Tolerated, but Never Equal: The Limits of Recognising Difference

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SUMMARY

The article examines the South African Constitutional Court's reliance on toleration as a legal mechanism for recognising difference, particularly concerning LGBTQIA+ individuals. While the Constitution of the Republic of South Africa, 1996, aspires to achieve substantive equality, foster diversity and uphold human dignity, the article argues that the invocation of toleration does not fully realise that vision. Instead, it merely accommodates difference within predefined limits, maintaining entrenched social hierarchies and, in turn, fails to dismantle systemic discrimination. Through an analysis of landmark cases – including *National Coalition for Gay and Lesbian Equality v Minister of Justice*, *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, and *Minister of Home Affairs v Fourie*, the article explores how the court frames legal recognition without fully disrupting dominant social norms. It highlights how toleration, while often perceived as a progressive legal mechanism for promoting inclusion and diversity, functions as a conditional and asymmetrical practice in which the dominant group determines the boundaries of what is acceptable. Ultimately, the article critiques the court's jurisprudence for reinforcing rather than transforming power structures. It argues that toleration results in superficial inclusion – a façade of legal protection that masks deeper structural inequalities. Rather than giving effect to the ideals of the Constitution, toleration operates as a mechanism for regulating full legal and social belonging and limiting true substantive equality.

KEYWORDS: toleration, substantive equality, tolerance of differences, the right to be different, LGBTQIA+, Constitutional Court, judicial reasoning, heteronormativity, power structures, conditional inclusion, equality, human dignity, equality and freedom, sexual citizenship

1 INTRODUCTION

The Constitution of the Republic of South Africa, 1996 (Constitution) has established an ambitious framework aimed at achieving substantive equality, fostering diversity and respecting human dignity. At the heart of this transformative constitutional vision lies the challenge of addressing deep-seated inequalities while recognising and affirming the differences that

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shape individual and collective identities. Among these differences, sexual orientation, gender identity and other ascriptive characteristics have often been treated with a legal and social response that rests primarily on the concept of toleration.

Toleration, framed as a constitutional value, is often harnessed as a mechanism for enabling the coexistence of individuals and groups with differing practices, beliefs and identities – without necessitating full acceptance or affirmation. However, this approach raises critical concerns about whether toleration is sufficient to dismantle systemic discrimination or whether it reinforces, rather than disrupts, entrenched social hierarchies. Specifically, does the judiciary's reliance on tolerance for diversity merely accommodate difference within predefined limits instead of engaging with the root causes of marginalisation? To what extent does toleration function as a tool of regulation rather than liberation, allowing dominant social norms to remain intact under the guise of legal inclusion?

In order to engage with these questions, this article revisits landmark cases concerning equality rights, including *National Coalition for Gay and Lesbian Equality v Minister of Justice* (*NCGLE I*),[1] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (*NCGLE II*),[2] and *Minister of Home Affairs v Fourie* (*Fourie*),[3] to explore how the Constitutional Court (CC) has framed the legal recognition of difference. While these cases have undeniably advanced formal legal protections for LGBTQIA+ individuals, they also reveal the limits of an equality framework that is rooted in toleration – one that accommodates difference without fully dismantling structural hierarchies. At the outset, it is important to note that the CC does not explicitly invoke toleration as a guiding legal principle in these cases. Instead, the court frames its reasoning around constitutional commitments to equality, dignity and non-discrimination. However, as this article argues, the way in which the court adjudicates claims related to difference reflects the logic of toleration – allowing for inclusion while maintaining dominant social norms and limiting the transformative potential of equality. To this end, in this article, "tolerance" refers to the court's own idiom of accommodating difference, while "toleration" is used analytically to describe the power-laden structure of conditional inclusion that preserves dominant norms.

Accordingly, this article critically examines toleration as a constitutional principle within the jurisprudence of the CC, with particular attention to its implications for the rights of the LGBTQIA+ community. It argues that toleration, while often perceived as a progressive legal mechanism, fails to challenge structural inequalities and instead sustains a hierarchy where marginalised groups are merely "permitted" to exist within narrowly defined

1 1999 (1) SA 6 (CC).
2 2000 (2) SA 1 (CC).
3 [2005] ZACC 19.

parameters. Through an analysis of case law and theoretical perspectives, the article demonstrates that toleration operates as a conditional and asymmetrical practice, wherein the dominant group retains the power to set the boundaries of what is tolerable. Furthermore, the reliance on toleration often results in superficial inclusion – a legal façade that masks deeper structural barriers to full equality, dignity and freedom.

By interrogating the CC's jurisprudence on toleration, this article exposes its limitations as a transformative tool for equality and critiques its role in maintaining a legal order that implicitly preserves existing power structures. Rather than offering a genuine pathway toward substantive equality and justice, toleration functions as a regulatory mechanism.

2 CONCEPTUALISING TOLERATION

The notion of toleration is complex and is often described as an elusive concept.[4] In the liberal ethos, tolerance has been called "the substantive heart of liberalism",[5] and it has been described as a fundamental political and ethical value.[6] While there is an ongoing debate about which conception is best suited to address certain issues, there is a basic agreement about the concept of toleration.[7] In general, toleration can be defined as an agent's willing, intentional and principled refrain from interfering with an opposed act, behaviour or beliefs of another person or group – particularly in situations that pertain to diversity – where the agent believes that they have the power to interfere.[8] Accordingly, as a mechanism to defuse difference within society and to meet the demands of democracy and a pluralistic culture, toleration can be applied to various situations and scenarios, such as religion, culture, conscience, belief systems, behaviours, and manners of speech and expressions.[9] This general conception of toleration underscores its necessity

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4 McGonagle "Wresting (Racial) Equality From Tolerance of Hate Speech" 2001 23 *Dublin University Law Journal* 21 22; Beaman "The Missing Link: Toleration, Accommodation and … Equality" 2012 9(3) *Ontario Human Rights Commission: Creed, Freedom of Religion and Human Rights – Special Issue of Diversity Magazine* https://rb.gy/ub7lg; Dube "The Ethos of Tolerance of Diversity in Post-Apartheid Jurisprudence" 2022 *Obiter* 124 126; Witenberg *Tolerance: The Glue that Binds Us: Empathy, Fairness and Reasons* (2016) 34; Galeotti "Identity, Difference, and Toleration" in Dryzek, Honig and Phillips *The Oxford Handbook of Political Theory* (2006) 564.

5 Hampton "Should Political Philosophy Be Done Without Metaphysics?" 1989 99 *Ethics* 791 802.

6 Galeotti in Dryzek *et al The Oxford Handbook of Political Theory* 564.

7 Galeotti "Rescuing Toleration" 2021 24 *Critical Review of International Social and Political Philosophy* 87 90.

8 Cohen "What Toleration Is" 2004 115 *Ethics* 68 69.

9 Galeotti in Dryzek *et al The Oxford Handbook of Political Theory* 564; Dube 2022 *Obiter* 124.

in contexts where conflicting differences arise, necessitating a delicate balance to ensure harmonious coexistence.[10]

Regardless of the general conception, toleration remains abstract, and enquiry into which differences constitute the proper subjects of toleration is crucial for the justifications of toleration.[11] Given that most divisive differences of contemporary pluralism pertain to collective identities and mutual respect, the theory of toleration must be examined in light of its ability to recognise and include identities in a manner that meets the demands of contemporary democracy.[12]

Broadly speaking, toleration can be defined as consisting of three components.[13] First, the general concept prescribes that tolerated beliefs, practices and actions need to be considered objectionable and, most importantly, bad and wrong. If the objectionable component is missing, the concept of toleration is not applicable; instead, it amounts to the notion of indifference and affirmation.[14]

Secondly, the objection criteria must be balanced by an acceptance component, which seeks not to remove or override the negative or immoral judgment but provides certain positive reasonings that strive to trump the negatives in the relevant context.[15] Toleration, therefore, implies non-interference with certain practices or views to which the potential tolerator objects.[16] Here, toleration gives rise to a tension between one's own beliefs and the acceptance that another individual or group may have different beliefs. However, the practice does not involve a need to lose one's hatred, prejudice or implacable memories – it asks for something more complicated. The tolerator will indeed have to lose or give up on something: their desire to drive out or suppress the rival opinion, act, behaviour or belief, but their commitment to their own beliefs, which initiated the objection component, remains intact.[17]

Thirdly, the limits of toleration must be specified. This component lies at a point where the reasons for accepting the claim for toleration outweigh the

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10 Galeotti in Dryzek *et al The Oxford Handbook of Political Theory* 564.

