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**WHERE HEARTSTRINGS TUG
AT LEGALITIES: GHANA'S
CONSTITUTIONAL STANCE ON
LGBTQ+**

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WHERE HEARTSTRINGS TUG AT LEGALITIES: GHANA'S CONSTITUTIONAL STANCE ON LGBTQ+

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ABSTRACT

In 2021, the Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill was proposed in Ghana to criminalise LGBTQ+ activities, prohibit advocacy, and mandate 'rehabilitation' of children in the community. This paper critically examines how the Bill infringes upon certain fundamental human rights guaranteed under the 1992 Constitution of Ghana and International Human Rights law. The paper makes an imperative call for the Bill's withdrawal or rejection due to its unconstitutional nature and the potential for state-sponsored discrimination.

* I hold an LLB from GIMPA and I am currently pursuing my BL at the Ghana School of Law. This article is an abridged form of my dissertation, titled "THE "PROMOTION OF PROPER HUMAN SEXUAL RIGHTS AND GHANAIAN FAMILY VALUES" BILL: A RETROGRESSIVE STEP AWAY FROM THE FULL RECOGNITION OF HUMAN RIGHTS." Special thanks to Dr. Isidore Tufuor for his invaluable guidance and thorough review of the paper.

1.0 INTRODUCTION

In recent times, Ghana has witnessed the introduction of the controversial Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill. It is presented as a private member's Bill, sponsored principally by Hon. Samuel Nartey George, the Member of Parliament for Ningo-Prampam. Per its memorandum, the object of the Bill is:

to provide for proper human sexual rights and Ghanaian family values; proscribe LGBTQ+ and related activities; proscribe propaganda of, advocacy for or promotion of LGBTTQQAAP+ and related activities; provide for the protection of and support for children, persons who are victims or accused of LGBTTQQAAP+ and related activities and other persons; and related matters.

Quite clearly, the primary object of the Bill is the criminalisation and restriction of LGBTQ+ community activities and advocacy. Historically, LGBTQ+ behaviours have often been seen as abnormal across diverse cultures, with some even categorising them as mental disorders. Despite this, perceptions have shifted considerably in many parts of the world. However, in Ghana, where the 1992 Constitution enshrines fundamental human rights that are subject to limitations based on public interests, morals, and safety, the Bill poses a potential conflict with constitutionally guaranteed rights.

The catalyst for the Bill's inception was the publicised opening of an LGBTQ+ advocacy centre, attended by international figures from nations that recognise LGBTQ+ rights. Set against the backdrop of Ghana's significant religious landscape, this event drew considerable backlash. Consequently, the Bill emerged to stifle the progression of LGBTQ+ rights, effectively targeting not only the community but also its supporters. This proposed legislation has raised concerns both locally and globally, with many viewing it as a state-sanctioned discrimination against a marginalised group.¹

The problem this article seeks to address is the potential curtailment of minority rights. It is noteworthy that the Bill could blur the distinctions of inalienable rights.

This article aims to interrogate the Bill's constitutionality and its consistency with globally recognised Human Rights standards. Key objectives include: understanding the affected demographics, analysing the Bill's alignment with human rights, and providing actionable recommendations that prioritise the rights of sexual minorities. Critical questions this paper endeavours to answer encompass the current legal stance on the LGBTQ+ community in

¹ Attorney General's Memorandum to the Chairman of the Committee on Constitutional, Legal and Parliamentary Affairs' (19 October 2022) cited in GhanaWeb 'Gay Bill Not Unconstitutional but Faces Fundamental Problems – Attorney General' (*GhanaWeb*, 17 November 2022) <<https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Gay-bill-not-unconstitutional-but-faces-fundamental-problems-Attorney-General-1664261>> accessed 5 September 2023. The Bill in its present form violate some fundamental human rights and freedoms enshrined in the Constitution, including the right to freedom of expression, thoughts and conscience and freedom from discrimination.

Ghana, the scope of the Bill, the constitutional rights under threat, potential justifications for these infringements, and the stance stakeholders should consider.

Emphasising the Bill's possible misalignment with the 1992 Constitution, this study delves into the paramountcy of constitutionally assured rights and potential jeopardies. The research methodology predominantly adopted by this article is a doctrinal approach, examining relevant legislation, international treaties, and articles. A comparative perspective juxtaposes the Bill's tenets with progressive LGBTQ+ protective measures in the United States of America, while field work provides depth to the understanding of the Bill's implications.

