

THE ETHOS OF TOLERANCE OF DIVERSITY IN POST-APARTHEID JURISPRUDENCE*

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SUMMARY

This article examines the South African judiciary's understanding, interpretation, and application of the ethos of tolerance of diversity. The case law analysis shows that the courts treat tolerance of diversity as a constitutional value that derives from the Preamble and founding values of the Constitution of the Republic of South Africa, 1996. It also reveals that the courts moreover deduce the ethos of tolerance of diversity from the Bill of Rights, which entrenches rights and protects freedoms that could be classified as the building blocks of tolerance and diversity. Four major themes emerge from the analysis of the judiciary's conceptualisation of the ethos of tolerance of diversity. These are the principles of reasonable accommodation; the right to be different; racial sensitivity; and transformation.

1 INTRODUCTION

The adoption of the Constitution of the Republic of South Africa, 1996, has cemented the democratic transition from apartheid to constitutional democracy. It lays the foundation to "heal the divisions of the past"¹ in a South Africa that "belongs to all who live in it, united in our diversity".² Given South Africa's complex history, the Constitution has emerged as the most critical aspect of transformation in the post-1996 era. Notwithstanding centuries of colonialism and decades of apartheid intolerance, the Constitution represents a compromise that, ideally, enables South Africans to work together towards putting the past behind them and building a constitutional democracy.³ Thus, the promotion of diversity is one of the

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¹ Preamble to the Constitution.

² *Ibid.*

³ Moseneke *All Rise: A Judicial Memoir* (2020) 61.

most important objectives of the post-apartheid constitutional project. However, intolerance is on the rise in South Africa as a result of the exploitation of racial, ethnic, religious, cultural, and language differences, among other factors, which define contemporary South Africa.⁴ The law reports are awash with cases in which judges have expressed their concern against increasing expressions of intolerance such as xenophobia, racism, hate speech, and hurtful commentary in the public discourse.

The judicial understanding, interpretation, and application of the ethos of tolerance of diversity in post-apartheid South Africa are crucial not only because the drafters of the Constitution opted to use the judiciary, headed by the Constitutional Court, to safeguard human rights, support social reconstruction and act as a bridge from apartheid to constitutional democracy,⁵ but also because they recognised the desirability of entrusting the courts to guide the fledgling democracy towards long-lasting peace and justice. This trust, expressed in the wide constitutional powers given to the judiciary in Chapter 8 of the Constitution, makes the judiciary a very powerful branch of government. As such, it is not surprising that in contemporary South Africa, the law is what judges say is the law (or should be the law).⁶ Several cases illustrate this immense judicial power. For instance, post-apartheid judges have struck down entire sections from statutes for unconstitutionality and have inserted provisions into legislation through the reading-in of words into statutes. They have also ordered Parliament to enact specific laws within specific periods to cure what they term constitutional defects in legislation.⁷

This article examines the ethos of tolerance of diversity in post-apartheid jurisprudence to illustrate that South African courts treat tolerance of diversity as a constitutional value. The discussion shows that the courts deduce the ethos of tolerance of diversity from the Preamble, the founding values, and the Bill of Rights in the Constitution. In the first part, after this introduction, the article discusses the meaning of tolerance and diversity to determine whether the definitions found in the literature fit the post-apartheid South African context; and, if so, how and to what extent. The second part is a synopsis of the historical origins of intolerance in colonial and apartheid South Africa. It lays the foundation for the third part, which presents the constitutional aspiration for tolerance of diversity. It also analyses the expression of the ethos of tolerance of diversity in the Bill of Rights by

⁴ *S v Bresler* [2002] JOL 9580 (C) 13–14.

⁵ See Van der Schyff *Judicial Review of Legislation: A Comparative Study of the United Kingdom, the Netherlands and South Africa* (2010) 45.

⁶ See Dube “Separation of Powers and the Institutional Supremacy of the Constitutional Court over Parliament and the Executive” 2020 36(4) *SAJHR* 293, 294, for a discussion of the finality of judicial interpretation of law.

⁷ See, for instance, *Minister of Justice and Constitutional Development v Prince; National Director of Public Prosecutions v Rubin; National Director of Public Prosecutions v Acton* 2018 (6) SA 393 (CC) par 103. For a discussion of how the legislature and cabinet can cure constitutional defects and the underlying principles and considerations that must inform their actions in this regard, see *Minister of Agriculture, Forestry and Fisheries v National Society for the Prevention of Cruelty Against Animals* [2015] ZACC 27.

considering the rights from which the ethos could be deduced, such as the right to equality. The fourth part critiques the four major themes that emerge from post-apartheid judicial understanding, interpretation, and application of the ethos of tolerance of diversity. These themes are the principle of reasonable accommodation; the right to be different; racial sensitivity; and transformation.

2 UNDERSTANDING TOLERANCE AND DIVERSITY

Admittedly, tolerance of diversity is hard to define with precision in the legal context because of the vagueness of its composite terms – tolerance and diversity. Diversity is an ambiguous noun.⁸ However, there is some acceptance that diversity fosters tolerance and multiculturalism.⁹ Witenberg argues that tolerance, like diversity, is also prone to ambiguity and to many interpretations, which include “tolerance of forbearance, putting up with [and] full or indiscriminate acceptance”.¹⁰ The susceptibility of tolerance to many interpretations means that the term is bound to cause confusion and misunderstanding, particularly since the different versions of tolerance do not reveal a clear sequence. For instance, “tolerance of forbearance” and “full or indiscriminate acceptance” appear to be on the opposite ends of the spectrum. Wittenberg appreciates this and says, “that this is not a continuum but different ways to conceptualise tolerance to human diversity”.¹¹ Witenberg settles for tolerance as “a moral virtue, reciprocity and respect.”¹²

Linked to diversity, tolerance catalyses peaceful co-existence between different groups by making acceptance of their differences possible.¹³ Acceptance implies the elimination of unfair discrimination on the basis of difference, making equality a symbol of tolerance. Based on this argument, the right to equality and statutory prohibitions against intolerance in South Africa illustrates the constitutionalisation of diversity as a founding value. It could be for this reason that the inscriptions on the steps of Parliament tie equality with diversity.¹⁴ It also articulates the political and normative nature of tolerance of diversity as a social norm which is enforceable through the exercise of state authority within a broader context of the transformation of society.

