Constitutional Morality vis-à-vis Societal Morality and Populism: An interrogation of the *Eric Gitari 2* and *Ahmad Abolfathi Mohammed* Decisions.

By Joshua Malidzo Nyawa

"I could be well moved, if I were as you;

If I could pray to move, prayers would move me:

But I am constant as the Northern Star,

Of whose true-fixed and resting quality

There is no fellow in the firmament."[1]

Introduction

The constitution has been said to be 'a living, integrated organism having a soul and consciousness of its own and its pulse beats, emanating from the spinal cord of its basic framework, can be felt all over its body, even in the extremities of its limbs'[2]. The implementation of the constitution is however left to the judges who are expected to supply vitality, blood and flesh, to balance the competing rights by interpreting the principles, to the language or the words contained in the living and organic Constitution, broadly and liberally[3]. This is essentially one of the characteristics of a post war constitution. A post war constitution promises a human rights state (A term that has been coined by various writers)[4].Walter Khobe[5] has argued that a human rights state enforces and realizes the whole gamut of rights: political, civil, economic, social and cultural rights. The basis of this enforcement is pegged to "constitutionally effective" norms that the courts, the state, and the citizenry themselves make

[1]Words of Caesar to Cassius in William Shakespeare's *Julius Caesar* (Act III, Scene 1).
[2]*Chief Justice of AndhraPradesh and others v. L.V.A. Dixitulu and others* (1979) 2 SCC 34.
[3]*Ashok Kumar Gupta and another v. State of U.P. and others* (1997) 5 SCC 201.
[4] See Makau Mutua 'Hope and Despair for a New South Africa: The Limits of Rights Discourse' (1997) 10 *Harvard Human Rights Journal* 63; See also Benjamin Gregg, *The Human Rights State: Justice Within and Beyond Sovereign Nations* (Philadelphia: University of Pennsylvania Press, 2016)13; See also René Wolfsteller & Benjamin Gregg, 'A realistic utopia? Critical analyses of *The Human Rights State* in theory and deployment: Guest editors' introduction' (2017) 21:3 *The International Journal of Human Rights*219-229.
[5] See Walter Khobe, 'The Lion in winter: The High Court and the Thwarted Promise of a Human Rights State and Society', (2019) 45 *The Platform for law, Justice & Society* 13; See also *Benjamin Gregg, Human Rights as Social Construction* (New York: Cambridge University Press, 2012).

"practically realizable and enforceable."[6] In a human rights state therefore the judiciary is viewed as a pivotal institution under the Constitution that must promote and protect the human rights state and society[7].The role of judges in this dispensation is therefore to implement Prempeh's call for a 'rights-friendly' jurisprudence[8], which Eric Christiansen[9]has called a 'justice oriented ideology'.

The term a human rights state is therefore traceable to the post war constitutions and constitutionalism, others refer to this as the post Nazi German Basic Law[10] and the post-apartheid 1996 Constitution of South Africa (The 2010 constitution has been classified along these lines)[11]. A post-war constitution unlike the others has a limitation clause and requires justification for any limitation of the bill of rights[12]. This is because transformative constitutions[13] need to create a new legal culture of` protection of rights[14] and remain as a key instrument to bring about a better and more just society".[15] Simply put, the incorporation of the bill of rights in a post war constitution is to protect the rights of all including protecting the minority from the majority. The US Supreme Court would not have put it any better when it held that:

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[6] See the *Institute of Social Accountability & Another vs. National Assembly & 4 Others* [2015] eKLR where the court concluded as follows at paragraph 59 0f its decision 'Ours must be a liberal approach that promotes the rule of law and has jurisprudential value that must take into account the spirit of the Constitution."

[7]See Willy Mutunga 'Human Rights States and Societies: A Reflection from Kenya' (2015 (2) *Transnational Human Rights Review* 63-102

[8] HK Prempeh 'Africa's "constitutionalism revival": False start or new dawn?' (2005) 3 *International Journal of Constitutional Law* 469.

[9] Christiansen E, 'Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice', *The Journal of Gender, race & Justice* (2010), 1-7.

[10] See Michaela Hailbronner, *Traditions and Transformations: The Rise of German Constitutionalism* (Oxford University Press, 2015).

[11] See the court's interpretation of Article 19 of the 2010 constitution holding that the rights are not guaranteed by the state and hence require any limitation of the rights to meet the constitutional limitation test in *Robert Alai V The Hon Attorney General* Petition No 174 Of 2016 at Para 27.