2.0 HISTORICAL ANTECEDENTS FOR THE CRIMINALISATION OF HOMOSEXUALITY

Like other former British Colonies,² Ghana has, to some extent, criminalised homosexual acts. However, it has not criminalised all activities of the LGBTQ+ community, due largely to their recent exposure.³

Religious laws frown on the activities of the LGBTQ+ community, thus, this formed the initial basis for the criminalisation of such activities. Christians believe strongly that it is against the Bible to partake in LGBTQ+ activities⁴ whilst Muslims believe it is also against their religion and is a crime against Allah.⁵ Various European countries proceeded to provide for its criminalisation in their legal codes in the pre-colonial era and further transmitted them to their colonies.⁶ In England, the first law to criminalise LGBTQ+ activities was the Buggery Act 1533.⁷ It was an anti-sodomy law but most convictions under the law were of same-sex unions. The position of the law developed a narrower focus by targeting especially male sex unions 300 years after the passing of the Buggery Act in the Offences Against the Person Act 1828. The Wolfenden report eventually recommended that the actions of homosexuals were acts of private persons and that the law should not interfere with such activities. The Sexual Offences Act 1967 decriminalised private, consensual "homosexual acts" between persons aged twenty-one and over in England and Wales. At the time of this decriminalisation, Ghana was an independent Republic and had enacted its own Criminal Code that criminalised unnatural carnal knowledge. This provision, it is urged, is not unique to homosexuals but also

² E Han and J O'Mahoney, 'British Colonialism and the Criminalization of Homosexuality' [2014] CRIA 266, 270.

³ US Department of Justice, 'Homosexuals - Legal Provisions' <<https://www.justice.gov/sites/default/files/eoir/legacy/2014/09/25/homosexuals-legal%20provisions.pdf>> accessed 23 March 2022.

⁴ Christian Educator, 'What Does the Bible Say About Homosexuality?' (*Human Rights Campaign*) <<https://www.hrc.org/resources/what-does-the-bible-say-about-homosexuality>> accessed 23 March 2022.

⁵ Human Rights Campaign, 'Stances of Faiths on LGBT Issues: Islam - Sunni and Shi'a' <<https://www.hrc.org/resources/stances-of-faiths-on-lgbt-issues-islam>> accessed 23 March 2022; The Quran. Surah 7:80-81.

⁶ Human Dignity Trust, 'A History of Criminalisation' <<https://www.humandignitytrust.org/lgbt-the-law/a-history-of-criminalisation/>> accessed 23 March 2022.

⁷ Ibid.

affects heterosexuals who engage in other penetrative sexual activities other than vaginal sex, as they constitute practices that are considered unnatural carnal knowledge.⁸

2.1 The Criminalisation of Unnatural Carnal Knowledge in Ghana

Some Ghanaian scholars have argued that Ghana's criminal statute does not outlaw homosexuality and the LGBTQ+ community or the expression thereof in Ghana.⁹ It is submitted that what is outlawed by Ghana's primary criminal legislation—section 104 of the Criminal Offences Act, 1960 Act 29—is unnatural carnal knowledge. The provision is reproduced below.

Section 104—Unnatural Carnal Knowledge.

(1) A person who has unnatural carnal knowledge

(a) of another person of not less than sixteen years of age without the consent of that other person commits a first-degree felony and is liable on conviction to a term of imprisonment of not less than five years and not more than twenty-five years: or of another person of not less than sixteen years of age with the consent of that other person commits a misdemeanour; or of an animal commits a misdemeanour.

(2) Unnatural carnal knowledge is sexual intercourse with a person in an unnatural manner or with an animal.

This provision remains one of the many colonial relics that exist in Ghanaian Law, although it has been done away with by our former colonial masters.¹⁰

The Bill references the case of *Richard Banousin v The Republic*¹¹ as an interpretation of the term unnatural carnal knowledge. This position should however be taken with a pinch of salt because the appeal before the court was about the offence of rape contrary to section 97 of the Criminal Offences Act, 1960 (Act 29). The case defined carnal knowledge as 'the female sex organs called the vulva and vagina that are normally penetrated into during any sexual act which can qualify to be carnal knowledge'.

The law therefore targets unnatural carnal knowledge and not merely identifying as an LGBTQ+ person. Therefore, to punish a person for homosexuality, it must be proved that an individual is guilty of the offence of unnatural carnal knowledge. Section 99 of Act 29 helps shed more light on what amounts to unnatural carnal knowledge. The provision is reproduced below.

⁸ Raymond Atuguba, 'Homosexuality in Ghana Morality Law Human Rights' [2019] JPL 113, 116.

⁹ Ibid. The author argues: "It may, therefore, be reasonably proposed that, a person belonging to the LGBT community is permitted by the confines of Ghanaian law, to live openly as a homosexual—with the opportunity at will to publicly show affection to another person of the same-sex, and engage in all acts attendant to such affection, and which fall short of the requisite degree of penetration."

¹⁰ Ibid.

¹¹ [2015] DLSC 3046.

Section 99—Evidence of Carnal Knowledge.

