transformative adjudication'.

8 On being asked about socioeconomic rights in the last question of his 1994 interview by the Judicial Service Commission, Cameron answered (in relevant part) as follows: 'I think there are significant difficulties with asking a judicial structure such as ours to implement second generation rights. I think there are problems. A colleague of mine, Geoff Budlender, has done an analysis of the various ways, he has isolated four or five ways in which second generation rights can usefully be employed in a constitutional document. The one could be as directional principles as in the case of India, the second could be as a guide to interpretation and there are various other distinctions which I think he has very usefully made in his speeches and in his writings about this. I would not exclude, I am giving you a somewhat fudged answer, Senator Ngcuka, because I am not entirely clear on this issue. I approach it with reserve but I have not got a closed mind to the inclusion of second generation rights.' For where his open

among others.[9] Nor – though here the matter is mostly one of degree – has he re-written whole swathes of the common or customary law in the name of constitutional values. While Cameron was an early leader in the application of the constitution to private common law, for example, his approach remained a measured one.[10] The bold pushing of judicial powers to their limits, simply whenever injustice is encountered, is a vision of judging that has always exceeded Cameron's. His approach, while firmly, energetically, and imaginatively progressive, has stayed more recognisably traditional than this.

This is what I mean when I say that Cameron – even Cameron – sometimes falls short of the expectations of influential parts of South

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mind has since taken him, see *Mwelase v Director-General for the Department of Rural Development and Land Reform* [2019] ZACC 30; E Cameron 'A South African perspective on the judicial development of socio-economic rights' in L Lazarus, C McCrudden & N Bowles (eds) *Reasoning rights: Comparative judicial engagement* (2014) 319-38, which resonates with my own arguments against the distinction between socioeconomic and civil-political rights in J Fowkes 'Normal rights, just new: Understanding the judicial enforcement of socioeconomic rights' (2020) 68 *American Journal of Comparative Law* 722; see also, for more limited statements of some of these ideas, E Cameron 'Rights, constitutionalism and the rule of law' (1997) 114 *South African Law Journal* 507; E Cameron 'AIDS denial and holocaust denial: AIDS, justice and the courts in South Africa' (2003) 120 *South African Law Journal* 534 at 536-39; E Cameron & M Richter 'HIV/AIDS and human rights in the context of human security' in A Ndinga-Muvumba & R Pharoah (eds) *HIV/AIDS and society in South Africa* (2008); E Cameron *Justice: A personal account* (2014) at 249-73, drawing on E Cameron 'What you can do with rights' (2012) 2 *European Human Rights Law Review* 147. See also S Fredman 'Adjudicating socioeconomic rights', this volume at ch 9.

9 See also J Froneman & H Taylor 'Judicial dissent and the sceptical scrutiny of power', this volume at 410 , who write, 'Cameron cautions against complacency and over-confidence in adjudication. Judges in South Africa have a bold mandate to ambitiously pursue constitutional values, but they should approach this task with humility recognising their fallibility in wielding these powers'; N Ally 'Making accountability work', this volume at 256, referring to 'Cameron's general view that judicial enforcement plays a necessary and significant, but ultimately limited role in advancing a culture of justification'.

10 See in particular *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W); *Olitzki Property Holdings v State Tender Board* [2001] ZASCA 51; *Brisley v Drotsky* [2002] ZASCA 35 (in which he wrote a separate judgment); *Napier v Barkhuizen* [2005] ZASCA 119; *Minister of Finance v Gore NO* [2006] ZASCA 98. These decisions are all discussed in L Boonzaier 'Three stages of Cameron constitutionalism', this volume at 161-162, 168, who comments that 'Cameron played an important role ... energetically integrating the Constitution and the private common law ... But the developments in which Cameron JA participated were also, in important respects, moderate', and who describes *Gore* as 'an important development of the law ... but one that was, again, incremental rather than revolutionary'. See also the verdict on this area of F Michelman 'Redemptive-transformative: Edwin Cameron and the point of the Bill of Rights', this volume, ch 16.

African scholarship. And that fact, as I say, should make us think carefully, and critically, about those expectations. It should make us compare the idea of a lawyer and a judge implied by that scholarship, to the somewhat different idea suggested by his career and choices. There are large areas of agreement, to be sure. Progressive lawyers will generally view him as a model and a champion. But there are also differences that matter for anyone trying to decide how to be a lawyer.

This focus accounts for the choice of sources in the rest of this chapter. Unsurprisingly, Cameron has engaged much more explicitly with these issues outside his judgments than in them. A key part of his career, including as a judge, has been about forms of legal writing other than judgments. The rest of this piece is focused, accordingly, on his pre- and extra-curial career and writing. This is a rich source: in his case, a particularly rich one. By considering what he has said about law and lawyering, we can start to understand why his ideas about these things might diverge from some standard transformative expectations. We will also, I will suggest, find a deeper and more complete account of transformative constitutionalism, and of what it is to be a constitutionalist in pursuit of transformation.

2 Roles

Observing him from a distance, Cameron's starting point is to be a lawyer. That might be a banal claim, were it not imbued in his case with such a strongly felt sense of the professional morality that legal roles entail. At the first academic conference I ever attended – I was let into the staff lounge at Wits to join the grown-ups – the discussion ended up engaging an issue then about to enter the courts. Cameron, though not the only judge in the room, was the only one who made a point of leaving.

Justice: A personal account, in particular, is full of admiration for traditional legal virtues. In it, Cameron singles out as seminal for his own career a particular judgment he read as a student: the 1972 decision of Judge Ogilvie Thompson acquitting Gonville ffrench-Beytagh, Dean of the Anglican Cathedral in Johannesburg, on charges under the Terrorism Act:[11]

11 *S v ffrench-Beytagh* 1972 (3) SA 430 (A).

> Little did I appreciate, as I pored over Ogilvie Thompson's dense words in the whites-only students' law library at Stellenbosch, that his judgment would pave the way for my own legal practice and activism ten years later.[12]

It is not the first decision one would guess as an inspiration for a career like Cameron's. After all, Ogilvie Thompson also wrote the much-criticised decision in *Rossouw v Sachs*, as well as the judgment dismissing Barend van Niekerk's appeal against his conviction for attempting to obstruct the course of justice.[13] He would not be anywhere near the top of a list of lawyers who used their positions to resist the injustices of the apartheid state. But Cameron was admiring the *ffrench-Beytagh* decision as an example of how apartheid-era judges – and, notably, judges who were far from being conscientious opponents of the regime – often preserved basic procedural fairness. They thereby claimed a certain independence from power, and a capacity for impartiality. They did sometimes acquit those, like the Dean, whose conviction the apartheid regime would have found convenient. Cameron is selecting, as the starting point of his own thinking about lawyering, a case that exemplifies the particular role morality of a legal office, in the very traditional form of an impartial criminal trial.[14]

And then, from this starting point, having embraced these traditional professional commitments, he set out to fulfil them in a particular way. In *Witness to AIDS,* he writes, of a moment around 1988, after a short stint at the Johannesburg Bar:

> [I]n the growing crisis of apartheid a commercial practice did not attract or satisfy me. It seemed imperative that if law should survive as a way of regulating social conflict in South Africa – if it deserved to survive at all – more lawyers should

12 Cameron *Justice* (n 8) 28.

13 *Rossouw v Sachs* 1964 (2) SA 551 (A); *S v Van Niekerk* 1972 (3) SA 711 (A). In an earlier piece, Cameron also used a statement by Ogilvie Thompson on judicial propriety as a foil to express his disagreement, while noting the 'ponderous legalisms' of Ogilvie Thompson J's 'pronouncement': Cameron 'Lawyers, language and politics' (n 4) 53.

14 See also his criticism of the Sharpeville Six case, *S v Safatsa* 1988 (1) SA 868 (A), in Cameron 'Inferential reasoning' (n 3); his reflections on that and comparable criminal cases in the United States and United Kingdom in E Cameron 'When judges fail justice' (2004) 121 *South African Law Journal* 580; his rejection of the idea that law under apartheid was simply a myth and its trials mere show trials in E Cameron 'Fidelity and betrayal under law' (2016) 16 *Oxford University Commonwealth Law Journal* 346 at 351-52; and K Moshikaro 'Taking legality and just punishment seriously', this volume, ch 12.

