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LGBTIQ+ LAWFARE IN RESPONSE TO THE POLITICISATION OF HOMOSEXUALITY IN GHANA

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1 Introduction

The question as to whether homosexuality should be accepted or tolerated in Ghana is highly politicised and deployed as a lawfare tactic.¹ It is a subject that can make or mar a political career if a politician supports or denounces it. The announcement of an impending LGBTIQ+ conference in Accra, the capital city of Ghana, in August 2006² sparked a national debate on the ‘threat’ homosexuality posed to culture and morals in Ghanaian society,³ and marked the beginning of the politicisation of

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1 The authors define lawfare to mean the approach of looking at the issues of LGBTIQ+ with a political lens or from political gains rather than from the angle of the rights of the members of the community.

2 D Mcelhill ‘Ghanaians ban gay conference’ *PinkNews* 1 September 2006 <https://www.pinknews.co.uk/2006/09/01/ghanaians-ban-gay-conference/> (accessed 9 May 2022); see also Refugee Review Tribunal Australia ‘RRT Research Response: Ghana’ GHA33179 (9 April 2008) <https://www.justice.gov/sites/default/files/eoir/legacy/2014/09/25/homosexuals-2006%20gay%20and%20lesbian%20conference.pdf> (accessed 9 May 2022); K Sakyi-Addo ‘Ghana bans gay and lesbian conference’ *Mail&Guardian* 2 September 2006 <https://mg.co.za/article/2006-09-02-ghana-bans-gay-and-lesbian-conference/> (accessed 9 May 2022); ‘Proposed gay conference still sketchy’ *GhanaWeb* 1 September 2006 <https://www.ghanaweb.com/GhanaHomePage/rumor/Proposed-gay-conference-still-sketchy-109876> (accessed 9 May 2022); A Odoi ‘Homophobic violence in Ghana: When and where it counts’ (2021) *Sexuality Research and Social Policy* 2.

3 K Essien & S Aderinto ‘Cutting the head of the roaring monster: Homosexuality and repression in Africa’ (2009) 30 *African Study Monograph* 121.

homosexuality in Ghana. Moral entrepreneurs⁴ capitalised upon this imaginary threat to a so-called Ghanaian culture and started encouraging politicians to draft a law to curb the activities of LGBTIQ+ persons. Since this period, politicians have threatened to enact laws with stiffer punishments to curtail the ‘upsurge’ of the LGBTIQ+ community and their activities. Diverse tactics ranging from arrests, lawfare, discrimination, expulsion from school and the use of violence against members of the LGBTIQ+ community have been employed.⁵

The use of the criminal law, the coercive forces of the state and the delegitimising of the LGBTIQ+ community became more prominent in 2020 and 2021 when more stringent methods were introduced to clamp down on the LGBTIQ+ community.⁶ The LGBTIQ+ community and LGBTIQ+ led civil society organisations, which were usually quiet became more visible through advocacy related activities and the grand opening of an LGBT office in the capital of Ghana. The increased visibility angered state officials who were prompted by moral entrepreneurs to act swiftly to save Ghana from moral and cultural decadence.

Even when COVID-19 struck, the state did not withhold its wrath against the LGBTIQ+ community. At the height of the COVID-19 pandemic, for example, when minority rights were challenged globally,⁷ and people needed safe spaces to seek refuge, a newly established resource centre for the LGBTIQ+ community in Ghana, where members could

4 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 at 88-89. Moral entrepreneurs or moral panics are individuals or groups who ‘seek to organise behaviours and attitudes to conform to particular regimes of moral regulation’. The desire of moral entrepreneurs to regulate the moral and sexual lives of homosexuals leads to a portrayal of homosexuality and homosexuals as ‘threats to society and its values, thereby generating significant alarm among the public’. In Ghana, moral entrepreneurs or panics include Parliamentarians, religious leaders, traditional authorities, civil society groups, and the media.

5 Odoi (n 2).

6 See ‘US Department of State 2021 Country reports on human rights practices: Ghana’ https://www.state.gov/wp-content/uploads/2022/03/313615_GHANA-2021-HUMAN-RIGHTS-REPORT.pdf (accessed 12 May 2022), 7, 25-26. See also “‘LGBTIQ+ office in Ghana’ cause strong division among citizens’ *BBC News* 23 February 2021 <https://www.bbc.com/pidgin/tori-56146389> (accessed 17 April 2022); see also PI Williams “‘LGBTQI office in Ghana’ see Police storm location for Accra, raid & close am down’ *BBC News* 24 February 2021 <https://www.bbc.com/pidgin/tori-56183723> (accessed 17 April 2022).