Where, on the trial of a person for a criminal offence punishable under this Act, it is necessary to prove carnal knowledge or unnatural carnal knowledge, the carnal knowledge or unnatural carnal knowledge is complete on proof of the least degree of penetration.

The law therefore provides that unless there is the least form of penetration unnaturally, the LGBTQ+ community and their expressions and activities are not necessarily criminal. The situation under our current legal dispensation becomes tricky when a biological male undergoes gender reassignment surgery¹² and then engages in sexual relations with a biological male. The confusion arises as to what is considered natural: the gender at birth or the reassigned gender? The reassigned gender cannot be said to be automatically unnatural because the purpose of the reassignment is to make a biologically determined man a woman and *vice versa*.¹³

2.2 The Implications of the Criminalisation of Unnatural Carnal Knowledge on the LGBTQ+ Community and the Social Posture towards the LGBTQ+ Community

This paper refers to a 72-paged Human Rights Watch study that interviewed 114 Ghanaians who self-identify as LGBT between December 2016 and February 2017 in four regional capitals in Ghana which are Accra, Tamale, Kumasi and Cape Coast to show the societal effect of the existing legal framework on the LGBTQ+ community.¹⁴ The results of the report showed the harsh realities members of the LGBTQ+ community had to go through to avoid prosecution under section 104 of Act 29. Instances of abuse were documented, where members of the LGBTQ+ community had to endure sexual abuse by people who threatened to reveal that they were members of the LGBTQ+ community. There is disdain from a large section of the Ghanaian public for the activities of the community.

A Gallup International Association survey showed that ninety-six (96) percent of Ghana's population subscribed to a religious belief system. The members interviewed stated that despite the various religious and cultural beliefs of Ghanaians that caused them to abhor the community, they were empowered by the provision of section 104 of Act 29. To avoid discrimination, these individuals have to self-censor or not exercise their constitutionally guaranteed freedom of expression to avoid the harsh societal consequences as well as possible criminal consequences. They often suffer domestic violence in silence for fear of being subjected to more violence should they try and seek help for their abuse. In another

¹² Cleveland Clinic, 'Gender Affirmation/Confirmation or Sex Reassignment Surgery' <<https://my.clevelandclinic.org/health/treatments/21526-gender-affirmation-confirmation-or-sex-reassignment-surgery>> accessed 14 January 2022.

¹³ *Ibid.*

¹⁴ Isaack (n 2).

report adopted by Human Rights Watch,¹⁵ it was noted that Ghana had several hundred prayer camps which were privately owned by faith-based organisations where members of the community could seek refuge in times of turmoil. However, these camps are places of abuse for members of the LGBTQ+ community, where they are attempted to be “cured” or have their “demons expelled”. It should however be noted that despite the provisions of section 104 of Act 29, Ghanaian law does not allow for the persecution and discrimination of individuals that are members of the LGBTQ+ community. The Constitution in article 17 guarantees equality and freedom from discrimination for all Ghanaians.

2.3 Can the Activities of the LGBTQ+ Community Constitute a Threat to Public Interest?

Homosexuality was once seen as a mental anomaly necessitating the need for the law to interfere with their activities.¹⁶ Research has now shown that the prevailing scientific evidence does not support the claim that homosexuality and the members belonging to the LGBTQ+ community are affected by a mental disorder or are classified as having a mental disorder.¹⁷ Gays are also perceived to spread HIV rapidly. However, research shows that this is due to ‘social and structural issues—such as HIV stigma, homophobia, discrimination, poverty, and limited access to high-quality health care’.¹⁸

The justification of laws that violate the rights of members of the LGBTQ+ community has been that the activities of the LGBTQ+ community constitute a threat to national security, public safety and public morals. Indeed, the rights guaranteed under the 1992 Constitution are not absolute. Article 12 of the Constitution provides for the enjoyment of rights by all subject to the preservation of public safety, public health and morals and national security. It is argued that the practices of the LGBTQ+ community do not pose a justifiable threat to public interest such that they should be curtailed. The proportionality test has been put forward by the Supreme Court as a standard test that can be used to determine whether there has been a just imposition of restrictions on the rights of an individual bearing in mind the preponderant general interest of rights and freedoms of others and the public interest.

In *Republic v Tommy Thompson Books Ltd. (No2)*¹⁹ the proportionality test was explained as follows:

... the law in question must be ‘reasonably necessary or required’ in the public interest, national security etc... for any law to qualify as being reasonably necessary or required the objective of that law must be of such

¹⁵ S R Barriga, 'The (In)human Dimension of Ghana's Prayer Camps' (*Human Rights Watch*, 10 October 2014) <<https://www.hrw.org/news/2014/10/10/inhuman-dimension-ghanas-prayer-camps>> accessed 14 January 2022.

¹⁶ American Psychiatric Association, *The Diagnostic and Statistical Manual of Mental Disorders* (1st ed, 1952).

