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**CENTRE FOR HUMAN RIGHTS**

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# Towards the decriminalisation of consensual same-sex conduct in Ghana: A decolonisation and transformative constitutionalism approach

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Date: ……

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## DEDICATION

I dedicate this work to all persons who suffer violence, discrimination, and violation of their rights because of their perceived or actual sexual orientation, and to the human rights defenders and individuals who speak boldly for the protection of their rights in Ghana.

I also dedicate this work to Nana Adwoa Ako, Ernest Jaden Ako and Mikhaila Kukua Ako, who have stood by me from the beginning till the end of this thesis.

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## ABSTRACT

Micro country-level research on why Ghana continues to hold on to a colonial-era law that criminalises sex between consenting adults of the same sex is critical to understanding the unique phenomena of homophobia and violations of sexual minority rights in Ghana. Ghana has not decriminalised the offence of 'unnatural carnal knowledge', a law that targets homosexual sex, which it inherited from British colonial administrators in 1892, despite calls by international human rights bodies and Ghana's own admission that such laws fuel violations of sexual minority rights. The fundamental barriers to the decriminalisation of consensual same-sex sexual acts between adults in private in Ghana are religion, culture, and politics. Through the lens of decolonisation, *Sankofa,* as well as purposive and transformative constitutionalism theories, the thesis argues that the current religious, cultural and governance architecture in Ghana are colonial legacies that subjugated indigenous religious, cultural, and governmental institutions and replaced them for more than a century with Victorian-era structures and institutions of the colonial administrators. In order to overcome this colonial-era law, structures, and barriers to decriminalisation, which many Ghanaians unknowingly or mischievously claim as their own, there is a need for the decolonisation of colonial-era thinking and structures.

The 1992 Constitution of Ghana provides for a Bill of Rights, an independent judiciary, and the Supreme Court of Ghana, whose jurisprudence upholds the rights of individuals to non-discrimination, dignity, privacy, and association. Apart from religion, culture, and politics, a major obstacle to decriminalising sodomy law in Ghana is the legal culture and socio-political environment in Ghana. The judiciary is part of a society that abhors homosexuality and proclaims that because most Ghanaians oppose same-sex relationships, Ghana should not amend its Constitution to embrace sexual minority rights. The Supreme Court has declared laws that are inconsistent with constitutional rights to non-discrimination, association, dignity, and privacy as unconstitutional. Although the Constitution of Ghana does not prohibit discrimination based on sexual orientation, the Supreme Court can overcome the barriers of religion and culture by extending its jurisprudence on the right to non-discrimination, association, dignity, and privacy to include sexual minority rights. Through a broad, purposive, and transformative approach to interpreting the Bill of Rights, the Supreme Court can draw a line between Ghana's colonial past and the present era of constitutionalism and constitutional rights by declaring sodomy law as unconstitutional. The Supreme Court may also overcome the negative limitations of the current Ghanaian legal culture and socio-political pressure by looking to pre-colonial Ghanaian cultures that embraced same-sex sexuality for guidance. Similar to the proverbial *Sankofa* bird, the Supreme Court may, besides looking back to pre-colonial Ghanaian cultures, also fly forward to adopt decisions of foreign domestic and international courts of this modern era to endorse constitutional morality over majority morality in a Ghanaian secular state.

# LIST OF ACRONYMS AND INITIALISMS

| | |
|---|---|
| ACHPR | African Commission on Human and Peoples' Rights |
| AU | African Union |
| AU ACT | Constitutive Act of the African Union |
| CAL | Coalition of African Lesbians |
| CCG | Christian Council of Ghana |
| CHRAJ | Commission on Human Rights and Administrative Justice |
| CRC | Constitutional Review Commission |
| CSE | comprehensive sexuality education |
| COA | Criminal Offences Act |
| DPSP | Directive Principles of States Policies |
| ECOWAS | Economic Community of West African States |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| IE | independent expert |
| HR | human rights |
| LGBT | lesbian, gay, bisexual and transgender |
| MOPA | modern purposive approach to interpretation |
| NGO | non-governmental organisation |
| OIC | Organisation of Islamic States |
| SOGI | sexual orientation and gender identity |
| SR | Special Rapporteur |
| UDHR | Universal Declaration of Human Rights |
| UPR | Universal Periodic Review |
| UN | United Nations |

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|---|---|
| USA | United States of America |
| VCLT | Vienna Convention on the Law of Treaties |

# CHAPTER 1: INTRODUCTION

## 1.1 Background and motivation for the study

In 1892, the British colonial government enacted the Gold Coast Criminal Ordinance[1] for the Gold Coast colony, now Ghana, to regulate criminal conduct which had up to that time been within the domain of the customary laws of the various communities. Britain attempted to introduce this Criminal Ordinance in Jamaica, but the Jamaicans rejected it as unfit for their circumstances.[2] The Ordinance, which contained a provision that criminalised the offence of 'unnatural carnal knowledge', was however accepted into the Gold Coast colony without questioning.[3]

The early Europeans, in particular the Portuguese, Dutch and British, first gained entry into the Gold Coast through trade in the 13th century.[4] The Chiefs and other people of the Gold Coast allowed the British to stay on the coast for trade purposes and the control of other traders. The British started extending this authority over the indigenous people, usurping the authority of the traditional rulers. They sought to regularise the exercise of authority over the indigenous people through an agreement signed between the British and the traditional leaders of the Gold Coast on 6 March 1844, known as the Bond of 1844.[5] By this agreement, the British legitimised and continued exercising authority over the people of the Gold Coast.[6] The British gradually extended their territory from the coast to other areas to cover the entire landmass now known as Ghana, through conquest, annexation and a United Nations-sponsored plebiscite.[7]

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[1] Gold Coast Criminal Ordinance no 12 of 1892.

[2] HF Morris 'A history of the adoption of codes of criminal law and procedure in British colonial Africa 1876-1935' (1974) 18 *Journal of African Law* 8; see also ML Friedland 'RS Wright's model criminal code: A forgotten chapter in the history of the criminal law' (1981) 1 *Oxford Journal of Legal Studies* 308 at 338. The author quotes a colonial office memo which stated: 'we have got Mr. Wright's Jamaica Criminal Code, which the Jamaicans rejected, enacted in St Lucia and British Honduras and I think we might have it introduced in the West African colonies'.

[3] Friedland (n 2 above) 338.

[4] KY Yeboah 'The history of the Ghana legal system: The evolution of a unified national system of courts' (1991-92) 18 *Review of Ghana Law* 2.

[5] JB Danquah 'The historical significance of the Bond of 1844' (1957) 3 *Transactions of the Historical Society of Ghana* 3.

[6] F Bennion *The constitutional law of Ghana* (1962) 8. See chapter 2 for a discussion of the pre-colonial and colonial history of Ghana.

[7] See chapter 2, sec 2.3.2 for an in-depth analysis of this.

The most significant legislation that threatened the cultural, social and governance order of the Gold Coast was the Supreme Court Ordinance of 1876[8] which contained a 'repugnancy clause'.[9] This repugnancy clause ensured that local customary laws of the people of the Gold Coast that conflicted with British laws to be of no effect. British laws and religion subjugated and replaced the culture, customary laws, and religion of the indigenous people.

On attainment of independence in 1957 and republican status in 1960, most of the laws introduced by the British remained in force in the newly independent state of Ghana. Ghana kept the Criminal Ordinance of 1892 as the Criminal Code of Ghana in 1960,[10] and retained the infamous offence of 'unnatural carnal knowledge'.[11] The law has rarely been enforced since its introduction in 1892 in the colonial era by the British, and its retention as the Criminal Code of 1960 by Ghana. However, it is a source of violence against, and violations of the rights of sexual minorities in Ghana in contemporary times.[12]

The offence of 'unnatural carnal knowledge' belongs to the class of sodomy laws introduced as part of colonial laws[13] and has remained on the Ghanaian statute books with no controversy until recently. State and non-state actors violate the rights of persons who engage in same-sex sexual acts in Africa with impunity because they claim this practice is un-African. Sodomy laws have often formed the basis to justify arrests, detention, anal examinations, assault, battery, and other forms of human rights violations,[14] prompting questions about the relevance of colonial sodomy laws in

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[8] Supreme Court Ordinance no 4 of 1876.

[9] As above sec 14 made English laws applicable to the Gold Coast and subordinated customary laws of the people to English. Customary laws were only recognised if they were not repugnant to the notions of equity and good conscience. For a discussion of the repugnancy clause and its treatment of indigenous Customary law see M Ocran 'The clash of legal cultures: The treatment of indigenous law in colonial and post-colonial Africa' (2006) 39 *Akron Law Review* 465 at 475.

[10] JS Read 'Ghana: The criminal code, 1960' (1962) 2 *International and Comparative Law Quarterly* 272. Some provisions of the criminal code of Ghana has been amended by Parliament since 1960. Some notable amendments include the decriminalisation of speech, in the criminal code (repeal of criminal libel and seditious laws) (Amendment) Act, 2001 (Act 602), and the criminalisation of customary servitude with the insertion of section 314A.

[11] The Criminal Offences Act of Ghana, Act 29 of 1960, sec 104(1)(b).

[12] Human Rights Watch 'No choice but to deny who I am' Discrimination and violence against LGBT persons in Ghana Human Rights Watch (2018).

[13] M Kirby 'The sodomy offence: England's least lovely criminal law export?' in C Lennox & M Waites (eds) (2013) *Human rights, sexual orientation and gender identity in the Commonwealth: Struggles for decriminalisation and change* 61 66; Human Rights Watch 'This alien legacy, the origins of sodomy laws in British colonialism' (2008).

[14] Report of the 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' A/HRC/19/41 (2011) 3.

contemporary Africa. While many African countries keep their colonial-era sodomy laws, others have gone even further by re-criminalising[15] or attempting to re-criminalise[16] consensual same-sex acts.

However, recent developments suggest that a wind of change is blowing over some parts of Africa. Some countries have decriminalised sodomy laws through legislative amendments,[17] while in others, the process of decriminalisation resulted from judicial decision making through the courts.[18] Of the countries in the world that criminalise consensual same-sex conduct, a disproportionate number are in Africa.[19] Britain, a significant colonial power that introduced sodomy law in many African countries, decriminalised sodomy laws in 1967.[20] However, most of the colonies into which Britain introduced sodomy laws, including Ghana, still maintain these laws under the pretext of preserving African, or in this specific instance, Ghanaian culture. Because same-sex acts are generally not criminalised in the West, some African countries including Ghana have criticised calls by some Western countries for decriminalisation in Africa and Ghana as neo colonial and imperialist.

As this thesis argues, pre-colonial Ghanaian society did not criminalise consensual same-sex conduct and embraced persons of different sexualities. It was the British that introduced the offence called 'unnatural carnal knowledge' to criminalise same-sex sexual relationships in Ghana.[21] Therefore, a call for decriminalisation is a call to return to pre-colonial Ghanaian culture, which

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[15] Same-sex Marriage (Prohibition) Act 2014 of Nigeria which came into force on 7 January 2014; see also The Gambia Criminal Code (Amendment) Act, of 2014 passed by the Gambian Parliament on 25 August 2014, and received presidential assent on 9 October 2014, which added section 144A to criminalise 'aggravated homosexuality'.

[16] Anti-homosexuality Act 2014 of Uganda was declared void by the Constitutional Court of Uganda on procedural grounds in the case of *Oloka-Onyango & 9 others v Attorney-General* (2014) UGCC 14 20. A new Bill has since been proposed but is yet to be enacted into law.

[17] Angola and Mozambique have recently passed new penal codes that do not criminalise same-sex acts.

[18] The High Court in Botswana, for example, recently declared the criminalisation of same-sex acts as unconstitutional in the case of *Letsweletse Motshidiemang v Attorney General & Legabibo (Amicus Curiae)* MAHGB – 000591-16 (2019).

[19] ILGA World: LR Mendos, State-Sponsored Homophobia 2019: Global Legislation Overview Update (2019), reports that out of a total of 68 countries globally that criminalise same-sex sexual conduct, 34 are in Africa at 47 -52.

[20] 'Report of the committee on homosexual offences and prostitution' (Wolfenden report) 1957 recommended the decriminalisation of homosexuality. This report formed the basis for decriminalising sodomy law in the United Kingdom in 1967.

[21] Chapter 2 of this thesis discusses the pre-colonial state and same-sex sexual acts.

underlies the *Sankofa* philosophical theory of the Ghanaian people,[22] and not a form of neo-colonialism.

Meanwhile, many Ghanaians believe that same-sex sexual relationships offend Ghanaian culture, are an appropriation of western culture and do not concern human rights.[23] They argue that section 104 of the Criminal Offences Act (COA), which criminalises such conduct, preserves Ghanaian culture and prevents the infiltration of a foreign culture into Ghana. However, throughout the British Commonwealth, the offence of 'unnatural carnal knowledge,' or offences to that effect, was introduced to suppress and punish same-sex sexual acts in line with British cultural and religious beliefs.[24] This sodomy law has influenced homophobic attitudes in Ghana and has often been used to deny and violate the fundamental human rights of LGBT persons.[25]

The uncritical acceptance that homosexuality is foreign culture influenced the views of a majority of Ghanaians who spoke with the Constitution Review Commission of Ghana (CRC), charged with leading discussions on the amendment of the 1992 Constitution of Ghana, that sexual minority rights are un-Ghanaian.[26] Based on the submissions received, the CRC recommended in 2012 that there should be no amendment to the Constitution to recognise consensual same-sex conduct because the majority contends that it is against the culture of Ghanaians.[27] They CRC made this recommendation, despite Ghana's commitment to the tenets of human rights and constitutionalism, and with a Constitution that guarantees the rights of all persons without discrimination in line with international human rights norms.[28]

The failure of the CRC to recommend decriminalisation of 'unnatural carnal knowledge' make all three organs of government, the legislature, the executive, and the judiciary potential avenues to repeal this law. Same-sex acts are highly politicised and Parliamentarians who are the elected

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[22] The *Sankofa* theory is discussed in the theoretical framework section of this chapter and used as the frame to analyse chapters 2 & 3 of this thesis.

[23] *Justice Yaonansu Kpegah v Attorney General of Ghana and the Inspector General of Police of Ghana,* unreported case no J1/9/2012, Supreme Court Ghana, where a retired Supreme Court judge filed a writ he later abandoned, asking the court to declare that 'homosexualism and or lesbianism' is not a human rights issue and a cultural taboo in Ghana.

[24] Kirby (n 13 above); see also, Human Rights Watch 'This alien legacy' (n 13 above).

[25] As above, see also, 'Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity' Report of the United Nations High Commissioner for Human Rights submitted to the Human Rights Council pursuant to Resolution 17/19 of the Human Rights Council, 2011.

[26] 'Republic of Ghana, Constitutional Review Commission, Report of the Constitution Review Commission: From a Political to a Developmental Constitution' (Report of the Constitution Review Commission) 2012.

[27] As above, 656-657.

[28] Constitution of Ghana 1992 especially chapter 5 guarantees human rights and freedoms.

representatives of the people in Parliament, remain at the forefront of condemning the practice and calling for stiffer punishment. The executive made up of the President, Cabinet and his Ministers of State have also condemned same-sex sexual acts. The courts, as the protector of the rights of the weak, unpopular and minority in a democracy[29] is the most viable option for the decriminalisation of consensual same-sex acts in Ghana. However, the prospects of using the courts are also fraught with challenges related to the approach to interpreting the Constitution, the legal culture and the socio-political environment in Ghana that is currently hostile towards sexual minority rights.

The entrenchment of sodomy laws in Ghana for over a century shows that there are cogent reasons the law remains on the criminal statute books. Introducing colonialism alongside colonial laws, religion, and culture subjugated indigenous customary laws, religion, and culture, which tolerated diversity and embraced same-sex sexual relationships. Coloniality and the structures of colonialism such as religion, culture, and the system of political governance that overthrew indigenous systems remain in place and are the strongholds of sodomy laws that militate against decriminalisation.

That notwithstanding, there are constitutional rights and international human rights to which Ghana subscribes that make it imperative to decriminalise consensual same-sex acts. As Wekesa has noted, the constitutional rights to privacy and dignity, and including 'sex' and 'other status' in the Constitutions of Kenya and Uganda, respectively, permits the courts to include sexual orientation as a protected ground in the Constitution.[30] However, the situation of Ghana is different. The Constitution of Ghana does not mention 'sex' or 'other status',[31] which could have provided an avenue for the Supreme Court to prohibit discrimination based on sexual orientation. However, other constitutional and international human rights arguments provide a basis for the decriminalisation of same-sex acts in Ghana, despite the obstacle that religion, culture, and politics present.

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[29] M Mutua 'Sexual orientation and human rights: putting homophobia on trial' in S Tamale (ed) *African sexualities* (2011) 452 at 456.

[30] SM Wekesa 'A constitutional approach to the decriminalisation of homosexuality in Africa: A comparison of Kenya, South Africa and Uganda' LLD thesis, University of Pretoria, 2016 available at https://repository.up.ac.za/handle/2263/56992 (accessed 12 May 2021).

[31] Constitution of Ghana art 17(2) prohibits discrimination 'on grounds of gender, race, colour, ethnic origin, religion, creed, or social or economic status'.

While a plethora of scholarship address LGBT rights in the Global North, scholarship on the subject lacks in the Global South.[32] Even in the Global South, a majority of the research focuses on Southern Africa,[33] to the detriment of countries in West Africa, like Ghana.[34] Thus, there is a need to examine the particular circumstances of Ghana relating to the decriminalisation of same-sex sexual conduct. Adopting decolonial, transformative constitutionalism, living instrument and Ghanaian philosophical perspectives, this thesis aims to contribute to the ongoing debate on sexual minority rights in Africa[35] and Ghana[36] to assist politicians, academics, lawyers, judges, civil society organisations, and religious and traditional leaders to make informed decisions that protect fundamental human rights.

The study therefore draws inspiration from a lack of appreciation of pre-colonial and colonial underpinnings of sodomy law in Ghana. Another motivation for the study is the deliberate neglect or the lack of appreciation of constitutional and international human rights regime for protecting sexual minority rights in Ghana, or perhaps both. Because of the dearth of research in this area on Ghana, the study seeks to contribute to the academic discourse in this area. The thesis provides a

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[32] E Baisley 'Framing the Ghanaian LGBT rights debate: competing decolonisation and human rights frames' (2015) 49 *Canadian Journal of African Studies* 383.

[33] M Gevisser & E Cameron *Defiant desire* (1995); M Epprecht *Hungochani: The history of a dissident sexuality in Southern Africa (2004);* M Epprecht 'What an abomination, a rottenness of culture: Reflections upon the gay rights movement in Southern Africa' (2001) 22 *Canadian Journal of Development Studies*; RR Thoreson 'Somewhere over the rainbow nation: Gay, lesbian and bisexual activism in South Africa' (2008) 34 *Journal of Southern African Studies* 679; M Gevisser 'Canaries in the coal mines, an analysis of spaces for LGBT activism in Southern Africa' (2016) The Other Foundation, available at theotherfoundation.org/wp-content/uploads/2016/10/Canaries_Summary_epub_Draft4_MJ6.pdf (accessed 20 December 2020).

[34] Baisley (n 32 above); K Essien & S Aderinto 'Cutting the head of the roaring monster: Homosexuality and repression in Africa' (2009) 30 *African Study Monograph* 121; PA Amoah & RM Gyasi 'Social institutions and same-sex sexuality: Attitudes, perceptions and prospective rights and freedoms for non-heterosexuals' (2016) 2 *Cogent Social Sciences* (2016) 1; WJ Tettey 'Homosexuality, moral panic and politicised homophobia in Ghana: Interrogating discourses of moral entrepreneurship in Ghana media' (2016) 9 *Communication, Culture and Critique* 86.

[35] EY Ako 'The debate on sexual minority rights in Africa: A comparative analysis of the situation in South Africa, Uganda, Malawi and Botswana', LLM thesis, University of Pretoria, 2010 available at https://repository.up.ac.za/handle/2263/16739 (accessed 12 May 2021) Unpublished: AJ Osogo 'An analysis of the second wave of criminalising homosexuality in Africa against the backdrop of the 'seperability thesis', secularism and international human rights' LLD thesis, University of Pretoria, 2016 (on file with author); Wekesa (n 30 above); Unpublished: NM Baraza 'The impact of heteronormativity on the human rights of sexual minorities: Towards protection through the Constitution of Kenya' PhD thesis University of Nairobi, 2016 (on file with author); A Jjuuko 'Beyond court victories: Using strategic litigation to stimulate social change in favour of lesbian, gay and bisexual persons in Common Law Africa' LLD thesis University of Pretoria, 2018 available at https://repository.up.ac.za/handle/2263/68335 (accessed 12 May 2021); S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017).

[36] Essien & Aderinto (n 34 above); Amoah & Gyasi (n 34 above); Tettey (n 34 above); Baisley (n 32 above).

historical, constitutional, global, regional, Ghanaian specific and strategic analysis of the obstacles and possibilities to decriminalisation to consensual same-sex conduct in Ghana.

## 1.2 Research problem

The controversy surrounding consensual same-sex conduct and whether this is protected under Ghanaian law is an ongoing debate that will not go away soon, because of section 104 of the COA which criminalises 'unnatural carnal knowledge'.[37] Many believe that Ghana introduced this law in the post-colonial state to preserve Ghanaian culture and that it serves to prevent the infiltration of a foreign and western culture.[38] Some, including a lawyer and law teacher, even believe that this law criminalises an identity, the homosexual person who needs spiritual and psychological help, and not an act.[39]

However, the offence of 'unnatural carnal knowledge', which was first introduced by the British into the territory that is today Ghana, as part of the colonial Criminal Ordinance of 1892,[40] was a feature of many other criminal laws introduced in the British Empire based on the assumption that the culture of the colonised people 'did not punish 'perverse' sex enough'.[41] Politicians have used this law to threaten same-sex practicing persons with arrests and even incited ordinary Ghanaians to lynch them.[42] Traditional and religious leaders have also vehemently proclaimed that consensual same-sex conduct is against Ghanaian culture, and persons who practice such acts should not be tolerated in Ghana.

If section 104 of the COA remains on the criminal statutes of Ghana, because of socio-cultural, religious and political arguments, it will entrench colonial-era inequality, discrimination and social injustice against a segment of Ghanaian society despite the adoption of a constitution that

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[37] Criminal and Other Offences Act of Ghana, Act 29 of 1960, as amended, section 104. At the Parliamentary vetting of the Chief Justice of Ghana on 16 June 2017, a member of Ghana's Parliament asked whether the constitution could be interpreted to include gay rights, but the nominee Chief Justice refused to answer that question claiming it was a question for the courts to answer in future.

[38] 'President Mills: Homosexuality, lesbianism foreign to our culture' http://ghananewsagency.org/politics/president-mills-homosexuality-lesbianism-foreign-to-our-culture--30920 (accessed 30 June 2017).

[39] 'Homosexuals need spiritual and psychological help' – Lawyer http://mobile.ghanaweb.com/GhanaHomePage/economy/Homosexuals-need-spiritual-and-psychological-help-Lawyer-212172 (accessed 30 June 2017).

[40] Read (n 10 above).

[41] Human Rights Watch 'This alien legacy the origins of 'sodomy' laws in British colonialism' (2008) 5.

[42] 'Homosexuals could soon be lynched in Ghana – MP warns http://www.ghanaweb.com/GhanaHomePage/NewsArchive/Homosexuals-could-soon-be-lynched-in-Ghana-MP-warns-211415 (accessed 30 June 2017).

guarantees individual freedoms and liberties. Decriminalising it would preserve the fundamental human rights of 'every person' in Ghana, under the 1992 Constitution of Ghana.

Neither scholars nor the Ghanaian courts have applied decolonial, and transformative constitutionalism approaches to interpret section 104 of the COA, and the Bill of Rights in the 1992 Constitution. As a result, perceived discrimination, inequality, and homophobia introduced into the Ghanaian society by the colonial criminal Ordinance of 1892 and maintained in section 104 of the COA of 1960 remain. The visibility of LGBT persons in Ghana, claiming the right to free expression and association, has seen an intensification of these human rights violations under the pretext that these laws were introduced by the colonial masters to preserve Ghanaian culture.

The Supreme Court of Ghana has held on some occasions that laws that are inconsistent with constitutional rights such as the right to association, dignity, and privacy are unconstitutional. In similar vein, even though the Constitution does not explicitly prohibit discrimination based on sexual orientation, the application of section 104 of the COA, potentially violates the right to dignity, privacy, equality, and non-discrimination and may therefore be unconstitutional.

This research focuses on the rights of equality and non-discrimination,[43] dignity,[44] privacy,[45] and rights 'inherent in a democracy and intended to secure the freedom and dignity of man',[46] and international law as a tool to decriminalise section 104 of the COA. The decolonial, *Sankofa*, transformative constitutionalism and purposive interpretation theories provide a framework for analysing this research, which I discuss in full under the 'theoretical framework' section of this thesis. Such an approach is imperative because even though some studies have analysed criminalisation of consensual same-sex conduct in Africa,[47] there is no scholarly effort regarding the decriminalisation of consensual same-sex conduct in Ghana, through the theoretical perspectives outlined above.

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[43] Constitution of the Republic of Ghana, article 17(1) & (2).
[44] As above, art 15.
[45] as above, art 18.
[46] As above, art 33(5).
[47] C Lennox & M Waites *Human rights, sexual orientation and gender identity in the Commonwealth: struggles for decriminalisation and change* 2013; See also, Human Rights Watch 'This alien legacy' (n 13 above); Unpublished: AJ Osogo 'An analysis of the second wave of criminalising homosexuality in Africa against the backdrop of the 'seperability thesis', secularism and international human rights' unpublished LLD thesis, University of Pretoria, 2016 on file with author; Wekesa (n 30 above).

This thesis, therefore, contributes to the ongoing debate on protecting sexual minority rights in Africa,[48] by interrogating the obstacles against decriminalisation of consensual same-sex acts in Ghana and the arguments in favour of it. The study proceeds with research questions.

## 1.3 Research questions

The central research question of this thesis is: What is the role of domestic and international law in advancing the decriminalisation of consensual same-sex conduct in Ghana? I aim to answer the central research question with the aid of the following sub-questions:

1. To what extent has the post-colonial Ghanaian state de-colonised its laws that criminalise consensual same-sex conduct?

2. What is the impact of religion, culture and politics on the continued criminalisation of consensual same-sex conduct in Ghana?

3. To what extent can the Bill of Rights in the 1992 Constitution of Ghana be construed as a living instrument, purposively and in a transformative manner to provide a basis for decriminalising consensual same-sex conduct in Ghana?

4. What is the potential role of international human rights law in the decriminalisation of consensual same-sex conduct in Ghana?

## 1.4 Literature review

### Introduction

I review four major themes relating to the literature in this section. First, I briefly take stock of the introduction of colonialism and the regulation of criminal conduct in Ghana. Second, the impact of religion, culture, and politics to continued criminalisation of consensual same-sex conduct. Third, I

[48] S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017); P de Vos 'Mind the gap: Imagining new ways of struggling towards the emancipation of sexual minorities in Africa' (2015) 29 *Agenda* 39; O Jonas 'The quest for homosexual freedom in Africa: A survey of selected continental practices and experiences' (2012) *International Journal of Discrimination and the Law 12;* S Tamale (ed) *African sexualities: A reader* (2011); Wekesa (n 30 above).

examine the basis for the legal protection of consensual same-sex conduct in the 1992 Constitution of Ghana and fourth, analyse the role of international law in the decriminalisation of consensual same-sex conduct in Ghana.

## Colonialism and regulation of criminal conduct in Ghana

Scholars agree that Ghana's criminal law is a product of colonialism. Asante[49] and Quashigah[50] recall 24 July 1874, as the date when the British formally colonised the then Gold Coast and made all laws in force in the United Kingdom at that date applicable to the Gold Coast with no consultation with the colonised people.[51] Thus British laws regulated every sphere of life in the Gold Coast, including 'criminal conduct', in a manner that was contrary to the value systems of and thinking of Ghanaians.[52] The 'received' English law was supposed to be applied in a manner that is consistent with local circumstances, but the courts failed in this duty, sometimes, even adopting the reasoning of many English law principles without basis.[53]

Ogwurike,[54] Morris[55] and Read[56] confirm the view that criminalisation of consensual same-sex conduct was a deliberate effort of the British to inculcate Judeo-Christian principles of the British in their colonial subjects, regardless of their traditions and cultures. These laws were similar and have been kept in many post-independent African countries,[57] including Ghana, which has failed to 'satisfactorily de-colonise' these laws even after independence.[58] As Read noted in his commentary on the 1960 criminal code of Ghana, which was first introduced in the Gold Coast in 1892 as the Criminal Ordinance, the law was initially meant for Jamaica. Jamaicans rejected the Code, which was then implemented in St Lucia and later transplanted in the Gold Coast without discussion with the inhabitants.[59]

Some scholars argue that criminal codes that penalise 'unnatural carnal knowledge' or 'sex against the order of nature', came from an idea to introduce laws that punished homosexuality

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[49] SKB Asante 'Over a hundred years of national legal system in Ghana a review and critique' (1987) 31 *Journal of African Law* 70.
[50] K Quashigah 'The historical development of the legal system of Ghana: an example of the coexistence of two systems of law' (2008) 14 *Fundamina* 96.
[51] Asante (n 49 above).
[52] As above, 71.
[53] As above, 77.
[54] C Ogwurike 'A functional analysis of Ghanaian legal sources' (1967) 4 *University of Ghana Law Journal* 122.
[55] Morris (n 2 above) 6.
[56] JS Read 'Criminal law in the Africa of today and tomorrow' (1963) 7 *Journal of African Law* 5.
[57] Morris (n 2 above) 23.
[58] Ogwurike (n 54 above) 140.
[59] Read (n 56 above).

throughout the British Empire.[60] Human Rights Watch supports this view and points out that Britain introduced 'anti-sodomy' laws into British colonies without consultation with traditional local authority and appreciation of the culture of the people.[61] Thus, the adoption of British laws in the Gold Coast and the gradual obliteration of pre-colonial customary law to the detriment of the traditions and culture of a people has been strongly criticised as a reason for stifling the development of the regime of customary criminal sanctions in Ghana. [62]

The Parliament of Ghana has repealed some colonial-era laws that have no relevance in a constitutional democracy, to advance the course of a free society. For instance, Parliament repealed the criminal libel law, which criminalised free speech and was used to convict and imprison some journalists.[63] The Supreme Court of Ghana has also declared specific statutes which were inherited from military regimes as an infringement on the rights of Ghanaians as guaranteed in the new Constitution.[64] Thus, Parliament and the Supreme Court can repeal or declare specific laws unconstitutional, and they have done so in the past. However, both institutions are yet to confront issues relating to sexual minority rights. The burden of this thesis is to address this gap by demonstrating that a purposive interpretation of the Constitution of Ghana could lead to the decriminalisation of consensual same-sex acts.

## The impact of religion, culture, and politics to the continued criminalisation of consensual same-sex conduct in Ghana

Religion, culture, and politics are the major reasons Ghana continues to criminalise same-sex sexual acts between consenting adults in private. The scholarly contributions of Essien and Aderinto,[65] Tettey,[66] Baisley,[67] and Amoah and Gyasi[68] all acknowledge that religion, culture, and politics

[60] Kirby (n 13 above).
[61] Human Rights Watch 'This alien legacy' (n 13 above).
[62] GK Acquah 'Customary offences and the courts' (1991-92) 18 *Review of Ghana* Law 36.
[63] The criminal code (repeal of criminal libel and seditious laws) (Amendment) Act, 2001 (Act 602) decriminalised free speech especially by journalists who were imprisoned for statements they made in the course of their work.
[64] *Mensima v Attorney-General* [1996-97] SCGLR 676 held that it was unconstitutional to require that every person should belong to an association before they could acquire a licence to manufacture or sell alcohol. The court noted that such a requirement violated the freedom of association. See also *New Patriotic Party v Inspector General of Police* [1996-97] SCGLR 32 where the Supreme Court held that provisions of the Public Order Act which required the granting of police permission before a group can embark on a demonstration violated the right to demonstrate and therefore unconstitutional.
[65] Essien & Aderinto (n 34 above).
[66] Tettey (n 34 above).
[67] Baisley (n 32 above).
[68] Amoah & Gyasi (n 34 above).

account for lack of respect for LGBT rights in Ghana. They, however, approach this problem from different perspectives.

One perspective through which some scholars highlight the perennial problem of LGBT rights violation in Ghana is the polarised debate often split along pro and anti LGBT lines. The debate on LGBT rights and the backlash against sexual minorities and human rights defenders is often triggered by the announcement of an event or statement seeking protection of sexual minority rights. Essien and Aderinto identify two opposing viewpoints on the debate in Ghana. The pro-LGBT argument that says the bible and the Criminal Code of Ghana are colonial vestiges which should not be relied upon to deny LGBT rights,[69] and the anti-LGBT argument that homosexuality is an aspect of western culture which should not be entertained in Ghana. The anti-LGBT activists often appropriate media space and used political power, threats on the lives of homosexuals and their supporters, and the criminal law, to silence freedom of expression, of association and human dignity concerning the rights of LGBT persons in Ghana.[70]

Apart from using the media to verbally assault and threaten the rights of LGBT persons, anti-LGBT activists and their supporters deliberately create a homophobic environment, making it unsafe for sexual minorities to discuss infringement of their rights openly. Anti-LGBT activists take advantage of this homophobic environment, with the aid of the Ghanaian media to frame homosexuality as moral decadence, and western culture that is fast catching up with the youth of Ghana, with the threat of eroding morality, culture and the traditional Ghanaian family.[71] The media coverage challenges moral entrepreneurs, persons or institutions that believe they have a duty to preserve a moral code of Ghana to join the debate and challenge politicians to put in place stiffer regulatory regimes to safeguard the future of Ghana.[72] Politicians then join the debate by threatening alleged homosexuals with arrests and denying them the opportunity to free speech and association. In this way, the social, moral and political forces converge to produce a hostile climate and attitude towards homosexuality in Ghana. This convergence ignores the tenets of a liberal democracy that Ghana professes to be an epitome of, by ignoring the rights of some other citizens based on their sexual orientation.[73] Tettey reckons that even though the media cannot set standards and values

[69] Essien & Aderinto (n 34 above) 130-131.
[70] As above, 132.
[71] Tettey (n 34 above) 91-93.
[72] As above, 94-95.
[73] As above, 97-99.

for the country, it can couch the LGBT debate in Ghana in a more responsible manner by setting the agenda for the LGBT debate in Ghana in an engaging and conciliatory manner.[74]

The use of religion, culture and politics is best illustrated with two primary debates in the media by pro and anti-LGBT activists in 2008 and 2011. One scholar examines these two crucial periods in Ghana when LGBT debates were triggered in the media by the announcement of an upcoming gay conference. The spontaneous, unofficial debate attracted statements by ordinary Ghanaians, government officials, religious leaders, legal and health professionals. Baisley notes that in the first debate in 2008, using the decolonisation frame, the pro-LGBT group primarily focused on homophobic laws as a colonial relic while the anti-LGBT group argued that homosexuality is a western import in Ghana.[75]

In the second debate in 2011, pro and anti-LGBT activists used the 'human rights frame' to make their arguments. According to Baisley, the pro-LGBT group did not effectively employ the human rights frame. For instance, they did not use race or other comparator groups such as persons with disabilities, to emphasise the need to protect the rights of sexual minorities.[76] The anti-LGBT group comprised religious and traditional leaders, legal and health professionals. This group dominated the debate by relying on culture, religion, and morality to frame LGBT rights as western and morally offensive to Ghanaian culture. Baisley notes that the pro-LGBT group could not convince the public that sodomy laws in African and Ghana are a colonial legacy 'in need of de-colonising'.[77]

Amoah and Gyasi argue that culture and religion are two important social institutions that combine effectively to deny LGBT rights in Ghana. They tested this assertion through empirical research in a suburb of Ghana, and their findings confirm that ordinary people are unwilling to accept homosexuality in Ghana based on religion and culture.[78] They also found that based on religion and culture, many of the respondents thought homosexuals do not deserve human rights protection in Ghana. However, respondents who had attained university education were mostly of the view that we should protect the rights of homosexuals in Ghana because Ghana is a democratic state and must respect the rights of all persons including LGBT persons.[79]

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[74] As above, 101.
[75] Baisley (n 32 above) 384.
[76] As above, 398.
[77] As above, 393.
[78] Amoah & Gyasi (n 34 above) 6-8.
[79] As above, 9.

The important lesson for this thesis is that scholars have not discussed decriminalising section 104 of the Criminal Code of Ghana or the recognition of LGBT rights as a human right issue under the 1992 Constitution of Ghana. Also, while the decolonisation framework has been used to examine the arguments and counter-arguments for accepting homosexuality in Ghana, a critical evaluation of section 104 of the COA, as a law 'in need of de-colonising', using the decolonial frame and further examining the potential of transformative constitutionalism as a tool for this decolonisation process, has not yet been done.

**Protection of consensual same-sex conduct and the 1992 Constitution of Ghana**

The 1992 Constitution of Ghana has received its fair share of commentary by legal scholars who have noted that it is a progressive constitution whose rights have been interpreted in a broad, liberal, and purposive manner. However, scholars have primarily ignored rights associated with consensual same-sex conduct relationships.

In his doctoral thesis, Bimpong-Buta examines the role of the Supreme Court in the development of constitutional law in Ghana by enforcing fundamental human rights and freedoms guaranteed under the 1992 Constitution of Ghana.[80] He observes that the Supreme Court of Ghana has played this role very well by interpreting the rights in the Constitution in a broad, liberal and purposive manner to protect the rights of citizens.[81]

Other scholars have analysed the fundamental human rights provisions in the Constitution of Ghana, the scope of protection they offer and how the Supreme Court has interpreted these rights. They, however, do not analyse the human rights regime in Ghana concerning sexual minority rights. For instance, Quashigah analyses the fundamental human rights and freedoms enshrined in the 1992 Constitution of Ghana and observes that there is a distinction between human rights on the one hand and 'freedoms' on the other. However, the framers of the 1992 Constitution of Ghana used 'rights' and 'freedoms' without distinction. While 'rights' and their limitations are precise and often stated in the same provision, 'freedoms' are usually subject to general limitations.[82] According to Quashigah, what is clear from the Ghanaian Bill of Rights is a classification of rights

[80] Unpublished: SY Bimpong-Buta 'The role of the Supreme Court in the development of constitutional law in Ghana' unpublished PhD thesis, University of South Africa, 2005.
[81] As above, 350.
[82] K Quashigah 'A critical analysis of the concept of rights and freedoms under chapter five of the 1992 Constitution of Ghana' (2005-2007) 23 *University of Ghana Law Journal* 158, 161.

into three categories with limitations, but the right to dignity is not subject to any limitation,[83] a point that is central to LGBT rights.

Scholars like Appiagyei-Atua[84] and Quansah[85] observe that the courts in Ghana have dealt with many cases that relate to human rights and have often upheld the rights of persons when these rights have been violated. They both reckon that article 33(5) of the Constitution of Ghana, which acknowledges other rights inherent in a democracy, is a powerful tool for the judges and lawyers to rely on, especially to invoke international human rights norms,[86] and also an avenue for the courts to consider both the spirit and letter of the Constitution. Nevertheless, the courts have not fully utilised this provision.

This thesis examines how the provisions in the Bill of Rights, particularly article 33(5) could be applied transformatively to same-sex consensual conduct, a subject that has not yet been broached by scholars and the courts in Ghana.

## The role of international law in the decriminalisation of consensual same-sex conduct in Ghana

Scholars have discussed the recognition of international law, hierarchy and its application in the domestic court of Ghana.[87] Even though these contributions have discussed the application of international (human rights) law in the domestic courts of Ghana, the discussions have not focused on the application of human rights norms in the decriminalisation of consensual same-sex conduct. In this part of the literature review, I first discuss global international law and later discuss regional law, with specific reference to Africa.

### Global international law

Despite contestations by some member states of the United Nations (UN), mainly African states, about the existence of international human rights protections for consensual same-sex conduct, it is arguable that sexual minorities enjoy all rights equally to everyone else in international law. Since

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[83] As above, 166-167.
[84] K Appiagyei-Atua 'Ghana at 50: The place of international human rights norms in the courts' in H Bonsu et al (eds) *Ghana Law since independence: History, development and prospects* (2007) 179.
[85] EK Quansah 'An examination of the use of international law as an interpretative tool in human rights litigation in Ghana and Botswana' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 37.
[86] Appiagyei-Atua (n 84 above) 200.
[87] EY Ako 'Re-thinking the domestication of international treaties in Ghana' in R F Oppong & William Kissi Agyebeng (eds) *A commitment to law: Essays in honour of Nana Dr. Samuel Kwadwo Boaten Asante* (2016) 665; Appiagyei-Atua (n 84 above) 179; EY Benneh 'Sources of public international law and their applicability to the domestic law of Ghana' (2013) 26 *University of Ghana Law Journal* 67; Quansah (n 85 above) 37.

the 1992 decision in *Toonen,*[88] various UN human rights mechanisms and a majority of states at the UN have affirmed, through resolutions and statements, that existing human rights provisions in international law provide protections for LGBT persons.[89] Therefore, there is a movement towards decriminalisation of consensual same-sex conduct in international law.

Even though international law is not classified as one of the sources of law in the Ghanaian Constitution, scholars agree that international law is part of the laws of Ghana.[90] International law has been applied by the courts in Ghana, especially in human rights cases. As a dualist state, if Ghana ratifies an international treaty, it has to be domesticated, through a process by Parliament before it becomes law and applicable in Ghana.[91] Even though Ghana has ratified over 300 international treaties, including all the major international human rights treaties, it is yet to domesticate most of these treaties.[92] Perhaps international treaties that Ghana has ratified but are yet to be domesticated might not be considered as part of the laws of Ghana as a basis to determine a matter in the domestic courts. However, scholars maintain that even in dualist states where international law ought to be first domesticated before it becomes law and applicable in the domestic legal system, as compared to monist systems where international law once ratified becomes part of the domestic law, there is a tendency to 'sometimes apply or draw inspiration from international human rights law in adjudicating human rights matters'.[93]

While Ghanaian courts have refused on occasions to apply international laws that have not been domesticated, it has also applied international law, which is not domesticated. Scholars have hailed the application of international human rights standards in the domestic courts of Ghana as a progressive step in entrenching a culture of human rights in Ghana, but the courts are yet to apply this human rights approach to a consensual same-sex conduct case.

This thesis examines how a transformative interpretation of the Bill of Rights in the 1992 Constitution of Ghana, could apply international human rights norms such as 'universality, non-

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[88] Communication 488/1992, *Toonen v Australia,* UNHR Committee (31 March 1994) UN Doc CCPR/C/50/D/488 (1992).

[89] E Baisley 'Reaching the tipping point?: Emerging international human rights norms pertaining to sexual orientation and gender identity' (2016) 38 *Human Rights Quarterly* 134 136; See also E Heinze *Sexual orientation: A human right An essay in international human rights law (1995).*

[90] Ako (n 87 above) 672; Appiagyei-Atua (n 84 above) 189; Quansah (n 85 above) 39.

[91] Constitution of Ghana 1992 art 75(2) (a) & (b).

[92] Ako (n 87 above) 675.

[93] M Killander & H Adjolohoun 'International law and domestic human rights litigation in Africa: An introduction' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 16.

discrimination and equality', which have a basis in international law[94] in the decriminalisation of consensual same-sex conduct in Ghana. Another point for this thesis is that LGBT rights appear to be gaining grounds in international law and having ratified major international human rights treaties, Ghana is duty-bound to respect these norms and fulfil its international obligations. If Ghana fails to do this, it may be because of its colonial law that has to be de-colonised and interpreted transformatively.

### Regional International law

Concerning Africa, even though the African Charter does not mention sexual minorities, LGBT rights or non-discrimination based on sexual orientation, such a right could be inferred and exists in the African Charter[95] for three major reasons. First, a right to privacy does not exist in the African Charter. However, if the African Commission has held that the right to food and shelter which is not stated in the African Charter could be inferred from the right to life, it is also possible to claim a right to privacy as implied in the right to dignity, liberty and security of the person.[96] Also, granted that sexual attraction is integral to the human person; a violation of this aspect of a person's life violates the right to integrity and 'inherent human dignity'.[97] Respect for the right to integrity and dignity implies that the individual is 'free of state interference in the most intimate domain of sexual choice, thus implying the right to privacy'.[98] The right to privacy argument is also supported by the fact that state parties to the African Charter are also required under the guidelines for reporting to report on the right to privacy.[99]

Second, the equality clauses in articles 2 and 3 of the African Charter give room to include sexual orientation as a protected right in the African Charter. Article 2 prohibits 'distinction' on many grounds such as, 'sex' and 'other status', showing that other grounds including 'sexual orientation' may be implied in articles 2 of the African Charter.[100] Further, article 3 provides for equality before the law. Thus, a person cannot be denied the protection and benefits of the rights under the African

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[94] Baisley 'Reaching the tipping point?' (n 89 above) 136; See also E Mittelstaedt 'Safeguarding the rights of sexual minorities: The incremental and legal approaches to enforcing international human rights obligations (2008) 9 *Chicago Journal of International Law* 353; Heinze (n 89 above).
[95] R Murray & F Viljoen 'Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights' (2007) 29 *Human Rights Quarterly* 69.
[96] As above, 90.
[97] As above.
[98] As above.
[99] As above.
[100] As above, 91.

Charter merely because of their sexual orientation. 'A denial of the equal benefit of the law based on this personal characteristic is therefore prohibited by articles 2 and 3' of the African Charter.[101] Therefore, the limitation clause in article 27(2) of the African Charter[102] cannot be invoked as a basis to limit the rights of a person merely because of their sexual orientation.

Further, the beneficiaries of the rights in the African Charter are 'everyone, every human being, and every individual'.[103] Thus no one is denied the 'protection of the Charter' and that 'every person enjoys the Charter rights irrespective of her or his sexual orientation or gender identity'.[104] Flowing from this argument and adopting the approach of 'UN treaty bodies and the European Human Rights Court, 'sex', one of the specific grounds for non-discrimination, should be interpreted to include 'sexual orientation', or that 'sexual orientation' and 'gender identity' are included in 'other status' '.[105] Finally, even though 'sexual minorities', just like 'indigenous people' are not mentioned in the African Charter, it is a group that deserves protection under the African Charter:

> *As for the lack of explicit 'recognition' of sexual minorities in the Charter, there are at least two responses: (i) by virtue of article 2 of the Charter… sexual minorities are rights- holders under the Charter; (ii) the Charter has generally been interpreted as a living instrument, and not as a captive of the original textual strictures. The recognition of indigenous people… stands as an unequivocal example that the protection of the Charter is not denied to a group merely because the Charter does not explicitly recognise that group by name.*[106]

Rudman agrees with the views expressed above that the African Charter could be interpreted as affording protection on the grounds of sexual orientation, even though the group is not mentioned in the African Charter.[107] She examines the interpretation and application of the rights to dignity, equality and non-discrimination in international human rights law. Rudman draws on the jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights and surmises that the African regional human rights system could adopt a similar approach regarding a right to sexual orientation.[108]

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[101] As above.
[102] Article 27(2) of the African Charter states: 'The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest'.
[103] F Viljoen *International human rights law in Africa* 2 ed (2012) 264.
[104] As above, 264-265.
[105] As above, 265.
[106] As above, 267.
[107] A Rudman 'The protection against discrimination based on sexual orientation under the African human rights system' (2015) 15 *African Human Rights Law Journal* 1.
[108] As above, 6.

Drawing analogies from the European human rights system and particularly the Inter-American human rights system, she emphasises three points relevant to protecting a right to sexual orientation under the African human rights system. First, Rudman argues that the sources of laws in the African human rights system are similar in substance to the European and Inter-American human rights systems. Second, the African Commission in deciding the merits of cases has relied on the jurisprudence of the European and Inter-American human rights systems; and third, there is no legal bar to relying on the jurisprudence of regional courts.[109] Based on these three arguments, Rudman is of the view that the African human rights system could be interpreted and applied similarly to the European and Inter-American human rights systems, to provide a right to sexual orientation to protect sexual minorities in Africa. She observes:

> If a person's integrity, liberty or security is limited or taken away due to that person's sexual orientation, that person has been arbitrarily deprived of [the] said rights. Similarly, if a person is subjected to a law that would require other individuals to denounce that person's most intimate and private acts and thoughts, solely based on that person's sexual orientation, that would be an arbitrary infringement on that person's integrity. Hence an act prescribing such actions would violate articles 2 and 4 of the African Charter.[110]

From the observations above, scholars make a convincing argument for the existence of LGBT rights under the African Charter, and as a state party to the African Charter; these arguments could be applied in Ghana. These insights above suggest that using the decolonial frame to examine colonial-era 'anti-sodomy laws' and a transformative constitutionalism approach to breaking from such a past, especially for Ghana, is imperative. I now turn to the theoretical framework of this study.

## 1.5 Theoretical framework

The study interrogates culture, religion, and politics as a basis to deny sexual minority rights in a post-colonial constitutional democracy that recognises the use of rights inherent in a democracy to protect the dignity of human beings. In order to understand how culture, religion and politics form a basis to deny sexual minority rights, the study employs Ghanaian philosophical and symbolic theory of *Sankofa* to interrogate these phenomena as obstacles to the decriminalisation of consensual same-sex conduct. This helps to analyse the pre-colonial Ghanaian society, the values

[109] As above, 13.
[110] As above.

they cherished and practised and the extent to which they embraced or rejected same-sex practices.

The decolonial theory offers insights on colonialism and coloniality and its effects on the new nation-state long after Ghana had celebrated the attainment of independence. Last, the study employs modern approaches to constitutional interpretation and uses the transformative constitutionalism theory in comparison with the purposive interpretation of a constitution as a living instrument capable of growth. These two theories offer an opportunity to interrogate the most suitable approach to constitutional interpretation in Africa and Ghana that adequately protects the rights of citizens. It also offers a tool to assess the obstacles to protecting sexual minority rights in homophobic societies, and how extrajudicial considerations that affect the interpretation of constitutional rights may be overcome. The study, therefore, provides the lens to interrogate sexual minority rights in Ghana across three epochs. The pre-colonial, colonial, and post-colonial eras.

### 1.5.1 Decolonisation

Decolonisation is one of the theoretical frameworks that I use in this study. It is a theoretical perspective that has been used in law,[111] politics[112] and literature[113] to demystify colonisation, 'European invented tradition… and European rush into Africa'.[114] It is a theory that attempts to appreciate European culture, politics and law because of colonialism. When the British formally colonised Ghana in 1874, laws, which were in force in Britain automatically applied to the colonised state.[115] These laws were supposed to be applied in conformity with local circumstances. However, this was not achieved because the judiciary applied the laws in conformity with British legal reasoning and tradition.[116] Thus a British legal culture became entrenched in Ghana and arguably, remains. Decoloniality is a framework well suited to interrogate the British laws and reasoning that

[111] M Craven *The decolonisation of international law: State succession and the law of treaties*
[112] K Nkrumah *Consciencism philosophy and ideology for de-colonisation* (1964); Margaret Kohn & KD McBride *Political theories of decolonisation: Postcolonialism and the problem of foundations* (2011); A Mbembe *On the Postcolony* (2001).
[113] F Fanon *The Wretched of the earth* (1963)
[114] T Ranger 'The invention of tradition in Colonial Africa' in T Ranger & E Hobsbawm (eds) *The invention of tradition* (1983) 211; See also M Mahmood *Citizen and Subject contemporary Africa and the legacy of late colonialism* (1996).
[115] Asante (n 49 above) 77.
[116] As above.

has become entrenched in the legal culture of Ghana. The decolonial theory has been used to examine competing arguments for and against homosexuality in Ghana.[117]

I use this framework in this research to examine section 104 of the COA because it places the law in proper context and enables an understanding of the circumstances of the adoption of the law and the justifications or otherwise for its continuation in the post-colonial state. It also helps understand the arguments about homosexuality and the homosexual identity as a western culture, which is alien and un-African[118] and the use of human rights to vindicate LGBT rights being labelled as a neo-colonialist agenda.[119]

### 1.5.2 Decolonial theory

The decolonial theory acknowledges that colonialism did not end with the attainment of independence because the structures that were erected by colonialism, including laws, culture and religion are still entrenched in the ex-colonies. As a theory, decoloniality sheds light on how coloniality survives colonialism, forms of coloniality and ways of addressing coloniality in order to achieve real liberation and independence from colonialism in contemporary times. As William Mpofu observes:

> Many decades after formal slavery was abolished and after juridical and administrative colonialism was dethroned, coloniality as an enduring imperial and colonial power structure, which is manifest in the exercise of power, production and distribution of knowledge, and the experience of life and being of peoples in the global South, remains intact.[120]

Coloniality, in opposition to decoloniality, refers to the colonial structures that have outlived colonialism and remain in place and affect the members of the ex-colonised state in ways that even colonialism did not imagine. Therefore, while colonialism has officially ended, its worst form, coloniality still lives on. According to Maldonado-Torres, coloniality survives and goes beyond the limits of colonialism[121] and 'refers to long-standing patterns of power that emerged as a result of colonialism, but that define culture, labour, intersubjective relations, and knowledge production'.[122] Therefore, in order to understand and tackle coloniality, as a remnant of the

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[117] Baisley 'Framing the Ghanaian LGBT rights debate' (n 32 above).
[118] De Vos (n 48 above) 46.
[119] As above 45.
[120] W Mpofu 'Decoloniality as a combative ontology in African development' in SO Oloruntoba & T Falola (eds) *The Palgrave handbook of African politics, governance, and development* (2018) 83, at 84.
[121] N Maldonado-Torres 'On the coloniality of being' (2007) 21 *Cultural Studies* 240.
[122] As above 243.

coloniser, to overthrow it, the decolonial theory or decoloniality provides an answer. This is because 'the decolonial turn renders this coloniser vulnerable by dislocating him or her from the safety of its European or Western centredness'.[123]

In Ghana, relating to children's rights, Kwaw has rightly noted that colonial policies that interfered with pre-colonial indigenous systems of child rights are the source of children's rights violations in Ghana today.[124] On attainment of independence, Ghana inherited these exploitative colonial policies of children, some of which had even gained the status of custom and protected by legislation.[125] Kwaw, therefore, buttresses the argument that coloniality survives long after colonialism has ended and some of these colonial policies are even 'disguised' as the custom of the people who hold steadfastly to them.[126]

Concerning sexual minority rights, coloniality in the form of colonial laws that were introduced in the 19th century remain. Coloniality defines religion, culture and governance systems and continues to subordinate indigenous alternatives. Thus, even though sodomy law was introduced in the 19th Century in Ghana, it still keeps its place in the Criminal Offences Act of Ghana in the 21st century. Amendments and repeals of some sections of the 1892 Criminal Ordinance have been made, yet criminalisation of sodomy remains in place. Decoloniality, therefore, offers insights into how coloniality and colonial laws have lasted long after official colonialism has ended. The coloniser still exists in Ghana as a criminal provision, and in order to dethrone this 'Western centred' law, decoloniality as a frame is employed in this thesis.

Coloniality not only defines culture in Ghana but also religion, politics, and knowledge production. Even 'aspects of gender and sexuality are not spared as Empire prescribes ways of being and what family should mean in terms of sex, gender and reproductivity'.[127] The colonial structures of knowledge production, religion and politics that criminalised same-sex sexual relationships are still intact after colonialism has ended, and continue to churn religious leaders, traditional rulers and political leaders that view consensual same-sex acts a cultural taboo. The leaders of these social institutions in Ghana concertedly claim that same-sex acts are a crime and offensive to the religion and culture of Ghanaians. On close examination, with the decolonial theory, however, sodomy law

[123] G Snyman 'Responding to the decolonial turn: Epistemic vulnerability' (2015) 43 *Missionalia* 266 at 269.
[124] EA Kwaw 'Colonial marginalisation of children and the denial of children's rights: The Ghanaian experience' (2015) *Centerpoint Journal (Humanities edition)* 65.
[125] As above.
[126] As above.
[127] Maldonado-Torres (n 121 above) 243.

together with the religion and culture which was constructed by the coloniser is what majority of Ghanaians refer to as Ghanaian culture. After a century and a half of colonialism and the entrenchment of coloniality for over six decades, the decolonial theory provides a lens in understanding that criminalisation of consensual same-sex conduct in Ghana occurred in a specific context and must be addressed with fresh perspectives from a theoretical perspective that offers alternatives rooted in an appreciation of indigenous culture. Thus, I conceive of decoloniality in a manner that responds to the history of Ghana,[128] and how the violence of colonialism[129] overthrew pre-colonial structures and replaced with British structures. Decoloniality is also used as a theoretical tool to interrogate coloniality in the post-colonial state and its entrenchment of sodomy laws.

The thesis, therefore, responds to this challenge of bringing to the fore the nature of the destructive force of coloniality and how it has disguised itself and remains a powerful force today in the ex-colonies, like Ghana, through laws, religion, politics, knowledge systems and social institutions.

### 1.5.3 Transformative constitutionalism and the purposive interpretation

Transformative constitutionalism is a theory that has received much scholarly attention in South Africa and could be defined as a 'long-term project of constitutional enactment, interpretation and enforcement committed … to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction'.[130]

Some scholars emphasise transformative constitutionalism as seeking to achieve substantive equality and social justice and a radical departure from a legal culture.[131] Transformative constitutionalism aims at using the national Constitution to transform the past into a future promised by the same Constitution through an interpretation of its provisions. Accordingly, transformative constitutionalism as used in this thesis, examines not only section 104 of the COA and how a new constitution could assist in a break from a colonial past. It also offers insights to interrogate legal culture and its usefulness to social justice and human rights protection. In the case

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[128] CE Walsh & WD Mignolo *On decoloniality* (2018) 1, argue that there are many ways of conceiving decoloniality and should be done in a manner that responds to the history of a particular country.
[129] Maldonado-Torres (n 121 above) 243; A Mbembe *On the postcolony* (2001).
[130] KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 150.
[131] M Pieterse 'What do we mean when we talk about transformative constitutionalism' (2005) 20 *South African Public Law* 165-166; See also K van Marle 'Transformative constitutionalism as/and critique' (2009) 2 *Stellenbosch Law Review* 286.

of South Africa, transformative constitutionalism aims to tackle racial inequalities that were created in the past into a future that establishes a just and equal society. In other words, transformative constitutionalism provides the opportunity 'to heal the wounds of the past and guide us to a better future'.[132] I contrast the transformative constitutionalism approach to interpretation with the Ghanaian model of interpretation, to examine how constitutional rights such as non-discrimination, equality and other rights inherent in a democracy[133] could advance arguments to decriminalise section 104 of the COA, a law that engenders discrimination, inequality and social injustice.

Unlike the Constitutional Court of South Africa, which adopts the transformative constitutionalism approach to interpreting the South African Constitution, the Supreme Court of Ghana adopts the modern purposive approach to interpreting the Ghanaian Constitution. In *Tufour v Attorney General*,[134] the Supreme Court of Ghana held that the 1979 Constitution of Ghana is 'a living instrument capable of growth.[135] The court reasoned that a constitution was not an ordinary document whose interpretation should be restricted to a strict interpretation of its words only. The court noted that a national Constitution embodied the history and values of the nation and should therefore be interpreted by resorting to the words and 'spirit' of the Constitution.[136]

The approach to interpretation in *Tufou*r in 1980 was the preferred approach to interpretation until the Supreme Court held in 2003 that a modern purposive approach to interpretation (MOPA) is the best way to interpret the 1992 Constitution of Ghana.[137] The court meant that MOPA does not rely on the bare words of the Constitution alone but also the core values of the Constitution.[138] The court established that the core values of the Constitution of Ghana include the fundamental human rights provisions in the Bill of Rights in chapter 5 and the Directive Principles of State Policy (DPSP) in chapter 6 of the Constitution.[139] Thus, the MOPA is similar to interpreting the Constitution as 'a living instrument capable of growth', used in *Tufour* in 1980. The only difference is that the MOPA

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[132] P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 352.
[133] S Tamale 'Confronting the politics of nonconforming sexualities in Africa' (2013) 56 *African Studies Review* 42 argues that 'the question of sexuality is an intrinsic part of the democratic struggle on the continent [of Africa], and not peripheral to it'.
[134] *Tufour v Attorney-General* [1980] *GLR 637.*
[135] As above.
[136] As above.
[137] *Asare v Attorney-General* [2003-2004] *SCGLR 823.*
[138] As above 829.
[139] As above.

places reliance on fundamental human rights as a 'core value' of the Constitution which must be respected when interpreting the Constitution.

Chapter 4 discusses the MOPA and uses it as a tool to analyse the Bill of Rights and the DPSP and assesses the extent to which it protects the rights of sexual minorities in Ghana.

### 1.5.4 Sankofa[140]

This study situates the discussion of sexual minority rights in Ghanaian and African philosophical thought of 'Sankofa', which means 'go back for it'.[141] Sankofa is a traditional Ghanaian symbol of the Akan speaking people,[142] of a 'mythical bird flying forward with its head turned backwards',[143] with an egg in its mouth which 'represents the "gems", or knowledge, of the past upon which wisdom is based. It also signifies the generation to come that will benefit from that wisdom'.[144] Sankofa, represented by the mythical bird is also a philosophy, a way of life and a form of communicating Akan ideas,[145] 'religious, aesthetic and cultural values'.[146] When expressed as an Akan proverb, *'se wo were fi na wosankofa a yenkyi'*,[147] it means 'it is not wrong or shameful to go back for something you have previously forgotten'. Thus, the Akans believe that the wisdom of their forebears is critical to understanding their history, navigating the present and carving out a future based on an accurate representation of their culture and who they are as a people. Therefore, 'the Akan people are of the opinion that the past serves as a guide when planning for the future and obtaining wisdom of the past enables planning for a stronger future'.[148]

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[140] I have adapted the Sankofa theory from a paper I recently published. See EY Ako 'Domesticating the African Charter on Human and Peoples' Rights in Ghana: Threat or promise to sexual minority rights?' (2020) 4 *African Human Rights Yearbook* 99 105-109.

[141] JET Kuwornu-Adjaottor et al 'The philosophy behind some Adinkra symbols and their communicative values in Akan' (2015) 7 *Philosophical Papers and Review* 22.

[142] Akan is a dominant umbrella language group in Ghana with many dialects such as Fante, Asante, Akuapem and many others. It is spoken by over half of the population in Ghana and used as a medium of trade in almost all the regional capitals of Ghana. See Kuwornu-Adjaottor et al (as above) 24.

[143] KP Quan-Baffour 'The wisdom of our forefathers: Sankofaism and its educational lessons for today' (2008) 7 *Journal of Educational Studies* 22 25.

[144] A K Beale 'Daring to create change agents in physical education: The Sankofa philosophy' (2013) 84 *Journal of Physical Education, Recreation & Dance*' 7.

[145] K Gyekye *African cultural values: An introduction* (2002) 125.

[146] J Nkansah-Obrempong 'Visual theology – the significance of cultural symbols, metaphors and proverbs for theological creativity in the African context: A case study of the Akan of Ghana' 5 *Journal of African Christian Thought* 38 39.

[147] Quan-Baffour (n 143 above) 25.

[148] J Slater 'Sankofa – the need to turn back to move forward: Addressing reconstruction challenges that face Africa and South Africa today' (2019) 45 *Studia Historiae Ecclesiasticae* 1.

From the ground-breaking work of Kwadwo Appiagyei-Atua, we learn that the Akans through proverbs, folklore and symbols like Sankofa reflect Akan philosophy and contribution to the concept of human rights.[149] Some of these rights, in Akan philosophy and culture, include the right to life, freedom of speech and expression. Inherent in the right to life, is the right to human dignity and the freedom of the individual in such a cultural setting to claim their 'individuality' and achieve their full potential in a society that also realised communitarian values. Charles Ngwena notes that embracing sexual diversity, including same-sex sexual relationships is part of our 'Africanness',[150] and there is evidence to back the claim, as Tamale asserts, that various African cultures accepted and embraced same-sex sexuality in pre-colonial times.[151]

Therefore, while Africans valued heterosexual relationships that produced children that continued the generations of people, it still accepted and valorised consensual same-sex relationships as a significant part of society for war, abundant farm yield and the expression of the diverse nature of humanity.[152] In the Ghanaian context, same-sex relationships existed before, during and after colonialism had officially ended.[153] Pre-colonial Ghanaian cultures had elaborate laws governing their societies, some of which categorised certain sexual conduct as offences against the community, but did not punish consensual same-sex conduct.[154] Colonialism introduced 'unnatural carnal knowledge' laws to punish consensual same-sex relationships.[155] Therefore, I contend that the theory or concept of 'Sankofa' implores us to revisit our pre-colonial past and take lessons from our culture 'to serve as a guide for planning the future'.[156] It is also an opportunity to

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[149] K Appiagyei-Atua 'Contribution of the Akan philosophy to the conceptualisation of African notions of human rights' (2000) 33 *Comparative and International Law Journal of Southern Africa* 165.

[150] C Ngwena *What is Africanness? Contesting nativism in race, culture, and sexualities* (2018) 198-199 204. Ngwena's book discusses the essence of being an African from a historical and contemporary perspective.

[151] Tamale (ed) *African sexualities* (n 48 above) 1 2.

[152] JO Ambani 'A triple heritage of sexuality? Regulation of sexual orientation in African in historical perspective' in S Namwase & A Jjuuko (eds) (2017) *Protecting the human rights of sexual minorities in contemporary Africa* 14.

[153] I Signorini 'Agonwole Agyale: The marriage between two persons of the same sex among the Nzema of southwestern Ghana' (1973) 2 *Journal de la Societes des Africanistes* 221.; SO Dankwa 'The one who first says i love you: Same-Sex love and female masculinity in postcolonial Ghana' (2011) 14 *Ghana Studies* 223; SO Dankwa (2009) 'It's a Silent Trade: Female same-sex intimacies in postcolonial Ghana' (2009) 17 *Nordic Journal of Feminist and Gender Research* 192.

[154] JM Sarbah *Fanti customary laws* a brief introduction to the principles of the native laws and customs of the Fanti and Akan sections of the Gold Coast with a selection of the cases thereon decided in the law courts (1897); RS Rattray *Ashanti law and constitution* (1929); GBN Ayittey *Indigenous African institutions* (2006).

[155] See Criminal Offences Act, Act 29, 1960 first enacted as Ordinance no 12 of 1892 which criminalised 'unnatural carnal knowledge'. See JS Read 'Ghana: The Criminal Code, 1960' (1962) 11 *The International and Comparative Law Quarterly* 272.

[156] Appiagyei-Atua (n 24 above) 168.

embrace contemporary developments into our Ghanaian and African cultures, taking cognisance of the past that our forebears laboured to build.[157]

Scholars have used *Sankofa* theory to emphasise the need to return to the functional aspects of African tradition and culture that existed in the past to serve as a guide for a better future. The theory has been used in education[158] to emphasise the need to de-colonise educational curriculum to depart from an education that reflects the ideals of the West to one that encapsulates African values and needs.[159] It emphasises the salient aspects of the *Sankofa* theory including 'humaneness, respect for life and human dignity'.[160] The theory has addressed issues in mental health,[161] the inevitable changes that occur with currency denomination,[162] and employed in the arts and literature for its relevance to society.[163] It also symbolises unity and remembrance for Africans in the diaspora.[164]

Unlike previous studies, this thesis uses *Sankofa* to interrogate claims that the Ghanaian Constitution is incompatible with sexual minority rights. It is a useful theory for this study, especially considering claims that same-sex relationships never existed in Ghana and Africa and only a colonial importation. It is also useful and representative of the African and Ghanaian conception of fundamental human rights, emphasising the right to dignity, equality, non-discrimination, and privacy. Alongside historical evidence of the existence of sexual minorities in Ghana, and other African societies, it makes an interesting case for policymakers, constitutional drafters, and legal officers to reconsider the validity of claims that same-sex relationships never existed in Ghana and Africa. Using *Sankofa* as a framework for critiquing same-sex relationships, therefore places the spotlight on sexual minority rights in the Ghanaian context.

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[157] As above.
[158] Quan-Baffour (n 143 above). See also MO Ajei 'Educating Africans: Perspectives of Ghanaian philosophers' (2018) 19 *Phronimon* 1.
[159] Quan-Baffour as above 26.
[160] As above 28.
[161] B Adomako et al 'Sankofa: Understandings of culture and its relevance for mental health provision in Ghana' (2016) 6 *Research on Humanities and Social Sciences* 232.
[162] VAA Dzokoto 'A bird, a crocodile, and the 21st Century cowrie shell: Analysing Ghana's currency change' (2011) 42 *Journal of Black Studies* 715.
[163] 'Look homeward, angel: Maroons and mulattos in Haile Gerima's Sankofa' S Kandé & J Karaganis (1998) 29 *Research in African Literatures* 128. See also P Appiah 'Akan Symbolism' (1979) 13 *African Arts* 64; S Benagr & TBK Ofosu 'Ghanaian Screendance Perspectives: The nuance of 'Sankofaism' as emerging aesthetics and rejection of orthodoxy' (2016) 6 *The International Journal of Screendance* 78.
[164] CN Temple 'The emergence of Sankofa practice in the United States: A modern history' (2010) 41 *Journal of Black Studies* 127.

## 1.6 Limitations of the study

The study addresses the obstacles to the decriminalisation of consensual same-sex conduct in Ghana and ways of overcoming these obstacles. It, therefore, has some limitations.

First, the study is confined to the context of Ghana. Even though it makes use of laws, decisions of courts and other sources of information from other countries, the focus of the study remains Ghana. The reference to other countries only serves to highlight the issues and does not extend the study to such countries.

Second, there are limitations to the study regarding the research approach and method employed to arrive at the research findings. The nature of the study required analysis of historical, anthropological, and legal materials which were readily available as secondary sources. The study, therefore, lends itself to a doctrinal research approach which relied on sources that were available in textbooks, journal articles and internet sources to analyse the research problem. Even though empirical research could have been utilised, the nature of the study and the vast literature available through desk research rendered this redundant. The reliance on a qualitative desk-based and theoretical approach was because of the fact that most of the information required for the research were available as secondary sources and informants that could confirm the veracity of these documents had long passed on.

Third, the study focuses on the sodomy law of 'unnatural carnal knowledge', the factors that sustain it on the statutes and how these factors may be dismantled using a judicial approach. There might be other avenues for decriminalisation such as legislative or executive, which is discussed briefly, but the study focuses mainly on what the judiciary may do when confronted with the issue.

Fourth, the study is limited to section 104(1)(b) of the COA of Ghana and the offence of unnatural carnal knowledge. Thus, even though the study relates to the rights of LGBT persons, the study narrows mainly on consensual same-sex conduct between men. *Prima facie,* sex between females may not be covered under this situation, but it potentially covers such conduct as well.

Fifth, sexual minority rights implicate all the rights in the Constitution of Ghana. However, an analysis of all these rights may not be adequately discussed in a limited study of this nature. Therefore, the study focuses on the right to equality and non-discrimination, dignity, privacy and other rights inherent in a democracy but not explicitly mentioned in the Constitution. Other rights such as the right to association, movement and expression also implicate sexual minority rights, but these are not discussed in the thesis.

Lastly, even references are made to events in 2021, the study is confined to the position of the law as of December 2020.

## 1.7 Definitions of terminology used in the research

I use four main key terms in this research. The first is 'LGBT', which stands for lesbian, gay, bisexual, and transgender.[165] According to Oloka-Onyango, the term LGBT is 'the dominant method of description worldwide. However, the terms used in the LGBT alphabet are rooted in culturally specific norms and values that are not necessarily shared by African people'.[166] In this regard, this study uses the term LGBT not in its cultural sense but as a descriptive term for homosexuals and non-heteronormative sexual orientations.

Second, the term 'sexual minorities' or 'sexual minority rights' is used frequently in this study to refer to 'people whose preferences, intimate associations, lifestyles or other forms of personal identity or expression actually or imputed derogate from a dominant normative-heterosexual paradigm'.[167] Similarly, 'rights of sexual orientation and rights of sexual minorities denote (interchangeably) rights against discrimination based on sexual orientation.'[168]

Third, 'homophobia' means 'a strong dislike and fear of homosexual people'.[169] The term homophobia is used in this study to mean all forms of dislike and fear of LGBT persons and everything associated with the group.

Finally, a reference to same-sex acts in this research refers to consensual same-sex conduct in private between adults unless otherwise specified.

## 1.8 Research approach/methodology

The primary research approach for this study is a qualitative desk research. The study analyses, segments and makes thematic deductions from textbooks, journal articles, research reports of human rights civil society organisations (CSOs) and country reports to treaty monitoring bodies relating to sexual minority rights. The study also utilises information from internet websites that report issues related to same-sex relationships in Ghana. The most popular sites include the *GhanaWeb* and *myjoyonline* which regularly reports on statements made by politicians, traditional

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[165] Viljoen (n 103 above) 259.
[166] J Oloka-Onyango 'Debating love, human rights and identity politics in East Africa: The case of Uganda and Kenya' (2015) 15 *African Human Rights Laws Journal* 31.
[167] Heinze (n 89 above) 61.
[168] As above.
[169] Oxford Advanced Learner's Dictionary international student's edition 9th edition.

leaders and civil society organisations on consensual same-sex relationships in Ghana. Most of the news items are those discussed on radio, in Parliament or other news sources which are then reported on these websites. By utilising these websites and setting up an alert for news relating to consensual same-sex acts using search items such as 'homosexuality', 'gay and lesbian' most of the information used for chapter 3 were obtained for this thesis. The study also relies on feature articles on homosexuality in Ghana in newspapers, mainly the *Daily Graphic*, a national daily newspaper that reports on stories from every region and district of Ghana.

For research question 1, which examines section 104 of the COA as a colonial import, the study relies on historical texts from libraries in Ghana and South Africa that discusses the pre-colonial and colonial period in Ghana and the introduction of sodomy law in Ghana. The sources also discuss the customs of the people of pre-colonial Ghana and the different offences recognised under customary law during that era.

In addressing research question 2, which evaluates social institutions like culture, religion and politics that help in entrenching sodomy law, I analyse historical data relating to customary law retrieved from national archives and other writings by scholars in pre-colonial and colonial times on sociology and anthropology. The study also uses internet sources that report interviews and press statements released by traditional, religious, and political leaders relating to same-sex sexual acts.

The third research question discusses the Bill of Rights in the Constitution, approaches to constitutional interpretation and the legal culture of Ghana. The textual review, therefore, focuses on the Bill of Rights in the Constitution of Ghana, the approaches to interpretation the Supreme Court of Ghana and the Constitutional Court of South Africa use in critical human rights cases, and the case law about interpreting the Bill of Rights. This part of the study examines the prospect of interpreting the Bill of Rights to decriminalise consensual same-sex conduct by relying on the Constitution, constitutional theories, case law and the approach of other courts in other jurisdictions.[170]

The last research question relates to the role of international law and international human rights mechanisms to decriminalise same-sex conduct in Ghana. The study examines Ghana's relationship with human rights mechanisms such as the United Nations Universal Periodic Review Mechanism (UPR), the Human Rights Council, and the African Commission. The study also reviews the potential

[170] Vilhena et al (eds) *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (2013).

use of international human rights norms by the Supreme Court of Ghana to decriminalise same-sex acts as it has done in less contentious human rights cases.

## 1.9 Significance of the study

The study contributes to the discourse on sexual minority rights in Ghana and West Africa. It aims to make up for the dearth of research on this part of the world on sexual minority rights. It contributes to an understanding of the context of sexual minority rights in Ghana and addresses claims that same-sex sexual desires are un-Ghanaian.

The study focuses on pre-colonial customary laws but also analyses contemporary constitutional rights and international human rights law that offer equal protection for everyone, using an interdisciplinary approach. It appraises the historical, anthropological, religious, cultural, and socio-political environment of sexual minority rights within the legal framework. This interdisciplinary approach provides an understanding of the context of criminalisation of consensual same-sex sexual conduct and homophobia in Ghana, and ways of surmounting these obstacles to realise decriminalisation of the offence of 'unnatural carnal knowledge'.

The study also employs the decolonial, Sankofa, transformative and living instrument theories to illuminate the subject of sexual minority rights in a pre-colonial, colonial and the post-colonial democratic society of Ghana. The use of these theories, particularly the Sankofa theory, situates the study within an indigenous Ghanaian context to appreciate claims that consensual same-sex conduct is foreign and alien to the culture of Ghanaians. The decolonial theory help interrogate the effects of colonialism on the laws, culture and social practices of the colonised people, even after colonialism has ended. These approaches offer an opportunity to understand the origins of sodomy law in Ghana, the social institutions that maintain its existence and how such a law may be decriminalised. Two other theories, the transformative constitutionalism and the living approach to interpretation interrogate the usefulness of adhering to colonial-era laws that have been overtaken by contemporary constitutional developments and the duty it imposes on the judiciary as the vanguard of the rights of the people.

Finally, the study also advances our knowledge of how constitutional rights, with international human rights law, could be used, in Ghana, to analyse sexual minority rights. It is not an exercise in merely analysing constitutional rights to equality, non-discrimination, dignity, and privacy and how they relate to sexual minority rights. It considers extrajudicial factors such as the legal culture and the socio-political environment among others and how they impact the outcome of sexual minority rights litigation, after careful assessment of the approach of the Supreme Court to human rights

cases. It is, therefore, both a constitutional rights assessment and a strategic approach to litigating sexual minority rights issues. The international human rights angle adds another dimension to the study, even as it draws linkages between the Bill of Rights in the Constitution of Ghana and international human rights norms. The participation of Ghana in the development of international human rights norms at the international plane debunks the Eurocentric criticism of international law. It highlights the importance of using international law norms and Ghana's commitment to these norms as a tool for the decriminalisation of consensual same-sex conduct.

The significance of the study, therefore, lies in its contribution to the discourse on sexual minority rights in the global South, but specifically in the Ghanaian context with ramifications for other African countries. It makes use of an interdisciplinary approach and a theoretical framework that is suited to interrogating the antecedents of consensual same-sex conduct in an indigenous African context, while adopting contemporary constitutional and international human rights norms, in a *Sankofa* fashion, to address the need for the decriminalisation of consensual same-sex conduct in Ghana.

## 1.10 Outline of chapters

I arrange this research in six chapters, as follows:

### Chapter 1

Chapter 1 comprises seven sections: the background and motivation for the study; a statement of the research problem; the research questions; the assumptions of the study; the literature review, limitations of the study; the research method; and the structure of the chapters.

### Chapter 2

Chapter 2 examines the phenomenon of homosexuality from a historical perspective in Ghana to the present. It critiques the existence or otherwise of homosexual practices in Ghanaian communities before colonisation and interrogates, whether the indigenous communities regulated or criminalised it. It also analyses the introduction, scope, and effects of the sodomy law on current legal developments in Ghana.

### Chapter 3

Chapter 3 critiques the use of religion, culture, and politics as a basis to restrict the sexual autonomy and freedom of LGBT persons with particular reference to Ghana from a decolonial perspective. I

propose that there is a need to rethink the underlying reasons-religion, culture, and politics- for criminalising homosexuality in Ghana.

### Chapter 4

Chapter 4 analyses the normative legal basis for protecting sexual minority rights in Ghana and argues that criminalisation of consensual same-sex conduct is unconstitutional, using the theoretical lens of purposive interpretation of the Constitution as a living instrument.

### Chapter 5

Chapter 5 appraises the importance and role of international law in the decriminalisation project in Ghana. Through an analysis of Ghana's relationship with global and regional human rights mechanisms, the treaties Ghana has ratified and the use of international human rights norms by the Supreme Court, the thesis argues that despite the dualist approach to international law in Ghana,[171] and the attitude of the courts towards the application of international law in its domestic legal system,[172] It is still probable for the courts to adjudge that the Constitution prohibits discrimination on the grounds of sexual orientation.

### Chapter 6

In chapter 6, I summarise the key points made in the preceding chapters and suggest strategies for the decriminalisation of section 104 of the COA.

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[171] Constitution of Ghana art 75(2) a & b requires treaties executed by the executive to be domesticated by parliament.

[172] The position of the courts has been ambivalent in the past, but the dominant and recent position suggests that unless domesticated a treaty has no effect. See for instance the recent case of Mrs. Margaret Banful & Henry Nana Boakye v The Attorney-General & The Ministry of Interior writ no J1/7/2016 (22 June 2017) (The Guantanamo Bay case) Where the court held that an agreement between Ghana and the United States was unconstitutional because it was not domesticated by Parliament. For a review of the case see EY Ako & RF Oppong 'Foreign relations law in the constitutions and courts of Commonwealth African countries' in C Bradley (ed) *The Oxford Handbook of foreign relations law* (2019) 583 595-597.

# CHAPTER 2: A CRITIQUE OF CONSENSUAL SAME-SEX RELATIONS AND INTRODUCTION OF ANTI-SODOMY LAW IN GHANA

## 2.1 Introduction

Many Ghanaians routinely contend–and in fact, passionately believe- that homosexuality is part of western culture and not found in any Ghanaian community or culture. They claim that homosexuality does not reflect Ghanaian culture or society in the past or the present and is part of a foreign cultural infiltration that threatens Ghanaian culture.[1] They state that if any homosexuals are living in Ghana at all, they might be people who have travelled outside Ghana and learnt such behaviour from western countries or from foreign sex tourists who have introduced it to Ghana.[2] Some Ghanaians therefore consider non-heterosexuals as infiltrators who are a threat to Ghanaian culture. There are often calls to arrest and imprison them or offer them psychological and spiritual help or 'correction'.[3] On some occasions, people believed to be members of the LGBT community have been verbally and even physically attacked.[4]

People who argue that homosexuality has never existed as part of any Ghanaian culture and that it is only a recent phenomenon in the post-colonial state may have to rethink their position. I suggest that a careful examination of the history of the pre-colonial societies that existed in the Gold Coast, now Ghana, reveals that consensual same-sex practices and relationships existed at least in some communities and cultures.[5] However, the customary laws of these pre-colonial Ghanaian communities did not regulate or punish such conduct — which may be a testament to

[1] E Baisley 'Framing the Ghanaian LGBT rights debate: competing decolonisation and human rights frames' (2015) 49 *Canadian Journal of African Studies* 383 390-391.
[2] As above 390.
[3] As above 394; K Essien & S Aderinto 'Cutting the head of the roaring monster: Homosexuality and repression in Africa' (2009) 30 *African Study Monograph* 121; PA Amoah & RM Gyasi 'Social institutions and same-sex sexuality: Attitudes, perceptions and prospective rights and freedoms for non-heterosexuals' (2016) 2 *Cogent Social Sciences* (2016) 1; WJ Tettey 'Homosexuality, moral panic and politicised homophobia in Ghana: Interrogating discourses of moral entrepreneurship in Ghana media' (2016) 9 *Communication, Culture and Critique* 86.
[4] Human Rights Watch 'No choice but to deny who I am' violence and discrimination against LGBT people in Ghana' (2018).
[5] I Signorini '*Agonwole agyale*: the marriage between two persons of the same sex among the Nzema of Southwestern Ghana' (1973) 2 *Journal de la Societe des Africanistes* 221.

their acceptance of such conduct. Arguably, it is instead the British colonial administrators who introduced anti-sodomy laws to control, regulate and suppress such conduct or relationships.

The introduction of anti-sodomy laws into pre-colonial Africa,[6] and Ghana,[7] suggests that homosexual practices existed in the Ghanaian and African communities before colonisation. Criminal codes that the British Empire enacted for its colonial territories in Africa were not tailor-made codes to address specific issues found in the colonies, but were instead responses to the knowledge that same-sex acts were a common feature of human society from their own experience in the United Kingdom and elsewhere.[8] Introducing these anti-sodomy laws, side-by-side Christian religion, which regarded homosexuality as abominable,[9] subjugated indigenous African and traditional Ghanaian religion(s). In the same way that British laws subjugated traditional religion as paganism or fetishism, traditional cultural practices suffered a similar fate. This ensured that same-sex sexual conduct had no place in the religious and cultural practices of the people. This dual process of introducing law and religion that criminalised consensual same-sex sexual conduct, forced underground, and gradually suppressed from the practices of the people. The result is that even in modern-day Ghana, law, religion, and culture have suppressed the practice of homosexual practices in the various cultures leading to the claim that homosexuality never existed in the past and does not exist in contemporary Ghanaian society.[10]

Against this background, this chapter examines the existence or otherwise of homosexual practices in Ghanaian communities before colonisation and interrogates, whether the indigenous communities regulated or criminalised it. It also analyses the introduction, scope and effects of the sodomy law on current debates and ongoing legal developments in Ghana.

Part I of this chapter analyses the nature of Ghanaian societies that existed before the introduction of colonialism. It analyses their customary legal systems to determine if these communities regulated consensual same-sex conduct. This analysis establishes a background to determine the legitimacy of introducing British anti-sodomy law, taking into consideration the local conditions that existed before its introduction.

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[6] Human Rights Watch 'This alien legacy the origins of 'sodomy' laws in British colonialism' (2008).
[7] See for example the Gold Coast Criminal Ordinance no 12 of 1892 which first introduced the criminal offence titled 'unnatural carnal knowledge' in Ghana.
[8] See for instance, Report of the committee on homosexual offences and prostitution (1957).
[9] Leviticus chapter 20 verse 13.
[10] Baisley (n 1 above) 390.

Part II discusses the introduction of British colonialism and anti-sodomy laws by the colonial administrators and analyses the imposition of British laws on the Gold Coast Colony which at the time included Lagos,[11] and its effects on the laws, culture and way of life of the people of the Gold Coast. It also examines the nature and content of Ghana's anti-sodomy law and its effect on regulating consensual same-sex sexual conduct.

Part III analyses how the history of anti-sodomy law informs the present legal position and ongoing legal developments. I analyse the appropriation and continuation of the offence of 'unnatural carnal knowledge' in the criminal law of the post-colonial state of Ghana and its effects on the lives of persons who have a same-sex sexual orientation and those who practice consensual same-sex sexual acts (whether in or outside a relationship).

Part IV concludes the chapter with a summary of the salient points canvassed earlier in the chapter and identifies emerging trends in Ghana relating to sexual minorities. It also sets the tone for a discussion in chapter 3 of the barriers that impede the decriminalisation of the offence of 'unnatural carnal knowledge'.

## Part I: Pre-colonial Ghana, the legal system, the existence of homosexual relationships and attitudes towards it

### 2.2 Pre-colonial governance and legal system of the Gold Coast

Debates on same-sex sexual conduct in Ghana concentrates on the quest for homosexual freedom and its ramifications, the acceptance of homosexuality, and violence against LGBT persons.[12] This focus neglects the historical antecedents of the current law that criminalises consensual same-sex acts.[13] Research does not also examine the nature of the Ghanaian societies that existed before the colonial government introduced this law and does not look into whether it accepted such practices. Furthermore, research does not discuss the organisation of these pre-colonial societies, or interrogate whether they regulated or criminalised consensual same-sex conduct, or whether there were persons who engaged in same-sex acts (or relationships) before the early European traders and British coloniser arrived in the Gold Coast.