[12] See *Attorney-General & another v. Randu Nzai Ruwa & 2 others* Civil Appeal No. 275 of 2012; [2016] eKLR.

[13] On the concept of transformative constitutionalism, see Karl Klare, in his article, "*Legal Culture and Transformative Constitutionalism*," (1998) 14 *South African Journal of Human Rights* 146, who conceptualizes the concept to mean "By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed…to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law."

[14]Walter Khobe, 'Transformation and crisis Legal Education in kenya', (2016) 25 *Platform for law , justice and society* pg 66-70.

[15] See *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 753 (CC); 1998 (10) BCLR 1207 (CC) at para 22.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[16]

The post-war constitutions eschew the reliance of public opinion in adjudication, it alternatively encourages courts to follow a principled, law-based adjudication.[17]It is on this basis that this paper suffices. This paper seeks to show that the 2010 constitution has successfully moved us from the dark ages of societal morality to an era of constitutional morality. However, this paper notes and regrettably so, that our courts have sought to return us back to those days. This paper will critique the Supreme Court's majority decision in *Mohammed*[18]and the high court's decision in Eric Gitari 2[19]. Similarly this paper will celebrate the Minority decision in *Mohammed.*

The concept of constitutional morality and societal morality

The concept of constitutional morality has been said to urge the organs of the State, including the Judiciary, to preserve the heterogeneous nature of the society and to curb any attempt by the majority to usurp the rights and freedoms of a smaller or minuscule section of the populace. Similarly the Constitutional morality cannot be martyred at the altar of social morality and it is only constitutional morality that can be allowed to permeate into the rule of law. The veil of social morality cannot be used to violate fundamental rights of even a single individual, for the foundation of constitutional morality rests upon the recognition of diversity that pervades the society[20]. This is exactly what it means *'Moral indignation, howsoever strong, is not a valid basis for overriding individuals' fundamental rights of dignity and privacy. In our scheme of things, constitutional morality must outweigh the argument of public morality, even if it be the*

[16] See *West Virginia StateBoard of Education v. Barnette* ; See also*Furman v. Georgia, 408* U.S. 238, 290 (1972) at 443
[17]319 U.S. 624, 638 (1943).
[18]*Republic v Ahmad Abolfathi Mohammed and Another*, Petition No. 39 of 2018
[19]*EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae).*
[20]One Day National Seminar On Constitutionalism and Constitutional Morality: Contemporary Issues and Challenges (CCMCIC) March 26th 2019 Organized by Department of Law, School of Legal Studies Babasaheb Bhimrao Ambedkar University.

majoritarian view[21]. An Indian court expressed this view in the following words "if there is any type of 'morality' that can pass the test of compelling state interest, it must be 'constitutional' morality and not public morality."[22]

This term was firstly propounded by the English classicist George Grote in "A History of Greece", the term constitutional morality, despite its rather simple appearance, attempts to convey the complex value of what the written constitution stands for. This term was expressed to mean:

> "… a paramount reverence for the forms of the constitution, enforcing obedience to authority and acting under and within these forms, yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts combined, too with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of the constitution will not be less sacred in the eyes of his opponents than his own."[23]

His conception of this term is the idea that it recognises plurality and differences (special needs) or as observed by Learned Hand, pluralism was "the temper which does not press a partisan advantage to its bitter end; it can understand and appreciate the other side and feels a unity between all citizens."[24] Grote therefore postulated that, for constitutional morality to reign, there had to be a management and adjudication of differences[25] or in Former Chief Justice M.N. Venkatachaliah words while making an observation on plurality in the context of India "India, in particular, is such a typical pluralist society– a model of unity in the mosaic of diversities."[26]Paul Sieghart also points out that "*the hallmarks of a democratic society are pluralism, tolerance and broad-mindedness. Although individual interests must on occasion be subordinated to those of a group, democracy does not mean that the views of a majority must always prevail: a balance*