11 *Ibid*.

12 Galeotti in Dryzek *et al The Oxford Handbook of Political Theory* 565.

13 Forst "Toleration" in Zalta (ed) *The Stanford Encyclopedia of Philosophy* (2017) https://plato.stanford.edu/archives/fall2017/entries/toleration/ (accessed 2026-05-22).

14 Carter "Are Toleration and Respect Compatible?" 2017 30(3) *Journal of Applied Philosophy* 195 196; Jones "Making Sense of Political Toleration" 2007 37 *British Journal of Political Science* 383 384.

15 Forst in Zalta *The Stanford Encyclopedia of Philosophy*.

16 Galeotti "The Range of Toleration: From Toleration as Recognition Back to Disrespectful Tolerance" 2015 41(2) *Philosophy and Social Criticism* 93 94; Carter 2017 *Journal of Applied Philosophy* 196; Deveaux "Toleration and Respect" 1998 12(4) *Public Affairs Quarterly* 407 409.

17 Williams "Toleration: An Impossible Virtue" in Heyd (ed) *Toleration: An Elusive Virtue* (1996) 19–20.

reasons for rejection, which functions as the rejection component. The limits of toleration are often set and determined by the harm principle, which, as argued by Mill, justifies interference if the tolerator can be harmed by the difference or practices in question.[18] Toleration can also be defined with reference to normative boundaries. The first boundary lies between the normative realms of practices and beliefs with which one agrees and those with which one does not agree but which one is still able to tolerate. The second boundary lies between the latter and the normative realm of what cannot be tolerated and must, as a result, be strictly rejected.[19]

With this theoretical foundation in mind, the following section analyses the South African judiciary's interpretation, conceptual understanding and application of toleration in its jurisprudence.

3 THE CONSTITUTIONAL JURISPRUDENCE ON TOLERATION OF DIVERSITY

3 1 Toleration as a constitutional value(?)

In the South African constitutional framework, courts frequently invoke tolerance, diversity and respect for difference – alongside the values of equality and dignity – as constitutional commitments, drawing support from the Bill of Rights.[20] Read in context, the manner in which these values (and especially the commitment to diversity and difference) are interpreted and applied approximates a practice of toleration in the sense set out above. Dube, for example, argues that the Preamble to the Constitution premises this commitment to diversity on an imperative for transformation, expressed through the urgent need to "heal the divisions of the past" and to recognise that "South Africa belongs to all who live in it, united in our diversity".[21] As a value, tolerance seeks to enable the harmonious coexistence of various individuals and groups with different views, practices and characteristics, which accords with the notion of promoting difference.[22] There is, thus, a strong conceptual nexus between toleration and diversity. Similar to the concept of toleration, diversity is conceptually difficult to define with precision

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18 Galeotti "Citizenship and Equality: The Place for Toleration" 1993 21(4) *Political Theory* 585 587; Jones 2007 37 *British Journal of Political Science* 384.

19 Forst in Zalta *The Stanford Encyclopedia of Philosophy*.

20 Dube 2022 *Obiter* 124; Preamble of the Constitution; *Gumede (born Shange) v President of the Republic of South Africa* ([2008] ZACC 23; 2009 (3) BCLR 243 (CC) par 22), where the CC confirmed that: "an important objective of our constitutional enterprise is to be 'united in our diversity'"; *Prince v President of the Law Society of the Cape of Good Hope* 2002 (3) BCLR 231 (CC) par 150.

21 Preamble of the Constitution; Dube 2022 *Obiter* 129.

22 Galeotti in Dryzek et al *The Oxford Handbook of Political Theory* 564.

in the legal context owing to its vagueness and ambiguity as a noun.[23] There is, however, some consensus on the fact that diversity is largely associated with multiculturalism, pluralism, difference and also toleration.[24] Linking toleration to diversity, Walzer conceptualises it as a mechanism that facilitates the acceptance of differences within the social and public spheres.[25]

Correspondingly, in *South African National Defence Union v Minister of Defence*,[26] O'Regan J highlights that tolerance functions as a refusal to silence unpopular views; it does not require approbation, but it does require public acceptance. In *Kotzé v Kotzé*,[27] the South African High Court highlighted that without tolerance and diversity, constitutional rights would not be fulfilled and instead amount to a hollow promise to safeguard a society that values human dignity, equality and freedom. Furthermore, in *Prince v President of the Law Society of Cape of Good Hope* (*Prince*),[28] Sachs J, in his minority judgment, observed that underlying the basic notion of tolerance is a constitutional value and demand for and on all members of society, which reflects a horizontal duty. This jurisprudential approach therefore finds its justification in the idea that the Constitution articulates and reflects the shared and communal aspirations of South Africans as a binding value and as a guide towards ensuring a stable foundation for the future.[29] On this account, such a foundation must be rooted in a state and society that

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23 Vertovec "Introduction: Formulating Diversity Studies" in Vertovec (ed) *Routledge International Handbook of Diversity Studies* (2014) 1 4

24 Gerapetritis *Affirmative Action Policies and Judicial Review Worldwide* (2016) 63; Dube 2022 *Obiter* 124 126.

25 Walzer *On Toleration* (1997) xii; Dube 2022 *Obiter* 126; *Gumede (born Shange) v President of the Republic of South Africa supra* par 22.

26 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) par 8.

27 [2003] JOL 11479 (T) par 5–6.

28 2002 (2) SA 794 (CC) par 147 and 150.

29 Further support for this can be found in *S v Makwanyane* [1995] ZACC 3 par 262; *Amod (born Peer) v Multilateral Motor Vehicle Accidents Fund* [1999] ZASCA 76 par 20, where Mahomed CJ held: "[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." Moreover, in *President of the Republic of South Africa v Hugo* ([1997] ZACC 4; 1997 (6) BCLR 708 (CC); 1997 (4) SA 1 (CC) par 41), Goldstone J, for the majority, held that the long-term goal of the Constitution is to achieve a society wherein everyone is deemed equal in rights and treatment. See also Smith "Equality Constitutional Adjudication in South Africa" 2014 14 *AHRLJ* 613; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) par 74.

values tolerance of diversity and one that gives every individual equal opportunity to develop their uniqueness and difference optimally and to free their potential.[30]

In *Ryland v Edros*,[31] Farlam J comprehensively listed and expressively articulated the constitutional provisions and principles that require tolerance of diversity:

> "(i) [T]he preamble, which speaks of [the fact that every citizen is equally protected by law];
> (ii) The prohibition against unfair discrimination [under section 9 of the Constitution];
> (iii) [S] 10, which gives every person the right to respect for and protection of [their] dignity …;
> (iv) [The] right to freedom of conscience, religion, thought, belief and opinion [under section 15 of the Constitution] …;
> (vii) [A]n open and democratic society based on [human dignity,] freedom and equality …;
> (viii) [R]acial and gender equality and national unity [under section 1 of the Constitution]."[32]

Farlam J recognised that, collectively, equality, dignity and freedom stand as a cornerstone for tolerance of difference in order to facilitate the actualisation of a pluralistic and democratic society.

