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Three stages of Cameron constitutionalism

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https://doi.org/10.29053/978-1-0672372-0-2_5

The simple thesis of this chapter is that Edwin Cameron's judicial career can be usefully divided into three stages. In the first stage, he played an important role, as a High Court judge and then on the Supreme Court of Appeal (SCA), in entrenching the new Constitution,[1] which at that stage still faced much resistance among his colleagues. In the second stage, once the Constitution's entrenchment was complete, Cameron became one of its most powerful and effective exponents, with his encompassing constitutional vision firmly in the ascendancy. In the third stage, that vision began to fracture. As the Constitutional Court changed around him, Cameron was pushed into a more uncomfortable role as a critic and dissenter. I will illustrate these three stages using a selection of Cameron's most intriguing and important judgments, and thereby tell the story, or *a* story, of his 25 remarkable years on the bench.

Other writers have divided the history of our Constitutional Court into stages.[2] The suggested stages are typically 'external', in the sense that they turn on the Court's changing relationship with other institutions, especially the ruling African National Congress (ANC). This chapter is different. For one thing, my interest is in Cameron's career, rather than the history of the Constitutional Court as such; and the overlap of the two is, of course, only partial. Second, my account is primarily 'internal', in the sense that I will focus on Cameron's changing role in relation to his judicial colleagues. Hence my discussion will, in two senses, be noticeably more personal.

1 Initially, this was the Interim Constitution – that is, the Constitution of the Republic of South Africa Act 200 of 1993 – but most of the chapter is about the 'final' Constitution of the Republic of South Africa, 1996.

2 See eg S Issacharoff 'The democratic risk to democratic transitions' (2013) 5 *Constitutional Court Review* 1; R Dixon & T Roux 'Marking constitutional transitions: The law and politics of constitutional implementation in South Africa' in T Ginsburg & A Huq (eds) *From parchment to practice: Implementing new constitutions* (2020).

1 Stage one: Entrenchment

In what I call the first stage of Cameron's career, he inculcated constitutionalism in courts not well known for it. From 1995 to 2000, as a High Court judge, he played an outsized role in early skirmishes about the Constitution's impact, especially on the contested issue of its horizontal application. Then, from 2000, as a Young Turk at the Supreme Court of Appeal, he dragged his more senior colleagues kicking and screaming into the era of constitutional supremacy.

1.1 Witwatersrand Local Division

In mid-1995, Cameron took up his position on the bench of the Witwatersrand Local Division (now the South Gauteng High Court, Johannesburg). When he sat on his first case, the Interim Constitution ('IC') had been in place for over a year, but its force and effect remained controversial. This was particularly so in relation to the 'horizontal application' of the Bill of Rights, in other words its application to private parties. This had been a matter of fevered contestation among its drafters, and the text of the operational provisions left it unsettled.[3] Section 35(3) provided gnomically that, in applying and developing the common law, 'a court shall have due regard to the spirit, purport and objects' of the Bill of Rights.[4] This provided a crucial frontier along which the reach of the new Constitution would be tested.

The flashpoint was the law of defamation, which had proved stubbornly resistant to improvement in the run-up to the transition. In 1982, the Appellate Division had decided, contrary to the general rule applicable in defamation claims,[5] that media defendants were to be held liable strictly, i.e. regardless of fault.[6] Even an honest and reasonable belief that its statement was true, for example, would not prevent a newspaper's being liable for publishing it. The Appellate Division's decision may have been defensible when it was made, given

3 R Spitz & M Chaskalson *The politics of transition: A hidden history of South Africa's negotiated settlement* (2000) 268 ff.

4 An adjusted version of this provision was later enacted, of course, as s 39(2) of the Constitution of the Republic of South Africa, 1996.

5 *Maisel v Van Naeren* 1960 (4) SA 836 (C); JM Burchell *The law of defamation in South Africa* (1985) ch 13.

6 *Pakendorf v De Flamingh* 1982 (3) SA 146 (A).

the power of media defendants to destroy reputations,[7] but it came to have a devastating effect upon press freedom.[8] This point was made several times to the court in the late 1980s and early 1990s, but in each case it left the law as it stood. In a well-known trilogy of cases – *Dhlomo NO v Natal Newspapers*,[9] *Argus Printing v Inkatha Freedom Party*,[10] and *Argus Printing v Esselen's Estate*[11] – it refused to limit the *locus standi* of powerful plaintiffs who had sought to use the law of defamation to stifle their critics. The most arresting illustration of the law's chilling effect, however, was *Neethling v Du Preez*.[12] A brave anti-apartheid newspaper, *Vrye Weekblad*, edited by Max du Preez, had reported allegations by Dirk Coetzee, a former South African Police officer turned whistle-blower, about the government death squads being trained at Vlakplaas. The strict liability standard, coupled with a short list of defences, meant that the newspaper, if it were to escape liability, had to prove on a balance of probabilities that its report was true. Inevitably, it could not do this: though we now know, largely thanks to the Truth and Reconciliation Commission hearings, that Coetzee's allegations were substantially true, they were scandalous at the time he made them. And how could a small newspaper possibly prove those claims in court, which related to top-secret operations that the government had every interest in suppressing? Whereas the High Court judge, Johann Kriegler, had developed a new common-law defence that would have relieved Du Preez and his newspaper of liability,[13] the unanimous Appellate Division, per Hoexter JA, found the law of defamation as it stood to be unimpeachable. The court refused either to relieve the defendant of its full onus of proving the statement's truth or to develop a new defence that did not turn on the statement's veracity. Indeed, the court moved to squelch the defences

7 This, at any rate, was the view expressed in *Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977 (3) SA 394 (A) 407F, approving the views of JC van der Walt in 'Die aanspreeklikheid van die pers op grond van laster' in JA Coetzee (ed) *Gedenkbundel HL Swanepoel* (1976). See also JC van der Walt 'Strict liability in the South African law of delict' (1968) 1 *Comparative and International Law Journal of Southern Africa* 49 at 79-80.

8 Some writers anticipated this, such as Burchell (n 5) 189 ff.

9 1989 (1) SA 945 (A).

10 1992 3 SA 579 (A).

11 1994 (2) SA 1 (A).

12 *Neethling v Du Preez; Neethling v Weekly Mail* 1994 (1) SA 708 (A).

13 1991-01-17 case 24659/89 (W).

then nascently emerging. It rejected the approach of *Zillie v Johnson*,[14] for example, in which Coetzee J had distilled a general underlying question for determining the unlawfulness of a defamatory statement, namely whether 'as a matter of policy an action should lie',[15] and had used it to help press defendants to escape liability where the article they had published, though defamatory and perhaps false, was plainly in the public interest.[16] The inevitable upshot was that Du Preez and his newspaper were held liable by the Appellate Division for what they had written. And the damages award, totalling R90 000, and perhaps more importantly its obligation to pay legal costs, bankrupted the paper and put it out of business.

The saga of *Neethling* was therefore clamant. A brave newspaper had exposed some of the worst crimes of the apartheid government, and the consequence, inflicted upon it by our law of defamation, was a liability that destroyed it. And this was not in the chill depths of apartheid but in December 1993, when the transition was well underway and the Interim Constitution had been drafted.[17] The liability rules upheld in *Neethling* were therefore subject to immediate disputation in several defamation claims brought in the first years of official post-apartheid. And the facts of *Neethling* became part of a pattern: the truths of the apartheid years were now being ventilated – indeed the whole national story was in the process of being upended and rewritten – with a swirl of allegations and counter-allegations determining who would fall where in the new order. Defamation law was to provide a crucial arbiter. High Court judges were thrust into deciding a slew of high-profile claims,[18] often involving statements about who had done what in apartheid's dying years.

The case that fell to Cameron J, in the first year of his appointment, was *Holomisa v Argus Newspapers*, which turned on an article published

14 1984 (2) SA 186 (W).
15 *Zillie* (n 14) 195B-G. Coetzee J favoured a 'general criterion of reasonableness' of the kind made famous in the wrongfulness element of Aquilian liability.
16 *Zillie* (n 14) 196A-197A.
17 The draft was complete in November 1993, but enacted later and assented to in January 1994.
18 For example, *Mandela v Falati* 1995 (1) SA 251 (W); *Jurgens v Editor, Sunday Times* 1995 (2) SA 52 (W); *Gardener v Whitaker* 1995 (2) SA 672 (E); *De Klerk v Du Plessis* 1995 (2) SA 40 (T); *Bogoshi v National Media Ltd* 1996 (3) SA 78 (W); *McNally v M&G Media (Pty) Ltd* 1997 (4) SA 267 (W); *Buthelezi v South African Broadcasting Corporation* 1997 (12) BCLR 1733 (D).

in *The Star* in May 1993.[19] It reported that Bantu Holomisa – a brigadier who had staged a coup in the Transkei, led its military government for six-and-a-half years, and then been appointed to Mandela's first Cabinet – had been 'directly involved' in the infiltration into South Africa of an Azanian People's Liberation Army hit squad whose purpose was 'killing whites' in northern Natal, and also in 'a plan to assassinate a top South African official in the Transkei'. Holomisa was not pleased. He sued the owner of *The Star* for defamation. The defendant excepted to Holomisa's claim, arguing that, in light of the Interim Constitution's guarantee of freedom of expression in section 15,[20] his pleadings were fatally defective, since they had failed to allege that the defendant had published the article knowing or suspecting it to be false. In effect, the defendant was urging that, in our 'constitutionalised' law of defamation, press defendants who had defamed public officials would no longer be held liable strictly. To adjudicate the exception, Cameron J had to determine whether section 15 of the Interim Constitution was applicable to the case at all, and, if it was, whether the rules of defamation law could and should be changed from those applied in *Neethling*.

The first issue was pressing because the case involved only private parties.[21] So: did the Interim Constitution apply horizontally? Cameron J's answer was eye-catching but measured. On the one hand, the Interim Constitution made 'incontestably plain', he wrote, that the rights in it did not bind the parties before him *eo ipso*.[22] It was not the case, in other words, that private parties came under a duty correlative to the right in section 15 just in virtue of the IC's enactment. Cameron J thus disagreed with the Bill of Rights' most radical proponents. And yet to deny that the IC had any horizontal application was, he thought, 'misconceived'.[23] 'The conclusion is unavoidable', he wrote, 'that the chapter was intended to apply *in some manner* to all disputes between litigating parties.'[24]

19 *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W).
20 See especially s 15(1), which reads: 'Every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research.'
21 *The Star* faintly argued that Mr Holomisa was suing *qua* state official, but this was swiftly rejected: that he had become a Deputy Minister after the publication of the article was coincidental.
22 *Holomisa* (n 19) 596G.
23 *Holomisa* (n 19) 598A.
24 *Holomisa* (n 19) 597E (emphasis in original).

How could it be otherwise, he suggested, given that the Constitution is supreme, the 'basic norm of legal authority' in a new order, and whose 'structure and … values necessarily inform every aspect of legal reasoning and decision-making'?[25] This 'revolution [that] the Constitution has wrought in our legal fabric', as he described it,[26] was to be channelled, in the case before him, through section 35(3).[27] This provision was, Cameron J explained, far-reaching: it is 'a force that informs all legal institutions and decisions with the new power of constitutional values'.[28]

For *The Star*, the upshot was that it could invoke IC's section 15 even in its dispute against another private party.[29] On the grander issue of principle: a compromise. The IC's rights '[did] not apply directly between private citizens',[30] but its power would nevertheless be asserted in the private sphere by a muscular reading of section 35(3). This was the *via media* Cameron J had defended in his interview before the Judicial Service Commission.[31] It was also one he had foreshadowed, six months before hearing *Holomisa*, in another defamation judgment, *O v O*.[32] Though the parties there had placed no reliance upon the Constitution, Cameron J had said he was bound to consider it in virtue of section 35(3), and had used it to justify his conclusion favouring free speech.[33] Finally, it was a compromise greatly assisted by his friend Johan Froneman, also then a High Court judge (he in Grahamstown). Froneman, too, had been confronted by a defamation case involving political speech, *Gardener v*

25 *Holomisa* (n 19) 597G-598A.
26 *Holomisa* (n 19) 598A.
27 See above n 4.
28 *Holomisa* (n 19) 598C.
29 To reach this conclusion, Cameron J had also had to apply *Jurgens* (n 18) and *S v Mhlungu* 1995 (3) SA 867 (CC) on the retrospective effect of the Bill of Rights: see *Holomisa* (n 19) 598.
30 *Holomisa* (n 19) 597C-D.
31 Judicial Service Commission 'Interview with Edwin Cameron' (3 October 1994): 'I think that the distinction between Clause 4(1) and Clause 7(1) clearly indicates that prima facie the Bill of Rights is not intended to be applicable to private relationships. However, the interpretive provisions and especially the provision at the end of Section 35(3) which says that the spirit purport and objects of the Constitution must be taken into account in all court proceedings, whatever the issue is, I think that, that will indicate a very significant influence will have to be exercised.'
32 1995 (4) SA 482 (W).
33 *O v O* (n 32) 490. His constitutionally infused application of the common law came to the same result in the case, he said, as applying the rights directly.

Whitaker,[34] and had defended, in detail, the same position on the Bill of Rights' horizontal effect.[35]

The main question of substance was whether and how our law of defamation should be developed. Here Cameron J was assisted not only by Froneman J, who had had to decide much the same issue in *Gardener*, but by a second old friend, Adv Gilbert Marcus, who represented *The Star* and had become a defamation law expert.[36] The point *Neethling* made vivid was that even speech judged untrue sometimes needs protection, since the defendant does not know *ex ante* that it will turn out to be false, or cannot prove in court that it is true. How, then, should our law deal with this problem? Framing the question through a masterful exposition of the South African case law, Cameron J held that – despite 'a burst of Roman-Dutch "purism"'[37] seeking to instate the defendant's subjective state of mind, specifically *animus iniuriandi*, as liability's watchword – the analysis nowadays rightly turns on the more transparent and sensible criterion of unlawfulness. The question is how the boundaries of that criterion ought to be shaped in light of the importance of press freedom and political debate. That, inevitably, raised the chilly climate that had taken hold in the Appellate Division of the early 1990s. Cameron J turned to the trilogy of *locus standi* cases,[38] and of course to the 'pivotal'[39] ruling in *Neethling*.[40] These he described, his moral indignation rising, as 'a cumulative repudiation of the notion that the action for defamation, as derived from our common law, should be circumscribed either in the interests of media freedom or in order to cultivate free political debate.'[41] But how to legitimate his departure from *Neethling*, a unanimous appellate precedent of just three years earlier? 'In a system founded only on the common law and statute', Cameron J granted, 'the Appellate Division's findings would be judicially definitive'.[42] 'But the terrain of the law in

34 *Gardener v Whitaker* 1995 (2) SA 672 (E).
35 *Gardener* (n 34) 684-686.
36 Adv Marcus argued, in addition to *Holomisa* itself, *McNally*, *De Klerk*, *Jurgens*, and *Buthelezi* (see n 18 above), all for the defendants, and wrote 'Freedom of expression under the Constitution' (1994) 10 *South African Journal on Human Rights* 140.
37 *Holomisa* (n 19) 600A.
38 n 9-11.
39 *Holomisa* (n 19) 602A.
40 n 12.
41 *Holomisa* (n 19) 602C.
42 *Holomisa* (n 19) 603D.

South Africa', he continued, 'has profoundly changed. All South African Courts must now, as a first duty, take into account the provisions of the Constitution, particularly its fundamental rights provisions.'[43] Again, section 35(3) was key: it entailed, he said, 'that even the high authority of pre-Constitution judicial determinations [may] be superseded. ... [It] requires the fundamental reconsideration of any common-law rule that trenches on a fundamental rights guarantee.'[44] This cleared the way for Cameron J to break with the unanimous appellate authority of *Neethling*, as had Froneman J in *Gardener*, less than three years after it was decided – a striking demonstration of the new Constitution's power.