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[21]*A.P. Shah, Chief Justice, Delhi High Court , Naz Foundation v. Government of NCT of Delhi (2009).*
[22]*Naz Foundation v Govt of NCT Delhi & Ors* 160 (2009) DLT 277 at para 79.
[23] A History of Greece by George Grote – Reissue by Routledge, London 2000 at page 93: cited in Pratap Bhanu Mehta, "What Is Constitutional Morality?," *Seminar* 615 (November 2010), 17– 22. 87.
[24] Learned Hand, "The Contribution of an independent Judiciary to Civilization" in Irving Dillard (Ed), *The Spirit of Liberty*, (A A Knopf, 1960) p. 155.
[25]Shri Gopal Subramanium, "Constitutional Morality – Is It A Dilemma for the State, Courts and Citizens?" 1st D.V. Subba Rao Memorial LectureDelivered On April 24, 2016 at Para 60.
[26] Venkatachaliah, M. N., "Common Law, Humanism and Constitutions", Constitutionalism and Constitutional Pluralism, Ed. P. Ishwara Bhat. Gurgaon: Lexis Nexis, (2013) 53-64.

must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position".[27]

While discussing the various conceptions of morality, Professor Waluchow[28]advocates for a morality that is neither "the Platonic morality of the philosophers", nor a kind of Hartian positive morality that amounts to the imposition beliefs and opinions shared by the majority in a society [29](this is what I call societal morality in this paper). On the other hand, Max du Plessis has suggested a balance between apology (judicial reliance on public opinion) and utopia (the absolute rejection of public opinion), judicial reliance on "critical morality" as opposed to positive/public morality. According to him the distinction between the two is that public morality is the morality accepted and shared by a particular social group, whereas critical morality is that body of generally accepted forms of reasoning which is used to second-guess the public mores (i.e., morality that is informed and defensible)[30].

This kind of morality(societal morality, runs counter to the very nature of having a bill of rights in the first place, which is established to protect the interests of minority groups in society and those susceptible to prejudices. Waluchow also distinguishes moral *opinions* from moral *commitments*: opinions are susceptible to shifting and evolving in tandem with societal shifts, such as those towards homosexuality, while commitments are the fundamental values and principles that are universally shared such as the equal treatment of all individuals in a society, free from prejudice. Put it in other way, when we talk about constitutional morality, we speak of "the moral norms and convictions to which the community has actually committed itself and which have...been drawn into the law via the rule of recognition and the law it validates."[31]

[27]The International Law of Human Rights, Oxford 1983, reprinted 1992, at p. 93 referring to James, Young and Webster v U.K. Judgment of the European Court of Human Rights on 13/08/81.
[28] W.J. Waluchow, "Constitutional Morality and Bills of Rights" in Grant Huscroft ed., *Expounding the Constitution: Essays In Constitutional Theory* (Cambridge University Press, 2008) 65.
[29] Nisha Rajoo, "A Case for Morality in Constitutional Adjudication" *Comparative Constitutional Law Research Paper*, 12 November 2012.
[30] See Max du Plessis, 'Between Apology and Utopia: The Constitutional Court and Public Opinion', 18 *SAJHR* 1, 11 (2002) at 12.
[31]Isaac Kramnick & R. Laurence Moore, *The Godless Constitution: A Moral Defense of the Secular State* (New York: W.W. Norton, 2005) at 77.

The different meanings of constitutional morality have been explained briefly by Pratap Bhanu Mehta[32] as follows:

> "In Grote's rendition, 'constitutional morality' had a meaning different from two meanings commonly attributed to the phrase. In contemporary usage, constitutional morality has come to refer to the substantive content of a constitution. To be governed by a constitutional morality is, on this view, to be governed by the substantive moral entailment any constitution carries. For instance, the principle of non-discrimination is often taken to be an element of our modern constitutional morality. In this sense, constitutional morality is the morality of a constitution. There was a second usage that Ambedkar was more familiar with from its 19th century provenance. In this view, constitutional morality refers to the conventions and protocols that govern decision-making where the constitution vests discretionary power or is silent."

The idea of a constitutional morality calls for a justification on the basis of values which cohere with the text of the Constitution and ensures fidelity with its inherent values.[33] Similarly, it entails the concept that Constitutional values are to be upheld, because these values reflect "widely shared social aspirations"[34] and should not fall captive of the societal morality standards. In *Manoj Narula v. Union of India,*[35] where a Constitution Bench was called upon to decide upon the legality of persons with criminal antecedents being appointed as Ministers in the Central and State Governments. Justice Dipak Misra (speaking for himself, Chief Justice Lodha and Justice Bobde) observed as follows:

> "The principle of constitutional morality basically means to bow down to the norms of the Constitution and not to act in a manner which would become violative of the rule of law or reflectible of action in an arbitrary manner. It actually works at the fulcrum and guides as a laser beam in institution building. The traditions and conventions have to grow to sustain the value of such a morality. The democratic values survive and become

[32]Pratap Bhanu Mehta, What Is Constitutional Morality, (2010), http://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm
[33] Rohit Sharma, "The Public and Constitutional Morality Conundrum: A Case-Note on the *Naz Foundation* Judgement" (2009) *NUJS L. Rev*. 445 at 450.
[34] Morris B. Kaplan, *Sexual Justice: Democratic Citizenship and the Politics of Desire* (New York: Routledge, 1997) at p. 25.
[35] (2014) 9 SCC 1.