Consequently, in relation to the judiciary's jurisprudence of toleration, it seems as if "acceptance of difference" can be understood to imply the elimination of unfair discrimination, positioning equality as a *grundnorm* for toleration.[33] Securing the need for tolerance under equality, Sachs J held in *Fourie*:

> "[The] Constitution represents a radical rupture with a past based on intolerance and exclusion, and the movement forward to the acceptance of the need to develop a society based on equality and respect by all for all. … At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting."[34]

In addition, with regard to the protection and promotion of diversity in relation to section 10 of the Constitution (on human dignity), in *Prince*, Ngcobo J, in the minority, stated:

> "Our society is diverse. It is comprised of [individuals] of different … backgrounds. Our Constitution recognises this diversity … The protection of

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30 *AB v Minister of Social Development* 2017 (3) BCLR 267 (CC) par 52; *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (4) BCLR 1 (CC) par 49; Dube 2022 *Obiter* 124 129.
31 1997 (2) SA 690 (C).
32 *Ryland v Edros supra 707*–709; Dube 2022 *Obiter* 130.
33 Dube 2022 *Obiter* 126.
34 *Minister of Home Affairs v Fourie supra* par 59–60.

> diversity is the hallmark of a free and open society. It is the recognition of the inherent dignity of all human beings."[35]

Furthermore, and by way of interpretation, another right wherein one can locate the tolerance jurisprudence of the courts is freedom, particularly, section 16 of the Constitution (on freedom of expression).[36] This rationale can be found in various CC judgments.[37] For instance, in *Qwelane v South African Human Rights Commission*,[38] Majiedt J highlighted that the encouragement of tolerance is one of the values that undergird the right to freedom of expression.[39]

It is clear that the CC uses tolerance to function as both a constitutional value and a social virtue, which the court gravitates towards when dealing with diversity claims. However, while the CC's tolerance jurisprudence stems from the need to promote and give effect to a pluralistic and diverse society, a question does remain: is the tolerance of difference, diversity and uniqueness sufficient to achieve the transformative vision of the Constitution?[40] Phrased differently, does the reliance on toleration (often

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35 *Prince v President of the Law Society of the Cape of Good Hope supra* par 49; *Volks NO v Robinson* 2005 (5) BCLR 466 (CC) par 49.

36 Free expression, Emerson argues, requires tolerance of diverse forms of expression so that everyone has the ability to develop, assert and realise their full potentialities and identities. Freedom of expression as toleration seeks to grapple with and resist the "impulse to censor" and thus attempts to avoid coercion and the suppression of certain viewpoints. See Emerson "Toward a General Theory of the First Amendment" 1963 72 *The Yale Law Journal* 877 887.

37 For example, *National Coalition for Gay and Lesbian Equality v Minister of Justice supra*, *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs supra*; and also, *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC).

38 [2021] ZACC 22.

39 Relying on Emerson's theory of freedom of expression, Majiedt J states: "[T]here are four particular values that undergird the right to freedom of expression. These, … include: (a) the pursuit of truth; (b) its value in facilitating the proper functioning of democracy; (c) the promotion of individual autonomy and self-fulfillment [sic]; and (d) the encouragement of tolerance" (par 69). See also Emerson 1963 *The Yale Law Journal* 877.

40 The transformative vision of the Constitution is to create a united, non-racial, non-sexist and democratic society by healing the divisions of the past and building a future based on human dignity, substantive equality, social justice and fundamental human rights. This vision is articulated in the Preamble and the founding values in section 1, read together with the Bill of Rights, especially sections 7 and 9, and has been developed in the CC's jurisprudence on equality, socio-economic rights and democratic participation. Klare describes transformative constitutionalism as a long-term project, using law to transform South Africa's social and political institutions and power relations towards an egalitarian, democratic and participatory society, while Albertyn and Goldblatt understand transformation as a complete restructuring of state and society, including a redistribution of power and resources along egalitarian lines, the eradication of systemic forms of domination and material disadvantage, and the development of opportunities that allow people to realise their full human potential within positive social relationships. See Klare "Legal Culture and Transformative Constitutionalism" 1998 14 *SAJHR* 146 150; Albertyn and Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" 1998 14 *SAJHR* 248 249.

framed in judicial language as "tolerance" as a concept that "does not require approbation"),[41] while necessary for harmonious coexistence, risk maintaining superficial inclusion without addressing the structural inequalities embedded in the fabric of society and within the legislative framework?

In short, under section 9 of the Constitution, the substantive equality jurisprudence first seeks to address inequality through the prevention of unfair discrimination and, secondly, through the promotion of equality, to eradicate forms of subordination that impose arbitrary and irrational normative standards.[42] As is explored below, in certain cases – usually cases that involve challenges to and attempts to disrupt systemic exclusion and hierarchical social structures – the judiciary tends to employ an over-reliance on toleration, which often leaves the deeper systemic barriers to equality intact. The failure to achieve the second leg of equality possibly stems from the (mis)conception that recognition could be achieved through the promotion of toleration for difference. It may also be linked to the court's heavy reliance on merely finding unfair discrimination in order to "satisfy" the equality enquiry, or it could be argued that both reasons possibly stem from the first, especially when the court is faced with diversity claims that go against the normative standards of society.

3 2 Toleration as a right to be different

Seidman notes that there has been "some loosening of the status of heterosexuality as a condition for institutional belonging".[43] In terms of the South African legal framework, such relaxations of the requirements for citizenship rights include the declaration of common-law and legislative provisions on sodomy as unconstitutional, the recognition of same-sex civil unions and the enactment of sexual reassignment laws. However, although the legal system aims towards social inclusion, it remains heavily influenced by the persistence of heteronormativity. Duggan correctly questions the extent to which the expansion of acceptance and citizenship represents a

41 *SANDF v Minister of Defence supra* par 8.

42 Further support for this multi-pronged approach to equality can also be located in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, which first seeks to prevent unfair discrimination in almost every sphere of society in Chapters 2 and 3, and secondly, provides measures on how to promote equality in Chapter 5; Albertyn, Goldblatt and Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2001) 3; Kok "The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Proposals for Legislative Reform" 2008 24 *SAJHR* 445 445.

43 Seidman "Critique of Compulsory Heterosexuality: Sexuality Research and Social Policy" 2009 61 *Journal of NSRC* 18–28.

challenge to the normative structures.[44] That raises the question of whether and to what extent the extension of rights and citizenship leaves structural inequalities untouched. As the applicants in *Fourie* put it, heteronormativity relies on homosexuality or difference being "shut out, unfairly and unconstitutionally".[45] As a result, the following section seeks to analyse the CC's application of the right to equality with a particular focus on its rationale and methods in relation to the recognition of difference and diverse identities and statuses.

3 2 1 National Coalition for Gay and Lesbian Equality v Minister of Justice

In *NCGLE I*, Ackermann J, for a unanimous CC, declared the common-law offence of sodomy as well as legislative provisions prohibiting male same-sex sexual activities unconstitutional. In considering the impact of the common-law offence on gay men, Ackermann J highlighted that, owing to their permanent minority status in society, such provisions severely affected their fundamental "dignity, personhood and identity" at a deep level, which perpetuates unfair discrimination.[46] Ackermann J further found that the achievement of equality does not presuppose the elimination of all differences; rather, it is the rejection of subordination which lies behind the equality project.[47] Consequently, any form of differential treatment towards those who are "different" from the norm would propagate the subordination of individuals and, in turn, negate the aims of equality.[48]

Furthermore, Sachs J, concurring, stated that equality means equal concern and respect for and the affirmation of difference.[49] Therefore, the recognition and acceptance of difference would enable the development of an active rather than a purely formal sense of common citizenship.[50] In order to achieve this, Sachs J held:

> "What the Constitution requires is that the law and public institutions acknowledge the variability of human beings and affirm the equal respect and concern that should be shown to all as they are. At the very least, what is statistically normal ceases to be the basis for establishing what is legally normative. … What becomes normal in an open society, then, is not an

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44 Duggan "The New Homonormativity: The Sexual Politics of Neoliberalism" in Castronova and Nelson (eds) *Materializing Democracy: Toward a Revitalized Cultural Politics* (2002) 175 179; Richardson "Rethinking Sexual Citizenship" 2017 51(2) *Sociology* 208 213.

45 *Minister of Home Affairs v Fourie supra* par 2.

46 *National Coalition for Gay and Lesbian Equality v Minister of Justice supra* par 24–27.

47 *National Coalition for Gay and Lesbian Equality v Minister of Justice supra* par 22 and 132.

