

The Limits of Moral Limitations: Reconceptualizing “Morals” in Human Rights Law

Ryan Thoreson*

Each of the major human rights instruments from the Universal Declaration of Human Rights onwards has reserved the state's ability to curtail some rights in the name of interests in national security, public health, public order, and morals. These instruments do not define “morals,” however, and the growing recognition that sexual rights are human rights has made the deferential application of these limitation clauses increasingly untenable. As regional and international institutions struggle to make sense of moral limitations, this Article argues that constitutional morality, a concept developed by domestic courts in the Global South, offers a promising doctrinal tool to adjudicate disputes over sovereignty and sexual rights.

INTRODUCTION

Since the drafting of the Universal Declaration of Human Rights (“UDHR”), a tension between universal principles and state sovereignty has haunted supranational efforts to develop and promote human rights worldwide. These competing prerogatives trace back to the earliest negotiations over the UDHR, when the Soviet Union famously attempted to insert language into the declaration requiring states to pass laws punishing advocacy of racial, national, or religious hostility.¹ The Soviet Union’s demand for supranational oversight was echoed by domestic advocates for racial justice in the United States, who actively lobbied the newly formed United Nations to recognize and protect the rights of Black Americans who faced rampant inequality, discrimination, and violence.² The transnational and grassroots efforts to create robust international standards met with resistance from the United States, which insisted that states should have leeway to address issues like race discrimination in their own fashion and at their own pace.³

* Researcher in the LGBT Rights Program at Human Rights Watch. The author thanks Reva Siegel and Judith Resnik for valuable conversations and comments on earlier drafts, and Caroline Darmody and the editorial team at the *Harvard International Law Journal* for their work on this Article. The views expressed in this article are solely the author’s, and any errors that remain are the author’s alone.

1. See Stephanie Farrior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 *BERKELEY J. INT’L L.* 1, 14–18 (1996).

2. See Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 *YALE L.J.* 1564, 1591–93 (2006).

3. See Farrior, *supra* note 1, at 31.

American assertions of state sovereignty and discretion ultimately carried the day.⁴ Article 2 of the UN Charter states: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter”⁵ Even in the aftermath of the horrors of World War II, such guarantees ensured that the recognition of fundamental rights and freedoms would not tread too heavily on the prerogatives of sovereign states.

The human rights regime has expanded considerably since 1948. Nonetheless, as additional instruments have been drafted, signed, and ratified, the tension between supranational guarantees of human rights and the sovereignty of state actors has persisted.⁶ Between 1948 and 1986, foundational international and regional human rights instruments—the International Covenant on Civil and Political Rights (“ICCPR”), American Convention on Human Rights (“ACHR”), European Convention on Human Rights (“ECHR”), and African Charter on Human and Peoples’ Rights (“ACHPR”)—struck a similarly cautious balance between universal guarantees and deference to state sovereignty.

In these instruments, a common strategy that treaty proponents used to reconcile universal rights with state prerogatives was the inclusion of limitation clauses. Many of the core international and regional human rights treaties therefore allow states to limit the exercise of certain rights in the service of interests like national security, public health, public order, morals, or the fundamental rights and freedoms of others.⁷ When certain conditions are met, governments may lawfully limit the exercise of a universal right to serve one of these identified state interests.⁸

The formulation and application of limitation clauses strike a delicate balance. States seeking to maintain sovereign prerogatives have insisted

4. *See id.* at 18.

5. U.N. Charter art. 2, ¶ 7. The United States insisted on the clause as a prerequisite to its approval of the Charter, and its formulation was influenced by these early debates over race discrimination. *See Resnik, supra* note 2, at 1593 n.113.

6. Seyla Benhabib describes this tension as the “constitutive dilemma at the heart of liberal democracies: between sovereign self-determination claims on the one hand and adherence to universal human rights principles on the other.” SEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS* 2 (2004).

7. For examples of such limitations, see Organisation of African Unity, African Charter on Human and Peoples’ Rights arts. 11, 12, 17, 18, 27, 29, June 27, 1981, 1520 U.N.T.S. 217 [hereinafter ACHPR]; Organization of American States, American Convention on Human Rights arts. 12, 13, 15, 16, 22, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143 [hereinafter ACHR]; International Covenant on Civil and Political Rights arts. 12, 14, 18, 19, 21, 22, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms arts. 6, 8, 9, 10, 11, *opened for signature* Nov. 4 1950, E.T.S. No. 5, 213 U.N.T.S. 221 [hereinafter ECHR]. The International Covenant on Economic, Social and Cultural Rights includes only one limitation clause, which attaches to the right to form and join trade unions. *See* International Covenant on Economic, Social and Cultural Rights art. 8, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3.

8. *See infra* notes 30–35 and accompanying text.

upon limitation clauses as a prerequisite to joining and participating in treaty regimes.⁹ If left unchecked, however, limitations threaten to eviscerate the fundamental rights to which they are attached.¹⁰ Indeed, while these clauses were introduced to affirm state autonomy in the face of claims by racial minorities,¹¹ they have since been invoked by states objecting to applying treaty obligations to women and other marginalized groups.¹² In a number of areas of human rights law, supranational bodies like the Human Rights Commission (“HRC”), the Inter-American Court of Human Rights (“IACtHR”), the European Court of Human Rights (“ECtHR”), and the African Commission on Human and People’s Rights (“African Commission”) have struggled to strike a consistent balance between universality and sovereignty, and their pronouncements on limitation clauses evince this indeterminacy.¹³

The origins and application of limitation clauses have made the provisions a hotly contested feature of human rights law, particularly as cases involving censorship and obscenity; reproductive rights; lesbian, gay, bisexual, and transgender (“LGBT”) rights; and other sexual rights have arisen in regional and international jurisprudence. Yet little attention has been paid to the ways in which “morals,” a ubiquitous term in limitation clauses, has doctrinally and empirically functioned as a constraint on human rights guarantees.¹⁴ None of the foundational supranational instruments define “morals.” However, in practice, clauses that allow states to limit rights in the name of morality—what I call *moral provisions*—have been invoked by governments primarily on issues of sex and sexuality. States have invoked morality to assert sovereign authority over subjects as diverse as same-sex activity, abortion and reproductive rights, sex work, group sex, BDSM, and the “promotion” of homosexuality.

Since the early 1990s, domestic, regional, and international actors have recognized various forms of sexual autonomy and expression as human

9. The demand for moral accommodations as a prerequisite for participating in a treaty regime continues in the present day. See A, B, and C v. Ireland, 2010-VI Eur. Ct. H.R. 185, ¶¶ 221–22 (2010).

10. See *infra* Appendix.

11. See Resnik, *supra* note 2, at 1611.

12. It is telling that instruments that are specifically designed to protect the rights of marginalized groups—for example, the International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Rights of the Child, and Convention on the Rights of Persons with Disabilities—do not attach analogous limitation clauses to the rights they recognize. See Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1887 (2003).

13. See, e.g., Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT’L L. & POL. 843 (1999) (critically assessing the ECtHR’s margin-of-appreciation doctrine); Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 COLUM. J. EUR. L. 113 (2005) (same). See generally Dean Spielmann, *Allowing the Right Margin – The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?* 14 CAMBRIDGE Y.B. EUR. LEGAL STUD. 381 (2012) (charting developments in the ECtHR’s margin-of-appreciation doctrine).

14. See ALICE M. MILLER, INT’L COUNCIL ON HUM. RTS., SEXUALITY AND HUMAN RIGHTS 41 (2009).

rights,¹⁵ fostering the emergence of a sexual rights framework at the United Nations and in regional systems.¹⁶ The recognition of LGBT rights is perhaps the most striking example of how sexual rights are increasingly legitimated as human rights internationally. Amnesty International and Human Rights Watch have come to understand the rights of LGBT persons as human rights, and have absorbed them into their mandates accordingly.¹⁷ Governments have followed suit, incorporating their support for LGBT human rights into diplomacy, aid initiatives, and human rights reporting.¹⁸ The coordinated efforts of state and nonstate actors have borne fruit in transnational and international venues. U.N. treaty bodies and Special Procedures have grown increasingly concerned about restrictions on sexual and reproductive health and rights,¹⁹ and their recognition of the rights of LGBT persons has been vocally echoed by top U.N. officials, particularly former High Commissioner for Human Rights Navanethem Pillay and former Sec-

15. See, e.g., Office of the High Comm'r for Human Rights, *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*, U.N. Doc. HR/PUB/12/06 (2012), www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf; Human Rights Council Res. 32/2, U.N. Doc. A/HRC/RES/32/2 (July 12, 2016); Human Rights Council Res. 27/32, U.N. Doc. A/HRC/RES/27/32 (Oct. 2, 2014); Human Rights Council Res. 17/19, U.N. Doc. A/HRC/RES/17/19 (July 14, 2011).

16. *Id.*; see also Françoise Girard, *Negotiating Sexual Rights and Sexual Orientation at the UN*, in *SEX POLITICS: REPORTS FROM THE FRONTLINES*, 311, 331 (Richard Parker et al. eds., 2009) (detailing early debates over sexual rights at the U.N.); Alice M. Miller, Eszter Kismödi, Jane Cottingham & Sofia Gruskin, *Sexual Rights as Human Rights: A Guide to Authoritative Sources and Principles for Applying Human Rights to Sexuality and Sexual Health*, 23 *REPROD. HEALTH MATTERS*, no. 21, 2015, at 16 (documenting the formal recognition of sexual rights by various actors); Rosalind Pollack Petchesky, *Sexual Rights: Inventing a Concept, Mapping an International Practice*, in *SEXUAL IDENTITIES, QUEER POLITICS* 118 (Mark Blasius ed., 2001) (exploring the early formulation and dissemination of the concept of sexual rights).

17. See STEVEN HOPGOOD, *KEEPERS OF THE FLAME: UNDERSTANDING AMNESTY INTERNATIONAL* 116–21 (2006); RYAN R. THORESON, *TRANSNATIONAL LGBT ACTIVISM: WORKING FOR SEXUAL RIGHTS WORLDWIDE* 51 (2014).

18. For examples of U.S. efforts to promote LGBT rights in its diplomacy and foreign policy, see Office of the Spokesperson, The Department of State's Accomplishments Promoting the Human Rights of Lesbian, Gay, Bisexual and Transgender People, U.S. Department of State (Dec. 6, 2011), <https://2009-2017.state.gov/r/pa/prs/ps/2011/12/178341.htm>. For critical perspectives on aid conditionality and the use of development assistance to compel adherence to LGBT rights, see Hakima Abbas, *Aid, Resistance, and Queer Power* 16 (Sex Policy Watch, Working Paper No. 7, 2012), <http://www.sxpolitics.org/wp-content/uploads/2012/04/spw-wp7-the-global-context-sexuality-and-politics.pdf>; Luis Abolafia Anguita, *Aid Conditionality and Respect for LGBT People's Rights* 9 (Sex Policy Watch, Working Paper No. 7, 2012), <http://www.sxpolitics.org/wp-content/uploads/2012/04/spw-wp7-the-global-context-sexuality-and-politics.pdf>; Association for Women's Rights in Development ("AWID"), *Statement of African Social Justice Activists on the Threat of the British Government to "Cut Aid" to African Countries that Violate the Rights of LGBTI People in Africa* (Oct. 28, 2011), <http://www.blacklooks.org/2011/10/statement-of-african-social-justice-activists-on-the-decision-of-the-british-government-to-%E2%80%9Ccut-aid%E2%80%9D-to-african-countries-that-violate-the-rights-of-lgbti-people-in-africa/>.

19. See, e.g., Paul Hunt (Special Rapporteur on the Right to Health), *Economic, Social, and Cultural Rights: The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, U.N. Doc. E/CN.4/2004/49 (Feb. 16, 2004); Martin Scheinin (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism), *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, U.N. Doc. A/64/211 (Aug. 3, 2009); Vernor Muñoz (Special Rapporteur on the Right to Education), *Report of the United Nations Special Rapporteur on the Right to Education*, U.N. Doc. A/65/162 (July 23, 2010).

retary General Ban Ki-moon.²⁰ As the intensified lobbying and the success of recent initiatives in the Human Rights Council and General Assembly attest, the human rights of LGBT persons are more widely regarded as a legitimate concern.²¹

At the same time, a series of high-profile domestic challenges have questioned the propriety of using moral condemnation as a basis for lawmaking. In 2003, the Supreme Court of the United States decided *Lawrence v. Texas*,²² which explicitly called morality into question as a singular justification for legislation.²³ Other courts, including the South African Constitutional Court and the Delhi High Court, have explored the constitutional limits of morality in the sexual rights context as well.²⁴ As the liberty, equality, and dignity of sexual subjects are recognized and affirmed by supranational and national entities, appeals to “morals” alone are increasingly shaky as a foundation for assertions of state discretion over sexual behavior.

Yet while some states insist that sexual rights are human rights,²⁵ others continue to invoke moral provisions to curtail the claims of sexual minorities, and do so using arguments that have accompanied attempts to constrain the claims of racial minorities and women. The division was perhaps most starkly evident in 2008, when Argentina read a statement at the UN General Assembly opposing the criminalization of sexual orientation and gender identity. More than 65 states signed onto the statement, roughly 60 states signed a counterstatement read by Syria, and the rest of the states abstained.²⁶ Notably, Syria’s counterstatement broadly condemned discrimination, intolerance, and violence, but nevertheless opposed recognition of LGBT rights. It noted that Argentina’s statement “delves into matters which fall essentially within the domestic jurisdiction of states.”²⁷ Although

20. See, e.g., Office of the High Comm’r for Human Rights, *supra* note 15; Press Release, Secretary-General, Confront Prejudice, Speak Out against Violence, Secretary-General Says at Event on Ending Sanctions Based on Sexual Orientation, Gender Identity, U.N. Press Release SG/SM/13311 (Dec. 10, 2010).

21. See Human Rights Council Res. 32/2, U.N. Doc. A/HRC/RES/32/2 (July 12, 2016); Press Release, Human Rights Watch, UN: Victory for LGBT Rights, (Nov. 21, 2016), <https://www.hrw.org/news/2016/11/21/un-victory-lgbt-rights>.

22. *Lawrence v. Texas*, 539 U.S. 558 (2003).

23. In the U.S. context, there have been robust discussions of whether morality does and should constitute a legitimate state interest, but few regional and international bodies have squarely grappled with this question. See, e.g., Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233 (2004) (examining the viability of moral justifications for lawmaking in the aftermath of *Lawrence*).

24. Nat’l Coalition for Gay and Lesbian Equality v. Minister of Justice, 1998 (12) BCLR 1517 (CC) (S. Afr.) [hereinafter *NCGLE*]; Naz Found. v. Gov’t of NCT of Delhi, (2009) WP(C) No. 7455/2001 (Delhi HC) (India).

25. See, e.g., Hillary Clinton, Secretary of State, Remarks in Recognition of International Human Rights Day (Dec. 6, 2011), <https://photos.state.gov/libraries/belize/231771/PDFs/Remarks%20in%20Recognition%20of%20International%20Human%20Rights%20Day.pdf>.