What remained was to show that constitutional rights indeed justified such a change. Cameron J began by anchoring the law of defamation in constitutional provisions. Freedom of speech, the right asserted by *The Star*, was of course expressly protected. The plaintiff's right to reputation, by contrast, is nowhere mentioned in the constitutional text, but Cameron J held that it ought to be read into the closely related right to dignity.[45] This means constitutional rights stand on both sides of the issue, and the constitutional scheme, Cameron J conceded, 'gives no ready answer to the question which right should prevail'.[46] But it does provide some clues. 'The value whose protection most closely illuminates the constitutional scheme to which we have committed ourselves', Cameron J said, has a special claim, above others.[47] The preeminent value, in this context, was freedom of expression, rather than the right to reputation. Cameron J's argument for this conclusion rested on two interrelated ideas.[48] The first is that freedom of expression is an indispensable precondition for true democracy, the achievement of which is not only demanded by certain specific rights commitments but characterises the entire constitutional endeavour. The second indicator of freedom of expression's special importance derives from its calculated violation by the apartheid state. It is one part of our 'authoritarian, insular and repressive' past from which the new constitutional compact requires

43 *Holomisa* (n 19) 603D.
44 *Holomisa* (n 19) 603F-G.
45 *Holomisa* (n 19) 606D-E. *Gardener* (n 34) 690G-H had again done the same.
46 *Holomisa* (n 19) 606D.
47 *Holomisa* (n 19) 607G-608A.
48 *Holomisa* (n 19) 608A-613B.

a 'decisive break'.[49] In these ways, freedom of expression acquired, for Cameron J, an elevated importance, and thus justified greater protection than under the old order, even though this might in some cases come at the expense of the right to reputation.[50] The way was therefore clear to hold that the defamation defences excluding unlawfulness had to be adjusted, notwithstanding *Neethling*.

But what should the new approach be? Froneman J in *Gardener* had favoured an open-ended general principle, of a kind indebted to *Zillie*.[51] Rather than relying upon the stereotyped defences, the question would simply be whether the statement is 'worthy of protection as an expression of free speech'[52] – a question a court would answer 'by balancing the competing interests'.[53] The objection to this approach was that it cast upon the courts a very wide discretion, thus undermining the clear rules that had crystallised into the stereotyped defences, and would do so unnecessarily, since no such far-reaching change was needed to address the problem raised by cases like *Neethling* and *Holomisa*. Perhaps for these reasons, Cameron J was not attracted by it. Moreover, he had the benefit, as Froneman J in deciding *Gardener* had not, of a propitious international climate: in the intervening 14 months, both the High Court of Australia[54] and Supreme Court of Canada[55] had recognised a new defence to protect press defendants for exactly the sorts of reasons that were left out of account by *Neethling* (whose claim that South African law was in step with other jurisdictions[56] was wrong, or had quickly become so). Relying on the Australian judgment, which Cameron J preferred to both the Canadian example and the famously permissive regime established in the United States of America by

49 *S v Makwanyane* [1995] ZACC 3 para 261.
50 For more in-depth discussion of these themes, see M Mbikiwa & L Minné 'Edwin Cameron and the protection of political speech', this volume, ch 13.
51 He did not cite *Zillie* (n 14), however, perhaps for tactical reasons: it would have been unnecessarily provocative to rely upon the very decision that *Neethling* had overruled.
52 *Gardener* (n 34) 691G, 693E-F.
53 *Gardener* (n 34) 691C. This enquiry would occur, Froneman J said, 'in much the same way as unlawfulness is established in a delictual [specifically, Aquilian] action according to the standard of the *boni mores*'.
54 *Theophanous v Herald & Weekly Times Ltd* (1994) 124 ALR 1 (HC).
55 *Hill v Church of Scientology of Toronto* 1995 2 SCR 1130. Shortly after *Holomisa*, a similar defence was affirmed in England and Wales: *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.
56 *Neethling* (n 12) 776F-G.

New York Times v Sullivan,[57] he developed a new defence tighter than Froneman J's, and whose particular parameters he spent some time explaining. The defence would apply only to statements 'in the sphere of political activity',[58] rather than private matters; the borderline between the two would need to be staked out in future cases, but the distinction was both workable, Cameron J argued, and normatively appropriate. And the defence's litmus test was whether the defendant had published the statement reasonably in the circumstances,[59] for example by checking its accuracy before publishing it or otherwise having a justified belief it was true. This reasonableness standard was appropriately fact-sensitive, and had antecedents in our law of defamation's history.[60] Of course, as Cameron J made clear, this defence might protect even untrue statements – this was its pointed difference from *Neethling*. But it would do so only if there had been, *ex ante*, 'due inquiry and the application of reasonable care' on the part of the defendant.[61] In the result, Cameron J upheld the exception, requiring this new defence to be properly averred and tested.

Cameron J's judgment was delivered on Valentine's Day 1996. Its timing was calculated to have an impact (and perhaps incidentally to allow him to take the following day off: it was his 43rd birthday). First, the appeal in *Du Plessis v De Klerk* was pending before the Constitutional Court, as Cameron J well knew.[62] The High Court judge in that matter, Kees van Dijkhorst – the judiciary's most clever articulator of a liberal-conservative legalism, with whom Cameron had locked horns in the past, but nevertheless respected[63] – had taken a narrow view of the Bill of Rights' horizontal application.[64] Rather than leaving it to

57 *New York Times v Sullivan* 376 US 254 (1964). The well-known perils of this defence had recently been discussed by Sydney Kentridge in his 1995 FA Mann Lecture, later published as 'Freedom of speech: Is it the primary right?' (1996) 45 *International and Comparative Law Quarterly* 253.

58 *Holomisa* (n 19) 619C.

59 *Holomisa* (n 19) 617B.

60 *Holomisa* (n 19) 617D-618B.

61 *Holomisa* (n 19) 617C.

62 He notes it in *Holomisa* (n 19) 597D. Stu Woolman suggests that Cameron J knowingly sought to pre-empt the Constitutional Court judgment in *Du Plessis*: see his 'Defamation, application, and the Interim Constitution: An unqualified and direct analysis of *Holomisa v Argus Newspaper Ltd*' (1996) 113 *South African Law Journal* 428 at 430.

63 Constitutional Court Oral History Project 'Interview with Edwin Cameron' (9 December 2011) 28.

64 *Du Plessis v De Klerk* 1995 (2) SA 40 (T).

the Constitutional Court to reconsider Van Dijkhorst J's judgment, Cameron J seized the chance to shape the debate. Second, his Judge President, Frikkie Eloff, had decided *Bogoshi v National Media Ltd* just one week before.[65] In it, Eloff JP reached the defensive conclusion that, despite the binding force of the new Bill of Rights, our law of defamation had no need for alteration under its auspices. Cameron J's judgment in *Holomisa*, which of course reached the opposite conclusion,[66] came in time to fortify the defendant's decision to appeal.

In the end, Cameron J's intervention proved successful on both counts. In *Du Plessis v De Klerk*, the majority of the Constitutional Court reached the same conclusion as had Cameron J on the horizontal application of the Interim Constitution, with Kentridge AJ rejecting Van Dijkhorst J's narrow view, and approving *Holomisa*.[67] Moreover, the defendant in *Bogoshi* did appeal, and prevailed before the SCA, which unanimously created a now-famous defence of reasonable publication much like Cameron J's own.[68]

This result was, however, far from inevitable. Though Cameron J's judgment was welcomed by those we would now recognise as the 'usual suspects' – Dennis Davis,[69] Stu Woolman,[70] Johan van der Walt[71] – theirs was not the establishment view. Not only had Cameron J's Judge President taken the opposite view in *Bogoshi*, but his colleague, Du Plessis J, would later hold that Cameron J's judgment in *Holomisa* was 'clearly wrong', since it had defied the binding authority of *Neethling*.[72]

65 *Bogoshi v National Media Ltd* 1996 (3) SA 78 (W).
66 *Holomisa* (n 19) has a brief coda at 620C-D acknowledging that it 'conflicts' with *Bogoshi*.
67 *Du Plessis v De Klerk* [1996] ZACC 10.
68 *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA). As explained elsewhere in this volume, the respect in which *Bogoshi*'s approach differed from Cameron J's was a weakness, and the SCA ought to have hewed more closely to *Holomisa*: see Mbikiwa & Minné (n 50) 464-476.
69 D Davis 'Cases and comments' (1996) 12 *South African Journal on Human Rights* 328.
70 Woolman (n 62).
71 JWG van der Walt 'Freedom of expression and defamation: A reflection on recent developments' [1998] *Journal of South African Law* 198. For Alfred Cockrell, too, *Holomisa* was 'the most rigorous exposition so far of what the Constitution means for private law disputes': see his comments quoted in 'In the year of the Constitution, SA begins moulding a *Rechtstaat*' *Mail & Guardian* (24 December 1996).
72 *McNally* (n 18) 276F. Du Plessis J agreed with *Holomisa* on other points, however. See too *Potgieter v Kilian* 1996 (2) SA 276 (N), in which a two-judge bench in

Moreover, the premise on which Cameron J's judgment rests – that even untrue statements sometimes need protection – was one persistently rejected by our most senior delict academics, Johann Neethling and Johan Potgieter.[73] And Derek van der Merwe had condemned both *Holomisa* and *Gardener* as exemplars of a then emerging 'judicial style' in the adjudication of private-law disputes that was 'harmful to the integrity of the common law and therefore ... to the integrity of the legal system as a whole'.[74] Nevertheless, Cameron J's reasonable publication defence did prevail in *Bogoshi*, before a unanimous SCA. That the bench included Hoexter JA, who just five years before had decided *Neethling*, and that the judgment was penned by Hefer JA, reputed as a reliable pro-government vote during the 1980s, but who now proclaimed press freedom, was a sign of how much in the country had changed.

The weak point in the *Holomisa* judgment, in common with *Gardener*, was that it adds a new defence to protect press defendants *and* places the onus in respect of it, unconventionally, on the plaintiff. Although Cameron J explained well why either of those changes would be desirable, he did not explain why one needs them both, and with hindsight this seems an unnecessary overcorrection of the mistakes of *Neethling*.[75] The reasonable publication defence, after all, does not require the defendant to prove the truth of the statement: the focus of the defence rightly lies elsewhere, on the actions the defendant has taken to verify it. So the basis of the critique of *Neethling*, which turns on the difficulty of proving a statement's factual veracity, falls away. Moreover, placing the onus on the plaintiff to disprove the defence is contrary to principle,[76] and difficult to justify given that the facts upon which it rests

Natal had agreed with Van Dijkhorst J and criticised *Gardener* as wrong. Thirion J in *Buthelezi* (n 18) was broadly sympathetic to Cameron J's reformist outlook but cast doubt on his proposed solution.

73 J Neethling, JM Potgieter & PJ Visser *Law of delict* 2 ed (1994) 351-352; J Neethling & J Potgieter 'Regsonsekerheid in die lasterreg in die lig van die Grondwet – Die pad vorentoe?' (1996) 60 *Journal of Contemporary Roman-Dutch Law* 706.

74 D van der Merwe 'Constitutional colonisation of the common law: A problem of institutional integrity' [2000] *Journal of South African Law* 12 at 14. *Gardener* received an additional rebuke from PJ Visser 'A successful constitutional invasion of private law' (1995) 58 *Journal of Contemporary Roman-Dutch Law* 745.

75 Compare J Burchell 'Media freedom of expression scores as strict liability receives the red card' (1999) 116 *South African Law Journal* 1 at 8-10; Mbikiwa & Minné (n 50) 465.

76 *Mabaso v Felix* 1981 (3) SA 865 (A) 872-873.

are within the knowledge of the defendant. Hence it was predictable that Hefer JA in *Bogoshi* did not endorse this aspect of Cameron J's judgment: he recognised the reasonable publication defence, but left the onus on the defendant to establish it.[77] Adv Marcus would later try to win back from the Constitutional Court what *Bogoshi* had taken away, arguing for a change of onus in the now famous case of *Khumalo v Holomisa* (Bantu Holomisa was the plaintiff again, suing another newspaper that had reported on his colourful past).[78] But the Court held, per O'Regan J, that the introduction of the reasonable publication defence had satisfactorily cured our law of defamation's constitutional deficit, and so the onus of proving it could stay where it was.[79]

1.2 The Supreme Court of Appeal

In July 1999, Cameron began a one-year acting stint on the Constitutional Court, before taking up a position at the Supreme Court of Appeal at the end of 2000. The SCA was rather different from the Constitutional Court, of course, and firmly of the old school. Its bench, upon Cameron's appointment to it at the start of the twenty-first century,[80] had only ever had a single judge of colour, the recently deceased Ismail Mohamed, and a single woman judge, Leonora van den Heever. When Cameron arrived, the court's most senior judges were white men, mostly Afrikaans, such as Hennie van Heerden, Joos Hefer, FH Grosskopf, Pierre Nienaber, and Louis Harms.[81] The SCA represented, as against the newly created Constitutional Court, institutional continuity with the apartheid era. It had been the country's highest court for 94 years, but now had a diminished status beside the new Court in Braamfontein. One of its most high-profile contributions to post-apartheid law had been its rejection of the authority of the new Constitution, and thus of the Constitutional

77 *Bogoshi* (n 68) 1215. It had already been rejected by Thirion J in *Buthelezi* (n 18) 1740.
78 *Khumalo v Holomisa* [2002] ZACC 12.
79 *Khumalo* (n 78) paras 42-45. Elsewhere, the Court substantially confirmed Cameron J's approach in *Holomisa*, which it praised (at para 17 fn 13) for its 'full and illuminating discussion' (though O'Regan J relied, as is well known, upon section 8 of the Constitution, rather than section 39(2), to integrate the Bill of Rights and the law of defamation).
80 Cameron was appointed along with Lex Mpati, Mohamed Navsa, and Ian Farlam.
81 Craig Howie was the exceptional Englishman.

Court, within its own common-law sphere.[82] Even as Hefer JA had given his pro-free speech decision in *Bogoshi*, he based his decision, revealingly, not on the new Constitution, but on the ordinary logic of the common law.[83]

Cameron JA soon became, by his own account, one of the SCA's 'hothead outliers,'[84] along with Mohamed Navsa and Robert Nugent, who had been his colleague in Johannesburg. They were frowned upon by the 'old fuddy-duddies',[85] whom Cameron respected but saw value in counterweighing, and perhaps provoking. His best-known judgments in the early 2000s provided valuable opportunities to do so. *Holomisa* had already shown where he had something distinctive to offer: in private-law disputes, thought by some to be beyond the Constitution's purview. Into these contested borderland areas, Cameron sought to assert its power.

In *Olitzki Property Holdings v State Tender Board*,[86] Cameron JA's first judgment of significance, decided in March 2001, he had to consider whether the defendant tender board, having negligently awarded a tender to the wrong party, should be delictually liable to restore lost profits to the tenderer who ought to have won. Cameron JA held, influentially, that the wrongfulness element in delict must now be guided by 'the norms, values and principles contained in the Constitution'.[87] In *Olitzki* itself, where the defendant was a bungling organ of state, the crucial value was governmental accountability:

> The principle of public accountability is central to our new constitutional culture, and there can be no doubt that the accord of civil remedies securing its

82 See especially *Commissioner for Customs and Excise v Container Logistics (Pty) Ltd* [1999] ZASCA 35, in which Hefer JA asserted the separate existence of the non-constitutional common law. Note, however, that the institutional posturing was attributed by Cameron to Ismail Mohamed rather than the SCA establishment: Constitutional Court Oral History Project (n 63) 19-20.