¹⁷ Sheila Mysorekar, 'Homosexuality is not a disease' <<https://www.dandc.eu/en/article/world-health-organization-considers-homosexuality-normal-behaviour>> accessed 1 March 2022.

¹⁸ Centers for Disease Control and Prevention, 'HIV and Gay and Bisexual Men' <<https://www.cdc.gov/hiv/group/msm/index.html>> accessed 1 March 2022.

¹⁹ [1996-97] SCGLR 484, 500-501.

sufficient importance as to override a constitutionally protected right or freedom... the objective of that law must not be trivial or frivolous, otherwise that law will not be reasonably necessary or required. The objective must be sufficiently important ...it must relate to concerns which are pressing and substantial.

The test was applied more recently in *Civil and Local Government Staff Association of Ghana [CLOSAG] v The Attorney-General and 2 Ors*²⁰ and quoted with approval in *The Republic v Eugene Baffoe Bonnie & Ors*²¹. It was also applied in *Center for Juvenile Delinquency v Ghana Revenue Authority*.²² In the *CLOSAG* case, Akuffo JSC stated that 'prima facie, constitutional rights and freedoms are to be enjoyed fully subject to the limits which the Constitution itself places thereon in terms of Article 12(2) ...'

In the *Center for Juvenile Delinquency* case, relying on the proportionality test, Adinyira JSC. stated that:

access to justice enables people who are more vulnerable to socio-economic hardships, discrimination and general human rights abuses to access and enforce their inalienable human rights. Generally, the majority of persons face obstacles when trying to bring cases to court due to lack of access to legal aid. So that any additional impediment introduced by any arm of government that prevents a person from invoking the jurisdiction of the court and thereby results in a denial of justice is unacceptable.²³

For a limitation to be valid, it must be necessary for the enhancement of democracy and freedoms of all and must at the same time not be overbroad such as to effectively nullify a particular right or freedom guaranteed by the Constitution. In *Ahumah Ocansey v The Electoral Commission*²⁴, in applying the proportionality test Wood CJ held:

I have considered the 1st defendant's counter arguments that the impugned legislation is reasonably required in the public interest, in that access to prisons must be restricted, and further that violators of the law must be punished, kept away from the public, under lock and key, disenfranchised and not allowed to have any say in who governs them. These, counsel contend, do serve as their just deserts for causing pain and suffering to others. In short, Counsel contends that the legislation meets the proportionality test. These arguments, examined in the best of lights, I am afraid, would have no place in participatory democracy, with the guaranteed rights that are enshrined in the Constitution.

²⁰ Suit No. J1/1/2016 (Unreported judgment of the Supreme Court dated 14 June 2017).

²¹ [2018] DLSC 73.

²² Writ No. J1/61/2018 SC, (Unreported judgment of the Supreme Court dated 30 July 2019).

²³ Suit No. J1/1/2016 (Unreported judgment of the Supreme Court dated 14 June 2017).

²⁴ [2010] DLSC 6138.

A questionnaire survey and further interviews conducted as part of the research for this paper on Snapchat; a popular social media platform famed for protecting the privacy of its members found that the attempts to restrict the rights of LGBTQ+ members were largely seen as an attempt to further infringe the rights of the members of the community. The study had five respondents who were unanimous on the issues the survey sought responses for. The study sought to find out how the current state of the law affected LGBTQ+ persons especially their enjoyment of their constitutionally guaranteed rights, how they expected the law to relate with them and their views on the proposed Bill and how it would affect them.

The study found that these individuals had been targeted and had many of their rights infringed upon usually on the threat of reports to the relevant authorities that they were LGBTQ+ persons. Although they stated that they identify as LGBTQ+ persons, they were too afraid to make this publicly known because of fear of persecution. They were all unaware that the current law only expressly criminalised partaking in sexual acts which were considered as unnatural carnal knowledge. Consequently, they were tagged as culpable due to their “queer” tendencies. One respondent recounted an incident from Secondary School where he had been beaten by students and teachers after a friend, he had confided in about his sexuality reported. He stated that he had been told by the headmaster after the ordeal that he should be grateful to them for not reporting the incident to the police as he would have been prosecuted. He was also threatened not to disclose the “discipline” he had received, as doing so would cause his arrest and prosecution for being “gay”. They had all been discriminated against and were unable to express themselves and had instances where their human dignity had simply been thrown out the window. All the respondents citing the socio-cultural attitude of Ghanaians were not optimistic about ever realising their full constitutional rights in Ghana. They however believed that should laws that recognise and protect them be put in place, the situation would be much more bearable. They believed that the passage of the Bill would be the final nail in the coffin of their efforts to be able to live in Ghana as members of the LGBTQ+ community.