26. Ryan Richard Thoreson, *Queering Human Rights: The Yogyakarta Principles and the Norm that Dare Not Speak Its Name*, 8 J. HUM. RTS. 323, 335–336 (2009).

27. Patrick Worship, *U.N. Divided over Gay Rights Declaration*, REUTERS (Dec. 18, 2008), <http://www.reuters.com/article/2008/12/18/us-un-homosexuality-idUSTRE4BH7EW20081218>.

Syria agreed that violence was unacceptable, it insisted that sexuality could nevertheless be regulated for the “just requirements of morality, public order, and the general welfare.”²⁸ These moral justifications have often been sidestepped in international and regional jurisprudence, despite being vigorously contested by parties in four recent cases regarding the freedom of expression for LGBT people in Russia and Turkey.²⁹ As laws aimed at LGBT “propaganda” take hold in Eastern Europe and elsewhere, the recognition of sexual rights counsels a reexamination of moral provisions and a rigorous consideration of their utility and limitations in contemporary jurisprudence.

In this Article, I explore two questions. First, with the rise of sexual rights, are moral provisions still a defensible feature in human rights law? And second, if these provisions retain some utility, how might adjudicatory bodies apply them in a more coherent and doctrinally rigorous way that balances state sovereignty with individual rights to sexual privacy, association, and expression? In Part I, I canvass the rationales that justify some form of moral provisions as a feature of regional and international law, and argue that a balance between absolute rights and deference to sovereignty is both pragmatic and normatively desirable. In Part II, I consider judicial doctrines that might be used to reconcile moral provisions with sexual rights, focusing in particular on the doctrine of *constitutional morality* elaborated by courts in the Global South. In Part III, I argue that constitutional morality can be productively adapted by supranational bodies to clarify what “morals” do and do not mean for the purposes of human rights law. Morality need not, and arguably cannot, be wholly excised from lawmaking. A viable theory of morality in human rights law should nonetheless set predictable and defensible limits on the invocation of morals as a justification for curtailing human rights, and it should do so in a way that respects both sovereignty and the rights of sexual subjects.

I. ASSESSING THE UTILITY OF MORAL PROVISIONS

In the original draft of the UDHR, morals were not included as a ground on which states might limit the exercise of rights. As the *travaux préparatoires* indicate, both “morals” and “*ordre public*” were only added when France argued that the French translation of “general welfare,” listed as a rationale for limiting human rights, was too broad and undefined to be

28. Piero Tozzi, *UN General Assembly Receives Dueling Declarations on Sexual Orientation*, CTR. FOR FAMILY & HUM. RTS. (Dec. 18, 2008), https://c-fam.org/friday_fax/un-general-assembly-receives-dueling-declarations-on-sexual-orientation.

29. See *Bayev v. Russia*, App. Nos. 67667/09, 44092/12 & 56717/12, Eur. Ct. H.R. (2017); *Kaas G.L. v. Turkey*, App. No. 4982/07, Eur. Ct. H.R. (2016); *Alekseyev v. Russia*, Apps. Nos. 4916/07, 25924/08 & 14599/09, Eur. Ct. H.R. (2010); *Fedotova v. Russian Federation*, Communication No. 1932/2010, U.N. Doc. CCPR/C/106/D/1932/2010, Views, Human Rights Comm. (Oct. 31, 2012).

useful.³⁰ Uruguay, New Zealand, and Australia objected that including “morals” and “*ordre public*” as limitations could dramatically undermine human rights guarantees, but skeptics were sufficiently assuaged by the provision that any limitations would have to be deemed necessary, or, in some cases, necessary in a democratic society.³¹

With this formulation in place, the foundational human rights instruments that followed the UDHR largely replicated its language in their texts. The first to do so was the ICCPR, which attaches moral provisions to a number of rights. Under certain conditions, states can thus invoke morals to limit the freedom of movement, presence of media at a trial, freedom to manifest one’s beliefs or religion, freedom of expression, freedom of assembly, and freedom of association.³² At the regional level, the ACHR³³ and ECHR³⁴ include moral provisions that are largely similar to those found in the ICCPR, with some minor distinctions. Most importantly, the ECHR attaches a moral provision to the right to privacy, while no other instrument does.³⁵

The one major instrument that diverges significantly from the UDHR’s model of moral provisions is the ACHPR. The Charter allows the freedom of assembly to be limited on ethical grounds, and includes morality as a ground for restricting the freedom of any individual to leave any country and return to his or her own country. Unlike the other instruments, however, the ACHPR does not attach moral provisions to any of the other specific rights it enumerates. Instead, in keeping with its unique emphasis on duties as well as rights,³⁶ the Charter contains a blanket provision that covers all rights and freedoms of the individual. Article 27 states: “1. Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community. 2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.”³⁷

Notably, Article 27 does not prescribe any particular role for the state, nor does it indicate that state action that infringes on rights on the basis of

30. ANNA-LENA SVENSSON-MCCARTHY, *THE INTERNATIONAL LAW OF HUMAN RIGHTS AND STATES OF EXCEPTION* 149–50 (1998).

31. *Id.* at 151.

32. *See, e.g.*, ICCPR, *supra* note 7, art. 12(3). For the full text of these and other clauses, see *infra* Appendix.

33. ACHR, *supra* note 7, art. 12(3). The ACHR attaches morals provisions to the freedom to manifest one’s beliefs or religion, freedom of expression, freedom of assembly, freedom of association, and freedom of movement. *See infra* Appendix.

34. ECHR, *supra* note 7, art. 6(1). The ECHR places morals provisions on the presence of media at a trial, the right to privacy, the freedom to manifest one’s beliefs or religion, the freedom of expression, and freedoms of assembly and association. *See infra* Appendix.

35. *See infra* Appendix.

36. *See* Makau wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VA. J. INT’L L. 339 (1995) (discussing the role of duties in the African Charter).

37. ACHPR, *supra* note 7, art. 27.

morality is only permissible if it is necessary in a democratic society. Nonetheless, the lack of explicit tests in the text of Article 27 does not leave the African Commission without any guidance when adjudicating the tension between morals and rights. Any limitations are to be read in conjunction with other parts of the ACHPR, which espouse positive duties to promote morality. Such references appear with regard to the rights to education and participation in cultural life,³⁸ the protection of the family,³⁹ and the duties of the individual.⁴⁰ Although the Organisation of African Unity's Council of Ministers considered amending the ACHPR to clarify that the Commission was not to interfere with the rights of sovereign states,⁴¹ it did not ultimately do so. The Council instead left the Charter's provisions ambiguous, "leaving it to the African Commission to interpret them in particular cases, and to decide on the core content of the rights."⁴²

The interpretive role of adjudicatory bodies like the African Commission has been critical for interpreting and applying human rights instruments. The criterion that was adopted by the drafters of the UDHR to circumscribe the scope of moral provisions—the necessity principle—has been imported into other agreements and scrutinized by adjudicatory bodies. The ICCPR, for example, allows some deference to states when a morals-based restriction on the exercise of a right meets two criteria: first, it must be *provided by law*, and second, it must be *necessary* or *necessary in a democratic society*.⁴³ The twin requirements of legality and necessity are replicated in the regional treaties as well. Both legality and necessity are explicitly incorporated into the text of the ACHR and the ECHR;⁴⁴ the African Commission has simply read a necessity requirement into the ACHPR, making its approach similar to that of other adjudicatory bodies.⁴⁵

38. *Id.* art. 17(3) ("The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.").

39. *Id.* art. 18(1) ("The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral."); *id.* art. 18(2) ("The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.").

40. *Id.* art. 29(7) (defining a duty "[t]o preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society").

41. Frans Viljoen, *The African Charter on Human and People's Rights / The Travaux Préparatoires in the Light of Subsequent Practice*, 25 HUM. RTS. L.J. 313, 315 (2004).

42. *Id.*

43. The question of what it means for a limitation to be "provided by law" and "necessary in a democratic society" has been developed through case law over time. See SVENSSON-MCCARTHY, *supra* note 30, at 53–146 (describing the origins and application of these provisions).

44. See *infra* Appendix.

45. See *Media Rights Agenda v. Nigeria*, Communication 105/93-128/94-130/94-152/96, African Commission on Human and People's Rights [Afr. Comm'n H.P.R.], ¶¶ 69–70 (Oct. 31, 1998), http://www.achpr.org/files/sessions/24th/communications/105.93-128.94-130.94-152.96/achpr24_105.93_128_94_130.94_152.96_eng.pdf.

A. *Justifying Moral Provisions in Regional and International Law*

In contexts as different as Strasbourg in 1949, San José in 1969, and Dakar in 1979, drafters and interpreters have sought to balance universal human rights guarantees with deference to sovereign states in the realm of morality. Why might adjudicators insist on such a balance? And as sexual rights are recognized as human rights, is there a principled reason to specifically retain moral provisions as a tool to preserve sovereignty?

The balance struck by moral provisions is animated by both normative and pragmatic justifications. From a normative standpoint, moral provisions recognize that both universal guarantees and state sovereignty are desirable features of the international system. The tension between them can be productive and beneficial, encouraging states to embrace shared human rights principles in a way that meaningfully resonates with popular traditions and values. From a pragmatic standpoint, it is worth recalling that the guarantees of human rights treaties do not arise *de novo*; they are negotiated and followed by states who must agree to be bound by their terms. When the anticipated loss of sovereignty and discretion is too great, states may be hesitant to opt into systems of supranational review at all, weakening the power of formal oversight and foreclosing important avenues for civil society mobilization.⁴⁶ In this respect, moral provisions bolster the reach and universality of the human rights regime by reassuring states that entering into human rights agreements will not require them to fully cede their traditions and values to supranational bodies. The inclusion of “morals” on enumerated lists of limiting principles reflects a tacit understanding that morality is deeply bound up with national identity and tradition; this is perhaps particularly true for moral prescriptions in the realm of gender, sexuality, and reproduction, which are often fiercely defended as core values of a nation and its people.⁴⁷ When adjudicatory bodies act in a counter-majoritarian fashion to enforce civil and human rights laws, long-standing moral and cultural norms are an especially treacherous ground on which an adjudicator, and particularly an external adjudicator, might tread. As the fierce opposition to the recent appointment of the United Nations’ first Independent Expert on violence and discrimination based on sexual orienta-

46. The HRC, for example, has only rarely expounded upon the permissibility of morals-based law-making because it is only able to hear complaints against states that have signed the First Optional Protocol, which gives it competence to evaluate individual complaints. Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 302 (entered into force Mar. 23, 1976).

47. MARTHA C. NUSSBAUM, *SEX AND SOCIAL JUSTICE* 15–16 (1999). The many reservations, understandings, and declarations (RUDs) that were registered by states acceding to CEDAW demonstrate the anxiety that states express over the threat of supranational entities imposing foreign norms with regard to gender and sexuality. See Judith Resnik, *Comparative (In)Equalities: CEDAW, the Jurisdiction of Gender, and the Heterogeneity of Transnational Law Production*, 10 INT’L J. CONST. L. 531 (2012).

tion and gender identity might suggest, these pragmatic considerations remain important in incentivizing supranational oversight.⁴⁸

The justifications for moral provisions, however, are not solely about incentivizing participation in human rights regimes. In practice, limitation clauses can also facilitate the development of human rights norms transnationally. These clauses lower the stakes of progressive advances by any one state in a supranational regime, and allow norms to evolve without triggering a mass exodus from the regime itself. Even when supranational bodies initially hesitate to hold states to an emerging human rights principle, they may become emboldened in future challenges such that a state—and other states in a system—are put on notice that they will soon be held to a stricter standard.⁴⁹ Moreover, there is reason to believe that encouraging state participation and dialogue in supranational regimes facilitates evolutive recognition of sexual rights. Even under moral provisions, sexual autonomy is likely to expand because morality is not a free-floating factor for adjudicatory bodies to consider; it only functions as a defense for the state. Claimants cannot affirmatively seek to have a law invalidated on moral grounds, and adjudicatory bodies are not empowered to strike down sexually progressive laws because they believe them to be immoral.⁵⁰

Consider supranational rulings on sodomy laws and same-sex marriage. In *Toonen v. Australia*, the HRC stated that the right to privacy and non-discrimination outweighed a state's moral interest in sodomy laws. The ruling only directly applied to Tasmania, but it functionally set a precedent, and is invoked even by UN personnel for the proposition that sodomy laws are

48. For accounts of the appointment of the Independent Expert and subsequent backlash, see Human Rights Council Res. 32/2, U.N. Doc. A/HRC/RES/32/2 (July 15, 2016); Press Release, Human Rights Watch, UN Makes History on Sexual Orientation, Gender Identity (June 30, 2016), <https://www.hrw.org/news/2016/06/30/un-makes-history-sexual-orientation-gender-identity>; Press Release, Human Rights Watch, UN: Victory for LGBT Rights (Nov. 21, 2016), <https://www.hrw.org/news/2016/11/21/un-victory-lgbt-rights>.

49. See *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R. 3 ¶¶ 73–74; see also *Schalk v. Austria*, 2010-IV Eur. Ct. H.R. 411, ¶¶ 58–61 (2010) (recognizing that Article 12 is not exclusive to heterosexual couples, observing a lack of consensus within Europe on the question of same-sex marriage, and observing that “as matters stand” the recognition of same-sex marriage is up to member states); *Oliari v. Italy*, App. Nos. 18766/11 & 36030/11, ¶ 178 (2015) (noting that “of relevance to the Court’s consideration is also the movement towards legal recognition of same-sex couples which has continued to develop rapidly in Europe since the Court’s judgment in *Schalk and Kopf*”).

50. The converse is theoretically possible, but unlikely. A claimant would have to argue that a law expanding sexual autonomy violated their rights so egregiously that their rights should trump the state’s lawmaking prerogatives, and the state would have to rely only on its moral interest in the law as a justification for limiting that right. If reproductive health or same-sex marriage legislation has ever been passed and justified *solely* on the grounds of morality, it is exceedingly rare. One body of law that might convincingly face a moral challenge is hate speech jurisprudence, which express the moral sentiment of the polity at the expense of the freedom of expression. Even these laws are rarely justified on moral grounds alone; they are more likely to fall under *ordre public* than moral limitations. If they are solely about reflecting a kind of collective morality, I would subject them to the analysis proposed in Part III.

presumptively invalid under the ICCPR.⁵¹ The situation regarding the right to marry is very different. Supranational bodies have said it is permissible for states to limit marriage to heterosexual couples, but this does not similarly preclude states from recognizing a right to same-sex marriage domestically, or relieve states of the responsibility to provide some form of recognition and protection to same-sex couples.⁵² When adjudicatory bodies find that individual rights trump state morality, they do so universally; when they find that individual rights *need not* trump state morality, that determination does not preclude states from surrendering moral claims and affirmatively recognizing those rights at a domestic level.