48 *National Coalition for Gay and Lesbian Equality v Minister of Justice supra* par 27; De Vos "From Heteronormativity to Full Sexual Citizenship?: Equality and Sexual Freedom in Laurie Ackermann's Constitutional Jurisprudence" 2008 *Acta Juridica* 254 263.

49 *National Coalition for Gay and Lesbian Equality v Minister of Justice supra* par 134.

50 *Ibid*.

> imposed and standardised form of behaviour that refuses to acknowledge difference, but the acceptance of the principle of difference itself, which accepts the variability of human behaviour."[51]

Therefore, based on the right to equality (and privacy), interpreted through the lens of human dignity, the unanimous CC invalidated the common law's restrictive prohibition on same-sex sodomy based on the fact that such rules represented the suppression of difference and contradicted the aims of the Constitution.

De Vos argues that the judgment represents the court's rejection of a discourse of "normal" and the very assumptions on which heteronormativity is based.[52] Furthermore, the focus on the acceptance and acknowledgement of difference disrupts the hierarchical sexual structures embedded in law and seeks to open up what was once the basis for subordination, exclusion and oppression in order to establish a legal framework that strives to include, recognise, and celebrate the difference, plurality and diversity of all citizens.[53]

3 2 2 National Coalition for Gay and Lesbian Equality v Minister of Home Affairs

In *NCGLE II*, the CC had to consider whether section 25(5) of the Aliens Control Act[54] (Aliens Control Act) and its use of the word "spouse" was unconstitutional to the extent that it permitted the immigration of heterosexual spouses of permanent residents but did not extend the same privileges and benefits to lesbians and gays in permanent partnerships with South African residents. Here, in another unanimous judgment authored by Ackermann J, he found that section 25(5) constituted unfair discrimination on the grounds of sexual orientation and marital status and infringed their right to dignity.[55] The reasoning in Ackermann J's judgment followed from an analysis of the impact of the discrimination on the affected applicants. Ackermann J held:

> "The message and impact are clear. Section 10 of the Constitution recognises and guarantees that everyone has inherent dignity and the right to have their dignity respected and protected. The message is that gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected. It serves in addition to perpetuate and reinforce existing prejudices and stereotypes. The impact constitutes a crass, blunt, cruel, and serious invasion of their dignity. The discrimination, based on

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51 *Ibid*.
52 De Vos 2008 *Acta Juridica* 265.
53 *National Coalition for Gay and Lesbian Equality v Minister of Justice supra* par 134–135; De Vos 2008 *Acta Juridica* 265.
54 96 of 1991.
55 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs supra* par 57.

> sexual orientation, is severe because no concern, let alone anything approaching equal concern, is shown for the particular sexual orientation of gays and lesbians."[56]

However, in deciding whether section 25(5) could be given an expansive interpretation to include partners in permanent same-sex relationships so as to avoid a declaration of invalidity, Ackermann J declined to expand the ambit of the term "spouse". Although the Aliens Control Act gave no definition, Ackermann J found its ordinary meaning in terms of the *New Shorter Oxford English Dictionary* as: "a married person; a wife, a husband".[57] In addition to invalidating section 25(5), Ackermann J found that the section could sufficiently be cured through the remedy of reading in to create a *separate legal category* for lesbians and gays called: "partner, in a permanent same-sex life partnership".[58] Therefore, regardless of the absence of same-sex marriage recognition laws, the judgment endorsed the notion that the State had a duty to protect same-sex couples who live in permanent life relationships.[59]

Although it might seem as if the judgment advances the approach in *NCGLE I*, De Vos convincingly argues that this judgment "took a step back" and failed to enhance the promise of queering and emancipating the constitutional jurisprudence by challenging heteronormative standards.[60] To this end, De Vos identifies two aspects of the court's decision in *NCGLE II* that are particularly troubling. First, Ackermann J declines to give the word "spouse" a broad and generous meaning and instead sticks to a standardised and heteronormative meaning.[61] The interpretation was thus based on heteronormative assumptions and systemic structures embedded in the legal framework. Moreover, it shied away from recognising that everyone is equal before the law. As a result, Ackermann J's legally correct interpretation imposed the notion that only heterosexual couples could be regarded as spouses and cast anyone else who could not, as "other".[62] More tellingly, Ackermann J justifies this approach in stating that there is a "clear distinction" between the process of interpreting legislation through

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56 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs supra* par 54.

57 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs supra* par 25; *New Shorter Oxford English Dictionary* (1993).

58 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs supra* par 86; De Vos and Barnard-Naudé "Disturbing Heteronormativity: The 'Queer' Jurisprudence of Albie Sachs" 2010 25 *SAPR/PL* 209 218.

59 De Vos 2008 *Acta Juridica* 266; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs supra* par 57.

60 De Vos 2008 *Acta Juridica* 266.

61 *Ibid*. See for example par 53 of the judgment: "[Gays and lesbians] are likewise as capable [in comparison to heterosexual couples] of forming intimate, permanent, committed, monogamous, loyal and enduring relationships; of furnishing emotional and spiritual support; and of providing physical care, financial support and assistance in running the common household."

62 De Vos 2008 *Acta Juridica* 267.

section 39(2) of the Constitution and the process of reading words into or severing them from legislative provisions, which functions as a "remedial measure" under section 172(1)(*b*).[63] For many authors, like Le Roux, there is very little or equally no support for such a "fundamental difference" between the two processes since giving words broader, inclusive and constitutionally transformative meanings is essential to, and legitimately forms part of the interpretation of statutes.[64] As highlighted by the same court in *Independent Institute of Education (Pty) Limited v Kwazulu-Natal Law Society*,[65] section 39(2) requires a break from orthodox and narrow textual approaches to statutory interpretation, and the embrace of a far more robust, purposive and value-based approach to interpretation.

In addition, while admitting that the exclusion of "others" would not pass the scrutiny of the Constitution, Ackermann J opted to include same-sex couples under section 25(5) by forging a new category, which, as argued further by De Vos, seems to lay the foundation for the recognition of a "separate but equal" classification to regulate sexual relationships and citizenship status.[66] In other words, by electing the remedy of reading in another category, the court's decision can be viewed as sustaining the heteronormative hierarchical value system. Through this, heterosexual relationships are first priority, and any other relations (although receiving the same rights) are rendered as secondary (second-class) or constructed as not "human enough" (devalued dignity and status) to enjoy the same categorical recognition to the protections and benefits of section 25(5). Therefore, unlike *NCGLE I*, this judgment failed to deconstruct and dismantle the traditional assumptions of normality and who the law views as worthy of spousal benefits and protection.

3 2 3 Minister of Home Affairs v Fourie

In *Fourie*,[67] the CC had to consider whether the common-law definition of marriage and section 30(1) of the Marriage Act were inconsistent with section 9(1) and (3), and section 10 of the Constitution to the extent that they made no provision for same-sex couples to marry, and, if so, what remedy

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63 *National Coalition for Gay and Lesbian Equality v Minister of Home supra* par 24. S 39(2) states: "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." S 172(1)(*b*) states: "A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct."

64 Le Roux "Undoing the Past Through Statutory Interpretation: The Constitutional Court and Marriage Laws of Apartheid" 2005 26 *Obiter* 526 534; Steyn *Die Uitleg van Wette* (1981) 55–68.

65 [2019] ZACC 47; 2020 (2) SA 325 (CC) par 15, 23 and 27.