It is submitted that, by applying the proportionality test, the Bill does not contain necessary limitations for the enhancement of democracy. The limitations attempted to be imposed by the Bill are indeed too broad and effectively nullify the rights and freedoms guaranteed by the Constitution.

3.0 CONSTITUTIONAL RIGHTS UNDERMINED BY THE BILL

The Constitution provides that the fundamental human rights and freedoms enshrined in Chapter 5 shall be respected by all the organs of government as well as its agencies and all other legal and natural persons in Ghana.²⁵ The Constitution further entitles everyone no matter his race, place of origin, political opinion, colour, religion, creed or gender to their fundamental human rights and freedoms of the individual as contained in the chapter.²⁶ The

²⁵ Constitution of the Republic of Ghana (1992), art 12(1).

²⁶ Ibid, art 12(2).

Bill contradicts many constitutionally guaranteed rights, and no strong case can be made to the effect that the activities of members of the LGBTQ+ community constitute a threat to the public interest. The paragraphs that follow discuss the constitutional rights that are violated by various portions of the Bill.

3.1 The Right to Personal Liberty.

The Office of the High Commissioner of Human Rights has defined the right to personal liberty as one that requires that a person is not subject to arrest or detention except by law. The right to personal liberty is one every individual is entitled to and is provided for by article 14 of the Constitution. The right to personal liberty is one of the rights that the bill contradicts. The infringement on the right to personal liberty is unique in this situation. Whilst the Constitution allows for the personal liberty of individuals to be curtailed by the law, including an Act of Parliament, such law, should not be contrary to the Constitution. If the law that subjects a person to arrest or detention is unconstitutional, then any arrest or detention made by the law is against the right to personal liberty of the person.²⁷

The proposed Bill seeks to infringe on the personal liberty of individuals by imposing prison sentences on individuals unlawfully. Clause 6 of the Bill defines and criminalises the activities of LGBTQ+ persons. The Bill, being contrary to the Constitution, cannot be a validly recognised law and as such cannot amount to a lawful restriction on the personal liberty of individuals.²⁸

To the best of my knowledge, there is no domestic case law to support the assertion that a proposed Bill contrary to the Constitution, that seeks to arrest and detain individuals is against the personal liberty of a person. It is however useful to look to foreign jurisdictions for guidance on the topic.

In the Supreme Court of the United States case of *Lawrence v Texas*²⁹, the questions before the court were on the validity of the Texas law that criminalised same-sex sexual intercourse and whether their criminal convictions for adult consensual sexual intimacy in the home violated their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment. Upon establishing that the claimants had an inherent right to privacy as consenting adults engaging in consensual sexual intercourse, it found that the liberty of the appellants had been curtailed contrary to the Fourteenth Amendment.³⁰ In this

²⁷ Constitution of the Republic of Ghana (1992), art 1(2). *Mensima and Others v Attorney-General and Others* [1997-98] 1 GLR 159. The court stated that article 1(2) contains "an in-built repealing mechanism which automatically comes into play whenever it is found that a law is inconsistent with the Constitution, 1992."

²⁸ The various parts of the Bill that seek to contravene the personal liberty of persons are found in: Clauses 4(2), 6(2), 7(b), 8, 9, 10(1), 11(b), 12, 13(1)(d), 14(1), and 16(2)

²⁹ [2003] 539 U.S. 558.

³⁰ U.S. Constitution, Amend. XIV. This amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

case even though the Texas law had been validly passed and the appellants subjected to the criminal justice system, the Supreme Court found that the liberty of the citizen as ensured by the Fourteenth Amendment had been contravened as a result of the contravention of other constitutional rights.

The Bill, by creating offences punishable by terms of imprisonment in many of its provisions that are contrary to the Constitution, amounts to an unjust interference with the personal liberty of affected individuals.

3.2 The Right to Dignity

The right to dignity is a prerequisite to having rights.³¹ It is the capacity for and the right to respect as a human being.³² Ackerman posits that the right to dignity allows human beings to have self-awareness, a sense of self-worth, self-determination, develop individual personalities and strive for self-fulfilment. To her dignity 'arises from the capacity of human beings to enter meaningful relationships with others'.³³ Human dignity is a fundamental right generally recognised³⁴ and guaranteed by the Constitution and described as inviolable.³⁵ The right to dignity is to a large extent the basis of the right to equality or freedom from discrimination³⁶ and the right to privacy.³⁷ A person should be able to determine certain personal matters of which sexual orientation is one.

Intentionally defining "Ghanaian Family Values" in Clause 2 of the Bill such that members of the Ghanaian society who identify as members of the LGBTQ+ community are cut out infringes upon the dignity of these individuals as it unconstitutionally defines their lifestyles as outside Ghanaian family values. Clause 6³⁸ of the Bill further derogates from the dignity of a person by attempting to describe which sexual activities are permissible and allowed. The Bill further violates the personal dignity of LGBTQ+ individuals in Clause 11.³⁹ Clause 11 of the Bill is to the effect that marriages celebrated amongst members of the LGBTQ+ community are void.