The original justifications for moral provisions thus remain intact today. As a means of respecting state sovereignty and encouraging participation in treaty regimes, moral provisions advance both normative and pragmatic ends. And insofar as moral provisions help persuade states to join, participate in, and remain a part of human rights regimes, there is reason to believe that they may actually help advance sexual autonomy over time. The application of these provisions, however, is more complex. As the following section illustrates, supranational bodies have had difficulty applying these provisions in a way that meaningfully scrutinizes state assertions of morality and safeguards sexual rights in a predictable, doctrinally coherent manner.

B. Moral Jurisprudence in Regional and International Law

The promise of moral provisions has been circumscribed in practice by the doctrines that various bodies have adopted to apply them. The first supranational decision to grapple with the scope of moral provisions laid out a doctrine that has proven influential in defining and applying moral provisions transnationally. In *Handyside v. United Kingdom*,⁵³ the ECtHR considered the legality of the United Kingdom’s seizure of a book intended for schoolchildren, part of which contained references to sex and drug use.⁵⁴ Although the book had been published widely, the government seized the publisher’s stock and destroyed it on moral grounds. In *Handyside*, the ECtHR ultimately deferred to the state’s regulatory powers in the realm of morality, concluding that the aim of the judgment and the initial seizures of the book—that is, “the protection of the morals of the young”—was legitimate.⁵⁵ The ECtHR then determined that the measures used were sufficiently “necessary,” and thus concluded that no violation of the Article 10 right to freedom of expression had taken place.⁵⁶

51. See, e.g., Office of the High Comm’r for Human Rights, *supra* note 15, at 30–32 (citing *Toonen v. Australia*, U.N. GAOR Hum. Rts. Comm., 50th Sess., U.N. Doc. CCPR/C/50/D/488 /1992 (1994) for the proposition that criminalizing same-sex activity is impermissible under the ICCPR).

52. See, e.g., *Schalk*, *supra* note 49; *Oliari*, *supra* note 49.

53. *Handyside v. U.K.*, 24 Eur. Ct. H.R. (ser. A) (1976).

54. *Id.*

55. *Id.* ¶ 52.

56. *Id.* ¶¶ 53–59.

In the ECtHR's review of the case, it concluded:

[I]t is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them.⁵⁷

The ruling in *Handyside* set out what is known as the "margin of appreciation," or the degree of discretion that state parties enjoy when implementing the rights in the ECHR. The doctrine extended a degree of discretion not only to legislators, but also to courts determining what did and did not constitute a violation of rights.⁵⁸ Since *Handyside*, the doctrine has been applied in over 700 cases.⁵⁹

The concept of a margin of appreciation has also been influential in the decisions of the HRC, which has a more global reach than the ECtHR. In *Hertzberg v. Finland* in 1982, for example, the HRC employed a functionally similar metaphor—a margin of discretion—to uphold the Finnish Broadcasting Corporation's ban on positive portrayals of homosexuality.⁶⁰ In an advisory opinion in 1984, the IACtHR similarly referenced a "margin of appreciation" in the context of state sovereignty over citizenship,⁶¹ and the ACHPR acknowledged that "the margin of appreciation doctrine informs the African Charter,"⁶² even if the IACtHR and African Commission have largely avoided relying on any formal margin of appreciation doctrine.⁶³

The margin of appreciation does not, however, inevitably counsel deference. *Handyside* specified that the margin of appreciation was just that—a

57. *Id.* ¶ 48.

58. *Id.* (citations omitted).

59. Brauch, *supra* note 13, at 119–21.

60. The HRC has not developed the concept as fully as the ECHR, but they serve a similar function. See *Hertzberg v. Finland*, U.N. GAOR Hum. Rts. Comm., 37th Sess., Supp. No. 40, ¶ 10.4, U.N. Doc. A/37/40 (1982). ("[P]ublic morals differ widely. There is no universally applicable standard. Consequently, in this respect, a certain margin of discretion ought to be accorded to the responsible national authorities. The Committee finds that it cannot question the decision of the responsible organs of the Finnish Broadcasting Corporation that radio and TV are not the appropriate forums to discuss issues related to homosexuality, as far as a programme could be judged as encouraging homosexual behavior.")

61. Proposed Amendments to the Naturalizations Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4184, Inter-Am. Ct. H.R. (ser. A) No. 4, ¶ 62 (Jan. 19, 1984).

62. *Prince v. South Africa*, Communication 255/2002, African Commission on Human and People's Rights [Afr. Comm'n H.P.R.], ¶ 51 (2004).

63. MARIA SJÖHOLM, GENDER-SENSITIVE NORM INTERPRETATION BY REGIONAL HUMAN RIGHTS LAW SYSTEMS 156 (2017); Benvenisti, *supra* note 13, at 844–45.

margin, with limits on its outer edges. The decision articulated loose restrictions on the discretion of state parties, stressing that “[t]he domestic margin of appreciation thus goes hand in hand with a European supervision.”⁶⁴

Notably, the ECtHR did not specify the conditions under which a state’s assertion of morality would be insufficient and when supranational supervision would prevail. But in subsequent cases, supranational bodies have at times rejected morals-based legislation that infringes heavily on the rights of claimants, most notably in the rulings rejecting criminal laws that prohibit same-sex activity. In *Dudgeon v. United Kingdom*, the ECtHR took a three-step approach: it affirmed that Northern Ireland’s law against homosexuality had interfered with the claimant’s rights, confirmed that the interference was in accordance with the law, and asked whether the interference was necessary to protect a plausible state interest—namely, morals.⁶⁵ The ECtHR specified that “necessary” implies the existence of a “‘pressing social need’ for the interference,”⁶⁶ which must be proportionate to the legitimate aim pursued.⁶⁷ Although the ECtHR recognized that “some degree of regulation of male homosexual conduct, as indeed of other forms of sexual conduct, by means of criminal law can be justified,” it observed that Northern Ireland’s law typically went unenforced without adverse consequences, and the harm it inflicted on gay men was disproportionate to the benefit of having the law in place.⁶⁸ In *Norris v. Ireland* and *Modinos v. Cyprus*, the ECtHR reiterated its reasoning in *Dudgeon*, invalidating Ireland’s and Cyprus’s laws against homosexuality.⁶⁹ Practically, it is this necessity analysis that governs most morals litigation.

The HRC took a slightly different approach in *Toonen*, but reached the same result.⁷⁰ Toonen challenged Tasmania’s sodomy law under the Article 17 right to privacy. Unlike the ECHR, the ICCPR does not attach a moral limitation to that right. In the absence of specific limiting language, the HRC thus inquired whether Toonen had suffered an unlawful or arbitrary interference with his privacy.⁷¹ The HRC found that the provision did infringe Toonen’s privacy, and was provided for by law.⁷² The determination thus turned on whether or not the interference was arbitrary. Citing General

64. *Handyside v. U.K.*, 24 Eur. Ct. H.R. (ser. A), ¶ 49 (1976).

65. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A), ¶¶ 41–49 (1981).

66. *Id.* ¶ 51.

67. *Id.* ¶ 53.

68. *Id.* ¶¶ 49, 60.

69. *See Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A), ¶ 46 (1988). The Supreme Court of Ireland had not only made a moral case for preserving the law against homosexuality, but asserted that a right of privacy encompassing same-sex activity could not be found in “the Christian and democratic nature of the Irish State.” *Id.* ¶ 24; *see also Modinos v. Cyprus*, 259 Eur. Ct. H.R. (ser. A), ¶¶ 25–26 (1993) (finding that a provision criminalizing same-sex activity interfered with the claimant’s right to privacy and, since the state did not assert a justification for that interference, ruling for the claimant).

70. *Toonen v. Australia*, U.N. GAOR Hum. Rts. Comm., 50th Sess., U.N. Doc. CCPR/C/50/D/488/1992 (1994).

71. *Id.* ¶ 8.1.

72. *Id.* ¶¶ 8.2–8.3.

Comment 16, the HRC found that the arbitrariness inquiry was meant for two purposes: first, to ensure that any interferences with a right accord with the rest of the ICCPR, and second, to ensure that such interferences are reasonable.⁷³ Focusing on the second prong, the HRC clarified that reasonableness requires both proportionality and necessity.⁷⁴ The lack of similar prohibitions across Australia, the lack of consensus on homosexuality within Tasmania, and the nonenforcement of the provision all indicated that the criminal law in question was an unreasonable way to promote morals.⁷⁵

The sodomy law cases did not spell the end of morals jurisprudence, however. It is often argued that *Toonen* implicitly repudiated *Hertzberg*,⁷⁶ but an equally plausible explanation is that the ICCPR attaches a moral limitation to the freedom of expression at issue in *Hertzberg*, while it does not attach any such limitation to the right to privacy at issue in *Toonen*. Under this reading, *Toonen* said little about when and how moral provisions can justify restrictions on human rights, particularly where public expressions of sexuality are concerned. The ECtHR's doctrine is equally murky. In *Muller v. Switzerland*, decided the same year as *Norris*, the ECtHR was again confronted with a restriction (like that in *Handyside*) that regulated the public sphere, plausibly protected children, and was not targeted at a particular group. It upheld Switzerland's seizure and destruction of obscene artwork on moral grounds after finding that the domestic judgment was not unreasonable, and therefore fell within the margin of appreciation due the state.⁷⁷

Indeed, in recent cases involving state attempts to regulate freedom of expression in the realm of sex and sexuality, both the HRC and ECtHR have largely dodged the question of whether moral justifications, standing alone, can be sufficient to curtail the rights of LGBT people in the public sphere. In 2013, Russia enacted a law prohibiting "propaganda of non-traditional sexual relations among minors,"⁷⁸ which has been interpreted and enforced

73. *Id.* ¶ 8.3.

74. *Id.*

75. *Id.* ¶ 8.6.

76. Laurence R. Helfer & Alice M. Miller, *Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence*, 9 HARV. HUM. RTS. J. 61, 73–74 (1996) ("A more probable explanation of the two decisions . . . centers on the Committee's maturation as a human rights institution.")

77. *Muller v. Switzerland*, 133 Eur. Ct. H.R. (ser. A), ¶ 36 (1988). A dissenting opinion by Judge Spielmann argued that the states "should take greater account of the notion of the relativity of values in the field of the expression of ideas." *Id.* at 22 ¶ 10 (Spielmann, J., dissenting).

78. О внесении изменений в статью 5 Федерального закона «О защите детей от информации, причиняющей вред их здоровью и развитию» и отдельные законодательные акты Российской Федерации в целях защиты детей от информации, пропагандирующей отрицание традиционных семейных ценностей О внесении изменений в статью 5 Федерального закона «О защите детей от информации, причиняющей вред их здоровью и развитию» и отдельные законодательные акты Российской Федерации в целях защиты детей от информации, пропагандирующей отрицание традиционных семейных ценностей

[On Amendments to Article 5 of the Federal Law "On Protection of Children from Information Harmful to Their Health and Development" and to Certain Legislative Acts of the Russian Federation with the Aim of Protecting Children from Information that Promotes the Denial of Traditional Family Values], *Sobranie Zakonodatel'stva Rossiiskoi Federatsii* [SZ RF] [Russian Federation Collection of Legislation]

to silence advocates offering support and counseling to LGBT youth, but also to quell affirmation of LGBT people in venues where children may be present, effectively silencing parades and demonstrations, positive portrayals of LGBT people in the media and on the web, and other forms of protected expression.⁷⁹ Individuals who were fined under legal restrictions on LGBT expression brought cases before the HRC and the ECtHR, arguing that these restrictions violated the ICCPR and the ECHR, respectively. In both instances, Russia countered that restrictions were necessary to protect public morality, and therefore permissible under limitation clauses. And in both instances, supranational bodies avoided passing judgment on the state’s overarching justification, ruling only that the law had violated rights as it was applied in the specific instances pertaining to the claimants.

A closer examination of these cases illustrates the uncertainty of contemporary morals jurisprudence. In *Fedotova v. Russian Federation*, the claimant, Irina Fedotova, had been charged under Russia’s propaganda law for standing near a school with placards that read “homosexuality is normal” and “I am proud of my homosexuality.”⁸⁰ In response, Russia argued it had a valid state interest in protecting morality, particularly where minors were involved. The HRC sided with Fedotova, but made a point of affirming “the role of the State party’s authorities in protecting the welfare of minors,” and indicating that whether the State’s application of the law was necessary was to be evaluated on a case-by-case basis.⁸¹ In the matter at hand, the HRC noted that Russia “had not shown that a restriction on the right to freedom of expression in relation to ‘propaganda of homosexuality’—as opposed to propaganda of heterosexuality or sexuality generally—among minors is based on reasonable and objective criteria.”⁸² It did not specify what criteria it would accept as guiding principles in such an inquiry, and more fundamentally, it did not explain why a broad and arguably non-discriminatory ban on all expression related to sexuality that might be overheard by minors might still impermissibly encroach on the freedom of expression.⁸³ The HRC did not question the validity of the state’s moral interest in restricting discussions of LGBT issues, but instead concluded that the steps taken were not necessary to safeguard that interest in light of the facts presented.

2013, No. 26, Item 3208; *Russian Duma Passes Ban on “Homosexual Propaganda,”* RADIO FREE EUR./RADIO LIBERTY (June 11, 2013), <http://www.rferl.org/content/russia-homosexuality-law-duma-protect/25013537.html>.

79. Ryan Thoreson, Comment, *From Child Protection to Children’s Rights: Rethinking Homosexual Propaganda Bans in Human Rights Law*, 124 YALE L.J. 1327, 1327 (2015); Cathal Sheerin, *The Human Impact of Russia’s “Gay Propaganda” Law*, IFEX (Mar. 2, 2017), <https://www.ifex.org/russia/2017/03/02/gay-propaganda-law>.

80. *Fedotova v. Russian Federation*, Communication No. 1932/2010, U.N. Doc. CCPR/C/106/D/1932/2010, Views, Human Rights Comm., ¶¶ 2.2–2.3 (Oct. 31, 2012).

81. *Id.* ¶ 10.8.

82. *Id.* ¶ 10.6.

83. Thoreson, *supra* note 79.

The ECtHR's analysis of Russia's restrictions on free expression proved similarly unsatisfying in its application of moral provisions. In *Alekseyev v. Russia*, the claimant argued that banning LGBT parades in Moscow violated Article 11 of the ECHR, which protects the freedoms of assembly and association. In response, Russia argued that its restriction of LGBT parades was justified by concerns about adverse effects on public order and public morality, the two limiting principles enshrined in the text of Article 11. In finding for the claimant, the ECtHR rested its decision in large part on the determination that Russia had failed to put forth evidence demonstrating that LGBT parades would adversely affect the development of children, and that "the authorities' decisions to ban the events in question were not based on an acceptable assessment of the relevant facts."⁸⁴ As in *Fedotova*, the court in *Alekseyev* did not question the assumption that banning the assembly and expression of LGBT people is a matter of morality, uncritically accepting the state's insistence that it had a moral stake in enacting such restrictions.