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[11] Lagos is a state in the Federal Republic of Nigeria but was administered as part of the Gold Coast during the colonial period.

[12] See for instance K Essien and S Aderinto 'Cutting the head of the roaring monster: Homosexuality and repression in Africa' (2009) 30 *African Study Monographs* 121; Baisley (n 1 above); Human Rights Watch 'No choice but to deny who I am' (n 4 above).

[13] Criminal Offences Act of Ghana, Act 29 of 1960, sec 104 (1).

The central question in this section, therefore, is whether there was a governance and legal system in pre-colonial Ghana, which approved of consensual same-sex conduct if such practise existed. The section also assesses the legitimacy of introducing anti-sodomy law, taking cognisance of the local conditions that existed at the time of its introduction.

In order to make this assessment, I examine the nature of the communities, their governance structure and their legal systems including their customary laws in the immediate sections below. In the subsections that follow, I analyse the existence of homosexual conduct in these communities and the attitude of these communities towards such practices.

### 2.2.1 The pre-colonial communities

As currently understood from a legal, cultural and nationalistic perspective, Ghana never existed as one complete entity before British colonisation in the late 1800s and early 1900s. Before independence on 6 March 1957, the territory now known as Ghana comprised various ethnic blocks making up the 'Gold Coast'.[14] The name 'Gold Coast' changed to 'Ghana' on 6 March 1957, to reflect the reality of the newly independent state. A discussion of pre-colonial communities therefore refers to the communities that existed in the Gold Coast territory, before independence. These communities comprised the Fanti speaking people along the coast in the south, extending downwards to the capital city of Accra, which consists predominantly of Ga speaking people, and further to the northern part of the coastal area where the Ewe-speaking people are located. The communities that lived further away from the coastal areas are closer to forest vegetation and are 'essentially people of the forest'.[15] Most of them belong to the larger group of Akan speakers that Ellis calls Tshi speaking people.[16] These communities, 'inland to the north of the Fantis, are the Assins, Adansis, and Ashantis'.[17] As well, 'behind the open country occupied by the Ga people from Accra to the volta, forest again prevails…inhabited by Tshi-speaking tribes, namely, the Akims, Akwapims, and Akwamus'.[18] The northern part of the Gold Coast 'stretched from Wa in the west to Mamprugu and Dagbon in the east'.[19] Consequently, as noted by one scholar, the current nation-

[14] AB Ellis *A history of the Gold Coast of West Africa* (1893) provides a comprehensive discussion of early Europeans who came to West African and the Gold Coast, the people of the Gold Coast and the territory they occupied before colonialism.
[15] AB Ellis *The Tshi-speaking speaking peoples of the Gold Coast of West Africa their religion, manners, customs, laws, language etc* (1887) 2.
[16] As above.
[17] As above 3.
[18] As above 3.
[19] R Addo-Fenning 'Ghana under colonial rule: An outline of the early period and the interwar years' (2013) 15 *Transactions of the Historical Society of Ghana new series* 39 40.

state called Ghana was not one entity, but colonised by the British gradually, first through an agreement with the coastal states, and then by conquest and assumption of protectorate and plebiscite status.[20] This amalgamation underscores the different ethnic groups comprising the country Ghana, and the many cultures and customary laws of the country. Therefore, as rightly defined, the customary law of Ghana refers to the laws practiced in particular communities by different ethnic groups.[21] This legal definition of the customary law is a product of history. However, over time and living side by side, inter-ethnic marriages and other interactions, similarities develop in the various customary practices even though significant differences remain.

### 2.2.2 Governance structure of the communities in pre-colonial Ghana

The communities that existed in pre-colonial Ghana were well-organised people with a system of laws and institutions that managed these societies and enforced their customary laws.[22] Before the British colonised the territory now called Ghana in the 1800s, the Gold Coast,[23] as it was then, comprised several ethnic groups and tribes that governed themselves. These groups had leaders who were chiefs or kings, village heads, heads of clans and extended families, and heads of the nuclear family who formed the basis of the society. There was, therefore, a well organised political structure that started from the family level extending upwards to the chief or king of a whole village or community and his council of elders, composed of people who traced their ancestry from a joint founder or founders of the community. As the community expanded, it included other people who did not originally hail from this community. They may have settled there, learned the language of the community, observed the customs and rituals, and obeyed the customary rules of the area enforced by a chief or king through a long line of other political leaders who held positions either at the family level or any level high up the structure.

Scholars emphasise that this closely-knit political system ensured that the society observed a sense of belonging as one community. Speaking about the Akan group of Ghana, which make up about half of the Ghanaian population, and the Fantis in particular, who belong to this umbrella

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[20] HA Amankwah 'Ghanaian law: its evolution and interaction with English law' (1970) 4 *Cornell Law Journal article* 3 39.

[21] Article 11(3), Constitution of Ghana, 1992.

[22] KY Yeboa 'The history of the Ghana legal system: The evolution of a unified national system of courts' (1991-92) 18 *Review of Ghana Law* 1; see also PM Christian 'Administration of justice by traditional authorities in Ghana: an exposition on the law and practice' in RF Oppong and K Agyebeng (eds) *A commitment to law, development and policy a festschrift in honour of Nana Dr. SKB Asante* (2016) 278.

[23] For ease of reference and convenience, the name Ghana shall be used throughout this thesis instead of the original name, Gold Coast, which was used to describe the territory now called Ghana during the colonial period.

group, Sarbah discusses the organisation of this group and the way they governed themselves.[24] These communities derived and respected power in a well organised hierarchical source. He observes that the system of governance of this group of people right from the level of the family to the head of the entire community was well organised and that the system of governance was patriarchal, admitting only the older males as leaders.[25] Sarbah notes:

> The family group being the unit of society among the peoples on the Gold Coast, Asanti, and neighbouring states, in the head or patriarch of the family, resides the supreme power. The towns originally founded and occupied by single family groups, the members whereof, bound together by ties of kindred ... As the family group gets larger, and the village community grows, and the households increase in number, the public or general affairs of the community are guided by the patriarch of the family, now the headman of the village, who acts with the assistance of the village council composed of the heads of the other family groups or households and others, usually old men. The village council thus represents the fountain-head of the common life, and its determination finds expression in the popular voice.[26]

This description is also reminiscent of others like the Ga, Ga-Adamgbe and other ethnic groups or communities which also later became part of Ghana such as the northern territories and the southern Togoland areas.[27]

It is this closely knit society with a well organised social and political structure that administered the binding rules of the community known as customary laws. These indigenous laws known as customary law is a unique set of laws that emanate from the people and their leaders, practised from time immemorial when the communities started forming and existed before the colonisation of the Gold Coast. It is not a uniform law that cuts across all communities in Ghana, because the nature and content of the customary law differ from community to community.[28] There are as many customary laws as there are communities in Ghana. Even among the Akan speaking group, there

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[24] JM Sarbah *Fanti customary laws* a brief introduction to the principles of the native laws and customs of the Fanti and Akan sections of the Gold Coast with a selection of the cases thereon decided in the law courts (1897).
[25] As above 10-15.
[26] As above 21.
[27] Amankwah (n 20 above) 39. The author notes that the territory now known as Ghana was acquired in three phases of cession, protection, and trust. The Coastal towns where the Fantis lived was acquired by cession through the Bond of 1844, Ashanti was acquired through conquest, the Northern territory of Ghana through protectorate status in 1912 and the Volta Region became part of Ghana through 'a UN supervised plebiscite'.
[28] Constitution of Ghana 1992 art 11(3); see also HJAN Mensah-Bonsu 'Of nuts in the ground not being groundnuts- The current state of customary law in Ghana' (2002-2004) 22 *University of Ghana Law Journal* 1, for a critique of this definition.

are some differences in their customary laws even though there are many similarities among the different ethnic groups. Customary law is a body of law that emanates from the customs that are closely linked to the people and reflect their way of life, culture and even deeply felt religious inclinations. As a result, some scholars define customary law as 'the general, and fundamental principles…[which] sprung from usage, as well as laws or commands made by chiefs or rulers, headmen, the village council, headmen of clans, and company captains'.[29] Ocran also defines it as

> rules of custom, morality, and religion that the indigenous people of a given locality view as enforceable either by the central political system or authority, in the case of very serious forms of misconduct, or by various social units such as the family'.[30] Thus defined, customary law reflects what the communities stand for in terms of its binding rules and ideals, which was influenced by many factors, including morality and religion.[31]

### 2.2.3 The legal system and nature of customary law of pre-colonial communities

The legal system of the pre-colonial communities did not exist as one homogenous system throughout the entire Gold Coast. Various ethnic communities had different unwritten customary laws which their leaders administered to govern the lives of these communities. Customary law was not a 'static and immutable rule of law',[32] and a description of its origin and how it developed underscores this point.

According to Sarbah, the key to understanding how customary law originated is to look at customs and usage.[33] The family that founds a community observed certain customs or a way of life. As society expands beyond the initial family that founded the community, these customs move beyond the sphere of that family to guide the entire group. Through its observance and usage by the larger group, it becomes ingrained in the way of life of the people and over time gradually

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[29] Sarbah (n 24 above) 24. See however, AK Mensah-Brown 'The nature of Akan native law: A critical analysis (1970) 20 *Sociologus* 133, who argues that Sarbah's definition of customary law which includes the commands of the king is deficient as it 'blurs the fundamental distinction between (Akan) customary law and the body of laws or commands of rulers'. This is a distinction without a difference because usage of custom for a long period of time or commands of rulers can all be broadly classified as customary law.

[30] M Ocran 'The clash of legal cultures: The treatment of indigenous law in colonial and post-colonial Africa' (2006) 39 *Akron Law Review* 467; see also RF Oppong 'Managing legal pluralism: An examination of the colonial and post-colonial treatment of customary law under Ghana's legal system' in Mensah-Bonsu et al (eds) *Ghana law since independence history, development, and prospects* (2007) 443.

[31] Oppong as above, rightly observes that one reason why customary law survived colonial laws is the emotional attachment of many Ghanaians to this branch of law 443.

[32] Mensah-Brown (n 29 above) 130.

[33] Sarbah (n 24 above) 10-15.

becomes a norm of law which is binding.[34] Sarbah observes that as the group grows beyond a small family into a larger community, the rules previously observed by the small family unit governs the life of the entire community.[35]

Besides the rules originally made by the family that founded the community, the leader or king of the community sitting in council with his elders may also make customary laws to govern the community.[36] These laws are often rules that prohibit certain conduct, and the king will announce this new law to the people assembled at a public square. While this body of law also form part of the customary law of the people, Mensah-Brown challenges Sarbah's characterisation of the formation of customary law in this manner and attempts to underscore some difference in the formation of customary law. Mensah-Brown argues that the body of law that emanates from the king and his elders in council is distinct from a customary law that emanates from custom and usage and owes its 'validity to common and continuous usage dating back to antiquity'.[37] He contends that laws made by the king as 'commands are separate legal norms owing their positivity and validity to a conscious legislative act by the chief-in-council setting out those norms'.[38] The king usually makes such laws to prohibit certain conduct and they have sanctions attached to them. Often these laws are made by the king in response to a calamity that has befallen the community or in compliance with a message from the chief priest who is the spiritual head of the community. A person who breaks such a law violates the oath of the entire community and is punished accordingly.[39]

While Sarbah and Mensah-Brown's analyses are useful as an attempt to distinguish the sources and categories of customary law, they ultimately make the same point that customary laws, be they usages of custom or commands of the king, spring from the people as the source of law. Also, some rules emerge from the determination of cases that form part of the body of customary laws.

Customary law also emerges from judicial discretion in the determination of cases. For instance, in the determination of cases, new situations may arise to which the existing body of customary rules may have no specific rule or answer. In such situations, the elders adjudicating the matter rely on their discretion and knowledge of customary rules to formulate new rules which guides them

[34] As above 21-24.
[35] As above 23.
[36] As above 34.
[37] Mensah-Brown (n 29 above) 133.
[38] As above.
[39] Sarbah (n 24 above) 24.

to resolve the issue before them. Thus, 'native judges… applied 'discretion' in Akan judicial process. This happened very probably in those cases not provided for by any law, customary or otherwise'.[40] Some scholars observe that when the leaders of a community resolve novel cases, they resolve the matter by using newly made laws but make it seem as if they are restating an old customary rule.[41]

When the matter is resolved using this principle, a new customary law is formed, and the elders make this known to the people who observe it from that time onwards. So, laws made by the chief and his elders in council, through the usage of custom and also exercising discretion when adjudicating difficult cases, using their wisdom and knowledge of the time-honoured principles of the community to come up with an answer.

The people strictly observe the customary laws that are in currency in any community. The obedience to customary laws is not out of fear for the punishment that results from a breach of these laws but because they are 'in accordance with the general notions, views, and convictions obtaining or current among them'.[42] However, like laws in every community or country, breaches sometimes occur, which call for their resolution by the elders of the community. In the past, the elders who made up the political structure were the same people that resolved the breaches or disputes arising out of the observance or otherwise of customary laws. One scholar notes that there was no separation of powers in customary law because the same people who made the laws or were custodians of the law handed down from generation to generation, also administered justice.[43] The elders or leaders of the community who were the political leaders and also judges at the same time resolved breaches of customary law.

It is essential however that the customary law of the various communities of Ghana also yielded to one fundamental classification that distinguished between civil, private matters, from serious matters public and criminal matters which were offences against the state.

### 2.2.4 Classification of customary law

Another feature of the customary law of the communities in Ghana is its classification into two categories, civil and criminal law.

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[40] Mensah-Brown (n 29 above) 133.
[41] Sarbah (n 24 above) 23. See also Mensah-Brown, as above 129.
[42] Sarbah (n 24 above) 21.
[43] Mensah-Brown (n 29 above) 127.

On the one hand, civil law accounted for matters that were private between people or groups of people. Mediators resolved such matters through negotiation, conciliation, and other peaceful non-confrontational means of settlement.[44] Household or civil matters comprised issues relating to, for example, marriage, land tenure, and petty quarrels. The indigenous communities described 'household matters' as civil cases or petty matters that did not invoke sanctions apart from remedying the erring conduct through efforts by mediators or a lesser chief at the village level to resolve the matter.[45]

Other transgressions of the customary law that were severe and criminal had attendant punitive consequences. The community classified them into 'taboos of the state', or 'taboos that the state hates'.[46] Criminal infringements of the customary law were matters that offended the collective sensibility of the community. The communities regarded certain criminal violations as so grievous that they attracted severe sanctions even to the extent of the transgressor losing his or her life.[47] These matters included sexual offences, murder, suicide, theft, and cowardice in war.[48] A hierarchical judicial system that was established throughout the community from the family to the state level determined these offences.

### 2.2.5 Hierarchy of the legal system

Long before colonialism took hold in the Gold Coast, with the arrival of the Portuguese and European traders around 1471,[49] an elaborate system existed for resolving conflict administered by the indigenous authorities. Starting from the family to the lineage[50] level, there were recognised institutions that dispensed justice.

A three-tier legal hierarchy existed in the various communities in the Gold Coast and continues to exist even in contemporary times,[51] with very few variations. The three-tier system started with the family head at the base of the system, progressing through to the head of the lineage and finally to the leader or chief of the community. The head of the family resolved disputes between members

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[44] As above.
[45] As above.
[46] RS Rattray *Ashanti law and Constitution* (1929) 304-305; see also GBN Ayittey *Indigenous African institutions* (2006) 2nd edition who classifies such offences as 'public offences' 82.
[47] Rattray as above 305 309.
[48] As above.
[49] Yeboa (n 22 above) 2.
[50] As above. Lineage in Ashanti and Akan custom usually refers to a person's ancestry through the matrilineal line.
[51] As above. See also Mensah-Brown (n 29 above) 125.

of one family, while the head of the lineage resolved those between members of different families.[52]

The leaders of the community, headed by the paramount chief, inevitably settled disputes which the family or lineage could not settle. Accordingly,

> in each state, there were basically three rungs in the ladder of courts. They included (a) the town or village courts …. (b) courts of divisional chiefs… and (c) the paramount chief's court.[53]

Mensah-Brown affirms that this three-tier hierarchy of the legal system in pre-colonial Ghana was a regular feature of almost every Akan judicial system, with only one or two tribes who had a fourth tier of legal hierarchy.[54] For example, the Ashanti created this fourth and highest court when all the tribal groups formed a union and relinquished their state powers to an overlord of the entire tribe and formed a final apex court for the entire tribe.[55] This indigenous justice system structure dealt with both civil and criminal matters.

## 2.3 Sexuality under pre-colonial customs

Pre-colonial customs treated sexuality and sex between adults as a private act, with public law consequences and viewed it not only as a means of procreation but also as an act to be regulated by the criminal law. There were customary practices that celebrated the coming of age of members of the community, particularly women,[56] and there were expectations that every person capable of getting married would marry and found a family. This emphasises that heterosexual patriarchy was the dominant sexual, cultural model, but did not exclude other forms of sexuality.

The state had an elaborate list of sexual offences that were punishable, but did not punish consensual same-sex practices. This points to an indisputable fact that the pre-colonial communities did not view consensual same-sex practices as a violation of customary law.

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[52] As above.
[53] As above.
[54] Mensah-Brown (n 29 above) 125.
[55] As above.
[56] JK Anarfi and AY Owusu 'The making of a sexual being in Ghana: The state, religion and the influence of society as agents of sexual socialisation' (2011) 15 *Sexuality and Culture* 1 at 6.

### 2.3.1 Sexual offences under customary law

Even though sexual offences like other forms of offences in pre-colonial times were unwritten, they were ingrained in the minds and consciences of the people of the various communities because of how these offences came about or the processes involved in their punishment when a breach occurs. 'Some of the customary practices and offences are related to the history of the founding fathers of the community, marriage and puberty rites of the women, and others to the day-to-day life in the community'.[57] Members of the community knew these categories of offences very well because they had educated generations about them. These offences formed part of the history of the society and everyone ought to have known them, and sometimes, they formed part of cultural practices which were observed as part of the customs and usages of the people.

A significant category of criminal offences were sexual offences, many of which, when committed, was a breach of the taboo of the state and as deserving severe sanctions. For instance, Rattray writes that among the Ashantis, there were four main groupings of sexual offences.[58] These were 'incest, sexual intercourse with certain individuals other than those related by blood, sexual intercourse with an unclean woman, and adultery with another man's wife'.[59] Sexual intercourse in the bush was another category of sexual offence that was serious and punished severely.[60] A few illustrations of how these offences could occur, the punishment and sometimes the rituals that follow, shed light on how customary law dealt with sexual offences. I discuss two examples of sexual offences below.

Rattray discusses 'mogyadie' (loosely translated as 'incest'), which literally means 'the eating up of one's own blood'[61], a sexual offence among the Ashanti of the Gold Coast. This is a sexual offence that comprised having sexual intercourse with a person related by blood or a close relative, but also a person of the same clan.[62] According to Rattray, incest in indigenous Ashanti had 'a much wider range of meaning than that word implies in our own language'.[63] It included 'sexual intercourse with anyone of the same blood or clan, however, remote the connection, and even

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[57] GK Acquah 'Customary offences and the courts' (1991-92) 18 *Review of Ghana Law* 36.
[58] Rattray (n 46 above). See also Sarbah (n 24 above); JB Danquah *Gold Coast: Akan laws and customs and the Akim Abuakwa constitution* (1928); JE Casely-Hayford *Gold Coast native institutions* (1911).
[59] As above 304.
[60] As above 308.
[61] As above.
[62] As above. Among the Ashanti and Akan people, a clan is defined as 'a group of families who are related to each other' and this definition is confirmed by the Oxford Advanced Learner's dictionary, international student's edition, 9th edition (2015).
[63] Rattray was British, therefore the people and the language he refers to is English.

cases where it would not be possible to trace direct descent'.[64] The wide-ranging nature of this offence–even to the extent of including persons that an offender is likely not to know–shows the premium that the society placed on sexual offences. Even more significantly, the punishment meted out to the offenders was grave. As Rattray puts it, 'perhaps no other sin was regarded with greater horror among the Ashanti. Both parties were killed'.[65] One criticism of the classification and punishment of certain offences such as incest, is that it was sometimes unspecific, unwritten and subject to the discretion of the person(s) enforcing these laws. In modern times, relatives might meet in a city or even outside the country and engage in sexual conduct without knowing they are related. However, in pre-colonial times, closely knit societies who lived in one community made it possible for everyone to know the family and lineage another person hailed from.

Another serious category of sexual offences which customary law punished harshly because it violated a tribal taboo, is the offence of '*ahahantwe* (sexual intercourse in the leaves)'.[66] Another version of this offence was sexual intercourse 'in the farm or bush', where there are no houses but only trees and vegetation. This offence comprised a man having sexual intercourse with a woman outdoors ('in the bush') with or without her consent. If the man committed the offence without the woman's consent, the community viewed it as a capital offence, and the offender had to suffer death as punishment. However, where the encounter was consensual, and the victim was a married woman, the offender paid a fine to the woman's husband. They also made the offender to pay for the cost of a sheep whose blood is used to cleanse the spot where the offence took place, and to appease the goddess of the earth, for the defilement that had taken place.[67]

There were other sexual offences such as a sexual intercourse of a man with another man's wife, with persons who were not of the same blood but are so close to the family as to constitute sin, and with an 'unclean woman'.[68] These offences did not attract the maximum sentence. However, in the exercise of discretion by the leaders, the offenders could suffer 'death or expulsion from the clan'.[69] Sexual intercourse with the wife of the king also carried the death penalty. These illustrations point to the seriousness that some pre-colonial Ghanaian societies attached to sexual offences, and the punishments for breaches of such offences.

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[64] Rattray (n 46 above) 304.
[65] As above.
[66] As above 308.
[67] As above.
[68] This generally refers to a woman in her menstrual cycle.
[69] As above 306.

An exhaustive list of sexual acts classified as offences under customary law does not refer to same-sex sexual acts or conduct. This may suggest that customary rules did not regulate or punish consensual same-sex sexual conduct.

This raises the logical and vital question: Did consensual same-sex conduct exist in the Ghanaian communities during pre-colonial times at all? A further question arises: If it existed at all, in what form and within what context did it exist? What was the attitude of the community towards such conduct? I attempt to answer these questions in the sub-sections that follow.

### 2.3.2 Existence or otherwise of consensual same-sex conduct in pre-colonial Ghana

Scholars have presented evidence that suggests that consensual same-sex relationships existed among some Ghanaian cultures before the colonial era, continuing even after Ghana gained independence from the British in the new post-colonial state.[70] As argued above, customary law did not regulate or punish same-sex relationships in pre-colonial Ghana, suggesting that pre-colonial society understood diverse human sexuality and accepted it as part of the human family.

However, such an argument that pre-colonial Ghanaian communities and their systems of law did not regulate or punish consensual same-sex conduct and therefore accepted homosexual relationships may be criticised as simplistic, given the contentious nature of the subject in Africa and Ghana, in particular. An excursion into the literature discussing the existence of same-sex conduct in Africa, and the reasons the early communities recognised and lived with it, may give a factual basis for such an argument and provide a better understanding of the issue.

Tamale[71] and Ngwena[72] contend that pluralist sexualities[73] existed in Africa before colonialism. Apart from historical evidence that supports the claim of these two scholars, the existence of sexual minorities and their lived experiences in contemporary Ghana and elsewhere in Africa can no longer be suppressed, by state and non-state actors.[74] As Epprecht contends, western scholars who first came into contact with homosexual conduct in Africa were disposed to suppress it.[75]

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[70] See for instance Signorini (n 5 above) who documents incidents of same-sex relationships among the Nzema of Ghana.
[71] S Tamale (ed) *African sexualities: A reader* (2011).
[72] C Ngwena *What is Africanness? Contesting nativism in race, culture, and sexualities* (2018).
[73] Ngwena as above 198, 204. See also Tamale as above 2.
[74] Tamale (n 71 above) 2.
[75] M Epprecht 'Bisexuality and the politics of normal in African ethnography' (2006) 48 *Anthropologica* (2006) 187 at 190-192.

Sometimes, they distorted the facts to present homogenous sexuality in Africa to please their governments and sponsors in Europe.[76]

However, western scholars who suppressed the existence of pluralist sexualities in Africa may not be the only persons at fault. African societies also unwittingly abetted such conduct by concealing what Ngwena calls 'transgressive sexualities'[77] in favour of the patriarchal, hetero-normative order which existed at the time and continues to exist today.[78] The caution here, as intimated by Signorini with the Nzema of Ghana,[79] is that such consensual same-sex conduct may have existed not as a 'homosexual identity' as understood in the western European context. In the African context, such relationships existed in different forms and for various reasons as persons who engaged in such relationships were often married or married later on in life in pursuit of the heterosexual ideals of procreation and creating a family. Therefore, while western scholars suppressed the existence of homosexual relationships for ideological reasons and to further the colonial enterprise of subordination of the colonised people, Africans may well have contributed to concealing such relationships for cultural and procreational reasons.[80]

Besides the above, it is also essential to understand, as Ngwena argues persuasively, that African 'sexuality' as a singular and homogenous concept is best understood within a specific colonial, historical and cultural background.[81] People who wielded knowledge and power constructed the notion of a singular heterosexual African sexuality.[82] The construction of African sexuality by persons who wielded knowledge and power with the aim 'to regulate the social, political, and economic lives of the objects of that power - the colonised people',[83] still occurs today. Epprecht had earlier expressed the view that the representation of African sexuality as homogenous is a

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[76] As above.
[77] Ngwena (n 72 above) 209-211. The author contends especially at page 211 that in order to avoid LGBTI essentialism which forecloses the admission of other sexual categories, the phrase 'transgressive sexualities' is better suited to describe other non-heteronormative sexualities in Africa. I sympathise with the term in so far as it opens the door to admit of other sexualities but disagree with its use, if 'transgressive sexualities' connotes an acceptance for instance, that consensual same-sex conduct violates some moral or customary code in Africa.
[78] M Epprecht 'The 'unsaying' of indigenous homosexualities in Zimbabwe: Mapping a blindspot in an African masculinity' (1998) 24 *Journal of Southern African Studies* 635. See also M Epprecht 'Hidden histories of African homosexualities' (2005) 24 *Canadian Woman Studies* 138.
[79] Signorini (n 5 above).
[80] Epprecht (n 75 above) 188.
[81] Ngwena (n 72 above) 156.
[82] Ngwena (n 72 above) 151.
[83] As above.

product of western scholars who endeavoured to justify a colonial agenda.[84] The previously colonised people are presenting their own story of the existence of 'plural sexualities', and there is a gradual change in the previously distorted narrative.[85]

As Epprecht contends, a closer look at facts which researchers previously made in passing, and evidence which they suppressed about the existence of homosexual relations in Africa, show that a general trend is emerging that challenges previously held assumptions that sexuality in Africa is only heterosexual.[86] The history of Africa on same-sex relations prompts researchers to take a second look at the scholarly work on sexuality in Ghana. On this point, it is plausible to affirm, for example, of the Nzema of Ghana that a careful examination of Signorini's field notes suggests that consensual same-sex relationships existed in some Ghanaian communities, but this was not easily visible to the outsider.[87] Even though Signorini stops short of saying that sexual intercourse occurred between persons in consensual same-sex relationships in Ghana it is possible that his informants concealed this information from him because they did not trust such secrets to an outsider. However, it could also be true that such relationships existed not for sexual purposes.[88]

To support the claim that homosexuality existed in traditional African society before the onset of colonialism, some scholars have reasoned that the absence of punishment for consensual same-sex conduct at customary law is a sign that although it may have existed these practices occurred secretly.[89] They argue that homosexual conduct existed in many societies in pre-colonial Africa and existed for various reasons, including success in farming and wealth creation.[90] Also, because of the importance placed on heterosexual relationships which often produced children,[91] homosexuality was 'overlooked through devices like silences and abeyances in language'.[92]

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[84] Epprecht (n 75 above) 190.
[85] As above. See also M Epprecht 'Sexuality, Africa, history' (2009) 114 *The American Historical Review* 1258, 1267-1270.
[86] As above.
[87] Signorini (n 5 above).
[88] JO Ambani 'A triple heritage of sexuality? Regulation of sexual orientation in Africa in historical perspective' in S Namwase & A Jjuko (eds) (2017) *Protecting the human rights of sexual minorities in contemporary Africa* 14.
[89] Ambani as above; See also Anarfi & Owusu (n 56 above) 14, who maintain that there is a 'culture of silence' in Ghana regarding sex even in contemporary times; see also Epprecht 'The "unsaying" of indigenous homosexualities in Zimbabwe' (n 78 above) 635-636.
[90] Ambani (n 88 above) 23-24.
[91] As above 66.
[92] As above 24.

It may be accurate that in some pre-colonial African societies, homosexual practices were concealed because of the social preference of heterosexuality, as Ambani asserts,[93] and a similar argument could be valid for the early communities that existed in Ghana. Ghanaian scholars who wrote about the customary laws of their various communities did not discuss customary laws that criminalised consensual same-sex conduct.[94] Perhaps they did not focus on same-sex conduct and laws that punished them, but if such laws existed, there were no reasons to omit them from their writings. The most plausible conclusion is that such laws did not exist because customary law did not view same-sex conduct (or relationships) as criminal. As if to buttress this point, scholars who have studied the subject and have written about the early communities in Ghana contend that consensual same-sex relationships existed in pre-colonial and in early post-independent Ghana.[95]

Various accounts suggest that same-sex relationships existed among men and women during the pre-colonial period in Ghana among different tribes such as the Fanti,[96] Nzema[97] and Ashanti.[98] Among the Fanti, Ashanti and other Akan groups men who had homosexual relationships with other men were 'not stigmatised but accepted'.[99] 'Those with heavy souls (*sunsum*), whatever their biological sex will desire women, while those with light souls will desire men'.[100] Scholars observed that some of these relationships were for 'social, not sexual consumption'.[101] One scholar has even made an overwhelming claim that 'lesbian affairs were virtually universal among unmarried Akan women, sometimes continuing after marriage. Whenever possible, the women purchased extra-large beds to accommodate group sex sessions involving perhaps half-a-dozen women'.[102] We may take some of these accounts at face value as accurate reports of what the researchers encountered in their studies. However, the claim that there was near-universal female same-sex sexual conduct

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[93] As above 24.
[94] See for instance Sarbah (n 24 above); Danquah (n 58 above); Casely-Hayford (n 58 above); Signorini (n 5 above).
[95] Signorini (n 5 above). N Ajen 'West African homoeroticism: West African men who have sex with men' in SO Murray & W Roscoe (eds) *Boy-wives and female husbands studies in African homosexualities* (1998) 129; SO Dankwa 'It's a silent trade: female same-sex intimacies in post-colonial Ghana' (2009) 17 *Nordic Journal of Feminist and Gender Research* 223;SO Dankwa 'The one first says I love you: same-sex love and female masculinity in postcolonial Ghana' (2011) 14 *Ghana Studies* 223; SO Murray 'Homosexuality in traditional sub-Saharan Africa and contemporary south Africa' 22 available at semgai.free.fr/doc_et_Africa_A4.pdf (accessed 26 December 2020).
[96] Murray (n 95 above) 22.
[97] Signorini (n 5 above).
[98] Murray (n 95 above) 22. CC Reindorf *History of the Gold Coast and Asante* (1889).
[99] Murray (n 95 above) 22.
[100] As above.
[101] Murray (n 95 above) 22; Signorini (n 5 above). Ambani (n 88 above) 23-24.
[102] Murray (n 95 above) 42, quoting the field notes of Eva Meyerowitz about the Gold Coast.

among unmarried Akan women may be exaggerated. We may accept claims that same-sex practices existed among a minority of the population. However, expanding it to encompass an entire class of people might be exaggerated especially when other scholars who investigated similar situations do not make similar findings. I therefore propose caution in accepting claims of the existence of near-universal same-sex conduct among unmarried Akan women, for example.

In concluding this section, it is essential to emphasise that indigenous institutions that existed in pre-colonial Ghana were well organised with a political and legal structure that governed these societies. They had elaborate systems of law that punished criminal offences, including sexual offences that were deemed to offend the entire community, such as a man having sex with a woman 'in the bush'. Even though consensual same-sex conduct existed in these communities, there were no known sanctions at customary law that punished this conduct. Given the contentious nature of the subject of homosexual practices in contemporary Ghana and the general attitude of Ghanaians towards it now, it is vital to examine how the pre-colonial communities reacted to such a practice, having established above that consensual same-sex relationships existed.

### 2.3.3 Attitudes towards consensual same-sex conduct in pre-colonial Ghana

The central question this part addresses is the attitudes of these communities towards adult consensual same-sex practices.

According to Signorini, he discovered that consensual same-sex practices existed among the Nzema of Ghana by chance while investigating 'the pattern of residence and the kinship system of that tribe'.[103] Previous researchers did not discover such an essential aspect of the culture of the people. Signori observes that other researchers did not discover homosexual relationships among Ghanaian cultures because they had not done a good job or because the informants were unwilling to speak, but also

> partly due to the simple fact that nobody had thought of asking them the right questions, owing to a lack of comparable elements which would obviously have led to an investigation of this particular subject.[104]

[103] Signorini (n 5 above) 221.
[104] As above.

Signorini stated that he discovered the existence of same-sex sexual relationships among the Nzema tribe because of persistent questioning in spite of denial by his respondents that male homosexuality existed in Nzema.[105] Signorini observes:

> During the course of cross-examination about the alleged non-existence of male homosexual relationships among the tribe, one of those present - tired of my insistent questioning - declared: 'there is no sexual intercourse even when two men are married to each other.[106]

This important assertion by Signorini signifies two things. First, it validates the assertion by Ambani and Epprecht that homosexual practices were concealed,[107] particularly in the presence of researchers who were not members of the community. Second, it also confirms that homosexual practices may have existed in pre-colonial communities in Ghana but in different forms. Signorini's informants asserted that people in same-sex relationships in Nzemas did not engage in sexual activity. They struck such relationships for other reasons such as the oratory or good looks of a partner.[108] The absence of sexual activity notwithstanding, the historical fact remains that same-sex relationships existed among the Nzemas of Ghana.

Despite the denial that sexual intercourse formed part of consensual same-sex relationships among the Nzema, Signorini's field notes suggest something more than mere physical attraction and oratory skills.[109] For instance, the field notes reveal that people in same-sex relationships married their partners in a similar manner to heterosexual partners marrying. The marriages in all instances occurred between an older male and his younger partner. Even though the older males had female wives, they appeared to consummate their marriage to another man by allowing their male partner to spend a minimum of one night to a maximum of one week, sharing their bed. In such situations, the wife would spend the night or nights apart from her husband, to make way for the husband to be with his male partner.

In one field note, for instance, a certain man called Noba from the village of Bonyere — who was 30 years old at the time and married to a woman — subsequently got married to another man called

[105] As above 221-222.
[106] As above 222.
[107] Epprecht 'The 'unsaying' of indigenous homosexualities in Zimbabwe' (n 78 above) 635-636; Ambani (n 88 above) 24.
[108] Signorini (n 5 above) 225-227.
[109] As above.

Ambrose who was 20 years old.[110] Noba subsequently married Ambrose after offering gin and money to the family of Ambrose in a public ceremony. It is further reported in the field notes that

> N(oba) became osofo (priest healer) of the church of 12 Apostles and moved to Kumasi. Since then, A(mbrose) visited him only twice - for a period of 3-4 days - and on these occasions, spent the nights with him, taking the place of his wife who slept in the entrance of the house.[111]

In another instance, a 40-year-old man by name Eno of Mpataba — who belonged to the Adahonle clan — married one Moke, 20 years, of Nzulezo number 2. Subsequently, the said Moke cooked a meal for Eno and 'spent one night with him in his house at Mpataba'.[112] Thus in all the instances reported in the field notes, two males spent either a night or several nights together in one bedroom, but the author is careful not to report that sexual intercourse took place because the informants disclosed that sexual intercourse was not part of same-sex relationships among the Nzema. Signorini allows the reader to draw their own conclusions about whether sexual intercourse took place.

It is essential also to note that the attitude of community members to such relationships was not antagonistic. It is abundantly clear that the Nzema community approved of such same-sex relationships for two reasons. First, there was a public ceremony to celebrate the marriage between the two males. The older male presented gifts, drinks, and money to the family of the younger male he married. Second, when such a couple walked through the town the community admired them, as admitted by one Ehwia Menlaba who got married to an older man:

> E(hwia) Menlaba answered that it is enjoyable and makes one feel happy to walk with a handsome friend and dressed in the same way when you go to some ceremony or take part in the kundum [a festival of the people of Nzema]. People watch and admire you.[113]

Even though research is silent on the status of marriage between men, except that they could contract such marriages in addition to heterosexual marriages, the description above shows that the Nzema community approved of consensual same-sex relationships between men. The community even admired men who married men when they walked together clothed in similar attire because it was not contrary to their customs and customary law. In the same way, as the

[110] As above 225.
[111] As above.
[112] As above 226.
[113] As above 226.

community admired a man who was married to a beautiful woman, they also admired a man who got married to another handsome man.[114]

Researchers found that some communities in pre-colonial Ghana, practiced consensual same-sex relationships.[115] However, as reported by Signorini, the community denied that sexual intercourse took place between the parties and was reluctant to speak about it to researchers.

The analysis above shows that consensual same-sex practices existed in pre-colonial Ghanaian communities, but this conduct was not punished under customary laws. It is possible that this position of the customary law has changed over time due to religious and legal influences of the colonial era and that, therefore, the current post-colonial Ghanaian communities deem such conduct as un-Ghanaian and criminal. This does not suggest that the current aversion towards same-sex practices in many Ghanaian communities reflects a 'fake culture', but rather society's negative attitudes are largely attributable to a culture that has been influenced by religious practices that abhors same-sex conduct.

The reception of British law and anti-sodomy law in particular, suppressed consensual same-sex relationships in the Gold Coast, which is discussed below.

## Part II: Introduction of British colonialism and anti-sodomy law in Ghana

## 2.4 Colonialism in Ghana

Introducing colonialism in Ghana was a precursor for the British to make inroads into other parts of Africa. Unsurprisingly, therefore, while Ghana was the first country in West Africa to taste British colonialism, it was also the first in sub-Saharan Africa to attain independence.

In this section, I examine the introduction of British colonialism in Ghana as the gateway to other West African countries. I will also analyse the distinctive phases of British colonialism in Ghana. Apart from the phases of British colonialism in Ghana, there were significant periods as well that saw the introduction of British laws, the court system, the legislature, and various constitutions that are crucial to our understanding of colonialism in Ghana. Finally, I examine the period leading to the end of colonialism in 1957 and the grant of independence to the Gold Coast, which was renamed Ghana by its leaders on the attainment of independence on 6 March 1957. The significance of colonialism in Ghana lies in the entrenchment of a British legal culture with its laws, court systems

[114] As above.
[115] Murray (n 95 above); Ajen (n 95 above).

and structures. This colonial legacy continues to dominate current legal developments in Ghana, including the debate on sexual minority rights.

### 2.4.1 Beginning of British Colonialism in Ghana

The incursions into the territory of the Gold Coast that eventually led to British occupation and its colonisation started around the 15th century. Before the formal introduction of English Common Law in Ghana, and as far back as the 15th century when the first Europeans arrived in the coastal areas of Ghana, indigenous customary law and institutions were the modes of administration of the people of Ghana.[116] European traders who arrived in the Gold Coast made various treaties with the traditional indigenous leaders. Later, governments of the various European traders set up governance structures in the Gold Coast. Even though the Portuguese were the first to arrive on the Gold Coast, followed by the French, Dutch, Swedes and other western European countries,[117] it was the English who made their stay permanent.

Because of the transient nature of their visit and focusing mainly on trading activities, the French, Dutch, Swedes, and Portuguese did not have a significant impact on the customary laws of the people of the Gold Coast. The British significantly affected indigenous institutions because they consciously introduced laws and systems of their own to the detriment of local customs, usages and customary law.

After settling in forts and castles along the coast, the English soon had permanent officers who lived on the coast and exercised jurisdiction in the immediate surroundings. Soon, the British extended the exercise of authority along the coast over European foreign traders to the local people. Even though the British had no authority to exercise control over the 'natives', they exercised these powers and sought to regularise them later with some statutes. Through a series of treaties, the British gradually established their authority over the native people. The most notable treaty before the formal introduction of British law was the Bond of 1844, which the British signed with the leaders of the Fanti states for military protection. The Bond gave formal and legitimate recognition to the illegal exercise of power by the British in the Gold Coast in return for protection of the local people.

The chiefs ceded power to try serious criminal offences to the British, and the chiefs only sat together with British officers to try such offences.[118] Thus, a relationship that first began with

[116] Yeboa (n 22 above) 2-3.
[117] Yeboa (n 22 above) 2.
[118] As above.

European traders on the coast of the Gold Coast for trade gradually crystallised from trade to military protection and eventually to British control of governance in the Gold Coast. Thus British colonialism in Ghana started from the coastal area in the south and gradually spread to encompass the whole territory now known as Ghana.

### 2.4.2 Phases of colonialism in Ghana

Even though the British occupied the territory of the Gold Coast before 1844 and exercised some powers over the pre-colonial communities, we accept the formal date of British colonialism as starting with the Bond of 1844.[119] The Bond of 1844 Is an agreement between the Fanti chiefs who occupied the coastal area in the south and the British, concluded on 6 March 1844. This date is the start date of British colonialism in Ghana, through cession.[120] While the Fantis along the coast ceded power to the British peacefully in the belief that this was for protection and trading purposes, the British gained the territory of the Ashantis through conquest.[121] The Ashantis lost their battle against the British in 1901 and from that time onwards became part of the territory administered by the British in addition to the territories occupied by the Fantis.[122]

Aside from the cession of territory by the Fantis in 1844 and conquest of the Ashantis in 1901, the Northern territories were next on the list to be part of the territory administered by the British.[123] The last territory added to the British controlled Gold Coast was the Southern Togoland territory, which came under British control as a mandate after the first world war.[124] Thus the occupation and control of the Gold Coast by the British which started with the Fanti territories in the coastal area ended with the annexation of the Northern territories and Southern Togoland through a mandate.[125]

### 2.4.3 Significant periods during the colonial era in Ghana

There are essential epochs in the lives of the people of the Gold Coast that significantly affected their way of life, customs and customary laws that are worthy of recollection. Periods in which laws, constitutions, courts and legislature were introduced by the British in the Gold Coast were significant and continue to affect legal processes in Ghana.

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[119] Amankwah (n 20 above) 39.
[120] As above.
[121] As above.
[122] As above.
[123] As above.
[124] As above.
[125] As above.

In 1874, Britain set up a legislative council in the Gold Coast to make laws for the colony,[126] and began the establishment of a judicial system in 1876. Scholars usually label 1876 as the commencement of the Ghana legal system[127] even though there was an established political, social and legal system for law enforcement and resolution of conflicts before British colonialism started.[128] That notwithstanding, scholars agree that

> the modern Ghanaian legal system was inaugurated by the Supreme Court Ordinance, 1876, which not only established a national judicial system but also prescribed the law and procedure to be applied in this court system.[129]

The date 31 March 1876 therefore marks the formal introduction of British law to the Gold Coast. By the Supreme Court Ordinance of 1876,[130] the British made English law applicable to the Gold Coast. The Ordinance states in part:

> The Common law, the doctrines of equity, and the statues of general application which were in force in England at the date when the colony obtained a local legislature, that is to say, on 24 July 1874, shall be in force within the jurisdiction of the court.[131]

In addition to the establishment of a Supreme Court for the colony, the enactment of the Supreme Court Ordinance also formally made British law part of the Gold Coast. The genesis of introducing these laws was that buoyed by the treaties signed with the local authorities and the illegal exercise of power by British officials stationed on the Gold Coast; the British started devising means of legalising and formalising this exercise of authority.

The British also thought of introducing their laws that will effectively take precedence over local laws and establish alternative systems of administration of justice. The initial strategy was to have British laws in force in England as at 1874 to take effect within the colony.[132] The British were acutely aware that the local people had a well organised legal system, comprising customary law, customary institutions and officers that administered this system. Consequently, they introduced so-called 'repugnancy clauses' that limited the application of customary law if it did not conform to

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[126] G Woodman 'British legislation as source of Ghanaian law: From colonialism to technical aid' (1974) 7 *Law and Politics in Africa, Asia, and Latin America* 19.
[127] SKB Asante 'Over a hundred years of a national legal system in Ghana – A review and critique' (1987) 31 *Journal of African Law* 70; Yeboa (n 22 above) 6-7.
[128] Ayittey (n 46 above) 70.
[129] Asante (n 127 above) 70.
[130] Supreme Court Ordinance No 4 of 1876.
[131] As above section 14.
[132] As above.

English notions of equity and good conscience, gradually limiting the application of customary law.[133] From 1876 to early 1900s, Britain enacted laws for the Gold Coast and set up Commissions of Inquiry that looked into the workings of the customary law and its institutions.[134] These enacted laws and commissions of inquiry made recommendations that took away the power of the chiefs to administer justice to their people.[135]

Even though the Supreme Court Ordinance which made British laws applicable in the Gold Coast Colony recognised customary law and native institutions that administered this law, there was a conscious effort to limit the authority of the chiefs and the application of customary law in all significant matters. For instance, the British assumed jurisdiction of criminal offences which the local authorities had authority to adjudicate.[136] Also, the British created courts, starting with the Supreme Court and other lower courts that followed, which gradually limited the participation of native institutions in the administration of justice. Colonial administrators therefore eroded the authority of chiefs and indigenous institutions set up to administer justice according to the customary law.

By the time Ghana gained independence from the British in March 1957, the chiefs had no power to try any customary law offences or adjudicate any civil matter as they did before colonialism, except those submitted to them by arbitration or mediation.[137] The British significantly reduced the power of local chiefs to determine both civil and criminal matters, and with it, the customs and traditions of the people and the institutions that administered justice. It may, therefore, not be a general rule that colonialism strengthened native institutions because it left them untouched.[138] The case of Ghana demonstrates how British rule and laws diminished the power of chiefs to administer the affairs of their people with their laws, especially criminal law.

The British laws that took effect and were binding in the Gold Coast through the adoption of the Supreme Court Ordinance of 1876 were the Common law, Equity and British statues in force in England. Thus, the British Criminal Ordinance in force in England regulated criminal conduct in

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[133] Ambani (n 88 above) 27, claims that the introduction of British law in Africa was 'to deliver affected jurisdictions to Britain', introduce British Common Law, Equity, and statues of general application in Britain.
[134] Oppong (n 30 above) 443.
[135] As above.
[136] Yeboa (n 22 above) 2.
[137] PM Christian 'Administration of justice by traditional authorities in Ghana: An exposition on the law and practice' in RF Oppong and K Agyebeng (eds) *A Commitment to law, development, and public policy a festschrift in honour of Nana Dr. SKB Asante* (2016) 278.
[138] Ambani (n 88 above) 445-6.

Ghana, stifling the development and application of the customary criminal laws of the people of the Gold Coast.

According to Epprecht, the 18th and 19th century industrial and scientific revolutions marked a turning point that saw 'racial and sexual Others' viewed negatively in Europe and America as 'less suited to govern and to enjoy the economic and social privileges that the bourgeoisie was claiming for themselves'.[139] Even though he notes further that 'same-sex sexual relations had long been taboo-indeed, punishable by death in Western European society',[140] this 'pre-industrial era witnessed a conception of such relations as sin atoned through prayer or mortification'.[141] Kirby confirms Epprecht's assertion that biblical texts promoted aversion towards same-sex sexual relations in Europe and England. They later incorporated the biblical text about homosexuality into the Common law as an offence, because it was a threat to the 'Christian principles on which the kingdom [England] was founded'.[142]

As a result, nineteenth century Victorian era morality in England, founded on the Bible,[143] became secular law in England and eventually found its way into British colonies, including the Gold Coast, now Ghana. 'So in this way, by common law, statute law and scholarly taxonomies, the English law criminalising sodomy, and other variations of 'impure' sexual conduct',[144] Kirby writes, 'was well-placed to undergo its export to the colonies of England as the British Empire burst forth on the world between the 17th and 20th centuries'.[145]

Considering that British anti-sodomy law had its foundation in the Bible and Christian principles, it is understandable why Christianity accompanied British colonialism. It also becomes more apparent that because of the inevitable clash that the colonial administrators envisaged their laws would have with the customary laws of the local people, they deliberately introduced so-called 'repugnancy clauses' that subjected indigenous laws to English notions of morality in order to

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[139] M Epprecht 'Bisexuality and the politics of normal in African ethnography' (n 75 above) 189.
[140] As above.
[141] As above.
[142] M Kirby 'The sodomy offence: England's least lovely criminal law export?' in C Lennox & M Waites (eds) *Human rights, sexual orientation, and gender identity in the Commonwealth: Struggles for decriminalisation and change* (2013) 61 62.
[143] Leviticus Chapter 20 verse 13 which states that 'if a man has sexual relations with a man as one does with a woman, both of them have done what is detestable. They are to be put to death; their blood will be on their heads'. The Holy Bible New International Version 1979.
[144] Kirby (n 142 above) 63.
[145] As above.

subjugate the laws, culture and way of life of the colonised people.[146] Ngwena is therefore right that colonial administrators who wielded power constructed African sexuality, during a particular historical epoch to subjugate the cultural, social, political and even economic lives of the colonised people.[147] Ngwena succinctly points out that confronting the biased representation of African sexuality as only heterosexual, 'is a struggle to overcome 'status subordination' of the culturally and judicially stigmatised sexualities'.[148] It is against this background that we understand why the colonial administrators introduced their laws to Ghana and the significance of the famous anti-sodomy law. Britain established the legislative council in the Gold Coast in 1874 to enact laws for the Gold Coast, but this council was subservient to the British Parliament, which could also make laws for the colony if it so desired.[149]

The most relevant British law imposed on the Gold Coast is the Criminal Ordinance of 1892. Sir Henry Taylor a 'well-known literary figure who had been a powerful force in the colonial office,'[150] pioneered championed the idea of a penal code for the colonies.[151] In his famous letter to Mr Gladstone, the then Prime Minister of the United Kingdom, Taylor expresses his belief about what he thinks the contents of a criminal code should be.[152] Conceding that he is not a lawyer, Sir Henry Taylor suggests that his suggestions for reforming criminal law is based on his understanding of human nature and not law.[153] I could sum his lengthy letter expressing his views on the penal code up as primarily focused on the punishment of criminal offenders. He advocated punishment for drunkenness,[154] protective custody for recidivist offenders, and introducing previous convictions of an accused person before a judge passes sentence.[155] He also expressed joy at the passing of the Indian Penal Code,[156] which contained section 377 which criminalised consensual same-sex acts. Perhaps one crucial characteristic he shared with Mr Wright, who drafted Ghana's Criminal Code

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[146] M Ocran 'The clash of legal cultures: The treatment of indigenous law in colonial and post-colonial Africa' (2006) 39 *Akron Law Review* 465 475.
[147] Ngwena (n 72 above) 151.
[148] As above 197.
[149] Woodman (n 126 above) 19.
[150] ML Friedland 'R.S. Wright's model criminal code: A forgotten chapter in the history of the criminal law' (1981) 1 *Oxford Journal of Legal Studies* 308.
[151] As above 308.
[152] H Taylor *The works of Sir Henry Taylor* (1878). This volume of work contains the letter titled 'Crime considered in a letter to the Rights Hon. W.E Gladstone at page 177. This letter was first written by Sir Henry Taylor in 1868.
[153] As above 247.
[154] As above 230-234.
[155] As above 245.
[156] As above 181.

was their quest to reform the criminal law of the colonies because they thought the laws were many and contained, in the words of Mr Wright, 'some dangerous if not wholly objectionable laws'.[157] The Prime Minister resisted Sir Taylor's ideas of a good criminal code. Unsuccessful in England, Sir Taylor wanted his ideas tried out in the colonies.[158] Further endeavours in 1870 in the crown colonies was successful and eventually signalled the acceptance of Sir Taylors ideas and preparation for the drafting of a criminal code for the colonies.[159]

Subsequently, in 1870, the colonial office contacted Mr Wright to draft the Criminal Ordinance of 1892.[160] The colonial office initially contacted Mr Wright, a young barrister of 31 years old, to draft a criminal code and a criminal procedure code for Jamaica, because the governor of Jamaica had undertaken to fund the drafting of the criminal code from the coffers of Jamaica and undertook to pay 500 pounds.[161] Jamaicans rejected the criminal code.[162] The legislative council of Jamaica initially adopted the code on 21 January 1879. However, while awaiting further debate in the British Parliament and approval of the colonial office, there was a change of government in Britain in April 1880, and the debate and final adoption of the law for Jamaica suffered a lapse.[163] When the colonial office was ready to adopt the code in Jamaica, it was unsuccessful because of 'the effect of personalities and local concern on the issue of codification'.[164] The Attorney General and the Chief Justice of Jamaica rejected the use of corporal punishment for an infringement of some offences. They also objected to the examination of an accused person instead of allowing him or her to be a witness at their trial, a view they shared with Mr Kimberly, the Colonial Secretary.[165] Even though the Attorney General of Jamaica amended sections of the criminal code, a groundswell of opposition which included the Bar, Supreme Court judges, the press and the legislative Council of Jamaica, 'strongly criticised' it.[166]

There was consensus initially, among the groups that later opposed it, that they could adopt the criminal code pending the repeal and enactment of a new criminal procedure code. Mr Wright

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[157] Prison report cited in Friedland (n 150 above) 311.
[158] As above.
[159] As above.
[160] As above 309-312.
[161] As above, 309.
[162] HF Morris 'A history of the adoption of codes of criminal law and procedure in British colonial Africa 1876-1935' (1974) 18 *Journal of African Law* 8.
[163] Friedland (n 150 above) 334-36.
[164] As above 338.
[165] As above 335.
[166] As above 336-337.

contended that they should adopt both codes at the same time and emphasised that the code of procedure was much more important than the criminal code. The colonial office could not settle the disagreement. Hence, because of the opposition by individuals such as the Attorney General, the Chief Justice and the Governor of Jamaica, the colonial office agreed that both criminal code and the criminal procedure code should be repealed.[167]

Forgotten and gathering dust at the colonial office in the late 1800s, the office suggested by a memorandum that some African states including the Gold Coast, Sierra Leone and the Gambia could adopt the once discarded criminal code drafted by Mr Wright. The memorandum stated:

> We have now got Mr Wright's Jamaica Criminal Code, which the Jamaicans rejected, enacted in St. Lucia and British Honduras and I think we might have it introduced in the West African Colonies.[168]

It was only the governor of the Gold Coast who responded positively to the colonial office memorandum of 1889 to adopt the criminal code, hence its introduction in the Gold Coast.[169] While introducing this same code in Jamaica generated many discussions involving the Attorney General, the Chief Justice, lawyers and ordinary people of Jamaica, there was no such response or activity related to its adoption in the Gold Coast. The colonial administrators adopted the Criminal Ordinance in Ghana without reference to the wishes of the people of Ghana. Therefore, Ghana is the only country on record to have adopted this code. Other African countries did not respond to the call to adopt it.[170]

Ambani has noted that 'although laws criminalising sexual conduct between persons of same-sex in Commonwealth Africa have England as their cradle, their refinery and incubation occurred in India, Australia, the English speaking Caribbean and other earlier colonies before eventual deployment to the newly acquired territories in Africa'.[171] However, the Ghanaian experience is an exception to this rule. England enacted the law but its 'refinery, and 'incubation' occurred in Ghana.

Even though Ghana has amended this code since 1960,[172] when it became a republic, many of its original sections have remained unaltered since 1892. The current Criminal and Other Offences Act

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[167] As above 337.
[168] Colonial office memo by Mr. Wingfield in 1889 quoted in Friedland (n 52 above) 338.
[169] Friedland (n 150 above) 338.
[170] As above.
[171] Ambani (n 88 above) 28.
[172] This Code was assented to by the President of the Republic of Ghana and became law in Ghana on 12 January 1961.

of Ghana, 1960, though amended over the years, largely keeps the substance of the law enacted in 1892.

### 2.4.4 The end of colonialism in Ghana–the dawn of a new nation

6 March 1957 officially marks the end of colonialism in Ghana. Britain drafted an independence constitution of 1957, and the Gold Coast legislature approved it. A vital feature of the 1957 Constitution was the grant of independence. The Gold Coast Legislature approved a government White Paper confirming the granting of independence to the Gold Coast and 'at midnight on 5 March 1957, as the Union Jack was lowered … the new flag of Ghana was raised'.[173] Meanwhile, even though Ghana attained independence in 1957, the Queen of Britain remained the ceremonial head of Ghana until 1960,[174] when Ghana became a Republic. The laws, legislature, and systems of governance, including the legal culture, mirrors a British way of life. Therefore, even on the attainment of republican status and till today, Ghana still maintains the Common Law and Equity as part of its laws and keep colonial-era laws, including the anti-sodomy law in the Criminal Offences Act, despite several amendments to this criminal statute.

## Part III: Current legal developments in Ghana

## 2.5 Introduction

The colonial legacy of section 104 of the Criminal Offences Act, which criminalises 'unnatural carnal knowledge' influences current discussions on sexual minority rights in Ghana today. The law keeps the original wording of the 1892 Criminal Ordinance, the ambiguity surrounding the meaning of 'unnatural carnal knowledge', and the uncertainty about specific acts that it criminalises. Principal legal advisers of the Government of Ghana[175] who occupied that position from 1993 to 2016 have at one point or another disagreed on the meaning and scope of section 104. The extent of the law, and who or what it targets, is a controversial issue.

I attempt to establish a careful analysis of the law and the category of acts within its range. This will afford an opportunity to rigorously test the object of the law and what it aims to achieve, and

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[173] Y Saffu 'The struggle for Ghana's independence' in K Gyekye (ed) *Ghana @ 50 anniversary lectures* (2008) 35 73.

[174] Ghana became a Republic on 1 July 1960 with the coming into force of the Constitution of Ghana, 1960 which created the office of President of the Republic of Ghana and did away with the office of Prime Minister as the head of government business and the Queen as the ceremonial or titular head of Ghana.

[175] Constitution of Ghana 1992 art 88(1) states: 'There shall be an Attorney-General of Ghana who shall be a Minister of State and the principal legal adviser to the Government'. A detailed discussion of the different positions of the government's principal legal advisers on section 104 is done in chapter 2, section 2.5.1.

whether its objects should be within the confines of the criminal law. Besides, it is imperative to establish the role of the law and its relation to violence against sexual minorities. It may be correct to say that the law does not criminalise a person but an act. However, the ordinary Ghanaian does not understand the actual ambit of the law. If they did, state officials and non-state officials would not assault people on suspicion they are gay.

It is also easy to claim that the assault of persons based on their perceived or actual sexual orientation is not because the law criminalises unnatural carnal knowledge. Perhaps assaulting people based on their sexual orientation is because others perceive them to be acting against societal norms and culture. Such an argument is acceptable because even in South Africa, where the Constitution protects LGBT rights,[176] gay people still suffer violence and discrimination.[177] Therefore, it is not the law that prompts people to commit acts of violence and violates the rights of LGBT persons, but societal and cultural norms.

However, an argument that criminalisation of homosexual relations is not a crucial factor in violence against, and violations of the rights of LGBT persons may be simplistic. In Ghana, LGBT persons have stated that 'the combination of the criminalisation of adult consensual same-sex conduct and the profoundly religious and socially conservative Ghanaian context has an insidious effect on their individual self-expression'.[178] 'In certain instances', they observe further, 'such suspicion has led to violence, extortion and arrests'.[179] Accordingly, the mere suspicion of being gay in Ghana may in some circumstances elicit a violation of one's rights.

Other people may assault a gay person based on their misapprehension of the law. Some people conflate 'acts' with a 'person' and presume that when a person self-identifies as gay, there are enough grounds to believe the person has already committed a crime. For the same reasons, some law enforcement officials will refuse to investigate violations of sexual minority rights and extort money from LGBT people.[180]

It is therefore important to consider the nature and scope of the law that criminalises unnatural carnal knowledge, but crucially important to analyse the link between the law and violence against

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[176] Constitution of the Republic of South Africa sec 9(3).
[177] Pew Research Center 'Global attitudes and trends' (25 June 2020) 3 shows only 54% of South Africans agree that 'homosexuality should be accepted by society'. Available at https://www.pewresearch.org/global/2020/06/25/global-divide-on-homosexuality-persists/ (accessed 4 October 2020).
[178] Human Rights Watch 'No choice but to deny who I am' (n 4 above).
[179] As above 2.
[180] As above 30-32.

gays. Such analysis should also consider the subjugating manner ordinary persons, recognised bodies, and even state officials disparage sexual minorities with their comments. Therefore, even though the law does not recommend speaking against LGBT persons, curtailing their rights to free speech, association and demonstration, or committing acts of violence against them, the law emboldens such conducts.

Another angle to the argument is to observe how negative discussions of sexual minority rights, courtesy of the anti-sodomy law, influence the actions or inactions of ordinary Ghanaians. While the State rarely enforces the law, if at all, some recent developments discussed below suggests that the negative discussion of sexual minority rights in Ghana influences the outcomes of individual decisions and behaviour of some people. In summary, while the law does not entitle state and non-state actors to violate the right of persons based on their perceived or actual homosexual orientation, this is the case in Ghana.[181] It is necessary to demystify the content of the law and its effect on the lives of actual or perceived homosexuals, to help decide whether to maintain or decriminalise this law.

### 2.5.1 The nature and scope of section 104 which criminalises 'unnatural carnal knowledge.'

Section 104 of the Criminal Offences Act of Ghana, titled 'Unnatural carnal knowledge', states:[182]

(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
  (b) Of another person of not less than sixteen years of age with the consent of that other person commits a misdemeanour; or
  (c) Of an animal commits a misdemeanour
(2) Unnatural carnal knowledge is sexual intercourse with a person in an unnatural manner or, with an animal.

The wording of section 104 is crucial to the arguments on (de) criminalisation of consensual same-sex conduct in Ghana. The provision does not explicitly mention homosexuality or same-sex acts but uses the words 'a person' and 'another person'. Therefore, a person who engages in 'unnatural carnal knowledge' falls within the object of this section. What then is unnatural carnal knowledge

[181] As above.
[182] Criminal Offences Act, 1960 Act 29 section 104.

as that is the key phrase which invokes the criminal sanction? The Act defines 'unnatural carnal knowledge' as 'sexual intercourse in an unnatural manner or, with an animal'.[183]

It is clear what sex with an animal connotes, but *prima facie*, sex in an 'unnatural manner' defies a precise definition. Kirby has observed that Britain exported five versions of the anti-sodomy law to its colonies.[184] All five versions have paragraphs criminalising a conduct which is 'unnatural' or 'against the order of nature', without proper clarity. However, where the criminal provisions contain phrases like 'sex against the order of nature', the courts in India,[185] Botswana,[186] and Kenya[187] have all assumed jurisdiction and interpreted it as including sexual acts between persons of the same sex.

In Ghana, the meaning of 'unnatural carnal knowledge' has not gone through the 'crucible of judicial interpretation'.[188] Neither is the phrase explained clearly in any law. Therefore, taking a cue from the explanation offered in other jurisdictions, 'unnatural' in this context means sexual acts between persons of the same sex with the object of using the anus as a point of penetration. Second, it could also include, though not stated from the black letter words, sexual acts between two or more women who use objects to penetrate individual orifices during a sexual encounter.

Last, sexual acts between a man and a woman may also come under this law if either party, with a sexual organ or other instrument, penetrates the other's anus. However, the section's primary target is sexual acts between two males. Therefore, people who argue that section 104 does not criminalise homosexual acts may have a point if they do a literal reading of the text.

However, a close analysis of the origin of the law and the application of similar laws in other jurisdictions establishes that it criminalises same-sex acts. With section 377 of the Indian Penal Code, for instance, the Indian Supreme Court pointed out that the law criminalises homosexual

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[183] As above section 104(2).
[184] Kirby (n 142 above) 61.
[185] *Navtej Singh Johar & Others v Union of India Thr. Secretary Ministry of Law and Justice* Writ Petition (criminal) No 76 of 2016. See detailed discussion of this case in chapter 4 of this thesis, especially section 4.4.4.
[186] *Letsweletse Motshidiemang v Attorney General & Lesbians, Gays and Bisexuals of Botswana (LEGABIBO)* 2016 *Amicus Curiae* MAHGB-000591-16. See detailed discussion of this case in chapter 4 of this thesis, especially section 4.4.4; see also *Republic v Kanane* (2003) (2) BLR 67 (CA).
[187] *EG v The Hon Attorney General & Others* 2016 Petition no 150 of 2016. See detailed discussion of this case in chapter 4 of this thesis, especially section 4.4.4.
[188] The Supreme Court of Ghana has employed the term 'crucible of judicial interpretation' to mean that an issue has been subjected to judicial interpretation.

acts.[189] The Wolfenden Committee recommended the decriminalisation of homosexual acts as it recognised that 'unnatural carnal knowledge' or acts described as against the 'order of nature' or 'buggery' target persons of the same sex who engage in consensual sexual acts.[190]

Successive Attorney Generals of Ghana have disagreed about the true meaning of section 104. While former Attorney-General Martin Amidu believes that the wording of section 104 does not criminalise consensual same-sex adult acts in private,[191] Marietta Brew Appiah-Oppong disagrees and argues that the section criminalises consensual homosexual acts even in private.[192] Despite these disagreements as to the correct meaning and effect of section 104, the section criminalises sexual intercourse between persons of the same sex, whether consensual or non-consensual together with sex between a person and an animal.

What is significant, however, is that the law does not criminalise a person, the homosexual person or a person who engages in consensual or non-consensual sex – it criminalises a conduct. So construed, acts classified as 'unnatural' could occur between persons of the same sex or even the opposite sex. However, the focus of this thesis is on the criminalisation of consensual same-sex acts and not non-consensual same-sex acts or other acts deemed 'unnatural' between persons of the opposite sex, or animals.

Compared to other criminal codes which the British introduced during the colonial period in Africa, the Ghanaian Code appears to be less punitive.[193] One reason for the adoption of this variant of the criminal code enacted by the British for its colonies, in Ghana, is that Mr Wright who drafted the code was influenced in his thinking of the role of the criminal law in society by scholars such as

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[189] *Navtej Singh Johar & Others v Union of India Thr. Secretary Ministry of Law and Justice* Writ Petition (criminal) No 76 of 2016 (n 185 above) 143.

[190] 'Report of the committee on homosexual offences and prostitution' [Wolfenden report] 1957 115; Kirby (n 142 above) 66-67; See also R Trumbach 'London's sodomites: Homosexual behaviour and Western culture in the 18th century' (1977) 11 *Journal of Social History* 1.

[191] 'Homosexuality is not illegal – Attorney General' https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Homosexuality-Is-Not-Illegal-Attorney-General-217527# (accessed 2 September 2019).

[192] A former Attorney-General of Ghana Marietta Brew Appiah-Oppong is on record as saying that she disapproves of gays. As well the laws of Ghana criminalises consensual same-sex conduct. Available at https://www.humandignitytrust.org/country-profile/ghana/ (accessed 2 September 2019).

[193] For instance, section 377 of the then Indian Penal Code punished consensual same-sex acts with life imprisonment or up to 10 years in addition to a fine. Similarly, the Queensland Code which was introduced in Australia and other African countries exacted a punishment of 14 years in prison but Ghana's code treats consensual same-sex acts as a misdemeanour with a maximum punishment of 3 years. See Kirby (n 142 above) 66 67; See also Human Rights Watch 'This alien legacy the origins of 'sodomy' laws in British colonialism (n 6 above).

Jeremy Bentham.[194] Bentham postulated that the object of the criminal law should target conduct that is detrimental to the community.[195] Thus courtesy of the thinking of Bentham and its influence on Mr Wright, Ghana arguably inherited a less Draconian version of the anti-sodomy law that Britain exported to its colonies.

Having started cultivating a legal culture that is inherently British through the training of lawyers, judges, imposing laws and creation of institutions, an essentially British legal culture rather than a Ghanaian culture grew in the Gold Coast for over a century.[196] It is therefore challenging, even today, to point to a distinct Ghanaian legal culture based on a uniquely Ghanaian culture and philosophy. The Common Law of Britain, which was part of the laws of Ghana during the colonial period, continues to exist and forms part of the laws of Ghana.[197] Aided by a system of judicial precedent, this law which reflects a British mindset, continues to be part of the Ghana legal system. The interpretation and application of customary laws in the courts, which was out of sync with customary practices of the local people in their communities, is part of the doctrine of precedent and continues in force even though those interpretations rarely reflect the accurate and developing customs of the people.[198] Because of the recognition of laws of the United Kingdom, through the Common Law, as part of the laws of Ghana by the Ghanaian Constitution, a colonial imbalance continues to exist.

On the evidence above, there was no justification for introducing anti-sodomy laws in the Gold Coast. Britain introduced their laws to affirm the British colonial agenda and disrupt the way of life of the people through a re-arrangement of their laws, institutions and personnel who administered justice according to the custom of the society. Kirby puts it more poignantly when he said that anti-sodomy laws 'were simply imposed to stamp out the 'vice' and 'viciousness' amongst native peoples which the British rulers found, or assumed, was intolerable to a properly governed society'.[199] As noted above, homosexual practices existed in the communities in the Gold Coast before colonialism. There was, therefore, a disruption of the way of life of the people through the

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[194] J Bentham *An introduction to the principles of morals and legislation* (1823).
[195] As above 205.
[196] Asante (n 127 above).
[197] See Constitution of Ghana 1992 art 11.
[198] HJAN Mensah-Bonsu 'Of nuts in the ground not being groundnuts- the current state of customary law in Ghana' (2002-2004) 22 *University of Ghana Law Journal* 1 9-16; See also GR Woodman 'A survey of customary laws in Africa in search of lessons for the future' in J Fenrich et al (eds) *The future of African customary law* (2011) 9 17-21.
[199] Kirby (n 142 above) 66.

regulation of consensual same-sex conduct which affected the development of the customary laws and culture of the people.

In sum, therefore, introducing British laws and anti-sodomy laws in particular, sowed the seed of regulation and intolerance of homosexuality in colonial and post-colonial Ghana which has lived on up to this day.

### 2.5.2 Section 104 and the lived experiences of sexual minorities in Ghana

The subject of homosexuality and its criminalisation frequently invokes moral panic in Ghana. Moral entrepreneurs appropriate the duty to rid the Ghanaian society of homosexuals because homosexuality offends the culture and religion of the people. The comments of these moral entrepreneurs about the threat of homosexuality to the culture and values of the Ghanaian society[200] galvanise people to speak against sexual minorities and even attack them without provocation.[201]

Some members of the LGBT community have to deny who they are, as confirmed by the Human Rights Watch report,[202] in order to avoid verbal and physical attacks. While there is some reasonable level of tolerance of persons perceived to belong to the LGBT community, incidents of violence against them exists. The pattern of violence against LGBT persons in Ghana suggests that members of the community need to avoid visibility and also choose whom they associate with and disclose their identity to, based on carefully selected indicators. While youthful, educated persons have been shown higher level of tolerance, persons closely attached to their religion and lack a high level of education are less tolerable of LGBT people and may even violate their rights.[203] In extreme situations, people have attacked LGBT persons merely because of their sexual orientation.

The sodomy law of Ghana is always a reference point when debates on sexual minority rights emerge in Ghana. Anti-LGBT activists use the law as a tool to threaten, blackmail and denigrate sexual minorities. The media sets the agenda for the debates in a manner that is prejudicial to the interests of LGBT persons and favours moral entrepreneurs who urge politicians to take a stand against sexual minorities, apply existing law and enact new severe punishment. Politicians take the

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[200] 'President Mills: Homosexuality, lesbianism foreign to our culture' http://ghananewsagency.org/politics/president-mills-homosexuality-lesbianism-foreign-to-our-culture-30920 (accessed 30 June 2017).
[201] Human Rights Watch 'No choice but to deny who I am' (n 4 above).
[202] As above.
[203] Amoah & Gyasi (n 3 above) 1.

bait to please their constituents by threatening sexual minorities with arrests, while religious leaders rely on religious texts to denounce homosexuality.[204]

For instance, a 2018 report by Human Rights Watch suggests that beyond the façade of tolerance for LGBT rights in Ghana, there are much more severe infractions of the rights of sexual minorities.[205] The HRW report details specific instances of violence and violations of the rights of LGBT persons that affect their rights to dignity, association and privacy with little or no help from the state and state agencies.[206] Despite glaring evidence on social media of assault and battery, the state abandoned a trial it had started against perpetrators for no justifiable reason. Sometimes, state-appointed officials paid with the taxpayer's money legitimise violence and take the lead in assaulting sexual minorities and ordering others to do the same.[207]

Even though critics of consensual same-sex acts in Ghana may argue that the state has not applied the law to harass or arrest members of the LGBT community, yet the Human Rights Watch report reveals systemic discrimination and violation of their rights. In all the instances where sexual minorities were molested and driven away from their homes by family members, assaulted by members of the public or denied the opportunity to pursue their chosen vocation, the underlying reason was the sodomy law. Because section 104 exists on the criminal statute books of Ghana, people have used it as an excuse to violate the rights of sexual minorities.

Section 104 of the Criminal Offences Act is a British colonial inheritance, which has remained on the criminal statute books because of a lack of opportunity or a deliberate effort to ignore the subject. Ghanaian legislators, judges and the executive have done nothing to repeal the law from the statute books. The ramifications of the continued existence of law are clear for all to see. Many use the law as a basis to discriminate, harass and treat sexual minorities unequally. It might be an opportune time to repeal this law from the statute books because the state rarely applies the law whose existence is an affront to the fundamental human rights of a minority.

### 2.5.3 (Non-)application of section 104 in Ghana

A question worth considering is whether the legal system of Ghana invokes section 104 of the Criminal Offences Act as it does with other criminal laws, such as theft, or it is one of those forgotten laws that remain on the statute books just for the sake of it, for symbolic reasons? This

[204] Tettey (n 3 above) 86.
[205] Human Rights Watch 'No choice but to deny who I am' (n 4 above).
[206] As above 2.
[207] As above.

question is relevant because if a law is rarely or never applied, this disuse should be a basis for its repeal, as its retention arguably does not serve any useful purpose. The enforcement of section 104 will cause the invasion of peoples' homes, and as a rarely reported victimless crime, except for extortion, the question is whether it is useful to maintain such a law. While the application of the law has not been consistent or regular, the non-application of the law may in practice have severe consequences for the rights of sexual minorities.[208]

Ghana has not encountered 'high profile' cases such as the 'gay wedding trial' in Malawi,[209] the *Kanane case*[210] in Botswana or *EG & 7 Others in Kenya.*[211] Notwithstanding the lack of prosecution of sexual minorities, the anti-sodomy law is a reference point for politicians and law enforcement agencies to warn sexual minorities to remain invisible or face prosecution. The law has been used to deny LGBT persons their constitutionally guaranteed rights of association, free expression and respect for their human dignity.[212] State and non-state actors have assaulted LGBT persons, threatened them with arrests and incarceration merely because they intend to meet to discuss issues affecting them or to celebrate a birthday party.[213]

The law also emboldens a range of persons and organised bodies to assault members of the LGBT community verbally. Psychiatrists have stated that sexual minorities need psychiatric examination,[214] religious leaders have recommended prayers,[215] and the media have also set negative agendas and created the platform for members of society to assault sexual minorities verbally.[216] While the law in its application has dealt with a few cases sometimes even leniently, its non-application has instead created more problems in practice.

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[208] As above 30-32.
[209] *Republic v Steven Monjeza Soko & Tionge Chimbalanga Kachepa* Chief President Magistrate's Court Blantyre Criminal case no 359 of 2009. The Blantyre Magistrate Court noted that the Malawian society was not ready to accept same-sex persons marrying each other.
[210] *Kanane v The State* 2003 (2) BLR 64 (CA), The Court of Appeal in Botswana held that society was not ready to accept homosexuals.
[211] *EG & 7 Others v Attorney General; DKM & 9 Others (interested parties); Katiba Institute and Another (amicus curiae)* consolidated suit of Petition no 150 of 2016 and Petition no 234 of 2016. A Kenyan High Court in Nairobi observed that criminalisation of same-sex sexual acts was constitutional.
[212] Human Rights Watch 'No choice but to deny who I am' (n 4 above) 30-32.
[213] As above.
[214] As above.
[215] As above.
[216] Tettey (n 3 above).

## 2.6 Appropriation and continuation of colonial-era legacy or decriminalisation?

Majority of Ghanaians claim that anti-sodomy law preserves the religion and culture of Ghanaians and is a buffer against the infiltration of a western taboo.[217] Those who propose that Ghana should keep the sodomy law are prominent citizens who occupy positions of trust including politicians, religious leaders, journalists and opinion leaders in various communities who trigger the moral panic button without provocation.[218] Those who speak for sexual minorities are human rights defenders and ordinary citizens who support the view that criminalisation of consensual same-sex sexual practices is an unnecessary infringement on the rights of sexual minorities.

Debates involving those who are against protecting the rights of sexual minorities and those who support sexual minority rights generate serious disagreements on national media. People threaten sexual minorities and harass them to keep quiet. Because of the acrimonious and accusatory nature of the debate, and the overwhelming majority that support the anti-LGBT group, there is limited opportunity for persons who support the pro-LGBT groups to make their voices heard for fear of being accused of being gay and as one scholar puts it, 'suffer reputational injury'.[219]

The debate does not consider the historical and ideological reasons for introducing anti-sodomy law in Ghana. It ignores the fact that a dominant group introduced the law — the coloniser — who imposed their conception of law, culture, and religion on the dominated group, the colonised. Therefore, the critical issue is whether such a law which was part of efforts to dominate and subjugate the colonised people is still relevant long after colonialism has ended and the colonised people are now in charge of their affairs in a democratic society?

Also, the debate has the potential to act as a catalyst for re-criminlisation or decriminalisation of consensual same-sex conduct depending on the strength of arguments on either side. For now, it appears the anti-LGBT group is more convincing relying on religion and culture to denounce homosexuality as foreign. When pro-LGBT persons argue that protection of sexual minorities is a human rights issue that calls for protection of a minority group, anti-LGBT groups argue that homosexuality is not a human rights issue, and not comparable to the plight of other minorities,

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[217] 'Republic of Ghana Constitutional Review Commission, report of the constitution review commission: From a political to a developmental constitution' [Report of the Constitution Review Commission] (2012) 656-657.
[218] Tettey (n 3 above).
[219] Baisley (n 1 above).

such as racial minority groups.[220] As Baisley's analysis of the debate shows,[221] the proponents of anti-sodomy laws can even appropriate decolonisation and human rights frames to make arguments that drown the voices that support decriminalisation, using human rights approaches and framing.[222] It is therefore imperative to analyse the colonial law influences on current discussions and developments in Ghana using the decolonial frame.

### 2.6.1 Decoloniality as a frame for critiquing anti-sodomy laws in post-colonial Ghana

I appropriate the decolonial theory as a frame to examine the ongoing discussion on consensual same-sex conduct in Ghana. The usefulness of employing such a theory is two-fold. First, the theory affirms the underlying reasons for decolonisation in many African countries, including Ghana. Part of the reason for fighting and attaining independence, was that the new independent Ghanaian state could manage its affairs.[223] Ghana's management of its own affairs include the repeal of laws and the enactment of new legislation to fit the aspirations of the new nation-state. However, over six decades after independence the laws and legal culture in Ghana still reflect a British colonial imprint that is sympathetic to the claim by a scholar that even at over sixty years, Ghana is still 'colonised and happy'.[224]

Second, the theory helps with understanding the quest to uproot the vestiges of colonial power, laws, and culture in the post-colonial state. As Maldonado-Torres puts it:

> Coloniality refers to long-standing patterns of power that emerged as a result of colonialism, but that define culture, labour, intersubjectivity relations, and knowledge production well beyond the strict limits of colonial administrations. Thus coloniality survives colonialism. It is maintained alive in books, in the criteria for academic performance, in cultural patterns, in common sense, in the self-image of peoples in aspirations of self.[225]

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[220] Baisley (n 1 above) 395-396.
[221] As above.
[222] As above 393 395.
[223]'Pan-African Quotes Independence speech Kwame Nkrumah 6 March 1957, Accra, Ghana at https://panafricanquotes.wordpress.com/speeches/independence-speech-kwame-nkrumah-march-6-1957-accra-ghana/ (accessed 26 August 2019).
[224] RA Atuguba 'Ghana @ 50: Colonised and happy' in Mensah-Bonsu et al (eds) *Ghana law since Independence history, development, and prospects* (2007) 571. The author argues that although the British colonised Ghana, it is incumbent on Ghana to decolonise itself because the British will not do so. Unfortunately, Ghana is 'blindly continuing in the colonial path dependency that was laid down for us' 572.
[225] N Maldonado-Torres 'On the coloniality of being' (2007) 21 *Cultural Studies* 240 at 243.

Colonialism does not end with the attainment of independence as the author points out above. Long after colonialism has ended, it is still possible for the laws and culture of colonialism to survive. A decolonial theory, therefore, help understand this phenomenon about laws that criminalise 'unnatural carnal knowledge'. It assists us in appreciating the retention of anti-sodomy law on the statute books of Ghana and further provides insights in critiquing claims by scholars[226] on the value of British laws and British legal culture in the post-colonial democratic Ghanaian state.

The Supreme Court Ordinance of 1876 made laws that were at the time in force in Britain, applicable to the Gold Coast. If colonial laws in Ghana were initially made for the British citizen living in the United Kingdom and applicable to particular circumstances of that country, of what value is such a law in a colonial Ghana, let alone a post-colonial Ghana? Consequently, the decolonial theory affords a useful lens to (re)-think anti-sodomy law in Ghana and useful for analysing the issues presented in this section.

### 2.6.2 Appropriation and continuation of anti-sodomy laws in post-colonial Ghana

A desire by the coloniser to inculcate British values in the colonial territories dictated the export of British laws into Britain's colonies, including Ghana, in the 19th century. Laws that had repugnancy clauses had as their object entrenching British law at the expense of local customary laws. Customary laws which in the opinion of the colonial authority conflicted with British law on the grounds of good conscience, justice and equity, had to give way.[227] Thus the idea behind introducing British laws was to regulate the lives and affairs of the colonised people to make them conform to British notions of justice and law. There was little regard for indigenous legal systems of law and governance if it conflicted with British law. The anti-sodomy law was one such law borne out of a desire to suppress other forms of sexuality, apart from heterosexuality, and purposefully introduced in Ghana to further this agenda.

The burning question therefore is: does Ghana have a reason for maintaining anti-sodomy law on its criminal law books? Some Parliamentarians have shown that there is a need to enact stiffer punishments anytime the subject of homosexuality comes up.

However, arguments positing that consensual same-sex conduct is culturally 'un-Ghanaian', against religion and a public health threat, ignore historical antecedents that anti-sodomy laws support British colonial culture and religion, and further instrumentalise the subjugation of the

[226] See for instance Asante (n 127 above); Atuguba (n 224 above).
[227] Ocran (n 30 above) 475.

colonised people. Statements even by Parliamentarians in Ghana's Parliament ignore the fundamental basis of introducing anti-sodomy law in Ghana. The next chapter of this thesis analyses the basis of religion, culture, and politics as barriers to the decriminalisation of consensual same sex sexual acts. These preliminary comments will suffice for now.

### 2.6.3 Decriminalisation of 'unnatural carnal knowledge'?

There is a wind of change that has blown from Southern Africa, with the potential to spread to other African countries, relating to the decriminalisation of consensual same-sex acts.[228] The taboo nature of the subject which was previously not discussed openly, or if when discussed was one-sided and disparaging of sexual minority rights, is changing. The pejorative narrative of consensual same-sex acts is gradually giving way to a discourse that recognises other sexualities apart from heterosexuality, and some African countries are responding positively to it in recent times.

Starting with South Africa in 1999, the Constitutional Court declared sodomy law unconstitutional paving way for Parliament to decriminalise it.[229] Angola and Mozambique have decriminalised consensual same-sex acts while a Botswana High Court has declared criminalisation of same-sex acts as unconstitutional. The UN has also issued resolutions[230] and a report from the Office of the High Commissioner for Human Rights that recommends decriminalisation of consensual same-sex conduct.[231] Although the African Commission stopped short of recommending decriminalisation of consensual same-sex acts, it denounced acts of violence against persons on their perceived or actual sexual orientation and gender identity. It called for action to end such violence by African governments.[232]

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[228] F Viljoen 'Abolition of Angola's anti-gay laws may pave way for regional reform' *The Conversation* 14 February 2019 https://theconversation.com/abolition-of-angolas-anti-gay-laws-may-pave-way-for-regional-reform-111432 (accessed 2 June 2019); See also F Viljoen 'Botswana court ruling is a ray of hope for LGBT people across Africa' *The Conversation* 12 June 2019 http://theconversation.com/botswana-court-ruling-is-a-ray-of-hope-for-lgbt-people-across-africa-118713 (accessed 30 August 2019).

[229] *National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1)* SA 6 (CC).

[230] See for example UN Human Rights Council 'Protection against violence and discrimination based on sexual orientation and gender identity' adopted by the UN Human Rights Council on 28 June 2016 at its 32nd Session A/HRC/32/L.2/Rev 1 (2016).

[231] UN Human Rights Council 'Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity' report of the United Nations High Commissioner for Human Rights, UN doc A/HRC/19/41 (2011).

[232] African Commission on Human and Peoples' Rights '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' Resolution 275 adopted at its 55th Ordinary Session in Luanda, Angola (2014).

Scholars have at various fora and for different reasons expressed varied opinions on how to achieve decriminalisation. Scholars have identified the African Commission as one avenue to achieve positive results using appropriate structures and tools.[233] While I sympathise with the views expressed by these authors and still am of the view that it is worth exploring the avenues and opportunities at the African Commission, recent events have called into question the independence and ability of the Commission to decide without the interference of the executive branch of the AU.[234] Others like Pierre de Vos concede that it is possible to achieve decriminalisation but through a proper understanding and addressing of the peculiar circumstances that African countries find themselves.[235] De Vos argues that anti-LGBT activists have bastardised human rights as a neo-colonial agenda that evokes images of Africans as 'victims' and the West as 'saviours'.[236] In addition, the concept of the 'homosexual' is a marker of identity in Western thinking that differs from same-sex sexual desire as understood in Africa.[237] For these reasons, when the elite and politicians in Africa express aversion to 'homosexuality', human rights and the need to respect the rights of sexual minorities, they express such abhorrence in reaction to images of 'victim' and 'saviour' reminiscent of the colonial agenda.[238] De Vos therefore argues that African academics and activists should discard the Western conception of the 'homosexual' person as an identity and find innovative ways to project the lived experiences of Africans who experience or act upon same-sex sexual desire.[239]

My thesis partly responds to this call by arguing in this chapter that same-sex sexual relationships existed in the Gold Coast before colonial rule. Persons who engaged in same-sex relationships were married to persons of the opposite sex and had children, fulfilling societal expectations yet having same-sex relationships that society approved of. Therefore, the lived experience of sexual minorities in Ghana differs from the Western identity marker of the 'homosexual' person.