³¹ A Rudman, 'The Protection Against Discrimination Based on Sexual Orientation Under the African Human Rights System' [2015] AHLJ 1.

³² L Ackerman, 'Human Dignity: Lodestar for Equality in South Africa' [2014] OJLS 609,610.

³³ Ibid.

³⁴ *Martin Kpebu v The Attorney-General* [2016] DLSC 11086. Benin JSC states, "Since the period of Roman civilization, this right to personal dignity has been emphasized. Religious thinkers insisted on it, citing the biblical statement that 'God made man in his own image'.

³⁵ Constitution of the Republic of Ghana (1992), art 15.

³⁶ Rudman (n 31)

³⁷ *Raphael Cubagee v Michael Yeboah Asare, K. Gyasi Company Limited and Assembly of God Church* [2018] DLSC 10909.

³⁸ Promotion Of Proper Human Sexual Rights and Ghanaian Family Values Bill [2021], clause 6(1). This clause stipulates: "A person commits an offence if the person (a) engages in a sexual intercourse between or among persons of the same sex."

³⁹ Ibid, s 11(1). This section provides, "A marriage entered into by the following persons is void: (a) persons of the same sex, or (b) a person who has undergone gender or sex reassignment."

In the context of sexual rights, the Ghanaian courts have not made any pronouncements, however, the courts have been called upon to give meaning and effect to Article 15 and have refused to give an exact meaning to what amounts to human dignity. In *Ahumah Ocansey and Centre for Human Rights & Civil Liberties v The Attorney-General & The Electoral Commission*,⁴⁰ Atuguba JSC stated that ‘giving justifiable meaning to article 15(1) is a complex task because the legal meaning of “dignity” is not easy to pin down’.

The Supreme Court of the United States offers some guidance on how the courts should treat the right to personal dignity of LGBTQ+ individuals in the case of *United States v Windsor*.⁴¹ The court found that the aim of the “Defense of Marriage Act” to exclude same-sex marriages was unconstitutional as such exclusion amounted to a violation of the dignity of individuals in same-sex unions.⁴² The court thought that by giving a class of persons the right to marry and denying another class that right, they had put the other class at a disability whereby they could not even aspire for the same status to which those of the class allowed to marry aspired to.

3.3 The Right to Equality and Freedom from Discrimination

The Ghanaian Constitution abhors discrimination and requires all laws to conform to the Constitution and not to discriminate.⁴³ People have suffered discrimination in all spheres of life based on their sexual orientation.⁴⁴ It was, however, not the intention of the framers of the Constitution that there would be any form of discrimination.⁴⁵ Discrimination is generally abhorred but when viewed through the clouded lenses of cultural attitudes, the rights of sexual minorities are disregarded and these minorities are discriminated against.

Positive discrimination, such as affirmative action, is however permissible.⁴⁶ The Ghanaian position is that different treatment can be given to different classes but within the same class, it will be unconstitutional to treat people differently.⁴⁷ Article 17 provides that all persons shall be equal before the law. It further prohibits discrimination on the grounds of “gender, race, colour, ethnic origin, religion, creed or social or economic status.”

⁴⁰ [2010] DLSC 6138.

⁴¹ [2013] 570 U.S. 744.

⁴² M Finck, 'The Role of Human Dignity in Gay Rights Adjudication and Legislation: A Comparative Perspective' [2016] IJCL 26, 29.

⁴³ *Nii Kpobi Tettey Tsuru iii v The Attorney-General* [2010] DLSC 4144.

⁴⁴ United Nations High Commissioner for Human Rights, 'Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on their Sexual Orientation and Gender Identity' (Report) A/HRC/19/41.

⁴⁵ *Christiana Quartson v Pious Pope Quartson* [2012] DLSC 6687.

⁴⁶ Stanford Encyclopedia of Philosophy, 'Affirmative Action' <<https://plato.stanford.edu/entries/affirmative-action/>> accessed 3 March 2022.

⁴⁷ *T. T. Nartey v Godwin Gati* [2010] DLSC 4143

The Constitution, aside from making freedom from discrimination a fundamental human right, also provides a directive principle of state policy⁴⁸ that the state cultivates among all Ghanaians, an attitude that rejects discrimination.⁴⁹

Given the constitutional stipulation, it is submitted that the Bill by seeking to outlaw the LGBTQ+ community, unfairly targets them and seeks to give them a different treatment relative to others as the LGBTQ+ community is subjected to disabilities or restrictions in the enjoyment of their rights as guaranteed by the Constitution. The Bill in clause 1 singles out a portion of the population that holds out any type of relationship other than a heterosexual relationship and applies the law to them. The Bill, by uniquely applying to people of one class of sexual orientation and not all sexual orientations, unfairly targets and discriminates against those of the identified group.