7 CL Booker & C Meads ‘Sexual orientation and the incidence of COVID-19: Evidence from understanding society in the UK Longitudinal Household Study’ *Healthcare* (2021) 937; see also American Psychological Association ‘How COVID-19 impacts sexual and gender minorities’ (29 June 2020) <https://www.apa.org/topics/covid-19/sexual-gender-minorities> (accessed 10 May 2022).

go for support, was closed down by the police based on political and public agitations.⁸ Politicians and the general public verbally attacked diplomats and supporters of the LGBTQI+ community who attended the inauguration of the LGBTQI+ office claiming that diplomatic support for the LGBTQI+ community was a camouflage and imperialist tactic to force homosexuality on Ghanaians.⁹

Following the closure of the LGBTQI+ resource centre, the threat to re-criminalise homosexuality by Parliament was resurrected.¹⁰ A group of religious leaders and anti-LGBTQI+ activists known as the ‘Coalition for Proper Human Sexual Rights and Family Values’ who have been pushing for this move since 2018, reinitiated attempts at lobbying parliamentarians to criminalise same-sex practices in March 2021.¹¹ What was different from the previous attempts was that this time round, these calls successfully won the support of eight members in Parliament to come up with a private member’s sponsored bill geared toward criminalising LGBTQI+ rights in Ghana.¹²

The court was also used as part of the attacks on the LGBTQI+ community. On 20 May 2021, a group of activists (16 females and five males) were arrested for participating in a workshop in empowering the LGBTQI+ community in Ho, a town in the Volta Region of Ghana.¹³ Charged with unlawful assembly and engaging in homosexual activities, these young activists, who came to be known as the Ho 21, were detained

8 The Police closed down an LGBTQI+ office inaugurated in February 2021. See *BBC News* articles (n 6) ; see also Odoi (n 2) 1.

9 K Emmanuel ‘Shut down LGBTQI+ office in Ghana – Pentecostal and Charismatic Council’ *Pulse.com* 23 February 2021 https://www.pulse.com.gh/news/local/shut-down-LGBT+-office-in-ghana-pentecostal-and-charismatic-council/7fkbtf5?utm_campaign=pulseghana&utm_medium=social&utm_source=Twitter#Echobox=1614068891 (accessed 10 May 2021).

10 ‘Bill to criminalise homosexuality coming soon – Foh Amoaning’ *GhanaWeb* 29 May 2018 <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Bill-to-criminalise-homosexuality-coming-soon-Foh-Amoaning-655883> (accessed 30 September 2019).

11 As above.

12 Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill, 2021.

13 ‘Outcry after 21 people arrested in Ghana for “advocating LGBTQI+ activities”’ *The Guardian* 24 May 2021 <https://www.theguardian.com/world/2021/may/24/outcry-people-arrested-ghana-advocating-LGBTQI+-activities> (accessed 17 April 2022); see also ‘Ghana court frees 21 arrested for attending May LGBTQI+ event’ *The Guardian* 5 August 2021 <https://www.theguardian.com/world/2021/aug/05/ghana-court-frees-21-arrested-for-attending-may-LGBTQI+-event> (accessed 17 April 2022).

and denied bail for three weeks.¹⁴ The case was eventually struck out for lack of evidence and the activists were discharged in August 2021.¹⁵

In the same week that the Ho 21 activists were discharged by the Ho High Court, a group of eight Ghanaian moral entrepreneurial¹⁶ parliamentarians, with support from the Speaker of Parliament, Mr Alban Bagbin, tabled a private member's bill named the 'Promotion of Proper Human Rights and Family Values Bill, 2021' (Anti-LGBTIQ+ Bill) before Parliament. The Bill seeks the criminalisation of LGBTIQ+ practices and related activities¹⁷ and to enforce a moral code on how people should make love and to which partners. The Bill, aims to provide for proper human sexual rights and family values. The Bill also prohibits propaganda, advocacy for LGBTIQ+ and associated activities, protection and support for children and victims of LGBTIQ+ related activities.¹⁸ If passed into law, the Anti-LGBTIQ+ Bill will expand the existing colonial-era provision in the Criminal Offences Act of Ghana that criminalises 'unnatural carnal knowledge',¹⁹ signalling the culmination of years of politicisation and lawfare against homosexuality in Ghana, dating back to 2006.

However, after the introduction of the Bill in Parliament to re-criminalise consensual same-sex relationships, some pro LGBTIQ+ activists have opposed the Bill in Parliament and showed signs of possibly litigating in court, if it is enacted into law.²⁰ In this chapter, we examine the lawfare practices engaged in Ghana in response to the threats to the LGBTIQ+ community. We begin with an overview of the legal framework on LGBTIQ+ rights in Ghana, chronicle how political involvement in

14 'Ghana court frees 21 arrested for attending May LGBTIQ+ event' (n 14).

15 'Outcry after 21 people arrested in Ghana for 'advocating LGBTIQ+ activities' (n 13); 'Ghana court frees 21 arrested for attending May LGBTIQ+ event' (n 13).

16 Tettey (n 4). Moral entrepreneurs are individuals or groups who 'seek to organise behaviours and attitudes to conform to particular regimes of moral regulation'. The desire of moral entrepreneurs to regulate the moral and sexual lives of homosexuals leads to a portrayal of homosexuality and homosexuals as 'threats to society and its values', thereby generating significant alarm among the public. In Ghana, moral entrepreneurs or panics include Parliamentarians, religious leaders, traditional authorities, civil society groups, and the media.