⁸ Vertovec “Introduction: Formulating Diversity Studies” in Vertovec (ed) *Routledge International Handbook of Diversity Studies* (2014) 1 4.

⁹ See Gerapetritis *Affirmative Action Policies and Judicial Review Worldwide* (2016) 63.

¹⁰ Witenberg *Tolerance: The Glue that Binds Us: Empathy, Fairness and Reasons* (2016) 34.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ See Walzer *On Toleration* (1997) xii on the necessity of difference in the discourse on tolerance.

¹⁴ The inscriptions on the steps of Parliament represent the values and principles that inform the post-apartheid constitutional project to build a united democratic South Africa that embraces diversity, tolerance, human rights and accountability, among other ethos. For a full exposition of their meaning, see Ramaphosa “Unveiling of Parliamentary inscriptions” *Government of the Republic of South Africa* <https://www.gov.za/speeches/president-cyril-ramaphosa-unveiling-parliamentary-inscriptions-19-mar-2019-0000> (accessed 2021-11-30).

Witenberg also defines tolerance as “putting up with something we dislike or even abhor”¹⁵ in the interest of maintaining peace and harmony. In the context of a fractured society like post-apartheid South Africa, the level of endurance (and tolerance) proposed by Witenberg might provide the answer against social implosion since tolerance of diversity is critical to the maintenance of peace.¹⁶ However, endurance implies that what is tolerated is undesirable, inferior, wrong, threatening, or evil.¹⁷ In this light, the endurance proposed by Witenberg also implies a compromise (under duress) for something that one would, given a choice, reject out of hand. Witenberg justifies this view by presenting tolerance as having a prejudice against someone, a group of people, or something, but restraining oneself from acting on that prejudice since doing so would upset the balance of norms established by society.¹⁸ As such, Witenberg’s view of tolerance does not mean extinguishing bias and prejudice against those who are different from us but merely suppressing oneself from acting on that bias and prejudice.

However, Wittenberg’s view seems to reinforce tolerance as a manifestation of superiority and power. This view is supported by Walzer, who says that inequality between groups, those groups that are tolerating and those groups being tolerated, puts the individuals in the latter group in an inferior position, since “to tolerate someone else is an act of power; to be tolerated is an acceptance of weakness”.¹⁹ After some reflection on Walzer’s proposition, one might understand why tolerance could be regarded as a manifestation of superiority and power. The essence, it appears, is not so much on the “superior” person’s (misguidedly perceived) power but their prejudicial beliefs. Evidently, society has an interest in restraining expressions of prejudicial beliefs as such expressions are, in fact, acts of intolerance that do more harm than good to support peace and harmony in divided societies. The following section provides a synopsis of the origins of intolerance in colonial and apartheid South Africa to contextualise the high levels of intolerance in contemporary times and to appreciate why society has an interest to protect diversity.

3 A CURSORY GLANCE AT THE HISTORICAL ORIGINS OF INTOLERANCE IN SOUTH AFRICA

The discussion of the origins of intolerance in this section also intends to enhance the understanding and appreciation of the tolerance of diversity as a constitutional value. The analysis only goes as far as history impinges on

¹⁵ Witenberg *Tolerance: The Glue that Binds Us: Empathy, Fairness and Reasons* 36.

¹⁶ Walzer *On Toleration* 15.

¹⁷ Witenberg *Tolerance: The Glue that Binds Us: Empathy, Fairness and Reasons* 38 lists “race, culture, nationality, religious practices, beliefs, attitudes and colour” as some of those which are to be tolerated.

¹⁸ Witenberg *Tolerance: The Glue that Binds Us: Empathy, Fairness and Reasons* 36.

¹⁹ Walzer *On Toleration* 52.

the constitutional injunctions for tolerance and diversity. Sachs J said that an understanding and appreciation of South Africa's history is important because "if we allow bitter division and opposition to continue, even in terms of memories of the past, our future will be based on separation and mistrust".²⁰ As such, the discussion of the painful aspects of South Africa's history in this section and the article in general (as far as tolerance and diversity are concerned), is undertaken for genuine analytical and contextual purposes. It has no political motivation and should be understood as no more than a scholarly dissection of a very complex past. The author hopes that the understanding of this history might give South Africans something to think about in the broad discussion of tolerance and diversity.

The historical analysis reveals that intolerance of diversity emanated from skewed feelings of racial superiority held by European colonial settlers (mainly Dutch and English) when they arrived in South Africa. The settlers gave themselves the moral justification to reject, with utter contempt and often with brutal force, the humanity, culture, languages, beliefs, and other aspects of African life.²¹ The apartheid government, for its part, exploited racial and ethnic differences for its selfish political ends. In the end, apartheid became an embodiment of intolerance of diversity.²² As such, the struggle against apartheid was one for tolerance of diversity and the inclusion of the marginalised communities in the political and economic affairs of the state.

The social divisions created by the codification of intolerance of diversity under the apartheid system were so deep that the largely peaceful transition from apartheid to constitutional democracy was viewed as a miracle.²³ In a state in which intolerance was a creature of statute and in which race was perversely exploited for political ends, it is not surprising that the post-apartheid democratic government inherited a fractured society.²⁴ Although the democratic transition of the early 1990s marked the end of codified intolerance and ushered in a new era of unity in diversity, the problems created by the apartheid system still plague South Africans. The only antidote to a lapse into intolerance is respect for the Constitution, which is an enduring commitment to the protection, promotion, and celebration of

²⁰ Sachs *We, the People: Insights of an Activist Judge* (2016) 55.