66 De Vos 2008 *Acta Juridica* 268; *Minister of Home Affairs v Fourie supra* par 86.

67 *Minister of Home Affairs v Fourie supra*.

the court should order. Sachs J, writing for the majority, drew on the court's position in *NCGLE I* in acknowledging the problematic history of marginalisation and oppression of lesbians and gays in South Africa. Furthermore, Sachs J held that the lack of comprehensive legal regulation of the family-law rights of lesbians and gays excluded same-sex couples from the benefits and responsibilities accorded to heterosexual couples through marriage. The majority then found that this unequal treatment "represents a harsh if oblique statement by the law that same-sex couples are outsiders", and that their need for the equal protection of their intimate relationships is viewed as less or secondary to that of heterosexuals.[68]

Moreover, the majority held that the silent and pervasive exclusion of same-sex couples from the reach of the law and the gender-specific language used in the marriage vow presupposes that only heterosexual couples were contemplated and regarded as worthy of protection and benefits in relation to marriage.[69] To this end, the majority found that the exclusion of same-sex couples in the common-law definition of marriage and section 30(1) of the Marriage Act resulted in a failure to provide them with the means to enjoy the same benefits and protections of marriage to which heterosexual couples are entitled, and constitutes a denial of their rights to equal protection and benefit of the law under section 9(1) and not to be unfairly discriminated against in terms of section 9(3) of the Constitution.[70] As for the remedy, the majority, per Sachs J, declared the common-law definition and the Marriage Act invalid, but suspended its declaration for 12 months to allow Parliament to craft a suitable remedy. However, the majority did not stop here: it added that if Parliament failed to do so within the allocated 12 months, the common-law definition and the Marriage Act would be read to include same-sex couples, and the words "or spouse" would be added after the words "or husband" in the marriage formula.[71]

Although the CC was unanimous in ruling the common law and the Marriage Act unconstitutional, O'Regan J did not concur with the majority's preferred remedy on the suspension of the order of invalidity, and instead favoured an order with immediate effect.[72] O'Regan J was not persuaded that the court should refrain from developing the common law, since the case dealt with a rule of the common law and its definition of marriage, which is relied upon in the Marriage Act. Therefore, as previously held in various cases such as *NCGLE I*, the duty to ensure that the common law

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68 *Minister of Home Affairs v Fourie supra* par 71.

69 *Minister of Home Affairs v Fourie supra* par 117; Woolman, Cornell, Fuller, Brickhill, Bishop and Dunbar *The Dignity Jurisprudence of the Constitutional Court of South Africa* Vol 2 (2013) 759.

70 *Minister of Home Affairs v Fourie supra* par 114.

71 *Minister of Home Affairs v Fourie supra* par 157–161; Gee and Webber "A Confused Court: Equivocations on Recognising Same-Sex Relationships in South Africa" 2006 69(5) *The Modern Law Review* 831 834.

72 *Minister of Home Affairs v Fourie supra* par 163–173.

accords with the Constitution lies, in the first place, with the courts.[73] Consequently, O'Regan J called for the development of the common law, together with the reading-in of words to section 30 of the Marriage Act, in order immediately to permit same-sex marriage thereunder.[74] The rationale behind O'Regan's argument is that such an approach would not undermine the institution of marriage but would rather foster a society based on respect for human dignity and difference.[75]

Notably, Sachs J's majority judgment followed an approach similar to Ackermann J's approach in *NCGLE II*, by declining to expand the meaning of spouse and marriage in the Act. However, at the same time, it (again) failed to live up to or advance the position enforced in *NCGLE I*, which O'Regan's approach sought to do. In *NCGLE II,* the CC considered whether the word "spouse" could include same-sex couples. Through the use of conventional statutory interpretive rules, the court applied the ordinary or traditional meaning of the word "spouse" and accordingly held that "spouse" cannot be read to include any other form of deviation from the heterosexual marriage. Although the court held that the word "spouse" could not be expanded and interpreted to include same-sex couples, it is also possible to argue that it did not want to disturb the heteronormative framework provided for in terms of the Marriage Act to include a form of marriage other than the universally accepted union between one man and woman (in the biological sense). This point can be illustrated by the CC's judgment in *Daniels v Campbell NO* (hereafter *Daniels*).[76]

In *Daniels*, the CC had to determine whether the word "spouse", under the Intestate Succession Act[77] and the Maintenance of the Surviving Spouse Act,[78] could be interpreted to include people married in accordance with Islamic rites, and if not, whether the denial of benefits in terms of those Acts to the surviving spouse in a Muslim marriage was unconstitutional. As in *Fourie*, Sachs J held in *Daniels* that such discriminatory practices based on exclusion are "deeply injurious to those negatively affected" by it and could not be sustained in terms of the Constitution.[79] Moreover, "the Constitution requires that, [where possible, legislation should be read] in ways which give effect to its fundamental values … and in conformity with the Constitution".[80] Thus, in accordance with the values of "equality, tolerance and respect for

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73 *Minister of Home Affairs v Fourie supra* par 167; *Carmichele v Minister of Safety and Security* [2001] ZACC 22.

74 *Minister of Home Affairs v Fourie supra* par 169.

75 *Minister of Home Affairs v Fourie supra* par 172.

76 2004 (5) SA 331 (CC).

77 81 of 1987.

78 27 of 1990.

79 *Daniels v Campbell NO supra* par 19–20.

80 *Daniels v Campbell NO supra* par 20; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In Re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) par 21–22.

diversity … and nonsexism", the majority relied on two different interpretive approaches.

According to Le Roux, the first approach followed from the court's previous textualist approach used in *NCGLE II* and *Satchwell v The President of the Republic of South Africa* (*Satchwell*).[81] In *Daniels*, Sachs J preferred an interpretation of the legislation that gives effect to the Constitution, provided that such an interpretation does not result in grammatical distortion or place undue strain on the word.[82] As a result, it was found that the ordinary meaning of the word "spouse", as a broad and inclusive construction, was capable of including Muslim marriages.[83] For Sachs J, the analysis and findings in *Daniels* could not be compared to the judgments in *NCGLE II*, *Satchwell* and *Fourie*, since in those cases the applicants "could not ordinarily be considered to be married persons, husbands, and wives".[84] By contrast, the position of married persons, under Muslim rites, could fall within the meaning of the word "spouse", since "they are married to each other, wife, and husband".[85] Furthermore, Sachs J in *Daniels* argued that the findings in *NCGLE II* and *Satchwell* could not, based on "legal logic", achieve the same outcome since, in comparison to the matter before them, "there was a significant textual pointer against the more extensive use of the word spouse".[86] As a result, on that reasoning, same-sex partners could not be included under the word spouse because such a legal finding "would place an unacceptable degree of strain on the word".[87] However, it is submitted that this is an unconvincing argument. It is important to note that *Daniels, Satchwell* and *NCGLE II* were not about the recognition of marriages – they were about recognising spousal benefits through an interpretation of the word "spouse". Sachs J in *Daniels* was willing to give an extensive interpretation to the word "spouse" to include Muslim partners since they are in a union between a man and a woman, and since such a reading would give effect to the values of equality, respect for diversity and non-sexism. On the other hand, Ackermann J was not willing to do so in *NCGLE II* because same-sex partners do not pass the criteria set by the "ordinary" meaning of the word "spouse", which reflects traditional, heteronormative assumptions. The question is whether that meaning should have been transformed by interpreting the word "spouse" through the lens of constitutional rights and values.

In relation to Sachs J's second interpretive approach, he held that the case cannot be decided by only looking at the ordinary (dictionary) meaning

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81 [2002] ZACC 18.
82 Le Roux 2005 *Obiter* 538.
83 *Daniels v Campbell NO supra* par 21–22.
84 *Daniels v Campbell NO supra* par 30 and 33; *Satchwell v The President of the Republic of South Africa supra*.
85 *Daniels v Campbell NO supra* par 30.
86 *Daniels v Campbell NO supra* par 31 and 33.
87 *Daniels v Campbell NO supra* par 33.

of the word "spouse", and that the true meaning of the word can be understood by broadly looking at the socio-economic and legislative context.[88] Here, the legislative context includes the purpose or object of the legislation.[89] In the *Daniels* case, the purpose of the relevant legislation was to provide spousal benefits in the form of financial relief to vulnerable widows. Accordingly, the word "spouse" should be interpreted to give effect to this aim of the legislation.[90] Le Roux argues that the question is not whether a spouse in terms of Muslim rites could be compared to the ordinary accepted meaning of the word. Rather, the question is "whether widows of Muslim marriage are functionally (as opposed to linguistically) similar to the widows of [dominantly accepted] legally recognised marriages".[91] Le Roux convincingly argues that the majority's second, purposive reading of the word "spouse" was merely used to bolster their initial dominant textual reading of the word.[92] Moreover, Le Roux argues that the CC could have easily used this second approach in *NCGLE II* and *Fourie*.[93] For example, if the Marriage Act aims to solemnise marriages between persons, then lesbian and gay marriages could have easily been recognised under the Act since it could be viewed functionally similar to a marriage between a woman and a man.