> get involved in fighting injustice in the courts and by offering legal advice and support to organizations and individuals resisting apartheid.[15]

In *Justice*, he expresses the point in more general terms:

> My personal quest was to make the law more than only an instrument of confinement, more than only an implement of reproof, rebuke and correction. The law's role, as I saw it, was also to repair. The law could be confining, and oppressive and unjust. But it could afford a means of healing, and restoration. In the law, while working with the often grimy realities of injustice, I found a means of channelling my life's aspirations, for social justice and for healing, into my daily work.[16]

It may seem that any progressive lawyer in South Africa would easily agree with these ideas. They might not, therefore, seem the right place to look to explain why Cameron diverges from some progressive expectations. But I think there is a deceptively simple difference here.

Cameron's picture starts where the last quote ends. It starts with the 'daily work' of the lawyer he has become. And then, within that job, within that role, it continues with the commitment to try and do it and be it, daily, in a certain way. It is determined, from within the role, to perform it in a way that might not only actively contribute to social justice and healing but also, by contributing to those things and being seen to do so, might serve to legitimate and redeem the performance of those legal roles in South African society.[17]

I am making rather a lot of this idea, because it seems to me that both transformative constitutionalism and its radical critics often work the other way around.[18] In talk about transformative constitutionalism, in support or critique, the almost invariable starting point is with an idea of *transformation* – and, more particularly, with South Africa's failure to transform or to transform sufficiently, with the list of things that transformation requires that have not yet happened. There are powerful

15 E Cameron *Witness to AIDS* (2005) 23.

16 Cameron *Justice* (n 8) 62-63.

17 See also here particularly E Cameron 'Our legal system: Precious and precarious' (2000) 117 *South African Law Journal* 371; 'A "single judiciary?": Some comments' (2000) 117 *South African Law Journal* 141 at 141-42.

18 In what follows, I draw on J Fowkes 'Transformative constitutionalism' (forthcoming) and sources there cited; 'Transformative process theory' (2025) 14 *Global Constitutionalism* (forthcoming); and on some of my earlier arguments in *Building the Constitution: The practice of constitutional interpretation in post-apartheid South Africa* (2016), especially at 121-26.

reasons to talk and think this way: bearing witness; calling for action; opposing complacency; trying to destabilise the status quo to a lesser or greater extent; not, in one way or another, closing one's eyes to an unjust reality. But doing so also has its costs.

One is that this emphasis on transformation means the focus is not on constitutionalism. Transformative constitutional talk spends a lot of time asking whether our constitutionalism is sufficiently transformative. It spends rather less time asking whether our transformation is sufficiently constitutionalist. No doubt that is taken for granted, or not seen as the part of the problem that needs attention. But in fact transformative constitutionalism as a scholarly project has a pretty patchy record when measured on a constitutionalist's scale. For example, it surely scores high at the part that involves judges as independent officials seeking substantive justice. But transformative constitutionalism also (and partly for that reason) has a strong tendency to court-centrism. In addition, it can be quick to override form in the name of substance, even where the form, too, serves substantive goals. This implicates other important aspects of constitutionalism: legal certainty and predictability, procedural rigour, and – by neglecting non-judicial actors – democratic legitimation and agency.

My point is not to reverse the problem by now making a fetish out of these virtues at the expense of the others. My point is that any account of constitutionalism, to *be* an account of constitutionalism, must take account of all these elements. It must strike some balance between them. If it simply urges some and ignores others, it may be a useful provocation or an effective piece of activism, but it will be a weaker theory of constitutionalism. And a theory of constitutionalism is what transformative constitutionalism both purports to be and, if it is to fit a 1996 text which surely reflects all these virtues, what it must be. Cameron's starting point in *S v ffrench-Beytagh*, and its merits, suggests to me the alternative of starting with *constitutionalism* – and then, as a constitutionalist, within that commitment, striving to pursue transformation, both for its own sake and to legitimate the idea of constitutionalism in a society where legitimacy depends on transformation.

Any statement that seems to constrain transformation or emphasise the traditional role morality of the lawyer is liable to cause serious disquiet in South Africa. (If this is the right way to understand Cameron,

then it starts to be less mysterious why his path might diverge from some progressive expectations.)[19] But before I address the reasons for that disquiet – reasons which are also long-standing concerns of Cameron's – it is worth saying something about the positive appeal of starting with constitutionalism in this way. I do not mean the philosophical appeal of a more theoretically complete theory. I mean the practical appeal this way of thinking holds for a lawyer who wants to pursue transformation.

In its urging that form should give way to substance, transformative constitutionalism can be prone to forget that legal form often serves substance, as I have said. In paying lip service to the separation of powers on the way to urging judicial boldness now, it can forget how that doctrine also serves important substantive ends. That these things are there to serve substantive ends is certainly a reason to ask constantly if they are indeed doing that, and to be open to reinventing them as necessary: transformative constitutionalism rightly insists on this. But it is also why a disregard for these forms can have patently substantive costs.

Consider, for example, the way in which a judge who sets out to 'do justice', and to attack social problems wherever she encounters them, can end up being a freely discretionary court of equity. If the urge is to act on large social problems whenever individual cases reveal them, she can end up ruling on issues without hearing from interested and affected parties or, in engaging the broader problem, losing sight of the original litigants. The more freely she develops the law as she deems justice requires, or the more she simply focuses on concrete interventions and remedial devices without filling in the general doctrinal underpinnings, the more uncertain and unpredictable the law will be. And the more she simply *decides*, the more this raises questions not only about unelected judges, but also about the part of post-colonial transformation which is about respecting and empowering democratic agency, including when we consider inequalities in who is able to litigate. Nor am I dealing in hypotheticals here: in writing this, I have foremost in mind the Indian example, the most instructive global illustration, not only of the

19 It will be even less mysterious why Cameron's path diverges from some radical expectations, who see this commitment to (liberal) constitutionalism as the problem – see n 25 below – and, by contrast, why Tembeka Ngcukaitobi's clear-eyed and notably constitutionalist recent contribution picks out two of Cameron's judgments: T Ngcukaitobi *Land matters: South Africa's failed land reforms and the road ahead* (2021) 224-25.

extraordinary possibilities of boldly creative judicial activity, but also of every one of the risks I have just sketched.[20]

In Cameron's case, the point might be illustrated best by his enduring interest in the criminal law process, for which his starting point in *ffrench-Beytagh* also stands (and which makes his current appointment as Inspecting Judge of the Judicial Inspectorate for Correctional Services a singularly fitting one).[21] It is an interest in trial and sentencing that is inextricably, at one and the same time, about both strict and technical processes, and about repair and redemption. It is about work at the heart of any traditional account of the role of the law, and of judges. It is also of extraordinary importance in South African society. And yet it is often remote from scholarship on transformative constitutionalism. Criminal trial and prisons, routine and ugly, are usually outshone by more excitingly ground-breaking topics. This is hard to justify, measured either in terms of social importance or in terms of the places where judges are in a strong institutional position to have a serious impact on a problem. By contrast, a focus on issues like criminal trial and punishment is obvious if one thinks of the judicial role in more traditional terms. This work, in the spirit in which Cameron conducts it, follows very naturally from his starting point as a court officer.[22]

20 India is usually invoked in South Africa as a bolder, more creative counterpoint to South African approaches, but while it is that, it is also a double-edged sword for that argument. See A Bhuwania *Courting the people: Public interest litigation in post-emergency India* (2017); AK Thiruvengadam *The Constitution of India: A contextual analysis* (2017) 127-35; AK Thiruvengadam 'Swallowing a bitter PIL? Reflections on progressive strategies for public interest litigation in India' in O Vilhena, U Baxi & F Viljoen (eds) *Transformative constitutionalism: Comparing the apex courts in Brazil, India and South Africa* (2013) 519-531. I discussed these issues and earlier scholarship in J Fowkes 'How to open the doors of the court: Lessons on access to justice from Indian PIL' (2011) 27 *South African Journal on Human Rights* 434. On democratic agency in Indian constitutionalism, see especially M Khosla *India's founding moment: The constitution of a most surprising democracy* (2020) (which I have discussed, including in relation to South Africa, in J Fowkes 'A suitable paradigm: The Indian founding and the world' (2022) 4 *Jus Cogens* 57); on the progressive and not so progressive strands of Indian doctrine, see especially G Bhatia *The transformative constitution: A radical biography in nine acts* (2019).