83 *Bogoshi* (n 68) 1216: 'In the present case I have not sought to revise the common law conformably to the values of the Interim Constitution; I have done no more than to hold that this Court stated a common law principle wrongly in *Pakendorf*.' See further J van der Walt 'Progressive indirect horizontal application of the Bill of Rights: Towards a co-operative relation between common-law and constitutional jurisprudence' (2001) 17 *South African Journal on Human Rights* 341 at 357-358.

84 Constitutional Court Oral History Project (n 63) 19.

85 Constitutional Court Oral History Project (n 63) 19.

86 [2001] ZASCA 51.

87 *Olitzki* (n 86) para 11

> observance will often play a central part in realising our constitutional vision of open, uncorrupt and responsive government.[88]

For this 'principle of accountability', Cameron JA was indebted to his friend Judge Dennis Davis, who had decided the similar case of *Faircape*,[89] and ultimately to their admired contemporary Etienne Mureinik.[90] It was given much greater prominence the next year by Nugent JA in *Minister of Safety and Security v Van Duivenboden*,[91] the pivotal constitutional-era judgment determining whether the conduct of state defendants is delictually wrongful, and thence by Kate O'Regan's judgment for a unanimous Constitutional Court in *Rail Commuters Action Group*.[92]

In *Brisley v Drotsky*,[93] decided exactly one year after *Olitzki*, Cameron JA turned from delict to contract. *Brisley* involved the fraught question of whether a non-variation clause, in this case embedded in a lease agreement over residential property, is contrary to public policy. An Appellate Division precedent from 1964, the famous *Shifren* case, said it was not,[94] but the SCA was asked by the plaintiff tenant to revisit it. She was seeking to resist her eviction for the non-payment of rent, and the clause would, unless declared invalid, bar many of her defences, which were based upon the parties' alleged informal variation of the tenancy's terms. The main judgment was jointly penned by Louis Harms, Piet Streicher, and Fritz Brand (the last of whom had been appointed to the appellate bench a few months earlier, and was destined to become 'the outstanding but traditionally orientated private law judge of the modern era').[95] Its analysis follows a simple structure: the rules of the

88 *Olitzki* (n 86) para 31.

89 *Faircape Property Developers (Pty) Ltd v Premier, Western Cape* 2000 (2) SA 54 (C), cited in *Olitzki* (n 86) para 31.

90 Davis J in turn relied upon the idea of a culture of justification developed in E Mureinik 'A bridge to where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31. For further discussion see N Ally 'Making accountability work', this volume at 227-230.

91 *Minister of Safety and Security v Van Duivenboden* [2002] ZASCA 79 especially at para 21. Carole Lewis's judgment in *Premier of the Western Cape v Fair Cape Property Developers (Pty) Ltd* [2003] ZASCA 42 was also important, since it affirmed the way *Olitzki* had deployed the principle of accountability in the law of delict, and overruled Davis J's more radical use of it.

92 *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20 paras 77-79.

93 [2002] ZASCA 35.

94 *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 (4) SA 760 (A).

95 D Davis 'Quo vadis the Constitutional Court's jurisprudence in private law?', this volume at page 491 fn 41.

existing common law are set out, and then defended against each and every argument for their development made by the tenant, with whom the court showed obvious impatience. In the background lay the fact that Pierre Olivier, another senior member of the SCA, had in a series of prior judgments been calling for the rules of contract law to be softened in various ways to allow the courts to ensure contractual fairness.[96] Both scholars and judges had anticipated that these demands for development would be given new heft by the Bill of Rights.[97] Against this, the main judgment in *Brisley* is a calculated counteroffensive. *Shifren* embodied a considered policy choice, the majority explained, and even if reasonable persons might disagree about that choice now, it was not appropriate to upset it.[98] Moreover, Olivier JA's judgments in previous cases, seeking to give 'fairness' and 'good faith' a more prominent role, were at odds with our law's traditional approach, and indeed profoundly at odds with crucial precepts such as commercial certainty and the rule of law.[99] Moreover, the plaintiff's attempt to invoke the Bill of Rights was unavailing. 'A court cannot seek refuge in the shadows of the Constitution', the main judgment explains, 'to attack and overthrow principles from there.'[100] In sum, therefore, the longstanding common law had in no way been impeached, and it should therefore take its ordinary course and compel the tenant's eviction.

Cameron JA agreed with the main judgment's outcome, and upheld the non-variation clause. Yet he chose to write separately from his colleagues, and in doing so broke fundamentally from their approach. Offering a patent riposte to his colleagues' defence of the common law, this is how Cameron JA's own judgment begins:

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

96 See especially *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* [1997] ZASCA 62. Olivier JA wrote separately in *Brisley* itself, advancing the same view.

97 See eg, *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C) (Davis J); A van Aswegen 'The implications of a Bill of Rights for the law of contract and delict' (1995) 11 *South African Journal on Human Rights* 50 at 67-68 and authorities cited there.

98 *Brisley* (n 93) para 8.

99 *Brisley* (n 93) paras 16-25.

100 *Brisley* (n 93) para 24 (my translation). The original Afrikaans reads: ''n Hof kan nie skuiling soek in die skaduwee van die Grondwet om vandaar beginsels aan te val en omver te werp nie'.

> all law inconsistent with the Constitution is invalid. That includes the common law of contract, which is subject to the supreme law of the Constitution. ... These propositions, if they ever were controversial, are no longer so.[101]

These remarks are now deeply familiar to all South African lawyers – indeed they were so even in 2002 to a constitutionally oriented subset. *Brisley* outs Cameron JA unmistakably as their agent in Bloemfontein, determined to assert the then-recent message of *Pharmaceutical Manufacturers*[102] and *Carmichele*[103] against his SCA colleagues, whose judgment defends the *status quo* and depicts the Bill of Rights as a threat to it. True, one should not exaggerate: the main judgment in *Brisley* does consider that the constitutional protection from eviction in section 26(3) might bear upon the dispute.[104] But it does so at its end, coupled with patent scepticism, and concludes – surprise, surprise! – that the section does not bring about any change to the common law at all. In the main judgment's conventional common-law analysis, then, the Constitution is, at best, a final cross-check. Cameron JA's approach inverts this: the Constitution comes first, the common law second.

Accordingly, Cameron JA sets about rooting the principles of contract law in constitutional provisions. Though *Shifren* was a carefully reasoned judgment that had stood for almost 50 years, the Court was now obliged, in light of the Constitution, to reconsider it.[105] But *Shifren*'s choice should be left intact, Cameron JA concluded in the end, since 'constitutional considerations of equality do not detract from it'.[106] This was because non-variation clauses do not necessarily 'protect[ ] the strong at the expense of the weak';[107] often it may be the stronger party who seeks to exploit a claimed oral variation of the contract's terms, and the weaker party who stands to benefit if this tactic is ruled out. These and other constitutional considerations were housed under the rule that contracts contrary to public policy will not be enforced – 'a doctrine of very considerable antiquity',[108] which Cameron JA gave a

101 *Brisley* (n 93) paras 88-89.
102 *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* [2000] ZACC 1.
103 *Carmichele v Minister of Safety and Security* [2001] ZACC 22.
104 *Brisley* (n 93) paras 35-45.
105 *Brisley* (n 93) para 90.
106 *Brisley* (n 93) para 90.
107 *Brisley* (n 93) para 90.
108 *Brisley* (n 93) para 91.

constitutional updating to complement *Olitzki*'s parallel move in respect of wrongfulness in delict. Constitutional norms and values were now the key touchstone in the discernment of public policy; they would provide a standard less inscrutable than the *boni mores* or 'legal convictions of the community'[109] and more objective than the judge's individual sense of fairness.[110] These constitutional values do not require courts to upset contracts willy-nilly, Cameron JA cautioned, for reasons that have become famous. Especially widely quoted is his graphic remark that contractual autonomy, '[s]horn of its obscene excesses', informs the constitutional value of dignity.[111] Still better-known is his directive that 'the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint'.[112] This was immediately taken up by his colleagues in the SCA,[113] where it is still widely invoked;[114] and the Constitutional Court has christened it 'the 'perceptive restraint' principle'.[115] Cameron JA's separate judgment is only eight paragraphs, but its words are now much better-known than the majority's – and only partly because he, unlike his colleagues, wrote in English.

It is also because his words express an approach to constitutional adjudication that has become dominant. A justiciable Bill of Rights can be given different roles.[116] On one approach, the Bill provides only a 'framework'. It sets the limits, beyond which the common law may not go. If the common law threatens to exceed those bounds, a court must step in to correct it. But, as long as it is within the bounds of the Bill, the common law is unimpeachable on Bill-of-Rights grounds and may develop just as it did before. On another, more ambitious, approach, however, the Bill is 'foundational'. No rule of the common law can be

109 This was the test made famous in 1975 by *Minister of Police v Ewels* 1975 (3) SA 590 (A) 596H-597D, and which Davis J had sought to deploy in the context of contractual public policy in *Mort v Henry-Shields Chiat* (n 97) 474J-475F.

110 *Brisley* (n 93) para 93.

111 *Brisley* (n 93) para 94. Here, again, Cameron JA drew partly from Dennis Davis, citing *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C) 475B-F. Davis J's views received less favourable treatment by the majority: see *Brisley* (n 93) para 21.

112 *Brisley* (n 93) para 94.

113 *Afrox Healthcare Bpk v Strydom* [2002] ZASCA 73 para 22.

114 *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* [2017] ZASCA 176 para 24; *AB v Pridwin Preparatory School* [2018] ZASCA 150 para 27(v).

115 *Beadica 231 CC v Trustees, Oregon Trust* [2020] ZACC 13 paras 42, 90.

116 A Fagan 'Determining the stakes: Binding and non-binding bills of rights' in D Friedmann & D Barak-Erez (eds) *Human rights in private law* (2001) 94-96.

justified except by it. It is therefore always imperative, for the acceptability of any common-law rule, that it can be sourced in the Bill. *Brisley* stands at the fork in the road between these two conceptions. The SCA had, in previous cases, above all *Bogoshi*, unmistakably taken the view that the Bill of Rights was a mere framework.[117] The main judgment in *Brisley* does the same. But Cameron JA's does not. Just as he had done for the *actio iniuriarum* in *Holomisa*, and for the Aquilian action in *Olitzki*, he sought to root the rules of contract law in constitutional rights and values. It was not a question of checking, as an afterthought, that contract law's rules were constitutionally compliant: it was a question of showing, from first principles, that they were constitutionally justified. As he himself would put it 15 years later, 'virtually all issues – including the interpretation and application of legislation and the development and application of the common law – are, ultimately, constitutional. This affects how to approach them from the outset.'[118]

I think my theme here is clear: Cameron JA played an important role, in his early years at the SCA, in energetically integrating the Constitution and the private common law. I have suggested his judgments were often bold and eye-catching, and their contrast with entrenched attitudes at the SCA noticeable. They were rightly hailed as exemplars of the new, 'constitutionalised' approach to private-law adjudication.[119] And by pushing the power of the Constitution into new areas, which come to be subordinated to Bill-of-Rights analysis, we can now see these judgments as important way-markers in South Africa's adoption of what Mattias Kumm calls a 'total constitution',[120] which, rather than merely imposing

117 It was therefore still possible to argue, shortly before *Brisley* was decided, that this was the South African approach: see Fagan (n 116) 95.

118 *Jordaan v City of Tshwane Metropolitan Municipality* [2017] ZACC 31 para 8.

119 F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 65 fn 3. Du Bois's other example is Nugent JA's judgment in *Van Duivenboden*. See also *Minister of Education v Syfrets Trust Ltd NO* [2006] ZAWCHC 65 para 42, where Griesel J quotes Dennis Davis's remark in *Democracy and deliberation* (1999) 119 that *Holomisa* 'represents the finest precedent we have of the kind of jurisprudence that should be inspired by the new Constitution'.

120 M Kumm 'Who is afraid of the total constitution? Constitutional rights as principles and the constitutionalization of private law' (2006) 7 *German Law Journal* 341. Kumm is analysing the German *Grundgesetz*, whose influence on the South African approach to horizontal application is considerable.

certain constraining outer limits, 'contains the DNA for the development of the whole legal system'.[121]

But the developments in which Cameron JA participated were also, in important respects, moderate. For one thing, he was plucking low-hanging fruit. That constitutional values would find their private-law entrée through its two most famously open-ended, policy-laden tests – wrongfulness in delict and the public policy doctrine in contract – was widely expected, largely because that is how indirect horizontal application, for which Cameron had an avowed preference,[122] had occurred in Germany.[123] The break with *Neethling* was also anticipated.[124] All three of the constitutionally-inspired common-law developments in which Cameron was a protagonist, then, were carefully targeted. Rather than a root-and-branch overhaul of the existing common law, it was a question of applying strategic pressure to some of the weak points. Indeed, Cameron's basic preference for indirect application, which had been espoused most prominently in judgments by his mentor, the late Laurie Ackermann,[125] itself reflected a faith in careful judge-led incremental development, rather than a rupture with common-law traditions.

Cameron's judgments were moderate in a second respect, namely by comparison with those given in the same fields by his judicial allies. Cameron J in *Holomisa*, like Froneman J in *Gardener*, developed the law to undo the damage caused by *Neethling*. But he did so in a way that was noticeably more moderate. Froneman had sought to decentre the

121 Kumm (n 120) 344, quoting Ernst Forsthoff. Perhaps the leading South African attempt to set out a constitutional vision of this kind, with particular reference to private law, is AJ van der Walt *Property and constitution* (2012) ch 2.

122 See again text at n 31.

123 See eg Van Aswegen (n 97) 56, 65-66.

124 See again Van Aswegen (n 97) 61-62. Similar points were made in DP Visser 'The future of the law of delict' in A van Aswegen (ed) *Die toekoms van die Suid-Afrikaanse privaatreg* (1994) 39-40.

125 *Fose v Minister of Safety and Security* [1997] ZACC 6; *Carmichele* (n 103). It is also notable that John Dugard, one of Cameron's formative heroes, had, despite his fierce criticism of the apartheid judiciary, seen value in returning to and reviving the fundamental equitable principles of the South African common law: see especially J Dugard 'The judicial process, positivism and civil liberty' (1971) 88 *South African Law Journal* 181 at 195-200; *Human rights and the South African legal order* (1978) at 382-384. See too, to similar effect, E Mureinik 'Dworkin and apartheid' in H Corder (ed) *Essays on law and social practice* (1988). For extended reflections on Cameron's redemptive approach to the common law, see F Michelman 'Redemptive-transformative: Edwin Cameron and the point of the Bill of Rights', this volume, ch 16.

stereotyped defamation defences and replace them with a broad, flexible, and value-laden test that would free up judges to strike their preferred balance on the particular facts before them. Cameron's solution, by contrast, kept the existing stereotyped defences in their place of prominence, but simply added one more, whose precise parameters he defined carefully. This was a sufficient solution for the problem that *Neethling* had made vivid, and did not overhaul the general method by which the lawfulness of defamatory statements was to be adjudicated. In *Olitzki*, to take another example, Cameron JA endorsed the same 'principle of accountability' as had Davis J in *Faircape*. Yet whereas Davis J had used that norm to justify the imposition of liability – a sharp break from the approach then prevailing in South Africa and other common-law jurisdictions, which impose delictual liability for pure economic loss only with great caution – Cameron evidently believed this change would be too sweeping. He held instead that, although our law of delict would have to change to combat government misconduct, the case for liability on the facts before him was not compelling. In *Brisley*, finally, he offered a pointed response to the approach of his SCA colleagues by subordinating common-law rules to constitutional rights and values. Yet, despite this, Cameron JA did not disagree at all with the staid common-law rules that his colleagues had, by their differing approach, endorsed.