Ghana suffers a dearth of case law on the promotion of sexual rights. However, the courts have been called upon to interpret the anti-discriminatory clause of the 1992 Constitution in *Nartey v Gati*.⁵⁰ Dr. Date-Bah JSC in giving the unanimous ruling of the court stated that the freedom from discrimination and the right to equality does not mean that everyone had the same set of rights. Whilst discrimination is allowed, the proposed Bill does not fall within the limits of positive discrimination allowed by the Constitution. The Bill operates to unfairly target and discriminate against people who identify as homosexuals. This grants heterosexuals special treatment unavailable to homosexuals.

The history of discrimination against homosexuals should make them entitled to receive special rights intended to ensure they have an equal footing in society. As noted in the Supreme Court of the United States case of *Romer v Evans*⁵¹, 'there is nothing "special" about laws which prevent people from losing jobs and homes because of who they are.'

3.4 The Right to Privacy of Home and other Property

The right to privacy is the right to personal autonomy⁵² which is now seen as an essential right to enable a person to enjoy their right to life.⁵³ Article 18 of the 1992 Constitution provides, that 'No person shall be subjected to interference with the privacy of his home, property, correspondence or communication except in accordance with law'

The memorandum of the Bill states in clause 6 that the purpose of the provision is to make an offence of sexual intercourse between persons of the same sex.⁵⁴ The Bill seeks to infringe on the right to privacy of individuals by prescribing which sexual conduct the individual may

⁴⁸ R Atuguba (n 8).

⁴⁹ Constitution of the Republic of Ghana (1992), art 37(2)(b).

⁵⁰ T. T. Nartey (n 47).

⁵¹ [1996] 517. U.S. Reports 620.

⁵² BA Garner and HC Black, *Black's Law Dictionary* (9th edn, 2009).

⁵³ W Samuel, 'The Right to Privacy' [1890] HLR 193.

⁵⁴ Memorandum of the Bill at 11, 'Under clause 6, a person commits an offence if the person engages in sexual intercourse between or among persons of the same sex or between a man and an animal or a woman and an animal.'

partake in. This has the effect of criminalising behaviour incompatible with the Bill and at the same time limiting the right of a person to have sexual relations in line with what the Bill prescribes. The right to privacy of an individual must necessarily be breached to prosecute a person for the crime of engaging in an LGBTQ+ activity involving sexual relations.

Although the courts have not made any pronouncements on the right to privacy in the context of sexual rights, the courts have on more than one occasion been called upon to interpret and enforce Article 18.⁵⁵ In *Cubagee v. Asare*⁵⁶, Justice Pwamang stated:

in our understanding, the framework of our Constitution does not admit of an inflexible exclusionary rule in respect of evidence obtained in violation of human rights'. He, however, went on to state that there must be a prevailing public interest that calls for the non-recognition of the right to privacy before it will be curtailed.

In the USA, privacy is deemed a fundamental human right and requires that it can only be breached when there is a prevailing legitimate and compelling state interest that requires the breach.⁵⁷ In *Smith and Grady v United Kingdom*⁵⁸, the right to privacy was invoked as a justification for LGBTQ+ rights. It was found that the investigation and subsequent discharge of personnel from the Royal Navy based on sexual orientation was a breach of their right to a private life.

Also, in *Lawrence v Texas*⁵⁹ a case involving two homosexuals who had engaged in homosexual relations with full mutual consent, Justice Kennedy stated that 'The State cannot demean their existence or control their destiny by making their private sexual conduct a crime'.

The Bill, by attempting to regulate the sexual conduct of Ghanaians, infringes on their constitutionally guaranteed right to privacy without just cause and is an attempt by the legislature to demean the existence and control the destiny of LGBTQ+ Ghanaians.

3.5 The Fundamental Freedom of Assembly

Freedom of assembly is a fundamental right, guaranteed to every person under article 21 (1) (d) of the Constitution, 1992, which provides: 'All persons shall have the right to - (d) freedom of assembly including freedom to take part in processions and demonstrations.' In many countries around the world, the push for the recognition of LGBTQ+ rights was preceded by lawful marches and demonstrations intended to galvanise support for the LGBTQ+

⁵⁵ *Edmund Addo v Attorney-General and The Inspector General of Police* (Suit No. HR/0080/2017. Unreported judgment of the High Court dated 30 March 2017); *Mrs. Abena Pokuaa Ackah v Agricultural Development Bank Civil Appeal* (No. J4/31/2015. Unreported judgment of the Supreme Court dated 28 July 2016).

⁵⁶ *Raphael Cubagee* (n 37).

⁵⁷ [1999] 29 EHRR 493.