21 See also Ally (n 9) 251.

22 E Cameron 'The crisis of criminal justice in South Africa' (2020) 69 *South African Crime Quarterly* (2020) 4-1-4-15; Cameron 'Rights, constitutionalism and the rule of law' (n 8); Cameron 'Single judiciary' (n 17) 150, also making a point about court formality that the criminal justice context makes much clearer than others might: 'It would be extremely hard to sentence someone to life imprisonment (or to any severe punishment) in an informal setting, where the danger might exist

And thinking this way holds a further and more personal appeal, the value of which should not be under-estimated. When transformative constitutionalism sets up 'transformation' as the measure of success, it makes itself a theory that must admit failure until society is transformed. But *that* is either as dauntingly large as human goals get, or it is an unattainable ideal. So something less than transformation is what transformative constitutionalism is bound to produce, except perhaps in the kind of long run in which Keynes reminded us that we are all dead.[23]

This is perfectly realistic, in the sense of being accurate to the facts. And pursuing an unreachable but noble goal does not have to be dispiriting.[24] But foregrounding 'transformation' can still condemn one to the constant role of bearing witness to failure. Whatever had been done to bring about transformation will not have been enough; whatever has happened will always have fallen short. Is this part of the explanation (among other causes) for why South African constitutional talk has become so full of disappointment, dismay, and disenchantment: that the leading theory of the constitution has a much more defined and prominent understanding of failure than success?

There is much to be said, in this position, for starting instead at the level of the individual, where Cameron did in the passage I quoted: with the more modest idea of 'daily work', with the 8997 days of his judicial service, and all the working days before it, taken one at a time. This is the benefit of thinking in terms of donning a mantle, of taking up an office and an oath, of performing a role, with all the smallness implied by fulfilling just one human-sized job among the many. For in a way that it

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that personal considerations could intrude upon the objective considerations that made the sentence appropriate.' I do not mean to claim that there are no South African lawyers or legal NGOs engaging the issue of prison reform – Cameron mentions some of them in the works just cited – only that the issue is not prominent in writing on transformative constitutionalism. See also E Cameron 'Prisons – A call to action for post-apartheid administrative lawyers' (keynote address for the Administrative Justice Association of South Africa, 4 March 2021) and his many posts on *GroundUp*, a local news platform.

23 JM Keynes *A tract on monetary reform* (1923) 80.

24 Pius Langa once expressed this understanding in terms of 'the old Nissan slogan: "Life's a journey. Enjoy the ride." What the slogan tells us is that we should enjoy the driving itself rather than seeing it merely as a means to arrive at a destination.' See P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 351 at 354, referring particularly to AJ van der Walt 'Dancing with codes – Protecting, developing and deconstructing property rights in a constitutional state' (2001) 118 *South African Law Journal* 258.

is not possible to 'transform South Africa', it *is* possible to feel, most days, that one has fulfilled a role in a way that a transforming South Africa probably needed it filled. Starting with the role, it seems to me, is the way to understand transformative constitutionalism on a human scale.

3 Transformation

This emphasis on role morality, on 'just doing one's job', will set off alarms in South African heads, as I said. Apartheid judges and lawyers, too, said they were just doing their jobs. That is a very important part of the reason why transformative constitutionalism has insisted, from the beginning, on expanding and reimagining the judicial role. And transformative constitutionalism itself has been criticised, in turn, for still retaining too many of the habits of liberal legalism. This, it is said, has impeded true transformation in South Africa.[25]

From either of these perspectives, my remarks in the previous section are evidence of treason. Not foregrounding 'transformation'? Emphasising instead 'constitutionalism', and talking up its more legalistic elements, no less? Focusing on the legal role, including in light of the professional constraints this idea brings with it? This is all highly suspicious. Am I not saying this – that one should be satisfied, that one should be *allowed* to be satisfied, with doing one's job – mostly as a way to reassure the consciences of the privileged on their comfortable way home? Isn't this a recipe for complacency, a pretext for downplaying the imperatives of transformation, a way to limit the responsibility of engaging them?

Certainly, none of these concerns is false, in that they all have perfectly real targets in South Africa. But while they are not false, they are not always true, either. This is perhaps the most significant blind spot

25 This is not the place for a survey, but see originally S Sibanda 'Not purpose-made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty' (2011) 22 *Stellenbosch Law Review* 482, more recently developed in S Sibanda 'When do you call time on a compromise? South Africa's discourse on transformation and the future of transformative constitutionalism' (2020) 24 *Law, Democracy & Development* 384; JM Modiri 'Law's poverty' (2015) 18 *Potchefstroom Electronic Law Journal* 224; T Madlingozi 'Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution' (2017) *Stellenbosch Law Review* 123; JM Modiri 'Conquest and constitutionalism: First thoughts on an alternative jurisprudence' (2018) 34 *South African Journal on Human Rights* 300.

of transformative constitutionalism in South Africa. The greatest part of transformative constitutional effort has gone into attacking reasons for judicial restraint, such as the place of judges in the inherited Westminster legal culture or entrenched scepticism about justiciable socioeconomic rights. Those were and remain real and important targets. Transformative constitutionalism has been right to insist that traditional attitudes and habits like these are in need of reimagination and redesign.

The problem arises when it is concluded, from the fact that a judge in a given case does *not* do something bold and creative and new, that the judge is a traditionalist reactionary who is failing to be a transformative constitutionalist. This puts judging on a bold standard. It fails to distinguish between the judge who has omitted or refused to take transformation seriously, and the judge who *has* done this but concluded that a more restrained form of judicial action is the best way to pursue transformation in the case at hand. This second judge may or may not be right about that conclusion, and such matters will often be debatable. But the second judge, at least, is in no need of a lecture about the transformative nature of the constitution. She already knows *that*, and has moved on to the much harder question of how best to vindicate that idea in the situation in front of her.

Put another way, there is a difference between insisting that judges are empowered to act boldly, and insisting that judges should be bold in every case. Transformative constitutionalists tend to mark this distinction in theory, but in practice, the tendency is to criticise judges whenever they could have been bolder. Transformative constitutionalism has developed a rich body of work on ways for judges to intervene. But it has little or no concrete account of judicial restraint.

I have elsewhere made the case for when judicial restraint can serve transformation better: for why this is *sometimes* the case, and more often, in both theory and in South African practice, than progressive scholars tend to acknowledge.[26] In brief, if we are transformative constitutionalists, we should care about achieving transformation, not about achieving more and bolder judicial action. So it is essential to ask, in every case,

26 J Fowkes 'Right after all: Reconsidering *New National Party* in the South African canon' (2015) 31 *South African Journal on Human Rights* 151; *Building the constitution* (n 18); 'A hole where Ely could be: Democracy and trust in South Africa' (2021) 19 *International Journal of Constitutional Law* 476; 'Transformative process theory' (n 18).

whether judicial intervention (or a particular bold form of it) is the best way to pursue transformation in that situation. Sometimes it will be. But unless every institution but the judiciary is rotten, it sometimes will not be, because other institutions will also be in play and courts are not always good (or best) at achieving transformation, especially on their own.[27] Where it is possible, there can be great value in co-operation, and in the respect and trust between constitutional institutions that deference allows courts to express.[28] This is particularly so because part of transformation, as noted, involves establishing democratic institutions and, especially in a post-colonial context, empowering majority government and democratic agency.[29] Judicial intervention can protect this agency from the powerful, and sometimes will need to do so. But judicial intervention also means taking a decision out of the hands of others, and expecting them to obey. There is a tension there, and defaulting to judicial intervention fails to appreciate that transformative value lies on *both* sides of this tension.[30]

For present purposes, what matters is only that, assuming there is truth in these arguments, the way to express it must be through a more rounded account of constitutionalism, that includes serious transformative arguments for judicial restraint as well as boldness. If one is addressing a reactionary sceptic, then doing this will risk giving them a pretext for continued inaction and complacency. That is one reason progressive critics are hesitant to do it: there is a possible strategic cost to the admission. But if one is *not* addressing a reactionary sceptic, if one

27 On the possibilities, but also the limits, of law and the pursuit of change through law, see E Cameron 'Law in the struggle for truth' (2003) 120 *South African Law Journal* 1 at 1-2, 6-7; and sources cited above at n 9.

28 See Cameron's remarks on this issue in his 'South African perspective' (n 8) 333-38, and on the need to maintain comity and civility between the judiciary and other branches, and to 'nurture carefully' this capital for when it is really needed, *Witness to AIDS* (n 15) 150-51.