Many analyses may be offered of Justice Cameron's relative moderation. One is institutional: unlike Davis J, who was sitting as a lone High Court judge, Cameron was (at least in the case of *Olitzki* and *Brisley*) sitting on a multi-judge appellate court, whose cautious other members he had to bring along with him. Even in the earlier case of *Holomisa*, where Cameron J (like Froneman J in *Gardener*, was a High Court judge sitting alone) senior members of his division had taken decisions strongly opposing any kind of legal change; the attraction of a gradualist approach, rather than Froneman J's more sweeping one, would have been obvious. But Cameron's approach is surely rooted in more than just collegial politics. It also reflects his convictions about the values the law should embody. In *Brisley*, for example, Cameron JA was plainly committed to preserving the kernel of human moral agency that justifies respect for contractual freedom and which animates the liberal

tradition[126] – unlike Davis J, who lampoons contractual freedom and *pacta sunt servanda* as libertarian shibboleths,[127] and so, not surprisingly, regards Cameron's contract law judgments as 'overly cautious'.[128] Third, there is a real difference in Cameron's preferred legal and judicial method. His judgments show a relative inclination to see wisdom in certain deep-seated rules of the common law, such as the categorical distinction it draws between bodily harm and pure economic loss and the stereotyped defamation defences. And whereas Froneman J's solution in *Gardener*, namely the conferral of an open-ended judicial discretion, was plainly derived from an equitable strand of the Roman-Dutch tradition, Cameron – who had spent several years studying English law at Oxford, after all – was inspired by the relatively rule-governed approaches from Commonwealth jurisdictions.

Whatever the explanation, Cameron's judgments have, it seems to me, a specific merit, namely their facility with the methods of both the common law and the Constitution. His judgments are an integration of the two, properly speaking. They are astute in drawing from a range of sources, and skilful at combining them in a way that respects the value of each. A commitment to constitutionally motivated law reform is palpable throughout – this he shares with his judicial allies – but he goes further than them in his careful imbrication of those human-rights precepts with the fabric of the common law,[129] and mindful of the need to come out with workable doctrine. It therefore stands to reason that the solutions he adopted in *Holomisa*, *Olitzki*, and *Brisley* have proved lasting. His approach in these judgments also help us to understand why he is an exemplary judge of his era: he provides a bridge between the classicism of the established common law and the romanticism of Bill of Rights adjudication. And finally, in the depth and detail with which these judgments tackle new problems, respectful of their difficulty and averse to sweeping or silver-bullet solutions, I suggest they instantiate

126 Compare, in a different context, the remarks in *S v Manamela* [2000] ZACC 5 at para 100, where O'Regan J and Cameron AJ in their co-authored judgment note the importance of 'treat[ing] ourselves and others as responsible agents', quoting Tony Honoré – a third profoundly important mentor to Cameron.

127 See recently *Beadica 231 CC v Trustees, Oregon Unit Trust* [2017] ZAWCHC 134 para 44.

128 D Davis 'Private law after 1994: Progressive development or schizoid confusion?' (2008) 24 *South African Journal on Human Rights* 318 at 328.

129 But see the discussion at n 146 below for a possible counterexample.

Cameron's commitment to constitutionalism as a whole. As he put it himself in 1997:

> Our 'rights discourse' may tempt us to believe that we have achieved something concrete when what we have really attained is only a framework for creating something concrete. We have no grounds for being complacent.[130]

Proclaiming one's good intentions, in other words, is the easy part. The hard part is doing the work to make them stick.

2 Stage two: Ascendancy

In the first stage of Cameron's career, then, he helped to build a culture of constitutionalism amongst hesitant and at times hostile colleagues at the High Court and then the SCA. Stage two begins once that approach had won out, as it surely did. The divide between 'constitutional' and 'non-constitutional' issues has been formally obliterated, as a consequence of the encompassing vision of the Constitution that he helped to entrench,[131] and the sceptical approach of his more conservative colleagues is now of primarily historical interest. The foundation had thus been laid for further endeavours. In the second stage, I give examples of how Cameron consolidated and capitalised on the robust vision of constitutionalism that was now ascendant. It begins while he was still at the SCA, but comes to fruition at the Constitutional Court.

2.1 The Supreme Court of Appeal

To when should we date the transition from stage one to stage two? The sentimental choice is 30 November 2004, when Cameron JA gave a judgment with an unmistakable personal resonance. This was the day he decided *Fourie v Minister of Home Affairs*,[132] a constitutional challenge brought by a lesbian couple who wanted to be married. Over the preceding four years, much had changed in the SCA's composition: Cameron and Ian Farlam, both appointed to the SCA in 2000, were

130 E Cameron 'Rights, constitutionalism and the rule of law' (1997) 114 *South African Law Journal* 504 at 507.

131 See especially the Constitution Seventeenth Amendment Act 2013, discussed in H Corder & J Brickhill 'The Constitutional Court' in C Hoexter & M Olivier (eds) *The judiciary in South Africa* (2014) 374-377.

132 [2004] ZASCA 132.

now the two most senior judges who sat on the case; the other three judges were Kenneth Mthiyane, Belinda van Heerden, and Visvanathan Ponnan. The issue was whether the constitutional prohibition against discrimination on the basis of 'sexual orientation', which Cameron had been instrumental in securing,[133] required South African law to bestow the right to marry upon same-sex partners. The SCA held unanimously that it did. But there was a split over the remedy, which foreshadows the famously contentious one between Sachs J and O'Regan J in the Constitutional Court.[134] Farlam JA held that the court's declaration should be suspended, so that in the interim the legislature could choose the solution. But Cameron JA's judgment, which won majority support, held that it was inappropriate for the court to duck the issue in this way. Rooted, again, in an approach to common-law development that drew upon section 39(2),[135] Cameron JA held that the court should not hand the matter over to parliament, but was empowered and obliged to cure the unlawfulness itself, immediately, by revising the common-law concept of marriage. This was not, for Cameron JA, inappropriate judicial activism. 'Once the court concludes that the Bill of Rights requires that the common law be developed, it is not engaging in a legislative process', nor 'intrud[ing] on the legislative domain.'[136] To the contrary, the court is fulfilling the 'imperative role' that is 'deliberately assigned' to it by the Constitution's operational provisions.[137] At the same time, the task so imposed requires sustained hard work by the courts, as well as imagination:

> [T]he meaning of our constitutional promises and guarantees did not transpire instantaneously. Establishing their import involves a process of evolving insight

133 E Cameron 'Sexual orientation and the Constitution: A test case for human rights' (1993) 110 *South African Law Journal* 450.

134 *Minister of Home Affairs v Fourie* [2005] ZACC 19. The split is discussed in C Rickard 'At heart, ruling lacks courage' *Sunday Times* (4 December 2005); T Roux 'Principle and pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* 106 at 121-123; J Barnard-Naudé 'For Michelman, on the contrary: Republican constitutionalism, post-apartheid jurisgenesis and O'Regan J's dissent in *Minister of Home Affairs v Fourie*' (2013) 24 *Stellenbosch Law Review* 342; J Fowkes *Building the constitution: The practice of constitutional interpretation in post-apartheid South Africa* (2016) 168 ff.

135 See above n 4. Section 39(2) reads: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

136 *Fourie* (n 134) para 39.

137 *Fourie* (n 134) para 40.

> and application. Developing the common law involves a simultaneously creative and declaratory function in which the court puts the final touch on a process of incremental legal development that the Constitution has already ordained.[138]

This aptly encapsulates the demanding, difficult, but hopeful process of judge-led constitutional change that Cameron's early judgments exemplify.

A different choice of transitional date is 30 November 2005, exactly one year after *Fourie*, when Cameron JA gave the unanimous SCA decision in *Napier v Barkhuizen*,[139] another case that has become canonical because of the judgment later given by the Constitutional Court on appeal.[140] The subject-matter here resonates with the cases I discussed in stage one. It was a case about contractual fairness, in which Mr Barkhuizen argued that a time-bar clause in his consumer insurance contract was invalid. The portal for this argument was the public policy doctrine that had been deployed by Cameron JA in *Brisley*. He reaffirmed the cardinal principles of the judgment he gave there,[141] this time for a unanimous SCA, whose membership was now rather different.[142] He also took the opportunity to suggest his disapproval of Fritz Brand's judgment in *Afrox Healthcare bpk v Strydom*,[143] given shortly after *Brisley*, and which had shown a cloistered unwillingness to develop contract law even on facts much more clamant. *Napier v Barkhuizen* nicely bookends, then, a process of contract law's constitutionalisation that Cameron JA had begun four-and-a-half years prior; and the Constitutional Court, in its famous judgment on appeal, sanctified this public policy-focused approach to the control of contractual content.[144]

A similarly attractive culmination occurred in the law of delict in September 2006. If the common law's traditional reluctance to impose liability for pure economic loss offered the thesis, and Cameron JA's norm of accountability in *Olitzki* the antithesis, then the Hegelian synthesis was

138 *Fourie* (n 134) para 23.
139 [2005] ZASCA 119.
140 *Barkhuizen v Napier* [2007] ZACC 5.
141 *Napier* (n 139) paras 6-7.
142 Mpati DP, (Belinda) van Heerden JA, Mlambo JA, and Cachalia AJA concurred in Cameron JA's judgment.
143 *Afrox* (n 113), discussed in *Napier* (n 139) para 8, fn 4.
144 As is well-known, however, both the SCA and a majority of the Constitutional Court felt that the complainant's threadbare statement of case made it impossible to intervene.

brokered by Cameron and Fritz Brand in their co-authored judgment in *Minister of Finance v Gore NO*.[145] It held that delictual liability will be imposed where a governmental official has caused pure economic loss to the plaintiff by his administrative decision, provided that fraud on the part of the official can be proved. This is an important development of the law, triggered by the specific constitutional commitment towards accountable government – but one that was, again, incremental rather than revolutionary, and disciplined by a workable doctrinal limitation: the need to prove fraud. It, too, like Cameron's other innovations discussed so far, has become a firm fixture.[146]

2.2 The Constitutional Court

When Cameron joined the Constitutional Court, effective 1 January 2009, his diet of cases naturally changed. At the Supreme Court of

145 [2006] ZASCA 98.

146 See eg *South African Post Office v De Lacy* [2009] ZASCA 45 paras 3-5, 13-14; *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* [2014] ZACC 28 paras 46-47. Admittedly, Cameron JA's later judgment in *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* [2007] ZASCA 70 cuts against some of the trends I have been discussing, and received much academic criticism for its failure to integrate the Bill of Rights and the common law of property. Faced with a large group of applicants whose informal dwellings had been unlawfully destroyed by the City, Cameron JA chose not to develop the common-law *mandament van spolie* so as to permit an order for the reconstruction of their dwellings, but achieved this result, instead, by creating a new remedy that was 'special to the Constitution' (para 27). Though the constitutional scheme 'requires the courts to synchronise [the common law] with the Bill of Rights', Cameron JA said, citing *Fourie* (n 134), to develop the *mandament* along the lines suggested would stretch it unduly; hence *Tswelopele* was a case in which it was better to leave the common law 'untouched, and to craft a new constitutional remedy entirely' (para 20). Though he spent some time justifying this choice of means, it was generally considered unpersuasive: see AJ van der Walt 'Developing the law on unlawful squatting and spoliation' (2008) 125 *South African Law Journal* 24; DM Davis & K Klare 'Transformative constitutionalism and the common and customary law' (2010) 26 *South African Journal on Human Rights* 403 at 456 fn 194; S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 336-338; ZT Boggenpoel 'Does method really matter? Reconsidering the role of common-law remedies in the eviction paradigm' (2014) 25 *Stellenbosch Law Review* 72. (Interestingly, Judges Nugent and Froneman again feature in the story, since Cameron JA had relied upon Nugent J's analysis of the *mandament van spolie* in *Rikhotso v Northcliff Ceramics (Pty) Ltd* 1997 (1) SA 526 (W), and Cameron JA's own approach in *Tswelopele* was endorsed by Froneman J, on behalf of a unanimous Constitutional Court, in *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* [2012] ZACC 26.)

Appeal, he had decided all manner of case, though generally not classically constitutional ones involving the allocation of state power or the judicial review of legislation, *Fourie* being a partial exception. His most distinctive contribution was in private law, since the Bill of Rights' impact there was most contested and up-for-grabs. In the Constitutional Court, by contrast, the constitutional dimension of his cases could be taken for granted, and the key question was how far the judiciary would assert itself as against the governmental branches. It is here, then, that stage two of his career was in full swing.

The Court, when he joined it, was in transition. November 2009 saw the departure of the last four judges of the 'Class of '94': Pius Langa, Yvonne Mokgoro, Kate O'Regan, and Albie Sachs. All exemplified a clear vision of progressive constitutionalism. Cameron was cut from the same cloth. The judgment of the Court which he most admired was *Minister of Health v Treatment Action Campaign (No. 2)*.[147] This, like *Fourie*, had a personal resonance, since it involved the rollout of HIV treatment, an issue with which he had been closely engaged.[148] More importantly, it involved a major assertion of judicial power over the political branches that would have been inconceivable without the new Constitution, and even then demanded boldness and imagination.[149] It is telling that Cameron saw it as a model. The four outgoing justices were replaced by a motleyer crew: Chris Jafta, Sisi Khampepe, future Chief Justice Mogoeng Mogoeng, and, interestingly here, Johan Froneman. Cameron and Froneman were soon pegged, rightly, as members of the newly composed Court's progressive wing.[150] In the first years of Cameron's tenure, this wing undoubtedly set the Court's trajectory, and allowed his muscular

147 [2002] ZACC 15, which Cameron applauds in, inter alia, 'What you can do with rights' [2012] *European Human Rights Law Review* 147 at 153-156; 'South Africa under the rule of law: Peril and promise' (2019) 68 *Journal of Legal Education* 507 at 510-514.

148 See especially E Cameron *Witness to AIDS* (2005).

149 It also involved a kind of political savvy, in Cameron's view, about where the Court most needed to apply its power. He surmised that the Court chose to expend its credibility in *TAC* rather than in the contemporaneous cases of *Prince v President of the Law Society of the Cape of Good Hope* [2002] ZACC 1 and *S v Jordan* [2002] ZACC 22, in which the Court upheld the criminalisation of marijuana possession and sex work respectively: see his remarks quoted in S Ellmann *And justice for all: Arthur Chaskalson and the struggle for equality in South Africa* (2020) ch 21 fn 100.

150 R Calland *The Zuma years: South Africa's changing face of power* (2013) 284-285, 460, 463.

constitutionalism to be given more scope, particularly by ensuring that all forms of public power are subjected to a constitutional standard.

Of course, there had been glimmerings of this in Cameron's work long before. In October 2002, seven months after *Brisley*, which involved a purely private lease agreement, he gave a compelling counterpart judgment in *Logbro Properties CC v Bedderson NO*,[151] which was about an agreement concluded by an organ of state. The KwaZulu-Natal provincial government had purported to terminate the contract between it and the appellant tenderer. Though the contract terms themselves empowered the government to do this, the tenderer complained that the state was seeking to terminate for an unjustified reason and without giving a fair hearing, contrary to precepts of administrative law. Clearly the tender process itself was administrative action.[152] But the government argued that, once the contract had been concluded, it exhausted the state's powers over and duties towards the tendering party. Provided the state had cancelled the contract conformably to its terms, administrative law did not get a look-in. In support of this argument, the state invoked two precedents of Cameron JA's court – one from the 1950s, one very recent – which appeared to endorse the view that administrative law did not apply to powers that, though held by organs of state, could be sourced in a contract.[153] However, Cameron JA robustly distinguished the later judgment on the basis that the state's contract there had been 'concluded on equal terms with a major commercial undertaking, without any element of superiority or authority deriving from its public position'.[154] *Logbro* itself was different. And he overruled the former judgment, which his hero John Dugard had condemned in the 1970s,[155] and said that Schreiner JA's dissent ought 'to be recognised as correct'.[156] This cleared the way for Cameron JA to test the government's exercise of its contractual power against precepts of administrative law – a test which it failed. The SCA therefore set aside the government's decision, resulting in success for the tenderer (represented by Adv Marcus, again).