> successful where the people at large and the persons in charge of the institution are strictly guided by the constitutional parameters without paving the path of deviancy and reflecting in action the primary concern to maintain institutional integrity and the requisite constitutional restraints. Commitment to the Constitution is a facet of constitutional morality …"

Similarly in Government *of NCT of Delhi v. Union of India and others*[36], Dipak Misra, CJI observed that

> "Constitutional morality, appositely understood, means the morality that has inherent elements in the constitutional norms and the conscience of the Constitution. Any act to garner justification must possess the potentiality to be in harmony with the constitutional impulse. We may give an example. When one is expressing an idea of generosity, he may not be meeting the standard of justness. There may be an element of condescension. But when one shows justness in action, there is no feeling of any grant or generosity. That will come within the normative value. That is the test of constitutional justness which falls within the sweep of constitutional morality. It advocates the principle of constitutional justness without subjective exposition of generosity."

Our constitution is explicit on the importance of values. It embodies the values of the Kenyan Society, as well as the aspirations, dreams and fears of our nation as espoused in Article 10[37]. It is not focused on presenting an organisation of Government, but rather is a value system itself hence not concerned only with defining human rights and duties of individuals and state organs, but goes further to find values and goals in the Constitution and to transform them into reality. In *Charles Lukeyen Nabori & 9 Others vs. The Hon. Attorney General & 3 Others* Nairobi HCCP No. 466 of 2006, it was held that:

"…the Constitution should not represent a mere body or skeleton without a soul or spirit of its own. The Constitution being a living tree with roots, whose branches are expanding in natural surroundings, must have natural and robust roots to ensure the growth of its branches, stems, flowers and fruits."

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[36] 2018 (8) SCALE 72.

[37] This was the position adopted by the Supreme Court in *The Matter of the Principle of Gender Representation in the National Assembly and the Senate*, SC Advisory Opinion No. 2 of 2012 where the Supreme Court held that the 2010 constitution establishes a value system.

The place of public opinion the 2010 constitution

A reliance on Public opinion or public hysteria[38] reflects the idea that laws are made to regulate the society and as such the views of the society should be taken into account or else the majority would reject the law. However, it is to be realized that the very purpose of a constitutional adjudication is to ensure that public opinion is not decisive and any approach that subjects fundamental rights to the moral approval of the majority would strike at the very foundation of having fundamental rights as a means of protecting minority interests[39]. This is because for instance as per Bruce Ackerman, "ordinary politics" is not very democratic, and employing the Bill of Rights to advance the interests of minority groups (what he refers to as "constitutional politics") is an act of further democratization.[40]

Notably, constitutional adjudication is founded on the basis that justifications for limiting rights "cannot be derived *solely* from popular will."[41]The South African Constitutional Court puts it this point more bluntly in *State v. Makwanyane,* submitted that:[42]

> "The duty of the court was to decide in accordance with the Constitution and the court should not be reduced to that of an election returning officer. It would set a very dangerous precedent if every time a Constitutional Court had to decide on a constitutional provision it had to canvass and seek public opinion so that it decides in accordance with it. That would make the role of the Constitution and the Constitutional Court useless and meaningless."