29 On agency, see especially E Cameron 'Nepal's new constitution and fundamental rights of minorities – Lessons of the South African experience' (2007) 23 *South African Journal on Human Rights* 195; 'What you can do with rights (n 8); 'Dignity and disgrace – Moral citizenship and constitutional protection' in H Corder, V Federico & R Orrú (eds) *The quest for constitutionalism: South Africa since 1994* (2014) 95-109; see also PN Langa & E Cameron 'The Constitutional Court and Supreme Court of Appeal after 1994' (2010) 23(1) *Advocate* 28 at 32-33, reflecting a point of shared interest with the late Chief Justice: see J Fowkes 'The people, the court and Langa constitutionalism' in M Bishop & A Price (eds) *A transformative justice: Essays in honour of Chief Justice Pius Langa* (2015).

30 J Fowkes 'Transformative process theory' (n 18).

is addressing a lawyer or a judge with a sincere commitment to being transformative, then the bold standard is too simple. It also comes at a cost, namely the cost of missing subtler responses to cases that could more fully realise transformative constitutionalism.

This is what brings us back to Cameron, for surely he of all people is not the reactionary sceptic. Instead, he recognises that, if you want the law to deliver on substantive goals, that implies being open to reinventing its institutions, but also being open to preserving them:

> [H]istory and tradition serve primarily to ensure familiarity, but familiarity can justify retention of an institution only in so far as it enhances performance. Titles and forms of address must be subjected to the same rigorous scrutiny. If they assist delivery, there is a case for preserving them. If they do not, they stand subject to abolition. But, by corollary, suggested changes must be subjected to an equally rigorous scrutiny. Only if they serve to advance delivery should they be introduced. In the catch-phrase, 'do not mend it if it's not broken'.[31]

When we see someone who thinks like this diverging from the expectations of the bold standard, I think what we are seeing is the inadequacy of the bold standard as a true measure of value. If, as I argued, Cameron's divergence should cause us to look critically at the expectations of which he falls short, then I think this argument about the transformative value of a more rounded judicial account, with a real place for both boldness and restraint, is what that look should cause us to see. And it is not a betrayal of *that* vision to foreground constitutionalism or legal roles as the terms in which lawyers, at least, should pursue transformation in their daily work. To the contrary, it might be the best way to live up to it.

4 Resistance

Transformative constitutionalism and its more radical critics come apart, however, when it comes to whether the existing legal order is worth saving. Transformative constitutionalists want to work within the current constitutional paradigm. They therefore operate under the constant imperative to achieve sufficient transformation to justify that choice. More radical critics, willing to jettison the current arrangements or simply protest against them, do not have to make the same effort to

31 Cameron 'Single judiciary?' (n 17) 150.

justify being legal officers of the current system.[32] This represents another respect in which Cameron has made a choice that some critics – now, only the most radical of them – see as not going nearly far enough for transformation. This disagreement is also an increasingly fractious divide in the South African legal order. But it is one that figures like Cameron know only too well. The relation to which he and others stood to apartheid law offers a useful way to think about this issue, and this disagreement.

As he has himself written, he chose to operate from within the apartheid law system, as a lawyer. Of course, he was a legal practitioner doing a good deal of work on the side of the resistance, representing unions and political detainees and objectors to the draft. His clients also included those oppressed by the established social order in other ways, such as people living with HIV. But he stayed inside the law, as an officer of the legal system. There is a well-trammelled debate over whether this is the proper moral course, or whether one must refuse to offer the wicked legal system the legitimation of continuing to operate within it.[33] There is also an obvious parallel between this older debate, and the current one about how to be a transformative lawyer under the 1996 Constitution, including whether, in the name of radical change, it is necessary to break free of the limits of (this) constitutionalism.[34]

32 They are presumably under some obligation to explain an alternative, but that is a topic for another paper.

33 For Cameron's contribution, see E Cameron 'Submission on the role of the judiciary under apartheid' (1998) 115 *South African Law Journal* 436; *Justice* (n 8) 11-63. He also endorses John Dugard's side of the argument against Raymond Wacks's insistence that apartheid-era judges were morally obliged to resign, most explicitly in Cameron 'Dugard's moral critique' (n 4) 315: 'history has vindicated Dugard'.

34 On this idea of breaking, see eg R Chikane *Breaking a rainbow, building a nation: The politics behind the #MustFall movements* (2018); in legal scholarship, see eg Sibanda 'When do you call time' (n 25). The parallel between pre- and post-1994 judges has been most explicitly invoked by J Dugard 'Judging the judges: Towards an appropriate role for the judiciary in South Africa's transformation' (2007) 20 *Leiden Journal of International Law* 965. Cameron regularly engages the parallel: in addition to *Justice* (n 8), see his 'Submission' (n 33) 438; 'Academic criticism' (n 4) 108; 'Dugard's moral critique' (n 4) 319; *Witness to AIDS* (n 15) 151-52; 'Judicial accountability' (n 3) 256. He also, however, appreciates the crucial distinction between the position of the judiciary under apartheid and the position, after 1994, under a democratic government: see eg *Witness to AIDS* (n 15) 152; 'Judicial accountability' (n 3) 251-52.

It is an enduring debate for a reason. But it seems to me that we too often assume that this debate has a right answer – or, better put, that only one side of it can ultimately be right. In the apartheid context, Cameron stands with other lawyers who made the same kind of choice that he did, with the Arthur Chaskalsons and the Pius Langas. And on the other side of the line stand another group of lawyers who ultimately made the other choice, the Nelson Mandelas and the Bram Fischers. The moral debate can imply that we are committed to concluding that one of these choices, and one of these groups, was wrong. But if we tried to rank the contributions of, say, Pius Langa against those of Bram Fischer, aren't we asking, not just an unanswerable question, but one that we have no real need to answer? Isn't the best answer that there is much to admire (and grapple with) on both sides of the line?[35] Isn't it true that South Africa is better off for having had both groups of people, and not just (either) one of them? Indeed, might it not simply be the case that people are different, and so resistance will always take different forms as a result? Granted, there will be problematic cases on either side. There will be those working from within too interested in the comforts of the status quo, for example, and those from without too little interested in the longer-term value of the rule of law. But the fact that there are in each group better and worse exponents does not commit us to condemning the best in either.

By the same token, in today's context, those who seek transformation by challenging liberal conventions might be on a different team to those who are trying to pursue transformation from within them. But that does not necessarily mean they are playing a different game, and South African constitutionalism might well be better off for having both than either one. After all, most of these critics, on either side, see themselves as trying to displace unthinking, comfortable adherence to the status quo, and trying to compel active engagement and real change. Their goals are often very similar, even if their badges are not.

We might compare this to the relationship between the activist litigant and the judge. There will be important differences in how these two people speak and act. In principle, those differences imply tension. It is easy, and sometimes accurate, to think of these as two people who do

35 See Cameron's Bram Fischer lecture, published as Cameron 'Fidelity and betrayal under law' (n 14), the finest short piece on Bram Fischer's life and legacy.

not respect each other's choices. But that is not the only way to think, nor the only description that might be accurate. If the litigant is trying to use the courts, and the judge is trying to be transformative, then each badly needs the other. Each badly needs the other even if it happens to be true that they could not imagine *being* the other. And, of course, the degree of mutual sympathy is often greater than this. The activist knows that if she is litigating (or making legal arguments in scholarship or public talk), then she is depending on others taking the authority of the legal system more seriously than her activist speech acts may imply. The judge knows that it can be a great deal easier for her to appear impartial, while pursuing transformation, if she seems to be prodded and persuaded, rather than being the one to lead the charge. Each is performing their role as part of the same play – something that becomes particularly obvious when someone like Cameron takes up first one role and then the other, as I will discuss later on.

But first, some may resist this attempt at harmonisation. Some radical critics and activists may wish to claim their protest as something more hostile and combative. Some of those committed to working within the system, in turn, may want to call out activists as destructive. Each may want to insist that the debate, and the country, really would be better off without the other. They want to *mean* their attacks, not just perform them. This is part of how humans address conflict, and there is no getting away from it. But the more personal parts of Cameron's writing suggest the value of putting real people in these arguments. Although the usual wise advice is not to have arguments in personal terms, we may understand some of these arguments better if we at least think in terms of people.