151 [2002] ZASCA 135.
152 *Logbro* (n 151) para 5 fn 3.
153 *Mustapha v Receiver of Revenue, Lichtenburg* 1958 (3) SA 343 (A); *Cape Metropolitan Council v Metro Inspection Services CC* [2001] ZASCA 56, in which Cameron JA had concurred.
154 *Logbro* (n 151) paras 9-10.
155 Dugard *Human rights and the South African legal order* (n 125) 320-323.
156 *Logbro* (n 151) para 13.

Cameron's own summary of the import of his judgment, in combination with Nugent JA's famous 2005 judgment in *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works*,[157] was that it had 'br[ought] important exercises of state power – where public allegations of corruption and malfeasance are rife – under the reading glass of judicial scrutiny'.[158] This neatly prefigures the project which he later undertook in earnest at the Constitutional Court.[159]

I give two main instances. They show, in different ways, what was distinctive about his convictions. Both are in fact cases in which the Court split, with Cameron J's judgment carrying only a narrow majority. But it is precisely these edge cases that reveal his convictions most clearly: they show the issues on which he would go further than his colleagues, or less reluctantly.[160]

The first is the great case of *Glenister v President of the Republic of South Africa*,[161] sometimes called *Glenister II*.[162] As we all know, the case was about the validity of parliament's attempt, almost immediately after Jacob Zuma's accession to the leadership of the ruling ANC, to disband the specialised anti-crime unit commonly called 'the Scorpions' and replace it with 'the Hawks'. The Scorpions were located within the National Prosecuting Authority ('NPA') and had been highly successful in fighting corruption; the Hawks would be located within the South African Police Service ('SAPS'), which does not enjoy the NPA's institutional independence. This was widely seen as a naked attempt by Zuma and his faction to neuter the forces of accountability, not least because Zuma had himself been investigated by the Scorpions (and

157 [2005] ZASCA 43.

158 PN Langa & E Cameron 'The Constitutional Court and Supreme Court of Appeal after 1994' (2010) 23(1) *Advocate* 28 at 30. For recent judicial praise and confirmation of *Logbro*, see *South African National Parks v MTO Forestry (Pty) Ltd* [2018] ZASCA 59.

159 See too *Permanent Secretary Department of Welfare, Eastern Cape Provincial Government v Ngxuza* [2001] ZASCA 85, where Cameron JA, on his way to affirming a High Court judgment by Froneman J, devastatingly rebukes the provincial government's mistreatment of its citizens and its conduct in the litigation.

160 Both judgments are discussed by several other contributors to this volume, attesting to their importance in the Cameron canon. I hope my treatment is complementary.

161 [2011] ZACC 6.

162 Since it came after *Glenister v President of the Republic of South Africa* [2008] ZACC 19, in which the Constitutional Court decided that the applicant was not entitled to bring the matter directly to it.

was party to a transaction that had already resulted in the corruption conviction of a politically ally).[163] It was also contrary to the emphatic recommendations made two years earlier by a commission of inquiry, led by Judge (as she then was) Khampepe, about the Scorpions' proper location and structure. The Zuma faction's legislative scheme was thus seen as an alarming instance of emergent authoritarian populism, and whether it would be allowed to go ahead as a crucial test for South Africa's institutions.

The judiciary was the only realistic counterweight. But it was not easy to find a legal basis upon which the Court might intervene. Mr Glenister, a businessman acting in the public interest, claimed that parliament's decision was unlawful on a slurry of murky bases; a full bench of the Western Cape High Court dismissed his application *ex tempore* immediately upon hearing it.[164] Fortunately, the Helen Suzman Foundation intervened thereafter, giving the argument more shape. But it was still a difficult one to sell. Four judges of the Constitutional Court, led by Chief Justice Ngcobo, held that it should fail. The controlling standard, in their view, was whether parliament's actions were rational, which in turn requires only that those actions facilitated some legitimate purpose.[165] And plainly it was legitimate (and indeed highly desirable) for parliament to enact an anti-corruption unit of some kind. What, then, was the complaint? It had to be that parliament's actions were made irrational just in virtue of the unit's new location within the SAPS, rather than the NPA. But this, for Ngcobo CJ, was most implausible. The rationality standard requires only that the government's actions plausibly conduce towards a legitimate government end – as having an anti-corruption unit, wherever located, plainly did – not that the government chose the best means possible. Ngcobo CJ would therefore have dismissed the application, with the effect that Zuma's scheme would be permitted.

But the Chief Justice's view did not prevail. Cameron J and his Deputy Chief Justice, Dikgang Moseneke, intervened to co-write a judgment

163 *S v Shaik* 2007 (1) SACR 142 (D), affirmed in *S v Shaik* [2007] ZACC 19.
164 *Glenister v President of South Africa* [2010] ZAWCHC 92.
165 Admittedly, Ngcobo CJ's judgment is hard to parse, and at other times suggests the state does have a constitutional obligation to take effective measures to combat corruption, which entails having anti-corruption institutions that are not subject to 'undue influence'.

that wrested a bare majority from Ngcobo CJ and is now famous. In it, they hold that parliament has a constitutional obligation 'to set up a concrete and effective mechanism to prevent and root out corruption'.[166] This obligation is tacit in the Constitution rather than express. It exists because, if corruption is rife, the state will be systematically unable to meet its express obligations, in particular its section 7(2) obligation to 'promote and fulfil' the rights in the Bill. For Moseneke DCJ and Cameron J, therefore, the setting up of an anti-corruption unit is constitutionally required, rather than merely a legitimate end that parliament's actions may permissibly facilitate. Indeed, the unit must not only exist but be 'effective'. They thus contrive an unexpectedly toothy review standard.

This reasoning is inventive. Its animating idea is that parliament has a tacit constitutional obligation to do what would, in the Court's view, facilitate the achievement of its express constitutional obligations. But, so stated, this is not an easy principle to sustain. If taken seriously, it would give courts the means to direct virtually all aspects of governance. As orthodox analysis, then, there is much force in Ngcobo CJ's view that courts should not be allowed to 'create'[167] or 'manufacture'[168] constitutional obligations in this way, and that they should recognise, instead, that '[t]he Constitution leaves the choice of the means to the state'.[169] Perhaps that is why the Moseneke DCJ and Cameron J judgment then has lengthy recourse to a second strand of authority: they seek to confine and corroborate their principle by pointing out that the specific facilitative means at issue in the case, namely an independent anti-corruption unit, is required by international law.[170] The obvious difficulty with relying on international law, however, is that South Africa is a 'dualist' system, and indeed section 231(4) of the Constitution confirms that a treaty becomes binding in our domestic law only 'when it is enacted into law by national legislation'.[171] There was no suggestion that the pertinent international agreements, requiring states parties to maintain independent corruption-fighting agencies, had been incorporated. 'But

166 *Glenister* (n 161) para 175.
167 *Glenister* (n 161) paras 108, 110.
168 This is Moseneke DCJ and Cameron J's description (para 201) of Ngcobo CJ's objection.
169 *Glenister* (n 161) para 107.
170 *Glenister* (n 161) paras 183-186, 189.
171 *Glenister* (n 161) para 181.

that does not mean', the judgment pivotally holds, 'that [a treaty] has *no* domestic constitutional effect'.[172] This is because treaties, even before their incorporation, 'bind the Republic'[173] – an injunction which may fairly be given some meaning in domestic litigation against state organs – and because section 39(1)(b) of the Constitution says that, when interpreting the Bill of Rights, a court 'must consider international law'.[174] International law is therefore 'of foremost interpretive significance' in understanding the requirements of our own Constitution.[175] And this brings us back to section 7(2), whose entailments must be given content mindfully of international law. The key entailment is that unless the state creates a 'sufficiently independent' anti-corruption unit, it is necessarily failing to fulfil its section 7(2) obligations.[176]

Applied to the facts, Moseneke DCJ and Cameron J find that the Hawks would not meet this standard. Here it was important that the head of the Hawks was removable by the National Commissioner of the SAPS (him- or herself a Cabinet appointee) in the same way as any other member of the police service. More important still was the fact that the new unit's activities would be coordinated by Cabinet. In both respects, the threat of political meddling, or of its perception, was severe. Moseneke DCJ and Cameron J therefore struck down the new legislation, but suspended the order of invalidity for 18 months, affording parliament an opportunity to devise a new scheme that would meet the 'sufficiently independent' standard.

Moseneke DCJ and Cameron J's reasoning is full of novelty. It is at the very outermost edge of what our legal culture is willing to tolerate. Theunis Roux described the reasoning as 'convoluted', 'strained', 'somewhat forced', and 'less than convincing'[177] – and not unjustly. Its extension of section 7(2) is far-reaching, as mentioned, and its use of international law to buttress it has failed to persuade many observers: the

172 *Glenister* (n 161) para 182 (emphasis added).
173 Section 231(2) of the Constitution.
174 And see, similarly, s 233.
175 *Glenister* (n 161) para 194.
176 *Glenister* (n 161) paras 196, 198, 203.
177 T Roux 'The South African Constitutional Court's democratic rights jurisprudence' (2013) 5 *Constitutional Court Review* 33. Ziyad Motala's critique was more aggressive, saying that the majority 'fundamentally ignores the [constitutional] text and separation of powers' and describing their judgment as 'a low water mark in South Africa's constitutional jurisprudence': Z Motala 'Divination through a strange lens' *TimesLive* (27 March 2011).

judgment's approach to the domestic effect of treaty obligations tends to blur the lines laid down by section 231, and in any event the disparate international materials are not analysed rigorously on their own terms.[178] But there is, of course, another perspective on the judgment, more realist or outcomes-based in flavour. According to this view, *Glenister II* shows exactly why we have a Constitutional Court. It was a moment when the political branches have seized an opportunity to centralise power and limit their own accountability, with the potential lastingly to undermine the deepest principles of constitutional governance.[179] And so one needs a judicial organ with sufficient credibility, esteem, and foresight to prevent it. In a dominant party state, as Mark Kende put it, Moseneke DCJ and Cameron J's approach 'may be the only way to preserve democracy'.[180] If some judges of the Court did not recognise this moment for what it was, and were in thrall to an inapposite model of the judicial function, then so much the worse for them.

For my purposes, there is no need to insist this perspective is the best one. I only claim it illuminates Cameron J's own perspective. His co-authored judgment in *Glenister* decides, at a moment of severe difficulty in the governance of the country, to use the full gamut of constitutional argument so as to assert the Court's power as against the other branches. It does so in a way that many of the Cameron J's colleagues found too bold, and which would, it seems reasonable to infer, have had no hope of prevailing without him on the bench. It shows him to be convinced

178 See especially J Tuovinen 'The role of international law in constitutional adjudication: *Glenister v President of the Republic of South Africa*' (2013) 130 *South African Law Journal* 661; 'What to do with international law? Three flaws in *Glenister*' (2013) 5 *Constitutional Court Review* 435; F Sucker 'Approval of an international treaty in parliament: How does section 231(2) "bind the Republic"?' (2013) 5 *Constitutional Court Review* 417. Cameron offers his own, naturally more sanguine, account in 'Constitutionalism, rights, and international law: The *Glenister* decision' (2012) 23 *Duke Journal of Comparative and International Law* 389.

179 Compare S Woolman *The selfless constitution: Experimentalism and flourishing as foundations of South Africa's basic law* (2013) 300: *Glenister II* was about a 'large-scale disruption in the social fabric' which 'pose[s] an imminent and pronounced danger to the general welfare of the commonweal.'

180 M Kende 'Corruption cases and separation of powers in the South African Courts and US Supreme Court' (2016) 60 *New York Law School Law Review* 183 at 193. See also George Devenish's fulsome praise in 'The Scorpions vs The Hawks – A royal battle' *Accountability Now* (2011); R Krüger 'The ebb and flow of the separation of powers in South African constitutional law – The *Glenister* litigation campaign' (2015) 48 *Verfassung und Recht in Übersee* 49.

of the pivotal role of the Court and sufficiently attuned to the state of the country to perceive that *Glenister II* marked a moment of crisis; and having seen how important it is that the Court prevent the centralisation of power by the Zuma faction, he decides to go all in to reach that result – if necessary by burning some of his credibility on the arguments he has to use to get there.[181] The Court pressed its power into a new area, so as to subject otherwise-unaccountable government decisions to constitutional prescripts, overseen by the judiciary. *Glenister II* was, in this sense, a '*TAC* moment'. Hence Cameron proclaimed it a victory for constitutionalism and the rule of law.[182] It was made harder to achieve by the fact that there was, unlike in *TAC*, no clear textual or jurisprudential anchor for the Court's arguments, and so he martialled new ones in a way that positions *Glenister II* as perhaps one of the Court's most polarising ever judgments: seen by those who support an ambitious role for the Court as one of its finest moments, and by those who think the Court is inclined to outstrip the conventional bounds of legal reasoning as a nadir.[183]

A case that marks a related cleavage is *KwaZulu-Natal Joint Liaison Committee v MEC, Department of Education, KwaZulu-Natal*.[184] In September 2008, the respondent MEC had issued a notice to independent schools in his province setting out the 'approximate' funding levels they should expect the following year. In May 2009, five months into that year, the MEC issued another notice stating that, because of a 'cash crisis', the schools would be reduced by 30% from those previously indicated. This reduction not only applied to the two

181 Compare D Kennedy 'Freedom and constraint in adjudication: A critical phenomenology' (1986) 36 *Journal of Legal Education* 518, whose account of the judicial process seems apposite here.

182 Cameron 'Constitutionalism, rights, and international law' (n 178) 408.

183 A more thoughtful criticism of *Glenister II* is that the cost to the Court's credibility need not have been so severe as in fact it was. According to this argument, well made by Issacharoff (n 2) 27-30, the Court should have been more proactive, laying the groundwork for the decision, over the preceding years, by developing a robust separation of powers jurisprudence, including principles prohibiting the centralisation of political power. Then, when a case like *Glenister II* arose, they would have been ready: able to condemn the disbanding of the Scorpions without having to rely on the unheralded argument that the majority judgment in fact did. Though this may be a compelling critique of the Court's jurisprudence, it does not seem germane to our understanding of Justice Cameron, who had joined the Court only shortly before *Glenister II* and, in deciding it, could only draw upon the arguments that were, by then, available.

184 *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal* [2013] ZACC 10.

tranches that were due later in 2009, but was partly retroactive, in that it applied also to a tranche that had already fallen due in April but not yet been paid. Naturally this sudden and catastrophic reduction in the schools' total budgets was unwelcome, and the Joint Liaison Committee, which represented the schools, brought litigation in the Durban High Court seeking to compel the MEC to pay the full amounts previously indicated. The basis of its argument was that the September 2008 notice constituted a binding contract to pay those amounts. The High Court (Koen J) refused its application, saying that there was plainly no *animus contrahendi* on the part of the MEC, and in any event, since the stated funding levels were merely 'approximate', the supposed agreement was too uncertain to enforce. Both the High Court and SCA refused leave to appeal. But the Constitutional Court – marching, as ever, to the beat of a different drum – heard the case and, as it turned out, found by a majority in the schools' favour. This was, fundamentally, because of the principles of good governance that the MEC had flouted. The MEC had reneged on a commitment which related to elemental aspects of the schools' budgeting and planning, and did so without notice and indeed after one of the affected tranches had fallen due. To judges seeking to ensure progressively that all public power is subjected to constitutional scrutiny, the case cried out for a remedy.