Although Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour[43]. In *S v Makwanyane* Kentridge AJ stated as follows[44]:

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[38] George Kanyeihamba, *Reflections of a Judge on the Death Penalty in Uganda*, (2004) *2 The Uganda Living Law Journal* at 94 & 96.
[39] Vikram Aditya Narayan, 'Matters Of Morality', (2016) 3 *CALQ*30.
[40]Bruce Ackerman, *We The People: Foundations* (Harvard Uni. Press 1993).
[41] *Legal Resources Foundation v. Zambia* (2001) AHRLR 84 (ACHPR 2001) para. 70.
[42]At 58.
[43]Adem K Abebe, 'Abdication of Responsibility or Justifiable Fear of Illegitimacy? The Death Penalty, Gay Rights, and the Role of Public Opinion in Judicial Determinations in Africa', *The American Journal Of Comparative Law* [Vol. 60) p 603
[44] Para 255, 486G

'If we were simply to defer to public opinion we would be abdicating from our constitutional function. Yet, were public opinion on the question clear, it could not be entirely ignored. The accepted mores of one's own society must have some relevance to the assessment whether a punishment is impermissibly cruel and inhuman.'[45]

When courts are asked to show proper respect for community values, they are not asked to bend before the changing winds of popular opinion. The Constitutional Court of Uganda has held that 'While . . . the norms and aspirations of the people must be taken into consideration when interpreting this Constitution, the language and spirit of the Constitution must not thereby be compromised'[46]

Judges should not therefore feel like they can be intimidated by popular disapproval. When this happens, there is a great danger the independence of the judiciary would be greatly affected. Murray Gleeson, a Judge of the High Court of Australia once noted that 'It is sometimes argued that failure to consider public opinion makes courts seem "out of touch" with the society they serve, but bowing to public opinion will curtail their independence[47].

Secondly, the main purpose of judicial review is to restrict the outcomes of the majoritarian process whether exercised through representatives or directly by the people. If judges would continue relying on the public opinion rather than the constitution then there is a great danger that we may end up with a majoritarian supremacy, this will end up leaving the minorities unprotected by judicial reliance on public opinion.[48]Chaskalson P in *S v Makwanyane* expressed himself on this issue thus:

> "The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and

[45] Para 200, 473D-E; See also Madala J in *S v Makwanyane* when he stated as follows in response to an argument by counsel who had appeared as amicus curiae on behalf of the Black Advocates Forum:
'As I understood her argument, the issue of capital punishment could not be determined in an open and democratic society without the active participation of the black majority. *This, in my view, would be tantamount to canvassing public opinion among the blackpopulation for the decisions of our courts.* I do not agree with this submission if it implies that this Court or any other court must function according to public opinion.'"
[46]*Susan Kigula & 416 others v. The Attorney General*, constitutional petition no 6 of 2003, Constitutional Court of Uganda (2005).
[47] Murray Gleeson, Out of Touch or Out of Reach? (Oct. 2, 2004), http://www.highcourt.gov.au/speeches/cj/cj_02oct04.html
[48]See Stephen Macedo, 'Against Majoritarianism: Democratic Values and Institutional Design', 90 *B.U.L. REV* 1029, 1038 (2010), observing that reliance on themajoritarian rule cannot be fair.

> others who cannot protect their rights adequately through the democratic process.' Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected."

The clarion call has been and is that courts should not be bound by the views of the majority and neither should the court struggle to satisfy the wishes of the majority. This was the approach of the President of the Hungarian Constitutional Court, Justice Solyom, in his famous Concurring Opinion in the 1991 Decision on the constitutionality of capital punishment, where he said: "The Constitutional Court is not bound either by the will of the majority or by public sentiments"[49].

Similarly Justice Powell observed in dissent that:[50]

> ". . . The weight of the evidence indicates that the public generally has not accepted either the morality or the social merit of the views so passionately advocated by the articulate spokesmen for abolition [of the death penalty]. But however one may assess amorphous ebb and flow of public opinion generally on this volatile issue, this type of inquiry lies at the periphery—not the core—of the judicial process in constitutional cases. The assessment of popular opinion is essentially a legislative, and not a judicial, function."

Closer home, this view was expressed in *John Harun Mwau & 3 Others*[51] *:*

> "This case has generated substantial public interest. The public and politicians have their own perceptions of when the election date should be. We must, however, emphasis that public opinion is not the basis for making our decision. Article 159 of the Constitution is clear that the people of Kenya have vested judicial authority in the courts and tribunals to do justice according to the law. Our responsibility and the oath we have taken require that we interpret the Constitution and uphold its provisions without fear or favour and without regard to popular opinion… our undertaking is not to write or rewrite the Constitution to suit popular opinion. Our responsibility is to interpret the Constitution in a manner that remains faithful to its letter and spirit and give effect to its objectives."