Evidently, then, it appears as if subjects are only capable of being viewed as spouses if they are able to conform to the hierarchical heteronormative system and able to conform as "normal" or "good" citizens. This line of jurisprudence, when dealing with anything that is not permitted in the heteronormative value system, tends to rely on conservative textual pointers and rigid rules of statutory interpretation, rather than giving proper effect to section 39(2) of the Constitution by actively promoting the spirit, object and purport of the Bill of Rights. Consequently, although the majority in *Fourie* found that same-sex partners could be included in a different and separate category, that judgment inferred a model that seeks to recognise rights through hierarchically distinguishing between subjects based on heteronormative criteria and status.

Thus, while tolerance for diversity has been presented as a value and pathway towards achieving equality, the inherent limitations of approaches rooted therein become evident when examining how it, in actuality, reinforces existing dominant norms and hierarchies. Toleration, in this context, and by way of its internal components, often operates as a form of conditional acceptance, where difference is allowed only within certain boundaries and spaces set by the majority. This raises concerns about the

88 *Daniels v Campbell NO supra* par 22–31.
89 Le Roux 2005 *Obiter* 539.
90 *Ibid*.
91 *Ibid*.
92 *Ibid*.
93 *Ibid*.

power dynamics inherent in an approach to difference that is overly reliant on toleration, and the ways in which it can be used to perpetuate inequality rather than dismantle it. Accordingly, the following section builds on these preliminary assumptions and critically analyses the limitations of toleration, examining how toleration, rather than giving effect to the achievement of the full equality of all individuals, regardless of differences, can serve as a vehicle to maintain the very structures of power it seeks to challenge.

4 THE LIMITS OF TOLERATION

If the above-mentioned conceptual components and realms of toleration are critically analysed, two concerns arise. First, the general notion of toleration implies a negative conception of "putting up with" and forbearance, which, as argued by Wittenberg, seems to reinforce the concept as a manifestation of superiority and power.[94] Secondly, and linked to the aforementioned, it is evident that toleration as a concept operates in relation to authority or majority on the one hand and a subordinate or minority on the other. To be in a position to be tolerant, a person or majority must have the power to interfere successfully, as prescribed by the objection component.[95] This view is also supported by Walzer, who holds that inequality between groups – those groups that are tolerating and those groups being tolerated – puts the individuals in the latter group in an inferior and "less than" position since "to tolerate someone else is an act of power; to be tolerated is an acceptance of weakness".[96]

Moreover, toleration qualifies as "permission" given by the authority with the goal of enabling the minority to live and act in line with their beliefs. Herewith, the majority also stipulates the perimeters of the given permission, which immediately creates (or maintains) a hierarchy and conditional acceptance. Operating through the rejection component, then, it reaffirms the majority's asymmetrical and dominant power relations over the inferior minority and further keeps notions of insider/outsider and first- and second-class citizenry rife. Therefore, as long as their difference and actions remain within the ambit of established limits – that is (as is usually the case), in the private realm – and as long as the minority group does not claim equal political and public standing, they can be tolerated on pragmatic grounds.[97] Put differently, the least costly of all possible alternatives is used to provide (conditional) acceptance. Here, acceptance does not disturb the normative order but keeps the majority in the dominant position, as they have the

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94 Witenberg *Tolerance: The Glue that Binds Us: Empathy, Fairness and Reasons* 36.
95 Carter 2017 *Journal of Applied Philosophy* 196.
96 Walzer *On Toleration* 52.
97 Forst in Zalta *The Stanford Encyclopedia of Philosophy*; Beaman 2012 *Ontario Human Rights Commission: Creed, Freedom of Religion and Human Rights – Special Issue of Diversity Magazine*.

ultimate power of being the tolerator, and as their own practices and beliefs are not put in question.

The crucial problem with the toleration approach to difference, particularly when the difference pertains to identity, lies in the reductionist attitude towards such differences.[98] Even if the difference might be collectively shared, what is considered relevant is the fact that it pertains to individuals, which (construed in terms of an abstract acceptance of the individual's equal dignity) implies that the distinctive differences among individuals are considered and defined as publicly irrelevant. As a result, differences qualify as subjects for toleration to the extent that they can be neutralised in the private sphere or a separate bounded space. However, the concept of toleration can only be used in claims where the practices and beliefs are voluntary.[99] In other words, toleration cannot be endorsed and applied to claims that relate to innate aspects of personhood, such as sex, gender and gender identity, since the denial of these attributes would depict a sense of being devalued (suffering and personal harm), which calls for protection under the banners of dignity.

Thus, and as alluded to above, toleration does not provide a sufficient basis for the realisation of LGBTQIA+ rights. Merely enabling an individual to pursue their conception of a good life through "separate but equal rights" does not meet the implicit demands and quests for identity, respect, justice, dignity and recognition. The quest for recognition of one's identity triggers a fundamental demand for dignity, equality and pluralism. All individuals must be treated as equals, and no one should be relegated to a secondary or inferior status. Woolman proposes a greater emphasis on the concept of mutual respect:

> "Once we recognise our own difference, sexual, religious or otherwise, and demand its recognition by others, we have no coherent choice but to recognise the difference of others. To put it more pointedly, once we recognise the otherness of others and demand such recognition for ourselves, we are committed to a society in which every member [is legally and publicly recognised, and] can comfortably live out that difference."[100]

Accordingly, achieving a society wherein everyone, regardless of their difference (specifically regarding innate aspects), is recognised requires the value of respect. Such respect necessitates a transition from universalist, hierarchical and generative approaches to a responsive approach that embraces the politics of difference. Unlike universalism, the politics of difference rejects a uniform and neutral response to recognition, which

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98 Galeotti 1993 *Political Theory* 594.

99 Galeotti 2015 *Philosophy and Social Criticism* 95; Jones "Toleration, Recognition and Identity" 2006 14(2) *The Journal of Political Philosophy* 123 125 and 141.

100 Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013) 52.

simplifies identities and imposes a reified or dominant identity upon the other.[101]

Practices of toleration may secure "acceptance" but cannot produce recognition that is transformative and substantive.[102] Respect for dignity, which demands respect for the development and recognition of personhood and innate identity, demands more than simply tolerating differences that are not too offensive to the normative value systems of the majority. In cases such as *NCGLE I*, *NCGLE II* and *Fourie*, wherein the CC relied heavily on the rights to privacy and non-discrimination, the court arguably merely extended tolerance for same-sex relations (as long as they take place in private or are regulated through separate categories or legislation). Under this approach, the majority's beliefs that certain practices or identities are "aberrant" or "wrong" are likely to be left wholly undisturbed.[103]

A decisive shift away from dominant power structures, practices of "separate but equal rights", and the distinction between first- and second-class citizens requires deconstructive and critical engagement with the normative substance of difference, which cannot be achieved with the promotion of tolerance. Therefore, required is a double extension from the liberal model: (i) a special extension that shifts beyond conditional acceptance within the private and separate sphere based on the (hetero)normative framework towards the public domain; and (ii) a semantic extension from negative conceptions of acceptance by non-interference toward a positive meaning of recognition.[104]

While toleration is often framed as a tool for fostering equality, its limitations are evident. In the context of ascriptive differences, such as in the cases of sexual orientation or sexual citizenship, the court's jurisprudence further illustrates the tension between recognising difference and regulating it. This raises the question: does the legal framework truly affirm a right to be different, or does it function primarily as a regulatory site (possibly through toleration) for managing divergence from dominant norms and the status quo?