²¹ Meierhenrich *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652–2000* (2008) 23 notes that in 19th Century South Africa, "colonisation remained wedded to brutal exploitation of the conquered population".

²² Gibson and Gouws *Overcoming Intolerance in South Africa: Experiments in Democratic Persuasion* (2003) 29 opine that apartheid was a synonym for intolerance.

²³ See Klug *Constituting Democracy: Law Globalism, and South Africa's Political Reconstruction* (2000) 69. Some of the most notorious statutes which codified intolerance in apartheid South Africa were the Group Areas Act 41 of 1950 (which created different residential areas for different races) and the Immorality Amendment Act 21 of 1950 (which criminalised interracial relations and marriages)

²⁴ See Wafer "Diversity, Xenophobia and the Limits of the Post-Apartheid State" in Vertovec (ed) *Routledge International Handbook of Diversity Studies* (2014) 184 166.

diversity against the background of a long history of exclusion and intolerance.²⁵

4 THE CONSTITUTIONAL ASPIRATION FOR TOLERANCE OF DIVERSITY

It has been noted that one of the most important objectives of the post-apartheid constitutional project is to promote diversity.²⁶ In *Prince v President of the Law Society of the Cape of Good Hope*, the Court declared that tolerance and respect for diversity are constitutional values.²⁷ This declaration is significant as it effectively places tolerance of diversity among constitutional norms. The Court's observation emanated from the fact that the Constitution articulates, in detail, the shared aspirations of South Africans, the values which bind them, and the direction for their future.²⁸ Through historical reflections, the Constitution commits the state to build a stable foundation for the future.²⁹ Such a foundation is only possible in a state which values tolerance of diversity, and which gives every individual the opportunity to free their potential.³⁰

The Constitution premises the aspirations for tolerance of diversity on the urgency to "heal the divisions of the past"³¹ and to charter a new path for peaceful co-existence guided by the recognition that "South Africa belongs to all who live in it, united in our diversity".³² The Constitution also establishes a post-apartheid democratic state founded on the achievement of equality, human dignity, and other rights and tenets of constitutionalism that enables democracy to thrive in South Africa. The Preamble of the Constitution is an expression of the constitutional commitment to building a nation that is united in diversity and in which reconciliation, understanding, mutual respect, and care inform individual and state conduct. The underlying constitutional spirit is that the mistrust, acrimony, and racial divisions created by the apartheid ideology and its brutal enforcement could only be overcome by a legal order built on the foundations of tolerance, diversity, and inclusion. In the uniquely South African situation, tolerance, diversity, and inclusion are essential prerequisites for long-lasting peace and justice.

Although the constitutional aspiration for tolerance of diversity is uncontested, the exact point in history at which South Africa embraced the

²⁵ See *MEC for Education: KwaZulu-Natal v Pillay* 2008 (2) BCLR 99 (CC) par 65.

²⁶ *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC) par 22.

²⁷ *Prince v President of the Law Society of the Cape of Good Hope* 2002 (3) BCLR 231 (CC) par 150.

²⁸ See *S v Makwanyane* 1995 (6) BCLR 665 (CC) par 262.

²⁹ *Ibid.*

³⁰ For a discussion, see *AB v Minister of Social Development* 2017 (3) BCLR 267 (CC) par 52.

³¹ See the preamble to the Constitution.

³² *Ibid.*

ethos of tolerance and diversity has not been clear. In *Amod v Commission for Gender Equality*,³³ the court narrowed down the period as follows:

“[T]he new ethos of tolerance, pluralism and religious freedom ... had consolidated itself in the community even before the formal adoption of the interim Constitution on 22 December 1993. The new ethos had already begun in 1989 with the publication of the report on Group and Human Rights by the South African Law Commission, recommending the repeal of all legislation inconsistent with a negotiated bill of fundamental rights; it accelerated with the speech of the former State President on 2 February 1990 and the unbanning and the visibility of the previously prohibited political movements and it finally became irreversible with the commencement and conclusion of negotiations at CODESA from 1991 until 1993. The new ethos was firmly in place when the cause of action in the present matter arose on 25 July 1993.”

In *Ryland v Edros*,³⁴ a judgment delivered under the constitutional setting of the transitional Constitution, the court eloquently articulated and comprehensively listed the constitutional principles and provisions which require tolerance of diversity.³⁵ Notably, the Court identified tolerance of diversity as a constitutional value that stands at the same level as equality, which, under the 1996 Constitution, is both a founding value and a standalone right.³⁶ The Court recognised the bundle of equality, tolerance, and diversity as one of the cornerstones of the pluralistic South African society founded on constitutional democracy. The Court treated tolerance, diversity, and equality as the constitutional values against which it could test whether there was a divergence with public policy. The Court further observed that the principles of equality, tolerance, and reasonable accommodation underlie the Bill of Rights and are manifest in the Constitution in the following terms:³⁷

- a) Equality, social justice, and human dignity.
- b) The prohibition against discrimination.
- c) The non-derogability of the right to human dignity.
- d) The right to freedom of conscience, religion, thought, belief and opinion.
- e) Protection of language rights and cultural diversity.
- f) Racial and gender equality.
- g) National unity.

In addition to the above, *ubuntu*³⁸ is also considered as one of the building blocks of a democratic society founded on human dignity, equality, and

³³ *Amod v Commission for Gender Equality* 1999 (4) SA 1319 (SCA) par 20.

³⁴ [1996] 4 All SA 557 (C) 573.

³⁵ The constitutional principles were listed in Schedule 4 of the transitional Constitution and were incorporated into the current Constitution, as certified by the Court in *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (1) BCLR 1 (CC).

³⁶ See also *Cloete v Maritz* [2013] JOL 30337 (WCC) par 44. Equality is found in s 1 of the Constitution as a founding value and in s 9 of the Constitution as a human right.

³⁷ *Ryland v Edros supra* 572.