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[49] Decision No. 23/1990 (X.31.) AB of the (Hungarian) Constitutional Court (George Feher trans.) at 12.
[50] *Furman v. Georgia*, 408 U.S. 238, 290 (1972) at 443.
[51] *John Harun Mwau & 3 Others v Attorney General & 2 Others* Petition No 65 of 2011 [Consolidated with] Petitions No's 123 of 2011 and 185 of 2011[2012]:

The Role of Courts in adjudicating Minorities' Rights

The courts are obligated to protect the minorities in our societies. With respect to the protection of the gays in South Africa, the Constitutional Court of South Africa expressed itself thus[52]

> "The impact of discrimination on gays and lesbians is rendered more serious and their vulnerability increased by the fact that they are a political minority not able on their own to use political power to secure favourable legislation for themselves."

In a subsequent case that challenged the prohibition of gay marriages, the Court reiterated that:[53]

> "[i]n the open and democratic society contemplated by the [South African] Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other. Provided there is no prejudice to the fundamental rights of any person or group, the law will legitimately acknowledge a diversity of strongly-held opinions on matters of great public controversy . . . . [the Court] stress[es] the qualification that there must be no prejudice to basic rights. Majoritarian opinion can often be harsh to minorities that exist outside the mainstream. It is precisely the function of the Constitution and the law to step in and counteract rather than reinforce unfair discrimination against a minority. The test, whether majoritarian or minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom."

The idea of a bill of rights is supposed to protect the vulnerable minorities and individuals against the "errors, prejudices, and excesses of powerful majorities" and when courts fall prey to populism, they betray the essential purpose of a constitution. Andrei Marmor makes this point more clearly:

> "… the idea that constitutional interpretation should be grounded on those values which happen to be widely shared in the community would undermine one of the basic rationales for having a constitution in the first place. Values that are widely shared do not

[52]*National Coalition of Gay and Lesbian Equality & Another v. Minister of Justice & Others* 1999 (1) SA 6 CC, 1998 (1) BCLR 1517 (CC). (SA Sodomy case) at 20-1, 25.
[53]*Minister of Home Affairs and Another v. Fourie and another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) para. 94.

> require constitutional protection . . . It is precisely because we fear the temptation of encroachment of certain values by popular sentiment that we remove their protection from ordinary democratic processes. After all, the democratic legislature is a kind of institution which is bound to be sensitive to popular sentiment and widely shared views in the community. We do not need the constitutional courts to do more of the same."[54]

Courts should base their decisions on constitutional morality and not on anything else. Justice Sikri has observedon this point that "our Constitution inheres liberal and substantive democracy with the rule of law as an important and fundamental pillar" and that "it has its own internal morality based on dignity and equality of all human beings."[55] Courts should therefore realize that *those perceived by the majority as 'deviants' or 'different' are not on that score excluded or ostracized.*"[56]

The court has a duty to the constitution. They have to enforce the constitutional morality as contained in the constitution. The constitution has been Recognised as a repository of values'[57]and AJ van der Wal[58] echoed those 'constitutional values', and concludes that 'the Constitution must be interpreted in terms of values which take the past into account, but in doing so it looks towards the future, towards reconstruction and reconciliation in an "open and democratic society based upon freedom and equality". This is the basis for Cockrell's writing on 'rainbow jurisprudence'[59], where he conceptualizes the role of courts to mean 'In interpreting the Bill of Fundamental Rights and Freedoms... an all-inclusive value system, or common values in South Africa, can form a basis upon which to develop a South African human rights jurisprudence' [60] and another 'This evaluation must necessarily take place against the backdrop of the values of South African society as articulated in the Constitution and in other legislation, in the decisions of our Courts and, generally, against our own experiences as a people.' [61]

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[54]Andrei Marmor, *Interpretation and Legal Theory*, at 161-62 (rev. 2ded. 2005), cited in W.J. Waluchow, 'Constitutional Morality and Bills of Rights', in Grant Huscroft ed, Expounding The Constitution: Essays In Constitutional Theory (2008) at 88.
[55]*Naz Foundation v Govt of NCT Delhi & Ors* 160 (2009) DLT 277 at 129.
[56] NAZ ibid at para 74.
[57] Henk Botha 'The values and principles underlying the 1993 Constitution' (1994) 9 *SAPL* 233.
[58]AJ van der Wal 'Tradition on trial: A critical analysis of the civil-law tradition in South African property law' (1995) *11 SAJHR* 169 at 191-192
[59] Alfred Cockrell,'Rainbow Jurisprudence', (1996)12 *S. Afr. J. on Hum. Rts* 1.
[60]*S v Makwanyane* supra note 8 at para 307, 500H, per Mokgoro J.
[61]*S v Williams* 1995 (3) SA 632 (CC) at para 59, 650D, per Langa J.