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[233] R Murray & F Viljoen 'Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights' (2007) 29 *Human Rights Quarterly* 69; A Rudman 'The protection against discrimination based on sexual orientation under the African human rights system' (2015) 15 *African Human Rights Law Journal* 1.

[234] Under pressure from the executive body of the African Union, the African Commission has revoked the observer status of the Coalition of African Lesbians on the basis that the latter advocates for the rights of lesbians which is inconsistent with the object of the African Charter.

[235] P de Vos 'Mind the gap: Imagining new ways of struggling towards the emancipation of sexual minorities in Africa' (2015) 29 *Agenda* 39.

[236] As above 47-48.

[237] As above 45.

[238] As above 47.

[239] As above 49.

In addition, respect for human dignity, a key feature of human rights, is a feature of the Akan and Ghanaian cultural values. If we accept that same-sex sexual relationships existed in pre-colonial Ghana and respect for human dignity is a foundational cultural value of this society, then calls for protection of the rights of sexual minorities is uniquely Ghanaian and ought to elicit positive responses. Ebobrah contends that it is possible to 'Africanise' gay rights and advocates that the legislature should be the forum for achieving decriminalisation.[240]

While there is wisdom in approaching and using parliament as a forum for the decriminalisation of consensual same-sex conduct as has happened in some African countries recently,[241] such an approach is bound to fail in Ghana. Gay rights are politicised and misrepresented as a form of Western decadence that threatens the moral fibre of the Ghanaian society and political parties and politicians jostle each other to take the lead in deprecating such conduct, even in parliament.[242]

As the next chapter argues, protecting sexual minority rights in Ghana has been resisted as a western concept on religious, political and cultural grounds, making it extremely difficult to start a conversation about decriminalisation of consensual same-sex sexual acts.

## 2.7 Conclusion

Debate on sexual minority rights in Ghana has been a polarised contest between persons who purport to protect the morality of the society by resisting the infiltration of Western, decadent culture of homosexuality against those who want to perpetuate a neo-colonial agenda of protecting sexual minorities. The aim of this chapter is to situate the debate in a historical context

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[240] ST Ebobrah 'Africanising human rights in the 21st century: Gay rights, African values and the dilemma of the African legislator' (2012) 1 *International Human Rights Law Review* 110. Ebobrah argues that even though it is the legislature's duty to decriminalise same-sex sexual conduct in Africa the judiciary are in a better position to do this.

[241] Parliament of Mozambique decriminalised arts 70 & 71 of the penal code of 1886 which criminalised 'habitually practised vices against nature' through law 35/2014, effective June 2015; In July 2016 Seychelles decriminalised section 151 (a) & (c) of its 1955 penal code that criminalised 'carnal knowledge of any person against the order of nature'. See ILGA World: LR Mendos, State-Sponsored Homophobia 2019: Global Legislation Overview Update (2019) 32; 'Gabon senate votes to decriminalise homosexuality' GhanaWeb African news of Monday 29 June 2020 available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Gabon-senate-votes-to-decriminalise-homosexuality-993622 (accessed 6 August 2020).

[242] 'I will resign over amendments to accept gayism- Speaker of Parliament' Edmund Smith-Asante Graphic online 10 May 2018 available at https://www.graphic.com.gh/news/politics/i-d-resign-than-preside-over-gay-debate-speaker-of-parliament.html (accessed 24 October 2019); 'Parliament has spoken the gay question is settled' Dr A Osei *GhanaWeb* 20 June 2018 available at https://www.ghanaweb.com/GhanaHomePage/features/Parliament-has-spoken-the-gay-question-is-settled-661629 (accessed 6 August 2020).

and examine the merits of these arguments against the pre-colonial society, whether same-sex sexual relationships existed and the response of the communities towards such practices. The chapter also examined the introduction of anti-sodomy law in Ghana together with Christian religion and the entrenchment of homophobic attitudes because of anti-sodomy law in contemporary Ghana.

The chapter establishes that same-sex sexual relationships occurred among the various cultures in Ghana,[243] yet the customary laws did not criminalise such conduct even though it criminalised many sexual offences.[244] While several forms of conduct–many of which were sexual–were punishable by the pre-colonial legal system, the legal system did not punish same-sex sexual relationship between two consenting adults. This non-regulation and non-punishment occurred at a time during the pre-colonial period when homosexual relationships existed among the people.

Colonial administrators introduced the offence of 'unnatural carnal knowledge' in the Gold Coast in 1892[245] without the consent of the local people in furtherance of the colonial agenda. While the law has rarely been applied, it has remained on the criminal statute books since colonialism ended purportedly as a law that preserves the culture and religion of the Ghanaian people. As argued in this chapter, the British colonisers criminalised same-sex sexual desire in Ghana to preserve their religion and culture. The law therefore remains on the criminal books as a colonial relic with no specific relevance to Ghanaian culture and religion and is a reason to violate the rights of sexual minorities.

In contemporary Ghana, there is a tendency to violate the rights of persons who have an attraction for persons of the same sex. While Ghanaian law may not dictate that we should violate the rights of persons perceived to be homosexual or persons who engage in homosexual conduct, the law legitimises these violations. People who have taken part in night vigils, demonstrations or spoken pejoratively about homosexual persons have done so because the law criminalises such conduct. There is sufficient evidence to suggest that persons who violate the rights of others based on their sexual orientation do so because victims will not report violations to law enforcement agencies or take legal action against violators of their rights because of the fear of stigma, discrimination and fear that the law may be used against them because of their sexuality.[246] Thus,

[243] Signorini (n 5 above); Ajen (n 95 above); Murray (n 95 above).
[244] Sarbah (n 24 above); Rattray (n 46 above); Danquah (n 94 above); Casely-Hayford (n 94 above).
[245] Criminal Ordinance no 12 of 1892 (n 7 above).
[246] Human Rights Watch 'No choice but to deny who I am' (n 4 above) 30-46.

even law enforcement agencies, lacking understanding about their proper mandate or prejudiced against homosexual persons, fail to investigate cases of violence against them.[247]

The lack of understanding that section 104 is a product of British colonialism and borne out of a British culture of the Victorian era, and 'exported' to Ghana[248] when the customary law did not criminalise same-sex relations, is mostly to blame for this violence against homosexuals. Besides this misconception of the origin and cultural background of the law, and its basis as originating from the Bible, religious bodies also condemn the practice. With an overwhelming majority of the population of Ghana deeply religious and their religious leaders condemning homosexuality, the law in its current state has overwhelming majority support.

That notwithstanding, appropriating and using section 104 in the independent state when there appears to be no justification for holding on to it, is untenable. If the pre-colonial society did not punish same-sex sexual relationships among their various communities, then it behoves Ghana to go back and pick up a part of its cultural values that it has neglected for over a century because of colonialism. While such a proposition to do away with colonial-era law is difficult because the colonial legal structures remain, it is not insurmountable. Even though it is plural, and admitting of customary law as one source of law, the legal system of Ghana has been dominated by the British Common Law, Equity,[249] and modern legislation by lawmakers who themselves are influenced through their training and practice by a British legal tradition of the colonial era.

Despite these challenges, the call for decriminalisation is well-founded. Although the barriers on the path to decriminalisation are steep, human rights advocates can dismantle them. Apart from the law examined in this chapter, these barriers include religion, culture and politics–all aspects on which proponents of anti-sodomy law rely to threaten re-criminalisation or maintain the current law. The next chapter considers the nature and scope of these barriers to the decriminalisation of consensual same-sex conduct in Ghana.

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[247] As above 47-50 shows that the Ghana police service has acted positively in some instances to respect the rights of sexual minorities.
[248] Kirby (n 142 above) 63.
[249] Constitution of Ghana 1992 art 11(2) states that the laws of Ghana include the Common law and Equity.

# CHAPTER 3: OBSTACLES TO THE DECRIMINALISATION OF 'UNNATURAL CARNAL KNOWLEDGE' IN GHANA

## 3.1 Introduction

In many countries in Africa, the subject of consensual same-sex activity between adults is dismissed as a religious and cultural aberration that does not even merit discussion. Members of the public, as well as politicians, strongly oppose sexual minority rights. When called upon to decide matters relating to sexual minority rights, the courts often rely on the argument based on religion and culture that society is not yet ready to accept the practice and the rights of persons who engage in consensual same-sex conduct.[1]

The resentment towards sexual minority rights in Ghana expressed by ordinary citizens is no different to the situation in many African countries. When charged with the mandate of suggesting amendments to the 1992 Constitution, the Constitution Review Commission (CRC) of Ghana surveyed the views of a cross-section of Ghanaians and submitted a report to the President of Ghana in 2012, suggesting that the majority of Ghanaians oppose amendments to the Constitution of Ghana to recognise the rights of LGBT persons.[2]

In more detail, after consulting broadly with Ghanaians, on proposed amendments to the Constitution, including same-sex sexual rights, the CRC noted that because of their religious and cultural values, majority of Ghanaians oppose amendments to include specific protections of sexual

[1] *Kanane v The State* 2003 (2) BLR 67 (CA) the Court of Appeal in Botswana noted that 'there was no evidence that the approach and attitude of society in Botswana to the question of homosexuality and to homosexual practices by gay men and women required a decriminalisation'; see also *R v Soko and Another* (359 of 2009) [2010] MWHC 2 (19 May 2010) where a Malawian magistrate court held at page 23 of the report that 'we are sitting in place of the Malawi society which I do not believe is ready at this point in time to see its sons getting married to other sons'; *EG & 7 Others v Attorney General; DKM & 9 Others (interested parties); Katiba Institute and Another (amicus curiae)* consolidated suit of Petition no 150 of 2016 and Petition no 234 of 2016. A Kenyan High Court in Nairobi held that criminalisation of same-sex sexual conduct was constitutional. The Court reasoned that majority of Kenyans were opposed to same-sex sexual relationships and declaring it as constitutional would open the floodgates for homosexuals to get married. See however the Botswana High Court decision in *Letsweletse Motshidiemang v Attorney General & Lesbians, Gays and Bisexuals of Botswana (LEGABIBO)* 2016 *Amicus Curiae* MAHGB-000591-16, that declared criminalisation of homosexual conduct is unconstitutional, showing that judicial attitudes towards same-sex sexual desire in Botswana has evolved since *Kanane* was decided in 2003.

[2] Republic of Ghana, Constitutional Review Commission, Report of the Constitution Review Commission: From a Political to a Developmental Constitution (Report of the Constitution Review Commission) (2011) particularly 656-657.

minority rights. Therefore, no amendment should be made to that effect but rather the courts should be allowed to pronounce on it, if they are approached in future.[3]

The Supreme Court of Ghana, which is the only court empowered to hear and determine cases that challenge the constitutionality of other laws,[4] has not been approached to determine the constitutionality of anti-sodomy laws.[5] Nevertheless, while waiting for an opportunity for the courts to do so, it might be prudent to ascertain the veracity of the claim that homosexuality violates the religious and cultural values of Ghanaians. Therefore, discrimination on the grounds of sexual orientation should not be explicitly prohibited.

Uncritically accepting that homosexuality is a religious abomination, and a cultural taboo, empowers social institutions and the majority to compel all Ghanaians to reject LGBT rights. If same-sex sexual desire continues to be criminalised in Ghana on these bases, Ghanaians are only using British religion and culture which was introduced in Ghana during the colonial period to fight indigenous Ghanaian culture and religion which accommodated and did not punish such conduct in pre-colonial Ghana, before the colonial administrators arrived. Suffice it to say that successive governments since Ghana attained independence from the British have either wittingly or unwittingly endorsed the colonial position by failing to repeal or amend the law, thus being complicit in this colonial-era restriction on homosexual freedom. If Ghana does not decriminalise consensual same-sex conduct between adults, it deprives a minority group their fundamental human rights as enshrined in the 1992 Constitution of Ghana. The country retains the colonial-era law because the majority support it, thereby denying sexual minorities an opportunity to develop their full potential just like other citizens.

Religion and culture have been used to subjugate and violate sexual minority rights in Africa and Ghana. Scholars have analysed the relationship between religion and homosexuality,[6] the nature of the controversy it poses in Africa and Ghana, together with other social institutions like culture

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[3] As above.

[4] Constitution of Ghana articles 2(1) and 130(1).

[5] See however *Justice Yaonansu Kpegah v Attorney General of Ghana and the Inspector General of Police of Ghana,* unreported case no J1/9/2012, Supreme Court of Ghana who filed suit at the Supreme Court asking the court to declare that 'homosexualism and or lesbianism is … a cultural taboo in Ghana'.

[6] S Tweneboah 'Religion, international human rights standards, and the politicisation of homosexuality in Ghana' (2018) 24 *The African Journal of Gender and Religion* 25; Av Klinken & E Chitando *Public religion and the politics of homosexuality in Africa (2016);* WJ Tettey 'Homosexuality, moral panic and politicised homophobia in Ghana: Interrogating discourses of moral entrepreneurship in Ghana media (2016) 9 *Communication, Culture and Critique* 86.

and politics.[7] Together, religion, culture and politics act as barriers to the decriminalisation of consensual same-sex conduct in many African countries, including Ghana. However, as courts and parliaments begin to affirm that LGBT persons are also entitled to sexual freedom just like heterosexuals,[8] the bases for using religion, culture and politics to criminalise consensual same-sex conduct has come under the spotlight.

In Ghana, some have argued that because same-sex sexual activity is contrary to the teachings and values of religion and culture, there is the need to maintain anti-sodomy laws on the statute books and even pass new legislation to enhance the punishment regime for persons who engage in such activity.[9] They have by their persistent arguments, influenced negative attitudes towards homosexuality and dominated the LGBT debate in Ghana, creating a hostile atmosphere for same-sex practising persons and advocates of sexual minority rights who put forward alternative arguments for decriminalisation.[10]

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[7] K Essien & S Aderinto 'Cutting the head of the roaring monster: Homosexuality and repression in Africa' (2009) 30 *African Study Monograph* 121; PA Amoah & RM Gyasi 'Social institutions and same-sex sexuality: Attitudes, perceptions and prospective rights and freedoms for non-heterosexuals' (2016) 2 *Cogent Social Sciences* 1; S Tamale 'Confronting the politics of nonconforming sexualities in Africa' (2013) 56 *African Studies Review* 31.

[8] See for instance *Attorney General of Botswana v Thuto Rammoge & Others* Court of Appeal (n 1 above) where the court of Appeal of Botswana affirmed the right of an LGBT organisation LEGABIBO to register and operate as a society; *COI & GMN v Chief Magistrate UNKUNDA law courts & others* Civil Appeal no 56 of 2016 where the Court of Appeal at Mombasa in Kenya, held that forced anal examination was unlawful and unconstitutional; *Mukasa & Oyo v Attorney General* MISC CAUSE no 247/06 of December 2008 where the High Court of Uganda in Kampala held that 'the applicant's rights to dignity, protection from inhuman treatment, personal liberty and privacy of the person, home and property had been violated and awarded compensation' 18-21; see also *Letsweletse Motshidiemang v Attorney General & Lesbians, Gays and Bisexuals of Botswana (LEGABIBO)* (n 1 above) which declared the criminalisation of consensual same-sex sexual activity in Botswana as unconstitutional; Angola's parliament also decriminalised homosexuality recently. See 'Members of Parliament approve new Angolan Criminal Code available at https://www.angop.ao/angola/en_us/noticias/politica/2019/0/4/Members-Parliament-approve-new-Angolan-Criminal-Code,462e956d-0b3f-4a1d-8f9b-ee9b5b81ae1e.html (accessed 30 September 2019).

[9] 'President Mills: Homosexuality, lesbianism foreign to our culture' http://ghananewsagency.org/politics/president-mills-homosexuality-lesbianism-foreign-to-our-culture-30920 (accessed 30 June 2017); 'Bill to criminalise homosexuality coming soon- Foh Amoaning' https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Bill-to-criminalise-homosexuality-coming-soon-Foh-Amoaning-655883 (accessed 30 September 2019); 'Coalition to soon present bill to criminalise homosexuality- Foh Amoaning' https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Coalition-to-soon-present-bill-to-criminalise-homosexuality-Foh-Amoaning-655622 (accessed 30 September 2019).

[10] E Baisley 'Framing the Ghanaian LGBT rights debate: competing decolonisation and human rights frames' (2015) 49 *Canadian Journal of African Studies* 383; Essien & Aderinto (n 7 above).

On average, Ghanaians are highly religious, sentimentally attached to their ethnic and cultural background and staunchly protective of their political party interests.[11] This general make-up of the average Ghanaian provides a fertile ground for the seeds of anti-homosexual rhetoric to germinate and flourish, making it almost impossible to make an argument for the decriminalisation of same-sex sexual conduct. Politicians have threatened to arrest, prosecute, and even lynch alleged homosexuals for attempting to exercise their rights and claiming protection from the state.[12]

This chapter critiques the use of religion, culture, and politics as a basis to restrict the sexual autonomy and freedom of LGBT persons with particular reference to Ghana from a decolonial perspective. I propose that there is the need to rethink the underlying reasons–religion, culture and politics–for criminalising homosexuality in Ghana. Against the background of the introduction of religion and anti-sodomy law by colonial administrators during colonial rule, it is essential to dissect and interrogate the existing religion, culture and political systems which justify contemporary arguments for the continued criminalisation of homosexuality.

Therefore, in this chapter, I suggest that religion and culture should not be a basis to violate the rights of LGBT persons in Ghana, but rather serve as a means to recognising and decriminalising 'unnatural carnal knowledge' and expunging it from the criminal statute. The chapter is divided into three main sections. The first section addresses religion as a barrier to decriminalisation. Culture as a basis for continued criminalisation of consensual same-sex relationships is analysed in the second segment. The third section examines the politicisation of homosexuality and how it feeds into the cultural and religious arguments and its ramifications for the decriminalisation of consensual same-sex conduct in Ghana.

### 3.2 Religion as a barrier to the decriminalisation of homosexuality in Ghana

The central question that is explored in this section is the utility of religion as a basis to restrict sexual minority rights and at the same time as a tool for facilitating decriminalisation of same-sex

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[11] K Quashigah 'Religion and the secular state in Ghana' available at https://classic.iclrs.org/content/blurb/files/Ghana (accessed 9 September 2020) quotes Professor John Samuel Pobee a theologian and former Vicar General of the Anglican Diocese of Accra as saying that 'homo ghaniensis (a Ghanaian) is a homo radicaliter religiousus (a radically religious man – religious at the core of his being)' 331.

[12] 'Homosexuals could soon be lynched in Ghana- MP warns' http://www.ghanaweb.com/GhanaHomePage/NewsArchive/Homosexuals-could-soon-be-lynched-in-Ghana-MP-warns-211415 (accessed 30 June 2017).

sexual desire. In other words, the debate on homosexuality in Ghana has employed religion as a basis to de-legitimise the rights of same-sex practising persons.

However, there is a need to rethink this position and view religion as an avenue to express unconditional love towards everyone regardless of their sexual orientation and not to use it to discriminate against people because of whom they love. It is not an effort to critique the contents of the Bible and Koran or other religious texts concerning homosexuality. Instead, it is an exercise in finding out how religion has been used to determine the extent of enjoyment of fundamental human rights by sexual minorities. It examines Christianity and Islam as foreign religions which 'dethroned' the traditional forms of worship and imposed their religious dogma which is predisposed to a dislike for homosexuality.

This section, therefore, examines the use of religious values to regulate a sensitive issue such as homosexuality in a secular state like Ghana. First, I analyse the central messages conveyed by the two dominant religions in Ghana, Christianity and Islam, and how they shape attitudes and impact on the reaction of heterosexuals to homosexuals. Next, I consider the role of religious leaders and churches in entrenching homophobic discourses and attitudes in Ghana. Lastly, I explore opportunities for using religion as a basis for the decriminalisation of 'unnatural carnal knowledge' in Ghana.

### 3.2.1 Religion and homosexuality in Ghana

Of the estimated 30.5 million Ghanaians living in Ghana, 71 per cent are Christians, whereas a little over 17 per cent profess the Islamic faith. About 5 per cent claim to be worshippers of various African traditional religions while the rest who do not identify with any of these religions are deemed to be about 5 per cent.[13] With Christian and Islamic religious leaders leading the crusade against consensual same-sex relationships in Ghana, sexual minorities have come under siege.

The dominance of these two religions in terms of sheer numbers, as well as the influence their leaders wield in society and their access to mainstream media and other social media outlets demonstrates the influence religious leaders have over discussions in the media. Instead of using their influence, power and reach to preach love towards all human beings, they instead instigate

[13] 2010 Population and Housing Census, summary report of final results, Ghana Statistical Service (May 2012) 6. This census report puts the entire Ghanaian population at 24.6 million people as at 2010. Current estimates indicate that the Ghanaian population is over 30.5 million people with the figures for religious denominations, 71% Christians and 17% Muslims, almost the same as contained in the 2010 census report. See World Population Review available at http://worldpopulationreview.com/countries/ghana-population/ (accessed 2 May 2021).

people to demonstrate, speak against and even lynch persons perceived to be homosexuals. However, the fundamental question that is asked in this section is how Christianity and Islam became antagonistic towards homosexuality in Ghana when various forms of traditional African religion were the preferred form of worship before colonialism.

Sylvia Tamale explains that Christianity and Islam both belong to the Abrahamic religious tradition and have a lot in common. The two religions have usurped the rightful place of African traditional religion when they were exported to Africa.[14] She argues that African traditional religion was tied to and tolerant of different forms of African sexualities.[15] However, the indigenous religion suffered a relapse when foreign religions like Christianity and Islam through the 'process of proselytisation subverted, overthrew and demonised African traditional religions'.[16] After 'overthrowing' African traditional religion (ATR) by demonising it, 'traditional sexual practices that were informed by ATR and indigenous culture have been seriously threatened'.[17] Some Ghanaian scholars who situate the threat to sexual minority rights in the Ghanaian context argue that 'in cultures under Abrahamic religions, the law and the church established sodomy as a transgression against divine law or a crime against nature'.[18] If a majority of the population in Ghana are Abrahamic religious followers who perceive the 'unnatural carnal knowledge' law as protection of their religious beliefs then these followers are bound to oppose same-sex sexual desire. Therefore, with a dominant Abrahamic religious following of nearly 90 per cent it is no wonder that the majority of the population are averse to same-sex sexual rights.

However, it is not only the massive presence of members of the Abrahamic religion that is the source of hate against sexual minorities in Ghana. It is also a lack of appreciation of the facts regarding the debate on homosexual freedom in Ghana. For instance, as Dai-Kosi and his colleagues point out, 'the controversy in Ghana has legal, religious, moral, cultural and medical underpinnings. The debate has to do with whether homosexuality should be legalised, endorsing homosexual relationships and marriages in Ghana'.[19] However, this is a mischaracterisation of the nature of the LGBT debate in Ghana. I agree that the debate on homosexuality in Ghana has legal, religious,

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[14] S Tamale 'Exploring the contours of African sexualities: Religion, law and power' (2014) 14 *African Human Rights Law Journal* 150 152. See, however, JS Mbiti *African religions and philosophy* (1989) 223, who contends that 'Christianity in Africa is so old that it can rightly be described as indigenous, traditional and African'.
[15] As above) 153.
[16] As above.
[17] As above 153.
[18] AD Dai-Kosi et al 'Ghanaian perspectives on the present day dynamics of homosexuality' (2016) 10 *African Research Review special edition* afrev@10 1 2.
[19] As above 4.

moral, cultural and even medical undertones, but the most immediate and urgent need is decriminalisation of section 104 and for sexual minorities to enjoy constitutional rights on an equal footing with other members of society. If appropriately analysed, the debate is more about the protection and tolerance of sexual minority rights such as the right to privacy, association, free expression, and decriminalisation.[20] However, some scholars have misunderstood the issues in the debate on sexual minority rights. They contend as follows:

> There are limits to every right enshrined in the Constitution. If the Constitution guarantees the right to homosexuality, there would not have been calls for its legalisation in Ghana again. The mere fact that there are calls for legalisation by the few perverted vocal individuals suggests that it is not legal to practice homosexuality in Ghana. The criminal offences code, which made mention of unnatural carnal knowledge, clearly made the act a criminal offence. Some people may argue that the phrase is ambiguous and subject to interpretation, but the fact still remains that homosexual practice is against our cultural practices, norms and values. In fact, there is no ambiguity about unnatural carnal knowledge if one appreciates the etymology of the term. Any attempt to legalise homosexuality suggest that it is being approved for people to engage in, and that would be dangerous to the youth of Ghana.[21]

The statement above misunderstands the debate on sexual minority rights in Ghana from 3 perspectives. First, as this thesis argues, there is the need to decriminalise the offence called 'unnatural carnal knowledge' and make constitutional protections applicable to all persons, regardless of their sexual orientation. Arguing for decriminalisation, as some human rights defenders and scholars have done does not amount to 'legalisation of homosexuality' in Ghana. The call for decriminalisation acknowledges that the Bill of Rights protects every Ghanaian and also the criminal provision whose enforcement requires breach of privacy, violation of human dignity and unequal treatment based on a person's sexual orientation offends constitutional provisions. As this thesis makes clear in the next chapter, (chapter 4), section 104 of the Criminal Offences Act of Ghana violates constitutional rights and therefore unconstitutional. The Constitution guarantees fundamental liberties and any law which conflicts with constitutional human rights guarantees is void and ought to be repealed. In essence that is what decriminalisation entails. 'legalisation of homosexuality' suggests that someone is calling for enactment of a law to provide for a new right

[20] See for instance E Baisley (n 10 above); Essien & Aderinto (n 7 above), Amoah and Gyasi (n 7 above), Tweneboah (n 6 above) Who properly characterises the nature of the LGBT debate in Ghana as competing claims between decriminalisation and recriminalisation, lack of tolerance for LGBT rights, politicisation of LGBT rights and the role of the law, religion, culture, and politics in shaping these arguments.
[21] Dai-Kosi et al (n 18 above) 7.

to engage in homosexuality. This sort of misinterpretation of the issue fuels homophobic rhetoric by religious leaders and their followers, which eventually results in attacks on sexual minorities and violation of their rights.

Second, to call persons who advocate for sexual minority rights 'perverted vocal individuals' insults researchers and activists who put their reputation and lives forward to fight for equality and respect for the rights of all persons regardless of their sexual orientation. The rights of human rights defenders have been violated because people who misunderstand the nature of their job often attack them on the basis that they are 'perverted vocal individuals' who want to corrupt the morals of society.

Third, to say that 'homosexual practice is against our cultural practice' is not only a 'worn and tired' ridiculous claim, as Tamale puts it,[22] but also 'protective homophobia'[23] and depicts lack of knowledge of the historical context of same-sex practices in Ghana, which chapter 2 of this research addresses. Last and most disturbing, for a team of academic researchers to contend that decriminalisation of unnatural carnal knowledge is a sign of danger for the youth of Ghana without proof, is reminiscent of unsubstantiated street talk being presented as academic research. It is to say that homosexuality is contagious and that as soon as it is decriminalised some youth will get 'infected' while others will be 'recruited' into it, which is unacademic and ought to be rejected.

Homosexuality is innate and not formed by environmental factors. The long-standing debate on whether homosexuality is innate or a life-style choice that is informed by environmental factors cannot be settled in this thesis.[24] Nevertheless, it is important to state that the dominant and current research on the subject points to the fact that homosexuality is innate and not formed by socio-environmental factors.

Recent scholarship suggests that the debate is more complex than often reported and there is still a lot to research on this issue.[25] As Cook argues, 'scientific research that has been published

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[22] Tamale (n 7 above) 40.

[23] K Kaoma *Christianity, globalisation, and protective homophobia democratic contestation of sexuality in sub-Saharan Africa* (2018) 1. The author reflects on protective homophobia as 'politically and religiously organised opposition to homosexuality as an attempt to protect Africa's traditional heritage, Christianity/Islam, and children from the 'global homosexual agenda' 1.

[24] See for instance AS Greenberg & JM Bailey 'Do biological explanations of homosexuality have moral, legal, or policy implications?' (1993) 30 *Journal of Sex Research* 245; DH Hamer *et al* 'A linkage between DNA markers on the X chromosome and male sexual orientation' (1993) 261 *Science* 321; S LeVay *Gay, straight and the reason why: The science of sexual orientation* (2011).

[25] CCH Cook 'The causes of human sexual orientation' (2021) 27 *Theology & Sexuality* 1.

suggests that the social environment does not appear to exert any impact on the development of sexual orientation'.[26] Cook acknowledges that some studies allege 'recruitment' of heterosexuals into homosexuality.[27] Other studies also allege that people become homosexuals because of childhood sexual abuse.[28] Yet, there is no scientific basis supporting 'recruitment' of people into homosexuality and 'current research does not provide any evidence for a causal link' between childhood sexual abuse and homosexuality.[29] As Cook cautions, people can freely question the moral choices that others make but it is imperative not to ignore the scientific evidence that 'sexual orientation has significant biological and non-social environmental causes which profoundly impact on our experience of ourselves and one another as sexual creatures'.[30]

Cook's claim that same-sex sexual orientation is founded on biological factors is vindicated by other researchers. For instance, in an unprecedented large study that examined the genomes of about half a million people, Andrea Ganna and her colleagues concluded that 'same-sex sexual behaviour is influenced by not one or a few genes but many'.[31] The research however underscored the need for further research into how 'sociocultural influences on sexual preference might interact with genetic influences'.[32]

In conclusion therefore, the most plausible argument appears to be that same-sex sexual preferences and behaviour is better supported by science that it is more genetic than environmental. As Bailey and other researchers affirm,[33] there is evidence which backs the two diametrically opposed views that homosexuality is genetic and also that homosexuality is caused by socio-cultural and environmental factors.[34] Yet, 'the fact that the non-social hypothesis can explain several findings much better than social hypothesis should affect our judgment of which is more likely'.[35] The analysis show that homosexuality is related to biological factors.

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[26] As above 8.
[27] As above.
[28] As above.
[29] Above.
[30] As above 13.
[31] A Ganna *et al* 'Large-scale GWAS reveals insights into the genetic architecture of same-sex sexual behaviour' (2019) 365 *Science* 3.
[32] As above.
[33] JM Bailey et al 'Sexual orientation, controversy, and science' (2016) 17 *Psychological Science in the Public Interest* 45.
[34] As above 87.
[35] As above. See also A Fausto-Sterling 'Gender/sex, sexual orientation, and identity are in the body: how did they get there?' (2019) 56 Journal of Sex Research 529; see also B Sullivan 'Stop calling it a choice: Biological

Despite the existence of research that conflate the issues in the debate, some scholars place the religious influence in the discussion on homosexuality in Ghana in the proper perspective. For instance, Amoah and Gyasi argue that religion is one of the foremost institutions that form and shape attitudes towards homosexuality in Ghana.[36] They conducted empirical research in 2016 to test this assertion in the Kumasi metropolis, one of the largest cities and the capital of the Ashanti region of Ghana.[37] The existence of the belief that followers of Christian and Muslim religious faith are predisposed to loathing homosexuality and homosexuals is confirmed by this 2016 study.

Amoah and Gyasi also confirm that religion, Christianity, in this case, is a powerful institution which acts as a stumbling block to the decriminalisation of consensual same-sex conduct in Ghana. They tested this by ascertaining from the respondents whether they will be comfortable living in the same house with a person they believe belongs to the LGBT community. Most respondents were of the view that it was ungodly to share the same house with a person who is gay.[38] The main reason was that the Bible said 'do not mingle with the ungodly'.[39] As Magesa rightly contends, the African does not make a 'distinction between religion and other areas of human existence'.[40] Therefore, once their religion teaches them to shun the 'ungodly', which includes the homosexual, they cannot separate the so-called ungodly sin of homosexuality from the human being. Thus, the teachings of the Bible have been appropriated as a motivating factor to shun the company of homosexuals because they are 'ungodly'. While the results of the research were confined to one city in Ghana, Kumasi, the results may reflect the general disposition of the majority of Ghanaians towards homosexuality.

While many of the research participants were unwilling to befriend or live in the same house with a person who self-identifies as gay,[41] those who agreed to befriend or live in the same house with a homosexual would only do so because they had the intention of helping the homosexual change

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factors drive homosexuality' *The Conversation* (3 September 2019) available at https://theconversation.com/stop-calling-it-a-choice-biological-factors-drive-homosexuality-122764 (accessed 11 October 2021), who argues that the science points to the fact that 'while there is no single gay gene, there is overwhelming evidence of a biological basis for sexual orientation that is programmed into the brain before birth'.

[36] Mbiti (n 14 above) 1, affirms that religion 'exerts probably the greatest influence upon the thinking and living of the people concerned'.

[37] Amoah & Gyasi (n 7 above).

[38] As above 7.

[39] As above.

[40] L Magesa *African religion: The moral traditions of abundant life* (1997) 24.

[41] Amoah & Gyasi (n 7 above).

their sexual orientation to heterosexuality.[42] The participants all arrived at these answers because of their religious beliefs and quoted sections of the Bible to support their reasons. In the main, they contended that the Bible forbids them from mingling with persons perceived to be demonised and living in 'filth'.

Most importantly, the study reveals the underlying assumptions of most Ghanaian's hatred towards homosexuals and deep-seated views about the concept of homosexuality. The responses of the participants generally show that most if not all of them believe that homosexuality is a learned behaviour which is contagious and that associating with homosexuals could expose one to getting 'infected'. The participants also operated under the misconception that homosexuals are in the business of converting non-homosexuals into homosexuality. While the Bible cautions against being yoked with believers, which generally means Christians not mixing with unbelievers, the participants did not lean on this bible verse to display their hatred for homosexuality. Their main reason for shunning the company of homosexuals was because they feared being contaminated, the stigma of being branded as also being homosexuals and generally personal dislike and discomfort for homosexuals as a result of the admonitions of their religious leaders. This findings confirm the views expressed by Tamale[43] and also by Ireland[44] that even though the fight against homosexuality in Africa has been influenced through proxy wars by Christian evangelicals from the West and their willing counterparts in Africa through establishment and funding of churches and mosques, it is a two-way affair with co-conspirators in Africa.[45]

Another disturbing trend that Amoah and Gyasi's research revealed was that most participants presumed that homosexuality could be cured. This is one of the reasons why attempts to cure homosexuals have gained currency through the so-called conversion therapy,[46] a practice which has been urged on Ghanaians by religious persons and an anti-same-sex civil society organisation.[47] The study participants also noted that homosexuality was something alien to Ghana, indicating that homosexuality was a foreign infiltration. What they conveniently forgot to mention or perhaps did

[42] As above.
[43] Tamale (n 14 above) 166.
[44] P Ireland 'A macro-level analysis of the scope, causes and consequences of homophobia in Africa' (2013) 56 *African Studies Review* 47.
[45] As above.
[46] Outright Action International 'Harmful treatment the global reach of so-called conversion therapy' (2019).
[47] As above 31.

not know was that the Christian religion is a foreign concept that subjugated African traditional religions, which accommodated different sexualities.[48]

Even though Amoah and Gyasi's research attributes participants' knowledge to their religion and religious teachings, the views expressed are symptomatic of the general dislike for homosexuals and perceptions about homosexuality that pervades discussions in the Ghanaian media. The findings of the study corroborate the views expressed by religious leaders and their followers in the media in Ghana.

As Seth Tweneboah notes,[49] the threat allegedly posed by homosexuality is only a recent phenomenon in Ghana. Before the public debate of homosexuality in 2006, virtually all matters relating to same-sex sexuality, including the conviction and sentencing of four alleged homosexuals to various prison terms had gone unnoticed.[50] While the claim by moral entrepreneurs that there is 'widespread homosexuality' in Ghana started in 2006 with the announcement of an upcoming gay conference in Accra, Ghana's capital,[51] the perception that same-sex sexuality is a threat to Ghana has coincided with the increase in the number of Pentecostal churches.[52] According to Tweneboah, one of the reasons why churches, in particular, got involved in the debate on homosexuality in Ghana was as a result of 'transnational religious and political power play'.[53] This is the involvement of American right-wing evangelical churches, who are arguably fighting a proxy war by funding and using churches and religious-based organisations in Africa to achieve their aim of subjugation of gay rights, which Kapya Kaoma describes in his research.[54]

The American battle to suppress gay rights is being lost by Christian religious organisations and churches are being turned into bars, shopping malls and are used for social amenities.[55] With this in mind, according to Tamale, the most prominent spot for this kind of war is Africa, where big churches are being built to this day.[56] Nevertheless, Tamale and Ireland concede, that these proxy wars are not one-sided. The right-wing evangelicals are fanning such proxy wars, but they have active and willing collaborators in Africa as well. It is, therefore, in the words of Tamale, a case of

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[48] Tamale (n 14 above) 152.
[49] Tweneboah (n 6 above).
[50] Tweneboah (n 6 above) 34.
[51] As above.
[52] As above.
[53] As above 35.
[54] K Kaoma *Globalising the culture wars: US conservatives, African Churches and homophobia* (2009).
[55] Tamale (n 7 above) 31 34.
[56] As above.

'the tree you wanted to chop down has been uprooted by a thunderstorm'[57] because Christian religious organisations in the West and Africa are both complicit.

This view that local Christian churches are as much complicit in denouncing homosexuality as their foreign counterparts is not lost on Tweneboah. He comments that local Ghanaian churches with partner churches in the USA such as the Presbyterian church, engaged in the debate on denouncing homosexuality as a way of fighting off 'churchly ideological decolonisation'.[58] Consequently, the Ghanaian Presbyterian Church was asserting its autonomy through its denunciation of homosexuality and emphasising that if its partner church accepts homosexual priests, it will not do so in Ghana.

Quite apart from this, the rise in the involvement of the church in the debate on same-sex sexuality in Ghana is also attributable to 'proselytising strategy' by 'Pentecostal pastor-prophets'.[59] Pastors use their condemnation of homosexuality as a ploy to attract many persons to their churches.[60] However, there is an even more sinister reason that compels Pentecostal pastors to engage in the homosexual debate in Ghana. Churches, particularly Pentecostal or charismatic churches in Ghana tend to compete with each other for space in the 'religious market' and also to remain relevant in the public domain. As Tweneboah rightly noted, it is not coincidental that 'anti-homosexual narratives coincided with the active Pentecostal engagement in the public sphere'.[61] Access to the media and a desire to remain relevant in the public space and attract members to their church motivates many pastors to denounce homosexuality publicly and call on members of society to reject it. Analysing some of the sentiments raised by these religious leaders against homosexuality in Ghana is essential to understanding religions role in the fight against consensual same-sex conduct in Ghana.

### 3.2.2 Deconstructing the religious argument

Religious leaders, religious organisations, or bodies as well as groups that espouse religious beliefs in their approach to sexuality have condemned homosexuality and warned that any attempts to decriminalise consensual same-sex conduct in Ghana would be fiercely resisted. As noted previously, the subject of homosexuality had barely attracted the attention of the clergy in Ghana

[57] As above.
[58] Tweneboah (n 6 above) 36.
[59] As above 37.
[60] As above.
[61] As above 38.

until about 2006, when the Christian Council of Ghana issued a statement to condemn the practice and warned that it should not be tolerated in Ghana.[62]

But what has been the substance of the message conveyed by religious leaders and how do these messages shape attitudes and inform homophobic reactions to homosexuality in contemporary Ghana? Analysing the contents of these messages thematically and critically reveals its glaring impact as a barrier to the decriminalisation of consensual same-sex conduct in Ghana. The recurrent theme has been that embracing homosexuality will bring the wrath of God upon the nation, homosexuality is evil and an abomination; homosexuality is an anti-Christ revolution, and same-sex marriage is a threat to family life.

In its first-ever statement condemning homosexuality in Ghana in 2011, the umbrella body of churches, known as the Christian Council of Ghana (CCG), stated that the practice of homosexuality had engulfed the nation.[63] The Council labelled homosexuality as an 'unnatural and ungodly act', a 'detestable and abominable act' which 'if passed into law in Ghana will bring the wrath of God upon the nation and the consequences will be unbearable'.[64] Creating further panic, the Reverend Dr Fred Deegbe, the General Secretary of the CCG, issued a statement announcing that 'the issue of homosexuality had become so serious that Ghana had witnessed gay marriages and even wanted to host a global conference on homosexuality'.[65] It is clear from this statement that the CCG just like some researchers, erroneously believed that a law to legalise homosexuality was imminent and therefore raised concerns that the moral fibre of the Ghanaian society was being sacrificed for human rights if the nation accepted homosexuality. It also raised the health implications of an overstretched national health system and the spread of HIV through homosexuality. The CCG encouraged Christians to vote against politicians who endorsed tolerance for homosexuality and also charged politicians to declare their stand on the homosexuality debate, publicly.[66]

The statement issued by the CCG shows its determination to incite Ghanaians against the practice and implore politicians to invoke sanctions against the practice. By putting labels such as 'ungodly',

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[62] Tweneboah (n 6 above) 35.
[63] Ghana News Agency 'Christian Council joins calls to condemn homosexuality in Ghana' 19 July 2011 https://www.ghananewsagency.org/social/christian-council-joins-calls-to-condemn-homosexuality-in-ghana-31187 (accessed 7 October 2019).
[64] As above.
[65] As above.
[66] GhanaWeb 'Christian Council kicks against gay campaigners' 19 July 2011 https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Christian-Council-kicks-against-gay-campaigners-214073 (accessed 7 October 2019).

'unnatural', 'detestable' and 'abominable' on same-sex practices, the CCG is living up to its pre-disposition to act against homosexuality. What is most concerning is that the CCG statement incites the public against homosexuals and put forward some unfounded truths such as the wrath of God on the nation, health implications, and the contention that homosexuality is so widespread in Ghana that gay marriages were a common occurrence. The import of the statement is to incite hatred against homosexuals and call on the general public and the government to act in ways that are detrimental to the rights and welfare of sexual minorities.

The national chief Imam, the head of the Muslim community in Ghana, issued a similar statement, claiming that homosexuality threatened the traditional family, was a 'great sin', immoral and undignified.[67] He noted further that homosexuality 'might attract and bring destructions to the nation', echoing the sentiments made by the CCG. The Chief Imam was very harsh in his condemnation of homosexuality, noting that it was an immoral act 'not even practised by animals in the jungle'.[68] The Chief Imam's comparison of homosexuals with animals is an unfortunate premise that has entered the lexicon of the debate on homosexuality in Ghana since 2006 and in 2011.[69] The comparison of homosexuals to animals is a ploy to renounce sexual minority rights as human rights[70] and also a pretext to incite the general public to attack and violate the rights of homosexuals. Kwame Gyekye comments in his book on African cultural values,[71] that everyone belongs to the family of God and not of the earth,[72] yet religious leaders through their utterances alienate some members of this 'Godly family'. In a separate message, the Chief Imam urged the political leaders of the country to reject homosexuality and reject pressure from the West to legalise it even if it comes with money because it is against the culture of Ghana. The Chief Imam, Dr Osmanu Nuhu Sharubutu urged Ghanaians to resist homosexuality 'with all their might'.[73]

The statements by these two Abrahamic religions is problematic because it projects the Bible and the Koran as religious texts with only one meaning: that of hating sexual minorities. However, as

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[67] GhanaWeb 'National Chief Imam condemns homosexual practices' 13 June 2011 https://www.ghanaweb.com/GhanaHomePage/NewsArchive/National-Chief-Imam-condemns-homosexual-practices-210864 (accessed 7 October 2019).
[68] As above.
[69] Baisley (n 10 above) 386, 389 & 395.
[70] As above.
[71] K Gyekye *African cultural values an introduction* (1996).
[72] As above 24.
[73] GhanaWeb 'We must reject homosexuality with all our might- National Chief Imam' 29 November 2017 ghanaweb.com/GhanaHomePage/NewsArchive/We-must-reject-homosexuality-with-all-our-might-National-Chief-Imam-604964 (accessed 7 October 2019).

observed by Patrick Ireland, there is only one passage from the holy Koran that speaks against homosexuality.[74] The Bible, on the other hand, only speaks of homosexuality in the Old Testament.[75] The New Testament which reflects the teachings of Jesus Christ does not speak about homosexuality at all. Meanwhile, the Old Testament passage which has been interpreted to mean Christian abhorrence of homosexuality also condemns other acts such as adultery and adulterers who are bound to suffer the same fate as homosexuals. Nevertheless, religious leaders place emphasis on homosexuality instead of adultery and other vices.

While a case could be made that the effect of proxy wars by right-wing evangelicals is having its toll on the debate on homosexuality in Ghana, the intense competition among various churches to attract the attention of the population may also be a contributory factor to hostile homosexual rhetoric. Churches have sprung up in all corners of the country, many of them taking over public places as well as school classrooms at night and during weekends. The desire to fill their churches and the desire to be famous has led many of these church leaders to speak on national issues and stir controversies. The substance of their statements that embracing homosexuality in Ghana will invoke curses and the wrath of God on the country is hypocritical and less convincing. One scholar has observed (Ireland) that the more secular a nation is, the more tolerant it is of homosexuality.[76] On the contrary, countries that are less tolerant of other non-heterosexual sexualities usually have a Christian and Muslim majority in high numbers,[77] just like Ghana.

Homosexuality has been decriminalised in Europe and America, and some of the laws of these countries protect LGBT members who are even entitled to marry, adopt and raise children–yet Ghana borrows money from these countries to supplement its annual budgets and carry out developmental projects. 'If embracing homosexuality attracts the curse and destruction of God in a country, why has God not destroyed Europe and America?'[78] Why are they more prosperous than all of Africa put together? Why do African countries, including Ghana, still perpetuate the delusion that recognising homosexual sexual orientation attracts the curse of God?

Such untruths continue to gain currency because that is what frighten the typical African and Ghanaian. They are also the only defence that can be mounted in an attempt to circumvent recent

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[74] Ireland (n 44 above) 53.
[75] As above.
[76] As above.
[77] As above.
[78] This was the question put to a member of the Christian Council of Ghana by a journalist and he answered, 'how do you know God is not visiting his wrath upon them?' see 'Christian Council kicks against gay campaigners' (n 66 above).

research that anchors the belief that all societies may have persons who practice same-sex sexuality because it is related to human genes.[79] The logic behind the 'wrath of God' being visited on a people because there are same-sex persons who express love towards each other in the nation is an old trick which has outlived its usefulness and must be rightly condemned as 'politicised religion'.[80] That is, using religion as a basis to frighten people and through such devices bring sexuality within its confines in order to be controlled by religious leaders and the state.

Another theme that permeates the discussion on religion and homosexuality in Ghana is that religious leaders portray homosexuality as 'un-Ghanaian, unbiblical or ungodly'.[81] This portrayal uses the Bible as a reference point, suggesting that 'homosexuals' are deemed as outcasts or better still, that the demons at work in them should be 'cast out'. However, the framing of homosexuality as evil stems from a religious conviction, whether Christian or Islam, that is not shared by everyone, not least the people who may belong to that faith who may be homosexual. If people of the same faith may not share the same belief that same-sex sexuality is evil, then others who do not belong to that faith may even have a more vigorous opposition to such classification. Ghana is a secular state which is governed by a constitution that guarantees freedom of religion.[82] It is therefore unacceptable for a religious group to impose their religious views on everyone, when it comes to the subject of homosexuality. Imposing their religious views on the entire nation, may amount to religious fundamentalism. It is one thing to say that the law criminalises unnatural carnal knowledge, which is an argument that is considered in chapter 4 of this research, but it is different from saying because of someone's religious views, same-sex activity should not be decriminalised.

In her appraisal of the LGBT debate in Ghana, Baisley observes that the description of homosexuality as unbiblical or ungodly and un-Ghanaian is a way of framing the debate using the 'corruption frame'.[83] This way of framing the debate suggests that homosexuality is an import capable of corrupting or destroying the Ghanaian nation and its morals.[84] Such characterisation creates unnecessary panic and incites people to attack homosexuals in an erroneous belief that by so doing, they will eradicate foreign infiltrators and their spread of homosexuality.

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[79] See for instance, A Ganna et al 'Large-scale GWAS reveals insights into the genetic architecture of same-sex sexual behaviour' 365 *Science* (2019).
[80] Tamale (n 7 above).
[81] Baisley (n 10 Above) 391.
[82] Constitution of Ghana art 21(c); see also Quashigah 'Religion and the secular state in Ghana' (n 11 above) 331.
[83] Baisley (n 10 Above) 391.
[84] As above.

In 2019, the then moderator of the Presbyterian Church of Ghana in one of his verbal assaults on sexual minorities described homosexuality as 'filthy'.[85] Tweneboah alleges that the concept of 'filth' as ascribed to homosexuality also resonates with traditional religious faith. Relying on an interview conducted with an evangelist, he reckons that it is not only the Christian religion but also indigenous traditional religions that can also be associated with this concept.[86] In his own words,

> in a secular and rationalist society, the claim that homosexual practice brings 'filth' is deemed as laughable and irrational. …I contend, however, that in contemporary Ghana, this claim reflects the importance society attaches to 'purity and danger' as related to sexual activities.[87]

Further, Tweneboah points out that 'both indigenous religious adherents and Christians view the so-called 'filth' as having the potential to attract *musuo* (misfortune)'.[88]

One may not begrudge Christians who classify homosexuality as 'filthy' if it is based on their religious beliefs, but one is entitled to seriously disagree with the characterisation of homosexuality as constituting 'filth' in the traditional African religious sense. There is overwhelming evidence to suggest that 'same-sex relationships existed in African societies with a wide variety of motives, practices and emotions involved, including affection and fertility control'.[89] Besides, relationships also existed for significant reasons such as wealth creation, high crop yield and the warding off of evil spirits.[90] Also, as argued above, traditional African religion recognised different sexualities even though it preferred heterosexuality because of its procreative value. Nevertheless, it did not classify homosexuality as filthy. In the absence of a convincing data or scholarly work to support the claim that homosexuality was/is viewed by traditional African religion as filthy, any view to the contrary is doubtful.

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[85] 'Homos are filthy – Presby Moderator' available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Homos-are-filthy-Presby-Moderator-211727 (accessed 22 October 2019).
[86] Tweneboah (n 6 above) 31.
[87] As above.
[88] As above.
[89] M Epprecht 'Bisexuality and the politics of normal in African ethnography' (2006) 48 *Anthropologica* 187 189.
[90] As above.

That notwithstanding, 'it is important not to belittle the moral panic associated with the alleged 'filth' that people believe homosexuality brings to society'.[91] This is because the imagery that 'filth' evokes in the minds of the ordinary Ghanaian is powerful. It is associated with something unwanted that should be discarded, or better still something that should be swept away and buried to avoid being contaminated. Coming from the lips of a religious leader, the imagery of homosexuality as 'filth' does so much to incense people to take up arms to fight the alleged 'filth' called homosexuality.

In the free-for-all mode that religious leaders engage in the debate on homosexuality in Ghana, perhaps the most surprising condemnation of homosexuality, was the statement that homosexuality is an 'antichrist sexual revolution which should be resisted'.[92] The statement was made by the Catholic Archbishop of Kumasi, the Reverend Thomas Mensah at an ordination ceremony.[93] Accordingly, he summoned political, traditional and religious leaders to rise against it. He also condemned an international LGBT organisation for leading a crusade for same-sex sexual rights and compared homosexuals to HIV patients who need to be helped but not encouraged.[94] The reverend minister's call to resist homosexuals and to other state and social institutions to join in the fight is a moral panic strategy often used by religious leaders to garner hatred against sexual minorities. His comparison of homosexuals with HIV patients is unfortunate, but carefully chosen to evoke the same stigma and ostracisation that people living with HIV are subjected to in Ghana. Such utterances have contributed mainly to religion-based homophobia in Ghana, which is discussed below.

### 3.2.3 Religion-based homophobia in Ghana

The utterances of religious leaders have contributed immensely to an environment of hate and disdain for sexual minorities in Ghana. As a result of statements condemning homosexuality as evil, an abomination and learnt behaviour that can be cured, people in same-sex relationships or self-identifying homosexuals are subjected to anti-LGBT speech by individuals, civil society organisations, ministers of state, leading political figures and even state agencies. If homosexuals

[91] Tweneboah (n 6 above) 31.
[92] KA Domfeh 'Homosexuality is an anti-Christ sexual revolution, says Catholic Archbishop' Modern Ghana https://www.modernghana.com/news/339319/homosexuality-is-an-antichrist-sexual-revolution-says-catho.html (accessed 8 October 2019).
[93] As above.
[94] As above.

can be accepted and loved like any other person in Ghana, and homosexuality decriminalised, religion-based homophobia must be tackled.

Kaoma explains that the current wind of homophobia, blowing in many parts of Africa is a consequence of the religion, religiosity and religion-based spiritual convictions of the participants.[95] For instance, the religious-based non-governmental organisation(NGO) known as National Coalition for Proper Human Sexuality (the coalition for proper sexuality), has been at the forefront in the fight against sexual minority rights in Ghana.[96] The organisation has contributed significantly to the hostile climate against pro-LGBT activists and LGBT persons in Ghana. It relies on leaders of social institutions and political leaders, including a past president of Ghana,[97] to reiterate religious sentiments expressed by religious leaders against homosexuality to launch the homophobic agenda. The organisation has organised vigils across the country to pray and speak against homosexuality. It has threatened to draft a Bill to tighten sanctions against homosexuality[98] and also to establish a 'holistic sexual therapy unit' at Ghana's leading research and national hospital for the treatment of homosexuality.[99] The Executive Secretary and spokesperson for this organisation attacks any person who speaks favourably of sexual minorities and calls them names to injure their reputation.[100] He also speaks vehemently against decriminalisation of unnatural carnal knowledge and has often challenged political, religious and traditional leaders to speak up against homosexuality. Aided by the media and social institutions, he has so far been successful in branding homosexuality as part of an imperialist agenda, a form of sexual colonialism and cultural infiltration by a movement from the West that intends to convert Africans into homosexuals. The otherwise quiet Ghanaian media landscape on homosexuality, is now vibrant with a consistent

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[95] Kaoma (n 54 above).

[96] A basic search on the internet suggests this coalition has no website but has a Facebook presence that says it 'operates under the joint umbrella of the Christian Council of Ghana (CCG), the GPCC[Ghana Pentecostal churches council], the Catholic secretariat, the Muslim council and traditional leaders and authorities. See https://web.facebook.com/ncphsrfv/?_rdc=1&_rdr (accessed 23 October 2019).

[97] 'We're 'fortunate' all our current, past presidents 've rejected LGBT legislation- Foh-Amoaning' available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/We-re-fortunate-all-our-current-past-presidents-ve-rejected-LGBT-legislation-Foh-Amoaning-791956 (accessed 24 October 2019).

[98] 'Bill to criminalise homosexuality coming soon-Foh Amoaning' (n 9 above).

[99] '400 homosexuals register for counselling' by Timothy Gobah Graphic online 21 August 2018 available at https://www.graphic.com.gh/news/general-news/400-homosexuals-register-for-counselling.html (accessed 24 October 2019).

[100] 'Retract or die-Foh Amoaning fights 'small boy' lawyer, Kpebu over gay rights' available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Retract-or-die-Foh-Amoaning-fights-small-boy-lawyer-Kpebu-over-gay-rights-749852 (accessed 24 October 2019).

discussion on the adverse effects of homosexuality, almost weekly, inspired by the coalition for 'proper sexuality'.

Other influential personalities such as the Speaker of Parliament of Ghana, a reverend minister, had also used his office to condemn homosexuality without provocation and even threatened to resign his position as speaker when it was suggested that perhaps that President of Ghana was open to a decision to decriminalise homosexuality in Ghana.[101] The speaker's criticism of persons who engage in same-sex relations from a religious perspective has contributed to a profound religious resentment towards homosexuality. He has been commended by the religious community for statements he has made while interacting with religious groups in parliament and has stated that he will use his office to block any attempt to decriminalise anti-sodomy law in Ghana.

A former chief psychiatrist has also added his voice to the anti-homosexuality debate that enhances religious homophobia and justifies attempts by pastors to 'convert' homosexuals to heterosexuals. According to Akwasi Osei, homosexuals are persons who are sick and afflicted by a psychiatric disorder. He claims that because it is a psychiatric disorder, it is not true that people are homosexuals because of genetic make-up.[102] There have been claims by highly placed persons in the Ghanaian society that they have witnessed pastors healing homosexuals of demons that afflict them, which makes them who they are. If religious leaders claim they are curing people of homosexuality daily in their churches of the demons of homosexuality,[103] it makes the general society view sexual minorities who call for protection of their rights as people who are not only refusing to seek the help they need but also 'contaminating' society with their 'abomination'.

These individuals and other leading political figures who speak against homosexuality at every opportunity have created a hostile environment for anyone to speak positively of sexual minority rights; they have also endangered the lives of persons in same-sex relationships.

Tweneboah has rightly noted, that the subject of homosexuality was not on the agenda of public discourse in Ghana as recent as the early 2000s.[104] This was the case to the extent that possible convictions of persons of the offence of 'unnatural carnal knowledge' may passed without incident.

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[101] 'I will resign over amendments to accept gayism- Speaker of Parliament' Edmund Smith-Asante Graphic online 10 May 2018 available at https://www.graphic.com.gh/news/politics/i-d-resign-than-preside-over-gay-debate-speaker-of-parliament.html (accessed 24 October 2019).

[102] See however Ganna et al (n 79 above).

[103] 'God can deliver homosexuals- Foh-Amoaning' Ghanaweb 25 April 2018 available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/God-can-deliver-homosexuals-Foh-Amoaning-646136 (accessed 24 October 2018).

[104] Tweneboah (n 6 above)

There were even calls by same-sex practising persons who called for their recognition and protection by the law. Therefore, in the case of Ghana, until recently people who were in same-sex relationships had the luxury of staying under the radar, and operated under a kind of policy of 'do not tell us' and 'we will not hate you'. When LGBT persons started gaining visibility, they suddenly became a 'threat' to the moral values of Islam and Christianity that merited all manner of actions to restrain them.

The Pew research is therefore right to depict Ghana as one of the countries in the world with a high percentage of persons who dislike homosexuals.[105] However, Ghana is acclaimed to be a peaceful and welcoming country, so why does it not welcome homosexuals? The answer purely lies in the depiction of homosexuals and homosexuality by religious leaders, their followers and other persons and groups that align with Christianity and Islam. Since the first statement by the CCG in 2006, condemning homosexuality and labelling it as a threat to the nation, there have been many more statements and utterances by religious bodies that have condemned homosexuality. There are even occasions where religious leaders, even religious programmes on radio, have challenged governments and political party leaders to denounce homosexuality, or they will galvanise Christians to vote against them in a general election.[106]

Not only Christian leaders and churches have perpetrated hatred and incited the general public against homosexuals. The Islamic sect, its various denominations in Ghana as well as the youth, have been incited to attack homosexuals and homosexuality in Ghana. For instance, organised religious groups belonging to the Muslim community have organised demonstrations, urging the government to pass severe sanctions for the practice of homosexuality and challenged the government to arrest and prosecute homosexuals or at best eliminate them from the society.

Therefore, religious homophobia is the order of the day, and the constant refrain on the lips of many people who speak against homosexuality in Ghana is to state first that it is against morality

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[105] *Afrobarometer* 'Good neighbours? Africans express high levels of tolerance for many, but not all' Dispatch no 74 (1 March 2016) 12 reports that only 11% of Ghanaians tolerate homosexuals better than Senegal at 3%. The highest tolerance level of homosexuals in Africa is 74% (Cape Verde) and 64% (South Africa); In an earlier research by Pew Research Center 'The Global divide on homosexuality' (updated 27 May 2014) 1. Only 3% of Ghanaians said society should accept homosexuality. Available at https://www.pewresearch.org/global/2013/06/04/the-global-divide-on-homosexuality/ (accessed 28 April 2021).

[106] 'We'll campaign against any party that supports homosexuality-Group' Ghanaweb 19 April 2018 available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/We-ll-campaign-against-any-party-that-supports-homosexuality-Group-644610 (accessed 24 October 2019).

and the teachings of God before they talk about culture. This points to hatred of homosexuals based on religion which is discussed below.

### 3.2.4 Religion as a basis for the decriminalisation of unnatural carnal knowledge

One of the most important biblical injunctions that are supposed to guide every Christian is, hate the sin but not the sinner.[107] However, in Ghana, this biblical injunction has been turned upside down by religious leaders and followers concerning homosexuality. They hate both the sinner and the sin.

While religion and religious leaders have led the fight against homosexuality and generated animosity towards homosexuals, there is still some opportunity to use religion as a basis for decriminalisation. There are indications that it may be challenging to employ any other strategy. Even if the law is decriminalised, religious resentment towards homosexuality in Ghana will remain if not tackled. Religion-based homophobia is entrenched in the body politic of Ghana and is a justification often invoked to violate sexual minority rights.

Amoah and Gyasi contend that religion could be used as a basis to accommodate same-sex sexuality.[108] They admit that most religions are opposed to same-sex sexuality. However, the authors draw on other research to say that since these same religious bodies preach forgiveness and tolerance, it is possible to use these teachings to embrace persons who practice same-sex sexual acts.[109]

Some religious leaders have called for tolerance towards sexual minorities. For instance, the former head of the CCG, the Christian umbrella body in Ghana, Reverend Dr Opuni-Frimpong, in a conciliatory tone urged Ghanaians not to violate the rights of LGBT persons.[110] This call for respect of LGBT rights is in sharp contrast to the numerous criticisms of homosexuality and homosexuals by the clergy who have demonised the phenomenon. The reverend minister noted that 'the only

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[107] Ezekiel 33 versus 11 intimates that God hates the sin of the wicked but not the sinner. For a discussion about the uneasy tension between religion and homosexuality in Ghana and how religion fuels hatred for homosexuals, see JY Adua 'Religion and homosexuality in Ghana: Assessing the factors constraining the legalisation of homosexuality in Ghana: A study of the Klottey Korle sub-metropolitan area of Accra' MPhil thesis, University of Ghana 2018 available at http://ugspace.ug.edu.gh (accessed 28 April 2021); see also Tweneboah (n 6 above).

[108] Amoah & Gyasi (n 7 above).

[109] As above 3.

[110] 'People shouldn't be 'attacked', 'abused' over their sexual preference- Opuni-Frimpong' GhanaWeb 5 August 2018 available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/People-shouldn-t-be-attacked-abused-over-their-sexual-preferences-Opuni-Frimpong-674560 (accessed 24 October 2019).

thing we will say is, this idea of attacking people, that we want to throw people away, that we want to abuse people for sexual preferences, shouldn't be'.[111]

### 3.2.5 Conclusion

The basis of homophobia in Ghana is religion-based. Religious leaders, leading politicians and individuals who head public institutions or NGOs encourage hatred against homosexuals through their public utterances. These institutions and persons have based their hatred of homosexuality on biblical teachings and morality.

While conceding that religion has been used as a tool for antagonising and restricting LGBT rights in Ghana, it also offers opportunities for decriminalisation. For instance, the message and content of Christianity and Islam could be used as a medium to heal society and encourage the embrace of all persons, whether heterosexual or homosexual. That is the starting point for recognising and respecting the sexuality of all persons. This will reduce the tension and hatred surrounding the subject. 'In the minds of Ghanaian church leaders, once the nation as a state party to international human rights protocols does not have full control over its values on sexuality',[112] Tweneboah argues, 'then there are excellent grounds to reconsider Ghana's sovereignty, hence the need to invoke the sovereignty of God'.[113]

The intriguing question is, must the sovereignty of God be invoked in determining the rights of sexual minorities and if so to what extent? If the purpose of using religious arguments is an acknowledgement that the rights of sexual minorities are recognised in law and that the only way to impugn such rights, is the invocation of the sovereignty of God, then it is an unattractive argument.

## 3.3 Culture as a barrier to the decriminalisation of homosexuality in Ghana

It will not come as a surprise to anyone who has followed the debate on LGBT rights in Ghana from 2006 till now, to hear anti-LGBT activists using culture as a basis to deny the rights of a minority group in society. They do so on the basis that Ghanaian culture cannot accommodate homosexual sexual orientation. To be clear, everyone has a sexual orientation, whether heterosexual or homosexual.

[111] As above.
[112] Tweneboah (n 6 above) 37.
[113] As above.

To deny and violate other people's rights on account of their sexuality which is acclaimed to be alien to a particular culture appears a formidable but hollow argument. It is a hollow argument because just as culture is incapable of suppressing and changing the immutable biological sexual orientation of heterosexuals, the same holds true for homosexuals. However, the argument of culture as a bar to recognising homosexual sexualities is formidable because the majority of the Ghanaian society is heterosexual, and with leaders of different religious, traditional, and political persuasions holding on to a colonial truth that denies the multiple indigenous African sexualities, it is difficult to convince people otherwise.

Unlike the 2006 and 2011 debates which were triggered by an alleged LGBT conference and the alleged registration of eight thousand homosexuals by a non-governmental organisation (NGO),[114] In 2019, the trigger for the debate is an alleged comprehensive sexuality education (CSE) curriculum being introduced to primary and secondary schools in Ghana. The CSE document is a guideline to teaching sexuality education in primary and secondary schools in Ghana. The main argument put forward by persons and bodies speaking against the introduction of CSE in Ghana has two main points.

First, because the CSE is being introduced in Ghana and sponsored by some foreign governments through agencies of the UN, it is a subtle agenda to introduce an alien culture, LGBT rights, to Ghanaian children.[115] Second, the concept of LGBT rights is detested by the Ghanaian culture and should not be introduced. A careful analysis of the arguments put forward suggests that there has not been an official introduction of any CSE document. Many of the persons who spoke on authority had not even read the said document and were only doing excellent guesswork. Once 'sexuality' is mentioned in the document and it is allegedly sponsored by foreign donors their thinking was that it signals the subtle introduction of LGBT rights through education to make children more tolerant than the current generation to homosexuality.[116]

The attempt to deny consensual same-sex practices because it is against the culture of Ghanaians is ahistorical, uninformed, and a misunderstanding of what Ghanaian culture represents and its dynamic nature. Such arguments deny the very nature of Ghanaian culture as humane, its historical antecedents as welcoming of different sexualities, and how it was denigrated by British

[114] Baisley (n 10 above) 390; see also Essien & Aderinto (n 7 above) 121-122.
[115] 'Teaching 5-year-olds about sexuality is 'clear LGBT agenda'-Foh-Amoaning' GhanaWeb 27 September 2019 available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Teaching-5-year-olds-about-sexuality-is-clear-LGBT-agenda-Foh-Amoaning-784160 (accessed 25 October 2019).
[116] As above.

colonialism. The so-called Ghanaian culture that is touted in contemporary times is instead fossilisation of British religion and culture. Therefore, when Ghanaians speak of a Ghanaian culture that does not embrace homosexuality, it is instead a reference to a combined British culture and religion which they use to fight genuine, indigenous Ghanaian culture.

### 3.3.1 Ghanaian culture and homosexuality

One of the most persuasive arguments, apart from religion, for the rejection of sexual minority rights is that it is against the culture of Ghanaians. Politicians, religious and traditional leaders, as well as individuals and groups, argue that same-sex sexual relationships cannot be found in any culture or community in Ghana. Such statements view Ghana as one entity with one culture that permeates every corner of the country and often fail to distinguish the different cultures that existed in pre-colonial Ghana and continue to exist in contemporary times. Indeed, there are as many cultures as there are ethnic groups and languages in Ghana, which are over fifty.[117] Therefore the claim that a solitary, unified Ghanaian culture rejects homosexuality needs to be tested against the proposition that there are different cultures. Perhaps some cultures may have allowed it while others may have rejected.

As established in chapter 2 of this research, different ethnic groups existed in pre-colonial and colonial Ghana with different cultural, political and governance systems. For instance, among the Ashanti, Fanti, Akyem, the Ga and Adangbe people of pre-colonial Ghana, there were elaborate sanctions against persons who committed clearly defined sexual offences. However, there was no offence and punishment for consensual same-sex sexual relationships.[118] Scholars have also noted that among the tribes of pre-colonial Ghana, there were persons of the same sex who expressed love to each other.[119] The existence of male to male and female to female relationships or marriages pointed to one conclusion that even though these pre-colonial societies in Ghana may not have

[117] Ghana Statistical Service 2010 population and housing census national analytical report (May 2013) reports at page 61-62 that there are 8 major ethnic groups in Ghana with other smaller groups; See also Unpublished: EA Asamoah 'The national language question in Ghana: prospects and challenges' unpublished MPhil thesis, University of Ghana, 2016 1 observes that there are over 50 languages in Ghana.

[118] See for instance Rattray, Danquah, Sarbah, in chapter 2.

[119] I Signorini 'Agonwole Agyale: The marriage between two persons of the same sex among the Nzema of southwestern Ghana' (1973) 43 *Journal de la societe des Africanistes* 221; RM Amenga-Etego 'Marriage without sex? Same-sex marriages and female identity among the Nankani of northern Ghana' (2012) 4 *Ghana Bulletin of Theology* 2; SO Murray & W Roscoe *Boy-Wives and female husbands studies in African homosexualities* (1998) 106-107; 130-138.

celebrated homosexuality as they did heterosexuality, they embraced such homosexual practices as part of the diverse sexualities found in their various cultures.[120]

If consensual same-sex acts existed among these tribes, which in no small extent constituted the early indigenous tribes of pre-colonial Ghana, but were unpunished, then there is a likelihood that while such practices existed, it was not the business of the traditional leaders to regulate it, let alone punish it. The introduction of British anti-sodomy laws in the then Gold Coast also suggests that the law was not introduced for the fun of it. If homosexual practices did not exist in the Gold Coast, then why did the British introduce anti-sodomy laws? Law is often introduced to cure mischief. The question that remains unanswered is: what kind of mischief were the British hoping to cure when they criminalised 'unnatural carnal knowledge'? To prove that homosexuality is un-African and un-Ghanaian, as many social, religious, traditional and political commentators would have one believe, one must contend with why the law made an act a criminal act in the first place. I propose that the British criminalised consensual same-sex acts between adults in the Gold Coast because they found out that it existed among the indigenous people.

To be fair, it could also be argued that British anti-sodomy law was a hallmark of British colonial administration. Anti-sodomy law, which was introduced in their colonies, just like many other laws that were introduced by the British was not necessarily done as a response to a local condition but rather as a way of entrenching British culture, law and religion in the British empire. Nonetheless, the overwhelming evidence by scholars of the existence of homosexuality in Africa, that have come forth, even in recent times and the existence of various sexualities that boldly 'come out' to declare their sexuality, lends credence to what is happening in Ghana and other parts of Africa in contemporary times. There are indigenous Africans who are homosexuals, existing in Ghana and Africa, who are telling their stories that link their existence in contemporary times to the pre-colonial past.[121]

It is, therefore, no coincidence that in contemporary times, almost all the British colonies in Africa where anti-sodomy laws were introduced have sexual minorities who are indigenous to their communities and are fighting back against such repressive laws. Scholarly research also buttresses the point that different sexualities, including homosexuals, have existed in Africa, but either such information was suppressed or ignored.[122] In some instances, due to cultural inclinations towards

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[120] Tamale (n 7 above) 35; Epprecht (n 89 above) 188; Murray & Roscoe as above.
[121] S Tamale *African sexualities: a reader* (2011); Epprecht (n 89 above) 188; Murray and Roscoe (n 119 above) 130.
[122] Epprecht (n 89 above) 192-193.

fertility and social silences relating to sexuality, homosexuality had to be confined to the backstage.[123] Significantly, same-sex relations were not regulated or punished by customary law, as the colonial administrators, and their current protégée in leadership positions in Africa and Ghana seek to do.

Any claim that homosexuality does not exist in any Ghanaian culture is not only ahistorical but also misinterprets the current visibility of sexual minorities as a recent phenomenon by cultural infiltrators and their stooges. Even in contemporary times, the very existence and stories of sexual minorities, emphasises their indigenous and untainted nature, in the sense of having lived and grown up in Ghana all their lives, as evidence of home-grown homosexuality.[124] This reminds one that homosexuality is not something unique to only a specific group of people with an alien language and skin colour but a universal truth that reverberates in every corner of the earth. Ghanaians are also homosexuals.

The existence of Ghanaians who are homosexuals, having been born, bred and living in Ghana can no longer be denied or dismissed as the work of sex tourists who invade Ghana and entice a few innocent people to engage in the practice.[125] In the same vein, it is erroneous to hold the view that there are Ghanaians who practice consensual same-sex because of the effects of globalisation.[126] It may be pointless to deny that there are male persons who sell sex to their male counterparts, but it is highly contentious to argue that men who sleep with men in Ghana are the product of globalisation and global tourism.[127]

Declaring that people's deeply felt intimate feelings towards persons of the same sex are expressions of globalisation and the desire to make money reduces the 'homosexual experiences' of many gay people who are born that way to a 'commodity' or a 'body' that is for sale. It ignores the hard truth that transactional sex is a phenomenon or trade that cuts across different sexual orientations. Reducing homosexual love to globalisation and infiltration of foreign culture, therefore, ignores the fundamental truth that–transactional sex aside, whether between persons

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[123] As above 188: see also O Ambani 'A triple heritage of sexuality? regulation of sexual orientation in Africa in historical perspective' in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 14 19-21.
[124] Human rights Watch 'No choice but to deny who I am, violence and discrimination against LGBT people in Ghana' (2018).
[125] As above.
[126] M Oteng-Ababio & C Wrigley-Asante 'Globalisation and the male sex trade in Ghana: modernity or immorality' (2013) 1 *Contemporary Journal of African Studies* 79.
[127] As above 81.

of the same or opposite sex, be it male or female– people of different sexual orientations or persuasions express love to their partners through their relationships.[128]

The stigma, criminalisation and the general silence regarding sex, especially homosexual sex in Ghana, accounts for silence and the lack of showing up and challenging the widely held claim that homosexuality is against Ghanaian culture. Homosexual sex is a criminal offence under the laws of Ghana, and it is stigmatised in the various communities. For that reason, persons who engage in consensual same-sex practices are not disposed to flaunt that fact. Again, since it is a practice that is confined to the private spaces of partners, it is highly unlikely that the general public would be privy to such a practice. Also, additional evidence suggests that there are persons who self-identify as homosexuals. Indeed, there are Non-Governmental Organisations in Ghana, whose work is to provide all manner of services for the many members of the LGBT community in Ghana, who are assaulted, blackmailed or money extorted from them, in some instances just to conceal their identity.[129]

Therefore, any claim that homosexuality does not exist in the Ghanaian community is a dangerous fallacy. First, it is a fallacy because such a claim does not account for the historical antecedents of consensual same-sex conduct and the introduction of laws to regulate it. What is usually omitted from the narrative is that pre-colonial Ghana did not regulate or punish homosexuality, but it was the colonial administrators who criminalised the act. It may be argued then that if consensual same-sex conduct was not criminalised before the arrival of colonial administrators, it means indigenous Ghanaian cultures accommodated and embraced persons of different sexualities other than heterosexuality.

Second, the narrative that homosexuality is un-Ghanaian deliberately ignores the entrenchment of British colonialism, culture and religion which outlawed indigenous cultural practices, hence replacing tolerance and acceptance of homosexuals with homophobia and rejection of sexual minorities. For over a century of the introduction of anti-sodomy laws, same-sex relationships could

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[128] For a discussion on same-sex sexual expressions as symbolic of love towards one's partner see, O Onyango 'Debating love, human rights and identity politics in East Africa: The case of Uganda and Kenya' (2015) 15 *African Human Rights Law Journal* 28.

[129] 'Human Rights Violations Against Lesbian, Gay, Bisexual, and Transgender (LGBT) People in Ghana: A Shadow Report Submitted for consideration at the 115th Session of the Human Rights Committee October 2015, Geneva Submitted by Solace Brothers Foundation, The Initiative for Equal Rights, Center for International Human Rights of Northwestern University School of Law, Heartland Alliance for Human Needs & Human Rights Global Initiative for Sexuality and Human Rights (shadow report)' August 2015 available at https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/GHA/INT_CCPR_ICO_GHA_21415_E.pdf accessed 8 July 2020;

not possibly have been widely practiced and accepted among the communities, and people are not disposed to come out openly to talk about sex as is the practice among many Ghanaians.[130] However, even though the law, culture, and religion, which at that time was mainly British, suppressed the outward expression of homosexual tendencies, the inward feelings of persons who are homosexuals could not be crushed. Despite the use of culture to reject and suppress same-sex sexuality, culture has not and cannot change the biological make-up of homosexuals in Ghana.

Third, any claim that there are no homosexuals in Ghana, especially by politicians and some traditional leaders,[131] is hypocritical. There is enough evidence to suggest that in some areas of Ghana, some traditional leaders have conspired with ordinary citizens to banish persons perceived or who have admitted being homosexuals from their communities. Politicians have mounted so-called moral entrepreneurial crusades against homosexuals, and misguided youths in some communities have launched attacks on persons perceived to homosexuals who are either celebrating a member's birthday party. Alternatively, even in some instances, without any provocation whatsoever but only with the knowledge and admission of persons that they are homosexuals, attacks have been launched against them by family members, politicians and even friends.[132]

There is also evidence on record to show that law enforcement agencies, particularly the police, have harassed, extorted and sometimes assaulted members of the LGBT community without any provocation whatsoever.[133] The police have also failed on countless occasions to act on complaints of harassment, extortion and assault of members of the LGBT community simply because when the alleged offenders are arrested and claim that the person or persons they attacked are homosexuals, the police are not disposed to continue investigating the case anymore because of their perceived or actual sexual orientation.

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[130] GY Oduro & E Miedema 'We have sex, but we don't talk about it: Examining silences in teaching and learning about sex and sexuality in Ghana and Ethiopia' in SN Nyeck (ed) *Routledge handbook of queer African studies* (2020) 236; JK Anarfi & AY Owusu 'The making of a sexual being in Ghana: The state, religion, and the influence of society as agents of sexual socialisation' (2011) 15 *Sexuality and Culture* 1 at 14; SO Dankwa 'It's a silent trade: Female same-sex intimacies in post-colonial Ghana' (2009) 17 *Nordic Journal of Feminist and Gender Research* 192.

[131] Baisley (n 10 above) 390-391.

[132] Human Rights Watch 'No choice but to deny who I am' (n 124 above) 30-46.

[133] As above 63-64. In a letter to the head of police, the Inspector General of Police (IGP), Human Rights Watch noted the 'climate of impunity for crimes committed against LGBT people' in Ghana. In response, the IGP observed that 'going forward the police service will adopt more proactive steps and pragmatic approaches to ensure the protection for LGBT individuals generally' 67.

Given the above, any suggestion that homosexuality did not exist in the communities of Ghana misrepresents the issue. Again, a claim that if there are persons in Ghana who practice same consensual sex, these might be persons who have travelled outside Ghana or come into contact with persons who are homosexuals who have visited Ghana, is spurious and lacking any credibility. There is indubitable evidence that the issue of homosexuality is culturally neutral and existed among Ghanaians and Ghanaian communities regardless of ethnicity, culture, or professional background. Therefore, even though there is no single Ghanaian culture, it is safe to say that homosexuality existed and continues to exist among different cultures in Ghana.

### 3.3.2 The role of culture in shaping and sustaining criminalisation of homosexuality in Ghana

The famous Ghanaian symbol, 'Sankofa', transliterated as 'return for it' is expressed as a bird with its body in a forward motion but its head is turned, looking backwards. This symbol aptly captures the essence of Ghanaian culture in changing and shaping attitudes towards the (de)criminalisation of homosexuality in Ghana. While the bird moves forward in flight, in a bid to move with the changing times of the global world, it also looks behind with head tilted backwards, checking if there are any good things left behind to inform the future. Kwame Gyekye uses this 'Sankofa' symbol with another symbol beneath it that looks like a stool, called 'ofamfa', which means critical examination. Put together, the two symbols mean 'a return to the past must be guided by critical examination'.[134] The present thesis contends that while British culture was vital in perpetuating anti-sodomy law and homophobia, indigenous Ghanaian culture did not. Therefore, Ghanaians must return to their culture of the pre-colonial era but with critical examination, in order to embrace different sexualities.

While an argument can be made that Ghanaian culture did not play a role in the criminalisation of homosexuality in Ghana, yet supporters of sodomy legislation invoke Ghanaian culture as a basis to continue holding on to the crime of 'unnatural carnal knowledge'. Such a claim that Ghanaian culture abhors homosexuality and therefore, the law in its current state preserves Ghanaian culture, is contentious. The unnatural carnal knowledge offence originated from the United Kingdom. The introduction of this law in Ghana in 1892 represented the clash of legal cultures that Modibo Ocran discusses in his paper on the inception of English law in Africa.[135] It symbolises the clash of legal cultures because not only did this sodomy law take over from existing customary law that did not

[134] Gyekye (n 71 above) unnumbered page, 3 from the beginning of the book.
[135] M Ocran 'A clash of legal cultures: The treatment of indigenous law in colonial and post-colonial Africa' (2006) 39 *Akron Law Review* 465.

punish consensual same-sex activity but also usurped law-making power from traditional authorities and shaped cultural attitudes towards homosexuality differently.

The coloniser's culture and law which criminalised homosexuality 'clashed' with the 'colonised peoples' customs, laws and traditions that embraced homosexuality. While the coloniser's law was written, the colonised's law was not written, and the former prevailed over the latter as if there was no law. When colonialism ended, it did not end the effect and operation of the coloniser's law. Therefore, maintaining this anti-sodomy law is tantamount to perpetuating English colonial thinking of the 17th Century, with the aid not of the colonial administrator, but indigenous people who purport to preserve Ghanaian culture.

Accordingly, *Sankofa* reminds Ghanaians that something good existed in our various cultures before the colonisation project started. The pre-colonial cultures did not enact laws to prohibit same-sex relationships and embraced people of different sexualities. Even if Ghana's culture(s) has been adulterated as a result of the infiltration of English culture, religion, and law through colonisation, it is still not too late to look back and pick the good aspects of our culture in order to move in the right direction, forward.

If Ghanaian culture concerning same-sex practices was hijacked by the British over a century ago, and we come to a realisation that this is the case, it is imperative to return to the past and critically examine our culture. It is difficult to do so because even though colonialism ended over six decades ago in Ghana, the country has failed to emancipate itself from the clutches of colonial-era law.[136] Although colonialism has long ended, coloniality remains. The educated elite who benefitted from British education, religion and culture have preserved these powerful social institutions and their edicts, physically and mentally. It is therefore difficult for the ordinary Ghanaian to accept that anti-sodomy laws offend Ghanaian culture and not preserve it.

It is essential to make the point that Ghanaian culture(s) did not in and of itself prohibit the practice of homosexuality, but instead accommodated it. As noted by scholars, same-sex practices existed in various cultures in Ghana during the pre-colonial period.[137] With the advent of colonialism, the colonial administrators were determined to regulate such conduct in order to preserve their

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[136] RA Atuguba 'Ghana @ 50: Colonised and happy' in Mensah-Bonsu et al (eds) *Ghana law since Independence history, development, and prospects* (2007) 571 572.

[137] N Ajen 'West African Homoeroticism: West African men who have sex with men' in Murray & Roscoe (eds) *Boy-wives and female husbands- studies in African homosexualities* (1998) 129; SO Murray 'Homosexuality in Traditional sub-saharan Africa and contemporary south Africa' 22 available at semgai.free.fr/doc_et_Africa_A4.pdf.

culture and religion. Therefore, the introduction of anti-sodomy laws was consistent with the overall strategy of the British government to ensure that all its territories conformed to British law, culture and religion.[138] With the introduction of anti-sodomy laws alongside Christian religion and British culture, there was a concerted effort to gradually phase out the ways of life of the people that the British thought was inconsistent with their worldview and with how the country should be governed to achieve what they had set out for themselves.

It is therefore crucial to note that Ghanaian cultures which were hitherto accepting of homosexuals gradually came to understand that the colonial administrators who they held in awe, did not like such a practice. Side by side with the law, which had the potential to punish, the people gradually lost their authentic culture and conformed to the new culture imposed on them. The result is that the authentic culture was lost and replaced with a culture that prohibited homosexuality. In this way, the culture that shaped and defined the discussions on anti-sodomy laws was and still is, a pseudo-Ghanaian culture primarily based on English traditions. Hence when people argue in contemporary Ghana that Ghanaian culture does not acknowledge homosexuality,[139] it is valid to the extent that they are referring to an inherited culture that does not refer to their roots nor refer to who we are as Ghanaians.

Returning to the symbol of the bird that represents going back to Ghanaian culture and picking up the good things that were left behind,[140] it is clear that Ghanaians must decolonise our culture, concede that culture is dynamic and ask what their forefathers would have done, seeing that there are minorities in their midst who express different sexuality from the majority. I doubt if any Ghanaian culture will recommend putting to death or violating the rights of such persons. An important Akan maxim that is of relevance to other ethnic groups in Ghana is the admonition that no one is a child of the earth but a child of God.[141] This symbolises that all human beings are equal and ought to be treated equally.

Although culture has shaped and sustained the argument for the criminalisation of homosexuality in Ghana, it is not too difficult to see, upon careful examination that it is a pseudo-

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[138] M Kirby 'The sodomy offence: England's least lovely criminal law export?' in C Lennox & M Waites (eds) *Human Rights, sexual orientation and gender identity in the Commonwealth: Struggles for decriminalisation and change* (2013) 61 63.

[139] 'President Mills: Homosexuality, lesbianism foreign to our culture' (n 9 above).

[140] JET Kuwornu-Adjattor et al 'The philosophy behind some Adinkra symbols and their communicative values in Akan' 7 *Philosophical Papers and Review* 22; KP Quan-Baffour 'The wisdom of our forefathers: Sankofaism and its educational lessons for today' (2008) 7 *Journal of Educational Studies* 22.

[141] Gyekye (n 71 above) 24.

culture not built on Ghanaian cultural principles but English culture, religion and law. That is why it is vital to examine whether or not culture should be used as a basis to criminalise homosexuality or whether culture should be a barrier to the decriminalisation of homosexuality in Ghana, to which I now turn.

### 3.3.3 Culture as a barrier to the decriminalisation of consensual same-sex acts in Ghana

Whenever the debate on homosexuality has been triggered by an event or pronouncement, the cultural argument has been used by anti-homosexual proponents. Unlike previous years when the subject has come up for discussion, the 2019 debate on homosexuality has education and culture as the trigger mechanism.[142] As discussed earlier in this chapter, the CSE which was alleged to have been commissioned by the education ministry in Ghana with the assistance of some foreign donors came under intense scrutiny.[143]

In the words of Mr Foh-Amoaning, spokesperson for the coalition for proper sexuality, the CSE was a vehicle for transmitting LGBT knowledge and hence tolerance of homosexuality in Ghana.[144] He therefore cautioned the government not to introduce and urged the President to denounce and abolish the CSE because it is against Ghanaian culture.[145] The education minister quickly retreated and in a press statement declared that no such policy or curriculum had been approved for use in schools in Ghana and that anything contrary to the culture of Ghanaians will not be entertained in the CSE. The President eventually spoke on the subject at a church service, stating that he would preserve the culture of Ghanaians, making sure that no foreign culture is introduced in educational curricula.[146]

These brief exchanges between an NGO and the public on one hand and government officials on the other underscores some significant points worth discussing. First, the exchanges show that

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[142] In 2006 an announcement of a gay conference in Ghana triggered discussions of re-criminalisation of same-sex sexual acts. See Essien & Aderinto (n 7 above). In 2011, the debate was triggered by newspaper reports that an NGO had registered 8,000 homosexuals in the Western Region of Ghana, many of whom had HIV. See Baisley (n 10 above) 390. In 2021, the debate, which is still ongoing and may culminate in a law to re-criminalise homosexual acts, was triggered by the opening of an LGBT office in Accra, the capital of Ghana. See 'Ghana security forces shut down LGBTQ office: Rights group' *Aljazeera* 24 February 2021 available at https://www.aljazeera.com/news/2021/2/24/ghana-shuts-down-lgbt-office-rights-group (accessed 29 April 2021).