Unfortunately, it was appallingly argued. The schools relied on the private law of contract only. They disavowed any reliance upon administrative law, and had accordingly failed to conform to the procedural requirements of the Promotion of Administrative Justice Act.[185] They also failed, for related reasons, to put the Department's 2009 budget and decision-making process before the Court.[186] The solution might have been to remit the case to the High Court, where it could be properly evidenced and re-argued. But the schools' counsel disavowed this too, because of the delay and expense it would entail. So the matter had to be decided by the Court in the proceedings at hand. Since there was grave artificiality in the claim that the 2008 notice constituted a binding contract with the schools, the argument actually made by their counsel was, for nine of the ten judges on the bench, a non-starter. And for four of the ten judges – Jafta J, Mogoeng CJ, Nkabinde J, and Zondo

185 Act 3 of 2000; *KZN Joint Liaison* (n 184) para 31.
186 *KZN Joint Liaison* (n 184) para 32.

J – the case should have ended then and there. The contractual claim was the only one argued, and indeed public-law remedies were expressly and emphatically disavowed. The schools had also not argued for any development of the common law. Every rule of civil procedure thus forbad the Court from deciding the case on an alternative basis. Or so said the four-judge minority, in three lengthy and at times incredulous judgments.

They were incensed because Cameron J, leading the six-judge majority, went out on a limb to devise a new principle and, on the basis of it, find for the schools. Drawing on a range of sources – every child's right to a basic education,[187] the constraints imposed upon departmental budgeting by the South African Schools Act,[188] the National Norms and Standards for School Funding,[189] and provincial Acts and regulations[190] – Cameron J sought once again, in Herculean fashion, to wrest from the disparate legal materials a deeper-lying principle which he might then apply to the case before him.[191] These materials showed that the Department, in setting out its budgetary allocations in the 2008 notice, was acting in pursuit of Bill of Rights obligations, and was constrained, in doing so, not to act retrogressively by withdrawing promised payments. Hence 'a public official who lawfully promises to pay specified amounts to named recipients cannot unilaterally diminish the amounts to be paid after the due date for their payment has passed'.[192] This was rooted, ultimately, in basic principles of good governance: the protection of reliance, accountability, and rationality.

Cameron J's judgment insists many times that his principle applies only to tranches that have already fallen due.[193] He therefore ordered the Department to comply with the 2008 notice insofar as the payments stated in it had fallen due on 1 April 2009 – but no further. This limitation may be justified partly by the particular capriciousness of reneging on payments that were due,[194] and partly by the lack of information

187 Section 29(1) of the Constitution.
188 Act 84 of 1996.
189 GN 869, *GG* 29179, 31 August 2006.
190 See *KZN Joint Liaison* (n 184) para 44.
191 *KZN Joint Liaison* (n 184) paras 38-47, 57.
192 *KZN Joint Liaison* (n 184) para 52.
193 *KZN Joint Liaison* (n 184) paras 52, 56-57, 63-65.
194 *KZN Joint Liaison* (n 184) para 62.

before the Court about the budgets for the remainder of 2009.[195] But surely it was also an attempt to make his judgment more palatable to his colleagues: he sought to depict his judgment as a targeted strike, addressing only the gravest aspect of the Department's conduct, and not likely to have unintended consequences in cases not before the Court. It was, in that sense, a restrained judgment (even if it was *un*restrained in the difference sense emphasised by his irate colleagues in the minority). Only Froneman J was willing to go further than Cameron J, and hold the Department even to the allocations that were not yet due.[196]

KZN Joint Liaison can be aligned with *Glenister II*. It is particularly sensitive to bad governance and determined to prevent it, and reaches beyond the constitutional text, to deeper constitutional principles, in order to do it. Admittedly, the stakes in *KZN Joint Liaison* were not existential, as they were in *Glenister II*. Nor was the Court's incursion into the governmental sphere as far-reaching. Whereas *Glenister II* grandly implicates the separation of powers, the headline disagreement in *KZN Joint Liaison*, by contrast, is about civil procedure, and in particular about whether the Court should be bound by the ill-advised concessions by the schools' counsel, or should, instead, fashion a new and better legal argument on their behalf. It is tempting, then, to depict Cameron J and the other judges in the *KZN Joint Liaison* majority as the 'anti-formalists', and their opponents as 'sticklers for process'.[197] But perhaps the disagreement on the procedural point reflects a deeper one: it is really about how suspicious the respective judges are about the state's use of its power, and how determined they are to prevent it.[198] One would expect the more determined judges to engage in argumentative or procedural novelties where necessary to hold government to account. But where, by contrast, procedural strictures are in fact *helping* to hold government accountable, one should expect those same judges to uphold them. This was made vivid by *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd*,[199] decided in March 2014, in which the Court again split,

195 *KZN Joint Liaison* (n 184) para 69.
196 *KZN Joint Liaison* (n 184) para 108.
197 C Hoexter 'The enforcement of an official promise: Form, substance and the Constitutional Court' (2015) 132 *South African Law Journal* 207.
198 L Boonzaier 'Good reviews, bad actors: The Constitutional Court's procedural drama' (2015) 7 *Constitutional Court Review* 1 at 16-19.
199 [2014] ZACC 6.

along lines very similar to those in *KZN Joint Liaison*. But the camps' respective positions were reversed: Cameron J now wrote the judgment that insisted on full procedural propriety, with Jafta J dissenting.[200] The reason for the inversion of roles was that the formal strictures relevant to *Kirland*, exactly unlike those in *KZN Joint Liaison*, helped to constrain government caprice.[201]

In sum, cases like *Glenister II*, *KZN Joint Liaison*, and *Kirland* have a place in the Cameron canon because they exemplify his vision of a strong Constitutional Court that acts creatively to restrain government power. And this vision within the Court was, in this time-period, ascendant. I have chosen two cases at the acme, in which Cameron J's view succeeded within the Court, but only just. Perhaps they mark the point at which the progressive wave was cresting. The last two cases, *KZN Joint Liaison* and *Kirland*, are important for a further reason, which we will encounter again in a moment: they featured hostile dissents by an opposing camp of Jafta J, Mogoeng CJ, and Zondo J. A new power centre was forming.

3 Stage three: Fracture

In this third stage, the vision of Cameron constitutionalism that I just sketched starts to fracture. It happened in two ways: first gradually, and then suddenly.

Since 2009, as I indicated, the Court's composition was noticeably changing, and with it came a loss of ideological homogeneity. In November of that year, Jafta and Mogoeng had taken the place of noted progressives. Raymond Zondo joined the Court two years later.[202] That these appointments brought a new, more conservative strain of thought into the Court was soon obvious.[203] Importantly, however, in the first few years it rarely swayed outcomes. The Court's established progressive vision, for which Cameron J carried the flag, tended to win out in contentious cases. Jafta J, Zondo J, and (at times) Mogoeng CJ were

200 See for much more detail G Marcus 'Curbing the abuse of power: *Kirland* and the struggle for its acceptance', this volume, ch 8.

201 Boonzaier (n 198) 19.

202 He was appointed as an acting judge in November 2011, and was made permanent in September 2012.

203 See eg N Tolsi 'Applause for Mogoeng's judicial cadenza' *Mail & Guardian* (17 October 2013); Calland (n 150) 284, 456, 464, 468.

thus confined to writing gadfly dissents. Cameron J's vision triumphed, of course, in the three cases I discussed in the previous stage. It also triumphed in the trilogy of well-known 'school cases', which turned on the question whether provincial MECs could intervene high-handedly in school governing body decisions.[204] A similar picture appears from the two 'parliamentary cases', in which the majority, over Jafta J's dissents, was willing to invalidate parliament's rules.[205] Finally, there is the perhaps surprisingly fractious case of *Maphango v Aengus Lifestyle Properties (Pty) Ltd*,[206] in which Zondo J, in one of the first cases on which he sat, broke from Cameron J's majority judgment to assert staid rules of civil procedure, in a foreshadowing of *KZN Joint Liaison*.[207] As these judgments appeared, personnel changes at the Court were naturally continuing. In 2013, Zak Yacoob retired, and was replaced by Mbuyiseli Madlanga, whose views are often idiosyncratic but who joined the Jafta–Zondo bloc in key cases such as *Kirland*. Finally, May 2014 saw the retirement of Thembile Skweyiya, a reliable vote for the progressive wing

204 *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; *Head of Department, Department of Education, Free State Province v Welkom High School* [2013] ZACC 25; *MEC for Education, Gauteng Province v Governing Body, Rivonia Primary School* [2013] ZACC 34. *Welkom, Rivonia*, and *KZN Joint Liaison* are discussed in S Fredman 'Procedure or principle: The role of adjudication in achieving the right to education' (2013) 6 *Constitutional Court Review* 165; Y van Leeve 'Executive heavy handedness and the right to basic education: A reply to Sandra Fredman' (2013) 6 *Constitutional Court Review* 199. *Ermelo* predates the arrival of Jafta, Mogoeng, and Zondo and so, conformably with my thesis, Cameron J was able to join a unanimous judgment setting aside the actions of the provincial official.

205 *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* [2012] ZACC 27; *Mazibuko v Sisulu* [2013] ZACC 28. The voting patterns here are perhaps slightly less predictable, with Yacoob J siding with Jafta J in *Oriani-Ambrosini*.

206 [2012] ZACC 2.

207 *Maphango* is admittedly a tricky judgment and has attracted much academic commentary: see eg S-M Maass 'Conceptualising an unfair practice regime in landlord-tenant law' (2012) 27 *SA Public Law* 652; J Fowkes 'Managerial adjudication, constitutional civil procedure and *Maphango v Aengus Lifestyle Properties*' (2013) 5 *Constitutional Court Review* 309; M Dafel 'On the flexible procedure of housing eviction applications' (2013) 5 *Constitutional Court Review* 331 at 339-341; FI Michelman 'Expropriation, eviction, and the gravity of the common law' (2013) 24 *Stellenbosch Law Review* 245 at 254-263; M Dafel 'Curbing the constitutional development of contract law: A critical response to *Maphango v Aengus Lifestyle Properties (Pty) Ltd*' (2014) 131 *South African Law Journal* 271; I de Villiers 'Spatial practices in Lowliebenhof: The case of *Maphango v Aengus Lifestyle Properties (Pty) Ltd*' (2015) 17 *Potchefstroom Electronic Law Journal* 2164.

who had recently penned the majority judgment in *Khumalo v MEC for Education, KwaZulu-Natal*,[208] a notable predecessor to *Kirland*.[209] Cameron J's camp held together in these cases and carried the majority. Even so, a countervailing force was brewing.

To when should we date its eruption, marking the transition from stage two to this third one? In my view, we can be quite precise. It occurred in September 2014, when, over a ten-day period, the Court gave two judgments exhibiting, in different ways, a fundamental shift of power. The first case is *SAPS v Solidarity obo Barnard*.[210] The second is called *Turnbull-Jackson v Hibiscus Coast Municipality*.[211] In both, Cameron J and his key ally, Froneman J, were suddenly pushed to the margins.

Barnard is well-known, having been the subject of sustained media and academic attention.[212] It was the Court's first decision on affirmative action for ten years. Ms Barnard was a police officer who had twice applied for promotion and twice been denied, despite being strongly endorsed on both occasions by the interviewing panel. The National Commissioner of the SAPS overruled the panel, and rejected Ms Barnard on the basis of her race: since she was a white woman, her appointment would not further racial diversity in the SAPS's senior levels. No other candidate was promoted to the post in her place; it was left vacant for a period, and, when no suitable black candidate emerged, discontinued – even though it had been adjudged by the SAPS to be a post 'critical' for service delivery. Ms Barnard argued that this was unfair discrimination in terms of the Employment Equity Act.[213] She won in two of the lower

208 [2013] ZACC 49.
209 Compare Boonzaier (n 200).
210 [2014] ZACC 23.
211 [2014] ZACC 24.
212 See eg C McConnachie 'Affirmative action and intensity of review: *South African Police Service v Solidarity obo Barnard*' (2015) 7 *Constitutional Court Review* 163; CH Albertyn 'Adjudicating affirmative action within a normative framework of substantive equality and the Employment Equity Act – An opportunity missed?' (2015) 132 *South African Law Journal* 711; M Brassey 'The more things change ... Multiracialism in contemporary South Africa' (2019) 9 *Constitutional Court Review* 443. The lower-court judgments were discussed in, for example, JL Pretorius 'Accountability, contextualisation and the standard of judicial review of affirmative action' (2013) 130 *South African Law Journal* 31. See further N Ramalekana 'The (mis)appropriation of human rights, norm-spoiling, and white supremacist backlash in South African minority rights litigation', this volume, ch 10.
213 Act 55 of 1998, s 6(1).

courts, and lost in one of them.[214] When the SAPS appealed to the Constitutional Court, the stage was set for a major judgment setting out important principles.

As it turned out, however, the Court's judgment is a disappointing non-decision. Predictably, the Court affirmed the legitimacy of affirmative action. But, even taking this for granted, *Barnard* presented a difficult case, since the complainant's repeated non-appointment did not in fact lead to the advancement of a disadvantaged candidate, and on the SAPS's own version appeared to come at an unacceptable cost to service delivery. There was also the fact that the National Commissioner, Jackie Selebi, had given a remarkably glib justification for overruling his committee's considered decision.[215] Ms Barnard's counsel made much of this last fact before the Constitutional Court, emphasising the gross inadequacy of Mr Selebi's letter. This was seized upon by the majority of the Court to hold that Ms Barnard's challenge was, in truth, an attempt at the judicial review of Mr Selebi's decision, for which the proper procedure had not been followed.[216] This was puzzling, to say the least, since Ms Barnard's actual case, grounded upon unfair discrimination, had already been adjudicated by three lower courts. But counsel's conduct of the hearing offered a sufficient pretext, in the majority's view, to duck the question of substance. '[T]he overwhelming impression created by the majority judgment', as Chris McConnachie put it, 'is of a Court searching for an easy way out of a difficult task'.[217]

Of course, by holding that the lawfulness of the Commissioner's decision was 'not properly before [the Court]',[218] the majority in effect insulated it from scrutiny. And although the judgment proceeds to take some swipes at Ms Barnard's case on the merits,[219] it shows no great desire to lay down any markers about when a decision taken in pursuit of affirmative action would be unlawful. Both aspects of the judgment seem telling. The only criterion discernible from the judgment is that, as

214 *Solidarity obo Barnard v SAPS* [2010] ZALC 10; *SAPS v Solidarity obo Barnard* [2012] ZALAC 31; *Solidarity obo Barnard v SAPS* [2013] ZASCA 177.
215 *Barnard* (n 210) paras 15-16.
216 *Barnard* (n 210) paras 59-60.
217 McConnachie (n 212) 179. See, to similar effect, Albertyn (n 212) 716. In the view of Ms Barnard's counsel, the majority '[w]oefully fail[ed] to engage with the central issue in the case': Brassey (n 212) 463.
218 *Barnard* (n 210) para 60.
219 *Barnard* (n 210) paras 61-70.

the legislation states,[220] the race and gender targets must not be enforced as 'quotas' or 'absolute bar[s]'.[221] Otherwise, the judgment credulously accepts that the National Commissioner must have had his reasons for acting as he did. This was not acceptable to the minority, which was comprised of Cameron J, Froneman J, and Majiedt AJ.[222] These judges, unlike the majority, did confront the unfair discrimination challenge, and made clear at the outset that they felt more guidance was needed from the Court about when decisions taken in the alleged pursuit of employment equity would be impermissible. They laboured to find a standard against which the lawfulness of affirmative action decisions could be tested. The standard they developed – and which Jafta J wrote separately to condemn[223] – would have held state employers to a considerably higher standard than merely showing their equity measures were not rigid quotas. In the end, though, they found against Ms Barnard, admitting that the case was a 'close call'.[224]

