



IN DEFENSE OF CONSTITUTIONAL MORALITY

RECENT JURISPRUDENCE FROM THE GLOBAL
SOUTH ON LGBTI RIGHTS AFFIRMS
CONSTITUTIONAL MORALITY

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Recent Court Judgments Defending Constitutional Morality

Why is Constitutional Morality Important?

In 1846, when Grote [wrote](#) about the rise and fall of Athenian democracy, he explained that the diffusion of the sentiment of ‘constitutional morality’ throughout society is a prerequisite for a stable, peaceful and free society. The morality referred to includes the acceptance by both State and society of the universality of human rights.

Some of the worst carnages have occurred when society and States prioritised the views of the majority or those perceived to be superior. It is in recognition of this, and following the horrific atrocities of World Wars 1 and 2, that States across the globe in 1948 committed themselves to the [Universal Declaration of Human Rights](#). The Preamble and provisions of the Declaration embodies the idea of ‘constitutional morality’.

Similarly, the [African Charter on Human and Peoples’ Rights](#), orders States to protect human rights, as an essential requirement for liberation and the elimination of all forms of discrimination, including colonialism, Zionism and apartheid. These ideas were further incorporated into post-independence constitutions, signalling a break from an oppressive past. In that context, the enshrinement of constitutional rights is aimed at transforming society into one that is just, humane and compassionate.

This brief looks at the extent to which courts have carried through the idea of constitutional morality when asked to protect the rights of marginalised groups in society. Over the past 10 years, there has been a visible increase in the number of cases taken to courts seeking protection for the rights of lesbian, gay, and transgender individuals. These cases have had the effect of highlighting the extent to which the concept of constitutional morality is entrenched within the judiciary. Whilst the constitutions in all countries require that courts respect, protect and promote the rights entrenched in the constitution, it has been harder for the judiciary to adhere to this requirement where the legal issue at stake excites public opinion, and where the safeguards for judicial independence are fragile. This brief accordingly focuses specifically on how courts in the global South have dealt with issues pertaining to sexual orientation and gender identity. It is through such cases that we will be able to assess whether our courts have achieved the necessary maturity to protect constitutional morality. To best illustrate the reasoning of the courts, extracts from their judgments are quoted.

“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law, ...

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms...”

Preamble, Universal Declaration of Human Rights

Popular Morality ≠ Constitutional Morality

“...[T]here is at the present time a growing tendency throughout the country to disregard constitutional morality. On all sides we find impatience with constitutional restraints, manifesting itself in many forms and under many pretences, and particularly with the actions of the courts in protecting the individual and the minority against unconstitutional enactments favouring one class at the expense of another. However worded and however concealed under professions of social reform or social justice, the underlying spirit in many instances is one of impatience with any rule of law.”

“Again we are meeting the oldest and the strongest political plea of the demagogue, so often shown to be the most fallacious and dangerous doctrine that has ever appeared among men, that the people are infallible and can do no wrong, that their cry must be taken as the voice of God, and that whatever at any time seems to be the will of the majority, however ignorant and prejudiced, must be accepted as gospel.”

William D Guthrie (1912) “Constitutional morality” *North American Review* Vol. 196 No. 681 pp 154-173.

Unfortunately, the principle of constitutional morality is far from being dispersed throughout society, which explains why we live in world where violence is ruthlessly meted out against groups based on their ethnicity, gender, sexual orientation, gender identity, disability, country of origin, or other status.

A century ago, William Guthrie, reflecting on rising populism in the United States, cautioned on the inevitable consequences of populism and the importance of retaining the power of the courts to protect the rights of all persons at all costs. Fortunately, these powers are entrenched in most constitutions and require that the courts protect and promote the rights enshrined in the constitution. That said, judges are themselves influenced by trends in public opinion, and sometimes are at pains to utilize their powers where it might result in their disfavour.

The difficulties faced by judges in maintaining constitutional morality against an onslaught of public opinion about a particular issue is well-illustrated by examples of how some courts have dealt with whether the criminalisation of consensual same-sex sexual acts infringes on constitutional rights.

India

In 2009, the Delhi High Court, per Chief Justice Ajit Prakash Shah, in [NAZ Foundation v Government of NCT](#), cautioned that popular morality is based on “shifting and subjective notions of right and wrong”. The court explained that the morality it enforces is that which is espoused in the constitution, and that when assessing the rights violations imposed by the criminalisation of consensual same-sex sexual acts, public disgust cannot be a reason to justify discrimination against a social group. In 2013, the India Supreme Court, in [Suresh Kumar Koushal and Another v NAZ Foundation and Others](#) set aside the High Court decision in the *NAZ Foundation* case, causing considerable discomfort in the judiciary. In a Supreme Court decision, [Puttaswamy and Another v Union of India and Others](#), Chandrachud J opined “sexual orientation is an essential component of rights guaranteed under the Constitution which are not formulated on majoritarian favour or acceptance.” Eventually the *Koushal* decision was overturned by the Supreme Court in 2018 in [Navtej Singh Johar and Others v Union of India and Others](#), where Chief Justice Dipak Misra criticised the *Koushal* decision as having been “guided by social morality leaning on majoritarian perception whereas the issue, in actuality, needed to be debated upon in the backdrop of constitutional morality.” The Supreme Court explained that what the *Koushal* decision did not grasp, was that fundamental rights do not require majoritarian sanction and that to try to promote homogeneity in society would violate the principle of constitutional morality.