[143] 'Comprehensive sexuality education: A covert attempt to introduce homosexuality-MP' GhanaWeb 30 September 2019 available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Comprehensive-Sexuality-Education-A-covert-attempt-to-introduce-homosexuality-MP-784922 (accessed 25 October 2019).

[144] 'Teaching 5-year-olds about sexuality is 'clear LGBT agenda'-Foh-Amoaning' (n 115 above)

[145] As above.

[146] 'CSE no-no President Akuffo Addo vows' *Daily Graphic* by Daniel Denu, 7 October, 2019, 1.

Ghanaians are particularly sensitive and emotionally attached to their culture, to the extent that anything deemed a 'threat' to that culture–even in the form of educating children–will not be countenanced. Second, they emphasise the fact that in the debate on homosexuality in Ghana, culture plays a crucial role and once it is used effectively, it can shelve any discussion aimed at opening up space for a lively exchange of views on homosexuality. Third, they point to the fact that there is a lack of appreciation of the history of pre-colonial Ghana relating same-sex practices and the non-regulation and criminalisation of homosexuality.

Culture has been used as a rallying point to deny equal rights for sexual minorities in most parts of Africa, including Ghana.[147] However, the proponents who use culture as a basis to deny homosexual freedom and rights do not tell us which specific Ghanaian culture abhors homosexuality or for that matter the content and scope of that culture and when it was practised in recent memory. In the face of overwhelming evidence that some Ghanaian cultures embraced same-sex sexuality before colonialism started,[148] the cultural argument needs to be interrogated carefully. It was the same argument used by the CRC of Ghana to advise the government of Ghana not to amend the Constitution to provide for specific LGBT rights because it offends the culture of Ghanaians.[149] The time has come to interrogate that narrative and provide evidence to the contrary, affirming that various Ghanaian cultures embraced same-sex sexuality.

The question that arises then is: Should Ghanaian cultures be used as a basis to deny sexual minority rights and to decriminalise consensual same-sex practices in Ghana given the historical backing that such practices were not punished by forebears of this nation? There are good reasons to suggest that consensual same-sex relationships should be decriminalised because the argument that it is against the culture of Ghanaians is not plausible for the following reasons.

The first reason is that Ghana is a constitutional democracy ruled by a constitution that guarantees the enjoyment of culture but limits the enjoyment of culture when it offends the rights of other persons. The Constitution states clearly that 'every person is entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the provisions of this Constitution'.[150] So stated, the enjoyment of cultural rights is determined by the Constitution and all culture, and cultural practices are subject to the provisions of the Constitution. What this means is that if any culture contains any norms or practices that violate the rights of any person,

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[147] 'President Mills: Homosexuality, lesbianism foreign to our culture' (n 9 above).
[148] Ajen (n 137 above); Murray (n 137 above).
[149] Report of the Constitution Review Commission (n 2 above) 656-657.
[150] Constitution of Ghana art 26(1).

such cultural norms and practices to the extent that it offends any provision in the Constitution, particularly the Bill of Rights, is void.[151] Emphasising the ill-effects of culture that is outlawed by the Constitution, it goes on to state that 'all customary practices which dehumanise or are injurious to the physical well-being of a person are prohibited'.[152] Consequently, the enjoyment of, or adherence to cultural principles cannot be a basis to deny sexual minority rights.

Second, because the authentic culture of the people is accommodating and history confirms that there were no laws that criminalised such a practice, the view is further strengthened that Ghanaian pre-colonial cultures were adulterated by English culture which rejected consensual same-sex practice. Third, if culture is dynamic, then there is every reason to suggest that Ghanaian cultures continue to evolve, as they are not static. They are capable of accommodating persons with a homosexual orientation even if the culture has not done so before, but only on the basis that the culture is sufficiently mature to accommodate homosexuals because, they are a product of the culture. They ought to be accepted by the same culture that produced them and makes them comfortable enough to contribute to society.

While people are closely attached to their cultures and will defend anything associated with it, it is essential to remember that in a democratic dispensation it is the Constitution, not culture, that regulates the life of all persons, even including the culture itself. The 1992 Constitution of Ghana guarantees the rights and freedoms of all persons. The Constitution also recognises the rights of people to practice their culture but outlaws any dehumanising culture.

This leads to the following question: Is a culture which banishes homosexuals, encourages hate speech, limits the freedom of speech, of association, of liberty and encourages violence and violations of the rights of homosexuals perpetuating or practising a dehumanising culture? Even though there is no guidance on this from the courts of Ghana, certain practices are outlawed in Ghana as being dehumanising, for instance the practice of *Trokosi* where female children are drafted to serve as sexual slaves to a fetish priest in a shrine.[153] The life of these *trokosis*–female children given to fetish priests as atonements for sins of their relatives–may be compared to homosexuals.[154]

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[151] Constitution of Ghana art 1(2).
[152] Constitution of Ghana art 26(2).
[153] EA Kwaw 'Colonial marginalisation of children and the denial of children's rights: The Ghanaian experience' (2015) *Centerpoint Journal (Humanities edition)* 65.
[154] As above 85 87.

In the case of *Trokosi*, the girls who are made to serve in the shrine did not commit any sins yet are made to atone for the sins of their forebears or their family.[155] This is comparable to the case of homosexuals, who, through no fault of their own, find themselves with a sexual orientation that they did not decree or propose to have. However, homosexuals are subjected to varying degrees of human rights violations because culture allegedly forbids it. Homosexuals are sometimes treated even far more cruelly than *Trokosis* because their rights do not matter. The parallels in the treatment of *Trokosis* and homosexuals in Ghana are clear. It therefore stands to reason to suggest that if the practice of *Trokosi* is outlawed,[156] so should anti-sodomy laws which provides the reason to violate the rights of homosexuals.

Therefore, if section 104 of the Criminal Offences Act of Ghana is deemed to reflect and preserve some aspects of a particular culture or the culture of a particular community, then it ought to be decriminalised because the culture it preserves dehumanises a minority group.

### 3.3.4 Culture as a tool for the decriminalisation of homosexuality?

My argument so far has emphasised that there is no such thing as Ghanaian culture but rather many different cultures in Ghana. Chapter 2 of this research established that there are various cultures among the most dominant ethnic groups in Ghana that experienced and embraced same-sex practices.

For this reason, persons who argue that homosexuality is alien to Ghanaian culture do so out of either ignorance of the history of the different cultures of Ghana, or because they are repeating the tag of 'African sexual exceptionalism' that early Europeans in Africa, placed on Africans without any scientific basis. While the veracity of that claim has since been repudiated, it is no longer fashionable to say that homosexuality is un-African or un-Ghanaian. There are scholarly works that point to the existence of same-sex practices in history in Africa, and Ghana, that emphasises this point. Therefore, any claim to the contrary is not only unfounded but ignorant or mischievous.

Having established that same-sex practices existed in different cultures in Ghana, it is important to interrogate how the current situation of animosity towards homosexuality can be reversed since it is based on a foreign culture which has been appropriated as Ghanaian. A revisit and adoption of cultural practices that accommodated persons of different sexualities, while still appreciating

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[155] SE Green 'Modern Trokosi and the 1807 abolition in Ghana: Past and present' (2009) 16 *William and Mary Law Quarterly* 959; see also RK Ameh 'Child bondage in Ghana: A contextual policy analysis of Trokosi' unpublished PhD thesis (2001) Simon Fraser University.

[156] Criminal Offences (Amendment) 1998, Act (Act 554) sec 314A.

heterosexual marriages that keep the family lines expanding are essential. To do so will be in keeping with the wise sayings of Ghana's forefathers, the concept of *Sankofa* and re-establish the identity of the Ghanaian as a person that respects the dignity and worth of other human beings.

Gyekye outlines several proverbs that are found in the Akan culture of Ghana to emphasise the worth placed on every human being. Some of these proverbs include, 'all human beings are children of God; no one is a child of the earth'[157] and 'it is a human being that is needed'.[158] Others include, 'the human being is more beautiful than gold'[159] and 'humanity has no boundary'.[160] These maxims, for example, the one that states that all human beings are God's children, emphasise that none should be discriminated against as we all derive our being from a shared creator. There is a

> belief that there must be something intrinsically valuable in God: …the human being, considered a child of God, presumably because of having been created by God, ought also to be held as of intrinsic value, worthy of dignity and respect.[161]

The maxims also emphasise the importance of human beings and human fellowship and the value of human beings for 'the well-being of the individual human being'.[162] Perhaps the most revealing and vital maxim that goes to the root of the human being and his essence, regardless of their sexual orientation, is mirrored in the maxim that says that there is no boundary to the human being. This is understood to mean 'that our common brotherhood is intrinsically linked to our common humanity, that all human beings belong to one species'.[163] Gyekye goes on to say that African people 'perceive humanity to embrace all others beyond their narrow geographical or spatial confines'.[164] This profound maxim suggests that if all human beings are intrinsically linked to one another's humanity, the question of a person's sexual orientation, be it heterosexual or homosexual does not matter and ought not to be used a basis to determine what rights they enjoy.

Apart from the worth and dignity of the human being, which is culture neutral, culture is also supposed to be dynamic. If pre-colonial cultures embraced different sexualities in Ghana, in an age when the universality of human rights had not been broached, it is even more important in contemporary times that culture would have evolved positively, to embrace the rights of all

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[157] Gyekye (n 71 above) 24.
[158] As above 25.
[159] As above.
[160] As above 27.
[161] As above.
[162] As above 25.
[163] As above 27.
[164] As above.

persons including homosexuals. However, the crucial missing point in debating homosexuality and its criminalisation in Ghana ignores culture as dynamic and capable of embracing all human beings regardless of their sexual orientation. Assuming, without admitting, that the so-called Ghanaian culture truly abhors homosexuality, is it not possible using the maxims common to all cultures which emphasise the common humanity and intrinsic value of all human beings as a basis for the evolution of culture to respect the rights all persons?

If the cultures of the Ghanaian people that was practised during the pre-colonial period accommodated homosexual persons in society and did not punish that act, then there is the need to revisit that culture and apply it in contemporary times. First, the contention that homosexuality has never existed in any Ghanaian community and therefore should not be entertained in present-day Ghana, is false. If it is false, then the whole argument about culture being such a stumbling block to the realisation of LGBT rights is wholly destroyed. The next thing that needs to be established is what the determinants of that culture are. It is known from the wise maxims and proverbs of one's forebears that the intrinsic worth and dignity of the human being is inviolable because it is linked and derived from God, the creator.[165] If humans are each other's keepers, then it behoves this cultural philosophy to underpin our relationship with all members of society, including LGBT persons.

Most importantly, the Ghanaian society is a secular society that has all forms of religious denominations as well as different cultures. The various cultures have similarities which show a particular leaning towards helping each other, showing love to one another. These cultural precepts can be used as a basis to inform the secular society and make it work for everyone.

While Ghanaian cultures have been adulterated by colonialism and the religion accompanying colonialism, a critical analysis shows that authentic Ghanaian culture embodied the very essence of humanity, accommodated homosexuals and did not punish them. Ghana's cultures have been adulterated through colonialism and the people have been misled to believe that Ghana's culture does not recognise and accommodate homosexuality. It behoves Ghanaians to come to the point where they learn through historical and empirical evidence, that pre-colonial cultures accommodated same-sex relationships, revisit that culture and apply it for the benefit of all members of the society.

[165] As above.

### 3.3.5 Conclusion

It has been easy for several years to use culture as a reason to ward off discussions on decriminalisation of consensual same-sex conduct in Ghana. It turns out after all that when people mention culture as a reason to criminalise homosexuality, they are not referring to indigenous Ghanaian cultures that existed before colonisation began.

Ghanaian cultures embraced different sexualities even though it celebrated and preferred heterosexual relationships for reasons of procreation.[166] With the introduction of colonialism and laws that criminalised consensual same-sex practices, there was a disruption of the way of life of the people. These anti-sodomy laws have not only survived colonialism and continue to exist in the post-independent state but have also shaped and entrenched negative attitudes towards homosexuality and persons deemed to be homosexuals.

The current situation in Ghana depicts a country that is using a foreign culture to fight an indigenous culture by holding on to an English law that is culturally English to regulate and punish and restrict the expression of same-sex love. The time has come to return to the authentic cultures of the pre-colonial period, not entirely, but like the *Sankofa* bird on the *Ofamfa*, to do so with scrutiny.[167] Aspects of Ghanaian cultures that see the humanity of one person in the other and the cultural values that espouse assistance and true neighbourliness to others should be emphasised and practised. That way, culture can be used as a basis to preserve one's humanity and to love every member of the society regardless of their sexual orientation.

## 3.4 Politicisation of homosexuality in Ghana

### 3.4.1 Introduction

The subject of homosexuality is highly politicised in Ghana. It is a subject that can make or mar a political career, depending on how a politician responds to it. Unlike his predecessors, the current President of Ghana, a human rights lawyer, is perceived by many, including persons within his party as a person who is sensitive to the rights of sexual minorities. His interview with an international television network, Al Jazeera, attracted much criticism. The President noted that when there is a groundswell of opinion, sufficient enough to galvanise action, homosexuality could be

[166] Ajen (n 137 above); Murray (n 137 above).
[167] Gyekye (n 71 above).

decriminalised in Ghana.[168] Since then, the President has been forced to clarify what he meant by 'groundswell of opinion' in that interview and forced to retreat from his positive statements about LGBT rights. The President has also been forced on two occasions to deliver a statement to deny that he is on course to decriminalise consensual same-sex practices in Ghana.[169] Quite recently, in October 2019, the President was compelled to openly declare that he will not support anything that offends Ghana's culture.[170] This was concerning statements that the introduction of CSE in schools was a ploy to introduce LGBT education and tolerance towards homosexuality.[171]

His predecessors, like Presidents Mahama, Atta-Mills and Kufour faced similar challenges in their tenure as presidents but they were very vocal in their condemnation of gay rights and even threatened stiffer punishments through amendment of the existing law.[172] The posture of the current Ghanaian President is commendable as he has refused to respond dramatically to the pressing of the moral panic button to condemn homosexuality. Even when he is hard-pressed, as with the CSE brouhaha, he has managed to euphemistically denounce homosexuality, not mentioning it by name and only saying that he would not do anything to undermine Ghana's culture.[173]

His political opponents have challenged him with taunts that he supports homosexuality and is on course to legalise it.[174] Even the speaker of Parliament who is elected by a majority of members of the legislature and belongs to the same party as the President has been very vocal in his

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[168] 'Legalising homosexuality not on the agenda but bound to happen- Akuffo Addo' GhanaWeb 26 November 2019 available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Legalising-homosexuality-not-on-the-agenda-but-bound-to-happen-Akufo-Addo-604072 (accessed 25 October 2019); see also 'Ghana likely to legalise homosexuality- Akuffo-Addo' GhanaWeb 26 November 2017 available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Ghana-likely-to-legalize-homosexuality-Akufo-Addo-604066 (accessed 25 October 2019).

[169] 'Homosexuality won't be legalised under Nana Addo – Presidency' GhanaWeb 28 April 2018 available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Homosexuality-won-t-be-legalized-under-Nana-Addo-Presidency-647221 (accessed 25 October 2019).

[170] 'CSE no-no President Akuffo Addo vows' (n 146 above).

[171] 'Comprehensive sexuality education: A covert attempt to introduce homosexuality-MP' (n 143 above).

[172] 'Former President Kufour condemns LGBTQI' *ABCnewsgh.com* 8 March 2021 available at https://www.abcnewsgh.com/former-president-kufour-condemns-lgbtqi/ (accessed 28 April 2021); 'Homosexuality is criminal-President Mahama' Graphic Online 2 February 2013 available at https://www.graphic.com.gh/news/general-news/homosexuality-is-criminal-president-mahama.html (accessed 28 April 2021).

[173] 'CSE no-no President Akuffo Addo vows' (n 146 above).

[174] 'Prof do little Mills boldly kicked against homosexuality, prof do plenty, can you? – Koku dares Akuffo-Addo' GhanaWeb 30 September 2019 available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Prof-Do-Little-Mills-boldly-kicked-against-homosexuality-Prof-Do-Plenty-can-you-Koku-dares-Akufo-Addo-784985 (accessed 25 October 2019).

condemnation of homosexuality in an apparent move to fill the vacuum created by the President who has not outrightly condemned it. The Speaker has hinted, in an apparent swipe at the President, that if any bill is brought to parliament to decriminalise homosexuality, he will fight against it and even resign his position in parliament.[175]

For those who have an intimate understanding of political party intricacies of Ghana's democracy, the speaker was indirectly telling the president that he will oppose decriminalisation of homosexuality even if the president is in favour of it. While parliament and the Speaker's office is supposed to be independent of the executive, a keen follower of Ghana's politics since 1992 will know that the majority in parliament has always belonged to the ruling executive President and his party.[176]

In addition to Parliamentary Bills which are initiated by the President and eventually passed into law, there are members of parliament who are ministers of state who are part of the President's cabinet.[177] Consequently, there are even intra-party disputes, in addition to the inter-party taunting, relating to a person's position on homosexuality, as depicted by the apparent tension between the president and the Speaker of Parliament.

Tweneboah appreciates this political tension relating to homosexuality and captures it neatly.[178] In his view, the concept of sovereignty is a myth in contemporary times because a country like Ghana does not have exclusive control over its borders, citizens and laws. Ghana has ratified international treaties and there are treaty bodies that are required to monitor Ghana's compliance with the terms of the treaty and hold it accountable for human rights violations. Thus, Ghana uses

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[175] 'I will resign if Akuffo-Addo legalises homosexuality- Speaker' GhanaWeb 14 May 2018 available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/I-will-resign-if-Akufo-Addo-legalizes-homosexuality-Speaker-651656 (accessed 25 October 2019).

[176] The December 2020 election in Ghana has changed these dynamics. Both the ruling New Patriotic Party (NPP) and the opposition National Democratic Congress both have 137 members of Parliament. An independent candidate, formerly of the NPP, has promised to work with the NPP in Parliament, giving the ruling party a slim majority of 138 to 137 members, available at https://www.parliament.gh/mps?az (accessed 28 April 2021). Parliament has also introduced a private members law that allows Members of Parliament to introduce Bills in Parliament. See 'Parliament adopts Private Members Bill' *The Chronicle* 18 July 2020 available at https://thechronicle.com.gh/parliament-adopts-private-members-bill/ (accessed 28 April 2021).

[177] Constitution of Ghana 1992 art 78(1) injuncts the president to appoint majority of ministers of state from parliament, who invariably are members of the president's political party and part of his cabinet that introduces bills that that is subsequently passed by parliament into law.

[178] Tweneboah (n 6 above).

religious and cultural values as a pretext to defend the country's sovereignty to withstand pressure from the west, concerning the rights of sexual minorities.[179]

Therefore, Ghana's former late President, Atta-Mills, 'would link Ghana's sovereignty with the sanctity society attaches to sexuality as an extra basis for his insistence on Ghana's position on the same-sex relationship'.[180] This is because political leaders are acutely aware that by the international human rights treaties they have ratified on behalf of their countries they cannot invoke law as a basis to deny sexual minority rights, but instead use culture and religion as a smokescreen. In the same vein, it is understandable why some people criticise the current President, Nana Akuffo Addo. Past Presidents of Ghana succumbed to the political gymnastics of denouncing same-sex relationships when urged by moral entrepreneurs and political activists. In this regard, having resisted the pressure to denounce homosexuality, the current President deserves commendation because he has proved that he is delivering his electoral promises and does not need the politics of homosexuality to endear himself to the electorate.

Consequently, even though 'Ghanaians accused President Akuffo Addo of missing the opportunity to unequivocally state his unwillingness to initiate moves for the legalisation of homosexuality in Ghana', the President acted within the confines of the Constitution. He swore an oath to uphold the Constitution of Ghana that requires him to protect the rights of all persons and not to denounce the rights of a minority group.

The politicisation of homosexuality in Ghana has a unique twist. Ghana operates a silent code of 'remain invisible and not be harmed' policy towards homosexuals. As long as members of the LGBT community remain silent and conduct their activities without public attention, people are happy to let them be. When the LGBT community announced the convening of an LGBT international conference in the capital of Ghana in 2006,[181] political leaders condemned the announcement and threatened to arrest participants and organisers if they go ahead with the conference. Since then, the focus has been on silencing members of the sexual minority community. The silent code was shattered, and the government and other institutions saw the movement as a threat to the heterosexual and political hegemony of the state. Sporadic statements such as the threat by LGBT persons that if the state does not do enough to protect their rights, sexual minorities will not vote

[179] As above 42.
[180] As above.
[181] Essien & Aderinto (n 7 above) 121.

in national elections,[182] has also placed sexual minority rights in the political spotlight. So, as it is said in local parlance, 'na who cause am'? (meaning, who caused the problem of politicisation of homosexuality in Ghana?).

However, can person or group of persons be blamed for asserting their rights to free expression, and association? Must a call on the state to protect their rights in the face of mounting violations be deemed an affront to state authority and a threat to heteronormativity? Students, teachers, market women, farmers, ordinary citizens and many other groups have threatened the political establishment to provide one service or the other and called for the protection of one right or the other, yet politicians have responded and either provided the service or right or promised to do so. So why is it different if sexual minorities call for protection of their rights, or invite like-minded persons to a conference to discuss issues that affect their community? Tweneboah makes the following comment:

> not only is the subjugation of the human body and sexuality a tool for maintaining state power in the Foucauldian sense but through the politics of homosexuality, the state's normative legitimacy can and does become a stage for political manipulation.[183]

Homosexuality is politicised in order for the state to exercise control and subjugation of non-conforming sexualities. A phenomenon relating to the politicisation of homosexuality is the interdependence of politicians and the electorate on each other. In Ghana, politicians find it very convenient to use sexual minorities as a basis to launch their political popularity in order to seek political office or be retained in office. They usually employ the very arguments used by religious and traditional leaders to make their point. This is not surprising because politicians often seek the support of various traditional and religious leaders in order to win elections. They campaign in traditional areas of the country, and since the traditional leaders have some influence over the people whose votes they want to win, they say what the people and their leaders want to hear. Churches also offer their pulpit for politicians to make statements in an attempt to woo electorates. Accordingly, some of the major churches give politicians the platform to market themselves and in return politicians kowtow to the whims of the churches. If the churches cry foul about homosexuality, the politicians are compelled to take the issue up and to be seen acting in the interests of the church.

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[182] 'Gays to boycott elections?' GhanaWeb 23 May 2008 available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Gays-To-Boycott-Elections-144227 (accessed 29 October 2019).

[183] Tweneboah (n 6 above) 40.

Therefore, politicians have often responded to moral entrepreneurs who press the panic button at the very mention of the word 'homosexuality'. The usual statements they make are that homosexuality is a threat to the cultural values and morals of society and threatens its members.[184] As a follow up to this rhetoric, politicians and their allies have threatened to introduce Bills in Parliament to further criminalise consensual same-sex conduct between adults and have even engaged in hate speech.[185]

An analysis of the statements of politicians in Ghana regarding the subject of homosexuality suggests that first, the politicisation of the victimless crime between two consenting adults in the privacy of their bedroom is a diversionary tactic away from the everyday bread and butter issues of the ordinary Ghanaian. The response of politicians to the so-called 'evils' of homosexuality is only a response to moral entrepreneurs in whose debt they are, for the promises they made on the pulpit of their churches and their mosques while pretending to be the most pious religious persons, but all in the name of seeking votes for political office.[186]

After all, a significant majority of Ghanaians belong to the Christian and Islamic faith,[187] so playing along with them and articulating what appears to be what they want to hear is essential for maintaining political office and for an opportunity in future to campaign in the churches and mosques. Also, politicians often pander to the dictates of their base, their party and political elites who fancy that majority of ordinary people are against homosexuality. Therefore, they have an opportunity to say what resonates with these supporters in order to win their trust and votes.

Politicians who have made homosexuality a central issue for political campaigning, demonstrate that they do not have a clear message regarding what the electorate identifies as core issues to be resolved for their welfare. The sections below will examine the issues enumerated above by discussing politicisation of homosexuality as a diversionary tactic from pressing national and developmental issues, as a violation of the national constitution and their oath of office, as a response to moral entrepreneurs in order to make themselves famous, and as a response to keep the political base happy. Its significance as indicating the lack of a clear message to tackle the numerous problems that the electorate face will also be discussed.

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[184] 'President Mills: Homosexuality, lesbianism foreign to our culture' (n 9 above).
[185] 'Bill to criminalise homosexuality coming soon-Foh-Amoaning' (n 9 above).
[186] Tettey (n 6 above) 86.
[187] 2010 population and housing census (n 13 above).

### 3.4.2 Politicisation of homosexuality as a diversionary tactic

Ghana has had its fair share of politicisation of homosexuality. Politicians from the very top, from the President, speaker of parliament, parliamentarians, and ministers of state to the ordinary political office holders in a political party have had a say in the debate on homosexuality in Ghana when presented with the opportunity. Since Ghana transitioned from military rule to the fourth republican democratic state in 1992 to 2020, it has had five presidents. The first of these five, President Rawlings, ruled from 1992 to 2000 but he is not on record as having spoken on the subject of homosexuality. Despite being an outspoken critic on national issues, subsequent to his retirement into private life, he has not commented on the issue. While his tenure as President did not witness any debate on homosexuality since Ghana's debate on the subject started around 2006, his retirement period has seen many discussions on the subject, but he has not used any opportunity to fuel the debate by commenting on the practice.

The term of President John Agyekum Kufour from January 2001 to December 2008, saw the first significant discussion on homosexuality in Ghana. The debate was triggered in 2006 by an announcement of the Gay and Lesbian Association of Ghana (GALAG) president who spoke about the subject on radio, announcing to the shock of the nation that an international conference of gays and lesbians would be held in the nation's capital, Accra.[188] It is fair to say that President Kufour was doing well in trying to fulfil his political promises and he did not 'invent' the debate on homosexuality that generated significant controversy in the country at the time. However, while fulfilling his political promises, his government had been accused of corruption. He was criticised for doing nothing about it and justifying it with statements like, 'corruption started with Adam' and dared his political critics to produce evidence if they thought his government and its appointees were corrupt.[189] In the midst of this, former government appointees under President Rawlings were being tried in the courts for corruption-related matters, including the President's former wife, Nana Konadu Agyeman Rawlings.[190]

At the height of the debate, President Kufour was serving his last term as President, which was due to end in two years, and with extreme political tension in the country over allegations of corruption and trial of government appointees, the homosexuality debate provided an escape

[188] Essien & Aderinto (n 7 above).
[189] 'Corruption as old as Adam misunderstood- Kufour' 2 September 2016 *Peace FM online* available at https://www.peacefmonline.com/pages/politics/politics/201609/290723.php (accessed 28 April 2021).
[190] 'Nana Konadu's statement on corruption charges' 15 January 2009 *GhanaWeb* available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=156244 (accessed 28 April 2021).

route to ease the tension. As some scholars have noted,[191] the debate was very acrimonious and included key social, institutional leaders such as pastors of churches, imams of mosques, traditional leaders, medical practitioners, NGOs, other identifiable bodies like student unions and ordinary citizens.

The minister of state in charge of national security at the time, Kwamena Bartels, sought to emphasise the power of the state to control its citizens, including their bodies and what they could do with them. Bartels issued a press statement warning alleged homosexuals to abandon the gay conference, or they would be arrested.[192] The state apparatus headed by the President of Ghana and his ministers ensured that the alleged gay conference did not happen, claiming it was against the values of Ghanaians. [193] Since then, every President of Ghana has been asked by social institutions to declare their stand against homosexuality publicly.

Professor Atta-Mills, who succeeded Mr Kufour as President in January 2009, also got involved in the debate. In response to comments made by the then British Prime Minister, Tony Blair, that aid will be cut to countries in Africa who do not recognise LGBT rights, the President stated that Britain could keep their money because the issue of homosexuality was a moral and cultural issue that Ghanaians were not prepared to recognise.[194]

President Mahama who succeeded professor Mills from July 2012 to January 2017, was accused of supporting a gay agenda,[195] while his vice president, the late Amissah Arthur was accused of being gay when he was nominated for the position.[196] Both President Mahama and late vice president Amissah Arthur were forced to come out publicly and denounce homosexuality.

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[191] Essien & Aderinto (n 7 above); see also Baisley (n 10 above).
[192] Essien & Aderinto (n 7 above) 127.
[193] As above.
[194] 'Ghana refuses to grant gays' rights despite aid threat' 2 November 2011 *BBC* available at https://www.bbc.com/news/world-africa-15558769 (accessed 10 September 2020).
[195] 'President Mahama and the powerful gay lobby' 20 March 2016 *Ghanaweb* available at https://www.ghanaweb.com/GhanaHomePage/features/President-Mahama-and-the-powerful-gay-lobby-424637 (accessed 10 September 2020); see also an opinion piece by Andrew Solomon titled 'In bed with the President of Ghana?' *New York Times* 9 February 2013 in which he denies accusation that he supported the campaign and election of the then President of Ghana, available at https://www.nytimes.com/2013/02/10/opinion/sunday/in-bed-with-the-president-of-ghana.html (accessed 10 September 2020).
[196] 'Vice President must not be ashamed of being gay' 12 October 2012 *Modern Ghana* available at https://www.modernghana.com/news/423685/vice-president-must-not-be-ashamed-of-being.html (accessed 10 September 2020); 'I am not gay; Amissah-Arthur defends integrity' 7 August 2012 *JusticeGhana* available at http://www.justiceghana.com/index.php/en/features/2-uncategorised/845-i-am-not-gay-amissah-arthur-defends-integrity (accessed 10 September 2020).

Religious leaders also called on the then President to make a public statement on homosexuality and what his response to the phenomenon was. In response, he stated that he was against the practice of homosexuality, just like all Ghanaians, and did not support the practice.

The current President of Ghana has remained focused on his core duties in the role, trying to solve the big electoral promises he made – until his statement as mentioned earlier, to the effect that if there was a groundswell of opinion in the country in future, LGBT rights might be recognised and protected like all other rights.[197] The statement of the President did not go down well with his party members and officeholders who stampeded the President to make a statement to clarify and possibly denounce what he said.[198]

The speaker of the parliament of Ghana, who belongs to the President's party and was nominated by him as speaker was not enthused about the comments of the President. In reaction to this, a group of religious leaders called on the speaker, who indirectly attacked the President's comments. The speaker noted that he would resist every attempt to change the laws of Ghana to recognise LGBT rights and condemned homosexuality as an abomination.[199] There are several instances that ministers of state, political appointees in the regions and districts of Ghana have made pronouncements bordering on hate against homosexuality and even threatened that homosexuals would be lynched. The effect is that traditional leaders in some areas of Ghana have threatened to banish or 'cleanse the community' of people suspected to be gay.[200]

The Ghanaian media often sets the agenda for the discussion of issues affecting LGBT rights in Ghana and frequently they portray it in very negative terms. So while the media have neglected their duty as the fourth estate of the realm and will neglect to hold politicians accountable for their actions, they rather aid the politicians to offend the rights and sensibilities of LGBT persons by setting the agenda and trapping politicians into it. As has been noted by Tettey,[201] the media ought to behave much more responsibly in their reportage of LGBT issues by avoiding sensationalism and reporting both sides of the story which is not too much to ask of ethical and professional journalists.[202]

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[197] 'Ghana likely to legalise homosexuality-Akuffo-Addo (n 168 above).
[198] 'Homosexuality won't be legalised under Nana Addo' (n 169 above).
[199] 'I will resign if Akuffo-Addo legalises homosexuality-Speaker' (n 175 above).
[200] Human Rights Watch 'No choice but deny who I am, violence and discrimination against LGBT people in Ghana' (n 124 above) 16.
[201] Tettey (n 6 above) 86.
[202] As above.

However, the bigger culprits in this whole issue are politicians who deliberately engage in discussions about LGBT persons in order to divert attention from the real issues facing the population. Sometimes they do this in order to boost their popularity in the wake of poor administration and governance and to present an image of being morally upright to the people. Diverting attention from the main issues facing the ordinary Ghanaian is the core reason why politicians engage in discussions on homosexuality in Ghana. For instance, in the wake of mounting allegations of corruption, mismanagement of the economy and maladministration and an unstable electricity supply, homosexuality provided a perfect distraction from the real issues. The governing National Democratic Congress led by Mr John Mahama as its party leader and President of Ghana, started making statements about the evils of homosexuality and how the government will not give them space to operate.[203] These statements were made in the heat of the national crisis of solving a load shedding exercise. Presidents Kufour, late Atta-Mills, and Mahama have all made opportunistic statements about gays and LGBT rights at susceptible moments in their presidency and have won over the population to advance their political cause.[204]

Sometimes, when a political party leader or the president is accused of being lenient with homosexuals, the reaction has been to forcefully deny this and outline measures taken to subjugate homosexuality and further measures in future to curtail the so-called menace.[205] Such discussions increase tensions in the country and expose sexual minorities to violations of their rights. For instance, President John Mahama was accused of receiving financial benefits from a well-known person who was gay and had attended his book launch.[206] The smear campaign and attacks on the President for selling the honour of the country to homosexuals were as baffling as it was hypocritical. Ghana has received aid and continue to do so from countries that recognise and respect gay rights, yet people do not complain about that. However, the slightest hint at tolerance by political leaders towards homosexuality is politicised, and politicians are attacked.

Very often, the discussion on homosexuality has been initiated by members of parliament either on the floor of parliament or the radio. On the floor of parliament, the discussion has mainly been

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[203] 'Homosexuality is criminal-President Mahama' (n 172above).
[204] We're fortunate all our current, past presidents 've rejected LGBT legislation- Foh Amoaning' (n 95 above); 'President Mills: Homosexuality, lesbianism foreign to our culture' (n 9 above); 'Homosexuality is criminal-President Mahama' (n 172 above); 'I will never legalise same-sex marriage- Akuffo-Addo finally breaks silence' 28 February 2021 GhanaWeb available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/I-will-never--legalise-same-sex-marriage-Akuffo-Addo-finally-breaks-silence' (accessed 28 April 2021).
[205] Homosexuality won't be legalized under Nana Addo' (n 169 above).
[206] 'President Mahama and the powerful gay lobby'; 'In bed with the President of Ghana?' (n 195 above).

in response to discussions outside parliament concerning homosexuality in one way or another, and this becomes an opportunity for morality-attention-seeking parliamentary members to make statements on the floor of parliament. Interestingly, no member of parliament dares to speak on behalf of gays or gay rights, because they will surely lose political mileage if they do so. So, in unison, members of parliament who are elected to protect the interests of their constituents, sacrifice the rights and interests of a minority on the altar of political expediency.

In other instances, nominees for various positions as ministers of state or as members of the judiciary have been put in awkward positions by members of parliament who have challenged them to speak on the issue because they are going to occupy a sensitive position and so should be declared 'clean' of homosexuality. For instance, a minister-designate for the ministry of gender and children, Nana Oye Lithur, was unnecessarily 'grilled' by parliament for several hours over her alleged support for homosexuality, making some people question whether homosexuality was the only immoral act in Ghana.[207] Sometimes nominees have made statements in support of LGBT rights in the past, and it is an opportunity to grill them and possibly get them to renounce such statements. In some instances, some overzealous members of the public have challenged members of parliament to re-criminalise homosexuality or risk losing their political positions.[208] It is in this vein that Ebobrah's analysis that the modern legislator in many African countries, including Ghana, faces a dilemma is apt.[209] This dilemma is between protecting human rights or saving a political career.[210]

The Ghanaian legislator is torn between protecting the rights of sexual minorities by decriminalising same-sex acts and passing laws that prohibit discrimination on the grounds of sexual orientation, or supporting continued criminalisation or re-criminalisation in order to save their political careers. Parliament is, therefore, a no-go area for the decriminalisation of same-sex acts because members are sensitive to the majority views that oppose homosexuality and are not

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[207] 'Is homosexuality the biggest immoral act in Ghana? Akomfrah asks' GhanaWeb 3 February 2013 available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Is-homosexuality-the-biggest-immoral-act-in-Ghana-Akomfrah-asks-263950 (accessed 30 October 2019); see also 'Oye Lithur's appointment opposed over her 'support' for homosexuality' GhanaWeb 14 January 2013 available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Oye-Lithur-s-appointment-opposed-over-her-support-for-homosexuality-262070 (accessed 30 October 2019).

[208] 'Bill to criminalise homosexuality coming soon- Foh-Amoaning' (n 9 above); See also 'we will campaign against any party that supports homosexuality-Group' (n 106 above).

[209] S Ebobrah 'Africanising human rights in the 21st century: Gay rights, African values and the dilemma of the African legislator' (2012) 1 *International Human Rights Law Review* 110.

[210] As above 130.

ready to relinquish their hold on political power by making statements in defence of gay rights, let alone support legislation to decriminalise it. I therefore agree with Ebobrah that using the courts to vindicate the rights of sexual minorities is the best option.[211]

The subject of homosexuality and politics is inextricably linked in Ghana. It is a highly politicised and recurrent issue which invokes passionate and negative responses from politicians who denounce it in order to sustain their political careers. The subject was first triggered in 2006 and thrown into the public discourse, the floodgates have been opened, and politicians have always been at the centre of the discussion because of the political power they wield to make changes to legislation.

There is fierce competition among the political parties, especially the two main political parties in Ghana, the ruling New Patriotic Party and the opposition National Democratic Congress to outdo each other in this debate. When the issue comes up for discussion, the usual tactic is to challenge the other side of the political divide to come out forcefully to condemn homosexuality and make some promise to deal with such a menace. Sometimes religious and traditional leaders have stoked the debate and challenged politicians to take a stand and redeem the nation from the 'scourge' of homosexuality.

### 3.4.3 Politicisation of homosexuality as a response to moral entrepreneurs

The response of political leaders to issues concerning LGBT rights in Ghana has often been at the instance of moral entrepreneurs and social institutions who put pressure on the politicians to act. Issues relating to sexual minority rights are sensationalised in the media, and politicians follow the bait to make negative comments about homosexuality. Apart from the response of politicians to sensationalised reports in the media concerning LGBT activities, politicians have also responded to statements made by leaders in other countries, particularly the West, to denounce homosexuality and attempt to affirm the sovereignty of the state capable of managing its affairs including the subject of homosexuality.[212]

Individuals who demand some moral standards, often subjective, of the state, are referred to as moral entrepreneurs.[213] These persons are usually religious, political, and traditional leaders. Sometimes they are people who have some standing or popularity in the eyes of the public. When

[211] As above 132.
[212] 'Ghana refuses to grant gays' rights despite aid threat' (n 194 above).
[213] Tettey (n 6 above).

these moral entrepreneurs speak on media platforms, particularly the radio, they quickly get the attention of political office-holders or those seeking political office.

It is generally the case that when moral entrepreneurs make passionate arguments on the radio, calling on politicians, religious and traditional leaders to act to save the country against homosexuality, the debate is sparked for weeks. They know that religious leaders will re-echo their sentiments on media platforms and church pulpits, but they expect that this will not achieve any results because the target of their concern is not church members per se but the ordinary citizen who may not even attend church.

Traditional leaders can also do much to change perception or whip up citizens on issues such as this. Influential traditional leaders may warn people in their locality and even in extreme cases, ban individuals perceived to be members of the LGBT community. However, the call to action, announced by moral entrepreneurs is usually targeted at politicians. They know politicians will do anything to cling onto power or to come to power. They also know that politicians wield enough power to make laws or issue edicts to cause discomfort for a group of persons who are either visible or invisible. In this way, the coercive forces of the state which should be used for the collective good of the country, are used by politicians to harass and violate the rights of sexual minorities. The objective is to keep sexual minorities quiet and 'invisible' from the public sphere.

Therefore, when LGBT persons, through public statements and activities become 'visible', politicians have been forced to act to save their political careers. There are also instances in which politicians have failed to act in the interest of LGBT persons when they have been assaulted or when law enforcement agencies have failed to act or come to their aid following assault or money extortion, or even when politicians themselves have led the charge of hate speech and assault against sexual minorities.[214] Also, in some situations where people have been declared unwanted and banished from a community by a traditional authority, contrary to the Constitutional provisions on the rights of all persons, politicians have failed to protect the rights of these people.[215]

When LGBT persons are presented in negative terms in the media, there is instant outrage and a determination to stamp out the practice of homosexuality. For example, when it was announced that there was a planned meeting of LGBT persons in Ghana, moral entrepreneurs created a hostile

[214] Human Rights Watch 'No choice but deny who I am' (n 124 above) 33-36. 'Pearl' an interviewee narrates a chilling story of how she was assaulted by a government official and his police escort on suspicion of being lesbian. Youth of the town put a vehicle tyre around her neck and nearly burnt her alive, but for the intervention of her father who promised to make her leave the town where the incident occurred.
[215] As above.

environment for sexual minorities to live in.[216] They expressed indignation at how homosexuals were on the verge of taking over the country and how God was going to punish all Ghanaians if politicians in particular and Ghanaians, in general, did not act quickly to curtail this abomination.[217]

On occasions, politicians have been forced to come out publicly and defy western nations and the donor community. At the instance of moral entrepreneurs, former President Atta-Mills defied the USA and the United Kingdom, stating that he will not kowtow to their demands to decriminalise homosexuality if it is tied to aid. As Tamale rightly observes, such pronouncements by western countries to African leaders smack of hypocrisy and endanger the fight by local activists for the decriminalisation of consensual same-sex practices.[218] Many problems such as corruption bedevil the African continent. Why do Western countries keep quiet over that and only speak when it comes to gay rights?[219] That gives an impression that recognition of gay rights is an imperialist agenda by the west to colonise Africa and Ghana sexually, and political leaders have an easy task of opposing that because they have an overwhelming majority of citizens to back them if the narrative is couched in that manner.

In some instances, moral entrepreneurs have sounded an alarm when media reports of the outcomes of health screenings have been made public. On one such occasion, the sensational report of a media outlet that alleged homosexuals had undergone health screening and the majority of them had acquired HIV and other sexually transmitted diseases, caused people to express indignation against the scourge called homosexuality. Moral entrepreneurs set up a hostile climate for LGBT persons in Ghana by using print and electronic media.[220] LGBT members were viewed by the general population as people who were bent on decimating society or creating a public health hazard for all Ghanaians because of their promiscuous sexual lifestyle. Interestingly, there is no space for a reasoned conversation because any attempt to speak for and on behalf of LGBT persons is met with insults, assault, and threats of death. Sometimes the reputation of respected members of society is dented and they are accused of also being homosexuals; that is why they speak favourably about the subject. Apart from a few bold human rights individuals who speak for LGBT persons on the grounds of principle, even human rights organisations are afraid or

[216] Essien & Aderinto (n 7 above) 1.
[217] Tettey (n 6 above); Baisley (n 10 above).
[218] Tamale (n 7 above) 41.
[219] As above.
[220] Baisley (n 10 above).

simply unable to do so, even when they suffer hate speech from the general population and from moral entrepreneurs.

When there is violence and violations of the rights of LGBT persons, politicians go quiet on the subject and refuse to speak against such acts. Therefore, not only do politicians attack and speak against LGBT persons and their rights when goaded by moral entrepreneurs, but they also fail to act when the rights of LGBT individuals are threatened or violated, as required by the 1992 Constitution of Ghana. For instance, when news emerged that a man had been severely assaulted by some residents of Nima, a suburb of Accra over allegations that he was homosexual, there was no urgency to pursue the case and bring the perpetrators to book.[221] Owing to the lackadaisical attitude of state agencies, the matter was thrown out of court for lack of interest to prosecute, even though the victim was always present in court and desirous of pursuing the matter to its logical conclusion.[222] Video footage shown on media outlets and social media revealed details of the assault which was carried out in a manner to send a message that homosexuality was unacceptable and vigilante groups would do everything to stop the practice. The perpetrators did not view their action of beating a gay person to pulp as a crime, but as part of the message of hate and dislike for homosexuals by even senior government officials.

Since this particular case was a crime against the state, the victim of the severe public assault could not have acted by himself. When the authorities reluctantly finally decided to act and prosecute the offenders, it was common knowledge among many Ghanaians that the matter would amount to nothing. Indeed, this perception became a reality when, after several attempts of visiting the court on every adjourned date and the refusal of the prosecutor to come to court with the offenders, the judge – contrary to all known criminal procedure that Ghana operates under – struck out the case for want of prosecution.

The striking out of the matter when the victim of the case was always in court, was just a signal to the LGBT community by the state and the judiciary that the state was interested in persecuting LGBT persons, not in prosecuting those who violate LGBT persons' rights. A bench warrant, issued by the court, for the arrest of the alleged offenders and a referral of the matter to the Attorney General's department, which is the primary prosecutorial agency to take up the matter from the police, could have saved the trial. Indeed, for such a high-profile matter which clearly showed

[221] Human Rights Watch 'No choice but deny who I am' (n 124 above) 44; see also https://www.humandignitytrust.org/country-profile/ghana/ last accessed 26 April 2021.
[222] Human Rights Watch as above 44-46.

Ghana at its worst regarding the rights of persons, the Attorney General should have ordinarily taken over the prosecution as it has done in other cases. The only difference in this matter is that moral entrepreneurs did not come to the aid of LGBT persons to say it is morally wrong to beat someone only because he proposed to another person of the same sex, and to be displayed in the media space to expose his sexuality and the brute force and violence that was meted out to him to strike up fear and panic in other LGBT persons.

This case also indicates that the tone of politicians in making sexuality a political matter is also relevant. If politicians can say that homosexuals would soon be lynched,[223] is it any wonder when ordinary citizens start beating and filming the beating of alleged homosexuals? There are even instances that politicians have shamefully instructed and supervised assault against LGBT persons in Ghana.[224] For instance, a District Chief Executive who is the representative of the President of the Republic of Ghana, summoned an alleged Lesbian, unilaterally cancelled a contract that the lady had won to provide some services to the assembly, ordered his police escort and other persons to severely beat her up and ordered her to leave the community.[225] Politicians have also incited citizens to force alleged homosexuals out of their communities. A former minister of the Western Region of Ghana authorised people in that region to report on persons who are homosexuals, charging landlords and employers to evict and dismiss them from their houses and employment, respectively. This resulted in demonstrations by the youth and religious organisations both Christian and Muslim, against LGBT persons in the region. Similarly, some chiefs have also banished persons perceived to be homosexuals from their communities. These are serious infringements of the Constitutional rights and liberty of a person, but the state, controlled by politicians have failed to act, and no sanctions have been meted out against perpetrators.

### 3.4.4 Politicisation of homosexuality as a response to a party politics

Perhaps the most enduring reason for the politicisation of homosexuality in Ghana is the desire by political leaders to please party supporters. It is increasingly becoming the norm in Ghana that party supporters urge their leaders to speak against homosexuality. Therefore, there is a tendency for politicians to speak against LGBT rights in the interest of their political party and as a basis to maintain the appeal of the party to the electorate.

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[223] Homosexuals will soon be lynched in Ghana- MP warns (n 12 above).
[224] Human Rights Watch (n 124 above).
[225] As above.

There have two main ways by which this response to political party base has been achieved in Ghana. First, there are instances where the issue of homosexuality for whatever reason is brought into mainstream discussion and gets the attention of the majority of the citizens.[226] Party supporters see it as an opportunity to signal to the rest of the nation that their party does not support such a practice. Immediately, they start mounting pressure on their elected executives to speak on the subject publicly. It is one way that party supporters think the party can separate itself from such a practice because it resonates with the party base as well as influential social institutions in the country. For example, condemning homosexuality resonates with both Christian and Islamic religious following and also traditional leaders. There is competition to win over members of these social institutions. Therefore, any statement that appeases them is deemed appropriate.

Politicians also make homophobic statements for political expediency.[227] For instance, at political party rallies usually held before elections, politicians can gauge the mood of party supporters and the nation. Political messages are therefore crafted in a manner to respond to this general mood. If there is an ongoing debate on homosexuality, either nationally or globally, they see this as an opportunity to make their case and get approval from party supporters and the nation.

Therefore, politicians in Ghana largely dictate the tone and tenor of the conversation on homosexuality. They make statements to get an advantage over their political opponents, but it is mainly to please their supporters and assure them and the nation that homosexuality will not be decriminalised in Ghana.

## 3.5 Conclusion

This chapter has examined the barriers in Ghana that hinder the recognition and protection of LGBT rights. Religion, culture, and politics have been identified as the three main barriers that contribute to the non-recognition of sexual minority rights in Ghana. The true religion and culture of the people has been sidestepped and foreign religions and culture(s) have been used unknowingly as a basis to deny LGBT rights. Politicians have participated in the debate at the promptings of moral entrepreneurs using religion and culture as a basis to deny LGBT rights.[228]

These three barriers are challenging and seemingly insurmountable. This is because the average Ghanaian is either religious, closely attached to their culture, or an active member of a political

[226] See for instance the opening of an LGBT office in Accra in February 2021 that has triggered the latest debate on LGBT rights in Ghana, 'Ghana security forces shut down LGBTQ office: Rights group' (n 142 above).
[227] 'Homosexuality is criminal-President Mahama' (n 172 above).
[228] Tettey (n 6 above).

party. In some instances, one may find a Ghanaian who is very religious, culturally rooted and an active member of a political party who even holds political office. The posture of people who believe or have a firm belief in religion, culture and politics have made it difficult for human rights activists to speak on the subject of homosexuality and often stampede human rights activists out of the public discourse on same-sex sexual desires. However, there is a need for engagement and deconstruction of the arguments that Ghanaian religion(s), and culture(s) proscribe homosexuality. As this chapter has proved, Ghanaians are only fighting one religion with another and one culture with another. In the end, political leaders are the beneficiaries who exploit the lack of understanding and emotions on this subject to their political benefit.

# CHAPTER FOUR: THE NORMATIVE LEGAL BASIS FOR PROTECTING SEXUAL MINORITY RIGHTS IN GHANA

## 4.1 Introduction

The question that this chapter proposes to answer is: Is there a normative legal basis under Ghanaian law for protecting sexual minority rights in Ghana? If so, can the Supreme Court of Ghana on that basis declare the crime of 'unnatural carnal knowledge' in section 104 of the Criminal Offences Act, unconstitutional?[1]

The 1992 Constitution of Ghana has a Bill of Rights that guarantees and protects the fundamental human rights of 'every person' in Ghana.[2] These rights include the right to life, personal liberty, human dignity, equality, and prohibition of discrimination.[3] Chapter 6 of the Constitution also contains the 'Directive Principles of State Policy' (DPSP),[4] which the Supreme Court has interpreted as enforceable human rights provisions.[5] While these DPSPs are not human rights provisions per se, they guide 'all citizens, Parliament, the President, the Judiciary, the Council of State, the Cabinet, political parties and other bodies and persons' in their application and interpretation of the Constitution, and policy formulation and implementation 'for the establishment of a just and free society'.[6] The Supreme Court of Ghana has held that together with the Bill of Rights in chapter 5 of the Constitution, or on their own, the DPSP are justiciable.[7] The rights in chapter 5 and its complementing 'Principles' in chapter 6, read together, make up the basis of fundamental human rights protections of all persons in Ghana.

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[1] Section 104 Criminal Offences Act of Ghana states: '(1) Whoever has unnatural carnal knowledge... (b) of any person of sixteen years or over with his consent is guilty of a misdemeanour... (2) Unnatural carnal knowledge is sexual intercourse with a person in an unnatural manner or with an animal.'

[2] Constitution of Ghana 1992 art 12(2) states: 'Every person in Ghana, whatever his race, place of origin, political opinion, colour, religion, creed or gender shall be entitled to the fundamental human rights and freedoms of the individual contained in this chapter but subject to respect for the rights and freedoms of others and for the public interest'.

[3] As above chapter 5, arts 12 to 33.

[4] As above chapter 6, arts 34 to 41.

[5] *New Patriotic Party v Attorney-General* (31 December case) [1993-94] 2 GLR 35, SC; *New Patriotic Party v Attorney-General* (CIBA case) [1996-97] SCGLR 729.

[6] Constitution of Ghana (n 2 above) art 34(1).

[7] *Ghana Lotto Operators Association & others v National Lottery Authority* [2007-2008] SCGLR 1088.

The question can be posed: In the absence of express provisions in the Constitution that forbids discrimination based on sexual orientation and gender identity,[8] can the Supreme Court construe the human rights provisions in the 1992 Constitution of Ghana as offering protection against discrimination of LGBT persons in Ghana? If the answer is in the affirmative, then it may be imperative on the Supreme Court of Ghana, which has the power to interpret the Constitution and determine the legitimacy of other laws,[9] to declare the offence of 'unnatural carnal knowledge' as unconstitutional. The Court may declare that the continued criminalisation of consensual same-sex sexual acts is incompatible with the objects and purposes of the fundamental human rights provisions in the 1992 Constitution. The Court may also find that it fosters discrimination against a minority group, denies them equality with other persons, while violating their right to human dignity, and is therefore unconstitutional.

However, the contention that criminalisation of consensual same-sex act is unconstitutional may outrage the conscience of persons who support anti-LGBT legislation, and they may fiercely contest such a claim. They may argue, for instance, that if the framers of the 1992 Constitution were intent on protecting the rights of LGBT persons, they would have stated so in express words. Therefore, by the rules of interpretation expressed in Latin as *expressio unius est exclusio alterius* – meaning that the express mention of one thing excludes all others - the Constitution does not protect the rights of sexual minorities. To bolster their argument, they may claim that the Criminal Offences Act of Ghana criminalises 'unnatural carnal knowledge' in section 104(1)(b), which prohibits same-sex sexual conduct.[10] Therefore, the Constitution cannot purport to protect an act that is already illegal under the laws of Ghana.[11] If it is criminal to engage in same-sex sexual acts, then it naturally follows that constitutional rights do not cover, for instance, equality and prohibition of discrimination on the grounds of sexual orientation, they may argue. This belief that sexual minorities may not have fundamental human rights protection under the Constitution of Ghana is the dominant and widely held view in Ghana at present.[12]

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[8] The Constitution of the Republic of South Africa, 1996 sec 9(3) expressly prohibits discrimination on the basis of sexual orientation and gender identity.

[9] Constitution of Ghana arts 1(2) & 2(1)(a). The effect of these two provisions is that the Supreme Court may declare as void, any law that is inconsistent with any provision of the Constitution.

[10] Human Rights Watch 'This alien legacy, the origins of sodomy laws in British colonialism' (2008).

[11] AD Dai Kosi et al 'Ghanaian perspectives on the present day dynamics of homosexuality' (2016) 10 *African Research Review* special edition afrev@10 1 at 7.

[12] Report of the Constitutional Review Commission of Ghana 'From a political to a developmental constitution' (Constitutional Review Commission report) 2011 656-657.

Because same-sex acts are illegal, there is widespread belief among Ghanaians that sexual minorities do not enjoy any constitutional protection. State, and non-state agents have violated the right to free speech, association, personal liberty, and human dignity of sexual minorities with impunity. For example, Human Rights Watch has observed that in Ghana persons perceived to be homosexuals or homosexuals, suffer assault, unlawful arrest, extortion and denied access to justice, among several other human rights violations.[13] State and non-state actors who carry out these violations do so, knowing that the State will not hold them accountable for their actions.[14]

I argue that there is a legal basis for protecting the rights of all persons, including LGBT persons under the 1992 Constitution. Therefore, human rights violations based on sexual orientation in Ghana violates constitutional rights. If citizens understand that while not stated, a broad and purposive interpretation of the Constitution protects all persons, including sexual minorities, this will ensure respect for sexual minority rights. Such an understanding provides an avenue for ordinary citizens, representatives of state institutions and other identifiable bodies to respect the rights of sexual minorities and promote a culture of respect for all persons as envisaged by chapters 5 and 6 of the Constitution.

Apart from making a claim that fundamental human rights in the Constitution apply to all persons regardless of their sexual preferences, a more enduring solution is to make a persuasive case for a declaration by the Courts that section 104(1)(b) is unconstitutional.[15] This chapter argues that the Constitution, which is the supreme law of Ghana, embraces sexual minority rights. Therefore, any ordinary legislation that violates any right guaranteed in the Constitution is inconsistent with it and potentially unconstitutional.

This chapter, therefore, explores the normative legal basis for protecting sexual minority rights in Ghana and argues that criminalisation of consensual same-sex conduct is unconstitutional. A broad and purposive interpretation of the 1992 Constitution of Ghana, paying attention to both its letter and spirit, affirms that the Constitution embraces sexual minority rights. For this reason, any law that is inconsistent with the Constitution, including section 104(1)(b) of the Criminal Offences

[13] Human Rights Watch 'No choice but to deny who I am' Discrimination and violence against LGBT persons in Ghana Human Rights Watch (2018).
[14] As above.
[15] Constitution of Ghana, art 2(1)(a) states: 'A person who alleges that- an enactment or anything contained in or done, under the authority of that or any other enactment; is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect'.

Act, may be unconstitutional.[16] First, a historical appraisal of human rights in the Ghanaian legal system and issues related to justiciability and enforceability shows that respect and protection of human rights is a core value of the Constitution and deliberately entrenched to provide human rights protection for every person.

Second, I examine substantive constitutional rights such as the right to equality and non-discrimination, dignity, privacy and other rights inherent in open and democratic societies intended to secure the dignity of humankind. I argue that these rights, taken individually or jointly can form a basis for the decriminalisation of consensual same-sex acts in Ghana.

Third, I acknowledge that despite a reasonable basis, founded on constitutional rights, for the Supreme Court to decriminalise consensual same-sex acts, such a practice will in practice depend on the interpretative approach the Court adopts. Based on the approach to the interpretation adopted by the Supreme Court in recent cases, there is a basis for optimism that it will decriminalise consensual same-sex acts when given the opportunity to do so. A purposive and transformative interpretation of the Constitution that respects not only the letter but also the spirit of the Constitution could lead to only one conclusion, namely, that criminalisation of adult same-sex sexual acts in private offends the 1992 Constitution of Ghana.

Fourth, I argue that despite the promising approach of the Supreme Court to protect fundamental human rights in its interpretation of the Constitution, the socio-political environment, and the legal culture of Ghana, may swing the decision. I presume judges in Ghana to be independent, well trained and knowledgeable to do their job. Yet these men and women are also members of a society that abhors homosexuality and that lacks a very vibrant legal culture. This section, therefore, also analyses how socio-political considerations, and the legal culture in Ghana, can affect the course of decriminalisation.

I conclude the chapter with a summary of the salient points and the way forward in the debate on (de)criminalisation of consensual same-sex conduct in Ghana. Immediately below, I start by examining the history of fundamental human rights and by analysing their enforceability in Ghana below.

[16] As above, art 1(2): 'This constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void'.

## 4.2 Fundamental human rights and freedoms in Ghana – history and context

Ghana's current Constitution, which came into effect in 1993[17] has a Bill of Rights that is enforceable by the courts.[18] In 1957 when Ghana gained independence from the British colonial administrators, it inherited the Independence Constitution, which did not have a Bill of Rights.[19] Three years later, when Ghana attained Republican status in 1960, it had the 1960 Constitution which also did not have a Bill of Rights.[20] Only in 1969 when Ghana had its third constitution after independence, a Bill of Rights was included. The 1979 and the 1992 Constitutions retained the Bill of Rights of the 1969 Constitution. The historical evolution of a Bill of Rights in Ghana's Constitution depicts the socio-political experience of the Ghanaian society. After attaining independence, the first President of Ghana, Dr Kwame Nkrumah, declared Ghana as a one-party state. The military overthrew the government of Dr Nkrumah in 1966 and from that time military interventions plagued Ghana with the last occurring in 1981.

A one-party state and sporadic military interventionists who ruled Ghana abridged fundamental human rights protections and trampled upon the rights of individuals and groups of persons. The current Bill of Rights is, therefore, both a product of the history and experiences of Ghanaians. A brief historical analysis starting from the period leading to independence to date is important to understanding the human rights regime in Ghana.

Before attaining independence in 1957, some Ghanaians lobbied the colonial government for an independence Constitution of Ghana with a Bill of Rights that would protect minority interests against the powers of the central government.[21] Ghana as one entity comprised different ethnic groups through conquest, amalgamation, and plebiscite. Some of these groups were minority groups, while others were majority ethnic groups that formed the foundation of the new nation-state. The opposition, the incoming government to take over the reins of power and the British discussed the need for a Bill of Rights to protect minority groups and other fundamental human rights of individuals and other groups. The three parties did not agree on either the content of

[17] Constitution of the fourth republic of Ghana (promulgation) law, 1992, PNDCL 282 stated in para 1 that the Constitution shall come into force on 7 January 1993.
[18] Constitution of Ghana, chapter 5 contains the Bill of Rights. Art 12(2) states that the Bill of Rights shall be enforceable by the Courts.
[19] The Ghana (Constitution) Order in Council 1957.
[20] Constitution of Ghana 1960.
[21] COH Parkinson *Bills of rights and decolonisation, the emergence of domestic human rights instruments in Britain's overseas territories* (2007) 103 107.

these rights and the Constitution which should embody these rights. While the opposition groups wanted these rights in the Independence Constitution, Dr Nkrumah and his party wanted the Bill of Rights in a new Constitution to be finalised only after independence. Owing to time constraints and the agreement that it was possible for the parliament of the newly independent state to debate and adopt a Bill of Rights, the issue was deferred until after independence.[22]

After independence in 1957, Dr Nkrumah failed to fulfil his promise of enacting a new Constitution with a Bill of Rights that protected minority rights.[23] Instead, the government amended the 1960 Constitution, banning multi-party politics and installing a one-party state.[24] The 1960 Constitution established a sovereign parliament that comprised the President and the National Assembly,[25] with power to enact the laws it desired without constraint. Under the control of Dr Nkrumah, It passed laws that limited the fundamental human rights and freedoms of citizens[26] and had the power to appoint and remove judges at will.[27] The government also passed laws that could curtail the liberty of the individual if the president was satisfied that such restriction was necessary, even without a trial.[28]

This environment of restriction of individual freedom was tested under the 1960 Constitution in *Re Akoto*.[29] The 1960 Constitution contained a 'principles of declaration' provision which

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[22] As above 131.

[23] See draft constitution presented by the Nkrumah government to the British colonial government in 1956 titled: 'Gold Coast, Secret proposals for the Constitution of Ghana' (1956), quoted in Parkinson (n 21 above) 112.

[24] Constitution of Ghana 1960 art 1A(1), as amended by Act 224, stated among others that 'there shall be one national party which shall be the vanguard of the People in their struggle to build a socialist society and which shall be the leading core of all organisations of the People'. Article 1A(2) stated that 'the national party shall be the Convention People's Party' which was the party of the President, Dr Kwame Nkrumah.

[25] As above art 20(1).

[26] In 1958, the Parliament of Ghana dominated by Dr. Nkrumah's party enacted the Preventive Detention Act (PDA) that gave the government power to imprison any person who was thought to be a threat to national security without trial.

[27] Constitution of Ghana 1960 (n 24 above) arts 44&45, particularly 45(3) gave the President powers to remove Judges of the superior court including the Chief Justice, if he had sufficient reasons to do so.

[28] Prevention Detention Act, 1958 (PDA) (n 26 above).

[29] *Re Akoto* [1961] GLR 523. The accused persons were arrested and detained without trial for their political beliefs and denied access to court to challenge their arrest. For a critique of this case and its ramifications for human rights protection in Ghana, see K Quashigah 'The trends in the promotion and protection of human rights under the 1992 Constitution' in K Boafo-Arthur (ed) *Ghana: One decade of the liberal state* (2007) 21 23. See also SK Asare 'Accounting for jurisprudential orientation: Akoto too never dies' in Mensah Bonsu et al (eds) *Ghana law since independence: History, development and prospects* (2007) 143.

guaranteed some fundamental human rights.[30] The Supreme Court in the *Re Akoto* case held that these principles did not constitute a Bill of Rights properly so-called and were therefore non justiciable. The Court held that even though it resembled a Bill of Rights, it was only a coronation oath that the President swore to abide by and was unenforceable.

The *Re Akoto* case exposed the inadequacy of the 1960 Constitution to protect the rights of citizens. Having learnt some lessons from the lack of fundamental human rights protection in earlier constitutions, the drafters of the 1969 Constitution entrenched a Bill of Rights in the 1969 Constitution. The drafters also added a provision that stated that the fundamental human rights in the Constitution were enforceable by the Courts. The 1969 Constitution also provided that any law in existence before the coming into force of the Constitution or any law passed by Parliament which was inconsistent with any provision of the Constitution, was void.

The 1979 and the current 1992 Constitution kept the Bill of Rights in the 1969 Constitution with slight modifications. The 1992 Constitution emphasises the enforceability and justiciability of the Bill of Rights.[31] The courts have also held that the DPSP, which also contains some fundamental human rights are also justiciable.[32] While the High Court has the power to enforce fundamental human rights as a court of the first instance under the Constitution,[33] the Commission on Human Rights and Administrative Justice (CHRAJ) has the power to investigate fundamental human rights violations and make recommendations for remedying such violations.[34]

CHRAJ is an independent quasi-judicial body created by the Constitution of Ghana,[35] whose role in securing fundamental human rights in the Ghanaian society is also recognised internationally.[36] As an 'A' rated human rights institution, Ghana's CHRAJ meets the minimum standards and complies with the Paris Principles as a national human rights body charged with the duty to protect human rights.[37] Apart from being independent and free from governmental control, CHRAJ has the power

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[30] Constitution of Ghana 1960 (n 24 above) art 13(1) guaranteed freedom of movement, assembly, and access to court. It also stated in part that 'no person should suffer discrimination on grounds of sex, race, tribe, religion or political belief'.
[31] Constitution of Ghana 1992 art 12(1).
[32] *Ghana Lotto Operators Association & others v National Lottery Authority* (n 7 above).
[33] Constitution of Ghana 1992 art 33(1).
[34] As above chapter 18, particularly art 218(a)-(d).
[35] As above.
[36] See 'Principles relating to the status of national institutions (The Paris Principles)', adopted by General Assembly resolution 48/134 of 20 December 1993.
[37] See 'National human rights institutions: History, principles, roles and responsibilities' United Nations (2010) 168.

to investigate human rights violations and can direct persons and organisations to remedy, correct or reverse human rights violations.[38]

The powers and functions of CHRAJ which is in consonance with the Paris Principles and constitutionally guaranteed, makes it an important player in the protection of human rights in Ghana. In the realm of sexual minority rights, CHRAJ has played a role and continues to play a role in investigating violations of sexual minority rights through an anonymous online reporting system.[39]

Consequently, the current human rights regime in Ghana has an extra layer of protection with the Courts and other quasi-judicial bodies granted powers to protect and enforce fundamental human rights. A special branch of the High Court has been dedicated to enforcing fundamental human rights in the Constitution.

The Supreme Court has the power to interpret the Constitution[40] and declare laws and acts inconsistent with the Constitution as void. This interpretive function of the Court is a special power that offers an extra layer of fundamental human rights protections in Ghana.[41] The power of the Supreme Court to declare legislation as unconstitutional for being inconsistent with fundamental human rights has been used to protect the right to association[42] and the right to demonstrate without a police permit[43] under the 1992 Constitution.

Despite the lengths to which the drafters of the Constitutions of Ghana since 1969 have gone to protect fundamental human rights, there is no right to equal legal protection on the grounds of sexual orientation in the Ghanaian Constitution as for example in South Africa.[44] This distinction is important because it stresses the uniqueness of the Ghanaian struggle for human rights protections as different from the South African experience.

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[38] Constitution of Ghana art 218(a)&(d).
[39] See Human Rights Committee 117th Session 'summary record of the 3274th meeting held at the Palais Wilson, Geneva, on Friday, 24 June 2016 at 10 am. CCPR/C/SR.3274 (29 June 2016). At para 38 a Deputy Commissioner of CHRAJ, Mr Richard Ackom Quayson assured the Human Rights Committee that CHRAJ had an online reporting system for victims of LGBT violations. See also section 6.3.2 on the discussion of CHRAJ as option to protect sexual minority rights in Ghana.
[40] As above art 130(1)(a).
[41] As above arts 1(2) and 130(1)(b).
[42] *Mensima v Attorney General* [1996-1997] SCGLR 676.
[43] *New Patriotic Party v Inspector General of Police* [1996-97] SCGLR 32.
[44] The Constitution of the Republic of South Africa, 1996 sec 9(3).

South Africa's Constitution has a specific provision that prohibits discrimination based on sexual orientation[45] because it linked the struggle for sexual minority rights to freedom from apartheid.[46] Members of the LGBT community fought alongside other members of society to liberate themselves from the apartheid regime.[47] Therefore, the politicisation and linkage of sexual minority rights to the liberation struggle in South Africa ensured that when apartheid ended, criminalisation of consensual same-sex act, also ended.

Ghana's historical struggle for independence revolved around ethnic minority rights,[48] not sexual minority rights. The opposition groups which comprised different ethnic minority groups cared about protecting ethnic rights in a Bill of Rights in the Independent Constitution. They argued that minority protection should feature in the Independent Constitution before Britain granted independence to Ghana.[49] The protection of ethnic minority rights has been a feature of Ghanaian Constitutions since 1960.[50] The 1992 Constitution of Ghana does not prohibit discrimination based on sexual orientation, but there are rights in the Constitution whose interpretation embrace sexual minority rights.

## 4.3 Constitutional rights and the basis for the decriminalisation of consensual same-sex acts in Ghana

Of these rights, is also discussed. Finally, I consider the potential application of other rights inherent in It is arguable that the 1992 Constitution provides an expansive human rights protection regime in Ghana, that is both vertical and horizontal and contemplates the protection of the rights of every person. This section examines human rights provisions in the Ghanaian constitution against the claim that it provides expansive human rights protections for 'all persons' in Ghana. The basic argument presented here is that given the Constitutional rights of equality and freedom from

[45] As above.
[46] H de Ru 'A historical perspective on the recognition of same-sex unions in South Africa' (2013) 19 *Fundamina* 221 at 226-230.
[47] As above 228.
[48] Interestingly, because Ghana's struggle for independence was linked to ethnic minority interests, the Constitutions of Ghana since independence have respected and protected regional and ethnic minority interests. To the extent that in the development of the country and the appointment of ministers of cabinet, the Constitution stresses the importance of achieving regional balance.
[49] Parkinson (n 21 above).
[50] See for instance Constitution of Ghana 1960 (n 24 above) art 13(1) which prohibits discrimination on the basis of tribe, and the Constitution of Ghana 1992 art 17(2) which prohibits discrimination on the basis of ethnic origin.

discrimination, dignity, privacy and unenumerated rights inherent in a democracy meant to protect the dignity of humankind, criminalisation of consensual same-sex acts is unconstitutional.

Chapter 5 of the Constitution, which provides a Bill of Rights, is the focus of analysis. I analyse the nature of the rights provided and the protection it offers in practice. I also review Chapter 6 of the Constitution, titled the 'Directive Principles of State Policy'. While chapter 6 is not an extension of the Bill of Rights, it contains important provisions that strengthen the meaning and application of the Bill of Rights. Initially held to be non-justiciable, the Supreme Court of Ghana later accepted that any provision in the DPSP read together with any right in the Bill of Rights is justiciable.[51] The Court has since confirmed, turning full circle, that the DPSP in and of themselves are justiciable.[52] An analysis of chapters 5 and 6 are therefore necessary for critiquing the human rights provisions in the Constitution of Ghana. I consider the relevance of these two chapters to sexual minority rights and, to decriminalisation of consensual same-sex conduct. I also analyse the distinction between fundamental human rights and freedoms under the Constitution and their relation to sexual minority rights. The applicability of the Bill of Rights, including its beneficiaries and duty bearers and the limitations on the enjoyment democracies through an analysis of article 33(5) and the potential for the decriminalisation of consensual same-sex acts in Ghana, focusing on chapters 5 and 6 of the Constitution.

### 4.3.1 The Bill of Rights and Directive Principles of State Policy as a basis for human rights protection

Apart from the elaborate human rights and freedoms provided in chapters 5 and 6 of the 1992 Constitution, the different enforcement mechanisms provided by the drafters of the Constitution at different fora is an important element of the 1992 Constitution. Apart from the High Court which has the primary jurisdiction in enforcing the fundamental human rights provisions in the Constitution,[53] the Commission on Human Rights and Administrative Justice (CHRAJ) also has jurisdiction under the Constitution to educate, investigate, make recommendations and seek enforcement and remedying of violation of fundamental human rights of all persons.[54] The

[51] *New Patriotic Party v Attorney-General (CIBA* case) [1996-97] (n 5 above).
[52] *Ghana Lotto Operators Association & others v National Lottery Authority* [2007-2008] (n 7 above).
[53] Constitution of Ghana art 140(2). In particular art 130(1) makes it clear that the jurisdiction of the Supreme Court to enforce fundamental human rights and freedoms in the Constitution is secondary to the primary jurisdiction of the High Court.
[54] As above art 218.

Supreme Court also has jurisdiction as the last court to enforce fundamental human rights, interpret the Constitution and also determine the meaning and scope of human rights as an exclusive jurisdiction.[55]

Chapter 5 of the Constitution is the reference point for any discussion on a Bill of Rights in Ghana. However, as an important contribution of the Supreme Court to the jurisprudence of human rights in recent times, the Court has held that chapter 6 falls within the scope of human rights in Ghana. By this progressive undertaking, the Court has made an important addition that provides better understanding and clarification to the Bill of Rights.

Chapter 5, which is the original Bill of Rights envisaged by the drafters of the Constitution, contains 22 provisions[56] that make up the Bill of Rights, properly so-called. From the outset, the Constitution clarifies that the Bill of Rights must be 'respected and upheld'[57] by the three organs of government 'and all other organs of government and its agencies'.[58] The Constitution also imposes an obligation on 'all natural and legal persons in Ghana' to respect and uphold the tenets of the Bill of Rights.[59] It goes further to state that the Bill of Rights is enforceable by the Courts in Ghana.[60]

In this respect, the Bill of Rights makes a significant departure from the 1960 Republican Constitution of Ghana in three respects. First, it imposes a duty on the executive, legislature, and judicial arms of government to respect the fundamental human rights of every person and to apply the Bill of Rights in every undertaking of theirs. This injunction to respect and uphold the Bill of Rights applies to the agencies of states and individuals appointed to execute state duties. This implies that the state should take proactive steps to respect these rights and should not violate these rights by using the coercive forces of the state to arrest, harass or imprison any person because of their sexual orientation. The Supreme Court held in *Re Akoto* that there was no justiciable Bill of Rights in the 1960 Constitution and that the president only swore a coronation oath which resembled fundamental human rights which he was not bound to uphold.

The second obligation the Constitution imposes is the horizontal application of the Bill of Rights. There is an obligation imposed on every person to respect the rights of other persons and not to

[55] As above art 130(1)(a).
[56] As above arts 12 to 33.
[57] As above art 12(1).
[58] As above.
[59] As above.
[60] As above.

infringe these rights. This could mean that ordinary citizens and any person in Ghana who propagates hate speech, instruct others to harass persons or even assault people because of their sexual orientation may be violating the Constitution. The third obligation that this introductory provision to the Bill of Rights raises is the duty of the Courts to enforce the Bill of Rights. As indicated earlier, the Courts declared that they had no power to enforce a non-existent Bill of Rights in the 1960 Constitution, even though what the Court described as a coronation oath contained fundamental human rights protections.

The organs of state, government agencies and institutions, private persons and private legal entities ought to respect and fulfill the rights in articles 13 to 32, including the unenumerated rights in article 33 of the 1992 Constitution. The Bill of Rights, therefore has vertical and horizontal application in Ghana.[61] State, non-state agencies and even private individuals should therefore respect and uphold the human rights values in chapter 5 of the 1992 Constitution.

Yet state and private individuals, violate these rights in relation to LGBT persons. For instance, whenever LGBT organisations show an intention to host a conference of LGBT persons or an event by LGBT persons, the state has used or threatened to use its coercive forces to stop such a gathering.[62] Sometimes, the state has taken no action, while religious, traditional and other identifiable bodies have vilified sexual minorities in the media–radio, television and newspapers. The State willfully fails to respect and uphold the rights of sexual minorities as prescribed by the Constitution.[63]

Chapter 6 states as follows:

> The Directive Principles of State Policy contained in this chapter shall guide all citizens, Parliament, the President, the judiciary, the Council of State, the Cabinet, political parties and other bodies and persons in applying or interpreting this Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just and a free society.[64]

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[61] As above art 12(1) stating among others that 'all natural and legal persons in Ghana' are also bound to respect and uphold the Bill of Rights 'where applicable to them'.
[62] K Essien & S Aderinto 'Cutting the head of the roaring monster: Homosexuality and repression in Africa' (2009) 30 *African Study Monograph* 121.
[63] WJ Tettey 'Homosexuality, moral panic and politicised homophobia in Ghana: Interrogating discourses of moral entrepreneurship in Ghana media' (2016) 9 *Communication, Culture and Critique* 86.
[64] Constitution of Ghana 1992 art 34(1).

This prelude to the DPSP underscores its significance not only to the Constitution but especially to the Bill of Rights. It emphasises and cements the provision in article 12 of the Constitution that elaborates on the binding nature of the Bill of Rights. Quite apart from this, it extends the duty to keep sacrosanct the need for a just and free society beyond the three arms of government, government agencies and private persons and private legal entities. It mentions the Cabinet and the Council of State, which advises the President, political parties and other private persons and entities.[65] Thus the Constitution of Ghana deliberately widens the number of persons and institutions required to ensure the implementation of the Bill of Rights.

Beyond this, the underlying theme of the DPSP is respect for fundamental human rights. It reflects this in all the objectives outlined in the DPSP, such as the political, economic, social, educational and cultural objectives.[66] For instance, one of the key themes in the political objectives in article 35 is that 'the state shall cultivate among all Ghanaians respect for fundamental human rights and freedoms and the dignity of the human person'.[67] It goes further to emphasise that the state should be at the forefront and 'actively' ensure that there is no discrimination or prejudice against any person, including on grounds such as gender and circumstances of birth.[68] The DPSP also require the state to enact laws that protect 'the disabled, the aged, children and other vulnerable groups',[69] and ensure that the laws enacted by the state conform to 'international human rights instruments'.[70]

Apart from these objectives, the Constitution also states that in its relationship with other nations, international human rights law such as the African Charter and the United Nations Charter should guide Ghana. The Constitution emphasises the duty of every Ghanaian and every person in Ghana to observe and respect the fundamental human rights of all persons and requires every citizen 'to respect the rights, freedoms and legitimate interests of others, and generally to refrain from doing acts detrimental to the welfare of other persons'.[71]

The combined effect of the Bill of Rights in chapter 5 and the DPSP in chapter 6 provide a formidable force in protecting the rights of every person in Ghana, including sexual minorities. The rights are broad in scope, and the application and enforcement are very wide. Despite the absence

[65] As above.
[66] As above arts 35 to 39.
[67] As above art 35(4).
[68] As above art 35(5).
[69] As above art 37(2)(b).
[70] As above art 37(3).
[71] As above 41(d).

of black letter words that expressly prohibit unfair discrimination on the grounds of sexual orientation, it is arguable that the 'spirit' of the Constitution in the form of the underlying values of the Constitution are far-reaching and if interpreted broadly and purposively will encompass respect for sexual minority rights.

### 4.3.2 Distinction between human rights and freedoms and their significance to decriminalisation

Unlike other constitutions in Africa that simply have a Bill of Rights,[72] chapter 5 of the 1992 Constitution of Ghana is titled: 'fundamental human rights and freedoms',[73] giving the impression that the Constitution distinguishes between 'fundamental human rights' on the one hand and 'freedoms' on the other hand. It also gives a forewarning that there are legal implications for asserting a fundamental human right, as compared to fundamental freedom. Yet, a cursory reading of the whole of chapter 5 leaves the impression that no such clear distinction exists and that the use of the term 'freedoms' is superfluous. If there is a distinction between rights and freedoms, the Constitution only states this in passing,[74] and the implications of such distinction are not apparent on the face of the provisions. With no such clear distinction spelled out in the Constitution along with its different implications and grounds for limiting either of them, there is a need for some critical analysis to unravel the intention of the framers of the Constitution for using those two different terminologies. The presumption is that the drafter of a law does not use words superfluously unless a careful analysis of the document shows this. Therefore, it is arguable that there is a distinction between rights and freedoms in the Constitution.

The closest the Constitution comes to in distinguishing between fundamental human rights and freedoms is article 23, which has a subtitle of 'general fundamental freedoms',[75] and lists a category of freedoms such as, 'freedom of speech and expression',[76] 'freedom of thought, conscience and belief'[77]; 'freedom of assembly'[78] and 'freedom of association'.[79] The specific characterisation of article 21 as constituting freedoms, gives the impression that the rest of the provisions in chapter 5 are fundamental human rights. This is confusing, but it is the only justifiable conclusion to reach

[72] See for instance Constitution of the Republic of South Africa 1996.
[73] Constitution of Ghana 1992 chapter 5.
[74] As above art 21.
[75] As above.
[76] As above art 21(1) (a).
[77] As above art 21(1) (b).
[78] As above art 21(1) (d).
[79] As above art 21(1) (e).

because words such as 'freedom' are used elsewhere in the Constitution together with 'rights' such as, 'equality and freedom from discrimination'.[80]

But as Quashigah has rightly pointed out, the drafters of the 1992 Constitution of Ghana did not use the phrase 'fundamental human rights and freedoms' superfluously,[81] even though they did not clearly differentiate this and what their implications are. According to Quashigah, the framers of the Constitution used rights and freedoms to mean different things.[82] He contends that the use of rights and freedoms in a national constitution originates from Canada where the term is used in their constitution and distinguishes between rights and freedoms. However, Ghana borrowed the term without distinguishing it in its constitution.

He observes that the practice is for a constitution to list the fundamental human rights and their limitations, while fundamental freedoms are subject to general limitations in the Constitution.[83] Quashigah argues further that in the case of Ghana, there is a tripartite distinction relevant to the discussion on fundamental human rights and freedoms. First, there are fundamental human rights such as the right to life, liberty and fair trial, which comes with clearly stated limitations. Second, there are fundamental freedoms subject to general limitations stated in the Constitution, while the third is a category of right which has no limitation.[84] The only right in the Ghanaian Constitution that has no limitation is the right to human dignity.[85] The Constitution clearly affirms this position when it states that 'the dignity of all persons shall be inviolable'.[86] Apart from the right to dignity, all other rights in chapter 5 are qualified and subject to limitations.

Distinguishing rights from freedoms are important. The distinction is important for striking a delicate balance between rights that are sacrosanct which the State cannot violate, in contrast with rights that could be temporarily suspended because of a national emergency. For instance, while the State may curtail the right to free speech in an emergency to avert a security crisis, the State cannot curtail a right to dignity. Similarly, while a person's right to liberty may be curtailed in fulfillment of a lawful prison sentence, they cannot be treated in a manner that violates their personal dignity while effecting this lawful order.

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[80] As above art 17.
[81] K Quashigah 'A critical analysis of the concept of rights and freedoms under chapter five of the 1992 Constitution of Ghana' (2005-2007) 23 *University of Ghana Law Journal* 158.
[82] As above.
[83] As above 161.
[84] As above.
[85] Constitution of Ghana 1992 art 15.
[86] As above art 15(1).

Apart from the distinction between rights and freedoms, it is also important to examine the right holders and duty bearers under the Constitution and their resulting rights and obligations.

### 4.3.3 Right holders and duty bearers under the Constitution and implications for decriminalisation

The elaborate human rights provisions under the 1992 Constitution target particular beneficiaries. The Constitution also places some obligations on entities and persons in order to realise these human rights objectives. The Constitution uses the word 'every person in Ghana'[87] to denote the category of persons who are entitled to enjoy the rights under the 1992 Constitution of Ghana. This means that apart from citizens other non-nationals who live in Ghana are also entitled to the rights under the Constitution.

It can be deduced that because the Constitution entitles every person in Ghana to enjoy the rights in the Constitution, no one can be denied the enjoyment of their fundamental human rights and freedoms under the Constitution simply on the grounds of their imputed or real sexual orientation. The Constitution does not discriminate between heterosexuals and homosexuals in the enjoyment of their rights because of the use of the phrase 'every person'. It is true that the grounds of prohibited discrimination in the Ghanaian Constitution does not include sexual orientation, yet there is no express provision that also bars people of a certain sexual orientation from enjoying the rights in the Constitution. Meanwhile, the qualification of being a person simply means every human being. Therefore, a purposive reading of the Constitution, in keeping with its spirit that affirms the inviolable dignity of the person, points to the enjoyment of fundamental human rights and freedoms regardless of a person's sexual orientation.

Apart from right holders, the Constitution also imposes duties on all the organs of government, government agencies as well as private persons and institutions.[88] The first category of duty bearers under the Constitution is the three organs of state, comprising the executive, legislature and judiciary. The import of this provision is the policies of the executive, the laws passed by the legislature and the decisions of the judiciary must have a human rights approach with the objective of upholding and respecting the fundamental human rights norms in the Constitution. For instance, a health policy intervention by the executive to educate citizens about HIV that excludes some category of persons will violate this general injunction to uphold and respect fundamental human rights and freedoms. In this regard, the health policies of the executive, through the ministry of

[87] As above art 12(1).
[88] As above.

health or the Ghana Aids Commission that excludes persons who practice consensual same-sex acts or men who have sex with men (MSM) could be viewed as discriminatory contrary to this constitutional provision.

Equally, the legislature is required to promote and protect the rights and freedoms in the Constitution in the enactment of laws. As elected representatives who represent all persons in their constituencies, and not only a segment of it, Parliamentarians are required to promote the rights of all persons without distinction. This obligation including passing laws that promote the rights and freedoms of 'every person' as well as abolishing and decriminalising laws that discriminate and fosters a climate of violence and violations of the rights of a segment of a population in Ghana. Thus, the rights of sexual minorities which have constantly come under attack ought to be protected by parliament through the decriminalisation of discriminatory laws such as the 'unnatural carnal knowledge' provision in the Criminal Offences Act. In this regard, Ebobrah's call for the 'Africanisation' of gay rights through the peoples' representatives in Parliament is appropriate.[89]

The judiciary also has the duty to uphold and respect the fundamental human rights and freedoms of persons in Ghana. Though it is yet to determine a matter implicating sexual minority rights, the Courts in Ghana have developed a body of human rights law through the interpretation and application of the fundamental human rights in the Constitution. The contribution of the Supreme Court in developing constitutional law and fundamental human rights is well documented,[90] and a few of these landmark cases are examined later in this chapter.