Cameron has written about his difficulties in reconciling different parts of himself: retreating from childhood tragedy by 'reinvent[ing] [him]self in the guise of a clever schoolboy', for example, or wrestling with the problems of representing HIV-positive clients while still concealing his own status.[36] We could read this simply as narrative autobiography. But we can also read it as a reflection on how the business of picking legal roles and deciding how to fulfil them is an exercise inextricably bound up

36 Cameron *Justice* (n 8) 12, 69-70, 81-87.

in our other roles and identities, the ones we chose and the ones we don't. If so, there is no understanding the one without the other.

Yet if this is true, it is notable how rarely we frame our discussion in this way. Transformative constitutionalism is usually debated in professional academic terms. We talk in general about 'judges' and 'activists', as I have been doing, or about moral duties or theories like the separation of powers. Cameron has participated in such debates in those terms. But he has also talked about them more personally, and we might be wise to follow his lead. Because, so often, these purportedly academic disagreements are bound up in personal expressions of identity. How often is transformative constitutionalism a way for a white person to make sense of their position as a lawyer in a post-1994 legal order? How often is its rejection a way for a person of colour to make sense of their relation to a legal academy still dominated by white people? Yet we seldom talk about this in these terms. Cameron's public expression of what are sometimes deeply personal things is rare indeed.

It is therefore not surprising how often the ostensibly theoretical debates end in stalemate. It not surprising that rather similar views end up labelled, variously, as a progressive version of liberal constitutionalism, as post-liberal transformative constitutionalism, and as a rejection of both of them.[37] I am not saying there are no substantive differences here. But I think at least a lot of what we are seeing, in these different labels, is the desire to mark and express different identity claims. That is when it can be so valuable to supplement talk of concepts with talk of the lives different people are trying, partly as lawyers, to lead.

5 Speaking

In picking Cameron's career, in particular, to make my point, I am of course stacking the deck. Those who worry that the constraints of legal roles can be a recipe or a pretext for slow-tracking transformation will be inclined to mutter that they're not all Edwin Cameron. And they have

37 We might think here, respectively, of the work of Frank Michelman, Karl Klare, and Sanele Sibanda: see especially FI Michelman 'The constitution, social rights, and liberal political justification' (2003) 1 *International Journal of Constitutional Law* 13 at 22-25; FI Michelman 'Liberal constitutionalism, property rights, and the assault on poverty' (2011) 22 *Stellenbosch Law Review* 706; Klare (n 6); Sibanda 'Not purpose-made!' (n 25); Sibanda 'When do you call time?' (n 25).

a point. So what is it that makes his such a strong example for me to pick? What is he that others might not be? My first answer is also one that transformative constitutional discussion, perhaps for coincidental reasons, has left rather under-explored.

The way influential ideas happen to be stated first time around can have an unintended influence on their future development. This has been the case, I think, with Karl Klare's original article on transformative constitutionalism. The article is focused, throughout, on adjudication and judicial interpretation: on the work of writing judgments. Doubtless, this is because the article was based on a talk to a group of judges, and because adjudication is the central concern of Klare's own background in Critical Legal Studies. He did not adopt this focus because he thought that this should be the sole concern of transformative constitutionalism.[38] And yet, ever since, the South African debate has very largely stayed where Klare began it, around adjudication.

There is a great and unfortunate irony to this. Klare's topics – adjudication, judging, judicial interpretation – are the places where he would inevitably have, and has had, the *hardest* possible time convincing the South African legal community that judges should be more personally candid and open.[39] Conversely, Klare's focus on adjudication has surely played its role in keeping the transformative debate away from a judge's *extra*-curial activities – the context where South African legal culture (like others) is much more likely to be open to creative, candid forms of judicial speech. The place where the detail of Klare's thinking is most useful and relevant to us might be everywhere outside the place he told us to look.

Here we see, too, a powerful reason for this article's focus on Cameron's extra-curial record. For it is no slight on his judgments to say that Cameron has few peers and no betters in South Africa as an illustration of the value of this extra-curial dimension, for precisely the reasons that led Klare to advocate for and value transformative

38 Klare (n 6) notes the importance of other institutions at the outset (at 147), and clearly views judgment-writing in the broader context of other legal work by practitioners and academics, civil society activity, and the polity more generally (at 150, 164). But his focus is on judgment-writing throughout.

39 See T Roux 'Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference?' (2009) 20 *Stellenbosch Law Review* 258.

constitutionalism in the first place. Klare wrote of the value of 'self-reflection and candor', lest intellectual caution blind us to more creative possibilities. This was necessary, he said, for 'law and legal practices' to really serve as 'a foundation of democratic and responsive social transformation' and contribute to 'deepening a democratic culture'.[40] He was taking about this in relation to adjudication. But if – increasing my unauthorised appropriations in this chapter to two – I were to take Klare's argument about adjudication, and insert into his logic (in square brackets) the point I have just been making about lives and legal roles, we might get this:

> If this article leaves the reader with a single thought, I hope that it will be that the legal profession needs to be more candid with itself and with the community at large about the [personal stakes of legal roles] and to accept more forthrightly our responsibility (however limited and partial) for constructing the social order through [how we fill them].[41]

If this were the aim, no-one has surpassed Cameron in fulfilling it: most obviously in what is, after all, called *Justice: A personal account*. Among the book's goals, in speaking unusually personally as a judge, is to make a case for the place of law, and the 1996 Constitution, in South Africa's social order. It exemplifies an extra-curial version of Klare's argument.

Consider, specifically, Cameron's response (in that book and elsewhere) to the question, after 1994, of how to handle the judiciary's apartheid legacy. At the time, the judicial leadership took the decision not to participate officially in the Truth and Reconciliation Commission (TRC). This decision reflected tradition and caution: courts are not usually accountable for their decisions to other bodies, and there was also concern that the legitimacy of the courts might be damaged. This approach, however, meant forgoing an opportunity. A more candid engagement, offering a judicial acknowledgment and self-accounting of its complicity in the apartheid project, in a non-punitive forum, might

40 Klare (n 6) 165, 172, 187. On these ideas, see especially Cameron 'Our legal system' (n 17); Cameron 'Single judiciary?' (n 17) 141-42; as well as his arguments on the use of international law in E Cameron 'Constitutionalism, rights, and international law: The *Glenister* decision' (2013) 23 *Duke Journal of Comparative & International Law* 389 and his co-authored discussion of the Court's disagreements about issues of language in E Cameron and others 'Rainbows and Realities: Justice Johan Froneman in the explosive terrain of linguistic and cultural rights' (2022) 12 *Constitutional Court Review* 261.

41 Klare (n 6) 164.

have served to rebuild the judiciary's legitimacy on stronger foundations. It is just the sort of opportunity Klare told South African judges to seize.[42]

Cameron would agree, although he has described it as a 'tough decision'.[43] At the time, he was among the 14 judges who made submissions to the TRC in their personal capacities.[44] Years later, he and Pius Langa (who had done the same) reflected on that decision:

> While [these personal] written submissions ... had significant value, we think the judiciary's decision to stay out of the TRC was wrong. Judges should have attended the hearings voluntarily, and submitted to questioning (the TRC had powers of subpoena, which it wisely didn't exercise). Their participation would have legitimated both the TRC and the judiciary itself. It would have countered the perception that judges viewed themselves as somehow separate from and above the politics of the rest of the country. Of course, in retrospect the decision seems easier than it would have been in 1997. At the time, a strict ideological separation between 'law' and 'politics' made participation seem potentially dangerous. And of course the judiciary might have emerged even more tarnished from the process. There was also concern that the judiciary might be used as a stalking horse for settling personal scores. We still regret the decision.[45]

Klare's themes are obvious in this passage. But it is about extra-curial speech, not judgment-writing. And while South African judges have seldom followed Klare's specific advice to present judgment in terms of their own personal views, in this extra-curial context – even in so fraught an extra-curial context – more judges were willing, as judges, to act on his ideas.

But the point extends well beyond this example, and Cameron's career is a fine illustration of why. He has not, to my knowledge, written much about what shaped his early career choices.[46] The first steps of his

42 Klare (n 6) 187-88.

43 Langa & Cameron (n 29) 29.

44 Submissions are reproduced, sometimes in edited form, in 'The Truth and Reconciliation Commission, and the bench, legal practitioners and legal academics' (1998) 115 *South African Law Journal* 15. The total given includes hostile or suspicious responses, eg CF Eloff 'The role of the judiciary' (1998) 115 *South African Law Journal* 64. Cameron's submission was accidentally not included, and appeared in a later volume that year: see Cameron 'Submission' (n 33), and also 'Judicial accountability' (n 3); 'Rights, constitutionalism and the rule of law' (n 8).