³⁸ *Ubuntu* is defined as humanness of heart and feeling for others. It is rooted in social justice and care – Bryant *A Zulu-English Dictionary* (1905) 455.

freedom.³⁹ Although its application in contemporary South Africa is subject to debate,⁴⁰ it is not difficult to accept that its invocation in judicial reasoning represents its appeal in the constitutional project of building a just and equitable society that is committed to the tolerance of diversity. It is very difficult to imagine a serious engagement of human rights, such as the right to equality and dignity, that does not include references to *ubuntu*. This is because the Constitutional Court embraced *ubuntu* as an embodiment of the Constitution's protective layer that guards human rights and protects the worth and well-being of every individual. In *Makwanyane*, Mohammed DJP declared that indigenous value systems (such as *ubuntu*) are the "premise from which we need to proceed and are not wholly unrelated to our goal of a society based on freedom and equality".⁴¹ He proceeded, with other judges of the Constitutional Court, to declare the death penalty unconstitutional for, *inter alia*, contradicting the spirit of *ubuntu*. In his view, indigenous values such as *ubuntu*, which had been historically disregarded, could be injected into judicial adjudication to create an inclusive South African jurisprudence.⁴² This approach indicates his view and wishes for the judiciary to not only foster tolerance of diversity for all people but also for the acceptance of the cultures and values of historically marginalised people.

Returning to the Bill of Rights and its application to the advancement of the post-apartheid constitutional project, it is noted that the fulfilment of the rights which it enshrines advances the constitutional aspiration for tolerance of diversity. For instance, fostering human dignity requires tolerance of racial, religious, and cultural diversity since the senses of self-worth and acceptance of individuals are linked to the respect accorded by society to the groups to which the individuals belong.⁴³ One could agree with Bonfiglio, who views the protection of rights and freedoms in multicultural societies as basic ingredients for tolerance of diversity.⁴⁴ This view is reflected in several cases decided in post-apartheid South Africa, as discussed below.

In *Kotzé v Kotzé*,⁴⁵ the court recognised the importance of the envisaged constitutional values of tolerance and diversity. It concluded that without tolerance of diversity, the rights in the Bill of Rights would not be fulfilled and that the Bill of Rights will remain a hollow promise to all persons whom it

³⁹ *S v Makwanyane supra* par 304.

⁴⁰ For some discussions of *ubuntu* and its relevance to human dignity, equality and freedom, among other constitutional values and rights, see, in general, Praeg "An Answer to the Question: What is [ubuntu]" 2008 27(4) *South African Journal of Philosophy* 367; Hutchison "From Bona Fides to Ubuntu: The Quest for Fairness in the South African Law of Contract" 2019 1 *Acta Juridica* 99; Himonga, Taylor and Pope "Reflections on Judicial Views of Ubuntu" 2013 16(5) *PER/PELJ* 369; Chibvongodze "Ubuntu is Not Only About the Human! An Analysis of the Role of African Philosophy and Ethics in Environment Management" 2016 53(2) *Journal of Human Ecology* 157.

⁴¹ *S v Makwanyane supra* par 304.

⁴² *S v Makwanyane supra* par 306.

⁴³ See *R v Keegstra* (1990) 3 CRR (2d) 193 (SCC) par 227–228.

⁴⁴ Bonfiglio *Intercultural Constitutionalism: From Human Rights Colonialism to a New Constitutional Theory of Fundamental Rights* (2019) i.

⁴⁵ *Kotzé v Kotzé* [2003] JOL 11479 (T) 5–6.

promises the prospect of living in a society that values human dignity, equality, and freedom. Thus, it is not difficult to grasp that the adoption of the final Constitution was one of the first steps towards the establishment of a legal order that champions the ethos of diversity and tolerance of difference in society towards the promotion and protection of rights enshrined in the Bill of Rights.⁴⁶

The right to equality, entrenched in section 9 of the Constitution, applies to the discourse on tolerance of diversity, as it requires the elimination of all forms of unfair discrimination, which are driven by bias, prejudice, and false feelings of racial and ethnic superiority. Within the constitutional context of the right to equality, tolerance of diversity requires more than self-restraint against acting in a biased and prejudicial manner but also embracing differences in race, colour, culture, language, and other criteria based on which discrimination is perpetuated in society. This, in turn, requires legislative action to redress the effects of past discrimination. The Promotion of Equality and Prevention of Unfair Discrimination Act is the main legislation enacted by Parliament to foster tolerance of diversity by building

“a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom”.⁴⁷

The right to equality also entails preferential treatment for previously disadvantaged groups through affirmative action. Giving a group preferential treatment to compensate for a discriminatory past enhances diversity by enabling previously disadvantaged groups to participate in governance, in the economy, and in social settings.⁴⁸ Levelling the playing field fosters equality and eliminates perceptions of racial and ethnic superiority in society. However, tolerance of diversity should not be confused with affirmative action since affirmative action is a means to achieve diversity in society. Treating affirmative action as the euphemism for diversity distorts the proper understanding of tolerance of diversity.⁴⁹

5 MAJOR THEMES IN THE JURISPRUDENCE ON TOLERANCE OF DIVERSITY

In several cases, South African judicial officers have remarked on tolerance and diversity, thereby inserting their (judicial) opinions and other interpretations of the law in the discourse. The jurisprudence developed by the courts on tolerance of diversity is interesting, particularly when

⁴⁶ See *Volks v Robinson* [2005] 2 BCLR 101 (CC) par 181.

⁴⁷ See the Preamble to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

⁴⁸ See Gerapetritis *Affirmative Action Policies and Judicial Review Worldwide* 27.