The Commission on Human Rights and Administrative Justice (CHRAJ)[91] is a quasi-judicial body that has contributed immensely to the human rights protection regime in Ghana. One of its core mandates as captured in the Constitution[92] and its enabling Act[93] is to educate the public about their fundamental human rights and freedoms.[94] An important addition to the core duty to educate the public on fundamental human rights and freedoms is the mandate to investigate complaints of

[89] ST Ebobrah 'Africanising human rights in the 21st Century: Gay rights, African values and the dilemma of the African legislator' (2012) 1 *International Human Rights Law Review* 110.
[90] SY Bimpong-Buta *The role of the supreme court in the development of constitutional law in Ghana* (2007).
[91] Constitution of Ghana 1992 art 216.
[92] As above art 218.
[93] Commission on Human Rights and Administrative Justice Act, Act 456 of 1993.
[94] Constitution of Ghana 1992 art 218(f).

violations of human rights.[95] In this regard, CHRAJ has received and continues to investigate complaints of violations of the rights of LGBT persons in Ghana.[96]

As indicated above, the Constitution places an injunction on citizens and private bodies alike to uphold and respect fundamental human rights enshrined in the Constitution[97] and also 'to respect the rights, freedoms and legitimate interests of others, and generally to refrain from doing acts detrimental to the welfare of other persons'.[98] These constitutional duties and obligations imposed on private persons and entities, highlights the horizontal application of human rights in Ghana, in addition to the vertical human rights obligations discussed above. However, one may argue that despite these clear and unambiguous duty imposed on individuals and entities, the breach of, and incitement to breach sexual minority rights through hate speech in the media, both print and electronic, is very demeaning.[99]

The implication of these provisions is that it is not only state or state agents that are required to respect the rights of every person, including sexual minorities. Private citizens and non-citizens, as well as private institutions such as radio and television stations in Ghana, are obligated to refrain from using language that offends the rights of other people. They are equally barred from using language that incites people to use violence and violate the rights of sexual minorities and should suffer punishment if they engage in such conduct, within the bounds of freedom of expression.

Having considered the rights and duties of persons and institutions, it is important also, to consider whether these rights have limitations and if so, how they affect the enjoyment of fundamental human rights and freedoms, particularly the rights of sexual minorities.

### 4.3.4 Limitations on the enjoyment of fundamental human rights and freedoms

The enjoyment of the rights specified in chapter 5 have limitations. The Constitution spells out the circumstances under which fundamental human rights and freedoms may be suspended or completely abrogated.[100] As noted by one scholar, the limitation clause in the Constitution 'does not elaborate the kinds of rights which could be derogated from and the core non-derogable rights

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[95] As above art 218(a) & (c).
[96] See Human Rights Watch 'no choice but to deny who I am' (n 13 above).
[97] Constitution of Ghana 1992 art 12(1).
[98] As above art 41(d).
[99] See for instance Human Rights Watch 'no choice but to deny who I am' (n 13 above). See also Essien & Aderinto (n 62 above); E Baisley 'Framing the Ghanaian LGBT rights debate: Competing decolonisation and human rights frames' (2015) 49 *Canadian Journal of African Studies* 383.
[100] Constitution of Ghana 1992 art 31.

as provided for in international human rights treaties'.[101] It is important to place the general limitation clause to the enjoyment of fundamental human rights and freedoms under careful scrutiny so as to appreciate the argument in relation to it. It states as follows:

> The President may, acting in accordance with the advice of the Council of State, by Proclamation published in the Gazette, declare that a state of emergency exists in Ghana or in any part of Ghana for the purposes of the provisions of this Constitution[102]

The Constitution goes on to say:

> Nothing in, or done under the authority of, an Act of Parliament shall be held to be inconsistent with, or in contravention of, articles 12 to 30 of this Constitution to the extent that the Act in question authorises the taking, during any period when a state of emergency is in force, of measures that are reasonably justifiable for the purposes of dealing with the situation that exists during that period.[103]

A combined reading of these two provisions above gives a clue as to the state of mind of the drafters of the Constitution when they attempted to limit the enjoyment of fundamental human rights and freedoms. First, these provisions are situated in the middle of the Bill of Rights in the Constitution, which suggests that the limitations relate directly to these rights. Second, these constitutional provisions are elaborate and contain ten provisions granting power first to the President to declare a state of emergency and then to Parliament[104] to scrutinize this exercise of emergency power. Finally, it acts as a general limitation clause that appears on the face of it to limit the enjoyment of all fundamental human rights and freedoms of every person in Ghana.

The general limitation clause appears to apply to all the fundamental human rights and freedoms stated in article 12 to 30.[105] However, careful scrutiny of the Bill of Rights as a whole suggests that this might not be so. As argued earlier, and in agreement with Quashigah,[106] three categories of rights and their limitations may be discerned from the Constitution of Ghana.

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[101] NKA Busia Jr 'Competing visions of liberal democracy and socialism' in AA An-Na'im (ed) *Human rights under African Constitutions* (2003) 52 72. While this statement might be true, the Constitution hints that it applies to all the rights contained in articles 12 to 30. See art 31(10), Constitution of Ghana 1992.
[102] Constitution of Ghana 1992 art 31(1).
[103] As above art 31(10).
[104] As above art 31(2) & (3).
[105] As above art 31(10).
[106] Quashigah (n 81 above) 161.

The first is the 'fundamental rights' which come with their in-built limitations such as the right to life[107] and the right to personal liberty.[108] These rights are expressed as capable of being enjoyed by every person but subject to, for instance, a court order that a person is killed for killing another person after a trial[109] or be imprisoned for a particular period after being found guilty and convicted by a court of competent jurisdiction for committing an offence.[110]

The second is the 'fundamental freedoms' which are subject to the limitation spelt out in the same provision.[111] I contend, however, that the third category of right, the right to human dignity, which is contained in article 15 of the Constitution is not and cannot be limited by any clause in the Constitution.[112]

The importance of the non-derogable nature of the right to human dignity is crucial even in times of emergency. Even when the President invokes his powers under the Constitution to declare a state of emergency, (s)he cannot purport to curtail the right to dignity of any person. By the same logic, a person's human dignity cannot be eroded because they are attracted to a person of the same sex. The Constitution emphasises the non-derogable nature of this right when it states that the 'dignity of all persons shall be inviolable',[113] without qualification.

Therefore, while the Constitution recognises the need for limiting the enjoyment of rights and freedoms, it can only be done in accordance with a threatened emergency properly declared by the president in consultation with the Council of State and endorsed or revoked by Parliament. There are other specific limitations stated in relation to other rights which may apply in accordance with the law. Consequently, it is argued that a person cannot be deprived of their rights on the basis of their sexual orientation.

### 4.3.5 Analysis of the rights to equality and non-discrimination, dignity, and privacy as applicable to sexual minority rights

It is arguable that if a constitution does not have express provisions that protect sexual minority rights, then such rights are not protected. However, the absence of express provisions that protect

[107] Constitution of Ghana 1992 art 13.
[108] As above art 14.
[109] As above art 13(1).
[110] As above art 14(1)(a).
[111] As above art 21(4)a – e.
[112] As above art 15(1).
[113] As above.

sexual minority rights has not prevented courts from holding that constitutional rights of equality, dignity and non-discrimination protect all persons regardless of their sexual orientation.[114] The Constitutional rights of non-discrimination, equality and dignity are analysed in the context of Ghana and how it relates to sexual minority rights. The burning question is: Can the Supreme Court of Ghana follow in the footsteps of the Indian Supreme Court and the Botswana High Court, in the absence of express provisions, to hold that the Constitution embraces sexual minority rights and accordingly decriminalise consensual same-sex conduct in Ghana? An analysis of constitutional rights, including equality and non-discrimination, dignity and privacy, shows that the criminalisation of consensual same-sex act in Ghana is unconstitutional.

### *a Equality and non-discrimination*

The right to equality aims at preserving the equal status of all persons in society and is often guaranteed in constitutions together with the right not to be discriminated against.[115] The Constitution of Ghana contains a single line that stipulates that 'all persons shall be equal before the law'[116] and prohibits discrimination in the next paragraph. Unlike the South African Constitution, which prohibits direct, indirect, and unfair discrimination, the Ghanaian Constitution only states the prohibited grounds of discrimination. Two separate provisions deal with non-discrimination. The first, which may be classified as a general non-discrimination clause, is stated as follows:

> Every person in Ghana, whatever his race, place of origin, political opinion, colour, religion, creed or gender shall be entitled to the fundamental human rights and freedoms of the individual contained in this chapter but subject to respect for the rights and freedoms of others and for the public interest.[117]

The general non-discrimination clause applies to all the provisions in the Bill of Rights and states up front that all persons are entitled to enjoy the rights in the Constitution without distinction. However, this provision makes the enjoyment of fundamental human rights subject to the rights and freedoms of others as well as the national interest. Since the national interest is not defined in

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[114] International Commission of Jurists *Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook* (2011).

[115] Constitution of Ghana 1992 art 17(1), titled 'equality and freedom from discrimination'. See also section 9 of the Constitution of the Republic of South Africa 1996, which is titled equality but also guarantees freedom from discrimination. I discuss the two rights separately because in claims for decriminalisation of consensual same sex conduct, different arguments have been framed around these rights which deserve separate analysis.

[116] Constitution of Ghana, as above art 17(1).

[117] As above 12(2).

the Constitution, it becomes difficult to know the basis for which a person's human rights may be curtailed on national interest grounds.

The second non-discrimination clause which is more specific states the prohibited grounds of discrimination as 'gender, race, colour, ethnic origin, religion, creed, social or economic status',[118] almost identical to the general clause above. The Constitution goes on to define discrimination as follows:

> To give different treatment to different persons attributable only or mainly to their respective descriptions by race, place of origin, political opinions, colour, gender, occupation, religion or creed, whereby persons of one description are subjected to disabilities or restrictions to which persons of another description are not made subject or are granted privileges or advantages which are not granted to persons of another description.[119]

This specific non-discrimination clause bars the differential treatment on the grounds listed to be prohibited, such as gender. The list is foreclosed and does not leave room for any additional grounds because the omnibus clause usually found in international human rights instruments, such as 'and any other status' is missing. Yet while treating it as a list of foreclosed grounds, in defining what 'discrimination' is, the door is left open for other grounds to be added. Thus, the Constitution prohibits subjecting people to different disabilities, restrictions or privileges that others are not subjected to. It is arguable that the privileges afforded heterosexuals that are denied homosexuals could fit into this description. While homosexuals are denied the ability to associate and freely assemble and express their views and engage in their sexual preference, heterosexuals are allowed that opportunity.

The right to equality and non-discrimination in relation to sexual minority rights has not received judicial consideration in Ghana. The case of *National Coalition for Lesbian and Gay Equality v Minister of Justice*[120] in South Africa offers some insights to consider. The applicants contended that criminalisation of consensual same-sex acts amounted to unfair discrimination and denied them equal treatment before the law. The Court agreed with the applicants and declared sodomy laws as unconstitutional, giving Parliament the opportunity to decriminalise sodomy laws.

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[118] As above art 17(2).
[119] As above art 17(3).
[120] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).

In concluding that sodomy laws were discriminatory, the Court reasoned that the alleged discriminatory act must be unfair. Justice Ackerman, who delivered the lead opinion of the Court, noted that sodomy laws 'reinforces already existing societal prejudices and severely increases the negative effects'[121] that gay people experience in society. He noted further that essentially sodomy laws criminalise a victimless crime for moral and religious reasons at the expense of a minority whose rights, interests and dignity are ignored, making the discrimination unfair.[122] In support of the lead judgment, Sachs J also reflected on that fact that homosexuality is criminalised because it is a symbol that offers a challenge to heterosexual hegemony. According to him, there is no justifiable harm that homosexual sex causes to the participants involved or to society, yet it is punished for the sake of it to preserve heterosexuality.[123] In the words of Justice Sachs, as a result of criminalising and stigmatising gay sex, the right to equality is implicated. He observed:

> The effect is that all homosexual desire is tainted and the whole gay and lesbian community is marked with deviance and perversity. When everything associated with homosexuality is treated as bent, queer, repugnant or comical, the equality interest is directly engaged.[124]

The words of Justice Sachs ring true in the case of Ghana. Even though the 'unnatural carnal knowledge' offence criminalises an act but not a person, homosexuals are assaulted and prevented from freely exercising their rights merely because they identify as gay or are perceived as such. It is, therefore, true that 'people are subject to extensive prejudice because of what they are or what they are perceived to be, not because of what they do',[125] not only in South Africa but also in Ghana. 'The result is that a significant group of the population is, because of its sexual non-conformity, persecuted, marginalised and turned in on itself'.[126]

It is therefore arguable that the violations of the rights of gay persons in Ghana are attributable only to their identity, even though the offence of 'unnatural carnal knowledge' criminalises an act, targeted only sex between males. Therefore, homosexuals are subjected to certain disabilities and restrictions which heterosexuals are not and implicates the equality and freedom from discrimination clause in the Constitution.

### *b Human dignity*

[121] As above 28.
[122] As above.
[123] As above 101.
[124] As above 103.
[125] As above.
[126] As above

'Respect for human dignity'[127] is recognised by the Constitution as 'inviolable'. It cannot be violated or curtailed even during a state of emergency, and whether a person is arrested or not, they cannot be 'subjected to cruel, inhuman or degrading treatment or punishment'.[128] In addition to this, respect for human dignity also demands that no one should be subjected to 'any other condition that detracts or is likely to detract from his dignity and worth as a human being'.[129]

These requirements, which guarantee respect for human dignity, were tested in the case of *Adjei-Ampofo (no 1) v Accra Metropolitan Assembly and Attorney-General (no 1)*.[130] The plaintiff, in this case, sought a declaration from the Supreme Court that the practice of the metropolitan authority in the capital of Ghana, of employing people to carry pan latrines that contained human excreta was an affront to human dignity. He framed his case along the lines of the human dignity clause in the Constitution to the extent that:

> (a) The act or practice of Accra Metropolitan Assembly, in making or causing Ghanaian citizens to carry human excreta in pans on their heads is an affront to the dignity of such persons, in particular, and Ghanaians as a whole; (b) the act is cruel, inhuman and degrading and also detracts from the dignity of such persons; (c) the practise or act is inconsistent with and in contravention of article 15 (1) and (2) of the 1992 Constitution'.[131]

The plaintiff also requested the Court to direct the defendants to abolish the practice. The Court agreed with the plaintiff and adopted the terms of the settlement reached by the parties, abolishing the practice.[132] As a result of the terms of settlement filed by the parties, the arguments surrounding the respect to human dignity was not argued in court, we are therefore robbed of the jurisprudence regarding this right in the Ghanaian context.

Nonetheless, the relief sought by the plaintiff is instructive. In relation to sexual minority rights, even though the courts have not had the opportunity to determine its relation to human dignity, there is indubitable evidence to suggest that the violence and violations of fundamental human rights suffered by sexual minorities in Ghana, would amount to 'cruel, inhuman and degrading treatment' that violates the right to human dignity.

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[127] Constitution of Ghana 1992 art 15(1).
[128] As above art 15(2)(a).
[129] As above art 15(2)(b).
[130] *Adjei-Ampofo (no 1) v Accra Metropolitan Assembly and Attorney-General* (no 1) [2007-2008] SCGLR 611.
[131] As above 612.
[132] *Adjei-Ampofo (no 2) v Accra Metropolitan Assembly and Attorney-General* (no 2) [2007-2008] SCGLR 663.

Violence and violations of the fundamental human rights of LGBT persons in Ghana, including assault, battery and extortion,[133] and the law that criminalises gay sex in Ghana, even if unenforced,[134] deprives LGBT persons of their human dignity both directly and indirectly.[135] As argued by Shaw in the Kenyan context, laws that criminalise consensual same-sex acts between adults is a form of dignity taking. He puts it succinctly:

> There is a dignity taking where criminalisation and anti-gay stigma engender physical violence due to state inaction- that is, where the state neither recognises nor protects its vulnerable queer population, which is dehumanised through rhetorical and physical exclusion from full participation in the social contract.[136]

In the context of Ghana, indirect dignity taking occurs when LGBT persons are subjected to physical violence at the hands of state and non-state actors and perpetrators walk free. When ordinary citizens and state officials make derogatory remarks on radio and television and threaten to arrest LGBT persons for attempting to exercise their rights to personal liberty association, private citizens and the state detract from the dignity and worth of LGBT persons in violation of the Constitution.

Decriminalisation of consensual same-sex act, therefore, becomes a form of dignity restoration.[137] The significance of such respect for human dignity and dignity restoration cannot be overemphasised, as observed by the Court in Botswana when it decriminalised consensual homosexual sex.[138] The Court noted that a person's sexual orientation is an innate and important attribute that makes them human, and therefore intrinsically linked to their human dignity. It is, therefore, an expression of this human dignity when a person chooses a person to express their love to, be they of the opposite sex or the same sex. Any attempt to curtail this innate expression in the form of laws that entrench stigma, discrimination and makes one feel like an 'unapprehended

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[133] Human Rights Watch (n 13 above).
[134] R Goodman 'Beyond the enforcement principles: Sodomy laws, social norms, and social panoptics' (2001) 89 *California Law Review* 643 argues that even if unenforced, sodomy laws impacts negatively on the identity of the individual and have the ability to constrict their social relations and participation in the public space.
[135] A Shaw 'From disgust to dignity: Criminalisation of same-sex conduct as a dignity taking and the human rights pathways to achieve dignity restoration' (2018) 18 *African Human Rights Law Journal* 684 at 687. Direct takings include 'forced examinations and medical tests', while indirect takings include institutionalisation of stigma' 687.
[136] As above 697.
[137] As above 698-699.
[138] *Letsweletse Motshidiemang v Attorney General & Legabibo (Amicus Curiae)* MAHGB – 000591-16.

felon'[139] amounts to dignity taking and the restoration of this dignity compels the decriminalisation of such laws. The Court delivered itself as follows:

> Sexual orientation is innate to a human being. It is not a fashion statement or posture. It is an important attribute of one's personality and identity; hence all and sundry are entitled to complete autonomy over the most intimate decisions relating to personal life, including the choice of a partner.[140]

The position of the Botswana court on the essence of dignity to a person's sexual orientation is endorsed by the Indian Supreme Court.[141] The Court observed that some cynics might think that dignity is something abstract or even egoistic. Nonetheless, it expressed the view, poetically and philosophically, that 'life without dignity is like a sound that is not heard. Dignity speaks; it has its sound; it is natural and human'.[142] I dare to add that life without human dignity is like an empty barrel amid plenty of water.

### *c The right to privacy*

The Bill of Rights in the 1992 Constitution of Ghana protects the right to privacy. It states that:

> No person shall be subjected to interference with the privacy of his home, property, correspondence, or communication except in accordance with the law and as may be necessary in a free and democratic society for public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others.[143]

From the wording of the right to privacy in the Constitution, it protects three main types of privacy. The privacy of the home which includes 'private and family life privacy',[144] the privacy of a person's property which could even include the body as a form of property,[145] as well as communication and 'information privacy'.[146] The philosophy that informs protection of a person's

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[139] As above at 96.
[140] As above at 79-80.
[141] *Navtej Singh Johar and Others v Union of India Thr Secretary Ministry of Law and Justice* Writ Petition (Criminal) No 76 of 2016.
[142] As above at 84.
[143] Constitution of Ghana art 18(2).
[144] *Mrs Abena Pokuaa Ackah v Agricultural Development Bank* (2016) Civil Appeal no J4/31/2015.
[145] Shaw (n 135 above). See also the Kenya Court of Appeal case of *COI & GMN v The Chief Magistrate of Ukunda Law Courts & 4 Others* (2016) Civil Appeal no 56 of 2016 Court of Appeal Mombasa para 27 where the court described forced non-consensual medical examinations as an invasion of the right to privacy, in article 31 of the Kenyan Constitution, couched in similar terms as article 18(2) in the Ghanaian Constitution.
[146] *Mrs Abena Pokuaa Ackah v Agricultural Development Bank* (n 144 above).

privacy is to ensure that the most intimate and personal matters that are intrinsically linked to the individual is shielded from the prying eyes of the public. These may include the person's sexual life, identity and whom a person relates to sexually. As the Canadian Supreme Court observed, the right to privacy is of 'intrinsic importance to the fulfilment of each person, both individually and as a member of society'.[147] The Court emphasised that 'without privacy, it is difficult for an individual to possess and retain a sense of self-worth or to maintain an independence of spirit and thought'.[148] This underscores the need to respect what goes on in a person's private life as it is intrinsically linked with their humanity. The concept of privacy under the 1992 Constitution, therefore, protects a person's sexual life, their identity, whom they relate to in their communication and in their sexual life.[149]

The right to privacy is, however, not an absolute right. The Constitution lists four circumstances under which we could curtail the right to privacy. These are; public safety or the economic well-being, protection of health or morals, prevention of disorder or crime, and lastly for protecting the rights or freedoms of others.[150] These grounds for interfering with a person's right to privacy is only justified if it is done under the law and necessary in a free and democratic society.[151] Therefore if someone makes a successful claim that their right to privacy has been breached, it behoves the state or non-state agent that violated this right to justify such violation within the four exceptions in the Constitution and also show that these exceptions exist in free and democratic societies.[152]

The Supreme Court of Ghana recently considered the right to privacy in the Bill of Rights, but with specific reference to privacy relating to a person's communication.[153] The Court observed that secretly recording a person's communication or correspondence without that person's knowledge is an interference with the right to privacy of that person. The decision is remarkable because it upheld the constitutional right to privacy against the common law assumption that all evidence is relevant and does not matter how a person acquired such evidence.[154] The Court also observed that the interference with the right to privacy may occur with or without judicial sanction and may

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[147] *Vickery v Nova Scotia Supreme Court (Prothonotary)* [1991] 1 SCR 671.
[148] As above.
[149] K Waaldjik 'The right to relate: A lecture on the importance of 'orientation' in comparative sexual orientation law' (2013) 24 *Duke Journal of Comparative & International Law* 161. Waaldijk contends that the 'right to relate' and develop relationships with other persons is an aspect of a person's right to privacy.
[150] Constitution of Ghana 1992 art 18(2).
[151] As above.
[152] For a discussion on laws in a democratic society, see the next section, 4.3.6 below.
[153] *Mrs Abena Pokuaa Ackah v Agricultural Development Bank* (n 144 above).
[154] As above.

depend on whether a statute requires a court to grant that permission or whether the Criminal Procedure Code entitles the police to conduct a search without a warrant when a crime is being committed.[155]

Ghana's right to privacy provision resembles article 8 of the European Convention for the protection of human rights (European Convention) and mimics the wording in the European Convention almost word for word, including the exceptions. The Supreme Court of Ghana acknowledged the similarity in the two provisions and reckoned that decisions of the European Court based on the right to privacy 'are of better persuasive value'.[156] The Supreme Court, therefore, quoted with approval the interpretation of privacy in the European Court case of *Peck v United Kingdom,* acknowledging that private life encompassed elements such as 'gender identification, name, sexual orientation and sexual life'.[157]

In relation to sexual orientation, the European Court has held in several cases that laws which criminalise consensual adult same-sex sexual relationships interfere with the right to privacy. In *Modinos v Cyprus,*[158] the European Court held that laws that criminalise homosexual sex violate the right to privacy because it presupposes the police could invade the private sphere of persons involved in such relationships. *Dudgeon v United Kingdom*[159] also held that the right to privacy entails the right to be left alone. The European Court maintains that notwithstanding the limits of the right to privacy, interfering with that right based on enforcing anti-sodomy laws violates a fundamental human right.

The Inter-American Court has also held, relying on the previous case law of the court, that 'privacy is an ample concept that is not subject to exhaustive definitions and includes, among other protected realms, the sex life and the right to establish and develop relationships with other human beings'.[160] In contrast, the Supreme Court of Ghana has not considered the right to privacy in relation to sexual orientation and whether the exceptions for interfering with the right to privacy under such circumstances may be justified. I consider these four exceptions relative to consensual

[155] As above.
[156] As above.
[157] As above.
[158] *Modinos v. Cyprus*, 7/1992/352/426, Council of Europe: European Court of Human Rights, 23 March 1993.
[159] *Dudgeon v The United Kingdom* (Application no 7525/76) 22 October 1981.
[160] *Atala Riffo And Daughters v Chile* 24 February 2012.

same-sex relationships, against the backdrop that such interference must be reasonable[161] in a free and democratic society.[162]

### *Interference with right to privacy for public safety or economic reasons*

The first basis for restricting the right to privacy is for public safety or economic reasons. It is self-evident that such a restriction to the right to privacy may not apply if consenting adults engage in the act of sexual expression. There is no threat to public safety or the economic well-being of the country if people engage in sexual activity in the privacy of their homes, and therefore there is no basis for invading the privacy of persons on this ground.

### *Interference with right to privacy for the protection of health and moral reasons*

Health and moral reasons have often been presented as reasons for criminalising consensual same-sex acts between adults and interfering with their right to privacy. This presupposes that to enforce public health, for instance, a person's sexual identity, or whom they relate to sexually could be revealed, or even invasive non-consensual procedures could be used to ascertain a person's sexuality. Even though such interference has sometimes been used by law enforcement in Africa under the pretext of establishing the sexuality of a person, such interference is deemed unconstitutional. The Court of Appeal in Kenya has held that the right to privacy includes the right not to be searched unlawfully.[163] The Court noted that the right to privacy is linked to human dignity and 'extend to a person not being compelled to undergo a medical examination'.[164] Therefore subjecting a person to anal examination is a violation of their right to privacy.[165] In effect, the violation of the right to privacy cannot be justified on health grounds where it relates to establishing the sexual identity, how or whom someone has sex with.

Another reason used for violating the right to privacy is morality. In the case of *Toonen v Australia,*[166] the respondent state justified the existence of the privacy-invasive sodomy law on health and moral grounds, which the Human Rights Committee held was unjustifiable. Courts in

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[161] General Comment 16 Human Rights Committee states that interference with the right to privacy must be compatible with the 'aims and objectives of the covenant and should be, in any event, reasonable in the particular circumstances'.

[162] The concept of a free and democratic society is discussed in section 4.3.6 below where I contend that there is no 'full democracy' in the world that criminalises sex between consenting adults of the same sex.

[163] *COI & GMN v The Chief Magistrate of Ukunda Law Courts & 4 Others* (n 145 above) para 27.

[164] As above.

[165] As above para 37(b).

[166] *Toonen v Australia*, Merits, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992, (1994).

some African countries have often resorted to morality as a basis not to decriminalise consensual same-sex relationships. The recent challenge of the Constitutionality of sodomy laws in Kenya was rejected on majoritarian moral grounds.[167] The Constitutional Review Commission of Ghana advanced a similar argument to suggest that the Constitution of Ghana should not be amended to provide express protection for sexual minority rights.[168] However, as the Indian Supreme Court has observed constitutional morality which entails respect for fundamental human rights of members of society even if they are in the minority should prevail over societal morality.[169] Using the LGBT community as an example of a minority, the Court noted that if it failed to protect minority rights on the basis of morality, it 'would reduce the citizenry rights to a cypher'.[170]

Public health and moral reasons are not a basis for violating the right to privacy in an open and democratic society. On the contrary, in open and democratic societies where the rights of citizens are respected, promoted and protected, everyone's right to privacy is respected and sodomy laws that give an opportunity for law enforcement agencies and other private persons to interfere with someone's privacy have been held to be unlawful.

***Interference with right to privacy for prevention of disorder or crime***

Section 104 of the Criminal Offences Act of Ghana criminalises same-sex acts between consenting adults in private. Therefore, law enforcement officers may use this law as a basis to interfere with the right to privacy. While the Constitutional right to privacy is not sacrosanct but subject to certain limitations, this is a clear case where a subordinate law is in conflict with the Constitution. The question which the Constitutional provision on privacy makes clear is that any law that purports to interfere with the right to privacy must first of all be necessary for a free and democratic society.

As noted above, in free and democratic countries around the world, and as pronounced by global and regional bodies, sodomy laws violate the right to privacy. For instance, the High Commissioner for Human Rights has observed that laws that criminalise consensual same-sex conduct between adults in private are a source of violence and violations of the rights to sexual minorities and should be decriminalised by countries that have them on their criminal statute books. In the concluding observations of the Human Rights Committee, it has advised countries that criminalise consensual

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[167] *EG & 7 Others v Attorney General; DKM & 9 Others (interested parties); Katiba Institute and Another (amicus curiae)* consolidated suit of Petition no 150 of 2016 and Petition no 234 of 2016 para 339.
[168] Constitutional Review Commission report (n 12 above) 653.
[169] *Navtej Singh Johar and Others versus Union of India Thr. Secretary Ministry of Law and Justice* (n 141 above) para 121.
[170] As above para 122.

same-sex acts to decriminalise these laws. Ghana has also received with approval the recommendation of the Human Rights Council that it should consider decriminalising its law that criminalises same-sex sexual conduct. The Special Rapporteur on torture and other cruel, inhuman or degrading punishment has also fiercely condemned criminal law as a basis to subject people to torture, cruel and inhuman practices related to sodomy law. In a report to the Human Rights Council, the Special Rapporteur noted that 'in States where homosexuality is criminalised, men suspected of same-sex conduct are subject to non-consensual anal examination intended to obtain physical evidence of homosexuality, a practice that is medically worthless and amounts to torture or ill-treatment'.[171]

In addition, if two consenting adults express themselves to each other sexually, no harm is done against anyone. Therefore, *prima facie,* no crime is being or committed. It is only a crime to engage in same-sex sexual activity because the criminal law says so. Therefore, balancing of constitutional right to privacy against a criminal law that violates such a right with no justifiable objective in a free and democratic country, such a law may be declared unconstitutional by the Supreme Court.

### *Interference with the right to privacy for the protection of rights or freedom of others*

The interference with the right to privacy for the protection of the rights of other persons is implied in article 12 of the Constitution.[172] This means that a person is entitled to enjoy their rights in so far as in doing so, they do not infringe on another person's right.

The meaning of this exception is that if someone purporting to enjoy their privacy violates the right or freedom of another person, then the law will interfere with such privacy in other to protect persons whose rights are being violated. In the context of two same-sex consenting adults engaged in a sexual act, it is inconceivable how this could happen if they are only expressing themselves sexually to each other. However, the protection of the rights and freedoms of others is paramount whether in a heterosexual or homosexual context and there is no reason for the law, were it to apply, to do so selectively based on same-sex sexual orientation.

[171] Report of the Special Rapporteur on torture & other cruel, inhuman or degrading punishment to the Human Rights Council of the UN A/HRC/31/57 (2016) para 36.
[172] Constitution of Ghana 1992 art 12(2).

### 4.3.6 The concept of unenumerated rights and protection of sexual minority rights

In addition to the fundamental human rights and freedoms listed in the Bill of Rights and other justiciable rights in chapter 6, the drafters of the Constitution added to article 33(5) which potentially incorporates other fundamental human rights into the Bill of Rights. It states:

> The rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this chapter shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.[173]

This phrase, which incorporates other rights into the Constitution, is referred to as the doctrine of 'unenumerated rights'.[174] The Constitution of Uganda has a similar provision almost word for word, omitting only the fact that the rights must be inherent in a democracy and intended to protect human dignity.[175] The Constitution of the United States of America also has a similar phrase, which also omits the criteria of the rights to be inherent in a democracy and to protect human dignity.[176]

The Ghanaian rendition of unenumerated rights is therefore unique because it emphasises the importance of rights that have attained universal acceptance in established democracies and secures human dignity. The definition of a democracy is elusive and often debased by regimes seeking acceptance by other nations.[177] In spite of the difficulty of defining democracy, it cannot be denied that the essential elements of democracy include

> respect for human rights and fundamental freedoms, freedom of association, freedom of expression and opinion, access to power and its exercise in accordance with the rule of law, the holding of periodic free and fair elections by universal suffrage and by secret ballot as the expression of the will of the people, a pluralistic system of political parties and

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[173] As above art 33(5).
[174] OJ Rogge 'Unenumerated rights' (1959) 47 *California Law Review* 787.
[175] Constitution of Uganda 1995 art 45: 'The rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned'.
[176] Constitution of the United States of America 1787 9th amendment: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people'.
[177] PC Schmitter and TL Carl 'What democracy is and is not' (1991) 2 *Journal of Democracy* 75.

organisations, the separation of powers, the independence of the judiciary, transparency and accountability in public administration, and free, independent and pluralistic media.[178]

The Economist intelligence unit (EIU) which has assessed and published a list of democracies for close to a decade and a half based on criteria such as electoral process and pluralism, political culture and civil liberties, assist us in separating full democracies from flawed and other types of democracies.[179] The recent democracy index of the EIU lists 22 countries out of 165 countries that qualify as 'full democracy'.[180] All 22 full democratic countries, except Mauritius, prohibit discrimination on the basis of sexual orientation and recognise that criminalisation of consensual same-sex sexual acts is an affront to the dignity of the human being.[181] Many others who belong to the category of flawed democracies[182] also protect sexual minority rights and do not criminalise or have decriminalised consensual adult same-sex sexual relationships.

Relying on the doctrine of unenumerated rights in the Constitution of Ghana, therefore, opens up the embrace of non-discrimination on the basis of sexual orientation. The Constitution does not specifically prohibit discrimination on the basis of sexual orientation. In addition, even though it guarantees the right to privacy, *prima facie,* this right can be violated by state and non-state agents under the pretext of enforcing the crime of 'unnatural carnal knowledge'. Article 33(5) therefore acts as a buffer against the violation of the rights of sexual minorities and prevents state and non-state sponsored intrusion into the private lives of persons on the basis of their sexuality. The effect of unenumerated rights is, therefore, to offer protection against violations of fundamental human rights, which are not enumerated but still protected by the Constitution.[183]

The view that sexual minority rights are protected by the Constitution through the doctrine of unenumerated rights is supported by the decision of the Supreme Court in the *Lotteries* case.[184] The Court observed, referring to unenumerated rights that, 'evidence of such rights can be obtained either from the provisions of international human rights instruments (and practice under them) or

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[178] Resolution 2002/46 E/2002/23- E/CN.4/2002/200 United Nations Commission on Human Rights para 1. Resolution on further measures to promote and consolidate democracy 51st meeting 23 April 2002 adopted by a vote of 43 to none with 9 abstentions.

[179] Democracy Index 2019 'A year of democratic setbacks and popular protest' (2020) *The Economist Intelligence Unit Limited.*

[180] As above 10.

[181] These countries include Norway, New Zealand, Finland, Canada, Australia, Germany, Mauritius, and Costa Rica.

[182] Examples are South Korea, United States of America, Malta, Botswana, Lesotho, India, and South Africa.

[183] WO Bertelsman 'The ninth amendment and due process of law - toward a viable theory of unenumerated rights' (1968) 37 *University of Cincinnati Law Review* 777.

[184] *National Lotto Operators Association & others v National Lottery Association* (n 7 above).

from the national human rights legislation and practice of other states'.[185] In this regard, evidence from the practice of 22 other states, recognised as full democracies vindicate the inclusion of prohibition of discrimination in the Bill of Rights in the Constitution of Ghana through article 33(5).

In the case of *Mensima v Attorney General*[186], the Supreme Court of Ghana held that Regulation 3(1) of the Manufacture and Sale of Sprits Regulations,[187] that required every person to be a member of a registered distiller's cooperative before obtaining a distiller's license was inconsistent with the right to freedom of association and therefore unconstitutional. Similarly, in the case of *New Patriotic Party v Inspector General of Police* (*NPP v IGP*), the Court held that the right to freely demonstrate is impaired if one required a police permit in order to exercise that right. The provision that required a police permit was therefore held to be in violation of the right to demonstrate and therefore declared unconstitutional.

In a similar vein, if it is accepted that discrimination on the basis of sexual orientation is prohibited as an unenumerated right by the Constitution, through article 33(5), then on the basis of the decisions of the Supreme Court in the *Mensima* and the *NPP v IGP* cases, the crime of 'unnatural carnal knowledge' in section 104(1)(b) is unconstitutional. The basis for decriminalising consensual same-sex conduct in Ghana also depends on the approach the Supreme Court adopts to interpret the Constitution.

## 4.4 Theoretical approaches to the interpretation of a national constitution: Ghana and South Africa in comparative perspective

Oftentimes, the apex courts of countries have been confronted with interpreting national constitutions and determining the rights of persons under these constitutions because they may be the final courts of appeal or the only courts empowered by law to do so.[188] They rely on various doctrines and approaches to interpret a national constitution, especially in difficult cases that have no clear-cut outcomes. These courts are deemed to reach a predictable conclusion once they rely on particular theories and doctrines that they are accustomed to using in their interpretations of difficult questions that implicate the interpretation of national constitutions. I take a critical look at

[185] As above at 1091.
[186] *Mensima v Attorney-General* [1996-97] SCGLR 676.
[187] Legislative Instrument (LI) 239 of 1962.
[188] See for instance, Constitution of Ghana 1992 art 2(1) and 130(1)(a) which empowers only the Supreme Court to interpret the Constitution and make declarations to that effect.

the approach adopted by the Supreme Court of Ghana in its interpretation of the Constitution and contrast it with the approach of the Constitutional Court of South Africa.

These two courts appear to adopt different approaches to interpreting their national constitutions but may have similar outcomes. The Supreme Court of Ghana has not interpreted the Constitution in relation to sexual minority rights, but the Constitutional Court of South Africa has done so in several cases.[189] If these courts adopt different approaches to interpretation yet reach similar outcomes, it is probable that the Supreme Court of Ghana may uphold the rights of sexual minorities as the Constitutional Court of South Africa has done. But this may also depend on the text of the Constitution in issue and whether this can fundamentally change the outcome and the lessons that can be learnt from the different approaches of these two courts.[190] I contend that despite the different approaches of the two courts to interpretation and the different wording of the two constitutions, there is a high probability that when confronted with issues relating to sexual minority rights, the Supreme Court of Ghana may reach the same outcome as the Constitutional Court of South Africa.

Interpreting the Constitution as a 'living instrument'[191] has been the hallmark of the Supreme Court of Ghana while the Constitutional court of South Africa relies on the theory of 'transformative constitutionalism'.[192] It is imperative to understand these theoretical approaches in order to fully appreciate the decisions of these courts. To this end, I shall review the approach adopted by the Supreme Court of Ghana in the interpretation of the Constitution, with particular reference to issues relating to fundamental human rights. It may also be useful to contrast this approach to the approaches adopted by other courts in Africa that perform the same function as the Supreme Court of Ghana. The Constitutional Court of South Africa performs a similar function as the Supreme Court of Ghana in respect to interpreting their national constitution in issues that implicate human rights. Even though the Courts in Botswana and Kenya have recently decided cases relating to sexual minority rights, and relevant examples may be drawn from these cases, using the functional method excludes them from consideration as it is only their apex courts that perform the same functions as the Ghanaian Supreme Court and the South African Constitutional Court.

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[189] *National Coalition for Gay and Lesbian Equality v Minister of Justice* (n 120 above).
[190] Constitution of South Africa 1996 sec 9(3) for example, prohibits discrimination on many grounds including sexual orientation. There is no such provision in the Constitution of Ghana, but it has a Bill of Rights that also prohibits discrimination.
[191] *Tufour v Attorney-General* [1980] GLR 637.
[192] KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 150.

Having used the functional method as a parameter to select the Supreme Court of Ghana and the Constitutional Court of South Africa, the lingering question is the extent to which the theories adopted in the interpretation of national constitutions by these two apex courts fulfils the object of the Constitutions and yields a predictable outcome. Relying on the Ghanaian apex court's approach to interpretation, this chapter attempts to gauge what the outcome will be should it be confronted with an issue relating to sexual minority rights since it has not had the opportunity to do so. The approach of the South African apex court presents a good opportunity to contrast with the Ghanaian position and draw useful lessons. Using a functional method-since, both apex courts of Ghana and South Africa perform the same task of interpreting their national constitutions- I draw comparisons in approaches to interpretation and how the theories can inform each other in relation to the interpretation of sexual minority rights.

In the sections that follow, I will first critique the two theories adopted by the two courts and discuss them separately, looking at the key phrases adopted by them.

### 4.4.1 The living instrument and transformative constitutionalism as aids to understanding constitutional interpretation

The Supreme Court of Ghana applies a theory of interpretation which it calls 'interpreting the Constitution as a living instrument capable of growth'[193] in cases before it. While it has applied this theory in a series of cases to affirm the rights in the 1992 Constitution such as the right to liberty, human dignity, free speech and freedom of association, it is yet to apply this doctrine in relation to equality, human dignity and prohibition of discrimination on the basis of sexual orientation and gender identity. In contrast, the Constitutional Court of South Africa has applied the transformative constitutionalism theory to determine cases alleging discrimination against persons on the grounds of their sexual orientation.[194]

The Constitution of Ghana does not contain express provisions that prohibit discrimination on the grounds of sexual orientation, as the South African Constitution does.[195] Thus, it may be argued that because there is no express provision in the Ghanaian Constitution that protects sexual minority rights, it cannot afford such a protection. Alternatively, it could be contended that if the South African Constitutional Court affirms prohibition on the basis of sexual orientation and gender

[193] *Tufour v Attorney-General* (n 191 above) 637.
[194] *National Coalition for Gay and Lesbian Equality v Minister of Justice* (n 120 above); *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC); *Geldenhuys v National Director of Public Prosecutions* 2009 (2) SA 310 (CC).
[195] Constitution of the Republic of South Africa section 9(3).

identity, it is not strange because the text of the Constitution is clear, and there cannot be a departure from these constitutional provisions.

Such an argument though true, may appear simplistic and misleading. As the Supreme Court of Ghana has emphasised time and again, the Constitutional framers could not have envisaged every single event that could happen in future in order to legislate for it.[196] Thus, the Constitution, which is not ordinary legislation, should be interpreted benevolently and progressively to take account of new situations and difficult questions of law which are not readily catered for through an analysis of the black letter law of the Constitution.[197] Such an approach accords with the view that at the time of drafting the 1992 Constitution of Ghana, the terms 'sexual orientation' and 'gender identity' was not commonly used and were thus not envisaged by the framers of the Constitution. In the case of South Africa, the Constitutional Court has affirmed that discrimination on the grounds of sexual orientation is prohibited by the Constitution by its clear and unambiguous provisions. Yet, an optimist could still argue that in the absence of express provisions in the Constitution that prohibits discrimination on the basis of sexual orientation, protection of sexual minority rights could have still been achieved.

The central argument in this section then is that the mere absence of constitutional provisions prohibiting discrimination based on sexual orientation and gender identity, should not preclude a court of law from reading into the Constitution such prohibition using a living instrument doctrine. In addition to this, I examine the application of constitutional theories to interpretation of the national constitution by these two apex courts to ascertain whether such theories make a difference in interpreting the Constitution. I also consider the similarities and uniqueness in the approaches adopted by the two courts that are relevant to the discussion on sexual minority rights and the decriminalisation of consensual same-sex conduct. I argue that while the text of the Constitution is relevant in arriving at a decision, the theoretical approach adopted is equally crucial in arriving at a decision.

I shall first examine the interpretation of the Constitution as a living instrument[198] in relation to Ghana, before delving into the approach of the Constitutional Court of South Africa in its application of the transformative constitutionalism theory.[199]

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[196] *Tufour v Attorney-General* (n 191 above).
[197] As above.
[198] As above.
[199] Klare (n 192 above).

This section, therefore, examines how the approaches adopted by these two courts, particularly the Supreme Court of Ghana, helps us to understand the realisation of sexual minority rights and possible decriminalisation of consensual same-sex sexual acts without explicit words in the Constitution to that effect. Not only that. I also contrast the position of the Ghanaian Constitution to South Africa's that has express provisions protecting sexual minority rights. Additionally, I shall analyse how the apex court in South Africa has approached the interpretation of the Constitutional provisions protecting sexual minority rights from the perspective of the theories adopted by that court in cases it has decided and the lessons that might be relevant for the situation in Ghana. Would the outcome of the decisions of the Constitutional Court of South Africa on sexual minority rights have been different without those express provisions in the Constitution, even if they had used the transformative theory of interpretation? But first, I attempt to analyse the approach adopted by the apex court in Ghana in interpreting the Constitution generally.

### 4.4.2 The approach to constitutional interpretation in Ghana

In a common law jurisdiction like Ghana that thrives on the concept of precedent,[200] being able to predict the approach a court will take in interpreting the Constitution is imperative to boosting one's chances of winning a case. Therefore, this involves an analysis of the principle of law set in decided cases, especially, by the apex court since it is the only court with jurisdiction to interpret the Constitution. Predicting the Court's approach also requires an understanding of the theories, methodologies and approaches used by the Court and how that influenced the decision one way or the other.

In this section, therefore, an attempt is made to gauge the approach the Courts will adopt in protecting the fundamental human rights and freedoms of sexual minorities. The Constitution of Ghana does not have any provision that explicitly protects sexual minority rights. There are only general provisions that protect every person. It can only be inferred from reading and interpretation of the Constitution, relying on its letter and spirit as the Courts have often noted, that these rights possibly include protection of sexual minorities too. To complicate matters, the Supreme Court has not been confronted with even any tangential matter relating to sexual minority rights, let alone a determination that the criminal offence of 'unnatural carnal knowledge' is incompatible with constitutional provisions.[201] In order to predict with a high degree of certainty

[200] This refers to the concept of abiding by the precedents of law set in earlier cases especially by superior courts which simply means 'stay by the decided cases'.
[201] See however *Justice Yaonansu Kpegah v Attorney-General of Ghana and the Inspector General of Police of Ghana* unreported case no J1/9/2012, Supreme Court. This case was later abandoned by the Petitioner.

what this conclusion would be since the Court has not been faced with a question like that, it may be prudent to rely on the Court's own cases that have been decided in the past on general human rights issues, analyse constitutional provisions, assess the views of scholars on the subject, and synthesise these statements about the law to draw a conclusion.

It is important to note that while the High Court in Ghana has primary jurisdiction to determine cases of fundamental human rights of persons, it is the Supreme Court of Ghana that has exclusive jurisdiction to determine questions relating to the interpretation of the Constitution and to declare legislation as unconstitutional.[202] This means that people who allege that their fundamental human rights are in jeopardy of being breached or have been breached are required by law to approach the High Court for a determination of that matter.

Therefore, where a person alleges that for instance the Constitution of Ghana embraces sexual minority rights or prohibits discrimination on the basis of a person's sexual orientation, or that a provision in the Criminal Offences Act of Ghana that criminalises unnatural carnal knowledge is unconstitutional, the appropriate forum is the Supreme Court.[203] The Supreme Court is the appropriate forum because the issues being contended demands an interpretation of the Constitution, and it is the only court that is clothed with jurisdiction to decide such matters.[204]

Since there is no express provision in the Constitution of Ghana that stipulates that sexual orientation is a prohibited ground of discrimination, or that a law that criminalises unnatural carnal knowledge offends the Constitution, the only way to determine that issue, is for the Supreme Court to interpret the Constitution and put the matter to rest. Therefore, in order to predict with some degree of certainty the outcome that the Court would reach, it is imperative to look at what it has done in similar cases.

To the substantive issue of the approach of the Ghanaian courts to interpretation, there are various ways of looking at the issue. First, the Courts have said that the approach should be to

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[202] Constitution of Ghana 1992 art 140(2) empowers the High Court with 'jurisdiction to enforce the fundamental human rights and freedoms guaranteed by this constitution, while art 130(1)(a) grants 'exclusive jurisdiction' to the Supreme Court to interpret the Constitution.

[203] As above art 2(1) empowers the Supreme Court to make a declaration whether an enactment is in contravention or inconsistent with the Constitution. Art 130(1) (a) states: '… the Supreme Court shall have exclusive jurisdiction in all matters relating to the enforcement or interpretation of this Constitution …'.

[204] As above. See also the cases of *Republican v Maikankan* [1971] 2 GLR 473 SC; *Republic v Special Tribunal; Ex parte Akosah* [1980] GLR 592 that emphasised the exclusive power of the Supreme Court to interpret the Constitution and the conditions for doing so.

interpret the Constitution as a 'living instrument capable of growth'.[205] In some instances, the Courts have said that in the interpretation of the Constitution, faith should be invested not only in the letter of the law but also in the spirit.[206] Scholars have also noted that the approach to the interpretation of the Ghanaian constitution largely relies on a 'modern purposive approach to interpretation'.[207] It is pertinent to ask, are these three phrases that have underlined the interpretation of the Constitution in Ghana one and the same thing or different principles regarding interpretation of the Constitution?

Ghanaian lawyers, judges and academics believe that since the decision in the case of *Tuffour v Attorney General*,[208] the Constitution of Ghana has been proclaimed as a document that should be interpreted as a 'living instrument capable of growth'. It is also the consensus as evidenced in difficult and leading cases of the Supreme Court that in interpreting the Constitution, both the letter and spirit must be taken into consideration in arriving at a decision. The issue becomes further complicated when scholars contend that the Ghanaian courts adhere to a 'modern purposive approach to interpretation' when confronted with issues that implicate the Constitution. It is important to clarify these concepts and establish the approach(es) that the Courts adopt in the interpretation of the Ghanaian constitution before deciding whether such an approach favours an interpretation that protects sexual minority rights.

### 4.4.3 The Supreme Court and the interpretation of the Constitution as a living instrument capable of growth

#### a. *The Constitution as a living instrument or tree*

The first known case which relied on the interpretation of the Constitution as a living instrument in the Constitutional history of Ghana is the case of *Tuffour v The Attorney General.*[209] Both the case and the theory of interpretation adopted by the Supreme Court has gained notoriety in Ghanaian legal jurisprudence and has set the pace for constitutional interpretation in Ghana. The Court adopted this approach to interpretation without giving an indication of the origins of this theory and where it borrowed it from. Most importantly, even though this theory was borne out of an interpretation of the 1979 Constitution of Ghana, it is also a feature of the 1992 Constitution. This is

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[205] *Tufour v Attorney-General* (n 191 above) GLR 637.
[206] As above.
[207] For a general discussion of the approach to interpretation in Ghana see DD Adjei *Modern approach to the law of interpretation in Ghana* (2019); see also A Barack *Purposive interpretation in law* trans from Hebrew (2005) 82. The author states that the purposive interpretation is the best form of legal interpretation.
[208] *Tufour v Attorney-General* (n 191 above).
[209] As above.

to be expected, as the impugned provision in the 1979 Constitution has been retained in the 1992 Constitution and by virtue of the doctrine of precedent retains its original interpretation and meaning.

The *Tuffour* case turned on an interpretation of the 1979 Constitution of Ghana. The applicant requested the Court to interpret articles 127 and 128 of the 1979 Constitution, arguing that the effect of that provision meant that the Chief Justice of Ghana continued in office just like all other judges of the courts upon the coming into force of the 1979 Constitution. Dr Tuffour, the applicant, urged the Court to declare that the purported nomination by the President and the subsequent vetting and rejection by Parliament was null and void. The issue before the Court was whether, upon the coming into effect of the 1979 Constitution, the Chief Justice of Ghana had to be re-nominated by the President of Ghana, vetted again and approved by Parliament, having undergone a similar process and installed before the coming into effect of the new Constitution. The Court held that there was no need for a fresh vetting and approval by Parliament and that if any such purported vetting and rejection had taken place it was unconstitutional and therefore void.

The Court made certain pertinent statements about the interpretation of the Constitution, which merits a full discussion. The Court appeared to hint at a missed opportunity in the history of Ghana to interpret the 'declaration of fundamental principles' in the 1960 Constitution as a protective human rights mechanism capable of protecting persons whose rights had been infringed. In a bid to exorcise the 'ghost' of the failure of the apex court then to uphold fundamental human rights principles,[210] the Court reminds itself of a twofold duty to the people of Ghana. It noted that the Constitution is the fundamental law of the land, which reflects the history of the people and represents an opportunity to remedy past mistakes in their quest for a better future. The Court expressed itself thus:

> A written constitution such as ours is not an ordinary Act of Parliament. It embodies the will of the people. It also mirrors their history. Account, therefore, needs to be taken of it as a landmark in a people's search for progress. It contains within it their aspirations and their hopes for a better and fuller life.[211]

The Court reasoned further that the Constitution must be interpreted in a broad, liberal and purposive manner to accommodate the contemporary needs of society. The Court observed as follows:

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[210] *Re Akoto* (n 29 above).
[211] *Tufour v Attorney-General* (n 191 above) 647-648.

> The Constitution has its letter of the law. Equally, the Constitution has its spirit. It is the fundamental head for the authority which each of the three arms of government possesses and exercises. It is a source of strength. It is a source of power. Its language, therefore, must be considered as if it were a living organism capable of growth and development. Indeed, it is a living organism capable of growth and development, as the body politic of Ghana itself is capable of growth and development. A broad and liberal spirit is required for its interpretation. It does not admit of a narrow interpretation. A doctrinaire approach to interpretation would not do. We must take account of its principles and bring that consideration to bear, in bringing it into conformity with the needs of the time.[212]

For this reason, the *Tuffour* case introduced a theory of interpretation in Ghanaian constitutional jurisprudence and an approach to the interpretation of the Constitution that hitherto had been unknown. The case emphasised the need to envisage the Constitution not only as of the fundamental law of the land but also as a document that reflects the better future that Ghanaians aspire to. In that regard, the Constitution must be interpreted broadly to fit the demands of the present circumstances, as the Constitution is capable of growing to embrace new developments.

Interestingly, before the Supreme Court of Ghana interpreted the Constitution as a living instrument capable of growth, the Privy Council had in the case of *Henrietta Muir Edwards and Others v The Attorney General of Canada*[213] decided a matter on appeal from the Canadian Supreme Court. *Pearson*'s case, as this case has come to be well known, turned on the interpretation of the meaning of the word 'persons' as used in section 24 of the British North America Act, which sought to exclude women from being considered as 'persons' within the meaning of the Act, and thereby denying women the opportunity to be elected to the Senate of Canada. The Privy Council, however, decided that interpreting the Act as a 'living tree capable of growth', would include women within the meaning of the Act as 'persons' and adopted that approach.[214]

The *Tuffour* case in the Ghanaian Supreme Court appears to draw inspiration from *Pearson's* case decided by the Canadian Supreme Court and the Privy Council. In essence, *Pearson's* case laid down the principle that in interpreting a national constitution, regard must be had, not only for the plain words of the Constitution but also the purpose of the Constitution. Hence a purposive approach

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[212] As above. The broad and liberal approach to interpretation espoused in this case has been followed in several cases and is the preferred approach to interpretation in Ghana. See for instance, *Kuenyehia v Archer* [1993-94] 2 GLR 525 562; and *Apaloo v Electoral Commission of Ghana* [2001-2002] SCGLR 1 19.

[213] *Henrietta Muir Edwards & Others v The Attorney-General of Canada & Others Privy Council* Appeal no 121 of 1928.

[214] As above.

that goes beyond the mere words of the Constitution to take account of the objects of the Constitution should be the preferred approach. In this approach, a court must consider the relevance of the impugned provision and adopt a broad and liberal approach to its interpretation.

The *ratio decidendi* of this case is particularly useful for discussing sexual minority rights in Ghana for two reasons. First, the Bill of Rights in the Ghanaian Constitution does not explicitly protect sexual minority rights. It also does not prohibit discrimination on the basis of sexual orientation, even though it prohibits discrimination on grounds such as gender, creed, and ethnic origin. The Ghanaian Constitution is therefore silent on whether a person can be discriminated against on the grounds of their sexuality. That is where the principle enunciated by the Supreme Court in the *Tuffour* case becomes relevant. What approach should a court or any person adopt to interpret the Bill of Rights in the Constitution of Ghana?

If the Constitution states that it protects the rights of 'every person'[215] in Ghana, does that include LGBT persons, or does it exclude them? Which of the *two* approaches adopts an interpretation of the Constitution as a living instrument? The following injunction of the Court in the *Tuffour* case regarding this is relevant:

> And so, a construction should be avoided which leads to absurdity. And when a particular interpretation leads to two, shall we say 'inconsistent' results, the spirit of the Constitution would demand that the more reasonable of the two would be adhered to. We must have recourse to the Constitution as a whole.[216]

From the above pronouncement of the Supreme Court of Ghana, it is arguable that an interpretation that favours an approach to the protection of the rights of all persons, including sexual minorities is the preferred approach. Even though not explicitly stated, the rights of sexual minorities are impliedly protected. If the Constitution is interpreted as a living instrument, it may be concluded that it protects 'every person' including sexual minorities. A person's rights are not curtailed or denied simply on the basis that they are attracted to a person of the same sex.

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[215] Constitution of Ghana art 12(2): 'Every person in Ghana, whatever his race, place of origin, political opinion, colour, religion, creed or gender shall be entitled to the fundamental human rights and freedoms of the individual contained in this Chapter but subject to respect for the rights and freedoms of others and for the public interest'.

[216] *Tufour v Attorney-General* (n 191 above) 647. For more recent reference and application of the 'spirit' of the Constitution see *Asare v Attorney-General* [2003-2004] 2 SCGLR 823 836; *Ransford France (no 3) v Electoral Commission & Attorney-General* [2012] SCGLR 705.

Yet, a claim can be made to the contrary by persons averse to sexual minority rights that interpreting the Constitution as a living instrument does not mean inserting words or giving extra legislative meaning to express words in the Constitution. They may argue that while a constitution may not be interpreted lightly and must grow to meet the demands of society, such an interpretation must meet societal aspirations. If the report of the Constitutional Review Commission (CRC) is anything to go by, then the majority of Ghanaians have expressed their determination never to have sexual minority rights protected in their national Constitution.[217] The CRC reported that many Ghanaians whom they interviewed expressed indignation at the thought of protecting sexual minority rights in a new constitution. These persons argued that homosexuality is a foreign culture and offends their religious sensibilities.[218]

The claim by the CRC that majority of Ghanaians abhor homosexuality expresses a 'majority morality'[219] view that is inconsiderate of minority rights. In essence, the majority appear to be imposing on the minority their views on what is moral and what is not. While the majority are free to do so, the counter-argument is that the Constitution is a secular document designed to protect the fundamental human rights of everyone regardless of their views on morality and not a religious text that endorses morality of the majority. Adopting an interpretation that subscribes to the Constitution as a living document, means interpreting the Bill of Rights which protects 'every person' to include sexual minorities.

Taking a leaf from the Indian Supreme Court - which has also interpreted its Constitution as an 'organic breathing document',[220] similar to that of Ghana, and particularly in the case of *Navtej Singh Johar and Others versus Union of India,*[221] - it is arguable that a constitution is not a religious document that has to be interpreted according to the religious beliefs of the majority of persons in society, but rather as a national document that transcends majority ethnic, religious and political boundaries. In this regard, 'through its dynamic and purposive interpretative approach, the judiciary must strive to breathe life into the Constitution', urged the Court, 'and not render the

[217] Constitutional Review Commission report (n 12 above) 656-7.
[218] As above.
[219] See R Murray & F Viljoen 'Towards non-discrimination on the basis of sexual: The normative basis and procedural possibilities before the African Commission on Human and People's Rights and the African Union' (2007) 29 *Human Rights Quarterly* 86 at 95 who use the term 'majority morality to mean 'the contention that sodomy laws reflect the moral views of the majority'.
[220] *Chief Justice of Andhra Pradesh and Others v L.V.A Dixitulu and Others* (1979) 2 SCC 34; see also the case of *Saurabh Chaudri and Others versus Union of India and Others* (2003) 11 SCC 146 that describes the Indian Constitution as a 'living organ'.
[221] *Navtej Singh Johar and Others v Union of India Thr. Secretary Ministry of Law and Justice* (n 141 above).

document a collection of mere dead letters'.[222] Therefore, the guarantee of human rights protection for 'every person' in the Ghanaian Constitution means that every human being's rights ought to be protected, regardless of the person's sexual orientation.

### b. The spirit and letter of the Constitution

The Supreme Court has proclaimed that the Constitution of Ghana has a letter and a spirit and that in difficult cases where reliance on the letter of the law will lead to absurdity the Court must have recourse to the 'spirit' of the Constitution as a last resort. In the *Tufour case*[223] , for instance, the Court noted that in interpreting the Constitution, it would take into consideration the letter of the law but also its spirit in resolving the dispute before it. It noted that 'the Constitution has its letter of the law. Equally, the Constitution has its spirit'.[224]

Even though the Court did not explicitly point out what it meant by the letter and the spirit, it gave some indications as to what it meant. It hinted, for instance, that the 'letter of the law', was the ordinary meaning attached to the words in the statute. The spirit was defined by the Court as being the most reasonable interpretation that gives effect to the objects of the Constitution, which overrides the letter of the law in certain circumstances. It observed that 'when a particular interpretation leads to two, shall we say 'inconsistent' results, the spirit of the Constitution would demand that the more reasonable of the two would be adhered to'.[225]

Therefore, the letter of the law may be understood on a reading of the Constitution, but the spirit is not easily discernible by a plain reading of the words. Ascertaining the spirit of the Constitution involves analysing the Constitution as a whole, through a purposive interpretation. For instance, relying on the letter of the law in the Constitution, it is clear that the Constitution protects everyone. Yet, because the Constitution does not specifically prohibit discrimination on the grounds of sexual orientation, it is only a thorough investigation of its 'spirit' that can lead us to such an interpretation.

Therefore, while the letter of the Constitution is easily ascertainable, the spirit behind the law may not on the face of the law be visible. It requires an act that attempts to view the law in light of

[222] As above 58.
[223] *Tufour v Attorney-General* (n 191 above).
[224] As above 647-648.
[225] As above.

what the drafter would have done if they had foreseen the currently prevailing circumstances of society and the consequences of not applying the law in a particular way.

It is important to note that in relation to LGBT rights, the question that arises is whether the drafters of the 1992 constitution of Ghana, guaranteeing the rights of every person in Ghana by inserting a Bill of Rights in chapter 5, and making international treaties part of the laws of Ghana would be opposed to the concept of LGBT rights? The answer is not an easy one given the current stiff opposition to gay rights in Ghana on the grounds of religion and culture.

However, it is arguable that even if the drafters of the 1992 Constitution did not foresee that sexual minority rights ought to be protected, on the face of the Constitutional provisions they did not envisage leaving any person out on account of their sexuality. The crafting of the Bill of Rights that even contain unenumerated rights,[226] in addition to aligning the Constitutional values of Ghana to that of the international community, and adhering to the tenets of international law, hints at the protection of fundamental human rights.

Most importantly, the Constitution urges the country to subscribe to the values of international (human rights) law and creates an open-ended system of fundamental human rights in Ghana that is applicable as long as such rights obtain in a democratic and open society.[227] It is arguable, therefore, that the spirit of the 1992 Constitution of Ghana subscribes to fundamental human rights and aims at protecting every person irrespective of their sexual orientation, even if the letter of the law does not state so. Anything to the contrary would be inimical to the Constitutional protections of fundamental human rights and freedoms.

### c. The modern purposive approach (MOPA) to the interpretation of the Constitution

There is an overwhelming conviction among lawyers, judges and legal scholars in Ghana that the approach to the interpretation of the Constitution is based on a principle of interpretation known as the modern purposive approach to interpretation (MOPA). The interpretation of the Constitution as a living instrument capable of growth established in the *Tuffour* case[228] in 1980 appears to have been 'overthrown' by the MOPA in 2003 in the case of *Asare v Attorney General*.[229] The purposive interpretation mode of interpreting a constitution is 'the system of interpretation that I think is best', according to Aaron Barack in his seminal book, 'purposive interpretation in

[226] Constitution of Ghana 1992 art 33(5).
[227] As above.
[228] *Tufour v Attorney-General* (n 191 above).
[229] *Asare v Attorney-General* (n 216 above).

law'.[230] According to Barack, the phrase 'purpose interpretation' is of common law tradition and 'started surfacing' in legal texts and interpretation by courts 'in common law traditions at the end of the 1960s and the beginning of the 1970s… simultaneously in American, English, Canadian, Australian, and New Zealand Common Law'.[231] Not surprisingly and as a member of the common law tradition, Ghana started subscribing to this approach to interpretation only in the early 2000s and is now a permanent feature of interpretation and subject of discussion by legal scholars and judges.[232]

According to Barack, the purposive interpretation contains two elements, namely the subjective and objective approaches to interpreting a legal text that balances each other in arriving at a decision.[233] As confirmed by Justice Adjei, 'the fundamental principle underlying the purposive approach is to look for the goal the text seeks to achieve'.[234] Using the Ghanaian constitution, for example, he writes: 'The goal is to look for the values underlying the Constitution, the principles of fundamental human rights and freedoms, representation of the people, democratic principles, effective judiciary and separation of powers'.[235] Thus the application of the purposive approach to interpretation enables the interpreter or the Court not only to rely on the words of the Constitution alone but the purpose of the particular provision in the Constitution. This appears to be the approach adopted by the Supreme Court in its first case – the *Asare* case- and subsequent cases that have followed the same approach to interpretation.

In the *Asare* case,[236] which first applied the principle, the Court delivered itself through the lead judgment of Justice Date-Bah as follows:

> I consider the purposive approach to be more likely to achieve the ends of justice in most cases. It is a flexible approach which enables the judge to determine the meaning of a provision, taking into account the actual text of the provision and the broader legislative policy underpinnings and purpose of the text. Judicial interpretation should never be mechanical.[237]

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[230] Barack (n 207 above) 82.
[231] As above at 85.
[232] Adjei (n 202 above).
[233] Barack (n 207 above).
[234] Adjei (n 207 above) 157.
[235] As above.
[236] *Asare v Attorney-General* (n 216 above).
[237] As above at 827-828.

As emphasised by Barack,[238] the Court also noted that the purposive interpretation is composed of a subjective as well as an objective element.[239] In applying these two elements to constitutional interpretation in Ghana, the Court observed that 'the subjective purpose of a constitution or statute is the actual intent the authors…had at the time of the making of the Constitution', whereas the objective element is 'what a hypothetical reasonable author would have intended'.[240]

The Court goes on to say that the objective purpose of the purposive interpretation theory addresses issues at the core of the legal system. These core values, in the case of Ghana, are those 'from which could be distilled the objective purpose of constitutional provisions would include the provisions of chapters 5 and 6 of the Constitution…'.[241] In essence, the Court is saying that in construing the provisions of the Ghanaian constitution from a purposive interpretation standpoint, regard must be had to the Bill of Rights in chapter 5, and the directive principles of state policy (DPSP) in chapter 6 of the Constitution to arrive at a true interpretation.

If it is accepted that the Bill of Rights and the DPSP constitute core values of the Constitution, as the Supreme Court has observed in the *Asare case,* then that is central to the determination of the rights of sexual minorities in Ghana. Taking this principle of law on its face value, it is arguable that no person or group of persons shall be left out in construing the Constitution as protective of the rights of 'every person'. This is so because relying on the objective arm of the purposive approach suggests that the core value of the Ghanaian constitution is to provide human rights protection for everyone in Ghana regardless of their sexual orientation, similar to the living organism approach to interpretation.

It is important to point out that even though the MOPA is the current model of interpretation in Ghana, taking over from the living organism approach to interpretation, it does not abandon the latter approach. At best, the MOPA theory absorbs the living organism theory and improves upon it. This is evident in the Asare case, where the Court relies on the living organism approach. The Court noted that the 'spirit' of the Constitution, which is cited and relied upon the Tuffour case, is indeed the underlying core values of the Constitution.[242] Justice Adjei affirms this position of the law when he states; 'MOPA is not entirely new to the Ghanaian community; however the tools used

[238] Barack (n 207 above) 85.
[239] *Asare v Attorney-General* (n 211 above) 828.
[240] As above.
[241] As above at 829.
[242] As above 830.

when applying living constitutionalism are quite different from MOPA, but they are both likely to yield the same results, particularly in constitutional interpretation'.[243]

The point is that the theory of interpretation in Ghana currently is the MOPA. While different from the living instrument approach in terms of the methods it employs, it achieves the same results, by also relying on the spirit and letter of the Constitution. While the spirit may refer to the objective interpretation that speaks to the core values of the Constitution, the letter of the Constitution refers to the subjective interpretation of the words used at the time the Constitution was drafted. The current approach to interpretation, therefore holds promise for sexual minority rights as it has as its core, the application and implementation of human rights norms in a broad and liberal manner. Examples from the jurisprudence of South Africa may strengthen this position which I now turn to.

### 4.4.4 Lessons from the Botswana, India and South African experiences

#### Botswana

Botswana is one of the African countries that inherited a variant of the anti-sodomy law that prohibited 'sexual offences against the order of nature'[244] the British colonial administration exported to India and other British colonies in the 19th century.[245] According to Botswana penal code,[246] it is an offence to have 'carnal knowledge of any person against the order of nature'[247] and punishable by a prison term of up to seven years.[248] The code criminalises unnatural offences,[249] an

[243] Adjei (n 207 above) 183.
[244] See section 377 of the Indian penal code which states 'whoever voluntarily has carnal intercourse against the order of nature with any man or woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years and shall also be liable to a fine'. The law has since been struck down by the Indian Supreme Court in the case of *Navtej Singh Johar and Others v Union of India Thr Secretary Ministry of Law and Justice* (n 141 above).
[245] Human Rights Watch 'This alien legacy' the origins of 'sodomy laws' in British colonialism' (n 10 above) 5-6; see also JO Ambani 'A triple heritage of sexuality? Regulation of sexual orientation in Africa in historical perspective' in S Namwase & A Jjuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 30.
[246] Penal Code, Chapter 08:01 as amended by the Penal Code Amendment Act 5 1998.
[247] As above sec 164(a)&167.
[248] As above sec 164(c).
[249] As above sec 164(a)-(c). These offences target persons 'having carnal knowledge of any person against the order of nature'; 'carnal knowledge of an animal'; and 'permitting any other person to have carnal knowledge of him or her against the order of nature'.

attempt to commit unnatural offences[250] and further criminalises 'indecent practices between persons'.[251]

In 2003, Mr Utjiwa Kanane was charged under sections 164 and 167 of the penal code and pleaded not guilty at a Magistrate's Court in March 1995. He challenged the constitutionality of sections 164 and 167 that criminalised acts 'against the order of nature' at the High Court[252] and the highest Court of Botswana, the Court of Appeal,[253] claiming that the said provisions offended his rights under section three of the Constitution of Botswana and therefore unconstitutional.[254] This case invoked a colonial-era law, and the police had to invade the accused's privacy to enforce the law.

The Court of Appeal in *Kanane* held that there was a need for Botswana to keep pace with other 'kindred democracies'[255] and protect Botswana citizens' rights jealously.[256] Yet, the Court held that the people of Botswana were not ready to accept sexual minorities, and the time had not yet arrived for the Court to decriminalise consensual same-sex sexual acts.[257] Even though no survey suggested that most Botswana people did not accept sexual minorities, the Court dismissed the case on this ground faced with constitutional provisions that guaranteed rights to dignity, non-discrimination and privacy to all persons.

Even though one may criticise the Court in *Kanane* for failing to protect sexual minority rights in 2003, the Court made some significant pronouncements that pointed to some hope for the future. For instance, the Court held that section 167, which criminalised 'indecent practices between male persons' discriminated against adult males.[258] By observing that the rights of Botswana citizens had to be protected jealously and aligned with rights in other democracies, the Court of Appeal also signalled that it was a matter of time for the courts in Botswana to uphold the rights of sexual minorities.

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[250] As above section 165.
[251] As above section 167.
[252] Crim Trial No F94/1995 (22 March 2002) unreported.
[253] *Kanane v The State* 2003 (2) BLR 67 (CA).
[254] Constitution of Botswana 1966 as amended (rev 2005). Section 3 prohibits discrimination on many grounds including sex and protects rights and freedoms such as life, liberty, assembly and association, and the right to privacy.
[255] *Kanane v The State* (n 253 above) headnote 1.
[256] As above headnote 2.
[257] As above headnote 4.
[258] Penal Code (Amendment) Act 1998 section 22 amended this provision by substituting the word 'male' with 'person' to make it gender neutral and applicable to both male and female.

In 2016, over a decade after *Kanane*, the 'prophecy' of keeping abreast of rights in 'kindred democracies' came to pass in the Court of Appeal case of *Rammoge.*[259] The High Court of Botswana had earlier held that the refusal of the Minister of Labour and Home Affairs to register lesbians, gays and bisexuals of Botswana (LEGABIBO), an LGBT organisation violated the freedom of expression, association and assembly.[260] Director of the Department of Civil and National Registration rejected the application of LEGABIBO to register as a civil society organisation because the laws of Botswana criminalised homosexuality and did not recognise homosexuals.[261] Minister of Labour and Home Affairs affirmed the decision of the Director of the Department of Civil and National Registration.[262] LEGABIBO sued the Attorney General of Botswana and requested the High Court of Botswana to declare the minister's actions as unconstitutional and violating the right to expression, association and assembly. The High Court set aside the decision of the Minister of Labour and Home Affairs. It held that LEGABIBO had the freedom to assemble and associate under the Constitution of Botswana and therefore could register as a society. On appeal of this decision from the Attorney General of Botswana, the Court of Appeal affirmed the High Court's decision and dismissed the appeal. The Court observed that 'in Botswana all persons, whatever their sexual orientation, enjoy an equal right to form associations with lawful objectives for the protection and advancement of their interests'.[263]

In 2019, the High Court in Gaborone delivered judgment in a landmark case, affirming the unconstitutionality of provisions of the penal code of Botswana that criminalises sex between adults of the same sex in private.[264] The Court emphasised the right to human dignity, privacy and non-discrimination of all persons in Botswana, regardless of their sexual orientation. It emphasised that sexual orientation is innate and integral to the human being and guarantees complete autonomy of a person's personal choices, including the choice of a partner.[265]

The history and trajectory of the inception of the sodomy law in Botswana until it was recently declared unconstitutional, inspires the quest for decriminalisation of the sodomy law in Ghana. Like Ghana, Botswana inherited the sodomy law from Britain during the period of colonialism. The

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[259] *Attorney General of Botswana v Rammoge and 19 Others,* Botswana Court of Appeal, 16 March 2016, CACGB-128 14.
[260] *Thuto Rammoge & 19 Others v The Attorney General of Botswana,* High Court of Botswana, Gaborone MAHGB-000175-13.
[261] As above para 4(b).
[262] As above para 4(d).
[263] *Attorney General of Botswana v Rammoge & 19 Others* (n 259 above) para 78.
[264] *Letsweletse Motshidiemang v Attorney General & Legabibo* (n 138 above).
[265] As above.

British controlled power and imposed sodomy law to subjugate and subvert indigenous ways of life. Since Britain enacted and imposed it on Ghana, law enforcement officers have rarely used it to convict any person. Until *Kanane*,[266] Botswana had also rarely used the sodomy law. The general perception in Ghana is that same-sex sexual conduct is un-African and against the cultural values of the people of Ghana. The Court in *Kanane* made a similar observation.[267]

Despite the challenges and arguments suggesting the culture of Botswana opposes sexual minority rights, Botswana's courts have delivered two critical decisions entitling an LGBT organisation to register as civil society entity[268] and also declared sodomy laws as unconstitutional.[269] Ghana is yet to decide any case relating to sexual minority rights on its merits. With a similar constitution as Botswana that does not mention sexual orientation or offer direct protection to sexual minorities, it might be interesting to see if the decision in Botswana will persuade the Ghanaian Supreme Court. Ghanaian judges have influenced the Botswana legal system through training and service to the judiciary. Justice Korsah, one judge who took part in *Kanane*, is a Ghanaian. The similarities in history and judicial system are striking, yet it is not conclusive that once Botswana has declared sodomy laws as unconstitutional, Ghana will automatically follow suit. The legal and socio-political considerations play an important role in cases of this nature that have policy and national concerns that sometimes defy legal analysis, as discussed below. Nonetheless, there is no reason why the apex Court in Ghana cannot decriminalise consensual same-sex acts having regard to constitutional rights and international instruments that Ghana has ratified.

### India

Another country that has a similar history to Ghana that has declared sodomy law unconstitutional is India. British colonial administrators governed both Ghana and India in the 19th century. As one of the first countries to 'receive' British criminal law, including the anti-sodomy law, India acted as an 'incubation' centre of British anti-sodomy laws before their transfer to other Commonwealth countries in Africa.[270]

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[266] *Kanane v The State* (n 253 above).
[267] As above headnote 4.
[268] *Attorney General of Botswana v Rammoge & 19 Others* (n 259 above) para 78.
[269] *Letsweletse Motshidiemang v Attorney General & Legabibo* (n 138 above).
[270] Ambani (n 245 above) 28.

The anti-sodomy law, which was first introduced in India on 25 July 1828,[271] and famously became section 377 of the Indian Penal Code, criminalised consensual sexual-sex relations between adults of the same sex.[272] In 2009 the Delhi High Court held that criminalisation of consensual same-sex sexual acts between adults violated constitutional rights and freedoms.[273] Section 377 was restored as constitutional when the Supreme Court of India overruled the Delhi High Court in 2013.[274]

In 2016, the 'unnatural offences' provision of the Indian Penal Code was re-challenged.[275] This time, the Supreme Court of India held that section 377 violated the rights of sexual minorities in India and was therefore unconstitutional. The Indian Supreme Court reasoned that sexual orientation was an intrinsic attribute of the human being, without which a person loses their humanity. The Court noted that the criminalisation of sex between consenting adults of the same sex violated their right to dignity.[276]

Ghana has a similar history to India, with a similar criminal code that criminalises unnatural carnal knowledge and a constitution that upholds the right to dignity, non-discrimination and privacy but has no express provision that protects the rights of LGBT persons. While India and Ghana's history, legal and social circumstances might be similar, Ghana is yet to declare sodomy laws unconstitutional. As discussed below, the legal culture of a country also plays a role in the outcome of judicial decisions. There is a difference between India and Ghana. While India has a relatively vibrant legal culture that engages in public interest litigation and challenges violations of the rights of minorities, the Ghanaian legal culture is not that vibrant.

Indian Courts have sometimes protected the rights of citizens in ways that Ghanaian courts have been unable to. For instance, in the Indian case of *Olga Tellis & Ors v Bombay Municipal Corporation & Ors,*[277] the Indian Supreme Court upheld the right of squatters in the city of Bombay from eviction. The Court interpreted the right to life as encompassing the right to livelihood and therefore held that evicting squatters from a place where they earned their livelihood meant violating their right

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[271] As above.
[272] Indian Penal Code Act no 45 of 1860 (6 October 1860) as amended, section 377 titled 'unnatural offences' states: 'whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine'.
[273] *Naz foundation v Government of National Capital Territory of Delhi* 160 Delhi Law Times 277 2 July 2009.
[274] *Suresh Kumar Koushal & another v NAZ Foundation and others* Civil appeal no 10972 of 2013 Supreme Court of India.
[275] *Navtej Singh Johar and Others v Union of India Thr Secretary Ministry of Law and Justice* (n 141 above).
[276] As above para 84.
[277] [1985] INSC 155 (10 July 1985).

to life.[278] In a similar case decided by the High Court of Ghana,[279] the court declined to protect squatters. The Ghanaian court noted: 'the mere eviction of plaintiffs who are trespassers, from the said land they have trespassed onto, does not in any way amount to an infringement on their rights as human beings'.[280] The long-standing activist nature of the Indian courts which have also held that homosexual sex is unconstitutional,[281] is yet to be emulated by Ghanaian courts.

Even though there are similarities between India and Ghana, which could inform a challenge to the sodomy law in Ghana, there is no guarantee that because the Indian Supreme Court has declared sodomy laws unconstitutional, Ghana may follow suit. For a Ghanaian society that is mainly homophobic and continue to shut down LGBT offices in 2021, it might take a brave court, like the Indian Supreme Court, to declare sodomy law unconstitutional. Ghana's Supreme Court can deliver a judgment that affirms the unconstitutionality of the British inherited sodomy laws if persuaded by the decisions of similar courts, including India. As emphasised by the Indian Supreme Court, the right to dignity is natural and human, and without dignity, through the criminalisation of consensual adult same-sex sexual acts, a person loses their humanity.[282]

A key point upon which the Indian Supreme Court decision rested is constitutional morality as against majoritarian morality. Like India, most of the population of Ghana detest LGBT persons, but this social factor did not deter the Supreme Court of India from upholding LGBT people's rights.

The history, legal system and socio-political factors of Ghana and India are so similar that one may conclude without more that judges of both countries may arrive at a similar decision on the controversial issue of sexual minority rights. The Indian Supreme Court has declared the sodomy law of India unconstitutional. Ghana may achieve a similar result if the Supreme Court of Ghana considers identical arguments. Yet, as the analysis below shows, there is no guarantee of that the Supreme Court of Ghana shall decriminalise sodomy law.

## South Africa

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[278] As above 79-80.
[279] *Issa Iddi Abass and Others v Accra Metropolitan Assembly and another* Unreported suit no MISC 1203/2002 on file with author.
[280] As above 14.
[281] *Navtej Singh Johar and Others v Union of India Thr Secretary Ministry of Law and Justice* Writ Petition (Criminal) no 76 of 2016(n 141 above); see also the earlier case of *Naz foundation v Government of National Capital Territory of Delhi* (n 273 above) which first held that criminalisation of homosexual sex is unconstitutional.
[282] As above.

The Constitution of South Africa is deemed to be transformative, and its interpretation must also be made in a manner to transform the society from an unequal one to an equal society founded on principles of respect for human dignity and fundamental human rights.[283] In his seminal article on the nature of the legal culture and the Constitution of South Africa,[284] Karl Klare positions the South African Constitution of 1996 as a 'post-liberal' document capable of transforming the fortunes of the poor and vulnerable through judicial adjudication and interpretation that is transformative. He clarifies what he means by transformative constitutionalism as:

> a long term project of constitutional enactment, interpretation and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.[285]

The idea of transformative constitutionalism as first postulated by Klare envisages the transformation of society through the Constitution that is able to act as a tool to ensure the society is weaned off is unequal and unjust past into a present and a future society which is equal and just. Klare's idea of transformative constitutionalism resonates with other scholars such as van Marle who adopts what she calls 'transformative constitutionalism as critique'[286] largely modelled on the principles advocated by Klare. Her understanding of transformative constitutionalism 'is an approach to the Constitution and law in general that is committed to transforming political, social, socio-economic and legal practices'[287]but in a radical manner. Pius Langa, a former Chief Justice of South Africa, recognises that there is no single definition of transformative constitutionalism but offers a middle ground when he suggested that the meaning of transformative constitutionalism was firmly etched in the epilogue of the interim constitution of the Republic of South Africa, 1993.[288] According to Justice Langa, the agreement on a unified meaning of transformative constitutionalism, quoting the epilogue of the interim Constitution of South Africa, is: 'a historic bridge between the past of a deeply divided society characterised by …injustice, and a future founded on the recognition of human rights…irrespective of colour, race, class, belief or sex'.[289]

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[283] P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 351.
[284] Klare (n 192 above).
[285] As above.
[286] K van Marle 'Transformative constitutionalism as/and critique' (2009) 2 *Stellenbosch Law Review* 286.
[287] As above 288.
[288] Interim Constitution of the Republic of South Africa 1993.
[289] Langa (n 283 above) above 352.

Thus at the core of transformative constitutionalism, for Chief Justice Langa, is the idea of 'change'.[290] The society needs to change from a past that did not respect fundamental human rights to a future that respect these values and trusts the interpretation of the Constitution to reflect this new change.

It is clear that legal scholars who have all engaged with the concept of transformative constitutionalism, appear to agree that it should be seen as a project of transforming or correcting the ills of the society through the Constitution. They all reckon that translated in an effective manner with a view to 'transforming' society; the Constitution holds a lot of promise. Yet there are obstacles to the use of the Constitution as a transformational tool. These obstacles include a conservative legal culture that may constrict the transformative agenda,[291] legal education that is fraught with difficulties but should recognise that law could be used as a double-edged sword, both to oppress and liberate,[292] and a 'formalistic' approach to interpretation 'that is inconsistent with a transformative constitution'.[293]

Commendably, however, the Constitution and the South African Constitutional court have overcome some of these obstacles in giving a transformative meaning to the provisions in the Constitution that implicate the rights to dignity, equality and unfair discrimination on the grounds of sexual orientation. In this regard, the Constitution has been interpreted to prohibit unfair discrimination in many respects. In the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice*[294] that decriminalised sodomy laws in South Africa for example, the Constitution was put to the test to see if it could transform the lives of persons who previously could not enjoy the right to privacy under the old order by virtue of laws that criminalised consensual sexual activity between persons of the same sex.

The practical application of the transformative constitutionalism approach to interpretation in this case and as analysed by other scholars[295] is crucial for understanding the approach of the apex court in Ghana. In upholding the rights of sexual minorities in this case, the Court emphasised the

[290] As above.
[291] Klare (n 192 above) 166-172.
[292] Langa (n 283 above) 356.
[293] As above 357.
[294] *National Coalition for Gay and Lesbian Equality v Minister of Justice* (n 120 above).
[295] See for instance O Vilhena et al (eds) *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (2013).

importance of both the letter and the spirit of the 1996 Constitution of the Republic of South Africa. When the Court had to deal with the issue of the rights which were in issue in this case, it carefully analysed the letter of the law. However, when it had to deal with issues of morality, it appeared to resort to the 'spirit' of the 1996 Constitution. This approach is akin to the approach relied upon by the Supreme Court of Ghana in its duty of interpreting the 1992 Constitution of Ghana. The Constitutional Court of South Africa resorting to the spirit of the Constitution observed in the *National Coalition for Gay and Lesbian Equality* case,[296] as follows:

> What is central to the character and functioning of the state…is that the dictates of 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.[297]

Justice Sachs appears to suggest in this opinion that even in the transformative constitutionalism approach to interpretation, just like MOPA, the Court can and perhaps should resort to the spirit of the Constitution even when a simple interpretation of the words yields the true meaning of the implications by the drafters of the Constitution.[298] In this instance, while emphasising the import and meaning of the need to protect the rights of all persons including sexual minorities, based on the rights to equality, dignity and prohibition of unfair discrimination he still finds it necessary to emphasise the need to call upon the spirit of the Constitution to guide such an interpretation.

The usefulness of resorting to the spirit of the Constitution, which the Ghanaian Supreme Court has noted is the core values underlying the Constitution is important for vindicating sexual minority rights in the case of Ghana. The Ghanaian Constitution does not have provisions as in the South African Constitution but resorting to the 'spirit' of the Ghanaian constitution as Justice Sachs did in the case of the South African Constitution without necessarily using the transformative constitutionalism-in the case of Ghana- could result in the same outcome of decriminalising consensual same-sex conduct between consenting adults in Ghana. Relying on the spirit underlying the 1992 Constitution of Ghana, which emphasises respect for human dignity and human rights generally will achieve such a result.

While the Ghanaian Supreme Court and its theory of MOPA do not explicitly say that it aims at transforming the lives of its citizens, in practice, it does. This is similar to the objectives of the

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[296] *National Coalition for Gay and Lesbian Equality v Minister of Justice* (n 120 above) 133.
[297] As above.
[298] See Constitution of the Republic of South Africa sec 39 which provides guidelines that should take account of the values of the Constitution when interpreting the Bill of Rights.

transformative constitutionalism approach adopted by the South African Constitutional Court. The Supreme Court of Ghana in the *Nana Adjei Ampofo* case,[299] discussed above, restored the right to dignity of persons who appeared to have lost it, by discharging human excreta for a living. In a similar vein, the Constitutional Court of South Africa held that laws that criminalise consensual homosexual sex were unconstitutional. The Court was virtually transforming the lives of persons who lived in fear of the law that criminalised the most private and humane aspect of their lives, removing the fear of being criminals at large, to full first-class citizens at par with their heterosexual counterparts.