The role of courts to the constitution can also be seen in *Gregg v. Georgia*, [62]where Justices Stewart, Powell and Stevens, accepted that "...the Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society. The Court also must ask whether it comports with the basic concept of human dignity at the core of the Amendment." Similarly, In *People v. Anderson,* The role of the court was clearly set out as

> "The cruel or unusual punishment clause of the California Constitution, like other provisions of the Declaration of Rights, operates to restrain legislative and executive action and to protect fundamental individual and minority rights against encroachment by the majority. It is the function of the court to examine legislative acts in the light of such constitutional mandates to ensure that the promise of the Declaration of Rights is a reality to the individual (citations omitted)...Were it otherwise, the Legislature would ever be the sole judge of the permissible means and extent of punishment and article I, section 6, of the Constitution would be superfluous."[63].

Lastly, Madala J held in Makwanyane that

> "We, as judges, are oath bound to defend the Constitution. This obligation, in turn, requires that any enactment of Parliament should be judged by standards laid down by the Constitution. The judiciary has the duty of implementing the constitutional safeguards that protect individual rights. When the State seeks to take away the individual fundamental right to life, the safeguards of the Constitution should be examined with special diligence. When it appears that an act of Parliament conflicts with the provisions of the Constitution, we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less."

In conclusion, the call in this paper is that when confronted with a matter, courts should realise that the bill of rights in the 2010 constitution "is the most recent expression of the values upheld in our society", [64]it can be correctly regarded, in the words of Christie, as an "exceptionally reliable statement of seriously considered public opinion".[65] This is essentially because as Prof

[62]*Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (Stewart, Powell and Stevens, JJ.) at 880.
[63]*People v. Anderson*, 493 P.2d 880, 886 (Cal. 1972) at 888.
[64] Van der Merwe et al, *Contract General Principles* 3 ed (2007) 18.
[65] Christie "The Law of Contract and the Bill of Rights" in Mokgoro and Tlakula (eds) *Bill of Rights Compendium* (2006) 3H8.

Makau Mutua, puts it in his article "Why Kenyan Constitution must Protect Gays" published in the *Sunday Nation*, 24th October 2009:

"Constitutions are not meant to protect only individuals that we like, and to leave unprotected those who are unpopular, or those the majority may find morally objectionable. A person's identity – especially if it exposes them to ridicule, attack, or discrimination – must be the reason for constitutional protection. Constitutions protect individuals from tyranny of the state and oppression from their fellow human beings".

Eric Gitari 2 and Mohammed decisions

In Eric Gitari 2, the court was asked to determine the constitutionality of Section 162 and 165 of the penal code. The two sections criminalize homosexuality in Kenya. Regrettably, the high court found the two provisions as constitutional. Behind the legal argument advanced by the court is the influence of public opinion and societal morality. Prior to the ruling, the social media and televisions were occupied by collection of views from the general public. This is reflected in the high court's decision. The three judge bench held that:

> "We are aware that all laws in existence as at 27th August 2010 must be construed with alterations, adaptations, qualifications and exceptions necessary so as to conform to the Constitution. Nonetheless, as observed above, the issue before us was alive during the constitution making process, and, therefore, if Kenyans desired to recognize and protect the right to same sex relationships, nothing prevented them from expressly doing so without offending the spirit of Article 45."

The above paragraph shows the court's reliance on public opinion (A similar reasoning was in the infamous *Joseph Njuguna Mwaura & 2 others v Republic* [2013] eKLR where the Court of Appeal upheld death penalty as constitutional in Kenya). Although the court relied on article 45 of the Constitution to justify the criminalization of homosexuality, it is noticeable that the court was seeking to satisfy certain aspirations. These are the aspirations of the majority in the society. The court herein was simply abdicating its duty and ordering the minorities to go and convince the majority. This was an act of cowardice on the part of the court. The three judge bench demonstrates an example of what can be termed as timorous souls. The judges allowed the public opinion to influence their decision. The court's reliance on the preparatory works to the

constitutions demonstrates a massive reliance on the majoritarian views, a holding that is not in line with the constitutional ethos and leitmotifs. This decision washes away all the gains that has been made when the high court and the court of appeal allowed the registration of the NGO meant to protect the affairs of homosexuals in Eric Gitari 1[66]. It brings back the stereotypes that are always based on societal morality. The Court of Appeal should overturn this disturbing judgement!