In another recent case, *Kaos GL v. Turkey*, the ECtHR reviewed Turkey's seizure of 375 copies of an LGBT magazine on the basis that images in the magazine were obscene and undermined the protection of public morals.⁸⁵ In its ruling, the ECtHR stopped short of questioning whether repressing the magazine's images was a matter of morality or even insisting that a state must show demonstrable harm to justify a moral restriction. To the contrary, the court accepted the immorality of the erotic image, finding that "notwithstanding its intellectual and artistic character," the image in the publication could be "likely to offend the sensibilities of an uninformed public," creating a pressing social need to repress it.⁸⁶ It sided with the claimant, however, when it proceeded to the question of whether the measure was proportionate, finding that the lengthy and indiscriminate confiscation was not tailored to protect vulnerable groups from viewing the image, and instead kept it censored from the public at large.⁸⁷ Despite finding for the claimant, the court's understanding that protecting public sensibilities constituted a pressing social need was, in the words of one advocate for freedom of expression, "dangerously subjective."⁸⁸ In assuming that some degree of regulation was permissible, it left open the possibility that LGBT literature and imagery could be regularly confiscated for offending the general public, albeit in narrower ways or for shorter periods of time.

Decades after *Hertzberg* and *Handyside*, supranational bodies have thus questioned and sometimes rejected the assertion that restrictions on LGBT rights are necessary, but tend to take for granted that states have a moral

84. *Alekseyev v. Russia*, Apps. Nos. 4916/07, 25924/08 & 14599/09, Eur. Ct. H.R., ¶¶ 85–86 (2010).

85. Andrew Smith, *Morality, Sex and Censorship at the European Court of Human Rights*, ARTICLE 19: OUR BLOG (Dec. 9, 2016), <https://www.article19.org/join-the-debate.php/257/view>.

86. *Id.* (quoting *Kaos G.L. v. Turkey*, App. No. 4982/07, Eur. Ct. H.R. (2016)).

87. *Id.*

88. *Id.*

stake in regulating certain types of LGBT behavior, expression, and relationships. A notable exception is the ECtHR’s recent ruling in *Bayev v. Russia*, which reviewed regional and federal propaganda laws in Russia. The applicants in *Bayev* claimed the laws violated their freedom of expression under Article 10 of the ECHR,⁸⁹ and the government in turn justified the restrictions as a means of protecting morals, public health, and the rights of parents and children.⁹⁰ In reviewing the morals justification, the ECtHR explained that “before deciding on the breadth of the margin of appreciation the Court must scrutinise the legitimate aim advanced by the Government in connection with their claim that the matter constitutes a sensitive moral or ethical issue.”⁹¹

The ECtHR’s approach in *Bayev* shows deeper scrutiny of moral justifications than previous decisions. First, the court questioned the assertion that acknowledging homosexuality would threaten family values, noting that it “sees no reason to consider these elements as incompatible, especially in view of the growing general tendency to include relationships between same-sex couples within the concept of ‘family life,’”⁹² and that the government “failed to demonstrate how freedom of expression on LGBT issues would devalue or otherwise adversely affect actual and existing ‘traditional families’ or would compromise their future.”⁹³ Second, the court reiterated existing case law on “policies and decisions which embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority,” where it had “held that these negative attitudes, references to traditions or general assumptions in a particular country cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment, any more than similar negative attitudes towards those of a different race, origin or colour.”⁹⁴

Even this deeper scrutiny remains wanting, however, in an important respect. After rejecting Russia’s justification as “predisposed bias,” the ECtHR acknowledged the government’s claim that most Russians do not approve of homosexuality or displays of support for same-sex relationships. It agreed that “[i]t is true that popular sentiment may play an important role in the Court’s assessment when it comes to the justification on the grounds of morals,” but that “it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority.”⁹⁵ In this analysis, the ECtHR restricts the state’s discretion to justify any limitation as a matter of morality, but stops short of articulating a framework to

89. *Bayev v. Russia*, App. Nos. 67667/09, 44092/12 & 56717/12, Eur. Ct. H.R. ¶ 3 (2017).

90. *Id.* ¶ 45.

91. *Id.* ¶ 66.

92. *Id.* ¶ 67.

93. *Id.*

94. *Id.* ¶ 68.

95. *Id.* ¶ 70.

decide what *does* constitute a matter of morality and what moral justifications are or are not acceptable under the ECHR.

The HRC and ECtHR have been vague about what “morality” means and when morally motivated laws are permissible, but the standards are even less clear for other adjudicatory bodies. The IACtHR has not directly confronted a moral provision; when it does, sexual rights activists will have to grapple with the ACHR’s unique and explicit provision declaring that life begins at conception. The African Commission has signaled some deference to states in a rare decision dealing with morality. In *Curtis Francis Doebbler v. Sudan*, it considered a case in which police physically assaulted eight students who were alleged to have violated public order by acting immorally contrary to Article 152 of the Criminal Law of 1991.⁹⁶ According to the opinion, “the acts constituting these offences comprised of girls kissing, wearing trousers, dancing with men, crossing legs with men, sitting with boys and sitting and talking with boys.”⁹⁷ The students were convicted and sentenced to fines and lashes. The complainant, an international human rights lawyer, argued that this constituted cruel, inhuman, and degrading punishment in violation of international law. The Commission found that Sudan violated the ACHPR, but only because “[t]here is no right for individuals, and particularly the government of a country to apply physical violence to individuals for offences.”⁹⁸ It did not reach the question of whether the criminalization of the students’ activities or other offenses against public order or morality were themselves illegitimate.

Yet the African Commission’s jurisprudence is not evolving in a vacuum. Even in areas where the ACHPR markedly diverges from other instruments, the Commission has made a point of borrowing standards or rationales from other adjudicatory or monitoring bodies worldwide.⁹⁹ In *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, the Commission recognized “sexual orientation” as an impermissible ground for discrimination under Article 2, despite the fact that “sexual orientation” is not enumerated in the text of the ACHPR.¹⁰⁰ The Commission has also curbed the scope of state sovereignty under Article 27. In *Media Rights Agenda v. Nigeria*, the Commission clarified that the ACHPR predominates over national law, and that in the absence of explicit derogation provisions, Article 27 functions as the only

96. See *Doebbler v. Sudan*, Communication 236/2000, African Commission on Human and People’s Rights [Afr. Comm’n H.P.R.] (May 15–29, 2003), http://www.achpr.org/files/sessions/33rd/communications/236.00/achpr33_236_00_eng.pdf.

97. *Id.* ¶ 3.

98. *Id.* ¶ 42.

99. See H. Kwasi Prempeh, *Marbury in Africa: Judicial Review and the Challenge of Constitutionality in Africa*, 80 TUL. L. REV. 1239, 1317 (2006) (“The evolving comparative jurisprudence emphasizes the principles of necessity, reasonableness, and proportionality (least restrictive means), as benchmarks that reviewing courts must apply in evaluating the constitutionality of a particular statutory restriction.”).

100. *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication 245/2002, African Commission on Human and People’s Rights [Afr. Comm’n H.P.R.], ¶ 169 (2006).

acceptable restriction on human rights.¹⁰¹ The Commission further elaborated: “The reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained.”¹⁰² The Commission’s interpretation, which it reiterated in *Interights v. Mauritania*¹⁰³ and *Prince v. South Africa*,¹⁰⁴ greatly cabins the exceedingly broad language of Article 27, importing the necessity standard that is found in the texts of other supranational instruments.

By attaching moral provisions to different rights and incorporating a range of extra-textual standards, adjudicatory bodies have left little certainty in the realm of moral provisions. The legality principle has been fairly straightforward, but the necessity principle has proven much more complex, and has morphed into a multifaceted inquiry with multiple factors.¹⁰⁵ On its face, the necessity inquiry simply asks whether there is a pressing social need to interfere with a right and whether the response is proportionate to the legitimate aim pursued.¹⁰⁶ In practice, this has led the ECtHR to consider whether the prohibition touches upon intimacy and private life, is widespread or anomalous in Europe, reflects actual public sentiment, is regularly enforced, affects children or other vulnerable third parties, or constitutes a sufficiently weighty state interest, with morality widening the margin. Such an approach offers little guidance or surety to LGBT people contemplating how they might exercise their rights and whether they may be prosecuted for doing so. Nor are states blind to this doctrinal confusion; states themselves have readily taken advantage of these inconsistent tests to maximize their sovereign prerogatives.¹⁰⁷ A more principled approach to moral provisions would not only clarify the ambiguous jurisprudence of the HRC and ECtHR, but would prevent further heterogeneity when the IACtHR and African Commission are inevitably confronted with similar complaints.

101. *Media Rights Agenda v. Nigeria*, Communications 105/93, 128/94, 130/94 & 152/96, African Commission on Human and People’s Rights [Afr. Comm’n H.P.R.], ¶¶ 67–68 (1998–99); *see also* Constitutional Rights Project v. Nigeria, Communications 140/94, 141/94, 145/95, African Commission on Human and People’s Rights [Afr. Comm’n H.P.R.], ¶¶ 41–42 (1999) (reiterating this point).

102. *Media Rights Agenda v. Nigeria*, Communications 105/93, 128/94, 130/94, 152/96, African Commission on Human and People’s Rights [Afr. Comm’n H.P.R.], ¶¶ 69–70 (1998–99).

103. *Interights v. Mauritania*, Communication 242/2001, African Commission on Human and People’s Rights [Afr. Comm’n H.P.R.], ¶¶ 76–79 (2004).

104. *Prince v. South Africa*, Communication 255/2002, African Commission on Human and People’s Rights [Afr. Comm’n H.P.R.], ¶ 43 (2004).

105. One author suggests that the general test that emerges is that restrictions “must be a) in accordance with the law, b) pursue one of the specific aims described, c) be necessary in a democratic society and d) demonstrate proportionality.” Sara Abiola, *Limitation Clauses in National Constitutions and International Human Rights Documents: Scope and Judicial Interpretation*, OPEN SOC. INST. PUB. HEALTH PROGRAM LAW & HEALTH INITIATIVE 11 (2010).

106. *See* *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A), ¶¶ 51–53 (1981).

107. *See* Benvenisti, *supra* note 13, at 844.

C. *The Doctrinal Confusion of Morals Jurisprudence*

The proper application of moral provisions remains highly volatile in human rights law. The indeterminacy in the doctrine is the product of two factors that any principled solution must squarely address. First, and most fundamentally, adjudicatory bodies have not specified how “morals” are to be identified and defined for the purposes of human rights law. Morality might find definition in a variety of sources, for example, history, tradition, culture, religion, philosophy, popular opinion, politics, law, or a complex blend of multiple factors. Where sexual rights are concerned, however, it has sufficed for states to assert that morality motivated the law in question. Adjudicators rarely scrutinize the depth of a state’s interest in morals, and instead tend to treat public opinion or legislative passage as evidence of prevailing morality.¹⁰⁸

In rulings like *Hertzberg*, *Handyside*, *Muller*, and even *Dudgeon* or *Norris*, morality tends to encompass whatever a state plausibly claims it might entail, with matters of sex, gender, sexuality, and family law disproportionately cast as moral concerns. Thus, references to homosexuality in *Hertzberg* or masturbation and drug use in *Handyside* were recognized as self-evident matters of moral concern, not morally neutral aspects of personhood or helpful information for schoolchildren to learn in a dynamic and rapidly changing world. Few cases have been brought in which a supranational body has rejected the invocation of a moral provision because the body disagreed that morality is at stake at all. If a plausible moral interest is asserted, adjudicators instead deploy increasingly complex and multifaceted tests to weigh that interest against a claimant’s right, sowing an unpredictable patchwork of both processes and outcomes as they do so.

108. See *Handyside v. U.K.*, 24 Eur. Ct. H.R. (ser. A), ¶¶ 45–46 (1976) (considering legislative motives in 1959 and 1964); *Hertzberg v. Finland*, U.N. GAOR Hum. Rts. Comm., 37th Sess., Supp. No. 40, ¶ 6.1, U.N. Doc. A/37/40 (1982) (considering “the prevailing moral conceptions in Finland as interpreted by the Parliament and by large groups of the population”); *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A), ¶ 46 (1981) (considering Parliament’s failure to amend the sodomy law in 1979 based on its assessment of public opinion in Northern Ireland); *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A), ¶ 40 (1988) (“Neither was it contested that the interference has a legitimate aim, namely the protection of morals.”); *Toonen v. Australia*, U.N. GAOR Hum. Rts. Comm., 50th Sess., ¶ 6.7, U.N. Doc. CCPR/C/50/D/488/1992 (1994) (considering moral arguments even after noting that “the State party acknowledges that a complete prohibition on sexual activity between men is unnecessary to sustain the moral fabric of Australian society”); *Muller v. Switzerland*, 133 Eur. Ct. H.R. (ser. A), ¶ 30 (1988) (noting that the ECtHR “accepts that Article 204 of the Swiss Criminal Code is designed to protect public morals”); *Open Door & Dublin Well Woman v. Ireland*, App. No. 14234/88, 15 Eur. H.R. Rep. 244, 265 (1992) (claiming that “it is evident that the protection afforded under Irish law to the right to life of the unborn is based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion as expressed in the 1983 referendum . . . The restriction thus pursued the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn is one aspect”). *But see* A, B, and C v. Ireland, 2010-VI Eur. Ct. H.R. 185, ¶¶ 221–22 (2010) (considering a range of historical, legislative, constitutional, and international human rights developments in determining the source and depth of the morality asserted by Ireland, and rejecting opinion polls in favor of the moral sentiment enshrined by the constitutional referendum of 1983).

Thus, secondly, adjudicatory bodies have applied different standards in deciding whether an asserted moral interest outweighs the rights of claimants. The evolving tests used by each body have at times produced divergent outcomes, for instance, from *Hertzberg* to *Toonen*, or in the various understandings of concepts like privacy and intimacy in the ECtHR’s jurisprudence.¹⁰⁹ Additionally, variations have also arisen among the different international and regional human rights bodies, such that sexual rights recognized in one system (for example, the recognition of same-sex partnerships, employment non-discrimination, or the right to terminate a pregnancy) are not necessarily recognized in other systems. Yet increasingly, sexual rights are recognized and legitimated as human rights, with some degree of universality implied by that recognition. When morality is taken for granted and supranational bodies proceed to balancing tests to determine whether a right is limited, it becomes difficult to ensure that sexual rights have durable content transnationally.

There are two ways that supranational bodies might attempt to create predictability in their adjudication of moral provisions, each of which proves unsatisfying in practice. The first is by imposing *procedural uniformity*, or the use of similar tests by different bodies. In the area of moral provisions, supranational bodies usually consider the principles of legality and necessity.¹¹⁰ Every instrument except for the ACHPR uses these factors to qualify its moral provisions, and all of the interpretive bodies have functionally embraced this test.