Therefore, in respect of sexual minority rights, Ghana can rely on the approach of the Constitutional Court of South Africa to reach similar outcomes. But the legal culture and the socio-political environment may be an impediment to achieving the decriminalisation of consensual same-sex conduct in Ghana.

## 4.5 The socio-political environment and legal culture for the decriminalisation of sodomy

The analysis of constitutional rights suggests that there is a legal basis to decriminalise consensual same-sex relationships in Ghana. However, extra-judicial factors such as the socio-political climate, and the legal culture that pertains in the State and its impact on the relevant role players, may affect such an outcome. As we have witnessed the judiciary in South Africa do, the socio-political environment, as well as the legal culture of a country, is crucial in determining the outcome of such litigation. Delivering judgments purely on the basis of constitutional rights to decriminalise consensual same-sex conduct in societies that are very much opposed to the open existence of sexual minorities is a herculean task. Therefore, it is by no means guaranteed that the Ghanaian Supreme Court will declare the offence of 'unnatural carnal knowledge' unconstitutional. An analysis of the socio-political environment and the legal culture in Ghana and how these are likely to impinge on a constitutional challenge of section 104 of the Criminal Offences Act is therefore undertaken below.

### 4.5.1 Socio-political environment

In respect of the socio-political environment affecting the outcome of a challenge to sodomy law in Ghana, the central question is: As members of the same society that abhor consensual same-sex acts, are judges immune from the views of the majority of their countrymen and women? Judges

[299] *Adjei-Ampofo (no 1)* (n 130 above) 611.

of the courts in Ghana, especially the Superior Courts, are regarded as being of 'high moral character and proven integrity'.[300] They are indeed well educated, trained and experienced people who have over time proved their merit in the decisions they have delivered on highly sensitive and sometimes divisive socio-political issues.[301] Yet, 'it would be foolish to deny that the judicial process, especially in the field of constitutional adjudication, calls for value judgments in which extra-legal considerations may loom large'.[302]

The education, training and judicial oath of judges in Ghana enjoin them to 'truly and faithfully perform the functions of [their] office without fear or favour, affection or ill-will'.[303] Judges further swear that they will 'at all times uphold, preserve, protect and defend the Constitution and laws of the Republic of Ghana'.[304] The Bangalore principles also entreat judges to be independent and impartial.[305] On the basis of the above, it is a reasonable expectation among Ghanaians that the country's judges would deliver a legal -not a religious, social, political or corruption induced- response to difficult questions with the aid of the Constitution and other laws. It is not uncommon, however for some judges to preface their decisions with biblical passages and reliance on bible quotations to illustrate a legal point.[306] This in itself might not be wrong, but gives an impression that a judge is attached to a particular religion and may not be impartial if there is an issue that implicates such religious faith. This is even more relevant in the context of a sensitive issue like sexual minority issues which is often opposed on the grounds of religion.

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[300] Constitution of Ghana 1992 art 128(4) for instance provides that a key criterion for appointment as a judge of the Supreme Court is 'high moral character and proven integrity'.

[301] See for instance the election petition case of *Nana Addo Dankwa Akufo-Addo & 2 Others v John Dramani Mahama & 2 Others* (writ no J1/6/2013) that almost brought Ghana to a standstill as the incumbent president, the main opposition leader and their supporters all claimed to have won the national election of 2012; see also *New Patriotic Party v Attorney-General* (31 December case) (n 5 above); see also *Republic v High Court (Commercial Division) Accra; Ex parte Attorney-General (NML Capital & Republic of Argentina Interested Parties)* (2013-2014) 2 SCGLR 990, where an Argentinian military vessel detained on the orders of a High Court threatened relations between Ghana and Argentina and a potential national security situation.

[302] *State v Makwanyane* (1995) (6) BCLR 665 (CC) para 349. While this statement is made in the context of South Africa, it may arguably apply in the context of many African countries including Ghana.

[303] The Judicial Oath of Ghana reprinted in Second Schedule to Constitution of Ghana 206.

[304] As above.

[305] See Bangalore principles of judicial conduct (2002) values 1 and 2.

[306] *Tufour v Attorney-General* (n 191 above) 637 647. Justice Sowah laid down the principle of constitutional interpretation of giving effect to every word in a provision. He relied on Apostle Paul's first epistle to the Corinthians (1 Corinthians 12:14-20) to illustrate that even though the human body is 'one member' that is made up of different parts, it functions as one unit. The judge observes that the Constitution of Ghana is also one unit with different words and every word must be relied upon in arriving at the best interpretation.

Sodomy laws or 'having sex against the order of nature' owes its criminalisation largely to religion and came about in English law at a time when the church and state were inseparable, and the laws of the church also became secular law, that governed the state.[307] How does a judge who belongs to the Abrahamic faith,[308] who is a practicing Christian or Moslem, and whose religious leaders and religious books condemn homosexuality, uphold the rights of sexual minorities? It would take much more than education, training, and experience for judges in this situation to live up to the expectations of their office, to defend constitutional rights against their religious faith.[309]

Ghanaians have usually taken for granted that their judges are incorruptible, impartial and apolitical persons who adjudicate their cases without fear or favour. Recently, however, this aura surrounding judges as incorruptible has been questioned by members of society. In a secretly recorded video, an undercover journalist exposed some judges in Ghana's judiciary accepting bribes to adjudicate cases one way or the other.[310]

The judiciary has also been accused of being politically biased in their decisions. After analysing the 100 decisions rendered by the Supreme Court of Ghana from 1993 to 2018, and the position taken by judges, a scholar has concluded that in political cases where the law is not very clear members of the apex Court almost uniformly vote in support of the government that appointed them to the Court.[311] Some judges, including the former Chief Justice, have challenged the findings observing that this kind of research is an 'American thing'.[312] Other judges have challenged the

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[307] M Kirby 'The sodomy offence: England's least lovely criminal law export?' in C Lennox & M Waites (eds) *Human rights, sexual orientation and gender identity in the Commonwealth: struggles for decriminalisation and change* (2013) 61; Human Rights Watch 'This alien legacy the origins of 'sodomy' laws in British colonialism (n 10 above); See also Dai-Kosi et al (n 11 above) 2, who contend that 'in cultures under Abrahamic religions, the law and the church established sodomy as a transgression against divine law or a crime against nature'. See chapter 3 of this thesis for a discussion on religion and homosexuality in Ghana.

[308] The Abrahamic religion refers to Christianity and Islam that descended from Abraham. See Sylvia Tamale S Tamale 'Exploring the contours of African sexualities: Religion, law and power' (2014) 14 *African Human Rights Law Journal* 150 at 152; See also Dai-Kosi et al (n 11 above).

[309] The example of the Chief Justice of South Africa, who in a private webinar made comments that appeared to challenge settled principles of law in defence of his religious faith. Despite repeated calls on the Chief Justice to retract his statements he has failed to do so prompting concerned citizens to take legal action against him.

[310] 'Judicial corruption Ghana in the eyes of God' 17 October 2015 available athttps://www.youtube.com/watch?v=NKMowfHFqLQ accessed 29 August 2020.

[311] 'Supreme Court judges rule on their political leanings – Atuguba' Ghanaweb 9 January 2018 available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Supreme-Court-judges-rule-on-their-political-leanings-Atuguba-615620 accessed 29 August 2020.

[312] 'Chief Justice cries as Atuguba punches the Judiciary' *Ghana Politics Online.com* (undated) available at http://ghanapoliticsonline.com/chief-justice-cries-as-atuguba-punches-the-judiciary/ accessed 20 August 2020.

findings as incorrect[313] and an insult to the judiciary.[314] But some have also hailed the research as groundbreaking and a confirmation of the widely held views of many Ghanaians.[315]

This is not to suggest that Ghanaian judges are corrupt or lean towards a certain political ideology based on the government that appointed them. To be fair to them, they have done a reasonable job over the years and continue to do so even in the face of limited resources. The point is that while a good case could be made for the decriminalisation of consensual same-sex conduct, much depends upon the judges who must be guided by the letter and spirit of the Constitution to make such a finding. Socio-political, religious and cultural factors inevitably affect the outlook of individual judges towards such a sensitive subject. The probability of such extra-judicial factors influencing the outcome of a decision is real, but judges must suppress their personal, religious and cultural convictions in favour of fidelity to constitutional rights. The Chief Justice of South Africa has contended that judges have strong views on religion and should not be forced to pretend they do not.[316] This was after a complaint was made against him to the Judicial Service Commission conduct committee for breach of his judicial oath for insinuating among others that South Africa risked the curses of God for closing its embassy in Jerusalem.[317]

Judges everywhere have unique upbringing, training and perceptions of life, which may have the ability to affect their judgement even if they purport to apply the law. Examples abound in Africa of judges who have observed that the society is not ready to see its sons getting married to its sons,[318] or that the society is not yet ready to endorse homosexual freedom[319] or even that

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[313] 'Justice Lovelace-Johnson slams Atuguba over research on judges' political leanings' *Ghanaweb* 10 December 2019 available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Justice-Lovelace-Johnson-slams-Atuguba-over-research-on-judges-political-leanings-810571 accessed 29 August 2020.

[314] 'Justice Dotse: Atuguba's Presentation 'Insult of the highest order' ' *Ghananews360.com* available at http://ghananews360.com/justice-dotse-atugubas-presentation-insult-highest-order/ accessed 29 August 2020.

[315] 'Atuguba's research on Supreme court Judges apt- Prof Asare' *Prime news Ghana* 17 February 2018 available at https://www.primenewsghana.com/general-news/atuguba-s-research-on-supreme-court-judges-apt-prof-asare.html accessed 29 August 2020.

[316] 'Chief justice Mogoeng Mogoeng sticks to his guns on Israel comments' *The Sowetan*

[317] 'South Africa chief justice under fire for Israel remarks to 'Post' ' *The Jerusalem Post* 26 June 2020 available at https://www.jpost.com/israel-news/south-africa-chief-justice-under-fire-for-israel-remarks-to-post-632889 accessed 29 August 2020.

[318] *R v Soko and Another* (359 of 2009) [2010] MWHC 2 (19 May 2010) where a Malawian magistrate court held at page 23 of the report that 'we are sitting in place of the Malawi society which I do not believe is ready at this point in time to see its sons getting married to other sons...'.

[319] *Kanane v The State* 2003 (n 253 above) the court of Appeal in Botswana noted in headnote 3 that 'there was no evidence that the approach and attitude of society in Botswana to the question of homosexuality and to homosexual practices by gay men and women required a decriminalisation'.

decriminalising consensual same-sex conduct is an affront to marriage between heterosexuals,[320] which is rooted in Christianity. Such an approach that subordinates constitutional rights over socio-political and majoritarian considerations calls into question the impartiality, independence and judicial oath of judges. It is expected that judges in Ghana will stand up for constitutional rights over any other preconceived bias when requested to decriminalise consensual same-sex conduct.

### 4.5.2 Legal culture

The legal culture of a country may be vibrant, conservative or a hybrid of these two. Legal culture is the sum total of the approach of judges to the interpretation of the Constitution and other legal texts, nature, and approach to the legal discourse by members of the legal profession and the nature of legal education and training in the State.[321] The legal culture contributes and constrains its participants - judges, lawyers, legal academics and law student - to produce a certain outcome that affect the nature and outcome of the adjudication process. As Klare puts it, 'legal culture and socialization constrain legal outcomes quite irrespective of the substantive mandates entrenched in constitutions and legislation'.[322] In the context of Ghana, the legal culture is not vibrant but also not conservative. It is somewhere between the two extremes. The colonial experience and the immediate post-independent one-party state between 1960 and 1966 entrenched a certain legal culture which culminated in the case of *Re Akoto*,[323] where the apex Court took a position contrary to the provisions of the 1960 Constitution to deny fundamental human rights of citizens.

Kibet and Fombad[324] have observed that judges in post-independent authoritarian African countries were either incapable of protecting fundamental human rights of citizens or that they were accomplices of despotic executives to suppress the rights of citizens.[325] The era of post-independent Ghana in the 1960s when the judgment in *Re Akoto* was delivered, as well as the judgment and the judges that delivered them have been harshly criticised.[326] The 1979 Constitution

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[320] *EG & 7 Others v Attorney General; DKM & 9 Others (interested parties); Katiba Institute and Another (amicus curiae)* (n 167 above) para 396.
[321] Klare (n 192 above); For a general discussion on the concept of legal culture see D Nelken 'Using the concept of legal culture' (2004) 29 *Australian Journal of Legal Philosophy* 1.
[322] Klare as above 151.
[323] *Re Akoto and 7 others* (n 29 above).
[324] E Kibet & C Fombad 'Transformative constitutionalism and the adjudication of constitutional rights in Africa' (2017) 17 *African Human Rights Law Journal* 340.
[325] As above 345.
[326] See for instance Asare (n 29 above).

which marked the beginning of a new era and legal culture was dominated by an interpretation by the courts of a Constitution that was characterised as a living instrument capable of growth.[327]

This new era has continued to this day with a new Constitution in 1992 that also continues the living instrument capable of growth approach to interpretation. In addition to interpreting the constitution as a living instrument capable of growth, the courts also contend that such an interpretation should also be made in a broad, liberal and purposive manner.[328]

However, the chink in the legal culture of Ghana is the failure to model the legal education and professional training of law students and lawyers in the ways of the new era and socialise these legal participants into a culture of purposive constitutional interpretation and protection of the rights of the ordinary person. While the judiciary has stuck to a purposive interpretation of the Constitution, they have had little to do in terms of public interest litigation and interpretation and enforcement of the Bill of Rights. Since the installation of the 1992 Constitution, it was only recently that the Supreme Court had to deal with the rights to liberty and compensation for wrongful conviction and imprisonment,[329] dignity[330] and privacy[331] in the Constitution. There is a human rights committee of the Ghana Bar Association, the national association of lawyers, but it is yet to comment on a single incident relating to sexual minority rights despite increasing violence and violations of the rights of this minority group.

The lack of training in international law and international human rights law at the undergraduate level in law in Ghana deprives many students of the opportunity to appreciate the use of international law and its relationship with domestic law and the protection of fundamental human rights in the domestic sphere.[332] There is also a lack of distinction between legal education that produces academic legal scholars and professional lawyers. In early 1960 when the Ghana School of Law was set up, the idea was to train lawyers who understood local conditions and who could adapt the post-colonial law to the African situation to serve their communities well.[333] Until the early 2000s, there was only one faculty of law that trained students allowing them to subsequently

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[327] *Tufour v Attorney-General* (n 191 above).
[328] *Asare v Attorney-General* (n 216 above) 823.
[329] Criminal appeal no J3/3/2012 Supreme Court Accra (11 June 2015).
[330] *Adjei-Ampofo (no 2) v Accra Metropolitan Assembly and Attorney-General* (no 2) (n 127 above).
[331] *Mrs Abena Pokuaa Ackah v Agricultural Development Bank* (2016) Civil Appeal no J4/31/2015.
[332] K Appiagyei-Atua 'Ghana at 50: The place of international human rights norms in the courts' in H Bonsu et al (eds) *Ghana Law since independence: History, development and prospects* (2007) 179 208-209.
[333] K Nkrumah text of the speech made by President Nkrumah at the formal opening of the Accra Conference on Legal Education and of the Ghana Law School (1962) 6 *Journal of African Law* 103 108.

enter the Ghana School of Law to complete the two-year professional training in law to become lawyers. Other streams of professional training admitted candidates with a first degree in any discipline to do a four-year training programme to qualify as lawyers. This system of legal education and training only focused on training of legal personnel for the immediate needs of the society focusing mainly on litigation. This approach is embedded in the English Common Law tradition with its focus on precedent.

There was until recently no postgraduate training in law. Therefore, the training of legal academics as different from professional lawyers was non-existent and reflected on the quality of training and development of the law, its participants and legal culture. Thus, the legal culture that has been nurtured in Ghana over time reflects the thinking of Britain in the seventeenth and eighteenth century when the law of 'unnatural carnal knowledge' was enforced.

The 2020 report of the General Legal Council signed by Chief Justice Anin Yeboah suggests a gloomy picture of legal education and training in Ghana.[334] The majority of the law faculties were adjudged to be unfit for purpose. The professional training at the Ghana School of Law has also witnessed massive failures of students who are deemed to be unfit to be called to the Bar. Many students seeking admission to the Ghana School of Law after completing their LLB training have also failed the entrance examinations, and students have been waiting for admission for several years. This state of legal education and training feeds into the legal culture of the country. There is, therefore, a disconnect between the objects of the Constitution and the legal education and training of lawyers in Ghana. While the Constitution promises a purposive and living instrument approach to interpretation that encompasses international human rights law and human rights in general as an underlying value of the Constitution, this has not been matched for several years with the quality and focus of legal education and training. The results are glaring.

Public interest cases that champion constitutionalism and constitutional rights are very few. There are indications that this is changing with a few public-spirited individuals approaching the courts for declarations relating to fundamental human rights, corruption and other public interest cases that border on the exercise of executive power.

It is therefore not surprising that in a country where there is no shortage of violence and violations of the rights of sexual minorities, there is no single case asking any of the courts to, for instance, declare that the right to association and therefore to hold a conference of LGBT

[334] 'How the 10 institutions accredited to offer legal education in Ghana have been assessed' *Graphic Online* 15 June 2020.

organisations or persons is guaranteed under the Constitution. The legal culture in Ghana could, therefore, be a catalyst for or against the decriminalisation of consensual same-sex conduct. A case before the Supreme Court, asking it to declare the sodomy offence of unnatural carnal knowledge as unconstitutional, could serve as an awakening of a culture of respect for fundamental human rights generally if so decided by the Court. A decision to the contrary may only affirm a legal culture that needs more than a slogan of interpreting the constitution as a living instrument and doing so through a purposive and liberal interpretation. It would call for a reflection on the legal education and training and the approach to the interpretation of the Constitution and the need to bridge the difference between what the legal culture aspires to achieve and what is happening in reality.

The legal culture of Botswana, South Africa and India tells a story of countries that have a vibrant legal system that will challenge acts that are deemed unconstitutional. Botswana and India, for example, decriminalised consensual same-sex acts at the second time of asking. In Botswana for example, prior to the High Court declaring the criminalisation of consensual same-sex conduct as unconstitutional, there had been an unsuccessful attempt.[335] There was also a successful challenge to the right to register LGBT organisations in the country.[336] Thus, the desire of not only lawyers but also ordinary citizens to test the law and ensure that the rights of the ordinary citizen are upheld is an important precursor for the major issues like decriminalisation of discriminatory law in countries where the constitution does not specifically mention these rights.

## 4.6 Conclusion

The Bill of Rights in the 1992 Constitution embodies the collective will and desire of the people of Ghana to cherish and protect their God-given innate rights that makes them human. The fight for independence and the fight for the inclusion of fundamental human rights and freedoms in a Ghanaian constitution was an expression of that will. The motivating factor of our forefathers was to secure the rights of 'every person' in Ghana, whether citizen or non-citizen and regardless of their gender, creed, or religion and arguably, their sexual orientation.

As argued above, the Constitution when interpreted purposely as a living instrument in line with the MOPA accounts for the gaps in it, reflects a determination to look back at our pre-colonial culture and religion, as well as the present circumstances and uphold the rights of everyone in society. The Constitution is a legal document and not a moral code.

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[335] *Kanane v The State* (n 253 above).
[336] *Attorney General of Botswana v Rammoge and 19 Others* (n 259 above).

The judiciaries in Botswana and India – countries that like Ghana do not have specific constitutional provisions that protect sexual minority rights have construed their Bill of Rights purposively to declare unconstitutional criminalisation of consensual same-sex conduct. This chapter has made the case for a declaration of unconstitutionality of similar legislation in Ghana, based on a purposive approach to the interpretation of the 1992 Constitution of Ghana as a living instrument capable of growth. The time has come for the Ghanaian courts to face up to the decriminalisation of consensual same-sex conduct.

# CHAPTER 5: THE ROLE OF INTERNATIONAL HUMAN RIGHTS LAW IN THE DECRIMINALISATION OF SAME-SEX RELATIONS IN GHANA

## 5.1 Introduction

Increasingly Ghanaian courts have used international law to interpret the Ghanaian Constitution, especially in human rights cases, even though international law is not an explicit part of the sources of law in Ghana.[1] Using international law has enabled Ghanaian courts to align the Bill of Rights in the 1992 Constitution to major international human rights declarations such as the Universal Declaration of Human Rights (Universal Declaration)[2] and treaties such as the International Covenant on Civil and Political Rights.[3] Apart from resorting to international law, the Supreme Court has also interpreted the Bill of Rights in the Constitution in a broad and purposive manner, by

[1] Constitution of the Republic of Ghana 1992 art 11(1) list the sources of law as the Constitution, Acts of Parliament, subsidiary rules made by persons or authorities under a power conferred by the Constitution, the existing law, and the Common law. That notwithstanding scholars have argued that international law is part of the laws of Ghana, see for instance EY Ako 'Re-thinking the domestication of international treaties in Ghana' in RF Oppong & WK Agyebeng (eds) *A commitment to law: Essays in honour of Nana Dr. Samuel Kwadwo Boaten Asante* (2016) 665; K Appiagyei-Atua 'Ghana at 50: The place of international human rights norms in the courts' in H Bonsu et al (eds) *Ghana Law since independence: History, development and prospects* (2007) 179; EK Quansah 'An examination of the use of international law as an interpretative tool in human rights litigation in Ghana and Botswana' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 37; RF Oppong 'Re-imagining international law: An examination of international law into national legal systems in Africa' (2006-2007) 30 *Fordham International Law Journal* 296; EY Benneh 'Sources of public international law and their applicability to the domestic law of Ghana' (2013) 26 *University of Ghana Law Journal* 67.

[2] Universal Declaration of Human Rights adopted by the United Nations General Assembly (UNGA) on 10 December 1948 (General Assembly Resolution 217 A) 'as a common standard of achievement for all peoples and all nations'. See H Hannum 'The status of the Universal Declaration of Human Rights in national and international law' (1996) 25 *Georgia Journal of International and Comparative Law* 287, who argues that the Universal Declaration is a model for many domestic constitutions through direct referencing or incorporation of its provisions.

[3] International Covenant on Civil and Political Rights entered into force on 23 March 1976. Ghana acceded to the ICCPR and the Optional Protocol-I on 7 September 2000 stating that it is only bound by 'decisions, acts, omissions, developments or events' of the Human Rights Committee after it became state party to the treaty and not bound by decisions before then.

relying on the decisions of expert bodies and international tribunals that interpret international human rights norms.[4]

However, despite its progressive use of international human rights norms and the development of sound human rights principles, the Supreme Court has not explicitly dealt with issues relating to sexual minority rights. Elsewhere on the African continent, domestic courts have used international law and Bills of Rights to prohibit discrimination on the grounds of sexual orientation, even when there are no express constitutional provisions to that effect.[5] Courts in Botswana and South Africa have relied on the right to equality, privacy, human dignity and freedom from discrimination to uphold the rights of sexual minorities.[6] In such instances, the courts have relied on international human rights instruments and foreign case law to enforce non-discrimination on the grounds of sexual orientation by their national constitution and declared sodomy laws unconstitutional. The courts have often emphasised the universality of human rights. They have also shown that the right to equality and non-discrimination based on sexual orientation is not a new set of rights but is grounded in existing international human rights norms. Domestic courts have also affirmed the position of a growing number of UN member states that all persons should enjoy fundamental human rights regardless of their sexual orientation.[7]

This chapter argues that despite the dualist approach to international law in Ghana,[8] and the attitude of the courts towards the domestic application of international law,[9] It is still possible for the courts to adjudge that the Constitution prohibits discrimination on the grounds of sexual

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[4] See for instance *Mensah v Mensah* [2012] 1 SCGLR 391 where the Supreme Court relied on the provisions of Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) to determine for the first time in Ghanaian family law jurisprudence that a woman is entitled to an equal share of property acquired in the course of marriage.

[5] See for example *Letsweletse Motshidiemang v Attorney General and LeGaBibo* (amicus curiae) High Court Gaborone MAHGB – 000591-16 (11 June 2019).

[6] As above (Botswana). See also the South African Constitutional Court case of *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).

[7] As above. See also E Baisley 'Reaching the tipping point? emerging international human rights norms pertaining to sexual orientation and gender identity' 38 (2016) *Human Rights Quarterly* 134.

[8] Constitution of Ghana 1992 art 75(2) a & b requires treaties executed by the executive to be domesticated by parliament.

[9] The position of the courts has been ambivalent in the past, but the dominant and recent position suggests that unless domesticated a treaty has no effect. See for instance the recent case of *Mrs. Margaret Banful & Henry Nana Boakye v The Attorney-General & The Ministry of Interior writ* no J1/7/2016 (22 June 2017) (The Guantanamo Bay case) Where the court held that an agreement between Ghana and the United States was unconstitutional because it was not domesticated by Parliament. For a review of the case see EY Ako & RF Oppong 'Foreign relations law in the constitutions and courts of Commonwealth African countries' in C Bradley (ed) The *Oxford Handbook of foreign relations law* (2019) 583, 595-597.

orientation. Put differently Ghana can follow in the steps of courts like that of Botswana,[10] and avoid the path taken by Kenya. [11] This chapter makes two main arguments. The first main argument of the chapter is that international human rights law prohibits discrimination based on sexual orientation. Upon exhaustion of domestic remedies, there are at least three alternative avenues at the subregional, regional, and global level to vindicate these rights. The second analyses the best interpretive guidance based on international human rights law that the Supreme Court of Ghana could adopt when interpreting constitutional rights concerning sexual minority rights.

I arrange the chapter in five parts. The first part focuses on the UN and other global level human rights law relevant to the decriminalisation of same-sex prohibition in Ghana. The second part analyses the human rights protection mechanism for sexual minority rights in the African human rights system, while the third part examines human rights protection at the sub-regional level, focusing on the human rights mandate of the Economic Community of West African States (ECOWAS). The fourth part analyses international human rights as persuasive guidance to Ghanaian courts in deciding cases related to protecting sexual minority rights. The last part concludes the chapter with a summary of the key points canvassed in the chapter.

Many member states of the United Nations (UN) from all the five regions of the world have expressed support for sexual minority rights.[12] People might therefore take for granted now that protection of every person, regardless of their sexual orientation, has a basis in international (human rights) law. As recently as the early 1980s, when it was first contested at the United Nations Human Rights Committee (HR Committee),[13] the subject of equal legal protection regardless of sexual orientation was highly contentious and threatened to divide nations. Some States contest the status of non-discrimination on sexual orientation in international law, labelling it as a new right and reject it on the grounds of religion and culture.[14] After decades of denial and frustrations of

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[10] *Letsweletse Motshidiemang v Attorney General and LeGaBibo* (n 5 above).

[11] *EG & 7 Others v Attorney General; DKM & 9 Others (interested parties); Katiba Institute and Another* (amicus curiae) consolidated suit of Petition no 150 of 2016 and Petition no 234 of 2016. A Kenyan High Court in Nairobi held that the criminalisation of consensual same-sex sexual adults between adults in private is not unconstitutional.

[12] Baisley (n 7 above).

[13] *Hertzberg and ors v Finland*, Merits, Communication No 61/1979, UN Doc CCPR/C/15/D/61/1979, IHRL 1713 (UNHRC 1982), 2nd April 1982, United Nations [UN]; Human Rights Committee [CCPR].

[14] See for instance 'Organisation of Islamic conference-sponsored declaration in the General Assembly by Syria', (19 December 2008) in reaction to a joint statement read by Argentina condemning violence against sexual minorities and affirming non-discrimination and equality on the basis of sexual orientation and gender identity. At para 5 the Syrian statement noted that there were attempts to create new rights at the UN

seeking its recognition and entrenchment in the UN framework for its protection,[15] sexual minority rights[16] is gaining acceptance. Therefore, the central issue in this section is whether the global (UN), regional (African Union (AU)) and the sub-regional (Economic Community of West African States) (ECOWAS) human rights frameworks prohibit discrimination based on sexual orientation. The section also analyses Ghana's commitment to promoting the ideals of a peaceful world order founded on respect for international (human rights) law,[17] and how the courts in Ghana could use international law as an interpretive guide to protect the rights of sexual minorities. The section, therefore, traces the introduction, development and status of non-discrimination based on sexual orientation in the UN, AU and ECOWAS human rights systems with a focus on how it concerns Ghana and draws on these developments to argue for its observance in the domestic legal system. The chapter starts with the UN human rights system.

## 5.2. UN and other global-level human rights law relevant to the decriminalisation of same-sex prohibitions in Ghana

### 5.2.1 UN Charter-based mechanisms

One of the critical foundations of the UN Charter is the protection of fundamental human rights.[18] The Charter provides various mechanisms that facilitate the promotion, protection, and fulfilment of fundamental human rights globally.[19] I discuss three fundamental mechanisms in this section. The Human Rights Council (HRC), which succeeded the Commission on Human Rights, is one of

through misinterpretation of international treaties. The statement also denounced, at para 2, what it called 'notions that have no legal foundations' that favoured the 'sexual interests and behaviours' of certain class of people. Available at https://issuu.com/i.l.m./docs/gl-rights accessed 6 December 2020. See also RC Blitt 'The Organisation of Islamic Cooperation's (OIC) response to sexual orientation and gender identity rights: A challenge to equality and non-discrimination under international law' (2019) 28 *Transnational Law and Contemporary Problems'* 89, 160-181.

[15] I Saiz 'Bracketing sexuality: Human rights and sexual orientation: A decade of development and denial at the UN' (2004) 7 *Health and Human Rights* 48.

[16] E Heinze *Sexual orientation: a human right An essay in international human rights law* (1995) 61, observes that 'rights of sexual orientation and rights of sexual minorities denote (interchangeably) rights against discrimination on the basis of sexual orientation'. Sexual minority rights is therefore not a new set of rights and is used in this thesis to denote persons whose fundamental human rights are violated because of their sexual orientation.

[17] Constitution of the Republic of Ghana 1992 art 73. For a discussion of the values that dictate Ghana's relationship with other nations and its commitment to international law see EY Ako & RF Oppong 'Foreign relations law in the constitutions and courts of Commonwealth African countries' in CA Bradley (ed) *The Oxford Handbook of comparative foreign relations law* (2019) at 583.

[18] Charter of the United Nations preamble & art 1(3).

[19] Charter of the United Nations (as above) arts 55 and 56 enables the creation of Charter based institutions to protect fundamental human rights.

the primary mechanisms that the UN uses to promote and protect human rights in the world.[20] The HRC has passed resolutions emphasising the importance of sexual minority rights as part of existing human rights corpus and the need for protection of such rights. The Universal Periodic Review (UPR) mechanism is another creature of the UN Charter through which member states of the UN review the human rights records of their peers.[21] I analyse the UPR process concerning sexual minority rights, followed by an analysis of the Special Procedures mechanism which utilises the expertise of individuals or groups of individuals. The special procedure mandate holders, known as Special Rapporteurs or Independent Experts, have thematic or country-specific mandates related to a human rights issue.[22] This section focuses on these three UN Charter-based mechanisms because of their contribution to the subject of non-discrimination based on sexual orientation, starting with the HRC.

### a The UN Human Rights Council joint statements and resolutions

The UN Human Rights Council (HRC) has used resolutions and joint statements to draw attention to human rights violations based on sexual orientation. Starting in 2003, the Council has emphasised the need for UN member states to address violence against sexual minorities and also take steps to decriminalise consensual same-sex conduct as an effective means to protecting the rights of sexual minorities.[23] When Brazil took the initiative in 2003 to introduce a resolution at the HRC to protect the rights of sexual minorities and condemn violence against them, it stirred a hornet's nest, creating a controversy that threatened to destabilise bilateral economic relations

[20] UN General Assembly resolution A/RES/60/251, para 1, established the Human Rights Council on 15 March 2006 to replace the Commission on Human Rights which was existence from 1946 to 2006, as part of reforms of the UN human rights system. See, 'In Larger freedom: Towards development, security and human rights for all', report of the Secretary-General, A/59/2005/Add 3 21 March 2005 available at https://www.un.org/ruleoflaw/files/A.59.2005.Add.3[1].pdf accessed 22 June 2020. The then UN Secretary General Mr Kofi Annan called for the reform of the UN Commission on Human Rights as a result of lack credibility to protect human rights because States sought membership of the Commission primarily to shield themselves against criticism instead of protecting the rights of persons globally.

[21] Resolution 60/251 (as above) para 5(e) empowers the Human Rights Council to conduct a peer review of every State's human rights record. Resolution A/HRC/RES/5/1 18 June 2007 and Resolution A/HRC/RES/6/102 27 September 2007 set out the processes and guidelines for conducting the Universal Periodic Review.

[22] Resolution 60/251 (as above) para 6, maintains the Special procedures mechanisms of the UN Human Rights Council instituted in 1980. As of September 2020, the UN Human Rights Council has 44 thematic mandates and 11 country mandates. See https://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx accessed 6 December 2020.

[23] Draft resolution E/CN.4/2003/L.92 entitled 'Human Rights and sexual orientation' and the amendment introduced by Egypt removing all references to sexual orientation as resolution E/CN.4/2003/L.108 22 April 2003, Commission on Human Rights 59th session, Agenda item 17.

between Brazil and Islamic nations.[24] Some key points presented by Brazil in their unsuccessful 2003 Resolution was the claim that prohibition of discrimination and violence on the grounds of sexual orientation is part of the Universal Declaration and existing human rights treaties. The resolution noted that there was a need for the UN to act decisively to save persons who suffer from violence based on their perceived or actual sexual orientation.[25] Under extreme pressure, Brazil withdrew the resolution.[26]

Two years after the introduction and withdrawal of the Brazilian resolution, New Zealand presented a joint statement on behalf of 34 other countries in 2005.[27] The joint statement lamented the lack of opportunity to consider the Brazil resolution of 2003 and stressed that 'we cannot ignore the mounting evidence of serious human rights violations against individuals based on their sexual orientation'.[28] The resolution further showed the uncompromising posture of states and their stance in ensuring the protection of sexual minority rights through definitive action. It noted: 'Mr Chairman, we recognise that sexuality is a sensitive and complex issue. But we are not prepared to compromise on the principle that all people are equal in dignity, rights, and freedoms'.[29] These uncompromising statements by a section of countries that supported sexual minority rights set the tone for the adoption of human rights resolutions relating to sexual orientation.

In a tense atmosphere in 2011, the HRC adopted a resolution allowing the High Commissioner for Human Rights to document violence and violations against sexual minorities.[30] The opposition towards equal legal protection based on sexual orientation was heightened when the HRC appointed an Independent Expert on the protection against violence and discrimination based on sexual orientation and gender identity. The HRC passed Resolution 32 with a slight majority on 30

[24] 'Homosexual rights resolution withdrawn at United Nations' *The Washington Times*, 30 March 2004 available at https://www.glapn.org/sodomylaws/world/wonews024.htm accessed 22 June 2020.
[25] Draft resolution E/CN.4/2003/L.92 entitled 'Human rights and sexual orientation' (n 23 above).
[26] As above.
[27] Joint statement on sexual orientation & human rights delivered by New Zealand at the Commission on Human Rights, March 2005 available at https://arc-international.net/global-advocacy/sogi-statements/2005-joint-statement/ accessed 23 June 2020.
[28] As above para 3.
[29] As above para 5.
[30] Resolution A/HRC/RES/17/19 Human Rights Council 17th session agenda item 8 entitled 'human rights, sexual orientation and gender identity' (14 July 2011) para 1. The resolution was adopted by a 23 to 18 vote with 6 countries including Ghana abstaining.

June 2016 which appointed the office of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, for three years.[31]

Six countries, including Ghana, abstained from voting on Resolution 32 that appointed the Independent Expert. If these six countries had also voted against the resolution, those opposing the appointment of the Independent Expert would have carried the vote of 24 to 23. Ghana abstained from voting on the resolution in the company of South Africa, Botswana, India, Namibia and the Philippines. Courts in Botswana and India have since then declared laws that criminalise consensual same-sex acts as unconstitutional, in 2019 and 2018 respectively, while South Africa had earlier decriminalised it in 1998. Perhaps the writing may be on the wall that countries that do not vehemently oppose resolutions relating to sexual minorities, may, with gradual persuasion and engagement, go the decriminalisation route, given time. Ghana has engaged positively with sexual minority rights at the global level, but is yet to translate this into decriminalisation at the domestic level. Time will tell whether Ghana will move a step further from abstaining to voting for, and eventually to the decriminalisation of consensual same-sex conduct.

As argued above, despite initial challenges, a majority of UN states recognise a substantive right to equality based on sexual orientation.[32] It is not a new right, but a substantive human right, recognised, within the corpus of existing human rights provisions in all primary international human rights documents.[33] However, this did not occur overnight. Initially, states relied on joint statements at the HRC to draw attention to sexual minority rights violations.[34] This method condemned discrimination and violence against sexual minorities, promising not 'to comprise on the principle that all people are equal in dignity, rights and freedoms'.[35] Gradually, this metamorphosed into resolutions that condemned not only violations against sexual minorities but

[31] Resolution A/HRC/32/L.2/Rev 1 Human Rights Council Thirty-second session agenda item 3 28 entitled 'Protection against violence and discrimination based on sexual orientation and gender identity' June 2016 para 3.
[32] ILGA World: LR Mendos, State-Sponsored Homophobia 2019 (n 16 above). At present only about 35% of UN member states criminalise homosexual sex between consenting adults.
[33] The Yogyakarta Principles (n 20 above); and the Yogyakarta Principles plus 10 (n 21 above).
[34] See for instance Joint statement on sexual orientation & human rights delivered by New Zealand at the Commission on Human Rights, March 2005 (n 27 above). Similar joints statements were delivered at the Human Rights Council by Norway in 2006; and another one in 2008 by Argentina.
[35] Joint statement by New Zealand (as above) para 5.

also prompted comprehensive studies and discussions of the situation of sexual minorities, globally.[36]

Consequently, the HRC 'is seized' with the 'priority issue of human rights, sexual orientation and gender identity',[37] and together with the General Assembly receives reports from the Independent Expert on the protection against violence and discrimination based on sexual orientation and gender identity (Independent Expert on SOGI) annually. While violence and discrimination based on sexual orientation persist in all regions of the world, just like other human rights violations, there are positive responses globally towards protecting sexual minority rights.[38]

Ghana was not a member of the HRC when the conversation on sexual minority rights started with New Zealand's Joint Statement.[39] The 15 African countries, including South Africa, who were part of the Commission did not support the Joint Statement. As a member of the newly made-up HRC in 2006, Ghana did not support the Joint Statement by Norway in 2006, which had the support of 54 States from all five regions of the world.[40] The Norway Resolution reiterated that international human rights law protected all persons regardless of their sexual orientation. The statement further condemned violence and discrimination against sexual minorities and noted that the principles of universality and equality required the HRC to address these issues.[41] Ghana is not on record as offering any reasons for opposing this resolution. However, the reasons attributed by the group of countries which opposed this statement is that sexual orientation is a new right that is not part of any international human rights instrument.[42] They also added that the statement threatened other rights and the entire human rights framework and called for protection of the traditional family.[43]

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[36] Resolution A/HRC/RES/17/19 Human Rights Council Seventeenth session agenda item 8 entitled 'human rights, sexual orientation and gender identity' (n 30 above) requested the High Commissioner for Human Rights to commission a study into discrimination and violence against sexual minorities worldwide, para 1.
[37] As above, para 4.
[38] See report of the office of the United Nations High Commissioner for Human Rights 'Discrimination and violence against individuals based on their sexual orientation and gender identity' A/HRC/29/23 4 May 2015 para 74-80.
[39] Joint statement on sexual orientation & human rights delivered by New Zealand at the Commission on Human Rights, March 2005 (n 27 above).
[40] Joint statement on sexual orientation & human rights delivered by Norway on behalf of 54 States at the 3rd Session of the Human Rights Council, December 2006 (n 127 above); see also Baisley (n 7 above) 150.
[41] Joint statement on sexual orientation & human rights delivered by Norway (as above) para 4.
[42] 'Organisation of Islamic conference-sponsored declaration in the General Assembly by Syria' (n 14 above).
[43] As above para 5.

Ghana also did not support the resolution to appoint the UN High Commissioner for Human Rights to commission a study into violence and discrimination against sexual minorities worldwide.[44] The HRC had acknowledged that there were reports of widespread violations committed against persons based on their perceived or actual sexual orientation. To verify these reports and address them, the HRC requested the High Commissioner for Human Rights to commission a study to find out the extent of these violations worldwide.[45] Ghana and the countries that voted against the resolution cannot deny the fact that grievous human rights violations were ongoing against sexual minorities worldwide, but still advanced religious and cultural arguments to oppose the resolution and subsequent discussion of the report produced by the High Commissioner for Human Rights.[46]

One of the significant obstacles that impede efforts to address violence against sexual minorities is the lack of knowledge on the extent of these violations.[47] Thus Ghana's vote against commissioning a study to find out these violations was tacitly to support egregious violations of fundamental human rights. Ghana has pledged respect for and adherence to the Charter of the UN.[48] At the barest minimum, regardless of whose rights is in issue, Ghana should support an investigation of human rights violations. Refusing to support an investigation into human rights violations of sexual minorities was a failure to 'reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women, and [of] nations large and small'.[49]

Apart from either voting against or abstaining from Joint Statements and Resolutions on sexual orientation, the statements made by Ghana while doing so are imperative in shaping the discussion and understanding the reasons behind Ghana's actions and inactions. The submission made by the representative of Ghana, Mr Sammie Eddico, at the adoption of Human Rights Council Resolution

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[44] Resolution A/HRC/RES/17/19 Human Rights Council Seventeenth session agenda item 8 entitled 'human rights, sexual orientation and gender identity' (n 30 above).
[45] As above para 1.
[46] D McGoldrick 'The development and status of sexual orientation discrimination under international human rights law' (2016) 16 *Human Rights Law Review* 613, 619-621.
[47] Human Rights Council panel on ending violence and discrimination against individuals based on their sexual orientation and gender identity (n 49 above) para 25.
[48] Constitution of the Republic of Ghana art 40 states 'In its dealings with other nations, the government shall '(c) promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means. (d) adhere to the principles enshrined in or as the case may be, the aims and ideals of – (i) the Charter of the United Nations'.
[49] Charter of the United Nations art 1(3).

on the appointment of the Independent Expert is significant, worth recounting and analysing.[50] He observed that Ghana's Constitution outlawed all forms of discrimination which aligns with the African Commission's Resolution on violence against sexual minorities. Therefore, Ghana will not vote against the resolution seeking to appoint an independent expert.[51]

Mr Eddico mentioned two significant reasons Ghana would not vote against the resolution. First, the attitude of some LGBT persons had created a negative perception against them. He mentions the case of one Dr Sully Ali Gabass, a male medical doctor who defiled a 15-year-old boy and currently serving a 25-year jail term imposed by an Accra Circuit Court.[52] The second reason was that in Ghana, homosexuality was 'culturally sensitive'.[53] The Ghanaian representative, however, noted that because of violence meted out to LGBT persons in the Orlando shooting incident in the USA[54] and the African Commission's Resolution 275, there had been an 'evolution of thinking' by Ghana.

The tone of Ghana at this voting session was commendable, recounting the Constitution of Ghana and Resolution 275, as protecting sexual minority rights. However, with due respect to the submission of Ghana, it was contradictory and an inexcusable pretext not to support the resolution. First, the Circuit Court in Accra convicted Dr Sulley Ali Gabass, not under section 104(1)(b) of the Criminal Offences Act which criminalises homosexual sex, but for defiling a person below the age of 16, considered a child, under section 101 of the Act. The law in Ghana punishes sexual intercourse with a minor whether the sexual encounter is between persons of the same sex or the opposite sex. Dr Gabass' conduct of having sex with a minor did not qualify as consensual sexual intercourse between two adults where no harm occurs. The media misunderstood or deliberately twisted Dr

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[50] Statement by Ghana at the Human Rights Council in relation to Resolution A/HRC/32/L.2/Rev 1 entitled 'Protection against violence and discrimination based on sexual orientation and gender identity' June 2016 . See detailed discussion at http://webtv.un.org/watch/ahrc32l.2rev.1-vote-item3-41st-meeting-32nd-regular-session-of-human-rights-council/5009164455001#player accessed 28 June 2020. In the about 5 minutes video that starts from 03:22:51, Ghana's representative at the Human Rights Council noted that Ghana's pattern of voting against sexual orientation and gender identity issues at the UN since 2011 had changed for the better partly due to Resolution 275 of the African Commission that condemned human rights violations against sexual minorities. Therefore, it will abstain from the voting.

[51] As above.

[52] *Republic v Dr. Sulley Ali Gabass* case no D12/29/15 13 July 2015 Circuit Court Accra.

[53] Statement by Ghana at the Human Rights Council (n 50 above).

[54] Yahoo entertainment '50 dead in Orlando gay bar shooting incident' available at https://www.yahoo.com/entertainment/50-dead-orlando-gay-bar-153600167.html accessed 13 July 2020; see also BBC news 'Florida Pulse gay club attacked in Orlando - at least 20 dead' available at https://www.bbc.com/news/36510272 accessed 13 July 2020.

Gabass' case as a homosexual issue when it was not, therefore instigating the wrath of the public against LGBT persons.

Second, to claim that the issue was culturally sensitive and therefore, Ghana would not support it shows a conscious effort by Ghana to avoid its international obligations on cultural grounds, which international human rights law forbids. It is contradictory to say that there had been a change in attitude because violence and violations of sexual minority rights are reprehensible and condemned by the Ghanaian Constitution and Resolution 275 yet cannot vote to support a Resolution that will appoint an independent expert to engage with States to end such violence against sexual minorities.

That notwithstanding, it is essential to note that through Mr Eddico's submission; it becomes apparent that Ghana appreciates the need to prevent violence and discrimination against sexual minorities. He said Ghana had taken a similar position as it has done in its submissions before the Human Rights Committee and the CEDAW Committee in a year before making this submission in 2016 at the Human Rights Council.

The most significant statement is that Ghana supports persons who are naturally gay but does not support those who are commercialising or engaging in homosexuality because of money. He noted: 'we support those who are naturally inclined or by nature have a particular identity, but we do not support the propagation or commercialisation of it'.[55] This statement is a new observation that underscores the tacit agreement by politicians and diplomats that homosexuality is not a fashion statement but a natural human trait. However, the apprehension is that other persons practise homosexual sex not because they are born gay.

Ghana has voted against Joint Statements and Resolutions at the Human Rights Council in the company of States that rarely believe in fundamental human rights and do not have good human rights protections records in their countries. Opposition to resolutions and joint statements has led to better clarification and engagement, making more UN member states support the equal protection of sexual minorities. Ghana's position on the subject is ambiguous. While Ghana recognises the need to protect sexual minority rights, it tacitly acknowledges that it has not done so and is yet to vote to support resolutions relating to sexual minority rights. It behoves Ghana to live up to its bidding as a State that respects its international obligations and validate its credentials as a State that protects the rights of all persons, including sexual minorities.

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[55] Statement by Ghana at the Human Rights Council (n 50 above).

### b *Universal Periodic Review*

**Engagement with the Human Rights Council's UPR mechanism- from 'noted' to 'supported.'**

The third cycle review of Ghana's human rights record in 2017 by the HRC's Universal Periodic Review (UPR) mechanism represents hope for LGBT persons in Ghana.[56] Ghana moved from a posture of resisting LGBT recommendations to a friendly and accepting position towards recommendations. When seeking membership of the HRC in 2014, Ghana promised in a 'note verbale'[57] that it would uphold fundamental human rights.[58] Ghana noted further that it had since the establishment of the HRC contributed to debates that helped to shape and develop human rights norms and protection in the world.[59]

The UPR offers an opportunity to test the human rights credentials of States against a variety of human rights standards in international human rights instruments. It also holds a state accountable for 'the UN human rights treaties to which the state is a party, as well those voluntary commitments and pledges that the state has made in the field of human rights'.[60] The system makes it compulsory for states to undergo review in a particular cycle once if elected a member of the HRC.[61] For states like Ghana, this is an opportunity for consistent and unfailing engagement on its human rights obligations with peers, and also for deep introspection of its commitment to human rights. Similar to other members of the Council, Ghana has gone through three review cycles, representing the three occasions that it has been a member of the Council. Through Ghana's membership of the

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[56] Human Rights Council 'Universal Periodic Review – Ghana Third Cycle Date of consideration: Tuesday 7 November 2017 - 14:30 - 18:00' available at https://www.ohchr.org/EN/HRBodies/UPR/Pages/GHIndex.aspx accessed 10 July 2020; See also Report of the Working Group on the Universal Periodic Review Ghana A/HRC/37/7 (26 December 2017) available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/367/88/PDF/G1736788.pdf?OpenElement accessed 10 July 2020.

[57] Human Rights Council 'Note verbale dated 8 August 2014 from the permanent mission of Ghana to the United Nations addressed to the President of the General Assembly' A/69/221 sixty-ninth session item 113(c) of the provisional agenda (11 September 2014).

[58] As above. In this 'note verbale' the permanent mission of Ghana to the United Nations notified the President of the General Assembly that 'Ghana has decided to present its candidature for election to the Human Rights Council for the term 2015-2017, at the elections to be held during the sixty-ninth session of the Assembly, in November 2014'. Ghana was successfully elected and served its three-year term from 2015 to 2017.

[59] As above para 1.

[60] M Schmidt 'United Nations' in D Moeckli et al (eds) *International human rights law* (2010) 395.

[61] As above.

Council and engagement with its peers from 2006 to 2017, it has signalled the desire to make progress in LGBT rights. From the first cycle in 2008 to the second cycle in 2012, and the recent one in 2017, Ghana has moved from the position of 'noting'[62] recommendations prompting it to decriminalise sodomy laws and take action against discrimination and violence against sexual minorities, to 'supporting' them.[63] While this represents a positive attitude, it is the beginning of a conversation that requires action to address systemic violence, discrimination and homophobic discourse in Ghana.

In 2008, during the first UPR cycle, Ghana submitted its national report of compliance with its human rights obligations under global and regional human rights instruments for assessment.[64] The report did not mention violations against sexual minorities and the responsibility to protect and prevent such abuses. However, the working group raised questions about reports of discrimination and violence meted out against sexual minorities in Ghana.[65] Romania[66] and Slovenia[67] recommended that Ghana should amend sections of its Criminal Offences Act that criminalised sexual activity between consenting adults of the same sex. Ghana conveniently avoided any comment regarding these observations, even though it reacted to other questions. At the close of the session, the Working Group stated that the recommendations regarding other human rights issues had enjoyed the support of Ghana.[68] However, Ghana 'noted' the recommendations made by Romania and Slovenia regarding the decriminalisation of sodomy laws, promising to examine and respond at an unspecified future date.[69] The HRC session that considered and adopted the outcome of the periodic review of countries assessed in 2008 noted that Ghana did not sufficiently address some 'questions or issues during the interactive dialogue in the

[62] Human Rights Council UPR of Ghana 2nd Cycle – 14th Session 'Thematic list of recommendations' 6-8.
[63] Human Rights Council UPR of Ghana 3rd Cycle – 28th Session 'Thematic list of recommendations' 13-14.
[64] Human Rights Council Working Group on the Universal Periodic Review Second session Geneva, 5-16 May 2008 National report submitted in accordance with paragraph 15 (a) of the annex to human rights council resolution 5/1 Ghana A/HRC/WG.6/2/GHA/1 8 April 2008 available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/124/95/PDF/G0812495.pdf?OpenElement (accessed 10 July 2020).
[65] Human Rights Council Report of the Working Group on the Universal Periodic Review Ghana A/HRC/8/36 (29 May 2008) previously issued as A/HRC/WG.6/2/L.2 available at https://lib.ohchr.org/HRBodies/UPR/Documents/Session2/GH/A_HRC_8_36_Ghana_E.pdf accessed 10 July 2020.
[66] As above para 24.
[67] As above para 50.
[68] As above para 69.
[69] As above para 70.

Working Group'.[70] These questions related to the decriminalisation of same-sex sexual activity between adults in private.

Interestingly, at the time of Ghana's UPR assessment in 2008, the debate on homosexuality had just begun in Ghana.[71] If Ghana had taken advantage of the conversation and engaged meaningfully with the working group in 2008, it could have avoided the toxic atmosphere that currently prevails concerning sexual minority rights in Ghana. At present, state and non-state actors violate the rights of sexual minorities through vicious verbal and physical attacks and verbally attack anyone who speaks in defence of sexual minority rights.[72]

The second cycle for Ghana occurred in 2012. Amid an ongoing debate that included health professionals, lawyers, religious and traditional leaders who vilified gays and denied that same-sex sexual relationships ever existed in any culture in Ghana,[73] the state submitted its national report for review in the second cycle of the UPR.[74] Again, Ghana was quiet in its report on discrimination and violence meted out to people on their perceived and real sexual orientation. However, despite not mentioning its obligation to protect sexual minorities against discrimination and violations of their rights, it had to answer for it. Several members of the Working Group asked questions about what Ghana was doing to combat discrimination, violence and violations of persons based on their perceived or real sexual orientation.[75] Germany, for instance, asked if Ghana would end its policy of

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[70] Human Rights Council 'Report of the Human Rights Council on its eighth session' A/HRC/8/52 (1 September 2008) 61 available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/152/83/PDF/G0815283.pdf?OpenElement accessed 10 July 2020.

[71] E Baisley 'Framing the Ghanaian LGBT rights debate: Competing decolonisation and human rights frames' (2015) 49 *Canadian Journal of African Studies* 383; K Essien & S Aderinto 'Cutting the head of the roaring monster: Homosexuality and repression in Africa' (2009) 30 African Study Monograph 121; PA Amoah & RM Gyasi 'Social institutions and same-sex sexuality: Attitudes, perceptions and prospective rights and freedoms for non-heterosexuals' (2016) 2 *Cogent Social Sciences* 1; WJ Tettey 'Homosexuality, moral panic and politicised homophobia in Ghana: Interrogating discourses of moral entrepreneurship in Ghana media' (2016) 9 *Communication, culture and critique* 86.

[72] Human rights Watch 'No choice but to deny who I am, violence and discrimination against LGBT people in Ghana' (2018).

[73] Baisley 'Framing the Ghanaian LGBT rights debate: Competing decolonisation and human rights frames' (n 71 above). See also chapter 2 of this thesis which adduced compelling evidence that same-sex sexual relationships existed in many cultures in Ghana between females and also between males.

[74] Human Rights Council Working Group on the Universal Periodic Review Fourteenth session Geneva, 22 October–5 November 2012 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21 Ghana' A/HRC/WG.6/14/GHA/1 10 August 2012 available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/158/78/PDF/G1215878.pdf?OpenElement accessed 10 July 2020.

[75] Human Rights Council 'Universal Periodic Review – Ghana Second Cycle Date of consideration: Tuesday 23 October 2012 - 14:30 - 18:00' Questions submitted in advance available at https://www.ohchr.org/EN/HRBodies/UPR/Pages/GHindex.aspx accessed 10 July 2020.

unequal treatment of LGBT persons.[76] The Netherlands posed a similar question, asking how Ghana proposed to apply the universal principle of non-discrimination to LGBT persons.[77] In answer to these questions, 'the delegation emphasised that Ghana does not have a policy of non-equal treatment of its citizens'.[78] However, Ghana responded that it had 'noted', instead of 'supported' all recommendations that asked it to decriminalise sodomy laws and take steps to end violence and discrimination against LGBT persons.[79]

The 2017 third cycle review marked a turning point in Ghana's engagement with the working group on finding a lasting solution to addressing violations based on sexual orientation. It accepted almost every recommendation aimed at tackling discrimination and violence related to sexual orientation.[80] During the third cycle review, Ghana adopted a friendly tone and a willingness to address human rights violations against LGBT persons. The HRC noted with concern the lack of action by Ghana to address human rights violations against sexual minorities, but Ghana conceded it had to do more to solve these problems. It outlined a series of programmes and training earmarked for law enforcement organisations and an online platform administered by the Commission on Human Rights and Administrative Justice (CHRAJ), Ghana, to address discrimination against the LGBT community. As the UPR mechanism allows for the UPR Working Group to follow with up with questions and issues for the state to answer, the Working Group asked Ghana to address issues relating to its human rights record. After a series of correspondence, the Working Group decided that Ghana should address the outstanding issues during its next periodic review.[81]

What emerges from this process is that Ghana's hostile position towards LGBT issues has changed and it now engages progressively on the subject with members of the Working Group, unlike previous years where it adopted a hostile attitude. Besides, some institutions of state have taken some steps to address violations of the rights of sexual minorities. For instance, the Commission

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[76] As above 1.
[77] As above 2.
[78] Human Rights Council 'Report of the Working Group on the Universal Periodic Review Ghana' A/HRC/22/6 (13 December 2012) para 75.
[79] Human Rights Council UPR of Ghana 2nd Cycle – 14th Session 'Thematic list of recommendations' (n 62 above).
[80] Human Rights Council UPR of Ghana 3rd Cycle – 28th Session 'Thematic list of recommendations' (n 63 above).
[81] Office of the United Nations High Commissioner for Human Rights 'letter to HE Ms. Shirley Ayorkor Botchwey Minister for Foreign Affairs and Regional Integration' dated 13 April 2008, congratulating Ghana for its 'constructive engagement' at 28th Session of the UPR and offering to assist Ghana strengthen its human rights mechanisms.

on Human Rights and Administrative Justice receives and addresses complaints of violence against sexual minorities. The police also investigates violations of sexual minority rights, as supported by a letter written by the Inspector General of Police in a separate investigation conducted by Human Rights Watch.[82] The head of the police service in Ghana listed a series of actions taken by the police to protect LGBT persons, including investigation of complaints relating to violations of human rights based on sexual orientation.

The most critical point, for now, is that contrary to the position taken in earlier years by Ghana, starting in 2008, there is a positive response to addressing sexual minority rights. Ghana has signalled that it is for the courts to determine if it would decriminalise sodomy laws. Since Ghana returned to democratic rule in 1992, the party that dominates Parliament with numbers to pass legislation is the same party whose candidate is President of the Republic. The ruling party always has a majority of members in Parliament to pass any legislation it deems necessary. Therefore, the Ghanaian public presumes that laws passed by the Parliament of Ghana since 1993 are acts of a single political party headed by the President and the executive, with support of their majority party members of Parliament. If Ghana passes a law in Parliament that decriminalises sodomy law, the public will deem it as an Act of a single political party, and if a majority of the public dislike that legislation, it may end the political fortunes of that party. The President and members of Parliament have therefore deliberately avoided the subject of sexual minority rights, and whenever they speak about it, they denounce it. It is, therefore, the judiciary that can definitively address this issue, despite the positive engagement of Ghana's diplomats and political leaders with treaty monitoring bodies.

It is incumbent on the state to take decisive action against all human rights violations, and it starts with the constructive engagement and recognition of the duty to address these violations. From its interaction with the global human rights system, Ghana recognises a duty to protect the right of LGBT persons, but the political will to do so domestically is lacking for fear of a backlash by the electorate in national elections. A legislative or executive action to address violations against sexual minority rights might not be workable for now. The courts represent the greatest hope for

[82] Human Rights Watch 'No choice but to deny who I am, violence and discrimination against LGBT people in Ghana' (2018) 'Annex 3: Response from Ghana Police Service' 65-67. In this letter, the Inspector General of Police (IGP) assures the Human Rights Watch that the Ghana Police Service applies human rights provisions of equality, non-discrimination, and dignity of the person in its dealings with LGBT persons. It also applies regional and international human rights instruments that Ghana has ratified when dealing with LGBT persons. The IGP notes further that through police training institutions, the Ghana police service was equipped to deal with violations of human rights and violence against LGBT persons rights nationwide.

protecting LGBT persons against human rights violations, even if diplomats and the government assures them of such protections at international fora.[83] If the courts adopt a consistent approach to its application of international human rights law to vindicate the rights of the ordinary persons as it has done in recent times,[84] this will bode well for sexual minority rights as the analysis below will show.

It is clear from the preceding arguments that Ghana's interaction with the subject of sexual orientation has developed from a place of denial and hostility to a conciliatory and engaging tone.[85] Ghana has taken some measures to address violence against sexual minorities but needs to match its words with action.[86] Its engagement with the subject at the global and regional level suggests Ghana is aware of its international legal obligations.[87] Ghana needs to educate the public about sexual minority rights, condemn homophobic speech in the media, and prosecute perpetrators of violence and violations of sexual minority rights. These are hard decisions and actions to effect, especially in a society which adamantly opposes homosexuality because of culture and religion.

Another mechanism which presents a focused and targeted approach to addressing human rights issues in the UN system is the special procedure mechanism. The section below analyses how UN treaty monitoring bodies use these mechanisms to address sexual minority rights violations in Ghana.

### c *Special Procedures*

Special Procedures are UN Charter-based mechanisms used by the HRC to protect fundamental human rights in the UN system.[88] The HRC appoints an expert or group of experts, usually a special rapporteur or an independent expert, with a mandate to focus on a specific subject or a country situation and report to the HRC on recommendations to address these human rights situations.[89] Three Special Procedures, namely the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (SR on the right to health), the Special Rapporteur on extreme poverty and human rights (SR on poverty and human rights), and the Independent Expert on the protection against violence and discrimination based

[83] Statement by Ghana at the Human Rights Council in the adoption of resolution 32 (n 50 above).
[84] See for example *Mrs Abena Pokuaa v Agricultural Development Bank* (2016) Civil Appeal no J4/31/2015.
[85] Statement by Ghana at the Human Rights Council in the adoption of resolution 32 (n 50 above).
[86] Human Rights Watch (n 82 above).
[87] Statement by Ghana at the Human Rights Council in the adoption of resolution 32 (n 50 above).
[88] Resolution 60/251 (n 20 above) para 6.
[89] As above.

on sexual orientation and gender identity (Independent Expert on SOGI) have dealt with situations in Ghana or addressed issues related to sexual orientation, which applies to Ghana.

The SR on the right to health, is one of the first mandate holders to address issues relating to health and sexual minority rights in Ghana.[90] From 23 to 30 May 2011, the then SR on the right to health, Mr Anand Grover, visited Ghana at the invitation of the Ghanaian government and interacted with government officials, NGOs, academics, and other stakeholders to assess Ghana's compliance with its human rights obligations related to health.[91] In a report submitted to the HR Council on the findings of his visit to Ghana, Mr Grover noted that even though knowledge of HIV was high among Ghanaians, such awareness did not translate into practical measures to prevent the spread of the disease.[92] In particular, he noted that stigma and discrimination remained high and reinforced by the criminalisation of sex among most at risk groups such as men who have sex with men.[93] Because of stigma and discrimination against vulnerable groups such as sex workers and men who have sex with men, HIV prevalence among these groups was much higher, at 25 percent, than the 1.9 percent average among the general population.[94] Based on his interactions with stakeholders and the findings of his visit, Mr Grover urged the government of Ghana to 'decriminalise sex work and men having sex with men'.[95]

From a public health perspective, the report of the SR on the right to health raises serious concerns. Because of the sodomy law that targets men who have sex with men, this vulnerable group cannot access health services and knowledge relevant to HIV prevention and transmission. Coupled with stigma and discrimination, the HIV prevalence among men who have sex with men is significantly higher than what prevails in the general population. Human Rights Watch has noted instances that avoidance of stigma, discrimination and pressure from society to marry, force persons who identify as LGBT to marry or have relationships with persons of the opposite sex.[96] It

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[90] Resolution 2002/31 of April 2002 by the erstwhile Commission on Human Rights established the mandate of the Special Rapporteur on the right to health to improve accessibility and enjoyment of the right to physical and mental health globally, especially for vulnerable groups who are unable to access such a right. The mandate was extended by the Human Rights Council resolution 6/29 of 14 December 2007 and resolution 42/16 of 7 October 2019. The current mandate holder is Ms Tlaleng Mofokeng from South Africa available at https://www.ohchr.org/EN/Issues/Health/Pages/SRRightHealthIndex.aspx accessed 6 December 2020.

[91] Report of the Special Rapporteur on the right to health A/HRC/20/15/Add 1 submitted to the Human Rights Council, 10 April 2012 para 1.

[92] As above para 21.

[93] As above.

[94] As above.

[95] As above para 60(b).

[96] HRW (n 82 above).

is therefore possible for HIV transmission among vulnerable groups like sex workers and men who have sex with men to spread to the general population. Thus, Mr Grover's recommendation to the government to decriminalise 'unnatural carnal knowledge' is a proactive step that will help prevent the spread of HIV in the general population. The criminalisation of same-sex sexual conduct increases stigma and discrimination against the LGBT community which force people to deny who they are,[97] and engage in sexual conduct with the opposite sex to conceal their real sexual orientation, avoid criminal sanctions, stigma and discrimination with the potential to increase the spread of HIV among the general population. Almost a decade after the SR on the right to health's visit, the government of Ghana has not taken any measures to decriminalise the sodomy offence of 'unnatural carnal knowledge' with grave public health consequences in the offing.

The SR on poverty and human rights, has addressed poverty, sexual orientation, and human rights in Ghana.[98] The SR on poverty and human rights, Professor Philip Alston, visited Ghana from 9 to 18 April 2018 and reported on his visit to the HRC in October 2018.[99] During his visit to Ghana, Professor Alston interacted with government officials, NGOs, academics and persons deemed to be poor in both rural and urban settings in Ghana. He observed that 1 in 4 persons in Ghana are poor, while 1 in every 12 is extremely poor.

Professor Alston further noted that factors such as the criminalisation of same-sex sexual conduct engenders discrimination and influences negative attitudes towards sexual minorities. He observed that, 'while government might argue that it is not responsible for acts of discrimination by private persons, the reality is that the law sets the overall framework and strongly influences attitudes'.[100] This statement by the SR on poverty and human rights confirms the findings of Human Rights Watch, showing that Ghana denies LGBT persons an opportunity to realise socio-economic rights such as education, jobs and healthcare. Family members and neighbours eject LGBT persons out of their homes based on their real or perceived sexual orientation.[101] Thus, sexual minorities in Ghana are disproportionately likely to experience poverty because of their sexual orientation.

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[97] As above.
[98] The mandate was first created in 1988 by the Commission on Human Rights available at https://www.ohchr.org/EN/Issues/Poverty/Pages/SRExtremePovertyIndex.aspx accessed 6 December 2020.
[99] Report of the Special Rapporteur on extreme poverty and human rights on his mission to Ghana A/HRC/38/33/Add 2 10 October 2018.
[100] As above para 42.
[101] Human Rights Watch (n 82 above).

Professor Alston validates the focus of this thesis when he outlines the benefits of decriminalisation of 'unnatural carnal knowledge': 'Decriminalising adult consensual same-sex conduct would be a first step towards recognising the human rights of lesbian, gay, bisexual, transgender and intersex people and fighting discrimination based on sexual orientation and gender identity'.[102] The SR on extreme poverty observes further that in order to uphold Ghana's commitment to equality and fairness there was a need to educate the public on the rights of sexual minorities and provide social and legal remedies for sexual minority rights violations.[103] Ghana has pledged to protect the rights of LGBT persons at the international level,[104] but the action in this direction lacks at the domestic level.

A recent mandate created by the HR Council that reinforces the application of existing human rights norms to sexual minority rights is the office of the Independent Expert. At its 32nd session in July 2016, the HR Council by a vote of 23 to 18, with six countries including Ghana abstaining, appointed the office of the Independent Expert on SOGI.[105] The mandate of the Independent Expert on SOGI includes dialoguing with states to ensure the protection of persons who suffer violence and discrimination based on their sexual orientation and gender identity.[106] The mandate holder is also responsible for assessing the 'implementation of existing international human rights instruments with regard to ways to overcome violence and discrimination against persons on the basis of their sexual orientation or gender identity, while identifying both best practices and gaps'.[107] The HR Council extended the mandate of the Independent Expert on SOGI at its 40th meeting in July 2019 for a further three years by a vote of 27 to 12, with seven countries, five from Africa abstaining.[108]

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[102] Report of the special rapporteur on extreme poverty (n 99 above) para 42.
[103] As above.
[104] Statement by Ghana at the Human Rights Council (n 50 above).
[105] Resolution appointing the mandate of the Independent Expert on SOGI adopted by HR Council on 30 June 2016 A/HRC/RES/32/2 para 3.
[106] As above para 3(c)&(d).
[107] As above.
[108] The 5 African countries are Angola, Burkina Faso, the Democratic Republic of Congo, Senegal, and Togo. Ghana was not a member and could therefore not vote. Significantly, Rwanda, South Africa and Tunisia voted for the resolution while Nigeria, Egypt, Eritrea, and Somalia voted against the resolution. The 3 African countries that voted for the resolution, and the 5 that abstained is an improvement on the earlier position taken by African countries on the HR Council in 2016 where no African country voted in support of the resolution, 9 including Nigeria voting against, and 4 including Ghana and South Africa abstaining.

The current Independent Expert on SOGI, Victor Madrihgal-Borloz, who took over from the first mandate holder Vitit Mutarbhon in 2017, has launched the latest report calling for a global ban on so-called 'conversion therapy' that aims at converting alleged LGBT persons into heterosexuals.[109] The second report of the Independent Expert on SOGI submitted to the HR Council in 2017,[110] highlighted the contributing effect of sodomy laws to violence and violations of sexual minority rights and called for the decriminalisation of these laws. The IE on SOGI noted, 'laws and policies that criminalise consensual same-sex relations are part of the background environment that leads to violence and discrimination'.[111] Based on this observation, the report called for the decriminalisation of sodomy laws to reduce violence and discrimination: 'There is thus a need to move towards decriminalisation in respect of these laws which regrettably help to fuel the violence and discrimination'.[112]

Even though the mandate of the Independent Expert on SOGI includes visiting UN member countries to dialogue with government officials and other stakeholders on implementing existing human rights norms to sexual minority rights, a visit to Ghana has not happened yet. I envisage that the Independent Expert on SOGI will make similar observations and recommendations as noted above by the SR on the right to health and the SR on poverty. The special procedure mechanism mandate holders echo a central theme that Ghana must decriminalise the sodomy offence of 'unnatural carnal knowledge' in order to protect the rights of every person. Other treaty monitoring bodies such as the HR Committee has also made similar recommendations to Ghana.

### 5.2.2. The ICCPR and the Human Rights Committee

The ICCPR is one of the nine core international human rights treaties in the UN human rights system. I discuss the ICCPR in this section because the HR Committee which monitors the observance of this treaty is the first to decide a matter relating to non-discrimination based on

[109] Report on conversion therapy by the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity A/HRC/44/53 at forty fourth session of Human Rights Council 20 June 2020 available at https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/ReportOnConversiontherapy.aspx accessed on 6 December 2020.

[110] Report by the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity A/HRC/35/36 19 April 2017 Human Rights Council 6-23 June 2017 available at https://undocs.org/A/HRC/35/36 accessed 6 December 2020.

[111] As above para 52.

[112] As above para 54.

sexual orientation and has a body of jurisprudence that affirm the protection of sexual minorities.[113] In addition, the Human Rights Committee (HR Committee), reviews state reports to assess their compliance with the ICCPR and has also issued General Comments that have affirmed protection of non-discrimination on the grounds of sex, including sexual orientation. The HR Committee is also a venue for Ghanaians to seek redress for human rights violations relating to sexual orientation. Based on the comprehensive jurisdiction of the HR Committee, there is a possibility that such a complaint against Ghana could be successful. Ghana has engaged with the HR Committee recently, providing explanations for the (de)-criminalisation of consensual same-sex conduct.

### a *State reporting, shadow reports and Concluding Observations under the ICCPR*

After nearly a decade and a half of ratifying the ICCPR, Ghana submitted its combined first and initial report to the HR Committee for consideration in 2014.[114] The report showed that it had primarily complied with its commitment to protecting the rights of every person in Ghana under the Convention. However, shadow reports submitted by various civil society organisations revealed systemic violations of fundamental human rights of women, children, prisoners, persons with albinism, and members of the lesbian, gay and bisexual, transgender (LGBT) community in Ghana.

The report submitted by CSOs on violations against different persons and group of persons, paint a picture of systemic violence and violations of the rights of persons perceived to be homosexuals.[115] The reports listed a litany of violent conduct meted out against the LGBT community by individuals, groups and even state officials.[116] These violations include threats, assaults, battery, and other violent behaviours, including the pouring of human excreta on persons

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[113] *Toonen v Australia* Communication no 488/1992 CCPR/C/46/D/488/1992 31 March 1994.

[114] Human Rights Committee 'Consideration of reports submitted by States parties under article 40 of the Covenant Initial reports of States parties due in 2001 Ghana (Date received: 13 October 2014)' CCPR/C/GHA/1 available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/014/27/PDF/G1501427.pdf?OpenElement accessed 8 July 2020.

[115] Human Rights Violations Against Lesbian, Gay, Bisexual, and Transgender (LGBT) People in Ghana: A Shadow Report Submitted for consideration at the 115th Session of the Human Rights Committee October 2015, Geneva Submitted by Solace Brothers Foundation, The Initiative for Equal Rights, Center for International Human Rights of Northwestern University School of Law, Heartland Alliance for Human Needs & Human Rights Global Initiative for Sexuality and Human Rights (shadow report) August 2015 available at https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/GHA/INT_CCPR_ICO_GHA_21415_E.pdf accessed 8 July 2020; See also a similar report submitted by the same group at the 117th Session of the Human Rights Committee Geneva, June-July 2016 available at https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/GHA/INT_CCPR_CSS_GHA_24149_E.pdf accessed 8 July 2020 .

[116] As above.

perceived to belong to the LGBT community.[117] Vigilante groups who advertised their ambitions to attack homosexual people on social media committed some of these violations,[118] but the State is yet to arrest and prosecute such perpetrators.

The joint report further noted the nurturing of a homophobic climate over the years in Ghana, and that it was common to hear statements denouncing sexual minorities in very pejorative terms in the media, both in print and digital. The report noted:[119]

> Homophobia is very common in Ghana, and transphobia would likely be as well, but for the fact that the social climate is so bad that transgender individuals keep their gender identity hidden. LGBT individuals and those supporting LGBT human rights are targets of homophobia. Disdain and resentment against the LGBT community have grown in recent years and often lead to violence.

Faced with overwhelming evidence of systemic and systematic violence against persons based on their real or imputed sexual orientation, by state and non-state actors, the HR Committee confronted Ghana with the issue.[120] On the list of issues addressed to the state party, the HR Committee requested Ghana, during the examination of the report, to clarify the position of section 104 of the Criminal Offences Act and indicate whether it criminalised consensual same-sex conduct between adults:[121]

> Please comment on reports of discrimination, stigmatisation, hate speech and homophobic discourse, including by State officials, religious actors and the media, as well as violence against lesbian, gay, bisexual and transgender individuals and activists, and report on the measures taken to ensure the protection of victims and address impunity for such acts.[122]

Ghana's response to the issues was four-fold. Ghana admitted that same-sex sexual activity was illegal and punishable,[123] yet the Constitution prohibited all forms of discrimination against all persons, including LGBT persons.[124] Ghana also showed that it attached importance to the rights of

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[117] As above.
[118] As above.
[119] As above 7.
[120] Human Rights Committee 'List of issues in relation to the initial report of Ghana' adopted by the Committee at its 115th session (19 October-6 November 2015).
[121] As above para 4.
[122] As above.
[123] Human Rights Committee 117th Session 'summary record of the 3274th meeting held at the Palais Wilson, Geneva, on Friday, 24 June 2016 at 10 am. CCPR/C/SR.3274 (29 June 2016) submission by Ms Baffoe Bonnie para 37.
[124] As above submission by Dr. Ayine leader of delegation para 35.

sexual minorities and had made efforts to protect the rights of sexual minorities through an online reporting system that received complaints of discrimination and violence against LGBT persons.[125] Finally, Ghana noted that its attitude towards LGBT persons was gradually changing from rejection to acceptance and recognition of the rights of LGBT persons. Mr Apreku, who made this statement, noted that this positive attitude towards LGBT rights is reflected at the HRC where Ghana does not oppose a resolution on LGBT rights like the other African States, but abstain from voting.[126] The representative noted that 'Ghana had no fundamental objection to upholding LGBT rights'.[127]

Ghana did not deny the allegations presented against it for violating sexual minority rights but emphasised the prohibition of discrimination against LGBT persons in the national Constitution, and the response of independent agencies of State to address these violations. The submission of the then-Deputy Attorney General and leader of Ghana's delegation, Dr Ayine, means that constitutional rights of non-discrimination trump the ordinary legislation that criminalises same-sex sexual conduct. Therefore, because section 104 which criminalises 'unnatural carnal knowledge' is inconsistent with article 17 of the Constitution that prohibits discrimination, the Supreme Court of Ghana may declare section 104(1)(b), void,[128] and decriminalise sodomy laws.

The HR Committee was further concerned that Ghana admitted to criminalising 'unnatural carnal knowledge, under section 104 of the Criminal Offences Act, 1960' as a misdemeanour and recommended that it should amend this section to decriminalise same-sex sexual activity between consenting adults.[129] The HRC has bemoaned the criminalisation of consensual same-sex sexual relations and encouraged other African countries to decriminalise such laws. For instance, in the recent Concluding Observations on Nigeria's second periodic report in 2019,[130] the HR Committee observed that Nigeria should 'decriminalise consensual same-sex relationships between consenting adults and ensure that arrest, prosecution and punishment based on actual or

[125] As above Mr Quayson, Deputy Commissioner of Commission on Human Rights and Administrative Justice of Ghana para 38.
[126] As above submission by Mr Apreku para 39.
[127] As above.
[128] Constitution of Ghana art 1(2) notes that 'This Constitution shall be the Supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void'.
[129] Human Rights Committee 'Concluding Observations on the initial reports of Ghana' CCPR/C/GHA/CO/1 paras 43 & 44.
[130] Art 40 of the ICCPR requires states to submit periodic reports to the Human Rights Committee. Rule 71 rules of procedure of the Human Rights Committee, mandates the Committee to examine a state's compliance with the ICCPR in the absence of a state report. This concluding observation was adopted in the absence of a state report by Nigeria which had persistently failed to submit its state report, which was due on 28 October 1999, despite constant reminders.

perceived sexual orientation and gender identity or advocacy of the rights of LGBT persons are prohibited'.[131] The Committee also added that Nigeria should 'consider repealing the Same-Sex Marriage (Prohibition) Act and reviewing all other relevant legislation'.[132] The HR Committee in 2016 urged Namibia to 'adopt legislation explicitly prohibiting discrimination based on sexual orientation, including in the Labour Act … and adopt hate crime legislation, punishing homophobic and transphobic violence and vigorously enforce it'.[133] Similarly, when the HR Committee considered the initial report of Botswana in 2008, it observed that the state party 'criminalises same-sex sexual activities between consenting adults'[134] and advised Botswana to 'repeal these provisions of its criminal law'.[135]

Treaty monitoring bodies direct Concluding Observations to government delegations to enable them to take measures to decriminalise sodomy laws, but the judiciary may also take note, adopt these recommendations, and offer a route for decriminalisation. Even though the HR Committee encouraged the government of Botswana to decriminalise sodomy law, the High Court in Gaborone, made similar arguments as the HR Committee, that criminalisation of consensual same-sex sexual relations between adults in private violated provisions of the ICCPR, such as the right to non-discrimination, equality and dignity.

As reassuring as the political statements of the Ghanaian delegation were, that it aimed to protect the rights of LGBT persons, a court of law needs to make a judicial pronouncement on non-discrimination on the grounds of sexual orientation to give it binding effect.

As discussed in chapter 3 of this thesis, the issue of LGBT rights is a hotly contested political issue that often dominates election discussions, and all major political parties in Ghana are quick to denounce it. While the leaders of government and political parties present an optimistic outlook internationally, they do not display the same energy domestically towards protecting LGBT rights for fear of being criticised as supporting homosexuality and losing political power.

The political challenges notwithstanding, the cordial engagement between the Committee members and Ghana is significant. Respectful, informative, and persuasive conversations around sensitive treaty obligations and the need for the State to address this as part of international human

[131] Concluding Observations on Nigeria in the absence of its second periodic report CCPR/C/NGA/CO/2 29 August 2019 para 19.
[132] As above.
[133] Concluding Observations on Namibia CCPR/C/NAM/CO/2 22 April 2016 para 10(b).
[134] Concluding observations on the initial report of Botswana CCPR/C/BWA/CO/1 24 April 2008 para 22.
[135] As above.

rights law is helpful. The tone of Ghana, as recounted above, was reassuring despite the difficulties the country expressed.[136] It might not be easy for Ghana to give a confident assurance that it is going to decriminalise sodomy laws because of the charged political atmosphere relating to this subject. However, if the government delegations to these UN bodies willingly accept to confront the issue and address violence and discrimination, it is a positive signal of the government's commitment, the potential political backlash notwithstanding. This positive response of Ghana appears to be the tone that permeates its recent engagement with UN bodies such as the HRC's UPR third cycle in 2017.

### *General comments of the Human Rights Committee on sexual orientation*

General comments by the HR Committee and other treaty monitoring bodies clarify treaty provisions and the obligations assumed by states under them. I discuss two General Comments of the HR Committee on sexual orientation, with specific relevance to sodomy law in Ghana. In 2014 the HR Committee issued general comment 35,[137] clarifying the scope and content of article 9 of the ICCPR that guaranteed the right to liberty and security of person.[138] Article 9 states in the first line that 'everyone has the right to liberty and security of person'. The Committee clarified that 'everyone' 'includes, among others, girls and boys, soldiers, persons with disabilities, lesbian, gay, bisexual and transgender persons…'.[139] The general comment also clarified the obligation imposed on States parties when the right is impaired or under threat. It requires States parties to provide remedies to violence against persons based on their sexual orientation.[140]

In an earlier General Comment issued in 1989, the HR Committee clarified the meaning of the non-discrimination provision of the ICCPR.[141] Articles 2 and 26 of the ICCPR both contain non-discrimination provisions. Article 2 specifically prohibits discrimination of many kinds, including on the grounds of sex, birth, or another status.[142] Article 26 protects equality before the law and equal protection of the law without discrimination.[143] In clarifying these two non-discrimination

[136] Human Rights Committee 117th Session (n 123 above) especially paras 38-39.
[137] CCPR general comment no 35 art 9 (liberty and security of person) 16 December 2014. General comment no 35 of 2014 replaced general comment no 8 which was adopted in 1982.
[138] ICCPR art 9.
[139] General comment no 35 para 3.
[140] As above para 9.
[141] General comment no 18 non-discrimination, adopted at the 37th session of the Human Rights Committee on 10 November 1989.
[142] ICCPR art 2(1).
[143] As above art 26.

provisions, the HR Committee noted that unlike article 2, article 26, which protects equal protection before the law is a substantive right and not limited to the rights in the Covenant.

Therefore, when States parties adopt legislation, the content of that legislation must not be discriminatory. The significance of this general comment to section 104(1)(b) of the Criminal Offences Act of Ghana that criminalises unnatural carnal knowledge, is that the sodomy law falls short of the requirements of a non-discriminatory law. Ghana's sodomy law targets sex between homosexuals and not heterosexuals. Also, even though one could stretch the law to cover same-sex sexual activity between two females, the law targets male same-sex sexual activity. The prohibition of discrimination under articles 2 and 26 of the ICCPR is further reinforced through the decisions of the HR Committee, which I discuss below.

## Decisions of the Human Rights Committee affirming non-discrimination on the grounds of sexual orientation

The HR Committee is the first global human rights treaty body to determine that international human rights law protects sexual minority rights. In *Toonen v Australia,*[144] the Committee held that the prohibition of discrimination in the ICCPR includes not only on the grounds of sex but also sexual orientation. In *Toonen*, the victim of the alleged violation, Mr Nicholas Toonen, alleged that the sodomy law that criminalised consensual same-sex sexual conduct between adult men in Tasmania, a province of Australia, offended his right to privacy. Mr Toonen argued that although rarely applied, the mere presence of the law on the criminal books of Tasmania put him in constant fear of his privacy being invaded and arrested for what he did in his bedroom.[145] In response to the claim by Mr Toonen of violation of his rights by the maintenance of the sodomy law, Australia conceded that the sodomy laws of Tasmania interfered with the right to privacy of Mr Toonen and that the law could not be justified on the grounds of health and morality.[146]

Considering that the communication was admissible, the HR Committee held that the sodomy law in Tasmania was an affront to the right to privacy of the complainant. The Committee noted that the prohibition of discrimination on the grounds of 'sex' includes 'sexual orientation'. Critics argue that the *Toonen* decision deviates from the text of the treaty, but a careful analysis of the decision shows it was the right decision. Article 2, which prohibits discrimination on many grounds including 'sex', also adds the omnibus clause 'and other status'. In its General Comment relating to

[144] Communication no 488/1992 CCPR/C/46/D/488/1992 31 March 1994.
[145] As above paras 2.1 to 2.7.
[146] As above para 6.1.

the discrimination provisions in the ICCPR, the HR Committee had earlier noted, before the decision in *Toonen*, that the prohibition of discrimination in the treaty which covered religion, sex, race, ethnic origin, among others is open-ended and could admit other grounds of non-discrimination.

Therefore, the decision in *Toonen* was just a matter of when it would happen and not if it would happen. The decision in *Toonen* therefore affirmed the fact that the criminalisation of adult consensual sex between persons of the same sex offended the ICCPR, particularly the right to privacy. As a remedy, the Committee requested Australia to decriminalise the sodomy law in Tasmania, which it has subsequently done. The HR Committee has not deviated from this decision, and in subsequent cases has affirmed its position in the *Toonen*, pointing out that State parties to the ICCPR including Ghana who keep sodomy laws on their statutes are potentially violating their international law obligations under the ICCPR.

Since the decision in *Toonen*, the Committee has decided other communications that affirm the protection of sexual minority rights in other spheres of life. In *Young v Australia,*[147] the Committee dealt with an alleged violation of article 26 of the ICCPR. Mr Young contended that the definition of 'couple' in the Veteran's Entitlement Act and 'partner' in section 23 B of the Marriage Act, 1961, that sought to exclude persons in same-sex relationships from accessing the pension benefits of their deceased partners, violated article 26 of the ICCPR. Relying on the decision in *Toonen* that proscribed discrimination based on sexual orientation, Mr Young argued that Australia's refusal to grant him a pension on account of his sexuality violated article 26 of the ICCPR that protected the right to equal treatment before the law.[148] Australia contested the admissibility and the merits of the case, arguing mainly that the facts did not entitle a homosexual or heterosexual person to the pension benefits because Mr Young's alleged partner did not die from an act of war. It also added that Mr Young had not provided sufficient evidence that he was the partner of the deceased.

In affirming that treating similarly situated individuals differently violated the article 26 duty not to discriminate based on sexual orientation, the Committee noted that Australia had discriminated against Mr Young and denied him a pension only because he was in a same-sex relationship with his deceased partner. The Committee observed that the only reason Australia denied Mr Young a pension was that he was a homosexual, since a person in a heterosexual relationship would have benefited from a pension of the heterosexual partner.