5 TOLERATION: A RIGHT TO BE DIFFERENT OR A REGULATORY SITE?

The concept of equal citizenship – where everyone is afforded equal respect and concern – runs deep throughout the decisions of the CC. In *NCGLE I*, Sachs J, concurring, held:

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101 Jones "Equality, Recognition and Difference" 2006 9 *Critical Review of International Social and Political Philosophy* 23 25.
102 Deveaux 1998 *Public Affairs Quarterly* 421.
103 Deveaux 1998 *Public Affairs Quarterly* 423.
104 Galeotti in Dryzek et al *The Oxford Handbook of Political Theory* 573.

> "the acknowledgement and acceptance of difference [enables the] development of an active rather than a purely formal sense of enjoying a common citizenship [which] depends on recognising and accepting people as they are."[105]

In terms of this view, individual and group difference and uniqueness should be celebrated, and individuals should be granted the space to participate actively in social life, be recognised in the legislative realm, and assert their different sexualities and identities without having to conform to hegemonic world views. De Vos points out that, at first glance, *NCGLE I* rejects conformity and prohibits the State from imposing restrictive beliefs and standards on society. Moreover, it affords individuals and groups spaces in which they can make free and open decisions about their own lives and identities, thus enhancing their equal, dignified and free (sexual) citizenship.[106]

An analysis of queer spaces and sexual citizenship consists of looking at where and how spaces are enabled for difference (through the regulatory regime) and where they are not.[107] As Benton notes, the language of rights enshrined in equal citizenship usually comes to the fore where the exercise or distribution of power is called into question.[108] However, citizenship is not just a tool for emancipation or inclusion but is also a mechanism for defining the boundaries between those who are included and those who are excluded.[109] Sexual citizenship is imbued with power relations, which sometimes reinforce biological essentialism and heteronormativity, as in the CC cases discussed above, as well as other cases. Thus, the structural limitations of sexual citizenship become apparent when examining who is fully included within legal recognition and who is merely tolerated. "Outsider" individuals or groups that claim rights often masquerade as ideal citizens or are granted equal, but separate spaces and rights through other categories, as seen from *NCGLE II* and *Fourie*.[110]

In view of sexual citizenship's tendency to exclude as well as assimilate difference, it is important to problematise and deconstruct forms of differentiation that are linked to discrimination, while embracing diversity and

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105 *National Coalition for Gay and Lesbian Equality v Minister of Justice supra* par 134.

106 De Vos 2008 *Acta Juridica* 265.

107 Bell "Pleasure and Danger: The Paradoxical Spaces of Sexual Citizenship" 1995 14(2) *Political Geography* 139 139–140.

108 Benton "Gender, Sexuality and Citizenship" in Andrews (ed) *Citizenship* (1991) 151–163.

109 Kofman "Citizenship for Some but Not for Others: Spaces of Citizenship in Contemporary Europe" 1995 14(2) *Political Geography* 121 121–122.

110 See Manicom ("Constituting 'Women' as Citizens: Ambiguities in the Making of Gendered Political Subjects in Post-Apartheid South Africa" in Gouws (ed) *(Un)thinking Citizenship: Feminist Debates in Contemporary South Africa* (2005) 21 24) for a further discussion on citizenship's regulatory and disciplinary aspects.

plurality.[111] The approach followed by the CC has not always succeeded in recognising difference, insofar as it introduces a plethora of presumptions about citizenship and individuality.[112] Thus, as mentioned above, the problem with addressing inequalities lies not solely in the establishment of discrimination based on difference or otherness, but rather the manner in which the recognition of difference is often tied to hierarchies, exclusions and disadvantages.[113] As a result, difference is often recognised conditionally – on the terms of the dominant group – rather than affirmed as an intrinsic part of a pluralistic legal order.

This feeds into the CC's misconception that equality can simply be secured through a discrimination-based approach, which admittedly has resulted in positive and inclusive outcomes and extended rights and benefits to disadvantaged and excluded groups. However, although it strives towards equality, the problem with this approach is that it does not dismantle and deconstruct dominant norms, nor does it truly disrupt the status quo.[114] In other words, the CC's jurisprudence, rather than truly affirming difference, tends to reframe it within a pre-existing normative structure that conditions recognition on adherence to established social and legal expectations. Similarly, a liberal approach to equality and human rights functions as a mechanism to achieve social inclusion, but it can also easily be mitigated by implementing the least costly remedy, through equality of (sufficient) outcome – which encapsulates the "separate but equal" discourse discussed above – instead of addressing the foundation or root of the inequality.[115] Thomas postulates that liberalism operates by estranging difference; it promises inclusion and acceptance, but eventually results in sameness and assimilation.[116]

A reliance on toleration also reflects a broader liberal tendency to individualise and contain difference within predefined normative limits, rather

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[111] Albertyn "Substantive Equality and Transformation in South Africa" 2007 23 *SAJHR* 253 260.

[112] Armstrong "Complex Equality: Beyond Equality and Difference" 2002 3 *Feminist Theory* 67 67. Botha argues that, in the areas of sex, gender and marital status, some of the court's decisions display a tendency to downplay the impact of discriminatory measures and/or to reify difference. See Botha "Equality, Plurality and Structural Power" 2009 25 *SAJHR* 1 17–18.

[113] Albertyn 2007 *SAJHR* 253 260.

[114] See Albertyn ("Contested Substantive Equality in the South African Constitution: Beyond Social Inclusion Towards Systemic Justice" 2018 34 *SAJHR* 441 457; *King NO v De Jager* 2021 (4) SA 1 (CC); 2021 (5) BCLR 449 (CC) par 219), where Victor AJ held: "To ensure gender equality, a constitution with a Bill of Rights helps but it is not enough. It needs to be bolstered by an overarching vision that seeks to transform institutions, laws, and practices that subjugate women [which could arguably also include any form of sexual orientation and gender (identity) discrimination, exclusion and subjugation]."

[115] Albertyn "(In)equality and the South African Constitution" 2009 36(6) *Development Southern Africa* 751 758.

[116] Thomas "Constructing Queer Theory in Political Science and Public Law: Sexual Citizenship, Outspeach and Queer Narrative" 2017 39(4) *New Political Science* 568 574.

than engaging with its structural implications. As seen in the court's approach, toleration is often accompanied by a discourse of privacy and choice, confining LGBTQIA+ rights within an "inner sanctum" framework (understood in the CC's "inner sanctum" language)[117] that does not destabilise dominant societal norms. In turn, this approach results in an impoverished understanding of equality – one that accommodates difference without disturbing the normative framework that defines the boundaries of full citizenship.

This approach is further reflected in the way citizenship is granted and conditioned. According to a liberal conception of citizenship, "citizens are regarded as autonomous individuals who are bound together by a social contract"[118] that imposes an obligation on the State to recognise rights claims. However, as noted by Phelan, "full citizenship requires that one be recognised" and legally acknowledged by the State.[119] This recognition includes an active willingness by the State and its legal system to defend and promote the rights, claims and status of its citizens. To this end, "mere visibility" or toleration, Phelan continues, "is not enough".[120] Therefore, citizenship does not refer to being accepted and tolerated as separate or viewed as the "other"; it refers to being *recognised* as sharing a "common South African citizenship", and being equally entitled to rights, privileges and benefits.[121] In other words, as formulated by Marshall, "citizenship [granted and recognised] entitles the subject to the right to have rights", which, in turn, enables them to assert themselves into the common citizenship (including the public sphere).[122]

However, on an alternative account, citizenship also holds the potential to bring forth the oppressive dynamics of power relations.[123] In this situation, the State and judiciary, through legislation and interpretation, determine the conditions and standards according to which citizens are granted rights, and dictate which identities are recognised as legitimate and which remain

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117 *Bernstein v Bester NO* [1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751 par 67; *National Coalition for Gay and Lesbian Equality v Minister of Justice supra* par 32.

118 Wilson "The 'Neat Concept' of Sexual Citizenship: A Cautionary Tale for Human Rights Discourse" 2009 15 *Contemporary Politics* 73 73–74; Conover, Crewe and Searing "The Nature of Citizenship in the United States and Great Britain: Empirical Comments on Theoretical Claims" 1991 53(3) *Journal of Politics* 800 802.