Yet in practice, bodies use different approaches to determine whether a restriction is necessary and proportional—for example, a regional consensus or the degree of enforcement—and harmonizing these approaches across different systems would likely lead to radically different substantive results. Consider the ECtHR’s rulings in *Dudgeon* and *Norris*. In both cases, the ECtHR noted that the margin of appreciation had narrowed because of a growing European consensus on the matter, wherein private, adult, consensual same-sex activity was no longer seen as inherently immoral or threatening. Thus far, both the IACtHR and the ACHPR have shied away from using regional consensus to gauge the margin of appreciation.¹¹¹ In the African context, the application of a consensus-based test would counsel very different outcomes for many sexual rights issues than it has in the European

109. See *Dudgeon*, 45 Eur. Ct. Rep.; *Norris*, 142 Eur. Ct. H.R. (Ser. A); Laskey Jaggard and Brown v. United Kingdom, 24 Eur. H.R. Rep. 39 (1997); *ADT v. United Kingdom*, 31 Eur. H.R. Rep. 803, ¶ 37 (2001). The ECtHR’s erratic jurisprudence on sexuality is also evident in *Frette v. France*, which relied on arguments that had been repudiated in the Court’s earlier decision in *Smith and Grady*. See Thomas Willoughby Stone, *Margin of Appreciation Gone Awry: The European Court of Human Rights’ Implicit Use of the Precautionary Principle in Frette v. France to Backtrack on Protection from Discrimination on the Basis of Sexual Orientation*, 3 CONN. PUB. INT. L.J. 271, 290 (2003).

110. Abiola, *supra* note 105, at 2; see also Luizius Wildhaber, *The European Court of Human Rights: The Past, the Present, the Future*, 22 AM. U. INT’L L. REV. 521, 535–36 (2007).

111. Sjöholm, *supra* note 63, at 156; Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT’L L. 101, 107 (2008).

system. In thirty-three countries in Africa, same-sex activity is criminalized, and in over half of the countries on the continent, steps have been preemptively taken to prohibit any recognition of same-sex unions.¹¹² In Mauritania, Sudan, and parts of Nigeria and Somalia, same-sex activity is punishable by death.¹¹³ In other contexts, including those with progressive legal reforms, physical, sexual, and psychological violence continue to be inflicted both at the hands of and in the absence of the state.¹¹⁴ If and when the African Commission is confronted with a case akin to *Dudgeon* or *Norris*, its survey of the sociopolitical landscape will look very different from that of the ECtHR.

Once moral interests are uncritically accepted by supranational bodies, there are few procedural approaches that would meaningfully uphold sexual rights if applied uniformly across regional and international systems. What would it mean, for example, to adopt a consensus-based inquiry in a region where more countries have the death penalty for same-sex activity than same-sex marriage? If laws restricting sexual rights are deemed unnecessary because they go unenforced in some countries, are they more defensible when they are used in others? How should one define “necessary in a democracy” when the imperatives produced by sex panics and the definition of “democracy” vary from region to region, or even fluctuate wildly within a region?¹¹⁵ Ambivalence about the answers to these questions stems from the recognition that procedural uniformity may not produce normatively satisfying results. In part, this is because a supranational body’s uncritical acceptance of a moral interest advanced by the state necessarily weakens the right by subjecting it to a balancing test, making the question one of necessity and proportionality rather than the permissibility of restricting the right at hand. If one believes that rights to privacy, association, and movement have content that is durable transnationally, relying solely on procedural uniformity to increase the predictability of morals provisions may not produce results that seem defensible in the human rights context.

One might object that the same result should *not* obtain in Europe and in Africa; polities have different understandings of rights and morality, and consensus is helpful in determining where a moral baseline should lie. Yet few human rights practitioners would concede that the right to life; freedom from cruel, inhuman, or degrading treatment or punishment; or freedom

112. See AENGUS CARROLL, INT’L LESBIAN & GAY ASS’N, STATE-SPONSORED HOMOPHOBIA: A WORLD SURVEY OF SEXUAL ORIENTATION LAWS: CRIMINALISATION, PROTECTION AND RECOGNITION 36 (2016); DANIEL OTTOSSON, INT’L LESBIAN & GAY ASS’N, STATE-SPONSORED HOMOPHOBIA: A WORLD SURVEY OF LAWS PROHIBITING SAME SEX ACTIVITY BETWEEN CONSENTING ADULTS 7 (2010).

113. See CARROLL, *supra* note 112, at 37.

114. See NONHLANHLA MKHIZE ET AL., THE COUNTRY WE WANT TO LIVE IN: HATE CRIMES AND HOMOPHOBIA IN THE LIVES OF BLACK LESBIAN SOUTH AFRICANS (2010); Madhumita Lahiri, *Crimes and Corrections: Bride Burners, Corrective Rapists, and Other Black Misogynists*, 15 FEMINIST AFR. 121 (2011).

115. See MORAL PANICS, SEX PANICS: FEAR AND THE FIGHT OVER SEXUAL RIGHTS (Gilbert Herdt ed., 2009); Amy Gutmann, *Democracy, in A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY* 521 (Robert E. Goodin, Philip Pettit & Thomas Pogge eds., 1993).

from arbitrary arrest and detention should be subject to the prevailing sentiments of a region. The power of human rights comes from the conviction that they are, in some sense, universally owed to all persons by virtue of their shared humanity. If moral provisions are attached to some of the most widely recognized rights—for example, rights to assembly, association, expression, conscience, privacy, and movement—allowing blocs of states to assert sovereignty over morals effectively allows them to selectively cabin the scope of rights themselves. The extent to which rights are recognized and enjoyed may vary widely in practice. Nonetheless, there is value in insisting on some level of universality in human rights discourse, and in establishing some floor for human treatment below which states are not permitted to fall.

To treat human rights as a matter of procedure alone ignores their most powerful dimensions; they are also heavily imbued with normative content that guides supranational adjudicators. A second way to increase the predictability of moral provisions is *substantive uniformity*, or the use of markedly different approaches to achieve essentially similar outcomes that favor or do not favor sexual rights. Decisions like *Dudgeon*, *Norris*, and *Toonen* are often cited together for the broad principle that criminal laws against same-sex activity violate human rights. What this grouping overlooks, however, are the slightly distinctive approaches that led to these results. In addition to its analysis of Toonen’s right to privacy, the HRC in *Toonen* independently considered a nondiscrimination claim and found that the term “sex” in the ICCPR should be read to include “sexual orientation.”¹¹⁶ By contrast, the ECtHR in *Dudgeon* found there was no need to examine the remainder of Dudgeon’s discrimination claim after finding his privacy was violated, and said that part of the alleged discrimination—Northern Ireland’s unequal age of consent law—was valid under the test it applied, as it was deemed to be plausibly necessary in a democratic society.¹¹⁷ Although both *Toonen* and *Dudgeon* addressed privacy and discrimination, the approaches they used to do so led to subtly different results, complicating their applicability to future cases.

A similar analysis could be performed on rulings regarding discrimination in employment. In *Lustig-Prean & Beckett v. United Kingdom*, the ECtHR invalidated the United Kingdom’s prohibition on openly gay service members by going through a full analysis of the ways in which national security and public order could or could not limit the employment options available to LGBT persons.¹¹⁸ By contrast, in *Zimbabwe Human Rights NGO Forum*, the African Commission hinted that “sexual orientation” could simply be read

116. *Toonen v. Australia*, U.N. GAOR Hum. Rts. Comm., 50th Sess., ¶ 8.7, U.N. Doc. CCPR/C/50/D/488/1992 (1994).

117. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A), ¶¶ 62, 64–70 (1981).

118. *Lustig-Prean & Beckett v. United Kingdom*, App. No. 31417/96, 29 Eur. H.R. Rep. 548 (2000).

into the nondiscrimination provisions of the ACHPR.¹¹⁹ The opinions concluded that discrimination on the basis of sexual orientation is wrong, but did so using very different approaches. The IACtHR has gone even further, finding that nondiscrimination is a *jus cogens* norm, and prohibiting discrimination against any group of persons.¹²⁰ In these instances and others, the European system has been more attentive to regional consensus and trends within Europe, while the Inter-American and African systems have borrowed more liberally from other regional and international sources of human rights principles.¹²¹

The number of supranational rulings on sodomy laws, the age of consent, or employment discrimination is small, and the results tend to be more heavily publicized and championed by activists than the doctrinal logic that lies behind them. If substantive uniformity is all that ties together these decisions, however, the logic and applicability of these rulings to other, arguably more difficult or contested fields of moral regulation (for example, abortion, sex work, or BDSM) will be limited.

The tension between procedural and substantive uniformity seems to create a paradox for supranational adjudicators. If adjudicatory bodies adopt identical procedures to balance moral interests with sexual rights, they are likely to reach different substantive results. When bodies have agreed upon similar substantive guarantees, their precedents and practice have taken different avenues to reach those results, which in turn has the potential to generate wide divergence on other issues. If sexual rights are to have meaningful content transnationally, it is not enough to seek consistency as interests and rights are being balanced in heterogeneous ways. To the contrary, it is the concept of morality itself, which extends across the major regional and international human rights instruments, that demands greater scrutiny and doctrinal clarity. What “morality” can and should mean is in many ways a prior question, but one that has been virtually ignored in theory and practice.

II. DOCTRINAL APPROACHES TO MORAL PROVISIONS

Without interrogating the source of the moral interest asserted by the government, supranational bodies have typically adjudicated moral provisions by balancing a presumed interest in morality with a right asserted by the claimant. The balance between the two determines whether a morally motivated law is permissible. Domestic courts that have considered morally motivated laws prohibiting same-sex activity have often employed a very

119. See *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication 245/2002, African Commission on Human and People's Rights [Afr. Comm'n H.P.R.], ¶ 169 (2006).

120. Neuman, *supra* note 111, at 118–22.

121. See ACHPR, *supra* note 7, arts. 60–61; SjöHOLM, *supra* note 63, at 157; Neuman, *supra* note 111, at 101–02.

different analysis, inquiring first into what *kind* of morality should be cognizable to the law and how that morality might be identified, and only then balancing the moral interest with the right asserted by the claimant. The latter approach, which defines how morality should be understood for the purposes of adjudicating rights, has been decisive for the development of sexual rights jurisprudence in domestic courts in the Global South—and has much to commend it as a baseline for adjudicating moral provisions.

A. *The Harm Principle as a Response to Moral Provisions*

Once supranational bodies accept that popular or legislative opinion is sufficient to evince a state’s moral interest in a law, the bodies examine whether a claimant’s right is at stake and then employ legality and necessity analyses to determine whether the state’s interest justifies infringement of the right. In practice, cases involving moral provisions typically turn on the necessity analysis—and claimants have consistently approached that analysis by insisting that their sexual activity does not inflict harm on others. The complaints in *Toonen*, *Dudgeon*, and *Norris* all alleged that private sexual activity does not do harm, either to the individual or to society, and that argument prevailed.¹²² By contrast, in cases like *Hertzberg*, *Handyside*, and *Muller*, complainants unsuccessfully argued that their own freedom of expression outweighed any speculative harm to children or the general public. In these cases, supranational bodies instead found that the alleged harms to morality in the public sphere, however inchoate, justified the suppression of rights. In some cases, what the state defines as harm can restrict sexual rights even in private interactions. The ECtHR in this way upheld a criminal conviction for sado-masochistic sex in *Laskey*, *Jagger*, and *Brown* on public health grounds, finding that the fact that harm was desired and invited did not meaningfully mitigate the state’s power to restrict it.¹²³

In each of these cases, the claimants argued that the type of harm the prosecutors perceived was not necessarily harmful and that the countervailing rights of the individual outweighed any impact on morality. The same arguments have been invoked, often successfully, in liberal democracies like the United States, the United Kingdom, and Canada in efforts to decriminalize same-sex activity, affirm reproductive autonomy, or legalize consensual BDSM.¹²⁴ In these suits, a lack of harm and a countervailing right to privacy have typically provided the relevant variables for the legal calculus.

122. The harm principle has a long genealogy in liberal democratic theory. JOHN STUART MILL, *ON LIBERTY* 82–85 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

123. *Laskey, Jaggard and Brown*, *supra* note 109; *see also* ADT v. United Kingdom, 31 Eur. H.R. Rep. 803 (2001).

124. *See* Lawrence v. Texas, 539 U.S. 558 (2003); *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Roe v. Wade*, 410 U.S. 113 (1973); *R. v. J.A.*, [2011] 2 S.C.R. 440 (Can.); *R. v. Price*, 2004 BCPC 103 (Can.); *R v. Brown* [1994] 1 A.C. 212 (U.K.).

But despite its ubiquity, the harm principle is a somewhat anemic framework for assessing moral provisions. Harm-based arguments rely on a showing that the asserted right does or does not have adverse repercussions. In the realm of morality, however, harms are exceedingly difficult to instrumentalize and measure, making balancing tests a poor substitute for actually defining the state's interest in a substantive way.¹²⁵ Indeed, even when claimants have prevailed, adjudicatory bodies have taken for granted—sometimes without any prompting by the state—that sex and sexuality are dangerous or damaging when they have a public element, when they might be visible to minors, or when they involve physical pain.¹²⁶

Even when harms are somewhat measurable, supranational bodies have been reluctant to scrutinize them closely. In domestic litigation, parties have demonstrated whether something is harmful or innocuous with statistical data, expert testimony, and amicus briefs. In supranational litigation, adjudicatory bodies play far less of a fact-finding role, and are generally quite deferential to state assertions of harmfulness.¹²⁷ In the rare instances where assertions of moral harm have been deemed insufficient, it has been because states provided no evidence whatsoever for their claims, and supranational bodies have sent worrying signals that the state's provision of some such evidence might have sufficed to establish its interest in curtailing rights.¹²⁸ The limits of the harm principle are accentuated when supranational bodies adopt a thin understanding of morality—namely, whatever popular opinion or a legislature has deemed moral—rather than adopting a thicker understanding of morality rooted in a defined set of values and principles.

Adopting a thin understanding of morality and proceeding to harm-based analyses also fails to appreciate the expressive dimension of morally motivated legislation. Joel Feinberg has argued that the harm principle alone need not provide the basis for criminal law, and introduced the offense principle as an alternative justification for prohibition and regulation.¹²⁹ The principle suggests that some things—for example, hate speech—might be legitimately prohibited because of the high degree of offense those things

125. See Rohit Sharma, *The Public and Constitutional Morality Conundrum: A Case-Note on the Naz Foundation Judgment*, 2 NUJS L. REV. 445, 450 (2009) (“The problem with the *balancing act* is two-fold – *first*, it does not sufficiently define a compelling public or state interest, and *second*, the lack of definition tends to leave the elected representatives as the best judges of compelling public interests. Therefore, in the absence of a definition based on some principle, the judicial determination of whether a particular public interest would override individual liberty would invariably come down to the idiosyncrasies of the presiding Judge(s).”).

126. MILLER, *supra* note 14, at 13 (“Unfortunately, the many reports and judgments produced by UN treaty and political bodies on sexual harm, entitlements and freedoms, are not matched by equally authoritative and clear legal arguments on the standards being applied to sexual rights questions.”).

127. See Fedotova v. Russian Federation, Communication No. 1932/2010, U.N. Doc. CCPR/C/106/D/1932/2010, Views, Human Rights Comm., ¶ 10.6 (Oct. 31, 2012); Kaos G.L. v. Turkey, App. No. 4982/07, Eur. Ct. H.R. (2016).