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[147] Communication no 941/2000 CCPR/C/78/941/2000 18 September 2003.
[148] As above para 3.1.

In another case, similar to *Young*, also about the right to receive pension benefits of a same-sex deceased partner, the Committee held that Colombia had violated the non-discrimination provision of the ICCPR. The Committee found that Colombia discriminated against the victim of the communication because of his sexual orientation to deny him pension pensions in violation of article 26 of the ICCPR.[149] The Committee observed that Colombia could not show that a 'distinction between same-sex partners, who are not entitled to pension benefits, and unmarried heterosexual partners, who are so entitled, is reasonable and objective'.[150] It added that Colombia had 'violated article 26 of the Covenant by denying the author's right to his life partner's pension on the basis of his sexual orientation'.[151]

The HR Committee has stuck to its jurisprudence in *Toonen* since 1992, affirming the principle that it does not permit discrimination based on sexual orientation under the ICCPR. In the recent cases of *G v Australia,*[152] *C v Australia,*[153] and *Kirill Nepomnyashchiy v Russian Federation*,[154] it affirmed that the ICCPR prohibits discrimination on the grounds of sexual orientation. In the *G v Australia,* for instance, the author argued that Australia had violated her rights under the ICCPR in articles 14(1), 2(1) and 26 because Australian law allowed access to divorce in the courts for heterosexual marriages while denying a similar opportunity for same-sex marriages concluded abroad.[155] A majority of the Committee members upheld the claim of the victim, observing that Australia could not explain satisfactorily why it made exceptions for some heterosexual marriages to access divorce in Australian courts while it denied the same opportunity to same-sex marriages. It, therefore, held that Australia had violated the article 26 treaty rights of the victim based on sexual orientation.

In an individual opinion, dissenting from the Committee's decision, Yadh Ben Achour, an African from Tunisia, who is a member of the Committee, raised issues with the conclusion reached by the Committee that Australia had violated article 26 of the ICCPR based on sexual orientation. In an opinion that resonates with arguments of persons who disagree that the ICCPR prohibits discrimination based on sexual orientation, Mr Achour noted that denying access to Australian

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[149] *X v Colombia* communication no 1361/2005 CCPR/C/89/D/1361/2005 14 May 2007.
[150] As above para 7.2.
[151] As above.
[152] *G v Australia* Communication no 2172/2012 CCPR/C/119/D/2172/2012 28 June 2017.
[153] *C v Australia* Communication no 2216/2012 CCPR/C/119/D/2216/2012 1 November 2017.
[154] *Kirill Nepomnyashchiy v Russian Federation* Communication no 2318/2013CCPR/C/123/D/2318/2013 23 August 2018.
[155] *G v Australia* (n 152 above) para 3.1.

courts for persons in same-sex marriages to get a divorce, did not amount to discrimination and such discrimination if found, is reasonable.[156] Mr Achour contends that homosexuals, unlike heterosexuals, do not meet the criteria for marriage in article 23 of the ICCPR because marriage is restricted to a man and a woman. Besides, Australian law did not recognise same-sex marriages. That being the case, he argued that access to the courts for divorce is the preserve of heterosexuals. With due respect, the views canvassed by Mr Achour, though plausible, ignore the point of the victim's claim. The jurisprudence of the Committee is clear that the ICCPR prohibits discrimination based on sexual orientation. The victim had contracted a same-sex marriage abroad in Canada. Heterosexuals, including those who were in a polygamous marriage or even those who married before 18 years which is prohibited under Australian laws, may get a divorce. The issue therefore is, is the author of the communication placed in a similar situation as others who have contracted marriages abroad, and if there is an exception in her case, whether that exception is for a reasonable purpose. Since the treatment of the victim differed from that of heterosexuals and Australia could not advance any reasonable arguments for treating the author differently, the Committee was right that there is no reasonable purpose for the discrimination; it therefore violated article 26.

The jurisprudence of the Committee makes a communication concerning Ghana about its sodomy law that criminalises same-sex sexual relationships between consenting adults, a violation of article 26. I analyse this below.

## The Human Rights Committee as an avenue for litigating decriminalisation of consensual same-sex relationships in Ghana

The potential for a Communication against Ghana relating to the criminalisation of consensual same-sex sexual conduct at the HR Committee is possible and remains an option for the decriminalisation of the offence of 'unnatural carnal knowledge'. Ghana has ratified the ICCPR[157] and the Optional Protocol to the ICCPR.[158] Under the Optional Protocol, Ghana has accepted the jurisdiction of the HR Committee to receive and determine cases relating to the ICCPR.[159]

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[156] As above para 1 Annex 1.
[157] ICCPR (n 3 above). Ghana acceded to the Convention on 7 September 2000.
[158] Optional Protocol to the ICCPR entered into force on 23 March 1976. Ghana acceded to the Convention on 7 September 2000.
[159] Article 1 Optional Protocol to ICCPR.

On ratification of the ICCPR on 7 September 2000 Ghana entered a reservation, noting that the actions and interpretations of the ICCPR from that date onwards would only bound it and not retrospectively.[160] This suggests that the decision in *Toonen*, decided in 1992, which found for the first time that laws that criminalise consensual same-sex sexual conduct between persons of the same sex is discriminatory and offends article 26 of the ICCPR is not binding on Ghana. On the face of it, a claim against Ghana that section 104 of the Criminal Offences Act offends non-discrimination under the ICCPR may not rely on *Toonen* as a precedent. However, as argued in the preceding section above, the jurisprudence of the ICCPR since 1992 has consistently affirmed the position that the ICCPR prohibits discrimination based on sexual orientation unless such discrimination is for a reasonable purpose. The effect of the reservation will therefore be minimised or largely excluded.

Ghana's recent position at international fora relating to sexual minority rights is that it supports persons who are born gay and that its Constitution protects the rights of every person.[161] It may therefore be contradictory for Ghana to argue that the criminal law that punishes acts of 'unnatural carnal knowledge', is reasonable and serves a legitimate purpose. Besides, if Ghana criminalises same-sex sexual conduct on cultural and religious grounds, as politicians have asserted domestically over the years, such a defence is unacceptable by the HR Committee. The ICCPR guarantees the rights of all persons regardless of their sexual orientation, and the HR Committee has maintained that religious and cultural arguments cannot be an excuse to violate fundamental human rights.

Based on the above, a victim who suffers discrimination on account of his sexual orientation or who challenges the sodomy law in Ghana and exhausts domestic remedies can bring a claim against Ghana at the HR Committee. If the claim is not pending before any international court, and the victim has exhausted domestic remedies, there is a possibility that the HR Committee may find Ghana in breach of its treaty obligations and as a form remedy,[162] request Ghana to decriminalise section 104 of the Criminal Offences Act.

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[160] ICCPR (n 3 above) Ghana entered a reservation stating that it is bound by the 'decisions, acts, omissions, developments or events' after ratification in 2000.
[161] Human Rights Committee 117th Session (n 123 above) especially paras 38-39.
[162] Article 5 Optional Protocol to the ICCPR.

## 5.3 Regional level human rights law relevant to the decriminalisation of same-sex prohibitions in Ghana

Despite the lack of specific mention of sexual orientation as a protected ground in the African Charter on Human and Peoples' rights (African Charter), a purposive reading of the Charter suggests it covers every person's rights regardless of their sexual orientation. Article 2 of the African Charter is open-ended, showing that there is an unnamed category of persons entitled to enjoy the rights under the African Charter.[163] Prohibition of discrimination on grounds including 'birth or other status' keeps the list of potential beneficiaries of rights under the African Charter beyond those listed. Recognition of indigenous people as entitled to the African Charter's rights[164] is one example of the open-endedness of the African Charter, and there are no reason interpreters of the Charter cannot add sexual minorities to the list.

In their seminal paper in 2007 on the African human rights system and its relationship with the prohibition of discrimination relating to sexual orientation, Murray and Viljoen argue convincingly that despite the omission of this right in the African Charter, the Charter protects the rights of everyone.[165] They rightly contend that the African Charter protects everyone, including sexual minorities.[166] The crux of their argument is that privacy rights–deriving from the right to integrity and dignity- equality, and non-discrimination on the grounds of sex includes 'sexual orientation', which applies to all beneficiaries of the African Charter, including sexual minorities.[167] By analysing the limitation clause that attempts to limit the enjoyment of rights in the Charter, the authors conclude that there is no basis to deny Charter rights merely because of sexual orientation.[168] The authors also contend that the tendency to limit the enjoyment of fundamental human rights based on majoritarian morality[169] and health grounds, such as the spread of HIV, are not well-founded.[170]

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[163] Article 2 of the African Charter prohibits 'distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any opinion, national and social origin, fortune, birth or other status'.
[164] F Viljoen *International human rights law in Africa* (2012) 2ed 232.
[165] R Murray & F Viljoen 'Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 86.
[166] As above.
[167] As above 89-92.
[168] As above.
[169] As above 95.
[170] As above 96-99.

Even though the African Charter arguably protects every person's rights, including sexual minorities, the African Commission has not yet determined the merits of a case based on sexual minority rights. The non-utilisation of litigation as a route to affirming sexual minority rights at the African Commission might be because of a cautious strategy to utilise other mechanisms in the African human rights system to prepare the ground for a positive and enduring outcome of direct litigation. Despite the lack of binding case law on sexual orientation and gender identity, the African human rights system has developed a body of soft law standards under the African Commission's auspices that protect sexual minority rights in Africa. Through the consideration of communications, state reports, adoption of resolutions and activities of special mechanisms such as Special Rapporteurs, Working Groups and Committees, the African human rights system has showed that every person, including sexual minorities, enjoy Charter rights.

Therefore, the central issue that I analyse in this section is the extent to which victims of human rights violation based on sexual orientation could use the mechanisms available in the African regional human rights system to vindicate their rights, with particular reference to Ghana. The section focuses on the African Commission as the main human rights monitoring body in Africa and how its activities, such as resolutions, decisions, Concluding Observations, and the grant of observer status, raise awareness of sexual minority rights and the need to protect these rights in Africa. Ghana has accepted the African Court's jurisdiction to decide claims against it. The section, therefore, considers the likely outcome of a case brought before the African Court against Ghana for failing to protect the rights of sexual minorities. First, I analyse the African Commission's activities that have implications for sexual minority rights.

### 5.3.1 African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights (African Commission) is a creature of the African Charter, responsible for promoting and protecting fundamental human rights in Africa.[171] As a human right treaty monitoring body, it ensures that African states comply with their human rights obligations under the African Charter. The African Commission has two broad mandates the protective and the promotional.[172] Through these mandates, the African Commission monitors state compliance with the African Charter. The African Commission's protective mandate includes the receipt and determination of individual and inter-state complaints,[173] which I discuss first. The

[171] African Charter art 30.
[172] As above arts 55&56.
[173] As above. See also Viljoen (n 164 above) 300.

promotional mandate comprises state reporting, resolutions and other soft law standards,[174] which I discuss next. Through the exercise of the protective and promotional mandate, the African Commission has complained about the treatment of sexual minorities in Africa and urged States to protect all persons' rights, including sexual minorities.

### The protective mandate–Communications

The African Charter empowers the African Commission to receive and investigate complaints relating to violations of the African Charter's rights.[175] Even though the African Commission is yet to determine a case about sexual minority rights, it has sometimes expressed in passing, in matters unrelated to sexual minority rights, that the African Charter protects every person, including sexual minorities. For instance, in *Zimbabwe Human Rights NGO Forum v Zimbabwe,*[176] one issue for determination was 'whether an amnesty for perpetrators of human rights violations is in violation of the Charter and whether the state is responsible for the acts of non-state actors'.[177]

Commenting on the legal effect of articles 2 and 3 of the African Charter, the Commission observed in passing that 'together with equality before the law and equal protection of the law, the principle of non-discrimination provided under article 2 of the Charter provides the foundation for the enjoyment of all human rights'.[178] The Commission observed that the combined reading and effect of non-discrimination and equal protection provisions in the Charter is the basis for the enjoyment of all human rights. This presupposes that the African Charter protects all persons regardless of their sexual orientation. Even though the issues in the *Zimbabwe Human Rights NGO Forum* case did not relate to sexual orientation, the Commission emphatically noted that the aim of articles 2 and 3 of the Charter is to provide equality of treatment for individuals', including on the grounds of 'age or sexual orientation'.[179] While this statement by the Commission is not an interpretation of the Charter on the merits of a case, it has persuasive value. It affirms that the Charter does not discriminate against persons based on their sexual orientation or gender identity.

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[174] As above art 45. Viljoen as above 349.
[175] African Charter arts 55&56. For an in-depth discussion on the procedure for submitting both individual and inter-state communications see Viljoen, as above 300–348.
[176] (2006) AHRLR 128 (ACHPR 2006), at para 169.
[177] As above, headnote. Para 134 frames the issue as 'whether Clemency Order 1 of 2000 resulted to a violation of the respondent state's obligations under article 1 of the Charter'.
[178] As above para 169.
[179] As above.

The Commission also hinted in *Purohit and Another v The Gambia*[180] that the African Charter protects individuals' rights, including sexual minorities. In *Purohit*, the complainants who were mental health advocates alleged that the mental health law in the Gambia, the Lunatics Detention Act, was outdated and used to violate mental health patients' rights.[181] In upholding the claim of the complainants, the Commission emphasised that article 2, which prohibits discrimination in all guises, is fundamental to the enjoyment of every right in the Charter and therefore non-derogable.[182] The Commission hinted that because the Charter prohibits discrimination in 'all guises' every individual, regardless of their sexual orientation, enjoys protection under the Charter.

Also, in *Bissangou v Republic of Congo,*[183] the African Commission noted that the grounds of the prohibition of discrimination in article 2 of the Charter remains open-ended and could admit other grounds proven to exist in international law.[184] The HR Committee has held in *Toonen*[185] that the prohibition of discrimination on the grounds of sex in the ICCPR includes sexual orientation. Therefore, the prohibition of discrimination on grounds of sexual orientation exists in international law. The African Commission appears to suggest in *Bissangou* that the African Charter approves of that decision.

While the cases cited above supports the claim that the African Charter prohibits discrimination on the grounds of sexual orientation, the Commission made them *obiter dicta* and not as definitive pronouncements on cases before it.

### The promotional mandate–State reporting

The African Commission examines State reports submitted by State parties to the African Charter every two years.[186] States submit periodic reports for examination by the African Commission 'on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter'.[187] Even though State reporting guidelines under the African Charter, do not explicitly require states to report on the issues relating to LGBT

[180] (2003) AHRLR 96 (ACHPR 2003) para 49.
[181] As above paras 3-8.
[182] As above para 49.
[183] (2006) AHRLR 80 (ACHPR 2006).
[184] As above para 69.
[185] Communication no 488/1992 CCPR/C/46/D/488/1992 31 March 1994.
[186] African Charter art 62.
[187] As above.

rights,[188] some Commissioners implicitly recognise that the African Charter protects sexual minority rights.[189] Therefore, with the benefit of information given to the Commission by NGOs, members of the Commission have asked States to comment on issues relating to sexual minority rights in examining State reports.[190]

As early as 2001, the African Commission asked the Namibian delegation about the rights of LGBT persons in that country.[191] Commissioner Pityana asked the Namibian delegation 'about the treatment of gay and lesbian persons in that country'.[192] Cameroon is one country whose human rights record has come under the spotlight concerning sexual minorities. Concerned about the treatment of gays and lesbians in Cameroon, the African Commission in 2006 requested the Cameroonian delegation to comment on trials of alleged gays, forced anal examinations and intolerance against LGBT persons in Cameroon.[193] Members of the African Commission complained about the apparent human rights violations of sexual minorities.[194] The Commission utilised its power to examine state compliance with the contents of the African Charter and did so after CSOs raised concerns about violence and violations of the rights of sexual minorities in Cameroon. At paragraph 14 of the concluding observations, the Commission noted as a matter of concern that 'there is an upsurge of intolerance against sexual minorities'.

Similarly, Cameroon's harsh treatment of gays and lesbians came under the spotlight in 2014 when the Commission considered Cameroon's third periodic report.[195] The Commission complained about violations of human rights defenders' rights, particularly those working on sexual orientation issues.[196] The Commission further noted with concern that 'discrimination, stigma and violation of the right to life and physical and mental integrity of individuals based on their sexual orientation'

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[188] Guidelines for national periodic reports under the African Charter (1998) as simplified in 1998. States could arguably submit a report on LGBT rights under paragraphs 4(a) on civil and political rights and 11 which requires 'information relevant to the implementation and promotion of the Charter'.
[189] '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 System and United Nations' (2016) 36.
[190] As above.
[191] As above.
[192] As above.
[193] As above 36–37.
[194] Concluding Observations and Recommendations on the 1stPeriodic Report of the Republic Cameroon Thirty-Ninth Ordinary Session 11 – 25 May 2005, Banjul, The Gambia.
[195] Concluding Observations on the 3rd Periodic Report of the Republic of Cameroon adopted at the 15th Extraordinary Session 7–14 March 2014 Banjul, The Gambia.
[196] As above para 84.

continue to exist in Cameroon.[197] Based on the observations above, the African Commission recommended that Cameroon should

> take appropriate measures to ensure the safety and physical integrity of all persons irrespective of their sexual orientation and maintain an atmosphere of tolerance towards sexual minorities in the country.[198]

Mauritius and Uganda have also come under the spotlight when reporting to the African Commission on their compliance with their obligations in the African Charter for good reasons. With Mauritius,[199] the Commission commended it for adopting legislation that attempted to offer equal protection to all citizens regardless of their sexual orientation.[200] Mauritius adopted the Equal Opportunities Act on 1 January 2012, which prohibited discrimination on many grounds, including sexual orientation in employment. The African Commission, therefore, expressed some happiness at the adoption of the Act by Mauritius.[201] While the African Commission commended Mauritius for adopting legislation that preserved the rights of sexual minorities, it also commended Uganda for 'investigating and prosecuting the perpetrator of the murder of Mr David Kato, the gay rights activist'.[202]

The African Commission is yet to make any observation regarding the treatment of sexual minorities in Ghana. After the first two reports submitted in 1993 and 2001, Ghana has consistently failed to submit its periodic reports to the African Commission for examination every two years as required by the African Charter.[203] Ghana ratified the African Charter on 24 January 1989 and submitted its initial report to the African Commission on 10 December 1993.[204] Ghana submitted the second Periodic Report covering the period 1993 to 2000 on 7 May 2001.[205] Since 2001 it has failed to submit a report on how it is complying with its human rights obligations under the African

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[197] As above para 85.
[198] As above para xxxvi.
[199] Concluding Observations and Recommendations on 6th to 8th combined report of the Republic of Mauritius in the implementation of the African Charter on Human and Peoples' Rights adopted at the 60th Ordinary Session of the African Commission held from 08 to 22 May 2017, in Niamey, Republic of Niger.
[200] As above para 15.
[201] As above.
[202] Concluding Observations of the African commission on Human and Peoples' Rights on the 4th Periodic report of the Republic of Uganda presented at the 49th Ordinary Session of the African Commission on Human and Peoples' Rights held in Banjul, the Gambia from 28 April to 12 May 2011 para 11(xiii).
[203] African Charter art 62.
[204] Ghana: Initial Report submitted to the African Commission on Human and Peoples' Rights on 10 December 1993 available at https://www.achpr.org/states/statereport?id=10 accessed 23 February 2021.
[205] Ghana: 2nd Periodic Report, submitted to the African Commission on Human and Peoples' Rights on 7 May 2001 available at https://www.achpr.org/states/statereport?id=29 accessed 23 February 2021.

Charter. When Ghana submitted its last report to the Commission in 2001, sexual minority issues were not in vogue. It was until about the late 2000s that arguments about sexual minority rights as an affront to the culture and moral fibre of the Ghanaian society emerged.[206]

Since Ghana submitted its last report to the African Commission in 2001, significant developments have occurred in Ghana relating to LGBT rights in apparent violation of Ghana's commitment to take legislative and other measures to protect all persons' rights under the African Charter.[207] In 2018, Human Rights Watch released a report on Ghana's treatment of sexual minorities.[208] The report revealed systemic violations of the rights of sexual minorities by both state and non-state actors. State officials were complicit in the violations of sexual minorities or had started and supervised the brutalisation of alleged sexual minorities.[209] Almost three years after they released the report, a disturbing trend continues to develop. On 12 February 2021, an organisation called the national coalition for proper human sexual rights and family values (Coalition for sexuality and human values), that campaign against LGBT rights, publicly identified the location of a house allegedly used for LGBT meetings and called for the closure of that office.[210] A week after the call for the closure of the LGBT office, the minister-designate for information, Mr Oppong Nkrumah, and Ms Sarah Adwoa Safo, minister-designate of gender, children and social protection, urged Parliament to ban LGBT organisations and criminalise LGBT advocacy in Ghana.[211] Calls by NGOs and ministers designate who are also members of the Parliament of Ghana are concerning because the call urges Ghana to abdicate its human rights obligations under the African Charter. It is even extremely worrying when the calls come from a minister-designate for a sensitive ministry as the gender, children and social protection, which has a responsibility to put programmes and policies in place to protect the poor and vulnerable in society, including sexual minorities.[212]

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[206] Essien & Aderinto (n 71 above) 121; Baisley (n 71 above) 383.
[207] African Charter art 62.
[208] Human Rights Watch 'No choice but to deny who I am' (n 82 above).
[209] As above.
[210] 'Coalition calls for closure of gay, lesbian office' *Daily Graphic* 20 February 2021 1.
[211] 'Legislation of homosexuality: Pass anti-advocacy law –Oppong Nkrumah' *Daily Graphic* 20 February 2021 1&3.
[212] As above 3.

The calls by the minister designates, who are both lawyers, and the coalition for sexuality and human values, violate the terms of Resolutions 275[213] and 376[214] , which condemns violence against LGBT persons and urges governments to protect their rights and also the rights of human rights defenders working on sexual orientation rights. Such calls also violate the rights of sexual minorities and expose sexual minorities to attacks by the public. Following the statements above, the traditional authorities in the area where the alleged LGBT office is located have threatened to burn down the office.[215]

Ghana is yet to submit its periodic reports to the African Commission for about two decades now. I expect that when Ghana submits its reports to the African Commission, the pattern of Commissioners asking States to comment on the treatment of LGBT persons shall apply to Ghana.

Questioning states about sexual minority protections might not be a consistent practice and may depend on the persuasion of a particular Commissioner. However, it is significant because it shows that when given the needed freedom and independence to do its work, the African Commission is bold to question states that infringe on the rights of sexual minorities and by impliedly protect them under the African Charter.

## Resolutions and other soft law standards

In 2014, the African Commission adopted the ground-breaking Resolution 275 which condemned violence and violations of the rights of sexual minorities in Africa and called on African governments to protect the rights of sexual minorities under the African Charter, just like every citizen.[216] Resolution 275 is the first of its kind in Africa and underscores the fact that the African Charter protects all individuals regardless of their sexual orientation and gender identity.

In a very bold attempt at confronting violations and violence against LGBT persons in Africa, the African Commission emphasises the importance of article 2 of the African Charter which prohibits

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[213] Resolution 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' The African Commission on Human and Peoples' Rights (the African Commission), meeting at its 55th Ordinary Session held in Luanda, Angola, from 28 April to 12 May 2014.

[214] Resolution 376: Resolution on the situation of human rights defenders in Africa' the African Commission on Human and Peoples' Rights, meeting at its 60th Ordinary Session held from 8 to 22 May 2017 in Niamey, Niger.

[215] 'Kwabenya traditional council threatens to burn down LGBTQI meeting place' *Daily Graphic* 23 February 2021 13.

[216] Resolution 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' (n 213 above).

discrimination, and other provisions of the African Charter to condemn violations of sexual minority rights. The resolution 'recalls' the open-ended nature of article 2 of the African Charter and its protective ambit to include all individuals. It further underscores the significance of article 3, that the Charter affords all individuals equal protection of the law. The resolution also observes that because of articles 4 and 5 of the African Charter, the life and integrity of every individual ought to be respected while also noting that 'torture and other cruel, inhuman and degrading treatment or punishment' is prohibited by the Charter.[217]

The African Commission adopted Resolution 275 against the background of increasing violence against sexual minorities in Africa. The resolution therefore recounted instances of 'corrective rape, physical assaults, torture, murder, arbitrary arrests, detentions, extra-judicial killings and executions'[218] and other forms of human rights violations meted out against sexual minorities. The Commission expressed indignation at the fact these human rights violations were committed by both State and non-state actors who were emboldened to commit such acts of violence because of the lack of diligent investigation and prosecution of perpetrators by law enforcement agencies.[219] The Commission did not only condemn such acts but also urged state parties to punish perpetrators and create an enabling environment for human rights defenders to protect the rights of all persons including sexual minorities.[220]

Most significantly, Resolution 275 urged states to establish 'judicial procedures responsive to the needs of victims'.[221] Such judicial procedures should arguably include pronouncements that laws that criminalise homosexuality are incompatible with the African Charter and constitutional rights. The judiciary could also determine that discrimination of any kind and the violation of sexual minority rights are prohibited by the African Charter and by necessary implications, the laws of the various countries that are members of the African Union.

As a member of the African Union, Ghana has undertaken to give effect to the rights in the Charter and is therefore obliged to respect the decisions of the African Commission and other organs of the African Union, including Resolution 275.[222] Ghana has expressed optimism about Resolution 275 and showed its willingness to abide by the terms of the resolution to protect the

[217] As above para 3.
[218] As above para 5.
[219] As above para 6.
[220] As above para 6(3).
[221] As above para 6(4).
[222] African Charter art 1 requires member states to adopt legislative and other measures to give effect to the Charter.

rights of sexual minorities, at international fora.[223] The Ghanaian delegation to the HR Council stated that because resolution 275 condemns violence and the violations of sexual minority rights in Africa, Ghana embraces sexual minority rights and will not vote against resolutions that protect those rights.[224]

Ghana's commitment to protecting sexual minority rights also reflects in the attitude of the Ghana Police Service, which has pledged to offer a haven for LGBT persons who seek their services, with a promise to investigate and ensure prosecution of persons who perpetrate violence against LGBT persons. In a letter written by the Inspector General of Police (IGP) of Ghana, David Asante-Apeatu in response to a Human Rights Watch query about violations of sexual minority rights, the IGP noted that the Constitution of Ghana protected LGBT people and the police shall continue to protect them. Mr Asante-Apeatu noted:[225]

> The 1992 Constitution of Ghana guarantees an array of fundamental human rights and freedoms to all citizens of Ghana. Police officers are taught to know these human rights, respect them and protect people against violation of their fundamental human rights, and by extension, crime committed against LGBT people.

The IGP therefore underscored that the Ghana Police Service (GPS) recognises that under the 1992 Constitution of Ghana all persons, including LGBT persons have rights which are protected by the Constitution. He went further to acknowledge regional and international instruments that also protect LGBT persons in Ghana which forms part of the training of police officers in Ghana. He observed:[226]

> In short, the Police have observed and applied and will continue to apply the provisions on equality, human dignity and non-discrimination as captured in the 1992 Constitution and other Regional and International human rights treaties that Ghana has ratified in all their interactions and dealings with LGBT people.

In conclusion therefore, it is evident from the statements of state officials in Ghana that Resolution 275, that emphasises respect for life and integrity of the human person, dignity and equal protection of the law, is also a fundamental principle in the Ghanaian Constitution, the African Charter and other international instruments.

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[223] Statement by Ghana at the Human Rights Council in relation to Resolution 32 (n 50 above).
[224] As above.
[225] Human Rights Watch (n 82 above) 65.
[226] As above 65-66.

The African Commission has also passed a resolution on the situation of human rights defenders in Africa in 2017 to underscore the need to protect human rights defenders, particularly those working in areas such as sexual orientation and gender identity.[227] The Commission was 'concerned' that human rights defenders working in areas including 'reproductive health, sexual orientation and gender' faced threats on their rights in the course of their work.[228] The Commission, therefore, entreated states to take legislative measures to ensure the protection of the rights of human rights defenders working on issues such as sexual orientation and gender.[229] Despite the existence of this resolution, State and non-state actors in Ghana are calling for the closure and burning down of a human rights office, allegedly because it advocates for the rights of LGBT persons.[230]

The African Commission has also adopted guidelines such as the 'principles on the decriminalisation of petty offences in Africa'.[231] The aim of these principles serves to persuade states to decriminalise petty offences that are classified as misdemeanours and carry lighter sentences and/or punishable by fines. Section 104 of the Criminal Offences Act of Ghana is one such petty offence which is classified as a misdemeanour, that criminalises the sodomy offence called 'unnatural carnal knowledge'.[232] The principles on decriminalising petty offences recognise that offences such as sodomy lie at the intersection of poverty, human rights, and justice and offend the African Charter's critical provisions, including article 2, which prohibits discrimination against a person on many grounds including birth and other status.[233]

Through the grant of Observer status to NGOs, sexual minority rights have come to the fore. This is considered below.

### The African Commission and NGOs: Observer status

In performing its duties as an independent commission overseeing the human rights regime in the African Charter, the African Commission grants observer status to NGOs working on human rights

[227] Resolution on the situation of human rights defenders in Africa – ACHPR/Res 376 (LX) 2017.
[228] As above para 12.
[229] As above para 17(3).
[230] Coalition calls for closure of gay, lesbian office' (n 210 above).
[231] African Commission on Human and Peoples' Rights Principles on the decriminalisation of petty offences in Africa (2017).
[232] Criminal Offences Act of Ghana sec 104(1)(b).
[233] As above.

issues in Africa.[234] NGOs who are granted observer status are eligible to take part in the activities of the Commission, including submission of shadow reports and participation in the public sessions of the Commission.[235] The key criterion in the African Commission's resolution for granting observer status in 2016 stipulates that NGOs should show a 'willingness and capability to work for the realisation of the objectives of the African Charter on Human and Peoples' Rights'.[236] Currently there are about 500 NGOs working in human rights in Africa who have been granted Observer status to participate in the activities of the Commission.[237] While there are NGOs that work on sexual orientation and gender identity in Ghana, such as the Centre for popular education and human rights, Ghana (CEPEHRG), none have sought or got observer status with the African Commission. Out of the close to 500 NGOs, the African Commission granted observer status, it is only one whose Observer status has come under scrutiny and eventually withdrawn because of concerns that its work focuses on protecting lesbians.

The African Coalition of African Lesbian (CAL), a human rights NGO that advocates for women and lesbian rights in Africa, applied for observer status in May 2008. In 2010, the African Commission rejected CAL's application for Observer status at its forty-seventh session.[238] Determined to take part in the African Commission's activities, CAL re-applied for Observer status in August 2014. The African Commission subsequently granted Observer status to CAL in March 2015.[239] The AU Executive Council protested the grant of Observer Status to CAL. In its review of the African Commission's Activity Report of 2015, the Executive Council requested the African Commission 'to review its criteria for granting Observer Status to NGOs and to withdraw the observer status granted to the Organisation called CAL, in line with those African values'.[240]

The statement above by the AU Executive Council (Executive Council) could ordinarily be mere advice to the independent African Commission. However, events following this 'request' show that

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[234] Criteria for the granting of and for maintaining Observer Status with the African Commission on Human Peoples' Rights (1999). See also Resolution 361: Resolution on the criteria for granting and maintaining Observer Status to Non-Governmental Organisations working on Human and Peoples' Rights in Africa ACHPR/Res.361(LIX) adopted in Banjul, Islamic Republic of the Gambia, 4 November 2016.
[235] As above.
[236] As above para 1.
[237] As above.
[238] '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 System and United Nations' (2016) 40.
[239] 'Coalition of African lesbians granted observer status by the African Commission on Human and Peoples' Rights' available at https://www.genderit.org/es/node/4425 accessed 23 February 2021.
[240] Decisions of the Executive Council African Union Twenty-Seventh Ordinary Session 7-12 June 2015 Johannesburg, South Africa 32.

the Executive Council wanted the African Commission to comply with its 'request', in apparent violation of the independence and autonomy of the African Commission.

The Constitutive Act of the African Union[241] establishes the Assembly, composed of heads of states and governments of member states of the Union. It is the supreme organ of the AU and meets at least once a year in an ordinary session.[242] Other organs established by the Constitutive Act include the Executive Council and the African Commission.[243]Among others, the Assembly has to 'receive, consider and take decisions on reports and recommendations from the other organs of the union'.[244] The AU Assembly delegated the autonomy to consider the African Commission's reports to the Executive Council.[245]

As a quasi-judicial body of the African Union, the African Commission has the mandate to promote and protect human and peoples' rights in Africa[246] and submit a report of its activities to the ordinary session of the AU Assembly, composed of heads of states and governments of member states of the AU.[247] While the Assembly considers and takes decisions on reports submitted to it by the African Commission,[248] the Constitutive Act of the AU does not grant the Assembly power to reverse the decisions of the African Commission, which is an independent quasi-judicial body of the AU. Therefore, the role of the AU Executive Council in examining the activity report of the Commission is only a mechanism of bringing the work of the African Commission to the attention of the mother body, the AU, and for the Assembly to use its good offices to recommend to member states to abide by the decisions of the African Commission.

In 2016 while reviewing the African Commission's activity report, The AU Executive Council reiterated its call for the African Commission to review the criteria for granting observer status to NGOs,[249] against the backdrop of its previous statement above relating to African cultural values and sexual minority rights. The AU Executive Council's 'request' has profound implications for the

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[241] The Constitutive Act of the African Union (Constitutive Act) was adopted in Lomé, Togo, on 11 July 2000 and came into force on 26 May 2001. It replaced the Charter of the Organisation of African Unity, which was adopted in Addis Ababa, Ethiopia, on 25 May 1963 and came into force on 13 September 1963.
[242] As above art 6.
[243] As above art 5.
[244] As above art 9(1)(b).
[245] As above art 9(2).
[246] African Charter on Human and Peoples' Rights art 30.
[247] As above art 54.
[248] Constitutive Act (n 241 above) art 9(1)(b). See also art 59(3) of the African Charter.
[249] EX.CL/Dec.898-918 (XXVIII) Rev 1 Executive Council twenty-eighth Ordinary Session 23-28 January 2016 Addis Ababa Ethiopia, where it 'authorises' the publication of the 39th activity report of the African Commission but 'requests' it to review the criteria for granting observer status to NGOs.

conceptualisation of culture and traditional African values, sexual minority rights, and the right to sexual orientation under the African Charter.

Perhaps the AU Executive Council's statement suggests that the African Charter does not protect sexual minority rights. By extension, an organisation that promotes sexual minority rights promotes values contrary to the rights enshrined in the African Charter. This statement also suggests that it is compatible with the African Charter to criminalise same-sex sexual acts in Africa. Worse still, the announcement preempts that CAL 'may attempt to impose values contrary to African values'.[250]

In August 2018, the African Commission revoked the observer status of CAL, citing the need to abide by the Executive Council's decision in communication to CAL.[251] The decision to withdraw the observer status of CAL by an independent body like the African Commission, at the Executive Council's insistence, does not bode well for human rights protection in Africa.[252] Unfortunately, the African Court declined to clarify the issue on technical grounds.

### 5.3.2. African Court on Human and Peoples' Rights

The Protocol to the African Charter established the African Court on Human and Peoples' Rights, with a mandate to determine violations of fundamental human rights.[253] Ghana is one of the ten countries that made a declaration accepting the jurisdiction of the Court to receive and decide complaints of human rights violations against it.[254] The Court has not directly determined a matter relating to sexual minority rights, but it declined a request for an advisory opinion in a matter relating to the withdrawal of the observer status of CAL.[255] The central issue analysed in this section is the likelihood of success of a case lodged at the Court by an applicant from Ghana, relating to

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[250] As above.

[251] 'Coalition of African Lesbians' observer status revoked by the African Commission on Human and Peoples' Rights' available at https://thisisafrica.me/politics-and-society/sexual-minorities-observer-status-achpr/ accessed 1 July 2020.

[252] For a discussion of the struggle for protection of LGBTI rights at the African Commission, see S Ndashe 'Seeking the protection of LGBTI rights at the African Commission on Human and Peoples' Rights' (2011) 15 *Feminist Africa* 17.

[253] The African Court Protocol was adopted in 1998 and entered into force in 2004.

[254] Art 34(6) African Court Protocol. 4 states, Rwanda (2016), Tanzania (2019), Benin and Togo (2020) have withdrawn their declaration under art 34(6) leaving six countries, Gambia, Ghana, Malawi, Mali, Rwanda, Tanzania and Tunisia as the only countries who have accepted the competence of the Court to adjudicate matters against them. For a discussion of the jurisdiction and withdrawal of some African States from the African Court, see SH Adjolohoun 'A crisis of design and judicial practice? Curbing state disengagement from the African Court on Human and Peoples' Rights' (2020) 20 *African Human Rights Law Journal* 1.

[255] Request for advisory opinion by the Centre for Human Rights of the University of Pretoria & the Coalition of African Lesbians (CAL) no 002/2015 delivered on 28 September 2017.

sexual minority rights, who has exhausted domestic remedies. Before dealing with the central issue of a potential case against Ghana and the possibilities before the Court, I examine first, the African Court's decision in an advisory opinion.

The African Court has not determined a matter relating to sexual minority rights. However, in the advisory opinion sought by the Centre for Human Rights and the Coalition of African Lesbians,[256] the Court missed an opportunity to interpret the word 'consider' as seized upon by the Executive Council to request the African Commission to withdraw the Observer Status granted to CAL.[257] As observed by the African Court, the gravamen of the applicants' case was:

> The Centre and the Coalition are seeking the opinion of the Court on how the term 'considered' as used in Article 59 (3) of the Charter should be interpreted. More specifically, they raise the question as to whether, in the afore-cited decision taken in 2015, the Executive Council and the Assembly of the African Union have not exceeded the reasonable limits of their powers to 'consider' the Activity Report of the Commission.[258]

Even though the advisory opinion requested the meaning and scope of 'consider' relating to the Executive Council's powers to consider the activity report of the African Commission, at the heart of the issue before the Court was the autonomy and independence of the African Commission to interpret the African Charter and to determine the grant of observer status. The Executive Council put pressure on the African Commission to withdraw the observer status it had granted to the CAL, women, and lesbian rights NGO because CAL did not promote positive African values. As rightly argued by Biegon,[259] the African Commission as an independent body with powers to interpret the African Charter may grant observer status to CAL as a human rights organisation, and any organ of the AU could not challenge that power. However, despite its avowed aim of protecting human rights in Africa, the Executive Council by its directive to the African Commission to withdraw the observer status of CAL undermined the efforts of the African Commission to interpret and protect human rights in Africa, effectively. The explanation given by the Executive Council for requesting the withdrawal of the observer status, that sexual minority rights protection was an affront to positive African values, was indirectly in issue and had the Court assumed jurisdiction, and upheld

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[256] As above.
[257] EX.CL/Dec.898-918 (XXVIII) Rev 1 Executive Council twenty eighth ordinary session 23-28 January 2016 Addis Ababa Ethiopia (n 249 above).
[258] As above paragraph 8.
[259] J Biegon 'Diffusing tension, building trust: Proposals on guiding principles applicable during consideration of the activity reports of the African Commission on Human and Peoples' Rights' *Global Campus Africa* Policy Briefs 2018.

the claim of the applicants in this case, it would have been a positive sign of sexual minority rights protection in Africa. However, the Court declined jurisdiction, and it is not clear how it would determine issues in future regarding sexual minority rights.

We must interrogate the approach of the African Court in determining issues relating to sexual minority rights since it is likely that with the wave of violations of the rights of sexual minorities in Africa, it might have to deal with such issues soon. Unfortunately, of the ten African countries that filed an article 34(6) declaration to recognise the competence of the Court to entertain cases against them, four have recently withdrawn their declaration.[260] Ghana has accepted the competence of the Court, and there is no sign that it will withdraw this soon. There is, therefore, a possibility that an aggrieved person from Ghana, who suffers human rights violations based on their sexual orientation and exhausts all local remedies can access the African Court and bring a case against Ghana for violating their Charter rights to dignity, equality, and non-discrimination.

Ghana ratified the Protocol to the African Charter on the establishment of the African Court of Justice on 16 July 2004. On 9 February 2011, Ghana's Minister for Foreign Affairs and Regional Integration Alhaji Muhammad Mumuni, on behalf of Ghana accepted the competence of the African Court under article 34(6) to receive cases against Ghana under article 5(3) of the Protocol. The effect of accepting the competence of the Court is that NGOs with observer status before the African Commission and individuals from Ghana can institute an action against Ghana.

In determining a case brought by an applicant from Ghana, the African Court must apply the African Charter and relevant human rights treaties that Ghana has ratified.[261] Ghana has ratified all major international human rights treaties except the convention on the Prevention of Enforced disappearance, which it has signed but not ratified. Therefore, in a matter before the African Court relating to a violation of a right based on sexual orientation, the Court must apply, for instance, the African Charter, the ICCPR and the jurisprudence of the African Commission and the HR Committee.

As argued above, scholars have convincingly argued that the African Charter arguably protects the rights of everyone, including sexual minorities. Rudman[262] and other scholars[263] provide

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[260] Adjolohoun (n 254 above).
[261] African Court Protocol art 7.
[262] A Rudman 'The protection against discrimination based on sexual orientation under the African human rights system' (2015) 15 *African Human Rights Law Journal* 1.
[263] Ndashe (n 252 above); JO Ambani 'The sexual minority rights conundrum in Africa: Contextualising the debate following the coalition of African lesbians application for observer status before the African Commission' (2016) 2 *Strathmore Law Journal* 181; D Kuwali 'Battle for sex?: Protecting sexual(ity) rights in Africa' (2014) 36 *Human Rights Quarterly*22.

compelling support for the stand taken by Murray and Viljoen that the African Charter protects the rights of all persons, including sexual minorities. They argue that the African Charter aims not to discriminate against any group of persons[264] and does not leave anyone or group of persons outside of its human rights protections. Thus, a proper interpretation of the African Charter will show that it protects non-discrimination, equality, and dignity of a human being regardless of their sexual orientation. The prohibition of discrimination based on sexual orientation by the African Charter becomes clearer when the African Commission applies the jurisprudence of regional and global human rights bodies to determine other human rights cases. As Rudman observes, after analysing the use of the non-discrimination and equality protections in global and regional international law surmises that:

> There is [evidently] enough evidence [to be able] to conclude that 'sex and other grounds' include discrimination based on sexual orientation and/or gender identity and that unjust differentiation based on these criteria is deemed discrimination by the UN, the Inter-American Court and the European Court. Thus, it is impossible to fathom how the African Commission, under the African Charter, could deviate from this established norm, even more so in the light of Resolution 275 as passed by the African Commission in May 2014.[265]

Rudman's argument that the African Commission can make a finding that the African Charter protects non-discrimination based on sexual orientation may also apply to the African Court. The African Court's jurisprudence suggests that it favours a broad and purposive interpretation of the African Charter and also, embraces the jurisprudence of regional and global human rights bodies.

In *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v Tanzania,*[266] for instance, Tanzanian law did not provide an avenue for independent candidates to contest presidential elections. Despite the absence of such a right in Tanzanian law, the Court relied on the African Charter and held that the applicant had a right to contest elections even if he does not belong to or sponsored by a political party.[267] Following this decision in *Mtikila*, Tanzania amended its Constitution to conform with the decision of the African Court. Also, in *Alfred Agbesi Woyome v Republic of Ghana,*[268] the Court relied on international human rights instruments that Ghana has ratified as a basis to grant provisional measures to preserve the rights of the applicant.

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[264] Kuwali as above 23.
[265] Rudman (n 262 above) 16.
[266] (Merits) (2016) 1 AfCLR 599.
[267] Art 13(1) African Charter.
[268] (Merits) 28 July 2019.

Partly because of the outcome of contentious cases decided by the Court against states, it has come under a political backlash that threatens the Court's very existence.[269] As a result of this backlash, the Court's application of the concept called the 'margin of appreciation' may come under the spotlight in a case relating to sexual minority rights. The African Court has not mentioned the 'margin of appreciation' in its decisions by name, but a close scrutiny of some cases decided by the Court shows the Court considers the concept in its judgments. In the *Mtikila* and *Woyome* cases mentioned above, the Court declined to apply the margin of appreciation to defer to the judgment of the state party in matters such as citizenship, the death penalty, propaganda on homosexuality as used by the European Court. In *Mtikila*, even though Tanzania's laws did not provide for independent candidacy in presidential elections, the Court still held that such a right exists in Africa. Therefore, Tanzania had to provide opportunities for the applicant to contest elections as an independent candidate.

Concerning sexual minority rights and Ghana, deferring to the state to give effect to the margin of appreciation does not arise. Ghana has ratified international treaties whose monitoring bodies have emphasised repeatedly through decisions, General Comments and Concluding Observations that sodomy laws are outdated and offend fundamental human rights. Ghana has also shown, unequivocally, that it respects and will protect the rights of persons who are naturally attracted to persons of the same sex. Thus, the Court, should not defer to Ghana's position to determine the constitutionality or otherwise of the 'unnatural carnal knowledge' prohibitions in the Criminal Code. Another reason is that global and regional treaty monitoring bodies affirm that criminalisation of consensual same-sex sexual conduct offends the right to equality, dignity, privacy, and non-discrimination in international law. Besides, Ghana has displayed a position of acceptance of sexual minority rights at the HR Council, through the UPR process and at the HR Committee in statements regarding voting on resolutions to protect sexual minority rights. There is, therefore, enough evidence to hold Ghana accountable to its pronouncements and commitments without the need to defer to the 'margin of appreciation'.

[269] Adjolohoun (n 254 above) 1 at 21-31 recounts the shortcomings of the African Court's practice which may account for the political backlash and withdrawals by some African States from the Court's jurisdiction to hear cases against them.

Therefore, the African Court provides a venue with a potentially positive outcome for NGOs and individuals to litigate sexual minority rights cases. As a court of law with jurisdiction to protect human rights in Africa, the Court may declare, using regional and global trends as a yardstick that sodomy law in Ghana violates the rights to dignity, privacy, equality, and non-discrimination. However, even though the analysis above shows the possibility of a decision that affirms sexual minority rights protection in Ghana, the African Court has come under siege with States withdrawing from the competence of the Court to adjudicate cases involving them and may defer to the state to avoid further withdrawals. There is a possibility that with the political backlash culminating in withdrawals from the jurisdiction of the Court, the Court may defer to Ghana in a matter regarding sexual minority rights.

The ECOWAS Court is another avenue where the constitutionality of sodomy law in Ghana could come under scrutiny as the analysis below shows.

## 5.4 Sub-regional level

At the sub-regional level in Africa, Ghana is a member of the ECOWAS, which is primarily an economic integration body.[270] Despite its focus on the socio-economic well-being of its citizens, the 15 member sub-regional body has a human rights mandate and an ECOWAS Court of Justice and Human Rights, that enforces fundamental human rights of citizens in the sub-region.[271] The central argument in this part is that the ECOWAS Court is a viable avenue to litigate human rights cases relating to protecting sexual minority rights in Ghana and the sub-region. Also, the jurisprudence of the ECOWAS Court in human rights, rarely used by the courts in Ghana, should serve as a source of inspiration in human rights cases, especially cases involving sexual minority rights.

### *Human rights mandate of ECOWAS*

The member states of ECOWAS initially set up the sub-regional body for the economic development of West Africa. Therefore, its original treaty did not have a human rights mandate. However, with the advancement in human rights protection globally, the sub-regional organisation amended its establishing treaty to include a human rights mandate. ECOWAS as an organisation, therefore, has a human rights mandate that protects the right to dignity, equality, non-discrimination, and the

[270] ECOWAS Treaty signed by 15 member states on 28 May 1975 and revised on 24 July 1993 available at http://www.ecowas.int/wp-content/uploads/2015/01/Revised-treaty.pdf accessed 7 December 2020.
[271] Supplementary Protocol to ECOWAS Treaty, A/SP.1/01/05 which created the ECOWAS Community Court of Justice with a human rights mandate entered into force on 19 January 2005.

liberty of the individual.[272] The ECOWAS human rights mandate does not include specific protection of human rights on the grounds of sexual orientation, but this does not exclude the possibility of such protection. The significance of the human rights mandate is that it aims to protect the rights of every person who is a citizen of an ECOWAS member state.[273] As a member state of ECOWAS, Ghana is subject to the jurisdiction of the human rights mandate of ECOWAS. Therefore, a citizen of Ghana can invoke the human rights provisions of the ECOWAS treaty in a matter before the domestic courts in Ghana or at the ECOWAS Court.

### ECOWAS Community Court of Justice and Human Rights

The ECOWAS Court of Justice and human rights is a likely avenue for litigation for the violation of the rights of sexual minorities.[274] Ghana has accepted the jurisdiction of the Court and submitted to litigation of the Court in a couple of cases relating to human rights. Given the jurisdiction of the Court to receive cases from individuals and NGOs from Ghana, it is a venue to challenge the constitutionality of sodomy laws in Ghana if a victim exhausts domestic remedies.

One challenge facing the ECOWAS Court relates to the enforcement of its decisions after the Court has delivered a final judgment. In the recent case of *Chude Mba v Ghana*,[275] the applicant sued the Ghanaian government for compensation for violating his rights. The Court gave judgment in favour of the applicant, awarding compensation for the violation of his rights. After Ghana failed to pay the sum awarded on the expiration of the time allowed for the payment, the applicant issued a writ in the High Court in Accra for the payment of the award. The High Court dismissed the claim of the applicant, holding that as a dualist state, Ghana had not domesticated the ECOWAS treaty after ratification. Therefore, the judgment of the ECOWAS Court of Justice was unenforceable. Oppong has rightly lamented the decision of the Accra High Court not to enforce the decision of

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[272] As above.

[273] Art 9(4) Supplementary Court Protocol.

[274] ST Ebobrah 'A rights-protection goldmine or a waiting volcanic eruption? Competence of, and access to, the human rights jurisdiction of the ECOWAS Community Court of Justice' (2007) 7 *African Human Rights Law Journal* 307; ST Ebobrah 'Critical issues in the human rights mandate of the ECOWAS Court of Justice' (2010) 54 *Journal of African Law* 1; AO Enabulele 'Sailing against the tide: Exhaustion of domestic remedies and the ECOWAS Community Court of Justice' (2012) 56 *Journal of African Law* 286; see also HS Adjolohoun 'The ECOWAS Court as human rights promoter? Assessing five years' impact of the Koraou slavery judgment' (2013) 31 *Netherlands Quarterly of Human Rights* 342, for a discussion of the human rights mandate of the ECOWAS Court.

[275] *In the Matter of Mr Chude Mba v The Republic of Ghana* suit no HRCM/376/15 High Court Accra (2 February 2016).

the ECOWAS Court.[276] I humbly submit, re-echoing the arguments made earlier in this chapter that the purpose of ratifying human rights treaties is to protect the rights of individuals whose governments do so on their behalf. Failing to give effect to a human rights treaty, which a State ratifies but does not domesticate, is tantamount to ignoring the essence of human rights treaties, which differ from other treaties that do not confer direct benefits on citizens. Resorting to arguments based on dualist approach to avoid enforcement of human rights treaties encourages the executive who have the power to ratify treaties and submit them to Parliament to domesticate them,[277] the opportunity to continue shirking their responsibility at the expense of ordinary citizens.

Apart from global, regional, and sub-regional fora for litigating sexual minority rights cases, the domestic forum for utilising international law is a viable possibility.

## 5.5 Domestic level: International human rights as persuasive guidance to Ghanaian courts in deciding issues related to protecting sexual minority rights

As argued in chapter 4 of this thesis, Ghana has a Bill of Rights in the 1992 Constitution that forms the basis for litigating human rights issues.[278] However, the courts in Ghana have often resorted to international human rights law to determine some of these cases. The approach of the courts in using international human rights law is, however, inadequate. This section analyses the basis for using international human rights law in the courts in Ghana and contends that the Court could utilise international human rights law more effectively if it uses it both as a legal basis for their decisions and also as interpretive tools. Besides, the courts in Ghana have ignored the decisions, general comments and concluding observations of the treaty monitoring bodies in the application of international law as an interpretative tool. The chapter contends that the jurisprudence of treaty monitoring bodies gives deeper and fuller meaning to international human rights treaties. It recommends that if the courts in Ghana have relied on treaty provisions, they should go a step further and apply the jurisprudence of treaty-making bodies to full effect, to protect fundamental human rights in Ghana.

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[276] RF Oppong 'The High Court of Ghana declines to enforce an ECOWAS judgment' (2017) 25 *African Journal of International and Comparative Law* 127.
[277] Constitution of Ghana 1992 art 75(2).
[278] As above arts 12-33.

### 5.5.1 The legal normative basis for decriminalising sodomy laws

This section focuses on how the courts in Ghana, particularly the Supreme Court, have approached the interpretation and application of international (human rights) law in the adjudication of human rights cases and how they might use this approach concerning sexual minority rights. The Supreme Court has used international law to interpret the Constitution of Ghana, especially in human rights-related cases. However, the Court should not only use treaty provisions to interpret constitutional rights but must also use decisions of treaty bodies, General Comments and Concluding Observations that progressively and purposively interpret existing human rights norms as inclusive of, and protective of sexual minority rights.

The greatest challenge to the use of international law in the courts of Ghana is the argument based on dualism approach contending that unless domesticated, international law is of no effect in the domestic legal setting. However, this argument based on dualism suffers a challenge that the beneficiaries of human rights are not states but human beings.[279] Once a State ratifies a treaty, it cannot rely on failure to domesticate it as a reason not to utilise it because it is ordinary citizens, not the state, who are beneficiaries.[280]

The approach and jurisprudence of the Supreme Court show that it sometimes rely on treaties that Ghana has ratified but not domesticated and at other times use treaties that reflect in the Constitution and domestic legislation to interpret constitutional rights. The words, 'use' or 'application' of international law is used in two senses in this section. The Supreme Court has often 'used' international law in the sense of an interpretive guide to determine constitutional rights issues. The Court has also 'applied' international law, at least in one case, as a legal basis for deciding a case. I clarify the application of international law in these two senses further in this section with a demonstration of the case law. The starting point, however, is how international law becomes part of the legal system and its position in the hierarchy of laws within the legal system before examining its applicability.

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[279] FR Teson 'International obligation and the theory of hypothetical consent' (1990) 15 *Yale Journal of International Law* 84.
[280] As above 99; See also FR Teson 'The Kantian theory of international law' (1992) 92 *Columbia Law Review* 53.

### 5.5.2 The reception, hierarchy, and application of international law in the domestic legal system

The process of how international law becomes part of the legal system of Ghana has received considerable scholarly attention.[281] Existing scholarship discusses the reception, hierarchy and application of international law.[282] However, little attention focuses on the implications of this relationship and the potential benefits that accrue to beneficiaries under international human rights laws.[283] Therefore, this part examines not only the reception, hierarchy and application of international law in the domestic legal system of Ghana but explores how such an approach could affect the enjoyment of human rights by the ordinary person in Ghana.

The importance of the reception of international law and its treatment in the legal system of Ghana has implications for the enjoyment of human rights. The sources of law in Ghana in chapter 4 of the Constitution omits to mention international law as a source of law.[284] Technically, therefore, international law is not part of the laws of Ghana. However, the Constitution empowers the President to 'execute or cause to be executed treaties, agreements or conventions in the name of Ghana'.[285] As a result, through article 75 of the Constitution, international treaties, when ratified by the President of Ghana, may become part of the laws of Ghana, primarily when the Parliament of Ghana domesticates them. The Constitution does not distinguish between treaties that belong to the realm of foreign relations law, which the executive can conclude without recourse to Parliament, and treaties that confer certain benefits on the state such as contractual agreements with companies or other states. The Constitution also does not distinguish between these two types of treaties different from those that confer fundamental human rights for the benefit of ordinary persons who live in Ghana. The non-distinction of the words, treaty, agreement or convention as used in the Constitution, led the Supreme Court to adjudge that all agreements must obtain parliamentary approval before it becomes binding in the legal system.[286] This pronouncement by the apex court of Ghana has negative implications for human rights protections. It means that if the executive branch of government ratifies a treaty, and does not

[281] Ako (n 1 above); Benneh '(n 1 above); Oppong (n 1 above).
[282] As above.
[283] Appiagyei-Atua (n 1 above); Quansah (n 1 above).
[284] Constitution of Ghana 1992 art 11(1)–(7).
[285] As above 75(1).
[286] *Mrs Margaret Banful & Henry Nana Boakye v The Attorney-General & The Ministry of Interior* (n 9 above). For a discussion of this case see CY Nyinevi 'The making of treaties under the municipal law of Ghana: A review of the Guantanamo detainees case' (2019) 5 *Lancaster University Ghana Law Journal* 99; See also Ako & Oppong (n 9 above) 595-597.

bring it to Parliament for domestication, such an agreement does not have a binding legal effect in the domestic legal system. The courts, therefore, deny enforcing the fundamental human rights of individuals because an undomesticated treaty is of no effect.[287]

Another issue that bedevils the legal system of Ghana regarding international law is the status and hierarchy of international law in the legal system. Chapter 11 of the Constitution which lists the sources of law in Ghana,[288] does not include international law as a source of law. Article 75(2) of the Constitution provides the clue to the status of international law in the Constitution of Ghana.[289] Upon ratification of a treaty by the President or his representative at the international level and domestication by Parliament,[290] an international treaty becomes part of the laws of Ghana and has the status of ordinary legislation or enactment by Parliament.[291] In effect, an international agreement that the President executes, and which Parliament domesticates ranks below the Constitution of Ghana but at the same level as ordinary legislation. Domesticated International law, therefore, has to conform to the Constitution in order to be valid, because any law which is inconsistent with the Constitution is void.[292]

The Supreme Court has held that one of the fundamental values that underlie the Constitution of Ghana is human rights.[293] It has also observed that human rights treaties such as the ICCPR, to which Ghana is a state party, have various provisions reproduced almost verbatim in the Constitution.[294] Therefore, it is easy to use these treaty provisions and their interpretations by treaty bodies to

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[287] *In the Matter of Mr Chude Mba v The Republic of Ghana* (n 274 above); RF Oppong 'The High Court of Ghana declines to enforce an ECOWAS Court judgment' (2017) 25 *African Journal of International and Comparative Law* 127.

[288] Constitution of Ghana 1992 states in art '11(1) the laws of Ghana shall comprise (a) this constitution (b) enactments made by or under the authority of the Parliament established by this constitution (c) any Orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution (d) the existing law and (e) the Common law'.

[289] As above art 75(2) 'A treaty, agreement or convention executed by or under the authority of the President shall be subject to ratification by – (a) Act of Parliament; or (b) a resolution of Parliament supported by the votes of more than one-half of all members of Parliament'.

[290] As above. The Constitution of Ghana uses the term 'ratification' when the President or his representative ratifies a treaty internationally and I use the term 'domestication' to denote the process of incorporating a treaty in the domestic legal system of Ghana.

[291] As above.

[292] As above art 1(2).

[293] *Asare v Attorney-General* [2003-2004] SCGLR 823 829.

[294] *The Republic vs Eugene Baffoe-Bonnie and 4 others* Supreme Court Accra case no J1/06/2018 (7 June 2018). Speaking about the bill of rights in the Constitution of Ghana the court noted at page 3 of the judgment 'Our Chapter 5 on Fundamental Human Rights and Freedoms is a direct incorporation of the international bill of rights based on universal human rights and freedoms contained in the Universal Declaration. Our article 19 which reflects article 10 of the Universal Declaration is in pari materia with article 14 of CCPR'.

interpret constitutional rights in Ghana. Also, human rights norms such as universality, equality, non-discrimination and human dignity in the Universal Declaration and the main UN human rights treaties that have attained *jus cogens* status are very authoritative norms that the Supreme Court cannot ignore in its interpretation of constitutional rights. The African Commission's Resolution 275 that upholds equality, non-discrimination and dignity based on a person's perceived or actual sexual orientation also affirms international human rights norms and aligns with the Constitution of Ghana. Therefore, the Supreme Court of Ghana has an array of international (human rights) law sources to rely on, in interpreting constitutional rights. The dualist conception of international law and the practical application of international law sheds light on the arguments above.

### 5.5.3 The dualism argument and the application of international law in the Ghana legal system

The dualism argument that, unless domesticated in a legal system, an international treaty has no force of law in a domestic legal system is highly controversial in Ghana. The Constitution requires Ghana to ratify international treaties and subsequently domesticate them.[295] The courts have interpreted this provision to mean that unless domesticated, international treaties are not binding.[296] However, the jurisprudence of the courts on this issue has not been consistent.[297]

The Supreme Court of Ghana in the *Guantanamo Bay* case[298] revisited the validity of treaties that the executive had ratified, but Parliament had not domesticated. The Court held that for a treaty to be binding in the legal system of Ghana, Parliament had to domesticate it. Therefore, article 75 of the 1992 Constitution of Ghana imposes an obligation on the executive to submit to Parliament all international treaties or agreements that it ratifies. Otherwise, if the executive ratifies a treaty without further recourse to Parliament, it is not binding. In short, the Court affirmed the dualist nature of the Ghana legal system regarding international law.

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[295] Constitution of Ghana art 75(2) a & b.
[296] *Mrs Margaret Banful & Henry Nana Boakye v The Attorney-General & The Ministry of Interior* (n 9 above).
[297] See for instance the case of *Republic v High Court (Commercial Division), Accra; Ex parte Attorney-General (NML Capital Ltd & Republic of Argentina interested parties)* 2013-2014 2 SCGLR 990 (NML Capital) where an agreement between Ghana and Argentina had not been ratified by parliament yet the Supreme Court enforced the agreement.
[298] *Mrs Margaret Banful & Henry Nana Boakye v The Attorney-General & The Ministry of Interior* (n 9 above).

The decision of the Supreme Court in the *Guantanamo Bay* case is not beyond reproach and should be critically scrutinised,[299] for four reasons. First, the decision ignores a fundamental principle of international law.[300] When a state ratifies a treaty, as Ghana did with the US in the *Guantanamo Bay* case, it cannot do anything contrary to the terms of the agreement.[301] This time-honoured principle is a cornerstone of international law and is the reason states openly contract with each other. Holding otherwise that a state can conduct itself contrary to a treaty will allow the state to take a posture internationally, that is directly opposite to what it does domestically.[302] Thus, in holding as it did, relying on the black letter law in the Constitution, the Supreme Court was urging Ghana to show respect for international law internationally, but reprobate and denigrate the terms of treaties it had ratified domestically. Interestingly, the Court in an earlier case in 2013, *The Ara Libertad*,[303] contradicted the position it took in the *Guantanamo Bay* case when it held that Ghana and Argentina had a valid agreement even though Parliament had not domesticated the terms of that agreement.

Second, the decision of the Court glossed over a factual situation that threatens the validity of international law and its application in the Ghanaian courts, with potentially damaging consequences for human rights. As noted elsewhere, Ghana has ratified or acceded to over three hundred treaties, but a majority of them are undomesticated.[304] If the country is not held accountable for its treaty obligations only because it has failed to take a further step of domesticating a treaty after ratifying it, this should be of utmost concern to the courts. Merely saying that even if ratified but not domesticated, a court cannot apply international law is with the utmost respect, defeating the ends of justice.

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[299] I am not alone in holding this view. See for instance GEK Dzah 'Transcending dualism: Deconstructing colonial vestiges in Ghana's treaty law and practice' in M Addaney et al (eds) *Governance, human rights, and political transformation in Africa* (2020) 117. Dzah rightly argues that the dualist conception of international law impedes the realisation of treaties that confer fundamental human rights (118) and is a 'colonial inheritance that has become a pliable device in the State's toolkit' (138).

[300] Vienna Convention on the Law of Treaties (VCLT) adopted on 23 May 1969 and entered into force on 27 January 1980.

[301] As above. Art 18 states that a State may not do anything to defeat the object and purpose of a treaty if it has signed the treaty or indicated that it will be bound by a treaty pending its entry into force.

[302] As above. This is the principle of fidelity to a treaty expressed as *pacta sunt servanda.*

[303] *Republic v High Court (Commercial Division), Accra; Ex parte Attorney-General (NML Capital Ltd & Republic of Argentina interested parties)* (n 294 above).

[304] Ako (n 1 above).

Third, affirming a strict dualist approach to international law ignores the reasons for ratifying treaties and the benefits that accrue to people, especially if it is a human rights treaty. Teson advances the theory that states ratify human rights treaties for the benefits of human beings.[305] Therefore, if a court refuses to enforce a human rights treaty because Ghana has ratified but not domesticated it, it is not the state that suffers but individuals and groups of persons on whose behalf the state ratified the treaty. The legitimate expectation of citizens and other persons that their country has ratified a treaty that protects their rights is paramount. Therefore, a court should not take the stance that because Ghana has not domesticated a treaty, a person cannot access a right which has accrued under it.

Fourth, affirming the dualist principle also makes courts lose an essential aspect of law and an opportunity to bring its decisions in tandem with current protections of human rights. Unlike the Constitutions of Kenya[306] and South Africa, which explicitly makes international law part of the legal system and requires the courts to apply international law,[307] the Ghanaian Constitution has no such provision. Therefore, the courts in Ghana may use international law as an interpretive tool at their discretion. The Courts in Ghana could use international treaties if ratified but not domesticated, both as an inspirational guide and an interpretative tool. The Supreme Court's application of international law in the courts in Ghana is analysed below.

### 5.5.4 The Supreme Court and its approach to the application of international (human rights) law

The Supreme Court of Ghana is ambivalent in its use of, or reliance on international law norms. A clarification of the two senses of 'use', 'apply, or 'rely on' international law is vital before proceeding. First, a court can 'rely' on a specific law as the legal basis for its decisions. For instance, a court in Ghana may declare a person is guilty of the crime of 'unnatural carnal knowledge' because of section 104(1)(b) of the Criminal Offences Act or that a contract is void because it lacks 'consideration' which is a requirement of the Common Law. Therefore, the legal rules which form the basis for a decision must be part of the sources of law in Ghana.[308] It is also for this reason that a cause of action must have a basis in Ghanaian law, which include international treaties that Parliament has domesticated, evidenced by Acts of Parliament. The only exception to this rule that

[305] Teson (n 276 above); Teson (n 277 above).
[306] Constitution of Kenya 2010 art 2(5) states that the general principles of international law are part of the laws of Kenya.
[307] Constitution of the Republic of South Africa 1996 sec 39(1)(b).
[308] Constitution of Ghana 1992 art 11.

a court can rely on a specific law as the legal basis for its decision, which is a feature of the Common Law, relates to private international law disputes where a court in Ghana can 'apply' foreign law, for instance, French Law, to declare that a contract is void.

Second, a court in Ghana can rely on a law that may assist it in its reasoning as part of a process to interpret another law, such as a constitutional right to privacy. In this sense, a court is only using a law which is not a source of law in Ghana, to interpret a specific law recognised in the legal system of Ghana. Nothing prevents a Ghanaian court from 'relying' on or 'applying' foreign laws, ratified or unratified treaties, and academic writings as long as they are not using them as sources of Ghanaian law, as defined by the Constitution, but as interpretative tools to aid the process of adjudication. Courts have *used* treaties that Ghana has ratified but not domesticated,[309] but have also insisted that it would only *apply* treaties that are both ratified and domesticated.[310] Relying on the doctrine of dualism, the Ghanaian courts favour the position that unless Parliament domesticates an agreement, the agreement is not binding. This position, however, ignores the distinction between treaties that confer human rights on persons or groups and those that do not. The courts need to appreciate the underlying reasons for which States ratify international treaties and apply them as interpretive tools even if it has not domesticated them, for at least two reasons.

First, the beneficiaries of international human rights treaties are individuals or groups of persons. Human rights treaties confer benefits on individuals and not States. Therefore, if a State ratifies an agreement and does not domesticate it in the national legal system, we should deem that it had domesticated it.

Second, scholarship, relating to the monist-dualist debate and its relevance to human rights, points to the application of fundamental human rights norms in domestic courts in Africa, whether or not it is domesticated. Killander and Adjolohoun argue that there is a trend towards applying fundamental human rights norms which are undomesticated even in dualist legal systems.[311] They observed: 'Countries of monist tradition behave according to dualist principles whereas dualist countries, overlooking common law transformation prerequisites, sometimes apply or draw

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[309] *NPP v Inspector General of Police* [1993-94] 2 GLR 459; *Republic v High Court (Commercial Division), Accra; Ex parte Attorney-General (NML Capital Ltd & Republic of Argentina interested parties)* (n 294 above).

[310] *NPP v Attorney General* [1996-97] SCGLR 729; *Mrs Margaret Banful & Henry Nana Boakye v The Attorney-General & The Ministry of Interior* (n 9 above); *In the Matter of Mr. Chude Mba vs. The Republic of Ghana* (n 274 above).

[311] M Killander & H Adjolohoun 'International law and domestic human rights litigation in Africa: An introduction' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 3.

inspiration from international human rights law in adjudicating human rights matters'.[312] Quansah shares this view of Ghana when he argues that 'it would seem that although the judges do not have a clear mandate to apply international law, they have tried, where necessary to rely on such law in determining human rights issues'.[313] Appiagyei-Atua, however, contends that Ghanaian courts have not invoked human rights instruments as much as they should have to improve their jurisprudence.[314] The views of these scholars are relevant to realising fundamental human rights protections in Ghana. The number of ratified but undomesticated treaties makes it very pertinent to apply treaties that Ghana has ratified but are yet to domesticate.

The Supreme Court of Ghana has in a series of cases in recent times applied international treaties to vindicate the rights of citizens even when Ghana has not domesticated the treaty. In *Mensah v Mensah*,[315] the Court relied on the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) to vindicate the rights of the petitioner who is a woman to overturn an age-old principle that women do not have a share of the property acquired during marriage upon divorce.[316] In the recent case of *Republic v Baffoe Bonnie*,[317] the Court similarly relied on international instruments such as the ICCPR to hold that the accused persons in a criminal trial can access all documents in the prosecution's custody in line with article 14 of the ICCPR.[318] The case of *Dodzie Sabbah v The Republic*[319] also relied on ICCPR to award compensation to the appellant for wrongful conviction and imprisonment. The *Dodzie Sabbah* decision is significant because it was the first time that the Supreme Court had awarded compensation to a victim for wrongful conviction and imprisonment, relying on international law and the Constitution. The former Chief Justice, Justice Theodora Wood, noted at page 18 of the judgment that 'it is permissible to resort to international treaties and conventions as a tool for constitutional interpretation'.[320] She added that the basis for the Court to certify the award of compensation to the appellant 'is by reference to article 14(6) of

[312] As above 16.
[313] Quansah (n 1 above) 37.
[314] Appiagyei-Atua (n 1 above).
[315] *Mensah v Mensah* [2012] 1 SCGLR 391 (n 4 above).
[316] Constitution of Ghana art 1992 22(2) states that Parliament shall pass a law to regulate property of spouses and 22(3) states that such law should ensure equal access and equitable distribution of property acquired during marriage. This provision is in direct response to earlier case before the coming into force of the Constitution in 1992 and even after that which treated property acquired by the male spouse during marriage as his sole property.
[317] *The Republic vs Eugene Baffoe-Bonnie and 4 others* (n 293 above).
[318] As above 3-4.
[319] Criminal appeal no J3/3/2012 Supreme Court Accra (11 June 2015).
[320] As above 18.

the International Covenant on Civil and Political Rights'.[321] Thus even though Ghana has not domesticated the ICCPR, the Court used it to interpret the Constitution.

The courts should make an exception for the application of international human rights law to vindicate the rights of persons and groups if Ghana has ratified such rights but is yet to domesticate them. The Supreme Court of Ghana has invoked international treaties that Ghana has ratified but not domesticated, to resolve constitutional cases. When it invokes those treaties, it purports to rely on them because the provisions in that treaty reflect constitutional provisions. Even if treaty provisions are similar to constitutional provisions, there is no indication that it was deliberately put there to reflect the treaty. Often, the full extent of the treaty provision and its interpretation by the relevant treaty monitory body does not match what it provides in the Constitution.[322]

In order to resolve the problem of non-domestication, the courts should apply these treaties to the full extent provided for in the agreement and be bold to apply it as a tool of interpretation and also as a basis for its decision because Ghana has ratified it, even if it has not domesticated it.[323] Ghana's attitude not to domesticate treaties it has ratified and the consequences for non-enforcement of fundamental human rights is legion.[324] In order to derive the full benefits of human rights treaties, the state needs to domesticate them after ratifying them, or else, the courts have to give effect to them as ratified. That is the only way to safeguard the rights of every person adequately, especially since the Constitution does not expressly spell out sexual minority rights.[325]

### 5.5.5 The potential application of the right to non-discrimination, equality, and human dignity to sexual orientation

Because section 104(1)(b) of the Criminal Offences Act criminalises same-sex sexual conduct, some people argue that sexual minorities have no constitutional rights.[326] They argue that if the

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[321] As above.

[322] See for instance art 8 of the European Convention on Human Rights and art 18 of the Constitution of Ghana on the right to privacy. While the right to privacy in the European Convention provides privacy of private life and family, the Ghanaian version protects privacy of home.

[323] See for instance the case of *NPP v Attorney-General* (n 240 above) where Justice Archer used the African Charter as a legal basis for his decision despite non-domestication by Ghana. Even though this position appears to be radical and a deviation from the norm, it serves to fulfil the objectives of human rights protection and the reason why countries ratify treaties.

[324] Ako (n 1 above).

[325] Constitution of Ghana 1992 chapter 5 contains the bill of rights that protects the rights of 'every person' and prohibits discrimination on many grounds but not sexual orientation and gender identity.

[326] *Justice Yaonansu Kpegah v Attorney General of Ghana and the Inspector General of Police of Ghana,* unreported case no J1/9/2012, Supreme Court Ghana. The Plaintiff in this case, a retired Supreme Court judge,

Constitution wanted to protect or grant them rights, it would have said so explicitly. The argument ignores the fact that the Constitution of Ghana entitles 'every person in Ghana'[327] to enjoy the fundamental human rights and freedoms in the Constitution. The Constitutional Review Commission of Ghana (CRC) attempted to resolve this issue by soliciting the views of Ghanaians whether the Constitution should include explicit protection on the grounds of sexual orientation. The CRC advised the President that Ghanaians were of the view that 'homosexuality should not be recognised by the Constitution',[328] recommending that the courts should decide the issue when approached by interested parties.[329] The government agreed to this recommendation, and in a White Paper subsequently released, noted that we should allow the courts to decide the issue.[330]

This chapter contends however that such an exercise, in seeking the views of Ghanaians on a sensitive human rights issue, that affects a minority of the population was tantamount to foisting a majoritarian morality view on all Ghanaians. The protection of minority rights must not depend on what the majority thinks should be the case. If the Constitution states that 'every person' should enjoy the rights in the Constitution, the position is unequivocal. 'Every person' includes sexual minorities. Therefore, embarking on an exercise to find out what the majority thinks about homosexuality was untenable. The resounding answer was a rejection of sexual minority rights. Constitutional morality, and not majority morality, should determine who enjoys fundamental human rights in a secular State like Ghana.[331] Four reasons underlie the importance of choosing constitutional morality over majoritarian morality.

First, as established earlier in this chapter, non-discrimination based on sexual orientation is part of existing human rights law. As a state party to almost every international human rights treaty, including the ICCPR which prohibits discrimination based on sexual orientation, Ghana has to respect its international legal obligations by giving effect to this in its legal system.

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filed a writ he later abandoned, asking the court to declare that 'homosexualism and or lesbianism' is not a human rights issue and a cultural taboo in Ghana; See also See also AD Dai-Kosi et al 'Ghanaian perspectives on the present day dynamics of homosexuality' (2016) 10 *African Research Review special edition* afrev@10 1 7.

[327] Constitution of Ghana 1992 art 12(2).

[328] Republic of Ghana Constitution Review Commission 'Report of the Constitution Review Commission: From a political to a developmental constitution' (2012) 654.

[329] As above.

[330] Republic of Ghana 'The White Paper on the report of the Constitution Review Commission of inquiry' (2012) 45.

[331] *Navtej Singh Johar and Others v Union of India Thr. Secretary Ministry of Law and Justice* Writ Petition (Criminal) No 76 of 2016 para 111. The Indian Supreme Court defined 'constitutional morality' as including 'virtues of a wide magnitude such as that of ushering a pluralistic and inclusive society'.

Second, at the regional level, Ghana supports Resolution 275 by the African Commission that condemns discrimination, violence, and violations of the rights of sexual minorities. At the global level, while Ghana has abstained from voting on sexual orientation and gender identity issues, it has pledged willingness to accommodate, not discriminate and violate the rights of sexual minorities. Ghana recently noted at the Human Rights Council that it respects the rights of persons who are born gay and would protect their rights.[332] These unequivocal statements of the equal legal protection of the rights of all persons should guide the Supreme Court of Ghana to declare same-sex sexual prohibitions as unconstitutional.

Third, one issue Ghana has raised as an official position at the international stage and often touted domestically by politicians and other anti-LGBT rights persons is homosexuality being culturally sensitive.[333] However, such an argument is untenable because the universality of human rights and the obligations assumed by Ghana to fulfil, promote and protect fundamental human rights supersede cultural considerations. Also, as argued in chapter 2 of this thesis and partly in chapter 3, same-sex sexual relationships existed in the pre-colonial culture of Ghanaians. There is overwhelming evidence that such relationships existed, and various Ghanaian cultures accommodated such practices until the colonial administrators arrived and subjugated such practices in line with their religious beliefs.

Fourth, the binding nature of the principles of universality, non-discrimination, equality, and dignity of the human person as *jus cogens* norms overrides arguments based on culture. Also, Ghana cannot abdicate its international legal obligations on the grounds of religion or culture. Added to this, the Vienna Convention on the Law of Treaties (VCLT) forbids Ghana from doing anything that detracts from its treaty obligations under the various treaties it has ratified.[334] The core message underlying these human rights treaties is that international law prohibits discrimination on all grounds, including sexual orientation and gender identity.

As observed by the International Commission of Jurists, countries with constitutions that do not have express provisions prohibiting discrimination based on sexual orientation have decriminalised sodomy laws by the 'sensible outreach by judges, grappling with common problems, to the wisdom

[332] Video discussion of resolution A/HRC/32/L.2/ Rev 1 (n 50 above).
[333] As above.
[334] VCLT art 18 (n 300 above).

evident in the decisions and reasoning of jurists in other lands'.[335] The examples of India and Botswana are instructive. These two countries had penal provisions criminalising 'unnatural carnal knowledge' inherited from the British just like Ghana. The two countries also have constitutions with bills of rights that do not expressly prohibit discrimination on the grounds of sexual orientation, yet they have both recently decriminalised sodomy laws inherited from colonial administrators.

It is therefore probable that when faced with whether section 104(1)(b) of the Criminal Offences Act of Ghana is unconstitutional or not, the Supreme Court would - or should - answer this question in the affirmative.

## 5.6 Conclusion

This chapter deals with whether international law is relevant as a tool to decriminalise consensual same-sex conduct in Ghana. It argues that the position of global and regional human rights law is unequivocal about protecting the rights of sexual minorities and the need to protect these rights in domestic legal systems by decriminalising consensual same-sex acts. It argues further that notwithstanding the lack of express provisions in the Constitution of Ghana prohibiting discrimination on the grounds of sexual orientation, if constitutional rights are construed in light of the international treaties that Ghana has ratified, it is imperative for the Supreme Court of Ghana to decriminalise consensual same-sex acts. The core UN and AU human rights treaties that Ghana has ratified provide a legal basis to hold Ghana accountable to protect the rights of all persons, including sexual minorities. Criminalising sex between adults of the same sex infringes core international human rights norms of equality, non-discrimination, and dignity of the human person, among many other rights.

As the arguments above show, the HR Committee, the African Commission, and the African Court, and the ECOWAS Court of Justice and Human Rights are potential avenues to litigate the constitutionality of sodomy laws. Of the three avenues, the ECOWAS Court is the closest to Ghana and because the requirement of exhaustion of domestic remedies is not a bar to accessing the Court, it remains a viable option. But enforcing the Court's decision if it delivers a favourable response might encounter significant challenges. The jurisprudence of the ECOWAS Court, similar to that of the African Court and the African Commission shows that they have not dealt with cases relating to sexual minority rights and it is, therefore, possible but unpredictable that these two

[335] International Commission of Jurists 'Sexual orientation, gender identity and justice: A comparative law casebook (2011) xxi.

Courts and the quasi-judicial body may deliver a favourable response on an issue relating to sexual minority rights. The HR Committee provides the most viable option as its jurisprudence is clear that sexual orientation is a protected ground in the ICCPR and therefore, laws that criminalise same-sex sexual conduct violates fundamental human rights.

The role of international human rights law in decriminalising consensual same-sex relationships and conduct in the domestic Court is a foundational issue answered in this chapter. Ghana has a Constitution that recognises and applies international law as an interpretative tool. The decisions of the courts in Ghana, particularly the apex court, reflects this position, and this approach has mostly protected the rights of citizens and is relevant in determining the unconstitutionality of section 104 of the Criminal Offences Act, which criminalises 'unnatural carnal knowledge'.

Some countries, like Botswana and India, have decriminalised consensual same-sex acts without express provisions in their constitutions and have done so using international human rights law and constitutional provisions. Ghana can emulate these relevant examples to uphold the rights of sexual minorities. As the preceding sections of this chapter have shown, this is arguably possible. The courts should interpret the Constitution purposively to embrace the principles of international law, human rights norms, and the rights of everyone, including sexual minorities.

If the Supreme Court of Ghana declines and invitation to decriminalise consensual same-sex acts, an aggrieved party who has exhausted domestic remedies may approach the HR Committee, the African Commission, the African Court, or the ECOWAS Community Court of Justice. The analysis above shows that of the four options available to a party challenging the 'unnatural carnal knowledge' law, the HR Committee provides the most viable avenue because of its jurisprudence which has since 1992, consistently protected the rights of sexual minorities.

# CHAPTER 6: CONCLUSION

## 6.1 Introduction

Violations of the rights of sexual minorities, globally, has prompted calls for decriminalisation of laws that punish consensual same-sex sexual activity.[1] The call for decriminalisation stems from the fact that most acts of violence and other human rights violations committed against sexual minorities are in one way or the other attributable to laws that criminalise same-sex sexual activity.[2] Colonial-era laws, together with the religion and the culture of the coloniser which subjugated indigenous systems of religious understanding and cultural expression, is partly to blame for homophobia in most Commonwealth African states with British colonial history, including Ghana. Against this background, this study examines the challenges and prospects of decriminalisation of the criminal offence of 'unnatural carnal knowledge'[3] in Ghana through the lens of decolonisation, purposive and transformative constitutionalism approaches to interpretation of constitutional rights.

The thesis seeks to establish whether a convincing legal argument can be made for the decriminalisation of consensual same-sex conduct in Ghana. While the thesis advances the position that a persuasive and cogent legal argument can be made, it also identifies three significant barriers to successful decriminalisation of sodomy laws in Ghana, namely culture, religion, and politics. Through an analysis of constitutional rights and international human rights law, it observes that despite the seemingly insurmountable nature of these barriers, there is a reasonable prospect that the Supreme Court of Ghana could declare the Ghanaian sodomy law as unconstitutional.[4]

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[1] Report of the 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' A/HRC/19/41 (2011) 3; The Yogyakarta Principles plus 10 'Additional principles and state obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta principles' adopted on 10 November 2017 in Geneva, Principle 33; Human Rights Council 'Report of the Working Group on the Universal Periodic Review Ghana' A/HRC/22/6 (13 December 2012) para 75.

[2] As above.

[3] Section 104(1)(b) of the Criminal Offences Act criminalises same-sex sexual activity couched as unnatural carnal knowledge with a prison term of 3 years when convicted.

[4] Constitution of the Republic of Ghana art 2(1) & (2) empowers the Supreme Court of Ghana to interpret the Constitution and declare any law this is inconsistent with the Constitution as void. The Supreme Court may also give orders and directions to give effect to its declarations.

The subjugation of same-sex practices by the colonial administrators through laws and religion became entrenched. For over a century, these colonial impositions exerted influence to displace the authentic culture of the people. The sodomy law which Ghana inherited from the British in 1892,[5] has remained unchanged since Ghana gained independence in 1957.[6] Successive constitutions since independence, beginning from 1969 when Ghana first had a Bill of Rights in its Constitution,[7] till the current 1992 Constitution, prohibits discrimination on many grounds including gender.[8] The 1992 Constitution does not contain specific protection of sexual minority rights and does not prohibit discrimination on the grounds of sexual orientation. However, it protects the rights of every person in Ghana. Arguably, the 1992 Constitution of Ghana does not contain a clause prohibiting discrimination on the grounds of sexual orientation because even the national constitutions and international treaties that inspired it did not contain such explicit protection.[9]

However, the lack of prohibition of discrimination on the grounds of discrimination should not prevent the Supreme Court from protecting sexual minorities. The Supreme Court can interpret the Constitution purposively as a living instrument,[10] in order to embrace the rights of sexual minorities, based on the rights in the Constitution[11] and the treaties Ghana has ratified.[12]

In the absence of specific protection of sexual minority rights in the Constitution, combined with a criminal provision that criminalises 'unnatural carnal knowledge', and the view held by most Ghanaians that consensual same-sex acts are alien to Ghanaian culture and religion, there have been severe infringements of the rights of sexual minorities in Ghana.[13] State and non-state actors have violated the rights of sexual minorities in Ghana, mainly because they think people learn homosexuality; it is foreign and threatens Ghanaian culture and morality.[14]

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[5] Criminal Ordinance of the Gold Coast, no 12 of 1892.
[6] Ghana (Constitution) Order in Council, 1957 affirmed section 5 of the Independence Act of Ghana, 1957, as the date for the attainment of Independence by Ghana.
[7] Constitution of Ghana 1969, chapter 4.
[8] Constitution of Ghana 1992, art 12(2).
[9] Ghana's Bill of Rights is modelled on the Universal Declaration of Human Rights and other international instruments such as the ICCPR (art 14 right to compensation for wrongful conviction and imprisonment) and the European Convention on Human Rights (art 8 right to privacy).
[10] *Tuffour v Attorney-General* (1980) GLR 637 at 647-648.
[11] Constitution of Ghana 1992 chapters 5 & 6.
[12] Ghana has ratified all the core international human rights treaties which have been interpreted to protect the rights of every person regardless of their sexual orientation, except for the Convention for the protection of all persons from Enforced Disappearance.
[13] Human Rights Watch 'No choice but to deny who I am' Discrimination and violence against LGBT persons in Ghana (2018).
[14] As above.

As this thesis shows, same-sex sexual relationships were evident in the Gold Coast, now Ghana, well before colonial administrators arrived.[15] Shedding light on the origins of same-sex conduct in Ghana helps in understanding that it is not part of a foreign culture but a natural human orientation which had existed in Ghanaian cultures from time immemorial.[16] Such clarity promotes tolerance and acceptance of different sexualities in contemporary Ghana and detract significantly from the argument that same-sex prohibitions need to be maintained to preserve a notion of 'traditional culture'.