“The concept of constitutional morality would serve as an aid for the Court to arrive at a just decision which would be in consonance with the constitutional rights of the citizens, however small that fragment of the populace may be. The idea of number, in this context, is meaningless; like zero on the left side of any number. In this regard, we have to telescopically analyse social morality vis-à-vis constitutional morality. It needs no special emphasis that whenever the constitutional courts come across a situation of transgression or dereliction in the sphere of fundamental rights, which are also the basic human rights of a section, however small part of the society, then it is for the constitutional courts to ensure, with the aid of judicial engagement and creativity, that constitutional morality prevails over social morality.... A country or a society which embraces constitutional morality has at its core the well-founded idea of inclusiveness.”

Dipak Misra CJ, *Navtej Singh Johar and Others v Union of India and Others*, Supreme Court of India

Zimbabwe

The Zimbabwe Supreme Court in the 2000 case of [Banana v the State](#), considered the same legal question. The majority, per McNally J, Muchechetere J, Sandura J, held that it is not for the court to “place a sexually liberal interpretation on the Constitution of a country whose social norms and values in such matters tend to be conservative.” The dissenting judgment by Gubbay CJ and Ebrahim J, came to the opposite conclusion, holding that courts cannot be dictated by public opinion and have a duty to interpret and apply the Constitution. The minority emphasised that in a pluralistic society, moral values cannot on its own justify criminal sanction, and that it would in any event be impossible to determine whose moral values ought to guide the State.

Botswana

In 2003, the Botswana Court of Appeal in [Kanane v the State](#), considering the constitutionality of Penal Code provisions criminalizing same-sex sexual acts, held itself bound by public opinion. Subsequently, the [High Court](#), in 2014 per Rannowane J (as he then was), and the [Court of Appeal](#), in 2016 per Kirby JP, espoused the principle of constitutional morality when they rejected the State’s arguments opposing the registration of an organisation which promoted the rights of lesbian, gay, transgender and bisexual persons. A 2017 High Court [decision](#) by Nthomiwa Nthomiwa J on the right of a transgender person to change the gender marker on their identity document, built on this jurisprudence and firmly protected the right to dignity of all persons. In June 2019, the High Court, per Leburu J, Tafa J and Dube J, in [LM v Attorney General \(LEGABIBO as amicus curiae\)](#) declared the Penal Code provisions criminalising same-sex sexual acts unconstitutional. The court held that public opinion does not trump the ‘triangle of constitutionalism’, liberty, equality and dignity. The court repeatedly emphasised the importance of a compassionate society which respects diversity.

Religious Beliefs ≠ Constitutional Morality

Some countries have included reference to the dominant religion in the country’s constitution. However, courts have cautioned against assuming that such reference somehow detracts from the universality of rights.

When assessing the constitutionality of the Penal Code provisions which criminalise same-sex sexual acts, the Belize Supreme Court, in 2016 per Chief Justice Benjamin, in [Caleb Orozco v Attorney General of Belize](#), held that even where the constitution refers to a specific religion or God, the rights to freedom of religion and freedom of conscience remain intact and enforceable.

In 2005, the Fiji High Court, per Winter J, in [McCoskar v The State](#), explained that “while Christianity underpins much of value in Fiji, we are a secular State influenced by Christianity but not predominated by it.”

In 2015, the Kenya High Court in [EG v NGO Coordination Board and Others](#) affirmed that moral and religious beliefs cannot be the basis to limit constitutional rights. The case dealt with the State’s refusal to register an organisation aimed at protecting the rights of lesbian and gay persons. The [Court of Appeal](#) in 2019 affirmed the High Court judgment, albeit with much less vigour. Waki JA, casting the deciding judgment in the case, sought to bring balance through citing the bible’s own prescriptions on judgment: “let anyone of you who is not without sin be the first to throw a stone at her”. The fact that the judge felt the need to cite the bible is indicative of the extent to which religious beliefs had entered the judicial decision-making terrain, and the difficulties faced by judges upholding constitutional morality. This was even more pronounced in the [Kenya High Court decision](#) in May 2019 which upheld the Penal Code provisions criminalising consensual same-sex sexual acts, and reflected a shallow understanding of the principle of constitutional morality.

In 2018, the [High Court of Trinidad and Tobago](#), per Devindra Rampersad J, in an exceptionally well structured judgment, firmly and with conviction rejected the relevance of religious arguments when assessing whether the Penal Code provisions criminalising consensual same-sex sexual acts violated constitutional rights.