128. See Fedotova, Communication No. 1932/2010, ¶ 10.6; Alekseyev v. Russia, Apps. Nos. 4916/07, 25924/08 & 14599/09, Eur. Ct. H.R. ¶ 86 (2010).

129. See JOEL FEINBERG, OFFENSE TO OTHERS (1985); JOEL FEINBERG, HARM TO OTHERS (1984).

produce. Often, courts asking whether something is necessary in a democratic society are not merely asking whether it causes harm, but are also considering the expressive message it sends and the values it transmits,¹³⁰ the views of the population or the region,¹³¹ and the kind of shared social project that is created as a result. Law is not merely a series of rules; it also serves an expressive function, reflecting the values and commitments of the political community that articulates and heeds it.¹³² The expressive aspect of law and regulation inspires the deference to sovereign rule that persistently haunts human rights law, but also animates the tests that supranational bodies use to determine what is and is not necessary in a democratic society.

The problem with harm-based analyses is not simply that they undervalue the expressive valences that animate law. Such analyses seek to shift the conversation from moral beliefs to demonstrable harm, but what constitutes “harm” is itself a product of moral convictions about right and wrong. Although people may disagree on the guiding moral or ethical principles of a polity, most believe that such principles should play some role in structuring shared laws and norms.¹³³ When supranational bodies do not develop a thick understanding of morality that identifies the values on which morality is based, they are unable to distinguish permissible and impermissible moral judgments for the purposes of crafting laws. Articulating a substantive basis for the concept of morality is a critical prerequisite if tests like legality or necessity are to be used to weigh a moral interest against individual rights.

B. Beyond Harm-Based Analysis: The Development of Constitutional Morality

Unlike supranational bodies, many domestic courts that have decided cases regarding same-sex activity have sought to identify and define the kind of morality that can properly guide their decision-making. In *National Coalition for Gay and Lesbian Equality (NCGLE) v. Minister of Justice*, the South African Constitutional Court considered the country’s apartheid-era sodomy law. With the inclusion of sexual orientation as a protected category in the post-apartheid constitution’s Equality Clause, the provision had been swiftly called into question. As Justice Laurie Ackermann noted in the ruling, limits on the rights of gay, lesbian, and bisexual adults had to be weighed against the state’s purpose in enacting the sodomy law. Nonetheless, he

130. A good example is the Peep Show Decision. See Bundesverwaltungsgericht [BVerwGE] [Federal Administrative Court] Oct. 28, 1981, 64, 274 (Ger.).

131. See *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988).

132. See Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Cass Sunstein, *The Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

133. The point is not only made by opponents of sexual rights, but by some of their supporters. See 142 Cong. Rec. H7483 (daily ed. July 12, 1996) (statement of Rep. Frank) (noting that “[y]es, there is a role for morality in Government. Of course there is. The Government has an absolute overriding duty to enforce morality in interpersonal relations. We have a moral duty to protect innocent people from those who would impose on them. That is a very important moral duty”); see also Sharma, *supra* note 125, at 447–49.

flatly concluded that “[t]he enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as such a legitimate purpose.”¹³⁴ Although Ackermann’s opinion circumscribed the reach of morality as a justification for lawmaking, a more nuanced view was espoused by the concurrence of Justice Albie Sachs. Sachs made an argument for morality, but specified that it was morality of a very particular kind:

A state that recognises difference does not mean a state without morality or one without a point of view. It does not banish concepts of right and wrong, nor envisage a world without good and evil. It is impartial in its dealings with people and groups, but is not neutral in its value system. The Constitution clearly does not debar the state from enforcing morality. Indeed, the Bill of Rights is nothing if not a document founded on deep political morality. What is central to the character and functioning of the state, however, is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself.¹³⁵

In India, the Delhi High Court in *Naz Foundation v. Government of NCT of Delhi* adopted a similar approach, this time representing the majority of the court. The law at issue was Section 377, a colonial-era penal law that criminalized “unnatural offences”¹³⁶ and was typically used to prosecute or intimidate same-sex practicing men.¹³⁷ The petitioner, an HIV/AIDS NGO, claimed that Section 377 unreasonably abridged the dignity and right to privacy of men who have sex with men, and that such privacy could only be limited by a compelling state interest.¹³⁸ The government responded that Section 377 was passed to reflect the reigning morals of society at the time of its passage, and further, that the criminal law of a democracy is inevitably based on such a blend of moral and political considerations.¹³⁹

The ruling ultimately read down Section 377 of the Indian Penal Code such that it narrowly applied to penile-nonvaginal sex that was nonconsensual or penile-nonvaginal sex with a minor.¹⁴⁰ The Delhi High Court considered a variety of factors; in reasoning that parallels that of the ECtHR in *Norris*, it found that the relative lack of enforcement meant that Section 377 failed the reasonability test.¹⁴¹ It noted that the protection of nonconsenting

134. *NCGLE*, 1998 (12) BCLR 1517 (CC) ¶ 37 (S. Afr.).

135. *Id.* ¶ 136 (Sachs, J., concurring).

136. PEN. CODE § 377 (1860) (India).

137. Anand Grover, *Is It Time to Review Section 377?*, HINDU TIMES (Sept. 1, 2017), <http://www.thehindu.com/opinion/op-ed/is-it-time-to-review-section-377/article19595727.ece>.

138. *Naz Found. v. Gov't of NCT of Delhi*, (2009) WP(C) No. 7455/2001, ¶ 8 (Del. HC) (India).

139. *Id.* ¶¶ 12, 14.

140. *Id.*

141. *Id.* ¶ 74.

persons and children was a compelling state interest, but the promotion of public morality itself was not.¹⁴² The differentiation provoked a broader reflection from Chief Justice Ajit Prakash Shah, who authored the opinion:

Thus popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. 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.¹⁴³

In this passage, Shah drew a distinction between *popular* or *public morality*, which is based on majoritarian or sectarian notions of right and wrong, and *constitutional* or *political morality*, which is grounded in the values of the constitutional text. Shah then proceeded to look at the Indian Constitution’s revolutionary origins, the location and meaning of its core commitments, and the stress it places on diversity. After briefly identifying and canvassing these fundamental aspects of the constitution, Shah concluded that “[t]o stigmatise or to criminalise homosexuals only on account of their sexual orientation would be against the constitutional morality.”¹⁴⁴

In both *NCGLE* and *Naz*, judges explicitly located the morality that guided their analysis in a constitutional tradition, and rejected the idea that their decision should be guided by public opinion or majoritarian moral sentiment. The concept of constitutional morality defines the morals that matter in law as those that derive from and reflect the values of the constitution, and not the popular morality of any particular moment. Both courts looked at a variety of factors to consider what limitations the constitution’s morality might or might not permit. They considered the origins of their constitutions in the twilight of apartheid and the transition to post-colonial independence under Ambedkar and Nehru.¹⁴⁵ They considered where the core provisions lie, and what these centralized as the fundamental concerns

142. *Id.* ¶ 75.

143. *Id.* ¶ 79.

144. *Id.* ¶ 80. A similar approach was taken by the Supreme Court of Belize in its recent decision striking down a prohibition on same-sex activity, although the court in that case purported to draw a line between morality and judicial interpretation rather than asking what kind of morality is cognizable in constitutional law. See *Orozco v. Atty Gen. of Belize* (2016) Claim No. 668 of 2010 (Belize) ¶ 53 (noting that “[i]t needs to be made pellucid that this Claim stands to be decided on the provisions of the Belize Constitution and in this regard, the Court stands aloof from adjudicating on any moral issue”). In its specific examination of the moral limitation contained in the Belize Constitution, however, it noted that “the Court cannot act upon prevailing majority views or what is popularly accepted as moral . . . There must be demonstrated that some harm will be caused should the proscribed conduct be rendered unregulated.” *Id.* ¶ 81.

145. *NCGLE*, 1998 (12) BCLR 1517 (CC) ¶¶ 28, 32, 60–61 (S. Afr.); *Naz Found. v. Gov’t of NCT of Delhi*, (2009) WP(C) No. 7455/2001, ¶¶ 79, 130–31 (Delhi HC) (India).

of the political order.¹⁴⁶ In both cases, they considered whether moral regulations could ever survive if they functionally served to discriminate against a particular group, given the prominence of equality, liberty, dignity, inclusiveness, and other values in the foundational texts of the polity.

In less widely celebrated opinions, other jurists in the Global South have adopted similar reasoning. In his dissenting opinion in *Banana v. State*, Chief Justice Gubbay of the Supreme Court of Zimbabwe noted:

It may well be that the majority of the people, who have normal heterosexual relationships, find acts of sodomy morally unacceptable. This does not mean, however, that today in our pluralistic society that moral values alone can justify making an activity criminal. If it could one immediately has to ask: "By whose moral values is the state guided?" . . . I am thus not persuaded that in a democratic society such as ours it is reasonably justifiable to make an activity criminal because a segment, maybe a majority, of the citizenry consider it to be unacceptable. The courts cannot be dictated to by public opinion. It cannot replace in them the duty to interpret the Constitution and to enforce its mandates.¹⁴⁷

By contrast, apex courts that have *upheld* restrictions on same-sex activity have typically presumed that popular morality is the relevant benchmark, referencing legislation or public opinion to justify upholding moral laws. In *Banana*, for example, three of the five justices ultimately opted to uphold Zimbabwe's sodomy law on the grounds that:

[I]t cannot be said that public opinion has so changed and developed in Zimbabwe that the courts must yield to that new perception and declare the old law obsolete. . . . From the point of view of constitutional interpretation, I think we must also be guided by Zimbabwe's conservatism in sexual matters. . . . I do not believe that the 'social norms and values' of Zimbabwe are pushing us to decriminalise consensual sodomy. Zimbabwe is, broadly speaking, a conservative society in matter [sic] of sexual behaviour. More conservative, say, than France or Sweden; less conservative than, say, Saudi Arabia. But, generally, more conservative than liberal. I take that to be a relevant consideration in interpreting the Constitution in relation to matters of sexual

146. *NCGLE*, 1998 (12) BCLR ¶¶ 28, 30, 60–61; *Naz Found.*, (2009) WP(C) No. 7455/2001, ¶¶ 130–31.

147. *Banana v. State*, (2000) 4 LRC, 621, 645–46 (Zim.) (Gubbay, C.J., dissenting). After questioning the basis of the state's moral interest, Gubbay proceeded to a harm-based analysis and concluded that "In my view, the criminalisation of anal sexual intercourse between consenting adult males in private, if indeed it has any discernable [sic] objective other than the enforcement of private moral opinions of a section of the community (which I do not regard as valid), is far outweighed by the harmful and prejudicial impact it has on gay men." *Id.* at 648; *see also* *McCoskar v. State*, [2005] FJHC 500 (High Ct. of Fiji) (overturning the sodomy law in place in Fiji).

freedom. Put differently, I do not believe that this court, lacking the democratic credentials of a properly elected parliament, should strain to place a sexually liberal interpretation on the Constitution of a country whose social norms and values in such matters tend to be conservative.¹⁴⁸

Shortly after *Banana*, the Supreme Court of Botswana decided *Kanane v. State* and affirmed Botswana’s sodomy law. The court reasoned that:

No evidence was put before the court a quo nor before this court that public opinion in Botswana has so changed and developed that society in this country demands such decriminalisation. . . . I am of the view that while the courts can perhaps not be dictated to by public opinion, the courts would be loath to fly in the face of public opinion, especially if expressed through legislation passed by those elected by the public to represent them in the legislature.¹⁴⁹

In practice, how morality is understood has thus made a decisive difference in national challenges to state restrictions on sexual activity. Courts that locate the relevant morality for adjudication in a constitutional text have found that “morality” is not self-evidently behind laws that restrict sexual autonomy; instead, constitutional morality may counsel *repealing* those laws. Courts that have regarded public or legislative opinion as indicative of morals have been far more reluctant to interject their own understanding of morality.¹⁵⁰ Under either interpretation, the courts consider the state’s interest, the rights at stake, and the relationship between the two, but the understanding of the state’s interest in morality and what it counsels is radically different in each.

Defining what courts mean by “morality” is a helpful intervention, and constitutional morality offers a far more promising interpretation than public morality. Using public opinion as a proxy for morality translates majority sentiment into law and provides little meaningful protection for minority groups. Using legislation as a proxy for morality is even more tenuous; using a single criminal law as evidence of a moral objection foregrounds the disapprobation of a handful of lawmakers at one moment in time rather than overarching commitments to liberty, equality, or dignity or more tailored

148. *Banana* (2000) 4 LRC at 670–71.

149. *Kanane v. State*, (2003) (2) BLR 64 (CA) (Bots.).

150. In its decision overturning the *Naz Foundation* ruling, the Supreme Court of India gave considerable deference to legislative opinion and the presumption of constitutionality afforded to legislation. See *Koushal v. Naz Found.*, (2014) 1 SCC 1 (India). *But see* Justice K.S. Puttaswamy (Ret.) v. India, (2012), Writ Petition (Civil) No. 494, ¶ 127 (criticizing *Koushal* and recognizing that the rights of LGBT people “are not ‘so-called’ but are real rights founded on sound constitutional doctrine”). The role of public and legislative opinion was even more decisive in the sodomy law litigation in Singapore. See *Lim Meng Suang & Kenneth Chee Mun-Leon v. Atty Gen.* [2013] 3 SLR 118 (Sing.).

values and institutions that might structure the legal order.¹⁵¹ By contrast, constitutional morality looks to the values of the polity that are both foundational and holistic, without deferring to a sectarian group or majoritarian preferences. To the extent that morality is normative, constitutional morality specifies where jurists might locate the normative tenets that are to guide their analysis. It does not unconvincingly duck the question of whether morality animates law, but confronts the presence of ethical and moral concerns head-on and offers a theoretical justification for acceptable and unacceptable uses of that morality.

C. *Anchoring Morals in a Constitutional Text*

If courts reject the idea that popular morality should govern rights claims, constitutions are not the only bodies of law and norms in which a court might search for moral tenets. Morals might also be anchored in tradition, legislation, regulations, or other recognized sources of rules in a polity. Why might courts adopt *constitutional* morality as a doctrine for addressing moral regulations?

First, constitutional morality bolsters the legitimacy of rulings by anchoring determinations in a ratified, communal, and potentially evolving text. Gerald Neuman has highlighted being grounded in the consent of the political community as a key source of the legitimacy of fundamental rights.¹⁵² Constitutions, like conventions and charters at the supranational level, are forged by those governed by their terms to agree on their rights and mutual responsibilities. The consensual nature of these projects gives them added legitimacy as a source of shared values and rights. Using Habermasian discourse ethics, Seyla Benhabib offers a rich account of the dynamism and continuity of these consensus-building processes, noting that a key part of the discourse that defines a political unit or alliance is contestation over its moral and ethical priors.¹⁵³

The legislative process offers one avenue to contest social meanings of morality, as do administrative regulations and social dialogue in the media and in other deliberative spaces. Yet constitutions are unique, in terms of both their symbolic and their legal status. As Chief Justice Ismail Mahomed of the South African Constitutional Court has noted:

All Constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people, and which discipline its government and its national institutions; the basic premises upon which judicial,

151. Using legislation as a proxy for morality is particularly problematic in postcolonial settings; a large portion of the laws prohibiting same-sex activity were introduced and imposed by colonial regimes. See HUMAN RIGHTS WATCH, *THIS ALIEN LEGACY: THE ORIGINS OF "SODOMY" LAWS IN BRITISH COLONIALISM* (2008).