45 Langa & Cameron (n 29) 29-30. For Pius Langa's personal submission, see PN Langa 'Submission to the Truth and Reconciliation Commission on the role of the judiciary' (1998) 115 *South African Law Journal* 36.

46 Apart from the Ogilvie Thompson J decision in *ffrench-Beytagh*, noted above at n 11, see only Cameron *Witness to AIDS* (n 15) 23.

professional ladder had the usual rungs of the young star: law degree, Oxbridge, scholarships, prizes, admission to the Bar. Cameron did study classics as well as law at Oxford, but even that counted (then) as a conventional enough choice for a BCL student going back to a legal system with a Roman-Dutch tradition. But at least after that point, powerful elements of experimentalism and boundary-pushing enter the picture.

Cameron was one of the first batch of South African lawyers to combine practice at the Bar with academic status. He found a home for these dual roles at the Centre for Applied Legal Studies (CALS), set up by John Dugard in 1978, where he worked from 1986. He soon took his practice to the front lines of legal resistance to apartheid, representing mineworkers' unions, people charged with national security offences, and conscientious objectors to the draft.

In this era, his professional activities expand outwards like the unfolding leaves of a fan. There is litigation, there are speeches, there is institution-building and coalition-forming, there is civil society participation in government forums. There is the extraordinarily fruitful founding of the AIDS Law Project, whose heirs are still with us, as good a symbol of what practical transformative constitutionalism looks like as one could hope to find. There is the academic work on HIV/AIDS, on human rights and labour law and treatment and stigma.[47] Taken all in all, it reflects the same truth of his piece on LC Steyn, where building up a picture of the truth implied engaging as many elements as the truth contains. If you want to be active on HIV/AIDS as a lawyer, if you want to engage a pandemic and the many kinds of impact it can have, then you will end up being many different kinds of lawyer.

6 Activism

This last statement may seem to contradict what I said earlier about foregrounding legal roles. (Isn't treating the HIV/AIDS pandemic as defining, and taking up whatever tasks that implies, the same as treating 'transformation' as defining, and so the opposite of what I was arguing earlier?). But the contradiction dissolves once we recognise that some

47 A body of work which would defeat a reasonably sized footnote, many of the older parts of which are also now understandably superseded. But see n 64 below.

legal roles permit more flexibility than others. I do not doubt that Cameron would also strongly emphasise lawyerly duties in the context of his earlier work, such as the ethical duties associated with representing clients and serving as an officer of the court. But being a judge involves more restrictions, on and off the bench, and there is no contradiction between choosing first to be the less constrained lawyer and then choosing to be the more constrained judge.

This, however, is easier to say in the abstract than to get others to accept in practice. Cameron's activism, and its relation to his position on the bench, have raised questions about what is compatible with the role of judge. His opposition to Thabo Mbeki's AIDS denialism, including via a provocative comparison to Holocaust denialism, is the prime example, and the one upon which he has reflected most openly.

As he says, 'My interventions on AIDS have explored the limits of judicial participation in current political debate.'[48] In *Witness to AIDS*, he explains how he personally tried to draw those limits. Judges, by accepting office, accept restrictions on expressing political opinions. They should not normally speak on matters of political controversy. If they do, form is important. It matters whether views are expressed 'on a formal occasion, in an appropriate academic context, with full academic and intellectual authority to back its every assertion', permitting 'proper scrutiny and refutation'.[49] A similar long-form statement in a newspaper is also acceptable, whereas 'to go on a radio show to repeat and debate and propagate' the political opinions concerned would 'be treading across the judicial/political divide' and 'entering a form and medium of public debate that would be inappropriate for me as a judge to engage in.'[50]

He acknowledges that these lines are not always easy to draw. The careful distinctions they strive to make may also not survive once the view is publicly expressed. He made these comments in relation to an invitation to talk on a radio show about his (earlier, formal written) comparison of AIDS denialism to Holocaust denialism. After he declined to appear, the show went ahead without him, and misrepresented his argument as comparing the government's policy to the Holocaust itself. He was also

48 Cameron *Witness to AIDS* (n 15) 149.
49 Cameron *Witness to AIDS* (n 15) 139.
50 Cameron *Witness to AIDS* (n 15) 139.

subject to political attacks, to which a judge cannot respond as a non-judge can.[51] Once that happens, then whatever the judge does, the form is no longer that of an academic-like debate. Most people will experience it via the headlines, not the written argument with its citations. As a much more minor contention over an academic trip to Palestine while he was a judge also shows, on some issues, a judge can escape controversy only by staying out of the issue entirely.[52]

But avoidance, of course, has its own problems. Cameron's more substantive argument is that, ordinarily, judges should not engage issues in ways that would oblige them to recuse themselves from later cases on those issues. But in some cases, that ordinary principle is outweighed. Cameron felt that it was outweighed by the need to speak out on AIDS, especially in his case as the only public official at the time who had made his HIV status public and as someone who was only alive because of the medical science being attacked.[53] As it happens, I do not think his choice of comparison to Holocaust denialism was the best one. The use of the word 'Holocaust' is not only inflammatory, which can serve a purpose, but also apt to distract from the purpose, as it proved, especially when the comparison is actually quite a subtle one.[54] But that is detail. Dramatic criticism was due, in a manner not only of life and death, but also indefensible obstruction to saving saveable lives. As Etienne Mureinik wrote in reference to Cameron's earlier academic criticism of judges:

> Sometimes [academic lawyers] encounter a decision ... that is not merely wrong, but altogether outrageous. It is the duty of an academic lawyer not just to criticize, but to criticize accurately. If he criticizes an outrage in terms appropriate to a mere error, he fails in that duty.[55]

And though Cameron was now a judge, he is surely right that he had to speak, just as he is surely right to have stated that, having spoken out, he would have had to recuse himself from a case involving that issue had he

51 Cameron *Witness to AIDS* (n 15) 138-43, 147-49.
52 See W Goldstein 'Can a judge not ask for both sides to be heard?' *Daily Maverick* (1 July 2020); E Cameron 'Warren Goldstein misses opportunity to bring light and healing to fraught issue of Israel/Palestine' *Daily Maverick* (2 July 2020); W Goldstein 'To Judge Edwin Cameron: "Let us talk to, and hear, one another, on the Israel-Palestine conflict"' *Daily Maverick* (6 July 2020).
53 Cameron *Witness to AIDS* (n 15) 147-56.
54 Cameron 'AIDS denial' (n 8); 'Struggle for truth' (n 27).
55 Mureinik (n 3) 468.

thereafter encountered it on the bench.[56] For surely that combination – to bear witness, in the awareness of a future duty of recusal – is easier to reconcile with the fact of his being a judge than *his* silence, at that time, on that issue, would have been.

But this is a special case, the exception that proves the rule. Cameron's broader background as an activist lawyer, before he was a judge, has also prompted questions, on which his position is different. Consider this well-known exchange with Adv Trengove from Cameron's Judicial Service Commission ('JSC') interview[57] in 1994:

> *Trengove*: Prof Cameron, you have been very committed to the campaign for gay rights both professionally and personally. Is that correct?
>
> *Cameron*: Correct.
>
> *Trengove*: Could I ask you two questions arising from that fact? The first is whether you think that that might enable you to bring a perspective to the Constitutional Court which might be a valuable perspective? But secondly, also, how would you respond if gay rights issues were to come before the Court? Would you be able to approach those issues with the open-minded dispassion that will be required of a Judge of the Constitutional Court?

After Cameron's response (which I will come to shortly) a different questioner, Adv Gordon, joined in:

> Professor, if I could continue on that subject. [Gordon then raised a case concerning different ages of consent for hetero- and homosexual sexual activity.] Now do you feel that if that kind of problem were to be presented to the Constitutional Court, and knowing your strong views in this regard, do you feel that you are really able to exercise an independent and impartial line? ... What we really are looking for are people who notwithstanding their views on things still have got an open mind and would not allow their own personal views to carry the day. Are you comfortable with that, with that sort of problem?