⁴⁹ Cohen and Sterba *Affirmative Action and Racial Preference: A Debate* (2003) 38 view affirmative action as the euphemism for tolerance. For criticisms of diversity in relation to affirmative action, see Vertovec in Vertovec (ed) *Routledge International Handbook of Diversity Studies* 13.

examining decisions in which the Constitutional Court pronounced on some of the most contested issues, such as lawful discrimination,⁵⁰ the renaming of streets,⁵¹ and tuition language in institutions of higher learning.⁵² In addition to its position at the apex of the judiciary, the Constitutional Court is an institutional embodiment of the promotion of the aspirations for South Africans united in their diversity.⁵³ Whereas South Africans have an equal claim to the Constitution and have a moral and legal obligation to fulfil its vision,⁵⁴ the Constitutional Court is the highest institution through which the ethos of tolerance of diversity could be given binding judicial meaning. The Court has the final say on the meaning and interpretation of the Constitution, including its ethos, such as tolerance of diversity. This section identifies the major themes in the jurisprudence developed by the courts on tolerance of diversity. The selected themes include reasonable accommodation, the right to be different, the need for racial sensitivity, and transformation. It is noted that there is no evidence that this list is exhaustive.

5 1 Reasonable accommodation

In *Makwanyane*, one of its most celebrated judgments, the Constitutional Court linked the accommodation of others, transformation, equality, and tolerance as follows:

“Constitutionalism in our country also arrives simultaneously with the achievement of equality and freedom, and of openness, accommodation and tolerance. When reviewing the past, the framers of our Constitution rejected not only the laws and practices that imposed domination and kept people apart, but those that prevented free discourse and rational debate, and those that brutalised us as people and diminished our respect for life.”⁵⁵

Sachs J, one of the judges who decided *Makwanyane*, further developed the Court’s jurisprudence on reasonable accommodation in his extra-curial writings. In his book, *We, the People: Insights of an Activist Judge*, he argues that accommodation is a matter of principle meant to enable the people of a diverse society to live together in dignity, dialogue, and difference.⁵⁶ Sachs J is correct in arguing that in a diverse society, accommodation entails “finding the means of living together”⁵⁷ for everyone

⁵⁰ See, for instance, *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC); *Solidarity obo Pretorius v City of Tshwane Metropolitan Municipality* [2016] 7 BLLR 685 (LC); and *South African Police Service v Solidarity obo Barnard* 2014 (10) BCLR 1195 (CC).

⁵¹ *City of Tshwane Metropolitan Municipality v Afriforum* 2016 (9) BCLR 1133 (CC).

⁵² *AfriForum v University of the Free State* 2018 (4) BCLR 387 (CC); *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch* 2019 (12) BCLR 1479 (CC); *Chairperson of the Council of UNISA v AfriForum* [2021] ZACC 32.

⁵³ Sachs *We, the People: Insights of an Activist Judge* 142.

⁵⁴ Sachs *We, the People: Insights of an Activist Judge* 6.

⁵⁵ *S v Makwanyane supra* par 391.

⁵⁶ Sachs *We, the People: Insights of an Activist Judge* 142.

⁵⁷ *Ibid.*

to feel a sense of belonging in “South Africa [which] belongs to all who live in it.”⁵⁸ Expressing the vision for diversity in the Constitution, he contextualises the need for tolerance and accommodation as follows:

“We struggled for the right to be the same, to be equal. But to be the same did not mean that we had to be identical. It did not require suppressing our own characteristics to fit into the mould created by the dominant minority. It meant the right to be treated equally, as you were, whoever you were.”⁵⁹

Sachs J stretched the reasonable accommodation test very wide and said that from a Bill of Rights perspective, the test of tolerance “comes not in accepting what is familiar and easily accommodated, but in giving reasonable space to what is “unusual, bizarre or even threatening”.⁶⁰ In the South African historical context, accepting what is “unusual, bizarre or even threatening” might mean many things, which include embracing affirmative action and its transformative agenda. It also means accepting religions that evangelise in different ways, such as requiring and permitting the smoking of cannabis for religious purposes. In *Prince v President of the Law Society of the Cape of Good Hope*,⁶¹ the Constitutional Court dealt with the tolerance of diversity of religious faiths. First, the Court acknowledged that the Constitution commits South Africans to the tolerance of diversity through reasonable accommodation of all that is perceived to be different from the “mainstream”.⁶² Secondly, the Court observed that reasonable accommodation of difference entails the employment of less restrictive measures to accommodate that which is different.⁶³ Thirdly, the Court expressed its displeasure at intolerance, the various forms through which it manifests, and its destructiveness when propelled by state power to aggressively target “the alternative”.⁶⁴ Notwithstanding this approach, the majority of the Court ultimately found that the failure to accommodate the Rastafarian religious practices of smoking cannabis was constitutionally valid largely because it would be difficult to police. This was a temporary setback for the Rastafari, as the Court accepted, almost two decades later, that the prohibition on the personal possession and use of cannabis is inconsistent with the constitutional right to privacy.⁶⁵

The essence of diversity is inclusion and tolerance. In certain circumstances, diversity requires individuals to endure a limited form of discomfort and loss of convenience to accommodate others.⁶⁶ Several cases

⁵⁸ See the preamble to the Constitution.

⁵⁹ Sachs *We, the People: Insights of an Activist Judge* 170.

⁶⁰ *Prince v President of the Law Society of the Cape of Good Hope supra* par 172.

⁶¹ *Ibid.*

⁶² *Prince v President of the Law Society of the Cape of Good Hope supra* par 79.

⁶³ *Ibid.*

⁶⁴ *Prince v President of the Law Society of the Cape of Good Hope supra* par 145 (per Sachs J).

⁶⁵ *Minister of Justice and Constitutional Development v Prince; National Director of Public Prosecutions v Rubin; National Director of Public Prosecutions v Acton supra* par 129.

⁶⁶ Cameron *Justice: A Personal Account* (2014) 226.

have come before the courts in which diversity had to be considered as a trade-off for comfort and convenience. The first two language cases decided by the Constitutional Court – *Afriforum v University of Free State* and *Gelyke Kanse* – are some of the examples of the application of the ethos of inclusion, tolerance, and reasonable accommodation in case law. In these two cases, the underlying message from the Court is that the convenience of Afrikaans-speakers to learn in their mother tongue must be traded-off for the broader interests of society to eliminate appearances of linguistic privilege and prejudice in higher education. In a separate contribution elsewhere, the desirability of this approach and its implications for linguistic tolerance is examined.