152. See Neuman, *supra* note 12, at 1866–67.

153. See BENHABIB, *supra* note 6, at 12–19.

legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that exercise; and the moral and ethical direction which that nation has identified for its future.¹⁵⁴

The doctrine of constitutional morality allows the judiciary to integrate the moral and ethical priors described by Chief Justice Mahomed into ongoing social and political conversations. In fervent or reactionary debates (and disputes about sexual politics often fit into this category), the doctrine of constitutional morality allows the judiciary to remind the public and their representatives of the agreed-upon norms of the political community.¹⁵⁵

The doctrine of constitutional morality thus preserves the concern for sovereignty that motivates moral provisions, albeit in a different way than recourse to public morality. Turning to a domestic constitution as a source of moral guidance mitigates fears that rights will be interpreted and applied in a manner completely divorced from sovereign lawmaking. As Jack Balkin and Reva Siegel note, judicial decision-making is not removed from broader political dialogue; "political contestation plays an important role in shaping understandings about the meaning and application of constitutional principles."¹⁵⁶ The kinds of interpretations generated by the courts in South Africa and India, for example, did not emerge *de novo* and were not unexpectedly imposed by judicial elites. The inclusion of an Equality Clause in South Africa's constitution and the vigorous contestation around Section 377 were both products of robust social movements.¹⁵⁷ As Benhabib's approach suggests, judicial interpretations emerge from a wider social conversation, such that the dialogic interchange between public opinion, political agendas, and the stances of various social actors shape the lens through

154. S v. Makwanyane, 1995 (3) SA 391 (CC) ¶ 262 (S. Afr.).

155. Of course, constitutions themselves can be amended to incorporate moral positions; consider the constitution of Ireland's affirmation that life begins at conception, CONSTITUTION OF IRELAND, 1937, art. 40.3.3, or the constitution of Uganda's prohibition on same-sex marriage, CONSTITUTION OF THE REPUBLIC OF UGANDA, 1995, art. 31(2a). Even if constitutions are at times subject to the same populist revision as a legislative code, they maintain a position of symbolic and legal supremacy that makes a constitutional text a preferable primary source of a polity's guiding morality. And unlike a piece of legislation that constrains sexual autonomy, a constitution also typically recognizes a range of other rights and values that provide a more balanced understanding of the moral investments of the polity. See S v. Acheson (1991) (2) SA 805 (Namib.) at 813A–B ("The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a 'mirror reflecting the national soul,' the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion.")

156. Jack Balkin & Reva Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 928 (2006).

157. See Jacklyn Cock, *Engendering Gay and Lesbian Rights: The Equality Clause in the South African Constitution*, 26 WOMEN'S STUD. INT'L F. 35 (2003) (examining the development and codification of the Equality Clause in South Africa); Geetanjali Misra, *Decriminalising Homosexuality in India*, 17 REPROD. HEALTH MATTERS, no. 20, at 20 (2009) (examining the movement to repeal Section 377 in India).

which the judiciary scrutinizes constitutional texts.¹⁵⁸ The aim of constitutional morality is not to elevate the judiciary above social contestation, but to place the stress of the analysis on the lasting and communal values of the polity—those enshrined in the constitutional text—rather than imposing standards external to the political community itself.

If the first strength of constitutional morality is its firm basis in the polity's self-definition, a second and related strength is the doctrine's ability to thwart usurpation of judicial standards by sectarian groups. Neuman notes that fundamental rights also derive legitimacy from their suprapositive character; they transcend politics and are understood to be animated by higher normative principles.¹⁵⁹ The doctrine of constitutional morality shifts discussions of morality toward these suprapositive values. Rather than allowing a representative of the government or the preferences of a popular majority to decide what is or is not moral, a constitutional morality analysis considers these claims in light of the broader values and commitments of the polity. Of course, this does not preclude or preempt the lively social contestation that accompanies debates about morality and sexual rights, and proponents and opponents of particular views will continue to make their voices heard. What does change is that any moral interest is considered in light of the underlying values of the state to determine whether it is the product of sectarian convictions or the broader principles upon which the polity has agreed.

A final strength of constitutional morality is that it uses values and methods of interpretation that are institutionally familiar to judicial actors.¹⁶⁰ The doctrine allows judges to play a fitting role in social contestation over moral norms by taking the legal claims of the various parties and balancing them in light of the governing values of the polity. The judiciary is far better suited to assessing constitutional morality than divining public morality, and this institutional expertise offers added value. Moreover, it brings together disparate understandings of what morality means. It identifies values and commitments in a foundational document that would likely apply in a variety of situations, and are not resolutely specific to the facts at hand. Thus, in the course of the *Naz* ruling, the Delhi High Court noted that:

If there is one constitutional tenet that can be said to be [an] underlying theme of the Indian Constitution, it is "inclusiveness." This Court believes that [the] Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role for everyone. Those perceived by the majority

158. See BENHABIB, *supra* note 6, at 12–19.

159. Neuman, *supra* note 12, at 1868–69.

160. *Id.* at 1869–72; see also Stephen Gardbaum, *Human Rights as International Constitutional Rights*, 19 EUR. J. INT'L L. 749, 752 (2008).

as ‘deviants’ or ‘different’ are not on that score excluded or ostracised.¹⁶¹

Such frank expositions of the moral values and commitments of the constitution are enormously helpful in understanding where the boundaries of moral regulation might lie. Rather than reserving moral determinations to judges, explicit discussions of the values at stake invite contestation and refinement, and do so in a more open and transparent way than implicit moral understandings of human rights adjudicators otherwise might.

Jurists considering restrictions on same-sex activity in South Africa, India, Zimbabwe, Fiji, and Belize have interrogated what “morality” means in rights discourse rather than accepting public or legislative opinion as a definitive metric, and the resulting doctrine of constitutional morality offers a potentially promising theoretical framework for moral provisions. How the doctrine might function in a supranational context—and, indeed, how it might resolve the tension between procedural uniformity and substantive uniformity—is more complex.

III. MORAL ADJUDICATION AT THE SUPRANATIONAL LEVEL

What might a supranational doctrine of constitutional morality look like? Recall that, at its core, the fundamental principle of constitutional morality is that morality, for the purposes of rights analyses, should not simply be coterminous with public opinion or the dictates of legislation. The relevant morality should instead be derived from the polity’s overarching values, which are most clearly and holistically articulated in its foundational text. At the supranational level, the doctrine immediately raises questions: Should defining the scope of “morals” in human rights be the prerogative of supranational institutions? If it should, what is the equivalent of a constitution in which one might locate the moral values that are relevant to the inquiry?

A. *Statist Morality*

A strong statist might argue that the only moral considerations that should matter are those that are enshrined in a polity’s constitutional tradition. Under this view, the same considerations that have led domestic courts to look to constitutional morality should counsel supranational bodies to do so as well. By encouraging adjudicatory bodies to locate the relevant values for moral adjudication in the constitutional text of the country being reviewed, deference to the values of that polity would be preserved and hostile-

161. *Naz Found. v. Gov’t of NCT of Delhi*, (2009) WP(C) No. 7455/2001, ¶ 130 (Delhi HC (India)).

ity to external intervention on matters of sex, gender, and sexuality might be minimized.

Yet there are good reasons to be skeptical of a strong statist position. First, states make human rights commitments that are not necessarily reflected in their domestic constitutional text. Like constitutions, treaties often emerge from specific histories of repression and aspiration, and are forged to assert specific moral and ethical commitments. For the purposes of applying the rights guaranteed under a treaty, those commitments should be factored into any analysis of the state's interest in morality.¹⁶² Second, looking only to domestic constitutions shifts supranational bodies from their area of expertise—interpreting and applying the instruments with which they have been charged—to interpreting constitutional traditions with which they may not be particularly familiar. A valuable strength of the constitutional morality doctrine is that it brings unique judicial knowledge to debates about morality and rights,¹⁶³ but this asset can become a liability when adjudicators are asked to divine values solely from unfamiliar texts and traditions.

The statist position is not the only way that constitutional morality might be adapted for supranational use. A strong internationalist might argue that the current confusion over morality merits supranational clarity and consistency, particularly in an era where sexual rights are gaining recognition as universal human rights. If moral provisions are permitted as constraints on human rights, the bodies tasked with interpreting those rights should develop a reasoned approach to their outer bounds.

B. *Treaty Morality*

A second way to adapt constitutional morality for supranational use would be for adjudicatory bodies to define morality with reference to the human rights instruments they interpret and apply in the same way that domestic courts have defined morality with reference to constitutions. Under this framework, constitutional morality would be elevated to a supranational form that might be termed *treaty morality*. States that signed or ratified agreed-upon treaties would be held to the values that they espouse.¹⁶⁴ If states invoked moral provisions to assert their sovereign control over a particular matter, the adjudicatory body applying the relevant treaty

162. BENHABIB, *supra* note 6, at 14 (“Since discourse theory articulates a universalist moral standpoint, it cannot limit the scope of the *moral conversation* only to those who reside within nationally recognized boundaries; it must view the moral conversation as potentially extending to all of *humanity*.”).

163. See *supra* notes 160–161 and accompanying text.

164. Arguably, such an obligation already exists under international law. See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (stating in Article 26 that “[e]very treaty in force is binding upon the parties to it and must be performed in good faith,” and stating in Article 27 that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”).

would ask whether the values of the treaty support the morality being asserted.

Strictly applied, the result of the treaty morality approach would be a somewhat rigid imposition of regional or international uniformity. Although it did not define a morality of its own, the ECtHR’s rejection of Russia’s popular morality in *Bayev*, which took note of a regional consensus on the freedom of expression for LGBT people and existing case law under the ECHR, resembles this type of approach.¹⁶⁵ Just as constitutional morality looks beyond the morality of both sectarian groups and the majority in a given polity, a pure form of treaty morality would overrule both sectarian outliers and even the majority of states in a regional or international system.

There are good reasons to be skeptical of the imposition of moral uniformity across the globe. Insisting upon a global standard for morality would profoundly upset the balance between universality and sovereignty that moral provisions helpfully strike, with the normatively and pragmatically undesirable consequences that that would entail.¹⁶⁶ As one of the virtues of constitutional morality is that it is attentive to the values and commitments that people in a given polity have deemed important enough to enshrine in their constitutional text,¹⁶⁷ the uniformity that a treaty morality doctrine would impose across highly diverse systems would negate that aspect of the doctrine. Abdullahi A. An-Na’im has forcefully argued that human rights, too, derive their power in part from their resonance with local histories, traditions, and values.¹⁶⁸ A doctrine of treaty morality, which entirely removes moral questions to the supranational level, is ill-equipped to generate the sense of communal purchase over both morality and rights that constitutional morality seeks to achieve.

Furthermore, structural factors are likely to exacerbate resistance to a strict treaty morality regime. A small number of states drafted the major supranational instruments;¹⁶⁹ other states have subsequently signed or ratified human rights treaties, but their inability to renegotiate the texts makes such instruments a poor proxy for a signatory’s or party’s more idiosyncratic normative commitments.¹⁷⁰ Treaties themselves require negotiated consen-

165. *Bayev v. Russia*, App. Nos. 67667/09, 44092/12 & 56717/12, Eur. Ct. H.R. ¶¶ 65–71 (2017).

166. See *supra* Section I.A.

167. See *supra* Section II.C; Ayelet Shachar, *Against Birthright Privilege: Redefining Citizenship as Property*, in IDENTITIES, AFFILIATIONS, AND ALLEGIANCES 257, 270 (Seyla Benhabib et al. eds., 2007) (emphasizing “an important feature of modern citizenship—namely, the direct, reciprocal, and special relationship between the individual and the bounded community to which she belongs”).

168. ABDULLAHI A. AN-NA’IM, CULTURAL TRANSFORMATION AND HUMAN RIGHTS IN AFRICA 3 (Abdullahi A. An-Na’im ed., 2002).

169. Abdullahi A. An-Na’im & Jeffrey Hammond, *Cultural Transformation and Human Rights in African Societies*, in CULTURAL TRANSFORMATION AND HUMAN RIGHTS IN AFRICA, *supra* note 168, at 13, 17 (observing that the UDHR was drafted and adopted at a time when Egypt, Ethiopia, Liberia, and South Africa were the only African members of the United Nations).

170. Constitutions may also be forged in the absence of full democratic participation; the exclusion of women and people of color from the drafting of the U.S. Constitution is an obvious example. Yet because they are tailored to a polity, constitutions invite a level of robust engagement that treaties do not; this

sus, which may foreclose the more specific normative commitments that are made at the state level.¹⁷¹ Although constitutions often resound in a shared language of liberty, equality, or dignity, the particular rights and entitlements to which these give rise vary widely from state to state. Finally, even if one looked solely at the texts of supranational treaties and the jurisprudence of adjudicatory bodies to identify the values that should guide moral inquiry, they would find that sovereignty is itself an interpretive value. The various limiting provisions are just one example; as discussed above, deference to states has shaped supranational treaties since the negotiations over the UDHR.

The competing concerns over how to best interpret each state's conception of morals for the purposes of adjudicating rights create something of a paradox. On one hand, looking solely to domestic constitutions seems to undermine any understanding of morality that reflects the depth and meaning of human rights commitments. On the other hand, allowing supranational bodies to define morality based solely on a treaty imposes uniformity that saps both morality and rights of their resonance and power. Each concern reflects the reality that, at their core, both constitutions and treaties codify foundational moral and ethical commitments of nation-states.¹⁷² If moral provisions are to strike a workable balance between universal principles and state sovereignty, both sets of commitments are analytically indispensable.

C. *Intertextual Morality*

The most robust understanding of morals for the purposes of human rights law would thus be a hybrid of supranational and constitutional commitments—what one could call *intertextual morality*—which looks both at the treaties to which the state has acceded and the state's own constitutional

engagement can either be through formal avenues like the amendment process or informal avenues like processes of popular constitutionalism. See Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 390 (2007); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto Era*, 94 CALIF. L. REV. 1323, 1340–43 (2006). In part, this is because national governments inculcate a sense of allegiance, belonging, and responsibility in their citizens that supranational regimes do not similarly inculcate in governments. See generally BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (1982). Without this sense of communality, the facets of treaty-making that make supranational agreements a poor proxy for moral sentiment are thrown into sharp relief.

171. One might suggest that RUDs function to signal state values in the treaty-making process, and that incorporating RUDs into the analysis could save the internationalist position. Such a position has a number of shortcomings. RUDs do not articulate the values of the polity in the way that a constitution typically does—they are often advanced by diplomats, do not have the symbolic weight of a constitution, and are truncated such that they do not articulate the full range of relevant values that adjudicatory bodies might wish to consider holistically.