In *Mohammed,* which was a criminal appeal case before the Supreme Court, the respondents had been charged with terrorism related offences. At the magistrate's court, the respondents were convicted of the offences and sentenced to life imprisonment. They later appealed to the high court where justice Kimaru upheld the conviction but reduced the sentence to fifteen years imprisonment. They appealed to the court of appeal where the conviction was quashed and the sentence set aside. While allowing the appeal, the majority of the Supreme Court held that:

> "This calls for vigilance of all Kenyans including Judges and Judicial Officers. For Judges and Judicial officers, their vigilance has to be within the confines of the rule of law. They cannot, for instance, act on public outrage of the offences of terrorism and ignore the law. While they must jealously guard an accused person's right to a fair trial, the courts should equally guard public interest by ensuring that those who commit or plan to commit terrorist offences do not escape punishment."

The point being made by the majority is that there have many terrorist attacks and as such courts should play an active role to protect the public interest. Simply put, the reasoning of the majority is that, the majority of the citizens have suffered and are complaining of the attacks, the courts must do something. This is a clear example of the influence of public opinions in court's decisions.

In contrast to the majority decision, Justice Ibrahim in his dissenting opinion held that the public's perception on the seriousness of an offence should never be a factor in determining the guilt of an accused or his acquittal and further that:

[66]Petition No 440 OF 2013 (Odunga, Mumbi and Lenaola J) and *Non-Governmental Organizations Co-Ordination Board v EG & 5 others* [2019] eKLR

> "consequently, while the public my resent and abhor the respondents' acquittal by the Court of Appeal, in determining this matter, this Court only focusses on issues that were before the Court of Appeal and the law. The gravity of the offence and the public sensitivity of the issue(s) are not given emphasis to the exclusion of very important constitutional provisions and fundamental rights and freedoms, which our Constitution guarantees to all persons, especially within the criminal justice system."

Justice Ibrahim's refusal to fall prey to populism is to be celebrated. His acceptance that public opinions should not form part of the judicial decisions is an acceptance of constitutional supremacy and not societal supremacy. His dissenting opinion can be compared to that of the high court of Gauteng in *The State V Oscar Leonard Carl Pistorius*, where the court correctly held that

> "Fortunately, regardless of the level of understanding among the general public, South Africa has a Constitution which applies to everyone and which protects everyone, including those who transgress the laws. As a country we have long moved from the dark ages — that is the era of an eye for an eye to a modern era of balancing all the relevant factors. Retribution, which, however, from the legal point of view is not the same as vengeance, has, inter alia, yielded ground to other purposes of punishment."

This speaks to the idea of constitutional morality that I have laboured to show in this paper. It is the acceptance that the bill of rights and the constitutional values supersede the societal morals and public opinions. It is the acceptance that courts have a duty to give effect to the constitution and not the majority views. This can be summarized in the following words, '*One of the functions of the Constitution is precisely to protect the fundamental rights of non-majoritarian groups, who might well be tiny in number and hold beliefs considered bizarre by the ordinary faithful. In constitutional terms, the quality of a belief cannot be dependent on the number of its adherents nor on how widespread or reduced the acceptance of its ideas might be, nor, in principle, should it matter how slight the intrusion … is*.[67]

Conclusion

[67] *S v Lawrence*; *S v Negal*; *S v Solberg* [1997] ZACC 11; 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) at 160.

A constitution sets specific obligations on the courts. Among these roles is the fact that judges are expected to vindicate the bills of rights. This can be seen in *Fourie* where Sachs J suggested that '[t]he law may not automatically and of itself eliminate stereotyping and prejudice. Yet it serves as a great teacher, establishes public norms that become assimilated into daily life and protects vulnerable people from unjust marginalisation and abuse. It needs to be remembered that not only the courts are responsible for vindicating the rights enshrined in the Bill of Rights.'[68] The law must therefore keep in view the necessities of the needy and the weaker sections of the community. If this is taken into account, two conclusions can be made and are herein made, that 1) The 2010 constitution provides for a constitutional superiority and not societal superiority and 2) Public opinion, populism and societal morality must give way to constitutional morality!

The writer is a finalist at Moi University, School of Law and can be reached at joshuanya6@gmail.com.

[68] *Minister of Home Affairs v Fourie* supra note 52 at para 138.