In addition to reasonable accommodation through inclusiveness and tolerance, the jurisprudence of the Constitutional Court seems to point to the celebration of diversity as a constitutional value. In *MEC for Education: KwaZulu-Natal v Pillay*,⁶⁷ the Court had to decide on the reasonable accommodation of the wearing of nose studs by learners in schools. Addressing the argument that permitting learners to wear nose studs would encourage other learners to “come to school with dreadlocks, body piercings, tattoos and loincloths”,⁶⁸ Langa CJ said that the expression of diverse cultures in schools is a cause for celebration, not fear. The judgment by Langa CJ shows the serious commitment of the Constitutional Court to inclusiveness and the protection of diversity through tolerance. It also championed the right to be different.

5.2 The right to be different

The principle of reasonable accommodation is built on the foundation of the right to be different. Reflecting on South Africa’s history of dictatorial segregation, the Court alluded to “the right to be different”, which has arisen as one of the most precious qualities of the constitutional dispensation.⁶⁹ The Court further reiterated that when faced with a case in which it had to decide on the reasonable accommodation of a minority, it would summon its “astute jurisprudential technique” to facilitate the resolution of the dispute in a manner which is not only central to the constitutional order but which also heeds “the clarion call of tolerance”⁷⁰ which should resonate in society with force.

In *Christian Education v Minister of Education*,⁷¹ the Court also examined the right to be different in language, culture, and religion, among other characteristics, and noted that in a constitutional democracy, minorities often have to rely on the judicial, rather than the legislative process, to protect

⁶⁷ *MEC for Education: KwaZulu-Natal v Pillay supra* par 107.

⁶⁸ *Ibid.*

⁶⁹ *Prince v President of the Law Society of the Cape of Good Hope supra* par 170 (per Sachs J).

⁷⁰ *Prince v President of the Law Society of the Cape of Good Hope supra* par 171.

⁷¹ *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC).

their right from majoritarian encroachment. The Court reiterated that the protection of minorities requires “a qualitative [approach] based on respect for diversity.”⁷² Echoing his remarks in *Prince v President of the Law Society of the Cape of Good Hope*, Sachs J noted that minorities would better be protected by the judiciary when they “express their beliefs in a way that the majority regard as unusual, bizarre or even threatening”.⁷³ In *ANC v Sparrow*, the court emphasised the need for the protection, promotion, and restoration of human dignity under the Constitution, whose underlying values prescribe the celebration of difference, as opposed to intolerance.⁷⁴ Like other courts, the Court contextualised its analysis on the Preamble and the historical setting of injustice which informed the adoption of the Constitution. The celebration of differences was also reiterated in *Commission of Staff Association obo Roeber-Maduba*, in which the CCMA alluded to the need for diversity training in the workplace as part of the first steps towards building inclusive workplaces.⁷⁵ It was hoped that diversity training would sensitise employees against racial prejudice and bias, thereby building inclusive workplaces by fostering racial sensitivity.

5 3 Racial sensitivity

In *City of Tshwane Metropolitan Municipality v Afriforum*,⁷⁶ Mogoeng CJ said that the achievement of the constitutional aspirations for unity in diversity requires a complete rejection of racial intolerance and racial insensitivity. The reasoning was followed by the Equality Court (also sitting as the High Court of South Africa) in *Nelson Mandela Foundation v Afriforum*,⁷⁷ when the Court took issue with Afriforum’s attempts to defend the gratuitous display of the old flag because of the hurtful colonial and apartheid past which the flag symbolises. Afriforum’s position should be understood in the context that its leaders deny that apartheid was a crime against humanity and have squarely laid the blame for apartheid at the feet of Africans,⁷⁸ whose human dignity was ravaged by the apartheid regime.⁷⁹ The Court interpreted the use of the old flag in gatherings organised by Afriforum as a reflection of the indifference of Afriforum, its supporters, and funders to the atrocities of apartheid.

⁷² *Christian Education South Africa v Minister of Education supra* par 25.

⁷³ *Ibid.*

⁷⁴ *ANC v Sparrow* [2016] ZAEQC 1 37–38.

⁷⁵ *Commission Staff Association obo Roeber-Madubanya v Commission for Conciliation, Mediation and Arbitration* [2018] 4 BALR 359 (CCMA) par 35.

⁷⁶ *Supra* par 11.

⁷⁷ *Nelson Mandela Foundation Trust v Afriforum NPC* 2019 (10) BCLR 1245 (EqC) par 74.

⁷⁸ De Vos “Afriforum Will Never Forgive Black People For Apartheid” <https://constitutionallyspeaking.co.za/afriforum-will-never-forgive-black-people-for-apartheid/> (accessed 2020-02-28).

⁷⁹ See *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (10) BCLR 968 (CC) par 208.

The fact that it took an order of the Equality Court to stop Afriforum from gratuitously associating itself with the apartheid regime says a lot about the organisation and all persons who subscribe to its ideology. This is because the old South African flag, like its Confederate counterpart in the United States, is not just an artefact from the past; it is a symbol of certain ideas. In the South African context, the old flag is a symbol of the discriminatory and oppressive colonial and apartheid epochs.⁸⁰ In the United States, the following is said about the Confederate flag:

“Today, the use of the Confederate flag is often controversial. While a number of non-extremists still use the flag as a symbol of Southern heritage or pride, there is growing recognition, especially outside the South, that the symbol is offensive to many Americans. However, because of the continued use of the flag by non-extremists, one should not automatically assume that display of the flag is racist or white supremacist in nature. The symbol should only be judged in context.”⁸¹

When looking at the utterances of Afriforum, particularly the defence of the gratuitous display of the old flag, a balancing act must be struck between freedom of expression and, on the other hand, pluralism, and tolerance of diversity. A careful balancing act is important since the democratic South African society is built on freedom (including freedom of expression)⁸² and tolerance of diversity.⁸³ In the light of the ethos of tolerance of diversity, all forward-thinking South Africans have an obligation to honour the legitimate commitment to building a united South Africa. This moral obligation entails disassociating with and speaking against the actions of those who stoke the fires of intolerance for selfish political ends. Apartheid denialism is not only insensitive to those who suffered under it and to those who continue to bear the brunt of its many injustices – it is also an insult to many South Africans who have tried to build a united and diverse South Africa.