Cameron's responses included accepting that there was something legitimate about these questions. I do not think he did so entirely out of diplomatic politeness during a job interview. To see what the questioners might be getting at, we have only to fast forward eight years, to the moment when Cameron handed down the Supreme Court of Appeal's

56 Cameron *Witness to AIDS* (n 15) 150.

57 A transcript of this interview is made available on the Constitutional Court of South Africa's website at https://www.concourt.org.za/index.php/judges/former-judges/2-uncategorised/199-justice-cameron-interview. Typographical errors in it have been fixed in the subsequent quotations.

same-sex marriage judgment, which preceded the Constitutional Court's final decision, different as to remedy, in *Fourie (No 2)*.[58] When we see this, we may think many things. But I think we see Cameron, in the context of his identity and career. We do not just see a judge writing a judgment, and no doubt it cannot have felt like that to assign it, or to write it, either.

How would we explain this situation? How would we explain the fact of Cameron writing that particular judgment to someone, like his 1994 JSC questioners, who was worried about what judges, as opposed to activist lawyers, need to be and need to appear to be? Conversely, supporters of transformative constitutionalism will find it appealing for lawyers to have legal practices like Cameron's. They will also want to encourage that kind of lawyer to go on to serve on the bench. So how should a transformative constitutionalist best respond to questions like those he faced at the JSC?[59] Cameron's real-time responses, on the day, made the argument that his work on gay rights was part of a much broader commitment to equality and social justice:

> 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. It leads me into the answer I want to give which is 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.

Later, cutting quietly to the heart of the matter as usual, Arthur Chaskalson underlined the point Cameron had made:

> *Chaskalson:* Prof Cameron, would you see any distinction in developing this issue between your own writings and position and for instance the question of gender discrimination in the selection of a woman judge who may have written on that field as well?

58 *Fourie v Minister of Home Affairs* [2004] ZASCA 132; *Minister of Home Affairs v Fourie* [2005] ZACC 19.

59 The question remains very much a live one: see J Brickhill & M Finn 'The ethics and politics of public interest litigation' in J Brickhill (ed) *Public interest litigation in South Africa* (2018) 100-101.

> *Cameron*: I do not, Judge Chaskalson. ... I am not saying the questions are illegitimate. I think they would be as proper to ask to the black candidates who have suffered racial discrimination, to the women who have suffered gender discrimination, to what extent will there be integrity and dispassion in deciding issues which fall within those fields. Have I understood your question correctly?
>
> *Chaskalson*: I think you have, yes.

This exchange broadens the point in a strategically useful way: the implication is that if Cameron were disqualified for having been an activist, then so would many others be, including precisely those whom the JSC would want to appoint. Cameron said this, too:

> I think that our history in a way afflicts all the shortlisted candidates because in some measure we have all been committed to a conception of human rights which was at odds with the previous system and which is in keeping with the present system.

But if these answers broaden the point, they do not broaden it as far as they might. It remains an argument about the 'others' lying outside the historical norm: it is either about activists who have not conducted a more staidly conventional legal practice before being considered for the bench, or about people who are not cisgender white men. If we, standing nearly 30 years later in the history of sexual equality, and not in the middle of a job interview, want to understand the legitimacy of someone like Cameron writing something like that same-sex marriage judgment, we will need to take the argument further still.

Our first temptation will be to turn the question on the questioners: to point out that here were two people, whose adjectives would include being white, male and wealthy, sitting in South Africa on 3 May 1994, asking questions about how to be and how to appear neutral. The situation is not free of irony.[60] But if this reflects an important truth –

60 I am reminded most, in Cameron's writings, of his discussion of Judge Kees van Dijkhorst's dismissal of Willem Joubert as an assessor in the 1985-86 trial of United Democratic Front ('UDF') leaders, on the basis that Joubert had signed a UDF petition. See Cameron 'Lawyers, language and politics' (n 4) 53-56. The fact that the possible bias of someone content *not* to sign petitions went unconsidered is as easy to explain as it would be hard to defend. See also, on a rare apartheid-era admission that judges come to the bench with personal views, Cameron 'Judicial accountability' (n 3) 257-59, 262-63. Cameron has linked this to the décor of the Constitutional Court chamber: 'That each judge approaches the law with their own background – including their own language and culture – is denoted by the unique patterns of the Nguni cattle hides on the Justices' Bench at the Constitutional Court. The cattle hides embrace the notion of Justices united in

neutrality does not exist – it does not address two issues the questioners are trying to get at. The first is that this reply does not solve the particular problem of appearances faced by activists and others who diverge openly from what, rightly or wrongly, is the status quo. We know that the judge who was not an activist might be a closet homophobe or – equally – might have an 'open mind' on the issue because they have no strong commitment about it, a troubling moral position of its own. But this judge, without strongly expressed public views, will probably have an easier time *appearing* impartial. Solving this, Critical Legal Studies-style, by trying to expose everyone's personal views and thus reveal that everyone is biased, is a powerful thought experiment. But it is not something we can actually do.

Secondly, the reply does not address the question of motivations. It is hard to imagine that someone would become an activist unless, frankly, they did not *want* to be even-handed about certain issues. An activist must want to fight for one set of views against others. So it is not unreasonable to ask such an activist, not so much about their ability to be impartial, as about their motivation and interest in relation to that aspect of the judicial role.

I think, therefore, that the best response is not directed to revealing or exposing everyone as equally biased. That is also a risky basis on which to set out to defend the legitimacy of judges in most or all legal cultures. The better response, I think, is that everyone has problems of the *appearance* of bias, of one kind or the other.

In another part of Cameron's responses on the day, he said this:

> I think that in a way you are raising an important paradox for all the candidates, not just for me. You are raising the paradox whether a commitment to human rights, to non-discrimination, to justice, to those lofty and important ideals which many people have struggled and died for in this country, whether that commitment will disable one from participating dispassionately and properly and with integrity on the Constitutional Court. I do not believe it will.

Again, Cameron's response is strategically deft, but we might take the thought further. In a post-1994 context, someone who does *not* have

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their diversity and that their different backgrounds, experiences, cultures and approaches to the law make the Constitutional Court a robust Bench reflective of the nuances in South African society': Cameron 'Rainbows and realities' (n 40) 284 fn 203.

evidence of this kind in their past would have their own questions to face. They would have their own problem with appearances, just not the same problem the activist has. If someone who has fought against past discrimination or been a victim of it may have a problem appearing impartial, someone who has *not* had the problem of credibility in speaking to the experience of those things. Each has different apparent deficits in wielding judicial power they will have to work to dispel.

Cameron has a number of the impeccable credentials of the traditional, entrenched white male legal world, but he manifestly does not fit into some of its boxes. As he once put it, 'Judges don't get AIDS. Nor are they gay'.[61] For someone in that position, who has been a prominent activist including on those matters, the challenge might be signalling commitment to judicial virtues not so naturally associated with activists, like impartial process. That has, after all, been Cameron's real response to the questions he faced on that day, ever since that day.

But conversely, a similar white man with a more privileged upbringing, who felt no attraction to other men and had a less stigmatized chronic disease like a heart condition, and had no history of activism, would have problems of his own to face. *He* is at risk of being perceived as elite, out of touch with ordinary South Africans or with the experiences of less privileged groups, too comfortable to be interested in serious transformation, someone whose historical turn it is to listen, not pronounce. *His* challenge will be to demonstrate the necessary awareness and understanding to be credible as an interpreter of the society's laws, and as a judge wielding judicial power against other members of the society. He will have to find ways to communicate with his audiences against *these* suspicions.[62]

This binary presentation is, of course, too simple: the truth is more variegated, since different judges will have varying relationships to different issues. Everyone will have cases nearer to or further from their own life experiences or visible identity. But the simplified version suffices to make the point. The solution to the question of Cameron writing a same-sex marriage judgment cannot be for him to have led a less activist

61 Cameron *Witness to AIDS* (n 15) 19.

62 Consider, for example, the way that Cameron has used his own experience of shame and stigma, as a gay HIV-positive man, to engage racial discrimination in South Africa: Cameron 'Dignity and disgrace' (n 29) 96.

(or a more cisgender) life. That is not just impossible or intolerable; it would also only swop appearance problems. By the same token, the solution cannot be for activist-Cameron not to become a judge because, since everyone has appearance problems, then no-one could become a judge.

We usually make this point more positively, in terms of pluralism and diversity. This was the way that Wim Trengove sought to make it in the first part of his JSC question that got rather lost in the exchange. He first asked Cameron if his status as a gay man or as an activist 'might enable you to bring a perspective to the Constitutional Court which might be a valuable perspective?' We know this point well, as the idea that the diverse life experiences of a diverse set of judges can contribute to better decision-making, especially in the context of a discursive collegial institution such as the Constitutional Court, at its best, has been. It is also the idea expressed in the s 174(2) requirement that judges should, broadly speaking, be demographically representative of South African society as a whole (as well as in closely related ideas such as the importance of diversity in published voices or faculty hiring).