“This is not a case about religious and moral beliefs but is one about the inalienable rights of a citizen under the Republican Constitution of Trinidad and Tobago; any citizen; all citizens... This is a case about the dignity of the person and not about the will of the majority or any religious debate. History has proven that the two do not always coincide. To my mind, religious debates are best left to be discussed and resolved in other quarters with persons who subscribe to those particular ideals and for the followers of those ideals to be convinced as to the religiousness, sanctity or morality of those ideals...”

“This conclusion is not an assessment or denial of the religious beliefs of anyone. This court is not qualified to do so. However, this conclusion is a recognition that the beliefs of some, by definition is not the belief of all and, in the Republic of Trinidad and Tobago, all are protected and are entitled to be protected, under the Constitution. As a result, this Court must and will uphold the Constitution to recognise the dignity of even one citizen whose rights and freedoms have been invalidly taken away.”

Jason Jones v Attorney General of Trinidad and Tobago, High Court of Justice, Trinidad and Tobago

Inclusivity and Universality of Rights

In some instances, States have sought to justify discrimination on the basis that human rights do not apply to some groups, because they are not specifically referred to in the country’s constitution. Courts have been swift to reject these arguments for failing the test of constitutional morality and its aspiration of equality and peace within society, including in the context of the rights of marginalised persons.

The Botswana courts have focused on the high premium the country places on its values of tolerance and compassion. The courts explained that such values necessarily means a rejection of any form of discrimination, including against groups who are deemed outcasts. By deepening its own jurisprudence on the rights to dignity and equality, to be all-encompassing, the courts have contributed to the diffusion of the principle of constitutional morality, and have seen the value in doing so to ensure Botswana remains at peace. See for example the High Court judgments in [LM v Attorney General](#) and [ND v Attorney General](#) and the Court of Appeal judgment in [Attorney General v Rammoge and 19 Others](#).

Kenya courts continue to grapple with the question of universality of rights. Whilst the Kenya High Court in [EG v NGO Coordination Board and Others](#) and the Kenya [Court of Appeal](#) clearly stated that the Bill of Rights could not be read to exclude certain groups from protection, a recent decision by the [Kenya High Court decision](#) illustrated how easily judges can perform jurisprudential gymnastics to avoid what they perceive could be an unpopular outcome.

In its most recent judgments in [Puttaswamy](#) and [Navtej Singh Johar](#), the India Supreme Court came out strongly against arguments which suggest that constitutional rights cannot be claimed by some groups in society. Chief Justice Dipak Misra eloquently embraces the role of the courts in educating to society about the value of constitutional morality and its ideal that all individuals are able to thrive in the mainstream.

The Uganda courts have, on occasion, explained that all persons are entitled to protection of their constitutional rights, and that such rights cannot be denied on the basis of a person's sexual orientation. The Uganda Constitutional Court in 2016, in [Adrian Jjuuko v Attorney General](#) held that the exclusion of persons from seeking support from the Equal Opportunities Commission on the basis of sexual orientation is unconstitutional. The court also emphasised that any person can approach to courts to defend constitutional provisions.

The Duty of the Courts to Defend Rights

When it comes to deciding on the constitutionality of provisions which criminalise same-sex sexual conduct, courts have sometimes sought to avoid the issue altogether, by referring to the separation of powers, arguing that this was an issue for the legislature to deal with, or through applying the fiction of a presumption of constitutionality.

These types of approaches were firmly rejected by the Botswana High Court in [LM v Attorney General](#) where it affirmed that it is the duty of the court to interpret the constitution. The India Supreme Court in [Navtej Singh Johar](#) has cautioned that in the instance of rights violations, the court does not have the luxury to defer the question to the legislature.

The High Court of Trinidad and Tobago, in [Jason Jones v Attorney General](#), further rejected the fiction of a presumption of constitutionality. The judgment clarifies that the fiction originated in a country which had parliamentary supremacy, and it ought not to be transposed without thought in countries which adhere to constitutional supremacy. The court explained that the presumption of constitutionality places an unfair evidentiary burden on an applicant and that the court should defer to the application of constitutionally protected rights instead of applying legal fictions. The same court also emphasised that an applicant can approach where there is a threat of the violation of rights.

What the judgments discussed in this brief illustrate, is that many courts in the global South have been firm in defending the rights of marginalised groups in society. In doing so, they have set an important precedent that will benefit all persons. As Guthrie pointed out, one would be amiss to remove the power of the courts to protect rights as one never know when it is your own rights which will need protection. Whilst this brief focused on recent judgments relating to the rights of LGBT persons, courts in the global South have promoted constitutional morality when confronted with a range of controversial issues, including in setting aside [customary laws which impact on women's rights](#) and laws which imposed the [death penalty](#). There is some comfort in knowing that some judiciaries have been bold in defending the principle of constitutional morality. In doing so, they defend the rule of law and assert the role of the courts in ensuring a peaceful society which caters for all who live in it.