⁵⁸ *Roe v. Wade*, 410 U.S. 113 (1973)

⁵⁹ *Lawrence v Texas* 539 U.S. 558.

community.⁶⁰ The legal effect of the freedom of assembly was considered in *New Patriotic Party v Inspector-General of Police*.⁶¹ In his judgment, Charles Hayfron-Benjamin JSC said 'the right to assemble, process or demonstrate cannot be denied... This positive attitude towards the enjoyment of the freedoms cannot be abridged by a law which prevents the citizen from delivering his protest even to the seat of government'.

The Bill seeks to violate this fundamental right by prohibiting the promotion of LGBTQ+ activities in Clauses 12 to 16. A way by which the LGBTQ+ community can seek better protection of their rights is through assembling and embarking on walks and rallies as well as conventions to promote their interests. They may also decide to demonstrate for better treatment. The Bill in contemplation of this seeks to outlaw all such expressions which are constitutionally guaranteed rights.

3.6 The Fundamental Freedom of Speech and Expression

Freedom of speech and expression are fundamental freedoms that the Ghanaian courts have had to make pronouncements on, most notably in *New Patriotic Party v Ghana Broadcasting Corporation*⁶² and *Republic v Independent Media Corporation of Ghana (Radio Eye Case)*.⁶³ In the former case, Francois JSC feared that to hold otherwise than that, the denial of the plaintiff's right to present or express divergent and dissenting opinions constituted an interference with the freedom of speech and expression, 'would mean a right given to persons, bodies or institutions to exercise censorship which could block avenues of thought and foreclose the citizen's right of choice contrary to the prohibition of censorship'. The 1992 Constitution frowns on censorship. Article 162 of the 1992 Constitution provides that 'Subject to this Constitution and any other law not inconsistent with this Constitution, there shall be no censorship in Ghana'.

The American Civil Liberties Union defines censorship as the unconstitutional act of government suppressing words, images, or ideas that are deemed offensive.⁶⁴ The Bill seeks to use censorship as a tool to curtail the rights of freedom of speech and expression of the LGBTQ+ community.

Clause 12 of the Bill makes it an offence for a person to promote or sympathise with the LGBTQ+ community. The provision further makes it an offence to engage in an activity that is aimed at changing public opinion towards the LGBTQ+ community. Clause 13 of the Bill also makes it an offence to make children aware of the activities of the LGBTQ+ community. Clause 14 of the Bill makes it an offence to fund and sponsor activities related to the LGBTQ+

⁶⁰ S Hall, 'The American Gay Rights Movement and Patriotic Protest' [2010] JHS 536, 538.

⁶¹ [1993-94] 2 GLR 459.

⁶² [1993-94] 2 GLR. 354.

⁶³ [1996-97] SCGLR 258.

⁶⁴ American Civil Liberties Union, 'What is Censorship?' (*ACLU*, 30 August 2006).
<<https://www.aclu.org/other/what-censorship>> accessed 31 March 2022.

community which may include the funding of speeches and conferences to discuss LGBTQ+ rights.

In *New Patriotic Party v Ghana Broadcasting Corporation*, the plaintiff alleged that the refusal of the defendant statutory corporation to give it time to air its views on the budget was a denial of their fundamental human rights and amounted to censorship. The court agreed with the plaintiff that the refusal of an opportunity to air their views was a violation of their rights. The court in giving its decision expressed the importance of having diverging views in the Ghanaian Society. It stated that the intention of the framers of the Constitution in formulating the freedom of speech and prohibiting censorship was to make available information and to allow for valued judgments from all citizens. 'That objective was only possible if there was a free ventilation of views.'

It is submitted that the Bill by attempting to restrict and prevent activism in the form of free speech and expression is an affront to the constitutionally guaranteed freedom of speech and expression as provided for by the 1992 Constitution.

4.0 CONCLUSION

Questions on the morality of the activities carried out by sexual minorities are of concern to many in society especially in modern times where the moral fabric of society is being constantly eroded. However, the people of Ghana from whom sovereignty emanates⁶⁵ chose and promulgated a constitution that ensures and guarantees the fundamental human rights of all individuals. The institutions tasked with governance must act in a manner that ensures that the rights of all are zealously protected. The legislature should not prioritise passing populist laws over protecting the rights of all in society including sexual minorities. Ghana would be taking a step backwards from the full realisation of individual rights should it pass the Bill into law and would greatly hinder the desire of the Ghanaian people to be free and to protect and preserve the Fundamental Human Rights and freedoms of all.⁶⁶ It is for these reasons this paper calls on Parliament to withdraw or reject the Bill, failing which, the president should refuse an assent to the Bill. In the event that the Bill becomes Law, the Supreme Court should declare the Law as null and void.

⁶⁵ 1992 Constitution of Ghana, art 1(1).

⁶⁶ The Preamble, 1992 Constitution of Ghana.