Besides, if Ghanaians appreciate that early Ghanaian societies accepted same-sex relationships, it empowers researchers to question the relevance and imposition of a colonial law on society without recourse to the culture and consent of the people.[17] Why should Ghana keep a law which encourages homophobic discourse,[18] fosters violation of human rights and endangers enjoyment of constitutional rights of at least some of Ghana's citizens?[19] Not only are sodomy laws outdated and imposed on Ghanaians by the British without consultation and cognisance of indigenous cultures, but its very existence also violates the rights of sexual minorities, who undeniably exist in Ghana today, making them live in constant fear and susceptible to blackmail and extortion.[20]

Theoretical insights from decolonial perspective provide an understanding of the profound nature of sodomy law and how coloniality controls social institutions, knowledge and power to entrench colonialism long after it had ended.[21] The end of colonialism did not mean that colonial laws, culture and religion introduced during the colonial era ceased to exist when Ghana gained independence from the British in 1957. Colonial administrators also introduced Western forms of religion, alongside sodomy law and British culture of the 17th century, which continue to justify the criminalisation of consensual same-sex sexual acts. The analysis of the factors that ensure the

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[15] I Signorini 'Agonwole agyale: the marriage between two persons of the same sex among the Nzema of Southwestern Ghana' (1973) *Journal de la Societe des Africanistes* 221. The author documents incidents of same-sex relationships among the Nzema of Ghana.
[16] As above.
[17] ML Friedland 'R.S. Wright's model criminal code: A forgotten chapter in the history of the criminal law' (1981) 1 *Oxford Journal of Legal Studies* 308.
[18] WJ Tettey 'Homosexuality, moral panic and politicised homophobia in Ghana: Interrogating discourses of moral entrepreneurship in Ghana media' (2016) 9 *Communication, Culture and Critique* 86.
[19] Human Rights Watch 'No choice but to deny who I am' (n 13 above).
[20] IGHLRC 'Nowhere to turn: Blackmail and extortion of LGBT people in sub-Saharan Africa' especially pages 60-74.
[21] N Maldonado-Torres 'On the coloniality of being' (2007) 21 *Cultural Studies* 240 at 243; CE Walsh & WD Mignolo *On decoloniality* (2018).

criminalisation of same-sex acts through the lens of colonial theory informs a strategic and depth of effort required to achieve decriminalisation of same-sex acts in Ghana.

The findings, recommendations and areas for further research show the profoundly entrenched nature of sodomy law in Ghana and what an attempt at decriminalisation entails.

## 6.2 Summary of significant findings of the study

The study makes some findings that help in understanding sodomy law, the factors that keep it in place and the approaches to its decriminalisation.

The first research question guiding this study is the extent to which the post-colonial State had achieved full decolonisation in terms of its laws, particularly the criminal offence of 'unnatural carnal knowledge'. Applying a decolonial lens,[22] the study finds that coloniality[23] helps to entrench the offence of unnatural carnal knowledge in the legal system of Ghana. Historical analysis shows that pre-colonial societies tolerated same-sex sexualities.[24] While consensual same-sex relationships existed, there were no customary laws that punished such conduct.[25] Colonial British laws subjugated the indigenous legal system through repugnancy clauses and ensured that British laws prevailed over indigenous customary laws in Ghana. The British introduced the Criminal Ordinance of 1892, which criminalised same-sex sexual conduct, without consultation with the indigenous people. The law is therefore an imposition that had nothing to do with indigenous cultures. The law preserved Victorian culture and religion, for over a century and a half in Ghana. The '*Sankofa* theory',[26] which is one theory used in this thesis, implores Ghana to go back to its pre-colonial cultures and embrace same-sex sexuality.

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[22] As above.

[23] As above. See also W Mpofu 'Decoloniality as a combative ontology in African development' in SO Oloruntoba & T Falola (eds) *The Palgrave handbook of African politics, governance, and development* (2018) 83 at 84.

[24] Signorini (n 15 above); N Ajen 'West African Homoeroticism: West African men who have sex with men' in Murray & Roscoe (eds) *Boy-wives and female husbands- studies in African homosexualities* (1998); SO Dankwa 'The one who first says I love you: Same-sex love and female masculinity in post-colonial Ghana' (2011) 14 *Ghana Studies* 223; SO Dankwa 'It's a silent trade: Female same-sex intimacies in post-colonial Ghana' (2009) 17 *Nordic Journal of Feminist and Gender Research* 192.

[25] JM Sarbah *Fanti customary laws a brief introduction to the principles of the native laws and customs of the Fanti and Akan sections of the Gold Coast with a selection of the cases thereon decided in the law courts* (1897); RS Rattray *Ashanti and constitution* (1929).

[26] Sankofa literally means 'go back for it', implying that one should go back to their history and embrace the good elements of their culture and infuse it with modern developments. See JET Kuwornu-Adjattor et al 'The

The second research question attempts to unravel the extent to which culture, religion and politics impact the criminalisation of same-sex sexual acts in Ghana. Through the decolonial lens,[27] the study makes some interesting findings. First, the study finds that by the time colonialism ended in Ghana in 1957, British culture, religion and governance structures had overthrown indigenous systems and become entrenched in the national consciousness and system. Second, coloniality influences and controls religion, culture and politics, which keeps the law introduced during the colonial period firmly in place.[28] Third, Christian religious and cultural beliefs strongly influenced the introduction of sodomy law in Ghana in 1892.[29] Finally, the study finds that decriminalisation of same-sex sexual acts in Ghana is imperative and, in this context, implies not only attempting to amend or repeal the law but strategically dismantling colonial structures and systems that entrench the law, specifically religion, culture, and politics.

The third research question assesses the utility and extent to which the Bill of Rights[30] and Directive Principles of State Policy[31] in the 1992 Constitution of Ghana could advance constitutional rights arguments to decriminalise sodomy law in Ghana. The study finds that even though there is no specific prohibition of discrimination on the grounds of sexual orientation, the articulation of constitutional rights to equality, non-discrimination, dignity, and privacy could provide a basis to declare the offence of 'unnatural carnal knowledge', unconstitutional. Also, the study finds that article 33(5) of the Constitution incorporates through the doctrine of unenumerated rights,[32] a set of rights inherent in democracies, that might protect sexual minority rights and consequently make the sodomy law unconstitutional. The potential to include the 'right to relate'[33] and 'non-

philosophy behind some Adinkra symbols and their communicative values in Akan' 7 *Philosophical Papers and Review* 22; KP Quan-Baffour 'The wisdom of our forefathers: Sankofaism and its educational lessons for today' (2008) 7 *Journal of Educational Studies* 22. For a discussion of this theory see chapter 1 of this thesis section 4.3.3.

[27] Maldonado-Torres (n 21 above); Walsh & Mignolo (n 21 above); Mpofu (n 23 above).

[28] As above.

[29] M Kirby 'The sodomy offence: England's least lovely criminal law export?' in C Lennox and M Waites (eds) 61 at 66; Human Rights Watch 'This alien legacy, the origins of sodomy laws in British colonialism' (2008).

[30] Constitution of Ghana 1992 chapter 5.

[31] As above, chapter 6.

[32] Constitution of Ghana art 33(5) observes that other rights that are not mentioned in the Bill of Rights but inherent in a democracy, which are intended to secure the dignity of the human being are not excluded from the scope of rights in the Constitution. Scholars have labelled the non-explicit mention of rights by name, 'unenumerated rights'. See OJ Rogge 'Unenumerated rights' (1959) 47*California Law Review* 787. For a discussion of the concept of unenumerated rights, popularised by American scholars, see chapter 4 of this thesis, section 4.3.6.

[33] K Waaldjik 'The right to relate: A lecture on the importance of 'orientation' in comparative sexual orientation law' (2013) 24 *Duke Journal of Comparative & International Law* 161. The right to relate as an aspect of the right to privacy is convincingly argued by the author and arguably inheres in a democracy.

discrimination based on sexual orientation'[34] is plausible under this provision of the Constitution. Further, even though the Constitution does not prohibit discrimination based on 'sex' or 'other status', it prohibits discrimination based on 'gender',[35] which is even more encompassing and could include sexual orientation and gender identity.[36]

The fourth and last research question examines the extent to which international law could play a role in the decriminalisation process in Ghana. The study finds Ghana has fully embraced international law and has committed to protecting the rights of every person.[37] The study finds Ghana has played an essential role in the international arena and expresses a determination to protect the rights of sexual minorities, even though it is a sensitive cultural issue at home, domestically.[38] The study also finds that the Ghanaian Supreme Court has used international law as a tool to interpret the Constitution in very recent cases, relying on treaties that Ghana has ratified.[39] If the Court follows in the same path of using international law in a case challenging the constitutionality of same-sex sexual acts, the study reasonably expects that the Court will affirm sexual minority rights.

Finally, the study finds that despite the bright prospects of decriminalisation of same-sex sexual conduct in Ghana, the legal culture and socio-political environment presents significant challenges. However, if the Supreme Court will abide by its approach to constitutional interpretation

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[34] The Constitution of the Republic of South Africa, 1996 sec 9(3).

[35] Constitution of Ghana, art 12(2).

[36] Gender is defined by the Oxford Advanced Learner's dictionary International students 9 ed as 'the fact of being male or female, especially when considered with reference to social or cultural differences, not differences in biology'. The definition therefore encompasses more than a person's biological sex, but also their sexual orientation and gender identity.

[37] 'Note verbale' from the permanent mission of Ghana to the United Nations, addressed to the President of the General Assembly A/69/221. At para 18, Ghana pledged to uphold fundamental human rights, treaty obligations and assist the Human Rights Council 'to achieve its aims and objectives' of upholding fundamental human rights globally. See chapter 5 of this thesis, especially 5.3 for Ghana's engagement with International law and its promise to protect all persons.

[38] Resolution A/HRC/32/L.2 Rev 1 Human Rights Council Thirty-second session agenda item 3 titled 'Protection against violence and discrimination based on sexual orientation and gender identity' June 2016. Ghana's representative, Mr Eddico, contributing to the adoption of the Resolution noted that Ghana's position on sexual minority rights had changed for the better because of Resolution 275 of the African Commission that condemned violence against sexual minorities. He noted further that Ghana is not against the rights of persons who are born gay. Ghana did not vote against the resolution. See chapter 5 of this thesis (as above).

[39] See for instance *Ghana Lotto Operators Association & Others v National Lottery Authority* [2007-2008] SCGLR 1088 which relied on the ICCPR; *Mensah v Mensah* [2012] 1 SCGLR 391 where the Court relied on CEDAW; *The Republic v Eugene Baffoe-Bonnie & 4 others* Supreme Court Accra case no J1/06/2018 (7 June 2018) where the Supreme relied on the Universal Declaration holding that the Bill of Rights is a direct incorporation of the Universal Declaration.

developed over the years that recognise fundamental human rights as a core value of the Constitution,[40] Ghana might decriminalise consensual same-sex acts. A detailed analysis follows below.

### 6.2.1 Pre-colonial Ghanaian communities and consensual same-sex conduct

The extent to which the post-colonial Ghanaian state had fully decolonised its laws, especially criminal laws that criminalise same-sex relationships guided the analysis in chapter 2. The study makes some findings that improve one's understanding of sexual minority rights in Ghana. The analyses focus on how sodomy law first became part of the Ghanaian legal system, the reasons for maintaining it and arguments for decriminalising it. The study observes that pre-colonial Ghanaian cultures accepted diverse sexuality, including same-sex relationships and did not criminalise or punish it. The British colonial administrators imposed sodomy laws on Ghana,[41] and it was not to prevent and punish an act which the pre-colonial cultures in Ghana abhorred but to preserve British culture and religion. British laws that criminalised consensual same-sex acts in pre-colonial Ghana remains on the statute book to this date.[42] Therefore, the principal argument of anti-LGBT activists that same-sex sexual conduct has never been part of Ghanaian cultures encounters significant challenges.

The findings of the study reveal instances of same-sex relationships and the absence of punishment for such conduct despite the existence of elaborate criminal sanctions that included sexual offences in various Ghanaian communities. Chapter two establishes that same-sex sexual conduct existed in early Ghanaian societies. For instance, same-sex relationships existed between males and relationships between females of the same sex.[43] Most times, even though society was aware of such relationships, there were no accounts of covert condemnation or punishment. In some societies, even after the colonial rule had ended, people celebrated same-sex marriages between males, who are often older, married, yet get married in a traditional ceremony with younger men because they are handsome or have a particular skill.[44]

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[40] *Asare v Attorney-General* [2003-2004] SCGLR 823 829.
[41] Friedland (n 15 above).
[42] Criminal Ordinance 1892 (n 5 above). See also HF Morris 'A history of the adoption of codes of criminal law and procedure in British colonial Africa 1876-1935'(1974) 18 *Journal of African Law* 8.
[43] Signorini (n 15 above).
[44] As above.

In these instances, families of the two consenting adults in the traditional marriage ceremony received the 'bride price' in similar circumstances as a marriage between a male and a female.[45] Curiously, even though the accounts showed that these same-sex adults who engaged in a relationship sometimes shared the same bed, they denied having sex.[46] Same-sex relationships existed in pre-colonial, colonial and even early post-colonial times in some Ghanaian societies.[47] The discussion of issues relating to sex is taboo in many Ghanaian communities even in modern times,[48] but the narration of the events that occurred, including the sharing of the same bed for days or weeks at a time is available for any discerning person to draw the inferences.

Indigenous Ghanaian scholars who recorded the customary laws of the people of the Gold Coast[49] did not observe any customary laws that punished consensual same-sex relationships. The customary laws of the Fantis, the Ashantis, the Akyems and other tribes in the early Ghanaian societies, did not punish same-sex sexual acts even though it punished deviant sexual acts such as incest and adultery.[50] These societies had comprehensive customary laws that governed their lives, with a well-structured judicial system.[51] While there were laws relating to sex, sexuality and breaches of the law relating to sexuality, it was not criminal to engage in same-sex sexual conduct.

Some people may contend that if there were no customary laws that punished same-sex relationships, it was because such relationships did not exist in those societies. Such an argument, though plausible, contradicts the accounts of many scholars who wrote about customs, customary laws, and the way of life of the early Ghanaian societies. Scholars argue that different sexualities other than heterosexuality existed, but because of 'silences and abeyances in language',[52]

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[45] As above.
[46] As above.
[47] As above. See also Dankwa 'The one who first says i love you: Same-sex love and female masculinity in postcolonial Ghana' (n 24 above).
[48] GY Oduro & E Miedema 'we have sex, but we don't talk about it: Examining silences in teaching and learning about sex and sexuality in Ghana and Ethiopia' in SN Nyeck (ed) *Routledge handbook of queer African studies* (2020) 236.
[49] See for instance Sarbah (n 25 above).
[50] Rattray (n 25 above). See also Sarbah (n 25 above).
[51] As above. See also HA Amankwah 'Ghanaian law: its evolution and interaction with English law' (1970) 4 *Cornell Law Journal* 3.
[52] O Ambani 'A triple heritage of sexuality? Regulation of sexual orientation in Africa in historical perspective' in S Namwase & A Jjuuko (eds) (2017) *Protecting the human rights of sexual minorities in* contemporary Africa 14 at 24; C Ngwena What is Africanness? Contesting nativism in race, culture and sexualities (2018) 209-211; M Epprecht 'The 'unsaying' of indigenous homosexualities in Zimbabwe: Mapping a blindspot in an African masculinity' (1998) 24 Journal of Southern African Studies 635 at 636; JK Anarfi & AY Owusu 'The making of

communities often concealed them. The ancient societies recognised different sexualities existed, accepted it, and did not criminalise it. These societies did not practice same-sex sexual relationships as the primary sexual life because only a minority engaged in same-sex and did not view different sexualities as a cultural aberration. Colonialism suppressed and distorted the existence of same-sex practices in most parts of Africa,[53] and together with western religion, over time, extinguished indigenous cultural practices that accepted such conduct.

In summary, chapter 2 establishes the existence of some form of same-sex sexual relationships in the early Ghanaian societies. These societies recognised and accepted such relationships but did not punish it. It valued heterosexual relationships for procreation and continuation of the family lineage[54] but accepted sexual diversity as part of humanity. The basis for criminalising same-sex relationships is, therefore, because of British culture, religion, and mode of governance.

### 6.2.2 The basis for criminalising consensual same-sex conduct: culture, religion, and politics

Chapter 3 is a critical assessment of the extent to which culture, religion, and politics entrench the criminalisation of consensual same-sex conduct in Ghana. Chapter 3, therefore analyses the relationship between culture, religion and politics as intrinsically linked to colonialism and as obstacles to the decriminalisation of consensual same-sex sexual acts in Ghana. Colonialism denigrated the culture of the colonised and subjugated various forms of culture and sexuality.[55] The decolonial theory provides a lens for understanding how coloniality controls knowledge, power and even the bodies of the colonised people.[56] Thus, analysing the law of 'unnatural carnal knowledge,' the study reveals that coloniality controls sex and sexuality in contemporary Africa, including Ghana. Coloniality continues to influence the sexuality of the colonised people even after colonialism has ended, which explains why a law that proscribed same-sex relationships in the colonial era survives colonialism. Through the use of repugnancy clauses that suppressed the

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a sexual being in Ghana: The state, religion, and the influence of society as agents of sexual socialisation' (2011) 15 *Sexuality and Culture* 1 at 14 argue that generally, there is a culture of silence surrounding sex in Ghana even in contemporary times.

[53] M Epprecht 'Bisexuality and the politics of normal in African ethnography' (2006) 48 *Anthropologica* 187 at 190-192.

[54] Epprecht 'The 'unsaying' of indigenous homosexualities in Zimbabwe: Mapping a blindspot in an African masculinity' (n 52 above); Ambani (n 52 above).

[55] Ngwena (n 52 above) 151.

[56] S Tamale *Decolonisation and afro-feminism* (2020) 92. The author rightly observes that coloniality influences core aspects of our lives such as sex, gender, and sexuality, yet 'most of us are not consciously aware of the subtle, multidimensional, and infinite ways that coloniality shapes our understandings of these aspects of our lives'.

application of indigenous customary law if it did not conform to British laws and notions of justice,[57] British laws superseded indigenous laws, outlawing different sexualities, apart from heterosexuality.

The subjugation of African and Ghanaian cultures succeeded through colonial laws that relegated customary laws of the people to the background and also through religion that classified African and Ghanaian forms of worship as heathen and primitive. Through this systematic subjugation, obliteration and substitution of Ghanaian culture and religion with British laws and culture, only scattered fragments of traditional Ghanaian cultures remain. The suppression of Ghanaian cultures happened for decades, and over time British culture and religion has fossilised into what many people call Ghanaian cultures alien to same-sex sexual relationships. As the decolonial theory reveals, the end of official colonialism did not end with colonial structures, rules, and mentality. The educated elite continued to uphold colonial structures and laws long after attaining independence. Thus, the colonial language, laws, culture, and political approaches persist.

To continue their hold on power, instead of addressing the myriad problems that colonialism left in its trail, the modern-day Ghanaian politician has to kowtow to the views of the majority and majoritarian morality, founded on colonial philosophy in order to stay in power. The origin of the sodomy law in Ghana reveal the British imposed it on Ghana after the people of Jamaica had rejected it,[58] to preserve colonial authority, culture and religion of the Victorian era.[59] Sodomy law does not represent any aspect of Ghanaian cultures, customary laws or religion, yet most people believe the law preserves Ghanaian culture, religion and laws. The misconception of sodomy law is a foundational issue which underlies the debate in Ghana. If the British introduced sodomy law into Ghana without consultation or cognisance of indigenous cultures, then as the study reveals, it does not represent nor preserve any Ghanaian culture. The contribution of chapter 3 helps clarifies issues surrounding the origins of sodomy law in Ghana, the acceptance of same-sex relationships in pre-colonial Ghana, the absence of customary laws that punished such relationships and increases the possibility of a groundswell towards tolerance, acceptance of sexual minorities and repeal of sodomy laws.

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[57] The repugnancy clause ensured that indigenous customary laws that were in conflict with British laws were declared redundant. See M Ocran 'The clash of legal cultures: The treatment of indigenous law in colonial and post-colonial Africa (2006) 39 *Akron Law Review* 465 at 475; Ambani (n 52 above) 27.
[58] Friedland (n 17 above). See also Morris (n 42 above).
[59] Kirby (n 29 above) 62.

### 6.2.3 Constitutional rights and consensual same-sex conduct

The study assesses the extent to which the Bill of Rights could found a basis to argue that constitutional rights protect sexual minority rights, and, therefore, sodomy law is unconstitutional. Chapter 4 argues that with a Constitution that compels the organs of government to uphold and respect the fundamental human rights of every person without distinction,[60] and a further promise to adhere to international human rights obligations,[61] it sets the stage for the decriminalisation of laws inconsistent with these ideals. While the Constitution does not contain specific protections for sexual minorities, as explained in chapter 4, every person, including sexual minorities, should enjoy the rights provided in it. The approach of the Supreme Court of Ghana, using a purposive approach to interpret the Constitution as a living instrument,[62] is commendable and akin to a transformative constitutionalism framework.[63] Drawing positives from the South African example, the current constitutional dispensation imposes an obligation on the courts to promote and protect the rights of every person, including sexual minorities. A court cannot deny a person's constitutional rights protection because of whom they love or whom they have sex with or how they do it.

While the South African example is encouraging,[64] the Indian[65] and Botswana[66] examples are even more encouraging. In the absence of express prohibition of sexual orientation and gender identity in their Constitutions, the courts in India and Botswana still held that the Constitution does not permit discrimination based on sexual orientation. The Supreme Court of Ghana can take a cue from these decisions that declared sodomy laws as unconstitutional even though there were no express provisions prohibiting discrimination based on sexual orientation, just like the Ghanaian Constitution.

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[60] Constitution of Ghana, art 12(1)&(2).
[61] As above art 73.
[62] *Tufour v Attorney-General* [1980] GLR 637.
[63] KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 150. Klare's seminal work defines transformative constitutionalism as a constitutional project that aims at achieving social justice. South African legal scholars and judges have deliberated on what the theory means. See for instance K van Marle 'Transformative constitutionalism as/and critique' (2009) 2 *Stellenbosch Law Review* 286; P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 352. See chapter 1 of this thesis for a discussion of the transformative constitutionalism theory.
[64] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) declared sodomy law in South Africa as unconstitutional.
[65] *Navtej Singh Johar and Others v Union of India Thr Secretary Ministry of Law and Justice* Writ Petition (Criminal) no 76 of 2016.
[66] *Letsweletse Motshidiemang v Attorney General & Legabibo* (Amicus Curiae) MAHGB – 000591-16.

A purposive interpretation of the Bill of rights in the Ghanaian Constitution shows it protects the rights of all persons including sexual minorities. Every person in Ghana should enjoy the fundamental human rights and freedoms in the Constitution.[67] The grounds for limiting the enjoyment of constitutional rights does not include sexual orientation and gender identity.[68] The study, therefore, finds that it will be unthinkable to suggest that a person loses his or her rights under the Constitution for engaging in consensual same-sex conduct. Beyond the rights stated, the Constitution also shows that there are other rights which it did not enumerate. The Constitution does not exhaust the list of rights and goes further to state that it recognises other rights inherent in democratic societies that preserve the dignity of the human person.[69]

Therefore, Ghana subscribes to the concept of unenumerated rights that, for example, embraces the right not to discriminate against a person based on their sexual orientation as in the South African Constitution.[70] The study finds that the approach adopted by courts in Botswana and India is exemplary and provides a path for Ghana to emulate. Both countries are members of the Commonwealth and have a history similar to that of Ghana. They both share with Ghana a dualist tradition regarding international law and have high levels of homophobia and opposition to consensual same-sex conduct. The courts in Botswana and India held that the dignity of the human person as a cornerstone of modern democratic and open societies was significant and outweighed majoritarian morality and public opinions about what is right and wrong. The Supreme Court of Ghana may adopt the jurisprudence of the Courts in India and Botswana when faced with a similar issue in response to the constitutional injunction to apply other rights inherent in a democracy.[71] Apart from constitutional rights, the thesis also considered the role of international law in decriminalising consensual same-sex conduct in Ghana.

### 6.2.4 international (human rights) law and consensual same-sex conduct

The study analyses the role of international law and the extent to which it could influence the decriminalisation of consensual same-sex sexual acts in Ghana. Chapter 5 makes it imperative that international human rights norms should form a vital bedrock in the quest to decriminalise sodomy laws in Ghana. Fortunately, the Supreme Court of Ghana has, in recent times, consistently used

[67] Constitution of Ghana art 12(2).
[68] As above.
[69] Constitution of Ghana art 33(5).
[70] Constitution of the Republic of South Africa sec 9(3).
[71] Constitution of Ghana art 33(5).

international human rights norms to vindicate the rights of citizens.[72] On these occasions, the Court has held that the Constitution of Ghana contains and recognises international norms in the ICCPR, CEDAW, and the Universal Declaration.[73] The Supreme Court may soon have to confront the actual test of human rights protection when called upon to adjudge that sodomy laws in the Criminal Offences Act are inconsistent with the Bill of Rights in the Constitution.

Chapter 5 finds that relying on Ghana's Constitution, Ghana's commitment to international law as reflected in human rights treaties and through Ghana's contribution to the development of international law, particularly the norm of sexual orientation and gender identity, show that Ghana acknowledges the existence of sexual minority rights but sees it as a sensitive issue because of culture.[74] The study shows that Ghana's commitment to upholding international obligations of protecting sexual minority rights places an obligation on the Supreme Court to hold the government to account by affirming this promise.

The study also finds that Ghana has played an essential role in the development of international human rights law relating to equal protection based on sexual orientation. Ghana's interaction with global bodies relating to sexual orientation and gender identity, from 2008 till now, particularly at the Human Rights Committee and the Human Rights Council has improved.[75] The current position of Ghana is to work towards eliminating discrimination and violence against sexual minorities.[76] The position of Ghana at the international stage coincides with an approach by the Supreme Court in recent times to use international human rights treaties as an interpretive tool to vindicate the rights of persons in Ghana. The study therefore argues that if adequately invoked and applied,

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[72] *Ghana Lotto Operators Association & Others v National Lottery Authority* [2007-2008] SCGLR 1088 which relied on the ICCPR; *Mensah (G) v Mensah (S)* [2012] 1 SCGLR 391 where the Court relied on CEDAW; The *Republic v Eugene Baffoe-Bonnie & 4 others* Supreme Court Accra case no J1/06/2018 (7 June 2018) where the Supreme relied on the Universal Declaration holding that the Bill of Rights is a direct incorporation of the Universal Declaration. (n 39 above).

[73] As above.

[74] Statement by Ghana's representative Mr Sammie Eddico at the Human Rights Council in relation to resolution A/HRC/32/L.2/Rev 1 titled 'Protection against violence and discrimination based on sexual orientation and gender identity' June 2016. See chapter 5 of this thesis particularly section 5.3 for a detailed discussion of this.

[75] As above. See also Human Rights Council UPR of Ghana 3rd Cycle – 28th Session' Thematic list of recommendations' 13-14 where Ghana responds positively to supporting recommendations made requiring it to address sexual minority rights, unlike its 1st and 2nd Cycle recommendations which it did not support. See a discussion of this under section 5.3 in chapter 5.

[76] As above.

international human rights law could be useful in decriminalising consensual same-sex acts in Ghana.

## 6.3 Recommendations

The study finds that if the Supreme Court of Ghana maintains its fidelity to a purposive interpretation of constitutional rights and uses international law as a tool to interpret constitutional rights, it is possible to decriminalise the law of 'unnatural carnal knowledge'. The legal culture and the socio-political environment in Ghana may pose significant challenges, but if the Supreme Court remains consistent in its constitutional interpretation, decriminalisation of consensual same-sex conduct remains possible. Based on the research findings, the study makes some recommendations towards realising decriminalisation of consensual same-sex activity in Ghana.

The first is for the LGBT community and its members to adopt an incremental approach mindset to litigating sexual minority rights cases, leading eventually to a declaration of the unconstitutionality of the sodomy law. The second relates to the constitutional obligations imposed on the national human rights institutions and suggests how victims of human rights violations could take advantage of their powers and functions to protect their rights. The last recommendation focuses on legal reform and takes a legal and strategic approach towards decriminalising 'unnatural carnal knowledge' in Ghana.

### 6.3.1 Incremental litigation of LGBT rights in court

The study recommends that civil society groups sympathetic to LGBT rights in Ghana should form a coalition to contest the constitutionality of section 104 of the Criminal Offences Act, in the long term. Long term in this sense could be a period ranging from between three to ten years. In the short term, the coalition could contest ongoing violations against sexual minorities based on their sexual orientation. For instance, the announcement of an LGBT conference scheduled for July 2020 caused adverse reactions in Ghana.[77] Individuals, organisations and government officials threatened to shut down such a gathering and also prevent persons who were travelling to Ghana from doing so.[78] The study recommends that it is appropriate to contest such cases in court because

[77] The Independent Ghana 'We'll halt LGBT conference in Ghana by all means- Christian group' 4 March 2020 available at https://theindependentghana.com/2020/03/well-halt-lgbt-conference-in-ghana-by-all-means-christian-group/ (accessed 26 September 2020).

[78] As above. See also KG Asiedu 'Ghana bans LGBT conference after Christian groups protest' Thomson Reuters Foundation 12 March 2020 available at https://www.reuters.com/article/us-ghana-lgbt-religion-idUSKBN20Z31L (accessed 26 September 2020); GhanaWeb ' '*Wallahi Tallahi*', we will stop any LGBT

threats of shutting down an LGBT meeting is a blatant infringement on the right to association.[79] This is not the first time a proposed LGBT conference has come under scrutiny because of threats to the lives of the participants.[80] Contesting this issue in court will settle and create a body of jurisprudence for future litigation. As a starting point, the human rights division of the High Court that determines only human rights cases could be an avenue to test violations of sexual minority rights.

While challenges to laws and policies have occurred in countries such as Botswana, Kenya and Uganda relating to LGBT rights, such as the refusal of registration,[81] forced anal examination[82] and harassment of sexual minorities,[83] no such litigation has occurred in Ghana. As Jjuuko rightly observes, such litigation requires strategic planning as it may have consequences.[84] While a court victory might be desirable, it may have consequences that might be harmful. The examples of

conference in Ghana- Chief Imam swears' 27 February 2020 available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Wallahi-Tallahi-we-will-stop-any-LGBT-conference-in-Ghana-Chief-Imam-swears-878911 (accessed 26 September 2020).

[79] Constitution of Ghana art 21(1)(e) guarantees 'freedom of association, which shall include freedom to form or join trade unions or other associations, national and international, for the protection of their interest'. See also the case of *Mensima v Attorney-General* [1996-1997] SCGLR 676. The Supreme Court upheld the right to association of the Applicant and declared as unconstitutional, Regulation 3(1) of the manufacture and sale of spirits regulations which required membership of a registered distillers association before obtaining and operating the sale of alcohol.

[80] K Essien & S Aderinto 'Cutting the head of the roaring monster: Homosexuality and repression in Africa' (2009) 30 *African Study Monograph* 121 recounts that a planned LGBT conference in Ghana in 2006 prompted a response from Ghanaians and the State that threatened the rights of association and other rights of LGBT persons.

[81] *Attorney General of Botswana v Thuto Rammoge & Others* Court of Appeal Civil case no CACGB-128-14 (March 16, 2016) where the court of Appeal of Botswana affirmed the right of an LGBT organisation *LeGaBiBo* to register and operate as a society.

[82] *COI & GMN v Chief Magistrate UNKUNDA Law Courts & Others* Civil Appeal no 56 of 2016 where the Court of Appeal at Mombasa in Kenya, held that forced anal examination was unlawful and unconstitutional.

[83] *Victor Juliet Mukasa and Yvonne Oyo v Attorney General* (Misc Cause No. 247/06, High Court of Uganda, Kampala, judgment of 22 December 2008, unreported) where the High Court of Uganda in Kampala held that 'the applicant's rights to dignity, protection from inhuman treatment, personal liberty and privacy of the person, home and property had been violated and awarded compensation' 18-21; For a discussion of this case see JD Mujuzi 'Even lesbian youths or those presumed to be lesbians are protected by the Constitution of Uganda—but to a limited extent: Rules the High Court' (2009) 6 *Journal of LGBT Youth* 441.

[84] Unpublished: A Jjuuko 'Beyond court victories: Using strategic litigation to stimulate social change in favour of lesbian, gay, and bisexual persons in Common Law Africa' LLD thesis University of Pretoria, 2018.

India,[85] Botswana,[86] and Kenya[87] confirm that strategic litigation requires adequate planning to challenge the constitutionality of sodomy laws. There are many reported cases of sexual minority rights violations in Ghana, yet the victims of these violations have not used the courts as an avenue to protect their rights.[88]

However, it is time to challenge the *status quo*. Even if not successful at the first time of asking, there might be another opportunity to test the law. As happened in the USA,[89] India[90] and Botswana,[91] the courts declared sodomy laws as unconstitutional on a second occasion after refusing the request to do so the first time. The absence of LGBT related issues before the courts in Ghana is a reminder that either potential litigants view the courts as an unfavourable venue to

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[85] *Navtej Singh Johar & Others v Union of India Thr Secretary Ministry of Law & Justice* (n 65 above). See the earlier case of *Suresh Kumar Koushal & Another v Naz Foundation & Others* Civil appeal no 10972 (2013).

[86] *Letsweletse Motshidiemang v Attorney General & Lesbians, Gays and Bisexuals of Botswana (LeGaBiBo)* (n 66 above) which declared sodomy law as unconstitutional in Botswana. For a discussion of this case see F Viljoen 'Botswana court ruling a ray of hope for LGBT people across Africa' *The Conversation* (12 June 2019) available at https://theconversation.com/botswana-court-ruling-is-a-ray-of-hope-for-lgbt-people-across-africa-118713 accessed 21 July 2020. See also, T Esterhuizen 'Decriminalisation of consensual same-sex sexual acts and the Botswana Constitution: *Letsweletse Motshidiemang v The Attorney-General* (*LEGABIBO as amicus curiae*)' (2019) 19 *African Human Rights Law Journal* 843. For an earlier decision of the Court of Appeal refusing to repeal sodomy in Botswana see *Kanane v The State* 2003 (2) BLR 67 (CA). The court noted at headnote 3 that 'there was no evidence that the approach and attitude of society in Botswana to the question of homosexuality and to homosexual practices by gay men and women required a decriminalisation'.

[87] *EG & 7 Others v Attorney General; DKM & 9 Others (interested parties); Katiba Institute and Another (amicus curiae)* consolidated suit of Petition no 150 of 2016 and Petition no 234 of 2016. The High Court in Kenya upheld the constitutionality of the sodomy offence claiming that to hold otherwise will be tantamount to offending the right to marry the opposite sex in the Kenyan Constitution. The case is on appeal.

[88] Human Rights Watch 'No choice but to deny who I am' (n 13 above); see also Human Rights Violations Against Lesbian, Gay, Bisexual, and Transgender (LGBT) People in Ghana: A Shadow Report Submitted for consideration at the 115th Session of the Human Rights Committee October 2015, Geneva submitted by Solace Brothers Foundation, The Initiative for Equal Rights, Center for International Human Rights of Northwestern University School of Law, Heartland Alliance for Human Needs & Human Rights, Global Initiative for Sexuality and Human Rights August 2015 available at https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/GHA/INT_CCPR_ICO_GHA_21415_E.pdf (accessed 8 July 2020).

[89] *Bowers v Hardwick* 478 U.S. 186 (1986) The United States Supreme Court held that the state of Georgia's statute that criminalised consensual sex between men did not violate constitutional rights. However, the court in *Lawrence v Texas* 539 U.S. 558 (2003) the Court overturned the decision in *Bowers v Hardwick* holding that laws that criminalised consensual same-sex sexual acts were unconstitutional.

[90] *Suresh Kumar Koushal and another v NAZ Foundation and others* Supreme Court of India: Civil Appeal no 10972 of 2013. The Supreme Court of India overturned a 2009 Delhi High Court decision, declaring that sec 377 of the Indian Penal Code that criminalised sex 'against the order of nature' was not unconstitutional.

[91] *Kanane v The State* 2003 (2) BLR 67 (CA) the court of Appeal in Botswana in 2003, noted in headnote 3 that 'there was no evidence that the approach and attitude of society in Botswana to the question of homosexuality and to homosexual practices by gay men and women required a decriminalisation'. However, the High Court in *Letsweletse Motshidiemang v Attorney General & Legabibo (Amicus Curiae)* (2019) MAHGB – 000591-16 held in 2019 that criminalisation of consensual same-sex relationships was unconstitutional.

contest such issues or that there are no strategies in place to contest human rights violations on the grounds of sexual orientation. However, approaching the courts to litigate human rights violations based on sexual orientation, strategically, could yield positive outcomes. Getting the courts, for instance, to determine matters involving violence against LGBT persons, may pave the way to litigate the constitutionality of sodomy law later, based on the outcome of earlier decisions.

It may be correct to argue that some people are also not comfortable revealing their sexual orientation in a homophobic society and would therefore not attempt to use the courts but use the anonymous online system operated by the Commission on Human Rights and Administrative Justice (CHRAJ). Strengthening the capacity of the personnel of CHRAJ is crucial to addressing violations based on sexual orientation.

### 6.3.2 CHRAJ as an option to affirm sexual minority rights

The study makes two recommendations relating to CHRAJ. First, CHRAJ must take the lead on educating the Ghanaian public on the rights of all persons, including sexual minorities. CHRAJ's mandate includes educating the public on fundamental human rights and freedoms[92] and has representation in almost every district of Ghana. Educating the public on LGBT rights might be a challenging assignment to carry out in the current homophobic climate in Ghana, but as an independent human rights commission of the State, it is duty-bound to develop strategies to execute this mandate. Through radio and television programmes, and face-to-face discussions in various communities, the Commission should be bold to execute this mandate. The findings of this study show that most of the public lack adequate education about sexual minority rights, and the Commission must find ingenious ways to execute this constitutional mandate.

Second, LGBT members should take advantage of the powers of the Commission to investigate violations of fundamental human rights to lodge complaints of violations of their rights. The Commission has powers to mediate such cases but can also resort to a panel hearing where it can make formal rulings. The procedure of panel hearing has generated a body of human rights jurisprudence which include the ground-breaking case on sexual harassment.[93]

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[92] Constitution of the Republic of Ghana art 218(f) empowers CHRAJ 'to educate the public as to human rights and freedoms by such means as the Commissioner may decide, including publications, lectures and symposia'; see also Commission on Human Rights and Administrative Justice Act, 1993 Act 456 sec 7(g).

[93] *Commission on Human Rights and Administrative Justice v Norvor* [2001-2002] 1 GLR 78. The High Court, Accra, enforced the decision of CHRAJ to award damages against the Respondent for acts of sexual harassment that caused injury to the complainant's dignity and self-respect pursuant to sec 18(2) of Act 456.

Therefore, CHRAJ is a viable option for protecting LGBT rights in Ghana. However, victims of human rights violations based on sexual orientation must pursue these cases to their logical conclusion. While CHRAJ operates an anonymous online service for LGBT persons, the efficacy of such a system is unknown, and a visit to their online website suggests this service might no longer be available.[94] The study recommends that CHRAJ should protect the identity of LGBT persons who lodge complaints of human rights violations based on their sexuality but should deliver rulings that will serve as jurisprudence for future cases. One factor that may affect the effective delivery of CHRAJ's constitutional mandate is the lack of capacity and resources. The Commission has been under-resourced for several years, and its annual budget has consistently reduced. The lack of resources also affects the retention and attraction of qualified staff at all levels of the work of the Commission, with expertise and knowledge in human rights at sub-regional, regional, and global level.

The Human Rights Council has advised the government of Ghana to consider resourcing CHRAJ adequately for effective execution of the Commission's mandate. The profound nature of sexual minority rights and the need to educate and adjudicate sexual minority rights in a homophobic environment require strengthening the capacity of personnel at all levels, especially those at the district and regional levels where most human rights violations occur. Besides addressing resource constraints, CHRAJ must prioritise strengthening the capacity of staff at all levels from the national office to the district office to deal with the intricate issue of sexual minority rights. The Commission can take advantage of scholarship opportunities available for training programmes on sexual minority courses at the Centre for Human Rights, at the University of Pretoria. CHRAJ can also liaise with academics and departments in universities in Ghana with expertise on sexual minority rights issues to organise training programmes for their staff. The above recommendations notwithstanding, legal reform of sodomy law is the best option to consider.

[94] Human Rights Committee 117th Session 'summary record of the 3274th meeting held at the Palais Wilson, Geneva, on Friday, 24 June 2016 at 10 am. CCPR/C/SR.3274 (29 June 2016). At para 38 a Deputy Commissioner of CHRAJ, Mr Richard Ackom Quayson assured the Human Rights Committee that CHRAJ had an online reporting system for victims of LGBT violations.

## 6.4 Legal reform

The study recommends legal reform of the Criminal Offences Act of Ghana.[95] There have been many calls by scholars, judges, lawyers, and members of the public for reform of Ghana's criminal justice system. This thesis reiterates the call for reform of the criminal justice system and as part of that reform emphasises the need to repeal the 'unnatural carnal knowledge' offence.[96] History suggests Jamaica rejected the Criminal Ordinance of 1892, creating the opportunity for the colonial administrators to impose it on Ghana.[97] Imposing the penal code that criminalises same-sex acts make the law lack legitimacy, unrepresentative of the culture and views of Ghanaians and therefore unfit to regulate the lives of Ghanaians.

The law is also ambiguous[98] and discriminatory. 'Unnatural carnal knowledge', on the face of the law targets 'unnatural' sexual conduct. The law does not define what makes up 'unnatural carnal knowledge' and therefore leaves it open for several interpretations. 'Unnatural carnal knowledge' may arguably occur between persons of the same sex or the opposite sex. However, the law primarily targets men who have sex with men.[99] While the law potentially criminalises sexual acts between heterosexual couples who engage in anal sex,[100] it requires some analysis to conclude that, *Prima facie,* the law potentially excludes same-sex sexual acts between two females, but not entirely.[101] State and non-state actors use the law as the basis to violate the rights of sexual minorities, through extortion, harassment, and blackmail. The law arguably conflicts with constitutional rights such as privacy, dignity, equality, non-discrimination and requires urgent reform.

### The viable route to legal reform

The study analyses the viability of different routes for legal reform and makes some findings. There are four routes to decriminalisation by the executive, Parliament, civil society, and the judiciary. All these routes are likely in an open and democratic society like Ghana, but there are enormous

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[95] Criminal Offences Act, Act 29 of 1960.
[96] As above sec 104(1)(b).
[97] Friedland (n 17 above) 338.
[98] RA Atuguba 'Homosexuality in Ghana: Morality, law and human rights' (2019) 12 *Journal of Politics and Law* 113.
[99] As above.
[100] As above 115.
[101] As above 114. The rationale behind excluding female same-sex sexual conduct is that sec 99 of the penal code requires penetration in order to convict a person of carnal knowledge. A woman does not have a penis to 'penetrate' another woman. Yet, unnatural carnal knowledge could be established if an artificial penis is used by a woman on another woman.

challenges related to culture, religion and politics which often intersect to deny such reform from happening. This section discusses the role of the executive, the legislature, civil society, and the judiciary in realising legal reform of sodomy law.

### The executive route to legal reform

By the powers vested in the President of Ghana, (s)he can commission a study into law reform and based on the advice of the Commission can start the process to repeal or amend the sodomy law.[102] Under the 1992 Constitution, the President could appoint a Commission of Inquiry,[103] headed by a sole Commissioner or a Commissioner and other persons on the advice of the Council of State to inquire into a matter of public interest.[104] Criminal justice reform in Ghana is long overdue. At the criminal justice conference in Accra in 2013, former Chief Justice Georgina Wood expressed frustration at the slow pace of criminal cases in Ghanaian courts, overcrowded prisons, the absence of comprehensive sentencing policy, and non-custodial sentences.[105] She recommended the need for 'radical reforms, the redesigning of systems, structures, policies; attitudinal and paradigm mental shifts in the way we render justice and a shared passion and commitment to collaboratively work to build a well-functioning system'.[106] The former Chief Justice also called for reform of the Criminal and Other Offences Act.[107] One piece of the reform could be the repeal of the offence of 'unnatural carnal knowledge', which targets consensual same-sex conduct.

The Criminal Offences Act of Ghana is a British legacy from the Criminal Ordinance of 1892.[108] If the President of Ghana finds it necessary to appoint a sole Commissioner or Commissioners[109] to start the reform of the criminal justice system, one issue they may want to consider is the repeal of section 104 as discriminatory, potentially unconstitutional and an affront to the rights of sexual minorities.

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[102] Constitution of Ghana art 278(1)(a).
[103] As above.
[104] As above art 278(1) a & b. The President can also initiate legal reform on his own volition.
[105] 'CJ bemoans 'tortoise-pace' of cases in court' (13 August 2013) *Modern Ghana* available at https://www.modernghana.com/news/482551/cj-bemoans-tortoise-pace-of-cases-in-court.html (accessed 1 October 2020).
[106] As above.
[107] As above. Criminal and Other Offences (Procedure) Act, Act 30, 1960.
[108] JS Read 'Ghana: The criminal code, 1960' (1962) 2 *The International and Comparative Law Quarterly* 272, traces the amendments to the criminal code from 1892 to 12 January 1961 when the current code came into force. The latest amendment to the law is the Criminal Code (Amendment) Act, 2003 (Act 646). See sec 318 of Act 646 for a list of repeals to the law.
[109] Constitution of Ghana art 278(2).

If the President accepts the outcome of an inquiry that recommends the repeal of section 104(1)(b) as part of purging the Criminal Offences Act, the Legislature needs to carry out the reform of the law required. However, if the President uses this route to reform the penal code, he risks accusations of having a vested interested in the subject, usurping the powers of the legislature, and being undemocratic, for initiating the reform. The election of the President by popular vote suggests he risks losing an election in a society where the majority are homophobic and have threatened to campaign and vote against a party that accommodates or starts legal reform to decriminalise 'unnatural carnal knowledge'.[110] Since the return from military rule to democratic rule in 1992, the political party that wins the presidential votes is the same party that has a majority of members in Parliament. By this parliamentary majority, the executive introduces Bills in Parliament which Parliamentarians always pass into the law.

The question then is; Will a President of Ghana ever introduce a bill in Parliament for the decriminalisation of section 104(1)(b) of the Criminal Offences Act? In the short term, the answer is no. In recent times none of the Presidents of Ghana has been bold enough to resist the pressures of political opponents and party members, religious and traditional leaders to condemn same-sex acts.[111] Anti-LGBT proponents target political leaders, including the President, to introduce stiffer punishments for same-sex sexual activity, while the LGBT community has not taken such initiatives, at least publicly. It is therefore inconceivable that decriminalisation of consensual same-sex acts would happen through the efforts of the executive President. The next option to consider is legal reform under the auspices of Parliament.

### The parliamentary route to legal reform

Arguably, the usual route for legislative reform is the Parliament of Ghana. The Constitution vests Parliament with the powers under the Constitution to repeal, amend and make new laws for the country.[112] It exercises this power through the consideration of Bills brought to Parliament by the executive. It is also possible for individual members of Parliament to introduce a private member's

[110] 'We'll campaign against any party that supports homosexuality-group' *GhanaWeb* 19 April 2018 available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/We-ll-campaign-against-any-party-that-supports-homosexuality-Group-644610 (accessed 3 October 2020).
[111] 'we're fortunate all our current past presidents 've rejected LGBT legislation – Foh-Amoaning *GhanaWeb* available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/We-re-fortunate-all-our-current-past-presidents-ve-rejected-LGBT-legislation-Foh-Amoaning-791956 (accessed 3 October 2020).
[112] Constitution of Ghana art 93(2).

Bill, but members of Parliament have rarely utilised this power since Ghana returned to constitutional democracy in 1992 because of the financial implications associated with this route. If a Bill has financial implications, it is only the executive that can introduce it in Parliament.[113] Since there is rarely a Bill that does not have financial implications, indirectly, Parliamentarians cannot introduce a private member's Bill. Thus, while Parliament has the power to debate and pass Bills into law, it usually considers Bills introduced to Parliament by the executive.[114]

Another way by which Parliament can make laws is through the Commission of Inquiry route.[115] Just like the President, Parliament also has the power to pass a resolution calling for a Commission of Inquiry into a matter of public interest. Parliament can also make amendments to the current law through performing its regular duties. Thus, the Parliament of Ghana, though encumbered in several ways as to introducing Bills for passage into law, still reserves the power to amend or repeal the Criminal Offences Act of Ghana.[116]

Ebobrah has argued that lawmakers in Africa can take the bold step of initiating legal reform and decriminalising consensual same-sex conduct.[117] A case in point is the Parliaments of Mozambique,[118] Seychelles,[119] and Gabon,[120] which decriminalised same-sex acts in 2014, 2016 and 2020 respectively. The legislators in these countries repealed colonial-era laws that criminalised same-sex sexual acts. Ebobrah is therefore right that such an approach is achievable in Africa.[121] However, the legislative route for law reform is not possible in Ghana. In theory, while the Parliament of Ghana has the power to make laws, in practice, it is the executive that determines the passage of laws.

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[113] As above art 108.
[114] As above art 106 (2)-(14) & art 108.
[115] Constitution of Ghana art 279(1)(c) states that Parliament may by a resolution request the President to set up a commission of inquiry into any matter of public importance.
[116] As above art 93(2).
[117] ST Ebobrah 'Africanising Human Rights in the 21st Century: Gay Rights, African Values and the Dilemma of the African Legislator' (2012) 1 *International Human Rights Law Review* 110.
[118] Law 35/2014 of June 2014. The Mozambiquan Parliament decriminalised arts 70 & 71 of the penal code of 1886 which criminalised 'habitually practised vices against nature'. The law came into effect in June 2015.
[119] In July 2016 Seychelles decriminalised section 151 (a) & (c) of its 1955 penal code that criminalised 'carnal knowledge of any person against the order of nature'. See ILGA World: LR Mendos, state-sponsored homophobia 2019: Global legislation overview update (2019) 32.
[120] 'Gabon senate votes to decriminalise homosexuality' *GhanaWeb* African news of Monday 29 June 2020 available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Gabon-senate-votes-to-decriminalise-homosexuality-993622 (accessed 6 August 2020).
[121] Ebobrah (n 117 above).

Since 1992, the party whose candidate wins the presidential elections is the same party whose members dominate or make up the majority in Parliament. The Constitution mandates the President to appoint a majority of Ministers of State from Parliament.[122] Even though Parliament has the power to make laws[123] through the passing of Bills,[124] this power shifts to the President if the Bill has financial implications.[125] In theory, almost every Bill that Parliament passes into law has financial implications. Thus, while Parliament has the power to pass Bills into law, it is the executive that in reality makes laws in Ghana. To that extent, decriminalisation of sodomy law by Parliamentarians may encounter significant challenges. Parliament on its own is extremely unlikely to undertake a reform of the sodomy law in Ghana unless such an idea coincides with that of the executive.

Also, given the current politicisation of same-sex relationship with Parliament leading the charge in condemning such relationships, it is inconceivable that Parliament will decriminalise consensual adult same-sex sexual relationships.[126] Parliamentarians, their constituents and party members are all members of the society that denounce same-sex relationships on religious and cultural grounds. Any attempt to undermine these religious and cultural beliefs by decriminalising the offence of 'unnatural carnal knowledge', will end a person's tenure in Parliament.[127] Therefore, the enactment of legislation in Parliament as a route to decriminalise consensual same-sex conduct is highly improbable in Ghana.

### The civil society route to legal reform

The third route for legal reform to decriminalise consensual same-sex conduct in Ghana is through civil society groups pressurising the government to repeal the sodomy law. Human rights, civil society organisations could organise around the theme of upholding constitutional rights of dignity, equality, and non-discrimination to put pressure on the government and Parliament to

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[122] Constitution of Ghana art 78(1).
[123] As above art 93(2).
[124] As above art 106(1).
[125] As above art 108.
[126] Ebobrah (n 117 above) 132, concedes this point, contending that this presents a dilemma for the African legislator and therefore the courts are well suited to deal with decriminalisation of same-sex sexual conduct in Africa.
[127] SI Lindberg 'What accountability pressures do MPs in Africa face and how do they respond? Evidence from Ghana' (2010) *Journal of Modern African Studies* 117 at 130-131. The author observes that Members of Parliament (MPs) are usually pressurised by the President and his advisors to follow party lines in enacting legislation.

decriminalise consensual same-sex conduct. The civil society route is difficult to pursue, but it is not uncommon for civil society organisations to mobilise around a specific subject to get the government to respond positively. The Freedom of Information Act is a case in point.[128] Through the activism of civil society groups, the executive and Parliament came under enormous pressure to pass a law that allowed for access to information as a constitutional right. In 2019, After about 20 years of stalling, the legislature finally passed the Freedom of Information Act.[129]

Human rights civil society organisations and LGBT organisations may come together and mobilise around a common theme to ensure decriminalisation of sodomy law. If a coalition of civil society groups could pressurise the government to pass the Right to Information Act, it is possible to pressurise the government to decriminalise sodomy law. In a homophobic environment where discussions on sexual minority rights are a taboo subject, this might be a challenging task with the likelihood of a backlash against the LGBT community.

A counter-movement that contends that same-sex relationships are against religion and culture is thriving in Ghana at the moment. The national coalition for proper human sexual rights and family values, comprising eminent religious and other personalities dominates the media landscape, condemning sexual minorities and making it difficult for a measured discussion on LGBT rights towards decriminalisation. The convenor of the group, Moses Foh-Amoaning has the penchant for attacking any person who speaks favourably about sexual minority rights and has ingratiated himself with some religious and political leaders to speak against sexual minority rights regularly. He has recently threatened politicians, journalists and even judges that God will punish them and their generations if they promote LGBT rights.[130] In a recent move to back the group's threat to seek re-criminalisation of consensual same-sex conduct in Ghana, it has publicly asked political parties to include in their manifestos, which is a document that shows the development agenda for the country, their position on sexual minority rights.[131] The deliberate attempt to gain political sympathy in condemning and re-criminalising consensual same-sex sexual acts endangers the

[128] Right to information Act, 2019 (Act 989).
[129] Commonwealth Human Rights Initiative Africa office 'The right to information Ghana's journey (1992-2019)' particularly pages 12-14.
[130] 'God will curse you and your generation if you promote LGBT- Amoaning to politicians, journalists' *GhanaWeb* 11 March 2020 available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/God-will-curse-you-and-your-generation-if-you-promote-LGBT-Amoaning-to-politicians-journalists-891343 (accessed 4 October 2020).
[131] 'NDC, NPP should have addressed LGBTQ in their manifestoes' *GhanaWeb* 24 September 2020 available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/NDC-NPP-should-have-addressed-LGBTQ-in-their-manifestos-Foh-Amoaning-1068586 (accessed 4 October 2020).

rights of sexual minorities. What it seeks to achieve is for the government to introduce stiffer laws for same-sex conduct with dire consequences for LGBT rights in Ghana.

This thesis, therefore, recommends that a civil society coalition of LGBT rights defender should bring public pressure to bear in part on the executive and also educate society about rights of LGBT persons to minimise the efforts of the counter-movement towards re-criminalisation of same-sex conduct. The group may come together to share common ideas and engage in research for the benefit of their members nationwide and make it a point to prepare strategically to start strategic projects to combat homophobia and also respond to issues relating to sexual minority rights.

This study finds that a lack of knowledge of LGBT issues in Ghana is a critical factor in showing tolerance for such rights. It is imperative that at least if a well-equipped coalition exists to educate, research, and disseminate LGBT rights information, it might influence the legal reform process towards decriminalisation of same-sex relationships when the time finally comes. A civil society coalition urging the government to adopt a Right to Information Act differs from a coalition of human rights defenders requesting the State to decriminalise consensual same-sex conduct. While the right to access information freely arguably enjoys more support than sexual minority rights in a homophobic society, tireless efforts by human rights defenders could achieve positive results because attaining respect and protection of human rights has always been a struggle.[132] To be successful, human rights defenders and LGBT organisations need to strengthen their capacity in order to protect their rights strategically.

### The judicial route – interpretation of the Constitution as legal reform

It is trite understanding judges do not make law but through an interpretation of the existing law, provide new insights into the law in conformity with contemporary developments. To this extent, the Supreme Court of Ghana may apply the concept of interpreting the Constitution as a living instrument as it has done in several cases,[133] but this time concerning sexual minority rights. This part, therefore, explores the avenues available to the judiciary to affect the process of decriminalisation of consensual same-sex conduct in Ghana.

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[132] M Mutua 'Sexual orientation and human rights: putting homophobia on trial' in S Tamale (ed) *African sexualities* (2011) 452 at 456.

[133] *Tuffour v Attorney-General* [1980] GLR 637; *Kuenyehia v Archer* [1993-94] 2 GLR 525 at 562; *Apaloo v Electoral Commission of Ghana* [2001-2002] SCGLR 1 at 19; *Asare v Attorney-General* [2003-2004] 2 SCGLR823 at 836.

## Interpretation of constitutional rights

Interpreting constitutional rights in a purposive and progressive manner is crucial in protecting fundamental human rights in Ghana. The Supreme Court has done commendably to protect the right to dignity,[134] the right to a fair trial,[135] and the freedom of association.[136] The argument, therefore, is that the Court can interpret constitutional rights as providing equal legal protection for all persons regardless of their sexual orientation.

This thesis argues that despite the absence of a specific provision in the Constitution that prohibits discrimination on the grounds of sexual orientation, using a combination of rights, the Supreme Court may conclude the Constitution protects sexual minority rights. The Constitution prohibits discrimination based on gender but not on sex or sexual orientation.[137] Gender refers to 'the fact of being male or female, especially when considered with reference to social and cultural differences, not differences in biology'.[138] Sex, on the other hand, refers to 'the state of being male or female'.[139] Every person has a sexual orientation which is an aspect of their gender. This orientation or identity is not only because of biological differences but also the social and cultural constructions of the human being. Therefore, the prohibition of discrimination based on gender in the Constitution which includes social and cultural constructions of who is male and female ought to encompass sexual orientation. What this means is that the equal protection of rights enshrined in the Constitution protects all persons without distinction of any kind, including their sexual orientation.

The Supreme Court of Ghana has observed that fundamental human rights protection is an underlying core value of the Constitution.[140] The Court interprets the Bill of Rights in a purposive manner to protect the rights of persons in society.[141] For instance, in *Abena Pokuaa Ackah v Agricultural Development Bank*,[142] the Court held the Respondent had infringed on the right to privacy of the Appellant for making use of a recorded conversation without the Appellant's

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[134] *Adjei-Ampofo (no 1) v Accra Metropolitan Assembly and Attorney-General* (no 1) [2007-2008] SCGLR 611.
[135] The *Republic v Eugene Baffoe-Bonnie & 4 others* Supreme Court Accra case no J1/06/2018 (7 June 2018).
[136] *Mensima v Attorney-General* [1996-97] SCGLR 676.
[137] Constitution of Ghana art 12(2).
[138] Oxford Advanced Learner's dictionary International student's edition 9th edition.
[139] As above.
[140] *Asare v Attorney-General* [2003-2004] 2 SCGLR 823 at 830.
[141] As above. See also A Barack *Purposive interpretation in law* trans from Hebrew (2005) 82. The author states that the purposive interpretation is the best form of legal interpretation.
[142] *Mrs Abena Pokuaa Ackah v Agricultural Development Bank* (2016) Civil Appeal no J4/31/2015.

knowledge and consent. In *Mensah v Mensah*,[143] the Supreme Court held that the Appellant was entitled to an equal share of property acquired during the marriage with her husband. Similarly, the *Sabbah* case[144] held that the Respondent had violated the right to liberty of the Appellant and awarded compensation for a breach of that right. The *Baffoe-Bonnie* case[145] established the parameters of a fair trial. It held that the right to a fair entitles an accused person to all relevant documents in possession of the prosecution in order to prepare their defence adequately.

Except for the *Mensah* case, the Supreme Court determined all the cases cited above in the last five years. The tendency of the Supreme Court to interpret the Constitution to uphold human rights as a core value of the Constitution through a purposive approach is commendable.[146] It shows the Court is willing and ready to protect the rights of every person. In *Sabbah*, the High Court convicted and sentenced the Appellant to death, and he spent about seven years in prison before the Court of Appeal overturned his conviction and imprisonment. The Court had to read into the Constitution a meaning that suggested that even though a person cannot serve part of a death sentence; they are still eligible for compensation if they have spent some time in prison. The imaginative approach of the Court to compensate a person wrongfully convicted of murder and serving prison time is remarkable.

Concerning sexual minority rights such an approach by the Court might be essential to hold that even though the Constitution does not expressly provide for the rights of sexual minorities, it entitles them to the rights within the meaning of the Constitution. Besides, a combination of the rights to dignity, privacy, equality, and freedom from discrimination protects the rights of consenting adults to engage in consensual same-sex acts in private. The right to dignity ensures that a person's intimate domain is free from interference while the right to privacy means that what two consenting adults do in their private bedroom, harming no one, should not be the subject of law enforcement. Anything to the contrary would be a breach of the right to privacy. Also resorting to forced medical procedures, including anal examination to find out if people are engaged in anal sex flagrantly violates their right to dignity and bodily integrity, and the Constitution does not allow that. Equality and freedom from discrimination further underscore the importance of the rights to dignity and privacy.

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[143] *Mensah v Mensah* (2012) 1 SCGLR 391.
[144] *Dodzie Sabbah v The Republic* Supreme Court Accra case no J3/3/2012 (11June 2015).
[145] The *Republic v Eugene Baffoe-Bonnie & 4 others* (n 135 above).
[146] *Asare v Attorney-General* (n 140 above).

The thesis, therefore, recommends that future litigation relating to equal legal protection of every person, regardless of their sexual orientation, should tap into the jurisprudence of the apex court. Enforcing human rights as a core value of the Constitution and applying a purposive interpretation to these values bodes well for sexual minority rights and the Court should apply a similar approach to decriminalise consensual same-sex conduct.

### The role of international (human rights) law

Even though there is no specific constitutional provision requiring the courts in Ghana to use international law in the Constitution's interpretation,[147] the courts have consistently done so to protect fundamental human rights.[148] The approach of the Court is to cite provisions in specific international treaties and find the corresponding right in the Constitution to give effect to that right. For instance, in *Sabbah*, the Court used the ICCPR[149] to interpret the constitutional right to liberty[150] in awarding compensation to the Appellant. The approach of the Court in using international law as a tool for constitutional rights interpretation is in the right direction. However, the Court can do more by resorting to the jurisprudence of treaty bodies and human rights tribunals that have interpreted the treaties cited.

For instance, the ICCPR,[151] the Maputo Protocol[152] and the CEDAW[153] prohibit discrimination of all kinds, including sex and gender. These treaties do not mention sexual orientation. However, in a purposive interpretation of this right, several treaty monitoring bodies prohibit discrimination on the grounds of sexual orientation and gender identity in explaining the treaties.[154] Such

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[147] EY Benneh 'Sources of public international law and their applicability to the domestic law of Ghana' (2013) 26 *University of Ghana Law Journal* 67.
[148] K Appiagyei-Atua 'Ghana at 50: The place of international human rights norms in the courts' in H Bonsu et al (eds) Ghana Law since independence: History, development and prospects (2007) 179; EK Quansah 'An examination of the use of international law as an interpretative tool in human rights litigation in Ghana and Botswana' in M Killander (ed) International law and domestic human rights litigation in Africa (2010) 37.
[149] ICCPR art 14(6).
[150] *Dodzie Sabbah v The Republic* (n 144 above).
[151] ICCPR art 2(1).
[152] Maputo Protocol art 2.
[153] CEDAW arts 2 & 3.
[154] Communication 488/1992, *Toonen v Australia*, Merits, UNHR Committee (31 March 1994) UN Doc CCPR/C/50/D/488/1992. At para 8.7 the Human Rights Committee held that the ICCPR prohibited discrimination on the ground of sex, which includes sexual orientation; Resolution 275: 'Resolution on protection against violence and other human rights violations against persons on the basis of their real or

jurisprudence underscores the fact that the core treaties of the United Nations (UN) guarantee equal legal protection regardless of sexual orientation. If the Supreme Court of Ghana resorts to the jurisprudence of the core international treaty bodies, this will deepen the progressive and purposive interpretive approach of the Court.

On the global stage, Ghana has acknowledged a duty to protect sexual minority rights.[155] Even though Ghana has often stated that the issue is culturally sensitive, it has not denied that its duty to protect sexual minorities from human rights violations.[156] Ghana has not given a firm answer to decriminalise consensual same-sex conduct. However, the engagement with global treaty monitoring bodies on the subject has been encouraging, and Ghana has tacitly pledged a commitment to address violations of sexual minority rights.[157] Such commitment and political will towards addressing sexual minority issues bode well for the judiciary to decriminalise same-sex sexual acts.

Therefore, the thesis recommends that the Supreme Court should continue using international law as a tool to interpret constitutional rights. Also, it must use the decisions, interpretations and general comments of treaty monitoring bodies as a guide to strengthening the use of international law to vindicate fundamental human rights of aggrieved persons. These interpretations are useful because they emphasise that even though at the time of drafting the core treaties did not expressly prohibit discrimination based on sexual orientation, a purposive interpretation shows they do.

### The role of foreign law

The Supreme Court has often relied on foreign law and decisions of other courts in its interpretation of constitutional rights. The Constitution stipulates that apart from the rights stated in the Bill of Rights, other rights inherent in democracies may also apply. The constitutional injunction to apply other human rights norms creates an opportunity for the Supreme Court to apply other rights and the jurisprudence of foreign domestic courts if this jurisprudence protects the dignity of the human person.[158] This provision limits the class of jurisprudence which the Court can apply. Thus, the laws

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imputed sexual orientation or gender identity'. The African Commission on Human and Peoples' Rights (the African Commission), meeting at its 55th Ordinary Session held in Luanda, Angola, from 28 April to 12 May 2014.

[155] Human Rights Committee 117th Session 'summary record of the 3274th meeting held at the Palais Wilson, Geneva, on Friday, 24 June 2016 at 10 am. CCPR/C/SR.3274 (29 June 2016) para 35-39.

[156] As above.

[157] As above.

[158] Constitution of Ghana art 33(5).

and jurisprudence of courts which protect the right to dignity, privacy, and prohibit discrimination on the grounds of sexual orientation, such as India, Botswana and South Africa may apply.

India, Botswana, and South Africa provide examples for analysis. All three countries have experienced colonial rule and in the case of South Africa besides colonialism, apartheid system of governance. Botswana and India inherited colonial-era anti-sodomy laws that criminalise sex against the order of nature, similar to Ghana's section 104 that criminalises 'unnatural carnal knowledge'.[159] The two countries also have a high incidence of homophobia,[160] and their constitutions are silent on sexual orientation and gender identity, just like Ghana.[161] The Supreme Court of India and the High Court in Botswana boldly held that criminalisation of consensual same-sex acts violates the right to dignity, privacy and equality.[162] These were watershed moments in these countries that have long held on to sodomy laws and had both upheld its constitutionality before finally declaring that it was unconstitutional.[163]

The Supreme Court of Ghana may apply the jurisprudence of the courts in Botswana, South Africa, and India to protect the rights of sexual minorities. Critics might view the South African example as an easy option because the Constitution already prohibits discrimination on the grounds of sexual orientation,[164] and therefore, the Constitutional Court had a simple task to decriminalise sodomy laws.[165] However, an analysis of the approach of the Court shows it relied heavily on international human rights, foreign law and even when it used the South African Constitution, it relied more on the rights to dignity, privacy and equality other than the anti-

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[159] Human Rights Watch 'This alien legacy the origins of 'sodomy' laws in British colonialism' (2008); See also sec 377 of Indian penal code which until recently punished 'carnal intercourse against the order of nature with any man, woman or animal', and the Botswana penal code sec 164(a), 'carnal knowledge of any person against the order of nature'.

[160] *Afrobarometer* 'Good neighbours? Africans express high levels of tolerance for many, but not all' Dispatch no 74 (March 2016) 11-2 reports that the acceptance level of homosexuals in Botswana is 43% compared to 11% in Ghana; See also Pew Research Center 'Global attitudes and trends' (25 June 2020) shows a rising acceptance of homosexuals in India from about 15% in 2002 to 37% in 2019 available at https://www.pewresearch.org/global/2020/06/25/global-divide-on-homosexuality-persists/ (accessed 4 October 2020).

[161] Constitution of Ghana art 17(2) prohibits discrimination on grounds including gender but not sex or sexual orientation. Arguably, India and Botswana have a higher level of tolerance and acceptance of homosexuals as compared to Ghana, but this might be due to positive litigation outcomes in India and Botswana.

[162] In Botswana, *Letsweletse Motshidiemang v Attorney General & Legabibo* (n 66 above); and in India, *Navtej Singh Johar and Others v Union of India Thr Secretary Ministry of Law and Justice* (n 65 above).

[163] As above.

[164] Constitution of the Republic of South Africa sec 9(3).

[165] *National Coalition for Gay and Lesbian Equality v Minister of Justice* (n 64 above).

discrimination provision.[166] Thus the South African example also provides an excellent guide to the courts in Ghana to emulate. Even though the Supreme Court of Ghana may decide not to apply its own previous decisions and may treat decisions of foreign courts as only persuasive,[167] the jurisprudence of the courts in Botswana, South Africa and India are so compelling to ignore. The Bangalore Principles of judicial conduct[168] as a guide to judges in the Commonwealth and worldwide in their interpretation and application of the law invites judges to resort to equal application of the law regardless of sexual orientation.[169] The Supreme Court of Ghana has resorted to foreign law in many decisions,[170] and it should not shy away from using such laws if the need arises. India, Botswana, and South Africa provide outstanding examples.

## Legal culture and decriminalisation of anti-sodomy laws in Ghana

The analysis so far shows that there are adequate conditions precedent to equip the Supreme Court of Ghana to decriminalise consensual same-sex conduct. However, a lot depends on the legal culture and socio-political environment for the determination of disputes relating to same-sex sexual conduct in Africa, including Ghana. The legal culture of a country plays a role in how the judiciary resolves disputes. Legal culture depends on many factors. This thesis focuses on the litigation landscape in Ghana.

South Africa has a vibrant legal culture where public interest litigation is at the forefront of litigation in the country with an arguably independent judiciary.[171] However, scholars have observed that the manner of judicial appointments, the handling of complaints against judges by the Judicial Service Council, and attacks by politicians on the integrity of judges threatens the independence of the judiciary.[172] In Ghana, even though there are perceptions that judges lean to the party that appointed them,[173] they have displayed a high level of independence.[174] The legal culture in Ghana

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[166] As above para 28 (dignity), para 36 (equality, privacy, dignity, and freedom), paras 108- 119 (equality and privacy), paras 120-129 (equality and dignity).
[167] Constitution of Ghana art 129(3).
[168] Bangalore principles of judicial conduct (2002).
[169] As above, principle 5 para 5.1.
[170] *Mrs Abena Pokuaa Ackah v Agricultural Development Bank* (2016) Civil Appeal no J4/31/2015. The Supreme Court relied on the European Convention on Human Rights to guide its interpretation of the right to privacy.
[171] L Siyo & JC Mubangizi 'The independence of South African judges: A constitutional and legislative perspective' (2015) 18 *Potchefstroom Electronic Law Journal* 817.
[172] As above 835-840.
[173] 'Supreme Court judges rule on their political leanings – Atuguba' *GhanaWeb* 9 January 2018 available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Supreme-Court-judges-rule-on-their-political-leanings-Atuguba-615620 accessed 29 August 2020.
[174] Constitution of Ghana art 127 guarantees the independence of the judiciary.

is neither vibrant nor dull. It is in between these two extremes. While some individual lawyers have challenged executive, parliamentary, constitutional bodies, and even individual actions in Court, it is a more recent phenomenon and infrequent.[175] The Supreme has determined critical constitutional rights cases but yet to determine a matter involving sexual minority rights.

The difficulty that the Supreme Court may encounter when faced with the opportunity to determine sexual minority rights issues are two-fold. First, as members of the same society that denounce same-sex sexual relationships, can the court rise above majoritarian morality principles in favour of constitutional rights? Given that judges of the Supreme Court are also members of the public, and most of the public arguable believe that homosexuality is offensive to the culture and religion of Ghanaians, would public majority morality sentiment or constitutional morality sway judges one way or the other to determine sexual minority rights? In other words, the decriminalisation of sodomy laws is a sensitive issue and might be hugely unpopular with most Ghanaians. Is the Supreme Court ready and willing to take a decision which is very unpopular with Ghanaians even if this is in defence of constitutional rights? This decision might not be an easy one to answer, and just as the constitutional review commission proffered in 2012, Ghanaians should allow the Court in its sober moments to reflect and come up with a decision.

The second issue relates to the socio-political environment. Same-sex sexual conduct is a political issue in Ghana, as chapter 3 shows. The politicisation of consensual same-sex conduct enormously pressures the judiciary just as it does the executive and the Parliament. The judiciary might not face periodic elections to maintain their seat in the court, but ultimately, members of the judiciary cannot escape the fury of the public and an attack on their legitimacy if a decision does not go in the direction expected by the majority. Because of the politics of homosexuality in Ghana, no politician, including the current President, wants to deal with its decriminalisation during their term of office.[176]

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[175] See for instance the recent cases litigated at the Supreme Court by a lawyer who contested the constitutionality of the Criminal and Other Offences (Procedure) Act , section 104(4) as unconstitutional in the case of *Martin Kpebu v Attorney-General* civil appeal no J1/7/2015; and the case of *Martin Kpebu v Attorney-General* civil appeal no J8/07/2020 which declared section 4 of the Public Holidays Act, 2001 (Act 601) as unconstitutional for conflicting the constitutional rule that suspects should be brought before court within 48 hours. This case held that the courts should sit on weekends, holidays or during strikes to fulfil the constitutional injunction in art 14(3) to determine the liberty of an accused person who should not be kept in prison beyond 48 hours.

[176] 'I'll never legalise homosexuality – Akuffo-Addo' GhanaWeb 9 August 2020 available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/I-ll-never-legalize-homosexuality-Akufo-Addo-675491 (accessed 4 October 2020).

The pronouncements of politicians suggest either they may have a hand in decriminalising same-sex sexual conduct or that they do not imagine the judiciary decriminalising it when confronted with the issue. Either way, the pronouncement of politicians unduly pressurises the judiciary in a country where there is a widespread perception that in contentious cases, the apex courts decide the matter in line with the opinion of the government that appointed them to the courts.[177]

For instance, the sitting President appointed the current Chief Justice and several judges of the Supreme Court. If the Supreme Court decriminalises a case of 'unnatural carnal knowledge' during the tenure of the current President, Nana Akuffo-Addo, the public perception would be that the President has influenced the outcome of the decision, which is not possible. The public and political parties wrongly accused the President of supporting gay rights because of an interview he granted in 2017 and stated that if there is a groundswell of opinion sufficient to sway the odds, Ghana could decriminalise its sodomy law.[178] The main opposition party has pounced on this interview to declare that the President supports LGBT rights.[179]

Interestingly, when the current president and his political party were in opposition between 2012 and 2016, they also criticised the President at the time (who is now the opposition leader) for being soft on homosexuality.[180] Accusations and counter-accusations by political parties, therefore create a hostile socio-political environment capable of impinging on the freedom and independence of the judiciary to determine a socially sensitive and politically emotive subject. That notwithstanding, this thesis argues that the judiciary will apply the tenets of constitutional interpretation associated with the legal culture and tradition of Ghana, to support constitutional rights and international human rights law, to decriminalise the sodomy law of 'unnatural carnal knowledge'.

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[177] 'Supreme Court judges rule on their political leanings – Atuguba' (n 175 above).

[178] 'Legalising homosexuality 'not on the agenda' but 'bound to happen'- Akufo-Addo' *GhanaWeb* 26 November 2017 available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Legalising-homosexuality-not-on-the-agenda-but-bound-to-happen-Akufo-Addo-604072 (accessed 4 October 2020).

[179] 'Akufo-Addo pleasing homosexual community to sponsor free SHS- Yamin' *GhanaWeb* 27 November 2017 available https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Akufo-Addo-pleasing-homosexual-community-to-sponsor-Free-SHS-Yamin-604200 (accessed 4 October 2020); See also 'Come clear on gay rights and free- Asiedu Nketia tells Akufo-Addo' *GhanaWeb* 30 April 2018 available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Akufo-Addo-pleasing-homosexual-community-to-sponsor-Free-SHS-Yamin-604200 (accessed 4 October 2020).

[180] 'Prez Mahama is too liberal on homosexuality- Sammy Awuku' GhanaWeb 7 February 2013 available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Prez-Mahama-is-too-liberal-on-homosexuality-Sammy-Awuku-264387 (accessed 4 October 2020).

This thesis provides answers to guide the Supreme Court. It recommends a broad and purposive interpretation of the Constitution to accommodate sexual orientation. It also calls for the use of international treaties, the decisions, General comments, and recommendations of treaty bodies

## 6.5 Areas for further research

This study focuses on the barriers to and the prospects for the decriminalisation of consensual same-sex conduct in Ghana. The findings and recommendations of the study reveal that there are several areas of concern that future research has to address. The study recommends further research in five major areas.

One area that needs urgent research attention is how sexual minorities are enjoying equal legal protection in civil, political, and socio-economic rights. This study focuses on the right to equality, non-discrimination, dignity, and privacy in decriminalisation. As a Human Rights Watch report[181] and some aspects of this study reveal, there are systemic human rights violations that affect the enjoyment of socio-economic rights of sexual minorities. For instance, the lack of access to education based on sexual orientation denies people from realising their full potential as equal citizens. Sometimes, headteachers in secondary schools in Ghana expel students from school for allegedly engaging in same-sex sexual acts, denying them an opportunity to realise their full potential in education.[182]

The executive director of the Centre for popular education and human rights, Ghana (CEPHERG), Mac-Darling Cobbinah, has condemned the action of school authorities, noting that 'outing students to their parents is irresponsible and dangerous and expelling them from school is disastrous to their future'.[183] Human Rights Watch confirms Cobbinah's fears in part, that in Ghana, family members and close neighbours, are the first to assault people accused of engaging in same-

[181] Human Rights Watch 'No choice but to deny who I am' Discrimination and violence against LGBT persons in Ghana Human Rights Watch (2018).
[182] 'Two Ghana schools expel 53 students for being gay' Gay Star news 19 April 2013 available at https://www.gaystarnews.com/article/two-ghana-schools-expel-53-students-being-gay190413/ (accessed 2 October 2020). See also 'Two SHS students sacked for allegedly practicing homosexuality in Nkawie SHS' Ghanaweb 31 May 2018 available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Two-students-sacked-for-allegedly-practicing-homosexuality-in-Nkawie-SHS-656481 (accessed 2 October 2020).
[183] 'Two Ghana schools expel 53 students for being gay' (n 185).

sex sexual conduct.[184] It requires empirical studies to show how discrimination and denial of constitutional rights affect sexual minorities and recommend ways to address it.

New research could measure the scale of the problem and its effects by using a qualitative or mixed-methods approach which will enhance the worldview of policymakers, parliamentarians, lawyers, judges, and civil society organisations to make informed decisions to protect sexual minorities. Current research focuses on health and human rights,[185] but there is a need, for example, to focus on specific rights violations such as socio-economic rights of LGBT persons, not only to show widespread violations of LGBT persons' rights but their lived experiences and the ill effects of the sodomy law on their lives. Research in this direction exposes how the State treats its citizens, which remains a scar on the conscience of right-thinking members of the society and can also be educational for the public to increase acceptance of sexual minorities.

Another area that requires further research is the (non) enforcement of the sodomy law and the role of the courts, especially the human rights division of the High Court and CHRAJ in protecting sexual minority rights. The first ambit of this research could focus on how the (non) enforcement of sodomy law at the lower courts in Ghana, such as the Circuit and Magistrate (District) Courts.[186] These are the courts that do the bulk of criminal cases in Ghana, where most accused persons are often unrepresented, and many end up in prison,[187] but decisions of courts below the High Court do not appear in law reports. The scope, frequency, and nature of the decisions of these courts relating to sodomy cases are therefore not readily available. The second part of this research could focus on cases at CHRAJ and the human rights courts that concern sexual minority rights or that implicate rights such as dignity, privacy, and non-discrimination. Researching into these areas clearly show the actual effects of sodomy law in Ghana and could inform policy decisions and legal reform.

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[184] Human Rights Watch 'No choice but to deny who I am' (n 184 above).
[185] See for instance RA Amoafo et al 'Ghana a country context analysis on the human rights and health situation of LGBT' COC Netherlands (September 2016); See also RA Amoafo & K Adomako 'Policy brief Ghana's legal and policy frameworks and the protection of the human rights of LGBT people in Ghana' (2018).
[186] 'Man jailed 5 years for sodomy' *GhanaWeb* 6 February 2018 available at https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Man-jailed-5-years-for-sodomy-623815 (accessed 4 October 2020).
[187] As above.

The next possible research focus is the potential reaction of people to litigation relating to LGBT rights. Jjuuko shows that litigation of LGBT rights may either have a negative or positive reaction.[188] The lack of LGBT litigation in Ghana suggests that there might be fears of a backlash or that people are not aware of how to conduct strategic litigation on LGBT rights in Ghana. Jjuuko has led the way with a macro-study in Common Law countries,[189] but micro studies that focus on specific countries like Ghana where there is a lack of litigation might reveal important underlying considerations to activate strategic litigation of LGBT rights.

Research to find out the capacity of CHRAJ and other LGBT organisations to deal with attempts to mainstream sexual minority issues in the policies and laws in Ghana would also be useful. Such a study could determine the capacity needs and recommend strategies for strengthening the capacity of these institutions.

The last area that in my view requires research is how traditional indigenous institutions such as chieftaincy respond to sexual minority rights. There is virtually no research done in this area. This study makes the finding that the effects of colonialism continues to influence and subjugate indigenous systems of law and governance. There are reports that at least a traditional ruler banished an alleged homosexual from a community. It would interest different audiences in finding out whether Ghanaian communities that banish people on account of their sexuality base such decisions on State or living customary law.[190] The research could further unravel whether indigenous customary laws embrace same-sex sexuality in contemporary times and determine how colonialism have affected the application of indigenous customary principles relating to sexuality.

Research in the areas above would contribute to the body of research and serve as a resource tool for academics, civil society organisations, policymakers, and the courts.

## 6.6 Conclusion

The foundational reasons for maintaining sodomy laws in Ghana because they preserve Ghanaian culture and religion are flawed. A colonial-era law that subjugated Ghanaian cultures and validated Victorian era culture of the United Kingdom cannot validate Ghanaian law and culture. In popular

[188] Unpublished: A Jjuuko Beyond court victories: Using strategic litigation to stimulate social change in favour of lesbian, gay and bisexual persons in Common Law Africa' LLD thesis University of Pretoria, 2018.
[189] As above.
[190] Tamale *Decolonisation and afro-feminism* (n 56 above) 133 discusses colonially influenced customary law as representing 'state law' which is in statutes as against the authentic 'living customary law' practiced by the indigenous people in their daily lives.

Ghanaian folklore, expressed by the Adinkra symbol of *Sankofa,*[191] Ghana needs to go back and revisit its authentic culture and retain the positive aspects which include respect of diverse sexuality and implement it in contemporary Ghana. Before British colonial rule, the cultures of various Ghanaian societies in pre-colonial times accepted and celebrated diverse sexualities. Colonialism subjugated Ghanaian cultures for several decades. The educated and political elites who benefited from colonialism and took over from colonial administrators have preserved these colonial structures and laws.

Significantly, the current Constitution of Ghana expresses the collective will of the people[192] with a core value of human rights that underscores the Constitution's relevance in protecting sexual minority rights. In terms of international human rights norms that Ghana has been part of developing and adheres to, the country affirms the obligation to protect the rights of all persons, including sexual minorities. This thesis argues that it is possible to decriminalise consensual same-sex acts in Ghana because of the constitutional provisions in the 1992 Constitution of Ghana and the many international treaties that Ghana has ratified, and the obligations imposed on Ghana. Even though there is no express provision in the Ghanaian Constitution that forbids discrimination on the grounds of sexual orientation and gender identity, using the theories of decolonisation, purposive approach to interpretation and transformative constitutionalism could achieve decriminalisation of consensual same-sex conduct in private.

That notwithstanding, public opinion in matters relating to sexual minority rights is a crucial element which the judiciary must overcome. The CRC claims that most Ghanaians think that the government should not amend the 1992 Constitution of Ghana to protect LGBT rights.[193]

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[191] Sankofa simply means 'go back for it'. JET Kuwornu-Adjaottor et al 'The philosophy behind some Adinkra symbols and their communicative values in Akan' (2015) 7 *Philosophical Papers and Review* 22, explains the philosophical relevance of the theory. For a discussion of this theory see chapter 1 of this thesis.

[192] Preamble, Constitution of Ghana says in part 'We the people of Ghana, in exercise of our natural and inalienable right to establish a framework of government which shall secure for ourselves and posterity the blessings of liberty, equality of opportunity and prosperity… the protection and preservation of fundamental human rights and freedoms, unity and stability for our nation; do hereby adopt, enact and give to ourselves this Constitution.'

[193] Republic of Ghana Constitution Review Commission 'Report of the Constitution Review Commission: From a political to a developmental constitution' (2012) 654.

Statements by judges in Malawi,[194] Botswana[195] and Kenya[196] that most members of society oppose sexual minority rights, and therefore a court of law cannot uphold constitutional rights of sexual minorities is otiose and indifferent to minority rights. The Botswana High Court[197] and the Indian Supreme Court[198] have shown that public opinion has little or no role in the constitutional interpretation of civil liberties, particularly the right to dignity, non-discrimination, and privacy. As observed by the Indian Supreme Court, constitutional morality trumps majority morality.[199] The Supreme Court of Ghana has a litany of persuasive decisions to guide it to overcome majority morality in determining a matter relating to the decriminalisation of sodomy law. The time has come for a colonial law that violates the authentic culture(s) and rights of a minority of Ghanaians to be decriminalised. This thesis argues that the Supreme Court of Ghana can, and should, deliver a judgment to uphold constitutional rights over majority morality when the time comes.

[194] *R v Soko and Another* case no 359 of 2009 [2010] MWHC 2 23. Chief Resident Magistrate's Court Blantyre, Malawi. Mr Nyakwawa Usiwa-Usiwa noted that 'we are sitting in place of the Malawi society which I do not believe is ready at this point in time to see its sons getting married to other sons...'.
[195] *Kanane v The State*' (n 91 above)
[196] *EG & 7 Others v Attorney General; DKM & 9 Others (interested parties); Katiba Institute and Another (amicus curiae)* (n 87 above).
[197] *Letsweletse Motshidiemang v Attorney General and LeGaBibo* (n 66 above).
[198] *Navtej Singh Johar and Others v Union of India Thr. Secretary Ministry of Law and Justice* (n 65 above) para 111. The Indian Supreme Court defined 'constitutional morality' as including 'virtues of a wide magnitude such as that of ushering a pluralistic and inclusive society'.
[199] As above.

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