119 Phelan *Sexual Strangers: Gays, Lesbians, and Dilemmas of Citizenship* (2001) 157; Wilson 2009 *Contemporary Politics* 73 76.

120 Phelan *Sexual Strangers* 157.

121 Wilson 2009 *Contemporary Politics* 73 75–76; s 3 of the Constitution. S 7(2) of the Constitution provides: "The state must respect, protect, promote and fulfil the rights in the Bill of Rights." See also *Kaunda v President of the Republic of South Africa* ([2004] ZACC 5 par 144), where Chaskalson CJ notes that the State has an obligation to protect the rights of citizens.

122 Klaaren "Citizenship" in Woolman and Bishop *Constitutional Law of South Africa* 2ed (2013) ch 60–8.

123 Wilson 2009 15 *Contemporary Politics* 76.

marginal. For Bell and Binnie, this modern understanding of citizenship grants rights and duties, but it reflects a "compromise with normalising power".[124] Similarly, it could be said that the concept of sexual citizenship entails formal regulatory processes that acknowledge and grant individuals certain rights such as equality, dignity and freedoms based on their adherence (or assimilation) to sexual norms.[125] Often displayed through the lens of liberalism, sexual citizenship functions as a legal status that emphasises the extent to (or the manner in) which equality is extended to sexual minorities.[126] The recognition of same-sex unions or spousal status is a salient example. Despite constitutional value commitments to equality, freedom and dignity, most "other" citizens are relegated to a second-class citizenship status unless they have assimilated to the sexual norm. Differently put, the recognition of same-sex unions, spousal status, and limited legal protections reflects this compromise with normalising power – a model in which equality is extended only to those who assimilate to the dominant order. Thus, sexual citizenship is not an automatic right, but a conditional status, shaped by adherence to what is legally and socially tolerable. Phelan argues that those seeking to enjoy the privileges and benefits of common sexual citizenship either claim to be or "masquerade" as the model citizen: cisgender and heterosexual.[127] As a result, the power over the democratic process and institutions remains in the hands of the ideal citizens and those who do not challenge or disrupt the norm.[128] Within this heteronormative value system, sexual citizenship is limited and constrained. Second-class citizens can, at best, hope to have gained the heteronormative rights and freedoms – provided that they do not unsettle (or, in the language of toleration, cause harm to the tolerator) the hegemonic heteronormative state that underpins the construction of citizenship.[129] In other words, viewed through the concept of sexual citizenship, equality and difference are recognised by way of assimilation and conditional acceptance, and grounded in the rights of all citizens, in accordance with what is universally accepted or tolerated.

The CC's equality jurisprudence demonstrates this tension. The above-mentioned judgments on sexuality, spousal benefits and protections, and marriage illustrate a mismatch between what the Constitution seeks to achieve and the way in which problematic assumptions about equal and sexual citizenship influence judicial constructions of the right to equality and dignity. This can be observed from the court's reserved and conservative

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[124] Bell and Binnie *The Sexual Citizen: Queer Politics and Beyond* (2000) 3; Wilson 2009 15 *Contemporary Politics* 76.

[125] Thomas 2017 *New Political Science* 568 569.

[126] Thomas 2017 *New Political Science* 569; Phelan *Sexual Strangers* 156.

[127] Phelan *Sexual Strangers: Gays, Lesbians, and Dilemmas of Citizenship* 157; De Vos and Barnard-Naudé 2010 *SAPR/PL* 213.

[128] Thomas 2017 *New Political Science* 570.

[129] *Ibid*; Richardson 2017 *Sociology* 208 212; Armstrong 2002 *Feminist Theory* 67 67.

approach to challenging structural inequalities such as heteronormative standards, as illustrated above. As a result, it could be argued that the CC's equality jurisprudence in relation to difference is implicitly based on standards maintained by dominant perspectives. While the court has ruled in favour of extending rights to LGBTQIA+ individuals, it has done so within a framework that maintains the heteronormative state as the default. The more different from or disruptive to the heteronormative value system, the less likely it is that full, equal, moral recognition will be granted.[130] There is thus a disconnect between true equality before the law and the extent to which the court's jurisprudence ensures the equal distribution of the protection and benefits of the law.

The jurisprudence of the CC, particularly in relation to sexual citizenship and equality claims, reveals the negative impact and inherent limitations of toleration as a tool for actualising substantive equality and addressing difference. While the court has taken steps to protect marginalised groups through a framework of non-discrimination, the reliance on toleration often results in a basic inclusion that maintains existing power hierarchies. In cases such as *Fourie* and *NCGLE II*, the court's decisions, although progressive on the surface, ultimately fail to dismantle fully the heteronormative framework that continues to define societal norms.

Rather than securing a right to be different, a toleration-based approach operates as a site of regulation – one that conditions access to rights on the terms of the dominant order. The CC's jurisprudence, while advancing formal equality, has done so through a framework that maintains existing hierarchies rather than dismantling them (substantively). LGBTQIA+ identities, while "included", remain subject to legal and social conditions that preserve heteronormative dominance. The court, by framing difference through toleration, continues to reinforce a distinction between those whose identities are fully recognised and those who are merely tolerated. This raises critical questions about the constitutional promise of equality. Can the law truly recognise diverse identities on equal terms, or will it continue to reinforce a hierarchy in which some identities are accepted unconditionally while others remain subject to regulation and assimilation? The court's approach suggests that as long as toleration remains the dominant legal framework for adjudicating difference, the law will sustain, rather than challenge, entrenched hierarchies of power. This, in turn, undermines the

[130] For example, Gutierrez argues: "Assimilation in the gay/lesbian community is based on models of respectability and upward class mobility that are heterosexually defined. Heterosexuals control the culture because the more different a gay/lesbian is to the heterosexual culture, the less likely it is that s/he will be hired to work in the highest paying jobs in our society." See Gutierrez "Gay and Lesbian: An Ethnic Identity Deserving Equal Protection" 1994 4 *L & Sexuality Rev Lesbian & Gay Legal Issues* 194 224; Ho "Find Out What It Means to Me: The Politics of Respect and Dignity in Sexual Orientation Antidiscrimination" 2017 3(2) *Utah Law Review* 463 482.

transformative aspirations of the constitutional project – leaving structural inequalities intact under the guise of inclusion.

6 CONCLUSION

The CC's reliance on a framework of legal inclusion, framed around equality, dignity and non-discrimination reveals the inherent limitations of using formal legal recognition as a substitute for substantive equality. While the court has taken steps towards extending legal protections to marginalised groups, its jurisprudence often falls short of dismantling the structural hierarchies that sustain exclusion. Although the court does not explicitly rely on toleration as a legal principle, its reasoning operates within a logic of toleration – one that permits difference only insofar as it conforms to dominant social norms. Rather than functioning as an instrument of transformation, this legal framework serves as a regulatory tool – allowing difference to exist within predefined limits while maintaining the broader status quo. The analysis of cases such as *NCGLE I*, *NCGLE II* and *Fourie* demonstrates that while rights have been extended, they remain conditional upon adherence to heteronormative and hierarchical structures. This conditionality prevents the realisation of a legal order where all identities are affirmed and recognised on substantively equal terms. Instead of fundamentally challenging systemic inequality, toleration merely creates a legal space for coexistence without disrupting the normative foundations that sustain discrimination.

If the constitutional promise of dignity, equality and freedom is to be realised, the judiciary must move beyond toleration and towards a framework of meaningful recognition. This requires a shift from passive acceptance to an active engagement with difference, ensuring that legal recognition does not simply tolerate marginalised identities but affirms and respects them as intrinsic and equal components of society. As long as the law continues to reproduce distinctions between those whose identities are fully recognised and those who are merely tolerated, it will remain a site of regulation rather than emancipation. Consequently, equality cannot be achieved through mere toleration – it demands a transformative commitment to dismantling the hierarchies that sustain exclusion. The challenge for the CC, and for the legislative framework more broadly, is to ensure that difference is not just tolerated, but genuinely recognised as fundamental to the realisation of what the Constitution desires – a truly inclusive and democratic society.