Turnbull-Jackson, decided ten days after *Barnard*, is less well-known, but has an intriguing backstory. It begins with *Walele v City of Cape Town*,[225] which the Constitutional Court decided in 2008.[226] The facts and legal issue in the case are dull. Mr Walele sought the judicial review of the City's approval of plans for the construction of a block of flats on land neighbouring his own. He made several arguments. Two judgments were given: one by Jafta AJ, acting on the Court at the time, and one by O'Regan ADCJ. The latter would have rejected Mr Walele's application on all grounds. Jafta AJ, on the other hand, though he rejected most of Mr Walele's arguments, upheld one of them, with the result that the City's approval was set aside. His reasoning is not impressive.[227] Even so mild-mannered a commentator as Geoff Budlender SC, who appeared for the City, described the judgment as 'awful' and 'inexplicable', perhaps

220 Employment Equity Act, ss 15(3) and (4).
221 *Barnard* (n 210) paras 66-67.
222 Van der Westhuizen J also wrote a separate judgment.
223 *Barnard* (n 210) paras 221-233.
224 *Barnard* (n 210) para 123.
225 [2008] ZACC 11.
226 See further J Brickhill 'Precedent and the Constitutional Court' (2010) 3 *Constitutional Court Review* 79 at 86-89; AJ van der Walt *The law of neighbours* (2010) 351-355.
227 Diverse aspects of its reasoning have been criticised. For criticism of aspects that I do not consider further here, see C Hoexter & G Penfold *Administrative law in South Africa* 3 ed (2021) 550-554; also 579-582.

one of the Court's worst ever.[228] Yet it managed to win a majority, and its *ratio decidendi* was therefore binding on lower courts. Of the many issues considered in Jafta AJ's judgment, the contentious one, as it would turn out, was the interpretation he gave to section 7(1)(b)(ii) of the National Building Regulations and Building Standards Act,[229] which sets out certain requirements for obtaining planning permission. The seemingly obvious meaning of the section is that, if the decision-maker 'is satisfied' that the building would be disfiguring, unsightly, or dangerous, or would reduce the value or neighbouring properties, then it must refuse to approve the planning application.[230] But Jafta AJ's interpretation flips the burden of satisfaction: in truth, he says, the section means that the planning application must be refused *unless* the decision-maker is satisfied that *none* of those disqualifying factors is present. In effect, this elevates the threshold for compliance with the section. Now the official must consciously attend to each of the disqualifying factors and satisfy himself that none of them is possibly present – and his decision will be vulnerable, on review, unless he can prove he has done this. Particularly given the vague and subjective nature of these factors, which have a wide band of uncertainty, this thrusts a weighty burden upon municipalities. Adv Budlender described *Walele*'s interpretation as 'unimplementable'.[231] But Jafta AJ held that the unusually heightened requirement was justified in order to protect the rights of neighbouring landowners, which he said

228 Constitutional Court Oral History Project 'Interview with Geoff Budlender' (6 January 2012) 23.

229 103 of 1977.

230 The section reads:

> 'If a local authority, having considered a recommendation referred to in section 6(1)(a) ... is satisfied that the building to which the application in question relates –
>
> (aa) is to be erected in such manner or will be of such nature or appearance that –
>
> (aaa) the area in which it is to be erected will probably or in fact be disfigured thereby;
>
> (bbb) it will probably or in fact be unsightly or objectionable;
>
> (ccc) it will probably or in fact derogate from the value of adjoining or neighbouring properties;
>
> (bb) will probably or in fact be dangerous to life or property,
>
> such local authority shall refuse to grant its approval in respect thereof and give written reasons for such refusal.'

Since the other subparts of the section, in direct contrast, state the burden of satisfaction oppositely ('is *not* so satisfied'), the choice of wording was surely non-accidental.

231 Constitutional Court Oral History Project (n 228) 23.

must enjoy high regard in the interpretative injunction contained in section 39(2) of the Constitution.[232] His eccentric interpretation risked a flood of litigation, since municipalities had already taken countless planning decisions based on the lower threshold that appeared from the section's wording.[233]

For lower courts seeking to deal with the fallout, Jafta AJ's interpretation of section 7(1)(b)(ii) could be circumvented only if it was an *obiter dictum*. This was not implausible: *Walele* had decided several issues, raised the meaning of the section only obliquely in the course of one of them – seemingly without full argument[234] – and found in the applicant's favour on a ground quite different. These, then, were the issues confronting the Supreme Court of Appeal in *True Motives 84 (Pty) Ltd v Mahdi*,[235] a 2009 case in which the meaning of the section rearose. The eThekwini Municipality intervened as an *amicus* to explain that *Walele*'s interpretation of the section was causing havoc in its planning department, and argued that the SCA should hold that that interpretation was *obiter* and wrong. The SCA, by a 4:1 majority, seized the opportunity to reverse the damage wrought by *Walele*. It held that *Walele*'s interpretation of the section was indeed *obiter*, and on that basis departed from it, restoring section 7(1)(b)(ii)'s facial meaning. The bench that decided the case included both Cameron JA, who would shortly move to the Constitutional Court, and Jafta JA, who had, since finishing the acting stint during which he wrote *Walele*, returned to his permanent position on the SCA. Of the three judgments written for the majority, the most detailed discussion of *stare decisis* and its incidents was in Cameron JA's.[236] The lone dissenting judge, needless to say, was Jafta JA.[237] History does not record his response to having his holding in

232 *Walele* (n 225) para 55.
233 The literal meaning had also been endorsed in *Paola v Jeeva* [2003] ZASCA 100.
234 It is clear from the heads of argument of the respondents, and of the *amicus curiae*, that they did not anticipate that the threshold in section 7(1)(b)(ii) was at issue; they did not discuss it. Adv Budlender also notes in his interview that the issue was not argued: Constitutional Court Oral History Project (n 228) 23.
235 [2009] ZASCA 4.
236 Other judgments for the majority were written by Heher JA and Scott JA.
237 It is also worth mentioning in passing the judgment in *MEC for Education, Northern Cape v Bateleur Books (Pty) Ltd* [2009] ZASCA 33, in which Cameron JA wrote the main judgment upholding an administrative-law challenge against the state, and Jafta JA was the lone dissenter. The disagreement relates to issues that arose in both *Walele* (n 225) and *KZN Joint Liaison* (n 184).

Walele marginalised and rejected as mistaken by his four colleagues, but it seems reasonable to infer he was not happy.

Certainly, the resonances of the *Walele* issue would have been transparent to every member of the Constitutional Court when, with both Cameron and Jafta now as their colleagues, the meaning of section 7(1)(b)(ii) next came before them. This it did in *Turnbull-Jackson*.[238] In *Turnbull-Jackson*, however, the applicant raised section 7(1)(b)(ii)'s meaning frontally. His complaint was that the municipality had wrongly granted planning approval to a neighbouring landowner to construct a six-story block of flats, and argued that the requirements of section 7(1)(b)(ii) were not, in truth, met. This was because, applying the interpretation given to the section in *Walele*, the threshold was higher than the municipality's official had realised, and he had not shown himself to be 'satisfied' that no disqualifying factor was present. Madlanga J, writing for the majority, therefore sought to resolve 'the *Walele* – *True Motives* controversy', as he called it.[239]

The upshot of his discussion was that *Walele*'s interpretation of the section was not *obiter* and that the SCA had therefore erred. Fair enough – that conclusion is supportable. What is more striking is the tone of the judgment in which Madlanga J couched it. Given the freighted collegial stakes, one might have expected his judgment to proceed towards this conclusion with caution. It does not. There are no reassuring pleasantries about the difficulties of charting the boundary between *obiter dicta* and *rationes decidendi*, or the fact that judicial disagreement about such matters is legitimate and not to be overread. Quite the contrary: '[t]he fact that *obiter dicta* are not binding', Madlanga J says, 'does not make it open to courts to free themselves from the shackles of what they consider to be unwelcome authority by artificially characterising as *obiter* what is otherwise binding precedent.'[240] And he goes on to express incredulity at the SCA's conclusion about *Walele*'s interpretation of the statute. It was 'rather difficult to comprehend', he said, 'how something so central,

238 True, the Court had flirted with the issue in the 2010 case of *Camps Bay Ratepayers and Residents Association v Harrison* [2010] ZACC 19, but on that occasion held unanimously (at para 47) that it did not squarely arise for decision. Compare Brickhill (n 226) 89-91.

239 *Turnbull-Jackson* (n 211) para 51.

240 *Turnbull-Jackson* (n 211) para 56.

not only to the reasoning, but to the outcome, can be said to be *obiter*'.[241] And, just in case one failed to catch that point the first time: 'How [the interpretation of the section] fizzles out to a non-issue with the result that a pronouncement on it becomes *obiter* is not easy to comprehend.'[242] In sum, *True Motives*, in Madlanga J's telling, did not reflect a legitimate perspective, but rather an unscrupulous circumvention by the SCA's judges of a precedent that bound them, disguised by logic that is impossible to comprehend. Moreover, *True Motives* was quite wrong, in Madlanga J's view, to read the section differently from *Walele*. True, it was *Walele* that had unanticipatedly departed from the plain wording of the section, whose meaning several SCA benches and municipal planning departments had regarded as incontestably obvious. Yet Madlanga J suggests that *Walele*'s interpretation was the only plausible one; the interpretation upheld by the SCA in *True Motives* is, he concludes, 'absurd'.[243] And indeed Cameron and his colleagues, in their claimed unwillingness to strain the section's literal meaning, had been left 'cower[ing] timorously in a corner', Madlanga J implied, failing to do what section 39(2) mandates.[244]

These are grave charges against the judgment in *True Motives*, going well beyond what was needed to justify the Court's taking a differing view. And given the delicate context, in which deep collegial ill-feeling was known to be at stake, Madlanga J's choice of approach is hard to ignore. It conveys a message about which side in the emerging rift in the Court can expect the greater degree of respect and concern. To be sure, Madlanga J does pay passing tribute to the 'eloquence' of Cameron JA's judgment in *True Motives*.[245] But it is hard to imagine that coming as much consolation. Madlanga J's general approach was to go on the offensive, for Jafta J's side and against Cameron J's. A comfortable majority of the Court, including some of Cameron J's usual allies, chose to concur in that judgment. They did not mollify Madlanga J's tone.

Barnard and *Turnnbull-Jackson* thus make newly vivid the divide in the Court that had been entrenching itself since 2009, with Cameron J now, rather suddenly, on the lonelier side of it. The two judgments are,

241 *Turnbull-Jackson* (n 211) para 67.
242 *Turnbull-Jackson* (n 211) para 69.
243 *Turnbull-Jackson* (n 211) para 91.
244 *Turnbull-Jackson* (n 211) para 94.
245 *Turnbull-Jackson* (n 211) para 55.

as illustrations, complementary. *Barnard* was a case in which the legal and principled stakes were high. It was about the race question that sits unresolved at the heart of South Africa's constitutional settlement. In *Turnbull-Jackson*, by contrast, the issue that divided the Court does not implicate deep legal principles. Its significance is more personal, suggesting a change in collegiate fellow-feeling.

These two judgments prefigure others that came later. Most clearly, they herald the way in which the Court divided in subsequent cases involving race. *Barnard* evinced a gap opening up between Cameron J and the majority of his colleagues that later deepened. First, in *Solidarity v Department of Correctional Services*,[246] a follow-up to *Barnard* decided in July 2016, Cameron J again found himself in a small minority which was much more worried than the majority about the heavy-handed way in which the state was implementing affirmative action in its workforce. Though the majority upheld the applicants' complaint, and found the Department's employment equity plan unlawful, they did so on a narrow ground. The minority judgment (written by Cameron's old colleague Robert Nugent, who had come out of retirement to act for a term on the Constitutional Court) represents a far more fundamental assault on the Department's methods. Drawing expressly upon the dissent in *Barnard*, Nugent AJ expresses deep disquiet at the grubby and bureaucratised way in which affirmative action was being implemented.[247]

Second, and much more acrid, are the two *AfriForum* cases.[248] In the first of these, *City of Tshwane Metropolitan Municipality v AfriForum*,[249] decided very shortly after *Solidarity v Department of Correctional Services*, the preachifying majority judgment of Mogoeng CJ overturned an interim interdict granted by the High Court in favour of AfriForum,

246 [2016] ZACC 18.

247 For example, Nugent AJ wrote at para 102, describing the government's employment equity policies: 'In contrast to the thoughtful, empathetic, and textured plan one might expect if weight is given to what was expressed by this Court [in *Barnard*'s minority judgments], what we have before us is only cold and impersonal arithmetic. A person familiar with the arithmetic functions of an Excel spreadsheet might have produced it in a morning.'

248 Cameron has recently given an account of these 'explosive' judgments in E Cameron & others 'Rainbows and realities: Justice Johan Froneman in the explosive terrain of linguistic and cultural rights' (2022) 12 *Constitutional Court Review* 261, and hints at their implications for relations between the Court's judges. For a different perspective, see Ramalekana (n 212).

249 [2016] ZACC 19.

which had sought to restrain the City's changes to street names in Pretoria. Mogoeng CJ's judgment upset a number of settled principles, since interim interdicts are not normally appealable. Moreover, the gravamen of Mogoeng CJ's complaint against AfriForum was that it had brought its application because of its 'one-sided' Afrikaner nationalist worldview[250] – which may be true, but is not obviously relevant to the adjudication of AfriForum's legal claim that the City had failed to facilitate adequate public participation before the name changes. One therefore gains the strong impression that Mogoeng CJ, rather than adjudicating the legal claim judiciously, was pursuing a vendetta against the applicant because of its objectionable worldview. If there were any doubt about this, it was surely removed by the second *AfriForum* case, *AfriForum v University of the Free State*,[251] in which the majority, led by Mogoeng CJ, took another extraordinary step: he wrote an 81-paragraph judgment dismissing AfriForum's challenge to the University of the Free State's contentious new language policy – but without granting AfriForum a court hearing. In both cases, Cameron J and Froneman J were the lonely dissentients,[252] objecting to the approach of their colleagues for all the obvious reasons of principle. The worldview embedded in AfriForum's litigation was indeed noxious, as Cameron J and Froneman J readily insisted,[253] and engaged issues of profound racial and historical sensitivity. But it was wrong, they argued, for the Court to violate principle in order to deprive even an unappealing litigant of basic rights, both procedural and substantive. Jafta J, characteristically, wrote a separate judgment in *City of Tshwane* that supported the majority on a more inflammatory basis, implying that Cameron J and Froneman J were seeking to defend 'racist cultural traditions'.[254]

Race issues, then, as one might expect in South Africa, drove the deepest wedge between the two blocs that I have been discussing. But the Court's changing centre of gravity is also apparent elsewhere, such as in *My Vote Counts NPC v Speaker of the National Assembly*,[255] decided in September 2015. At issue was whether parliament had a constitutional

250 *City of Tshwane* (n 249) para 64.
251 *AfriForum v University of the Free State* [2017] ZACC 48.
252 Only Pretorius AJ (in *UFS* (n 251)) joined them.
253 *City of Tshwane* (n 249) paras 121-123.
254 *City of Tshwane* (n 249) para 193.
255 [2015] ZACC 31.

obligation to enact legislation requiring the disclosure of private funding to political parties. Cameron J, evidently assigned to be the scribe for the case, wrote the first and longest judgment. It sets out the value of transparency in party funding, for both the meaningful exercise of voting rights and the fight against corruption, and ultimately upholds My Vote Counts's application. But a comfortable seven-judge majority of the Court rejected it. They did so on the basis that the application had been incorrectly framed: rather than alleging straightforwardly that parliament had an obligation to enact party-funding legislation, the applicant should have brought a constitutional challenge to the existing Promotion of Access to Information Act[256] ('PAIA') and argued that, by failing to make provision for the general disclosure of the funding of private political parties, the statute fell short of constitutional standards. The upshot was that the applicant public-interest organisation had to restart its litigation in the High Court, now using the Constitutional Court majority's preferred framing of its case. This delayed the pursuit of transparency by at least three years, and it did so quite pointlessly:[257] the majority's procedural point is technicist in the extreme, since the substance of the applicant's case, including the adequacy of PAIA, was already fully before the Court, entirely unaffected by the idiosyncratic re-framing on which the majority insisted.[258]

This defeat for Cameron J's judgment may be contrasted with the cases I discussed in stage two. The hallmark of cases like *Glenister II*

256 Act 2 of 2000.

257 See especially R Cachalia 'Botching procedure, avoiding substance: A critique of the majority judgment in *My Vote Counts*' (2017) 33 *South African Journal on Human Rights* 138. The majority's stated justification for its manoeuvre is the 'principle of subsidiarity', according to which parties must pay due regard to relevant legislation (in this case, PAIA), rather than circumventing it by direct appeal to the Constitution. But this reasoning is strange, since it was the essence of the applicants' case that PAIA did *not* govern (or in any way purport to govern) the issue of party funding disclosure: that is exactly why the application was needed. See for further criticism M Murcott & W van der Westhuizen 'The ebb and flow of the application of the principle of subsidiarity – Critical reflections on *Motau* and *My Vote Counts*' (2015) 7 *Constitutional Court Review* 43 at 63-64. And compare Ally (n 92) 242-245.