The denialism of apartheid atrocities disturbs many South Africans and will do so for many years. It could also backfire against those who believe that such denialism absolves them from being implicated in apartheid directly or as beneficiaries of its laws and policies. In *Daniels v Scribante*, Cameron J contextualised this reality by saying that “the past is not done with us ... it is not past ... it will not leave us in peace until we have reckoned with its claims to justice”.⁸⁴ The underlying tone in Cameron J’s powerful judgment is that some of the current and future generations of South Africans will have to take the fall for apartheid and bear the brunt of transformative efforts aimed at correcting the injustices of the apartheid system. The Constitutional Court endorses the concept of lawful discrimination and has held that although the current generation of some

⁸⁰ See, in general, *Nelson Mandela Foundation Trust v Afriforum supra*.

⁸¹ Fighting Hate for Good “Confederate Flag” <https://www.adl.org/education/references/hate-symbols/confederate-flag> (accessed 2020-06-06).

⁸² See s 1(d) of the Constitution.

⁸³ See the Preamble to the Constitution and the various cases discussed above.

⁸⁴ *Daniels v Scribante* 2017 (8) BCLR 949 (CC) par 154.

South Africans did not partake in the apartheid system, they must accept transformation, which is aimed at correcting the injustices of the apartheid order.⁸⁵

5 4 Transformation

Post-apartheid South Africa adopted transformation to overcome the legacies of the past. Transformation symbolises the unprecedented, and yet peaceful, drive towards the achievement of equality and the diversity and tolerance that equality requires. Venter submits that South Africa adopted transformation because of “the need for change, adaptation and the creation of a modified society”, which champions reconciliation, unity and social reconstruction.⁸⁶ Langa CJ, described as “a transformative justice” and “a man who knew the meaning of transformation”;⁸⁷ remarked as follows:

“Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant. This is perhaps the ultimate vision of a transformative, rather than a transitional Constitution. This is a perspective that sees the Constitution as not transformative because of its peculiar historical position or its particular socio-economic goals but because it envisions a society that will always be open to change and contestation, a society that will always be defined by transformation.”⁸⁸

In the context of this work, tolerance of diversity requires individuals to embrace transformation so that their attitudes, utterances, and acts reflect the spirit of unity in diversity. However, the law cannot compel individuals to change their beliefs, no matter how abhorrent such beliefs may be – it can only go so far as to suppress and punish the expression of beliefs that manifest intolerance. However, transformation requires some groups in society to make or accept uncomfortable sacrifices. Such sacrifices often go against individual desires, particularly when equality is involved and where one either must lose a privilege or where one must endure “fair” discrimination in correcting a past injustice. This is often the case in workplace appointments and state procurement.

The Constitution and the transformative spirit which it embodies do not self-execute. It is the people of South Africa, in their diversity, who can translate the constitutional aspirations into real change using the instruments

⁸⁵ See *Bato Star Fishing v Minister of Environmental Affairs* 2004 7 BCLR 687 (CC) par 74.

⁸⁶ Venter “The Limits of Transformation in South Africa’s Constitutional Democracy” 2018 34(2) *SAJHR* 143, 144, 151.

⁸⁷ See De Vos “Pius Langa: A Man Who Knew the Meaning of Transformation” <https://constitutionallyspeaking.co.za/pius-lang-a-man-who-knew-the-meaning-of-transformation/> (accessed 2020-03-11).

⁸⁸ *Ibid.*

provided by the Constitution.⁸⁹ Hence, the realisation of the ethos of tolerance of diversity depends on the implementation of the founding constitutional values and principles. Progressive judicial interpretation in the last two decades has shown that robust litigation plays a critical role in transformation. As a result of litigation, the courts have had opportunities to pronounce on transformation in pursuit of the fulfilment of the rights and freedoms embodied in the Bill of Rights. The law has further played a critical role in fostering tolerance of diversity by discouraging and punishing hate speech,⁹⁰ hurtful speech, racism, and unlawful discrimination, among several other manifestations of intolerance. The central role played by the courts in this regard is part of the promotion of nation-building.⁹¹

The courts have been driven by the reality that the fulfilment of the promises of the Constitution, its values, and ideals are wholly dependent on addressing the injustices of the past through transformative judgments. The courts are committed to building a just, free and equal South Africa that not only dismantles the ugly legacy of a discriminatory past but also places *ubuntu* at the epicentre of transformation.⁹² This vision of tolerance of diversity is unprecedented in the history of South Africa. It is further reinforced with executive policies and legislation. Affirmative action legislation, such as the Employment Equity Act,⁹³ and the proposed National Strategy on Social Cohesion and Nation Building,⁹⁴ stand as two examples of the fulfilment of the constitutional spirit of a just, free and equal South Africa.

Post-apartheid South Africa has achieved several milestones towards fostering tolerance through the creation of conducive spaces for inclusion by dismantling the legacies of historical barriers through transformation. In this regard, the adoption of a justiciable Bill of Rights is viewed in this work as the most critical aspect of the constitutional project towards an inclusive and tolerant society. The Bill of Rights is more relevant in that it is informed by the reality that the Constitution belongs to all the people of South Africa, “united in diversity” and that every South African has an equal but undivided claim to the Constitution.⁹⁵ Thus, Sachs J is correct when he metaphorically

⁸⁹ See Fowkes “The People, the Court and Langa Constitutionalism” 2015 *Acta Juridica* 75 76–77 for an analysis of the extra-curial writings of Langa CJ on the role of the people in executing the Constitution for the betterment of their lives.