172. Neuman, *supra* note 12, at 1866–67.

jurisprudence as evidence of its foundational values.¹⁷³ Such an approach seeks to synthesize the self-articulated values of the polity with a shared supranational understanding of the human rights commitments that states accept by signing and ratifying transnational treaties.

Reading intertextually takes full advantage of the strengths of constitutional morality. The doctrine of intertextual morality continues to ground judicial determinations in ratified, communal, and evolving texts. It does so not by taking the state’s foundational text and its interpretations by apex courts as the sole determinants of its morality, but by synthesizing the domestic and supranational commitments of the state. The doctrine also thwarts sectarian groups seeking to advance their own narrow view of morality. Intertextual morality recognizes that, at times, the morals that domestic courts locate in constitutions may not, in fact, be commensurate with the morals enshrined in supranational treaties.¹⁷⁴ In doing so, it offers the potential to correct for instances where domestic courts simply mirror the preferences of majority or sectarian groups or where the constitutional text itself advances a highly particularistic moral view that is fundamentally incompatible with human rights guarantees. And finally, intertextual morality takes the fullest advantage of the expertise of supranational adjudicators. The judges and commissioners who make up the HRC, IACtHR, ECtHR, and African Commission are familiar with the provisions of the instruments they interpret, and can harmonize the animating values of those instruments with those that form the foundation of domestic constitutional texts and jurisprudence.¹⁷⁵

Reading intertextually would also ameliorate the unique challenges presented by supranational morals adjudication, particularly the paradox of procedural and substantive uniformity. The doctrine of intertextual morality offers a singular procedural approach: to review the moral commitments of the polity in its domestic constitutional tradition and the treaties it has signed, and then to decide whether the moral interest claimed by the state is based on legitimate concerns or on animus, prejudice, or other motivations that are inconsistent with the values espoused by the polity. Once the valid moral interest is more narrowly defined and specified, it could be balanced against the right in question in a more precise manner. The doctrine would also introduce a baseline of substantive uniformity, however, by adding

173. Although it considers national traditions, extending Benhabib’s concept of disaggregated citizenship to the community of nation states prevents intertextual morality from generating individualized, state-specific standards from shared constitutional principles. BENHABIB, *supra* note 6, at 175.

174. See Neuman, *supra* note 12, at 1876.

175. Supranational adjudicators often bring experience as jurists, politicians, civil servants, and other actors familiar with the imperatives of lawmaking and the processes of constitutional change. Should they need a richer understanding of the history or jurisprudence that underlies a constitutional text, they might instruct claimants to present arguments as to the proper bounds of a moral claim being made by the state party. Where domestic courts have interpreted the values of the domestic constitution or the morals contained within it, this judicial precedent could be explicitly considered by supranational bodies to make the inquiry a cooperative enterprise.

shared international and regional instruments to the interpretive toolbox that adjudicatory bodies bring to bear in their analysis. Rather than assessing moral interests against the practices of other states in a region, supranational bodies could more fully consider commitments to sexual rights that are developing within regional systems such as Resolution 275, the African Commission's landmark resolution on ending violence and other human rights violations on the basis of sexual orientation and gender identity.¹⁷⁶ One source of morality need not trump the other; where they appear to conflict, it would suffice to acknowledge that the state's moral interests at stake are complex or multiple. Once again, having more fully illuminated the contours of the state's interests, an adjudicatory body could then proceed to the tests that they currently employ—like legality or necessity—to determine whether those interests sufficiently outweigh a claimant's rights.

D. *Intertextual Morality in Practice*

Of course, from the drafting of the UDHR to the present day, a core concern motivating moral provisions has been the pragmatic accommodation of universal rights and state sovereignty. If governments feel that intertextual morality usurps their sovereignty, there is a plausible concern that they will either refuse to enter supranational regimes or simply exit them. How might intertextual morality fare in practice?

As a practical matter, intertextual morality requires little structural change for its full realization. Because the major regional and international human rights instruments do not define "morals," defining the relevant morals for supranational adjudication would not require renegotiation of treaty terms. It would merely require jurists and supranational bodies to be more rigorous in locating and applying the morals that are relevant to human rights adjudication, looking at constitutional and treaty texts in conjunction rather than focusing solely on what governments claim as a moral interest.¹⁷⁷

176. African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], Res. 275, *Resolution on Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity*, African Commission on Human and Peoples' Rights (2014), <http://www.achpr.org/sessions/55th/resolutions/275>; see also AFRICAN COMM'N ON HUMAN & PEOPLES' RIGHTS ET AL., ENDING VIOLENCE AND OTHER HUMAN RIGHTS VIOLATIONS BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY: A JOINT DIALOGUE OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS AND UNITED NATIONS (2016), http://www.ohchr.org/Documents/Issues/Discrimination/Endingviolence_ACHPR_IACHR_UN_SOGI_dialogue_EN.pdf (detailing regional and international commitments relevant to sexual orientation and gender identity in the African, Inter-American, and United Nations systems).

177. Such a reading is not altogether unfamiliar to jurists; many domestic constitutions counsel judges to read constitutional rights in conjunction with international human rights law. See, e.g., CHRISTINE STEWART, NAME, SHAME AND BLAME: CRIMINALISING CONSENSUAL SEX IN PAPUA NEW GUINEA 285, 295–300 (2014) (discussing the constitution of Papua New Guinea's cognizance of international human rights commitments and the relevance of *Naz Foundation* and constitutional morality for decriminalization efforts).

Of all of the adjudicatory bodies that currently interpret and apply moral provisions, the practice of the African Commission is perhaps the most instructive as to the application of intertextual morality. The Commission has already hinted that states that invoke limitations on rights must justify those limitations with more than mere popular will.¹⁷⁸ The African system also places a premium on intertextuality. The drafters of the ACHPR rejected text that would have located “law” in a nation-state; instead, Articles 60 and 61 specifically allow the Commission to draw inspiration from other regional and international instruments.¹⁷⁹ Relative to the capacious borrowing licensed by Articles 60 and 61, the concept of constitutional morality is a somewhat conservative one, examining only each state’s own domestic, regional, and international commitments to more carefully specify its moral interest in sexual regulation.¹⁸⁰

The African Commission’s steps toward a more searching and global inquiry into human rights limitations hint at some of the reasons that intertextual morality might garner support from states. The strongest objection to intertextual interpretation is likely to be that it cabins the deference that supranational bodies have historically shown to governments asserting morals provisions. As sexual rights have gained traction, however, that deference is no longer dispositive, particularly when it begins to resemble sheer animus. As the ECtHR’s analysis in *Bayev* illustrates, courts may in some cases be willing to reject a moral justification outright, in part because of its evident mismatch with the broader principles of regional and international law. By contrast, where states articulate their moral interest in the context of their constitutional and supranational commitments, supranational bodies have been more willing to engage in a way that aims to balance that interest with the rights of claimants. The ECtHR’s jurisprudence on Ireland’s constitutional provisions on abortion, for example, has engaged in this much richer analysis of the interests at stake.¹⁸¹ Faced with the possibility that state sovereignty will be overridden entirely, intertextual morality allows some space for governments to identify and define their guiding values, and for jurists to interpret those values in a way that is consistent with

178. *Legal Res. Found. v. Zambia*, Communication 211/98, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.], ¶ 70 (May 7, 2001) (“The purpose or effect of any limitation must also be examined, as the limitation of the right cannot be used to subvert rights already enjoyed. Justification, therefore, cannot be derived solely from popular will, as such this cannot be used to limit the responsibilities of states parties in terms of the Charter.”).

179. Viljoen, *supra* note 41, at 322–24.

180. Articles 60 and 61 anticipate a broad reading; Article 60 instructs the Commission to “draw inspiration from international law on human and peoples’ rights,” *see* ACHPR, *supra* note 37, art. 60, while Article 61 extends even further to “African practices consistent with international norms on human and peoples’ rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine,” *see id.* art. 61.

181. *See, e.g.*, A, B, and C v. Ireland, 2010-VI Eur. Ct. H.R. 185, ¶¶ 27–55, 100–11, 167–91, 224–41 (2010) (exploring Ireland’s restrictions in the context of its constitutional and supranational commitments); *Open Door & Dublin Well Woman v. Ireland*, App. No. 14234/88, 15 Eur. H.R. Rep. 244, ¶¶ 61–80 (1992) (same).

their regional and international commitments. Such an approach may not counsel radically different outcomes where human rights law is quite clear (for example, on the question of criminalizing homosexuality between consenting adults in private or the total criminalization of abortion), but could offer meaningful guidance in more unsettled areas of law related to marriage and family law, obscenity and public discussion of sexuality, and the sexual rights of young people.

It is additionally worth noting that, in its normative priors and its geographic origins, constitutional morality itself is a doctrine with firm roots in the Global South. The shift that both constitutional morality and intertextual morality herald—focusing less on harm- and privacy-based arguments and more on the communalism and mutuality of a shared political project—is one that many jurists from the Global South have long advocated as a way of increasing the resonance of human rights.¹⁸² The fact that the doctrine has been discussed and elaborated most fully by jurists in Africa, Asia and the Pacific, and the Caribbean further bolsters the idea that re-envisioning morality is not a Northern imposition, but a human rights innovation with a decisively Southern cast.¹⁸³

Beyond the Global South, intertextual morality is unlikely to prompt a mass exodus from human rights regimes precisely because it does not foreclose the invocation of moral provisions. States could (and almost certainly would) continue to invoke morality as a rationale for policymaking. Under a regime of intertextual morality, however, popular opinion or legislative passage alone would not suffice to show a moral commitment of the state. A richer inquiry into the polity's values would be required, where the moral interest must accord with the broader commitments of the state and not rely on mere animus or prejudice. As a result of that searching inquiry, outcomes may appear *less* arbitrary than those achieved through procedures which do not engage the state's moral interests, but simply affirm or override them. Emphasizing that the state has multiple moral interests beyond those contained in a single law may ameliorate the perception that striking down a law is an act of supranational usurpation. Although states may still balk at a body's determination that their moral interest does not carry sufficient weight, the reasoning behind the outcome would be clear. Reading intertextually does not discard the decades-old balancing act between universality and sovereignty, but fundamentally reimagines where and how morals might be defined, and gives the concept of morality meaningful content that reflects the realities of contemporary human rights law.

182. See, e.g., Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589 (1996).

183. See Priya Urs, *Making Comparative Constitutional Law Work: "Naz Foundation" and the Constitution of India*, 46 L. & POL. IN AFR., ASIA & LATIN AMER. 95, 99 (2013) (discussing the importance of the *Naz Foundation* court's use of diverse sources to dispel the notion that LGBT rights are a foreign construct with little relevance in India).

IV. CONCLUSION

When supranational bodies accept at face value that popular or legislative opposition to sexual rights constitutes a valid moral objection, morality remains amorphous for the purposes of human rights law, and procedural and substantive variation run rampant. If human rights are to retain meaning and force as a supranational body of law and principles, particularly as sexual rights are increasingly recognized as human rights in regional and international forums, the potential for wide variation on the basis of morality is reason to pause and reconsider how limitations are applied.

The doctrine of intertextual morality offers a promising approach to contemporary morals jurisprudence. When supranational bodies adjudicate moral provisions, the inquiry implicates both the relationship between the citizen and her state and the relationship between the state and the global community. The a priori framework of the constitution, with all of its values and commitments for the polity, has helped domestic courts develop a much richer concept of morality. The origins of the human rights framework as a response to war and genocide similarly evince a rich morality, and one could also read human rights instruments as codifications of the moral sentiments of the states that have acceded to them—or, when those instruments have sufficiently broad support, the global community of states. Together, these foundational texts represent a far more robust set of commitments than the vagaries of public opinion or the passage of a single legislative act.

Battles over morality and sex will undoubtedly be fought in various guises, in various regions, and at various times. Moral provisions can play a critical role in these disputes by striking a practicable balance between universal human rights and the sovereignty of states. In order to do this, however, they must accommodate evolving understandings of sexual rights as well as the guiding values of a polity. The doctrine of intertextual morality, which brings domestic and global commitments to bear on dynamic sexual politics, offers a promising way to give morality meaning in the field of human rights.

APPENDIX: MORAL PROVISIONS IN INTERNATIONAL
AND REGIONAL INSTRUMENTS

	ICCPR	ACHR	ECHR	ACHPR ¹⁸⁴
Assembly	“No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (<i>ordre public</i>), the protection of public health or morals or the protection of the rights and freedoms of others.” Art. 21.	“No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedom of others.” Art. 15.	“No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.” Art. 11(2).	“The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.” Art. 11.
Association	“No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (<i>ordre public</i>), the	“The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and	“No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or	NA

184. The ACHPR is unique in that it also contains moral duties. Article 27(2) states that “[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.” ACHPR, *supra* note 7, art. 27(2). Article 29(7) defines the individual’s duty “[t]o preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society.” *Id.* art. 29(7).

	protection of public health or morals or the protection of the rights and freedoms of others.” Art. 22(2).	freedoms of others.” Art. 16(2).	crime, for the protection of health or morals or for the protection of the rights and freedoms of others.” Art. 11(2).	
Conscience	“Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” Art. 18(3).	“Freedom to manifest one’s religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.” Art. 12(3). “Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.” Art. 12(4).	“Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.” Art. 9(2).	NA
Education	NA	NA	NA	“The promotion and protection of morals and traditional values recognised by the community shall be the duty of the state.” Art. 17(3).
Expression	“The exercise of the rights provided for in paragraph 2 of this article	“The exercise of the right provided for in the foregoing paragraph shall	“The exercise of these freedoms, since it carries with it duties and	NA

	<p>carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (<i>ordre public</i>), or of public health or morals." Art. 19(3).</p>	<p>not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: a. respect for the rights or reputations of others; or b. the protection of national security, public order, or public health or morals." Art. 13(2). "Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence." Art. 13(4).</p>	<p>responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." Art. 10(2).</p>	
<p>Fair Trial</p>	<p>"The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (<i>ordre public</i>) or national security in a democratic society, or when the interest of the private lives of the parties so</p>	<p>NA</p>	<p>"Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the</p>	<p>NA</p>

	requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice” Art. 14(1).		protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.” Art. 6(1).	
Family	NA	NA	NA	“The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health.” Art. 18(1). “The State shall have the duty to assist the family which is the custodian of morals and traditional values recognised by the community.” Art. 18(2). “The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.” Art. 18(4).
Movement	“The above-mentioned rights shall not	“The exercise of the foregoing rights may be	NA	“This right may only be subject to restrictions

	<p>be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (<i>ordre public</i>), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant." Art. 12(3).</p>	<p>restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others." Art. 22(3).</p>		<p>provided for by law for the protection of national security, law and order, public health or morality." Art. 12(2).</p>
<p>Privacy</p>	<p>NA</p>	<p>NA</p>	<p>"There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." Art. 8(2).</p>	<p>NA</p>