258 That the change of formal framing did nothing of value is illustrated by the fact that the new judgments, when they later appeared, repeated step-by-step Cameron J's reasoning in the old one, and reached exactly the same conclusion: *My Vote Counts NPC v President of the Republic of South Africa* [2017] ZAWCHC 105; *My Vote Counts NPC v Minister of Justice and Correctional Services* [2018] ZACC 17.

was the Cameron J-led majority's commitment to confronting the most pressing issues in the country, and to overcoming technicality to do so. The majority judgment in *My Vote Counts* is, in that sense, *Glenister II*'s opposite: complacent about the issues of substance, and preoccupied, instead, with pointless procedural wrangling. And if rampant corruption was the defining issue of the 2010s, which *Glenister II* showed a forthright determination to counteract, then *My Vote Counts* suggests a notable loss of conviction. Indeed, we might also note here the judgment in *Helen Suzman Foundation v President of the Republic of South Africa*,[259] the follow-up to *Glenister* itself, in which the Court had to assess whether the government's amended anti-corruption unit was 'sufficiently independent' and thus complied with the standard Moseneke DCJ and Cameron J had laid down in *Glenister II*.[260] The majority, per Mogoeng CJ, did take issue with the new legislation, but not on fundamental bases; a generally deferent attitude to the government's choice of means is evident. Cameron J's dissenting judgment (concurred in by Froneman J and Van der Westhuizen J) went further, charging the majority with a complacent application of *Glenister II*: he would have declared unconstitutional the method by which the head of the new directorate was to be appointed. We thus see, in these cases, that a new force had emerged, generally less suspicious of state power than the Court in its earlier iterations. Accordingly, Cameron J, though he had led majorities in cases like *KZN Joint Liaison* and *Kirland*, came to occupy a different role, namely that of a dissenter. On this score we must note, finally, *Electronic Media Network Limited v E.TV (Pty) Limited*,[261] in which Cameron J and Froneman J's dissent expresses elegant contempt for the Mogoeng-led majority's unwillingness to test the legality of a highly consequential ministerial decision on the basis of the separation of powers.

Of course, the point is not that the Court was never united after September 2014, nor that it failed to act against executive malfeasance. The counterexamples to such a claim would be obvious. The most prominent, undoubtedly, is *Economic Freedom Fighters v Speaker of*

259 [2014] ZACC 32.
260 Compare the discussion of J Froneman & H Taylor 'Judicial dissent and the sceptical scrutiny of power', this volume at 391-395.
261 [2017] ZACC 17.

the National Assembly,[262] in which the Court held unanimously that the Public Protector's recommendation exacting accountability for President Zuma's misuse of public funds was binding, and thus triggered Zuma's overdue demise.[263] Cameron hailed this as a magisterial assertion of constitutional power to arrest executive malfunction that ranks alongside *TAC*.[264] In addition, he gave many impactful judgments after September 2014 that won a majority, some of them in much the same spirit as those I discussed in stage two. Important examples are *Genesis Medical Scheme v Registrar, Medical Schemes*,[265] and of course *Mwelase v Director-General for the Department of Rural Development and Land Reform*,[266] which Cameron J delivered on the day of his retirement, and which took the famous step (against the dissent of Jafta J) of ordering a special master to oversee the Department's stalled process of land reform.[267] Outside the field of administrative law, I have a soft spot for *Democratic Alliance v African National Congress*,[268] in which Cameron J's co-authored judgment, advancing the principles of free speech that he had first voiced in *Holomisa*, prevailed over the worryingly authoritarian approach of Zondo J.[269]

262 *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 11.

263 S Woolman 'A politics of accountability: How South Africa's judicial recognition of the binding legal effect of the Public Protector's recommendations had a catalysing effect that brought down a president' (2016) 8 *Constitutional Court Review* 155. In its sequel, Cameron and Froneman JJ made common cause with Jafta J in the face of Mogoeng CJ's charge of 'judicial overreach': see *Economic Freedom Fighters v Speaker of the National Assembly* [2017] ZACC 47.

264 See eg E Cameron 'Judges, justice, and public power: The Constitution and the rule of law in South Africa' (2018) 18 *Oxford University Commonwealth Law Journal* 73 at 90-91; 'South Africa under the rule of law' (n 147) 514-516.

265 [2017] ZACC 16.

266 [2019] ZACC 30.

267 See respectively, for further discussion of these two cases, C Hoexter 'Transformative constitutionalism in administrative law', this volume at 216-223; S Fredman 'Socioeconomic rights: A lasting legacy', this volume at 308-314.

268 [2015] ZACC 1.

269 See finally *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* [2015] ZACC 29, in which Cameron J and Froneman J's judgment prevailed, with difficulty, over that of Jafta J and Tshiqi AJ. The matter concerned the constitutionality of ss 22 and 24 of the Electronic Communications Act 36 of 2005, which allow licenced persons to enter upon land owned by others in order to lay piping, wiring, etcetera that are needed for 'electronic communication facilities' (typically, broadband). Jafta J and Tshiqi AJ would have struck down the sections as unconstitutional invasions of the rights of owners. Cameron J and Froneman J upheld them on the basis that they could be read as reasonable attempts to balance the competing interests and congruently with the common law. Jafta J

These are powerful victories. My point, nevertheless, is that Cameron J's context changed in an important way once the Jafta–Mogoeng–Zondo bloc had asserted itself and became capable of winning majorities. The shift transcends issues of state power, incidentally, and has come to afflict even the measured approach to horizontal application that Cameron helped to carve out in what I called stage one. In *AB v Pridwin Preparatory School*,[270] a judgment that appeared in 2020,[271] the Court was asked to test the constitutionality of the defendant private school's purported exercise of a contractual power of termination, which the complainant alleged infringed the rights of learners at the school. This seemed a natural role for the doctrine of public policy, of which Cameron JA, as we saw, had been a principal architect. That was indeed how he approached the case. Along with Froneman J, he wrote separately to defend the integrationist approach to the Bill of Rights and the common law that *Brisley* and *Barkhuizen* embody.[272] In contrast, the rightly maligned majority judgment of Theron J, which was concurred in by Jafta J and Madlanga J among others, rejects *Barkhuizen* as irrelevant, and paints the minority's approach as confused and complacent.[273] Her approach rests on a strict separation between contract law and the Constitution, which is difficult to reconcile with Cameron JA's celebrated remarks in *Brisley*, and with

had to revisit and apply Cameron J and Froneman J's judgment in *Telkom SA SOC Limited v City of Cape Town* [2020] ZACC 15, after they had retired; ultimately he affirmed their approach, but showed at least a hint of scepticism. More detailed analysis of the two cases is provided in G Muller '*Civiliter* exercise of a statutory servitude: Reflections on *Link Africa* and *Telkom*' (2021) 11 *Constitutional Court Review* 1.

270 [2020] ZACC 12.

271 The judgment post-dates Cameron's retirement in August 2019, but the case had of course been heard before then.

272 *Pridwin* (n 270) paras 213-219. They also concurred in Nicholls AJ's judgment, which applies *Barkhuizen* and defends the integrationist position in more detail.

273 *Pridwin* (n 270) especially at paras 102-107; also at paras 118-131. See for criticism M Finn 'Befriending the bogeyman: Horizontal application in *AB v Pridwin*' (2020) 138 *South African Law Journal* 591; M Bishop & J Brickhill 'Constitutional law' (2020) 1 *Yearbook of South African Law* 227 at 302-304; L Boonzaier 'Contractual fairness at the crossroads' (2021) 11 *Constitutional Court Review* 229 at 267-273; N Ally & D Linde '*AB v Pridwin Preparatory School*: Private school contracts, the Bill of Rights and a missed opportunity' (2021) 11 *Constitutional Court Review* 275; H Cheadle 'Application' in H Cheadle & D Davis (eds) *South African constitutional law: The Bill of Rights* rev ed (2022) paras 3-9 fn 35b, 3-19, 3-22. For commentary on the judgment elsewhere in this volume, see Davis 'Quo vadis?' (n 95); Michelman 'Redemptive-transformative' (n 125) 550-555.

the judgments on which he relied, like *Pharmaceutical Manufacturers*.[274] This rough treatment for basic prescripts established in the early years of the constitutional era, and for colleagues who had forged it, shows that we can trace the cracks that emerged in stage three into many areas. But *Barnard* and *Turnbull-Jackson* are my founding illustrations, because they show with special clarity and for the first time how power had decisively shifted.

Barnard may mark a transitional moment in a further respect. With hindsight, it seems revealing that Cameron J's co-authored minority judgment concurs (with misgivings) in the majority's outcome, finding against Ms Barnard. That the judgment reaches this result is incongruous, given the judgment's prior reasoning, which lengthily explains why the Commissioner's decision totally failed to advance affirmative action and evinced no consideration at all of the countervailing interests. The reasons the minority offers for the sudden concession to the majority, in the judgment's final three paragraphs,[275] are unpersuasive. My suggestion, then, is that in *Barnard* Cameron J's understanding of his own role, relative to his colleagues, was at a watershed. In mid-2014, Cameron J was still straining to win over his colleagues – as was natural for a judge who, up to that point, had typically been able to carry the majority. He therefore offered as a concession, against his own preferred view, the result that his colleagues thought right.[276] But this attempted détente

274 Compare Finn (n 273) 599-600; L Boonzaier 'Common-law avoidance' (2024) 141 *South African Law Journal* 213 at 233-234.

275 *Barnard* (n 210) paras 121-123.

276 In *Turnbull-Jackson* (n 211), Cameron and Froneman JJ also dissented (or, more precisely, Froneman J wrote a separate judgment, in which Cameron J concurred, and which disagrees with the majority's reasoning albeit not its outcome). This act of dissent may require a different analysis. The thrust of their judgment is that the burden of satisfying s 7(1)(b)(ii) did not squarely arise in the case, and that there was accordingly no 'pressing need to resolve' the *Walele-True Motives* conflict (paras 101-102). Their logic is, however, most unconvincing. It is true that Madlanga J found against the applicant on the facts, even accepting the interpretation of s 7(1)(b)(ii) that was more favourable to him (paras 96-97). In that sense, the Constitutional Court might have declined to settle the contested meanings definitively. Yet the High Court in the case had struggled to deal with the dilemma created by the unclear state of the authorities, and the evidence showed that municipalities across the country were also in a state of confusion. Hence this seemed exactly the sort of conflict an appellate court is meant to resolve. And the stated basis of Froneman J's dissent, namely that *Camps Bay Ratepayers* (n 238) had already sufficiently clarified the meaning of s 7(1)(b)(ii), is hard to credit, given that *Camps Bay Ratepayers* in fact disclaimed the section's relevance (see again n 238 above). So the true motive for Cameron J and Froneman J's act of

was unavailing, and Cameron J's judgments later took on a different character. Rather than hoping to steer the direction of the majority, his dissents became, at times, acts of conscientious objection: expressing his disquiet with the approach of the majority, though with little hope of altering it. (His luminous dissent in *Snyders v De Jager* is the example *par excellence*.)[277] In *Barnard*, however, Cameron J was still adjusting to that new role. Hence his co-authored judgment ended up defending a dissonant position which, in hindsight, he came to regret. Reflecting on the decision shortly after his retirement, he posed the question whether the Court had been 'right to apply its own power against Ms Barnard', and answered it thus:

> It was doubtful to me then, and I doubt it more strongly now. Five years after we decided *Barnard* in September 2014, I cannot help reflecting that we denied her elementary justice. Among the hundreds of cases I decided or helped decide over the last 25 years, Ms Barnard's weighs most heavily on me.[278]

4 Conclusion

These sombre remarks capture well the less favourable climate that prevailed within the Court in Justice Cameron's last five years on it. The nature of his contribution changed accordingly, providing intriguing contrasts with the earlier parts of his judicial career. In what I called the first stage, spanning his time at the High Court and his arrival at the SCA, he helped to entrench constitutionalism in the face of scepticism and resistance from many colleagues. His most influential contributions were in the fraught area of the Bill of Rights' horizontal application, especially *Holomisa*, *Olitzki*, and *Brisley*, in which he sought, successfully

dissent seems to have been more personal than legal: they felt that Madlanga J's dismissal of what Cameron had done in the SCA was uncollegial and ill-judged, so they sought a way of distancing themselves from it – short of actually having to insist, against their eight colleagues, including Jafta J, that *Walele*'s pronouncement was indeed *obiter* and wrong. That would have meant re-inflaming the underlying controversy, and vainly so, since it had become clear they were on the losing side of that issue. Hence they chose instead to opt out of the conflict.

277 *Snyders v de Jager* [2016] ZACC 52.

278 E Cameron & L Boonzaier 'Venturing beyond formalism: The Constitutional Court of South Africa's equality jurisprudence' (2020) 84 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 786 at 808. He made a similar point on Radio 702 in his first post-retirement interview, citing the *Barnard* decision as one of the two 'hardest moment[s] in [his] judicial life': see https://youtu.be/LMO9cjuyiYo?t=2267.

as it turned out, to subordinate disputes between private parties to the logic of constitutional adjudication. In the second stage of Cameron's career, and above all in his early years at the Constitutional Court, he turned to classic problems arising from the judiciary's relationship with the political branches. In *Glenister II* and *KZN Joint Liaison*, my two prime illustrations, he innovated in order to subject governmental power to constitutional standards. The winds within the Court were favourable, and Cameron harnessed and rode them to the very limit. In the third and final stage, however, as we have seen, the circumstances became more perilous. In *Barnard*, Cameron's project of subordinating all public power to lawful scrutiny ran aground upon the issue of race. *Turnbull-Jackson*, a lesser-known and different example, hints not at deep issues of legal principle but at a change in the Court's collegiate politics. It helps to show that Cameron had come to occupy a place more isolated and difficult. In this third stage, he still achieved the signal victories I mentioned, and across the Court some of its basic commitments have never wavered. But Cameron's brand of constitutionalism has become more contested, and its prospects less certain.