But my argument here suggests a different way of expressing this same idea, one that brings my argument full circle. Another way to say that different judges bring their own life experiences and identities to the bench is to say that they each bring, and can bring, *only* that. Each, accordingly, will struggle in one way or another to pull off the role of judge from case to case. If they have the insight borne of personal lived experience, they will lack the perceived impartiality of detachment, or vice versa, and so on. They – we – are all imperfect transformative constitutionalists, differently able to contribute to the work it requires. Thus the answer to the puzzle of the same-sex marriage judgment is that any judge, any*one*, would have been an imperfect author of *Fourie*. That is why it was not decisive if Cameron was imperfect in some ways, and why it *could* be decisive that he was perfect in others.

I say this brings the argument full circle because it embodies the claims I have made to this point. *This* is why it is important to talk in terms of roles, and not just in terms of an idea of transformation. It is why talking more often in terms of lives than concepts can be instructive. It is also why the business of calling out transformative imperfections is sometimes of such limited value: when it occurs between those who are best thought of as different species of ally, who need one another's

mutually complementary imperfections. Just as the activist litigant and the judge depend on each other, and just as South Africa is better off for having both Mandelas and Langas, so it is only by having many different kinds of imperfect transformative constitutionalists that we can hope to pull off the project that is transformative constitutionalism. It is only if our imperfections are various, only *because* our imperfections are various, that we can complement and compensate for one another and achieve the balance of competing imperatives that transformative constitutionalism entails.

7 Being

If this brings my argument full circle, it remains, in two respects, to finish colouring it in. What I just said – that demonstrating the activist or transformative part of a judge's ideal credentials might be easier for someone like Cameron – is a point only about appearances. It is not at all a claim that it *was* easy. Perhaps Cameron is by instinct an activist. But the public disclosure of the personal implied by Klare's arguments is not a matter of only intellectual courage. Cameron has written about his feelings ahead of going public with his HIV status, at a time when few public figures, and no public officials, had done so: 'Overcome by apprehension, I stopped by my car next to the roadside. For a while I leaned my head on the steering wheel and let grief overcome me. Afterward, I felt better.'[63]

But personally, I think back to the first time I ever saw Edwin Cameron in person. It was on my very first day of law school. We were in a huge lecture hall at Wits with extensively maltreated blue seats, which disabused some of my wispier notions about what university was supposed to look like. Cameron was the guest speaker to welcome the new LLB students. The part I most remember was that, towards the end, in the questions session, the issue of gay rights came up. In the course of his response, he said, in quite a mild tone, 'There's nothing wrong with being gay. I'm gay'. And there was an immediate buzz of noise, made up

63 Cameron *Witness to AIDS* (n 15) 60. Of writing that book itself Cameron later said: 'The first book was agony. Every word was anguish. Writing about stigma, infection, recovering from it. Writing about the horror of [former president] Thabo Mbeki's denialism was very painful.' See M Nthunya 'Judge Edwin Cameron on HIV, justice and attacks on the judiciary' *City Press* (22 January 2020).

of more than just whispering, a reaction expressing shock and agitation and controversy. I remember it as lasting an unexpectedly long time at an unexpectedly high volume, and that he had to wait for it to quieten down before he could continue speaking. It caught me by surprise. Perhaps, in my surprise, I heard it as louder than it really was; either way, its loudness stayed with me.

But that was about what I felt. It was not until several years later that I began to think about what it felt like, in that situation, and in so many others before and after it, to be him.

By the time I did get around to thinking about that, Cameron's own writing had been one of the routes. His scholarship was, unsurprisingly, central to my own thinking on sexual equality and on HIV/AIDS, as it has no doubt been to so many others.[64] But in his academic output, I saw, I think, at least one more thing, beyond those I have already mentioned.

Cameron's scholarly writing displays not only great variety, but more variety than is explained simply by the need for multi-faceted approaches to complex subjects, be they LC Steyn or HIV/AIDS. A few years before the Steyn piece, for example, he was writing legal theory, as the first scholar to introduce Ronald Dworkin into South African legal discussion.[65] In the late 1980s, while writing his critical challenges against deferential academics and supine judges, he also produced a two-part doctrinal article on labour law under the emerging Industrial Tribunal, complete with 409 precedent-laden footnotes.[66] Or, to take my favourite illustration of this: in 1992 he became an author of so classical a thing as *Honoré's South African law of trusts*.[67] A couple of years later, he published – with hot pink spine – *Defiant desire: Gay and lesbian lives*

64 Perhaps especially, in addition to his books, E Cameron 'Sexual orientation and the Constitution: A test case for human rights' (1993) 110 *South African Law Journal* 450; 'Legal and human responses to the HIV/AIDS epidemic' (2006) 17 *Stellenbosch Law Review* 47. See Fowkes *Building the constitution* (n 18) 142-47, 156-87.

65 E Cameron 'Are Dworkin's "principles" really rules?' (1979) 96 *South African Law Journal* 450. On its place in South African academic use of Dworkin, see Fowkes *Building the constitution* (n 18) 44 fn 35.

66 E Cameron 'The right to a hearing before dismissal – Part I' (1986) 7 *Industrial Law Journal* 183; 'The right to a hearing before dismissal – Problems and puzzles' (1988) 9 *Industrial Law Journal* 147.

67 T Honoré & E Cameron *Honoré's South African law of trusts* (1992) (now in its sixth edition, with Marius de Waal and Peter Solomon as co-authors); see also E Cameron 'Constructive trusts in South African law: The legacy refused' (1999) 3 *Edinburgh Law Review* 341.

in South Africa, co-edited with Mark Gevisser. To it I owe, among other things, the deeply cherished knowledge that a popular newsletter called 'The Gaily Male' used to be produced in Mokopane (then Potgietersrus), and that the University of Cape Town once boasted a student group called the LILACS: Lesbians In Love And Compromising Situations.[68]

Looking at this bricolage, from the classical to the pop art, the outsider cannot judge how planned it all was. I do not know how much it resulted from a careful if multi-part list, or (to project not at all from my own experience) whether the situation more closely resembles the child trapped in tragic indecision at the sweet shop, seeing value and interest everywhere, whose predicament can only be resolved by pick 'n mix.

Or perhaps, as something of a mix of the two, it shows only that deciding where to try and make one's contribution can involve some trial and error, until one finds what fits. This is a final reason to think more often about lives rather than concepts, because matters of fit are necessarily and always personal. From the point of view of society (and most law teaching), law is a system of general and impersonal rules, and lawyers are turned out in batches to operate it. But from our own individual point of view, law is about what to do with the working half of fifty or so years. For each of us, it is a life to be lived, and so we should care about finding some place in the corridors of the law where we can feel ourselves at home.

Klare's original paper was deeply interested in creative experimentalism, and personal expression, in the interests of the constitutional project. As we have seen, it sought a way to legitimate legal practice and a legal order, a vital task. It challenged traditionally professionalised judges with a new obligation, one they might be reluctant to take up. But these matters are not only about stepping out of a comfort zone. They are also about the search for it. A neglected virtue of this creativity is that it can be a way for individuals to find a way to be lawyers that fits them. It is not only an instrumental necessity or a discomfiting obligation. It can also be a way to align the legal practice of law and the being of a person, to the benefit of both. It can be freeing, a source of peace.

68 M Gevisser 'A different fight for freedom: A history of South African lesbian and gay organization from the 1950s to 1990s' and M Armour & S Lapinsky '"Lesbians in Love and Compromising Situations": Lesbian feminist organizing in the Western Cape', both in M Gevisser & E Cameron (eds) *Defiant desire: Gay and lesbian lives in South Africa* (1994).

Edwin manages, to a rare degree, to combine moral certitude with tolerance and open-mindedness, and to express both things at once. He has found a way to be a lawyer while being the opposite of a chauvinist: to be just as accomplished a lawyer in many traditional senses as LC Steyn was, and yet to be, in the final analysis, his opposite. But surely, in the end, what he is not is less remarkable than what he has found a way to be. When I think of finding a way to flourish within the law, equally as a lawyer and as oneself, I think of Edwin Cameron.