⁹⁰ On hate speech, see *Qwelane v South African Human Rights Commission* 2021 (6) SA 579 (CC).

⁹¹ Le Roux and Davis *Lawfare: Judging Politics in South Africa* (2019) (forward).

⁹² Le Roux and Davis *Lawfare: Judging Politics in South Africa* (preface).

⁹³ Employment Equity Act 55 of 1998.

⁹⁴ Government of the Republic of South Africa “Creating a Caring and Proud Society: A National Strategy for Developing an Inclusive and Cohesive South African Society” <http://www.dac.gov.za/sites/default/files/NATIONAL-STRATEGY-SOCIAL-COHESION-2012.pdf> (accessed 2020-11-29). This proposed national strategy seeks to put the need for social cohesion and nation-building into perspective, to identify threats to social cohesion and to propose strategies and programmes for increasing social cohesion and nation-building (see page 8).

⁹⁵ See Sachs *We, the People: Insights of an Activist Judge* 1.

describes the Constitution as “a glittering shield in which we all see our faces reflected”.⁹⁶ While protecting the poor from the excesses of the rich and powerful, the Constitution also provides a defence for the rich to claim equal rights,⁹⁷ although the jurisprudence of the Constitutional Court has established that when competing interests are weighed at a constitutional level, the scales of justice ought to weigh in favour of those who have little resources to defend themselves against the high and mighty. This is transformative judicial reasoning.

The courts bring the ideals of transformation into reality through transformative constitutionalism.⁹⁸ The Constitutional Court refers to transformative constitutionalism as one of its guiding founding values and principles.⁹⁹ The Court has adopted the view that its approach to constitutional interpretation will ultimately deliver on transformative constitutionalism.¹⁰⁰ Since it is within the province of the Court to “articulate the fundamental sense of justice and rights shared by the whole nation as expressed in the text of the Constitution”,¹⁰¹ it could be argued that transformative constitutionalism (as applied by the Court) might prove critical in understanding the ethos of tolerance of diversity. The essence of transformative constitutionalism – as understood and applied by the courts – is that the founding constitutional values inform the judicial assessment of the prevailing legal convictions of contemporary South African society within the context of tolerance, diversity, and pluralism.¹⁰²

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ Klare “Legal Culture and Transformative Constitutionalism” 1998 *SAJHR* 146, 150 defines transformative constitutionalism as nation-wide change in society through political processes grounded on peace and anchored on the law. Frankenberg *Comparative Constitutional Studies: Between Magic and Deceit* (2018) 101 views transformative constitutionalism as a radical and “unwavering commitment to social transformation that is expressed in the aspirational rhetoric calling for the ‘realisation’ of certain [constitutional] commitments”. Identifying the South African Constitution as the global model for transformative constitutionalism, Frankenberg highlights the importance of emancipatory constitutional values and the role which a judiciary which is “politically and morally engaged” (102) can play on delivering the ideals of transformative constitutionalism.

⁹⁹ See *S v Mhlungu* 1995 (7) BCLR 793 (CC) par 8; *Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC) par 147; *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (8) BCLR 872 (CC) par 232; *Print Media South Africa v Minister of Home Affairs* 2012 (12) BCLR 1346 (CC) par 97. Extra-curial writings on transformative constitutionalism have also shown the allure of transformative constitutionalism to Constitutional Court judges. See, for instance, Langa “Transformative Constitutionalism” 2006 3 *Stell LR* 351 and Moseneke “Transformative Constitutionalism: Its Implications for the Law of Contract” 2009 20(1) *Stell LR* 3.

¹⁰⁰ *Hassam v Jacobs* 2009 11 BCLR 1148 (CC) par 28.

¹⁰¹ *S v Makwanyane supra* par 363.

¹⁰² See *Hassam v Jacobs supra* par 28.

6 CONCLUSION

The adoption of the Constitution marked the end of the codification of intolerance and guaranteed a South Africa which promises tolerance of diversity. The Constitution, which is a pivotal instrument for managing diversity and fostering tolerance, embodies the ideal of a South Africa that belongs to all its people, united in their diversity. Thus, tolerance of diversity is a constitutional value that requires South Africans to aspire to fulfil the principle of reasonable accommodation, to recognise the right to be different, and to be sensitive to groups that suffered under the colonial and apartheid regimes. Although South Africa thrives to overcome historical injustices to create social harmony in which diversity is tolerated, it can never be overemphasised that inclusiveness requires more than legislation but also the entrenchment of tolerance of diversity into the fabric of the nation through transformation and transformative constitutionalism. Besides mitigating and trying to correct the injustices inherited from the past, transformation holds a promise for South Africans to unite in their diversity in confronting contemporary challenges.

It has become clear in contemporary times that any attempt to realise the constitutional aspirations for healing the continuing divisions of the past should be anchored on enhancing inclusion through tolerance of diversity. Consequent to extra-curial writings and the jurisprudence of the Constitutional Court, it is evident that issues of tolerance of diversity will always be contested within a democratic space in which the same things mean different things to different people, depending on one's background, circumstances, and ability to fit in a state defined by a transformative Constitution. It is also clear that fostering tolerance of diversity requires more than nurturing social conditions for peaceful co-existence but also entails the elimination of all forms of inequality, prejudice, and all other manifestations of exclusion that defined the past and still linger in the contemporary era. However, the post-apartheid state has failed to adequately address historical intolerance and its injustices. The legacies of apartheid reverberate in contemporary South Africa, making it inevitable that the gap between South Africans will widen. This should concern everyone because intolerance poses a potent threat to the pursuit of long-lasting peace and justice in a state which is struggling to put a difficult part of its history behind it. As such, the discourse on tolerance of diversity symbolises efforts to overcome a past that is not only uncomfortable and disgraceful but whose ramifications potentially endanger a peaceful future.