17 'Ghana LGBTIQ+ Bill: Lawmakers propose a new bill which goes to criminalise LGBTIQ+ activism - See what to know about it' *BBC News* 23 July 2021 <https://www.bbc.com/pidgin/tori-57939586> (accessed 17 April 2022).

18 As above.

19 Section 104(1)(b) of the Criminal Offences Act of Ghana 29 of 1960, as amended.

20 'Ghana Anti-LGBTIQ+ Bill: Why high-profile Ghanaian professors, lawyers dey fight against anti-gay bill' *BBC News* 6 October 2021 <https://www.bbc.com/pidgin/tori-58813525> (accessed 17 April 2022).

the debate on homosexuality in Ghana presents some impediments to using the court by the LGBTQI+ community and recommend avenues for conducting successful challenges against the politicisation of homosexuality in Ghana.

2 Overview of the legal and human rights frameworks concerning LGBTQI+ rights in Ghana

There are no express constitutional provisions or legislation in Ghana that prohibit discrimination based on sexual orientation, or that specifically mention and protect LGBTQI+ rights. It is arguable, however, that the Bill of Rights in the 1992 Constitution protects the rights of all persons including LGBTQI+ persons, because the operative word used in the constitution is 'every person'.²¹

The Constitution prohibits discrimination 'on grounds of gender, race, colour, ethnic origin, religion, creed, or social or economic status'.²² The Bill of Rights also enjoins the executive, legislature, judiciary and other entities including organs of government and private entities to respect and uphold the fundamental human rights of every person.²³ Even though the Constitution does not explicitly prohibit discrimination on the grounds of sexual orientation, there is no reason to foreclose the grounds of discrimination. While sex is not mentioned as a prohibitory ground of discrimination, gender and social status potentially widen the scope of this protection and the category of persons to include sexual and gender orientation.²⁴

21 Constitution of Ghana, 1992. Chapter 5, from articles 12 to 33, contains a list of rights titled 'fundamental human rights and freedoms', which are entitlements guaranteed to 'every person'.

22 Article 17(2) of the Constitution of Ghana, 1992. Article 12(2) also makes it imperative that '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'.

23 Article 12 (1) of the Constitution of Ghana, 1992.

24 RA Atuguba 'Homosexuality in Ghana: Morality, law, human rights' (2019) 12 *Journal of Politics and Law* 113 at 118. Atuguba argues that 'a bold and forward-looking interpretation of social status' is required to include LGBTQI+ persons within the scope of art 17 of the Constitution which prohibits discrimination.

Apart from article 17 which prohibits discrimination and does not expressly mention sexual orientation, article 33 of the Constitution potentially embraces the rights of LGBTIQ+ rights.²⁵ It states:

[T]he 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.²⁶

In effect, article 33(5) means that the rights listed in Chapter 5 of the 1992 Constitution are not exhaustive. Other rights which exist in other democracies, and treaties ratified by Ghana may therefore form part of the Constitution of Ghana. If this interpretation is accepted, the prohibition of discrimination even on grounds of sexual orientation which is the cornerstone of bills of rights in many democracies around the world,²⁷ potentially forms part of the Constitution of Ghana. The Economist Intelligence Unit (EIU) 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, the EIU differentiates full democracies from flawed and other types of democracies.²⁸ A recent democracy index of the EIU lists 22 out of 165 countries that qualify as 'full democracy'.²⁹ 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.³⁰ Many others belonging to the category of flawed democracies also protect sexual minority rights and do not criminalise or have decriminalised consensual adult same-sex sexual relationships.³¹

25 Article 33(5) of the Constitution of Ghana, 1992.

26 As above.

27 See for instance sec 9(3) of the Constitution of the Republic of South Africa, 1996 which states: 'The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender ... sexual orientation ... and birth'.

28 'Democracy Index 2019: A year of democratic setbacks and popular protest' Report by the Economist Intelligence Unit (2020).

29 Democracy Index Report (n 28) 10.

30 These countries include Norway, New Zealand, Finland, Canada, Australia, Germany, Mauritius and Costa Rica.

31 Examples are South Korea, United States of America, Malta, Botswana, Lesotho, India, and South Africa.

Despite the constitutional provisions that potentially protect the rights of LGBTQI+ persons, the Constitution Review Commission of Ghana (CRC) in 2011 argued that based on the African Charter on Human and Peoples' Rights (African Charter),³² the Ghanaian Constitution does not embrace the rights of LGBTQI+ persons.³³ However, as argued elsewhere,³⁴ the Constitution of Ghana and the African Charter protect the rights of LGBTQI+ persons.³⁵

Apart from the arguments by the CRC discounting the protection of LGBTQI+ rights, the Criminal Offences Act of Ghana³⁶ and the new Bill before parliament,³⁷ present formidable challenges to the rights of LGBTQI+ persons in Ghana. The Criminal Offences Act³⁸ criminalises sex between persons of the same sex, and arguably targets men and not women.³⁹

Therefore, while constitutional rights protect the rights of every person in Ghana including LGBTQI+ persons, existing laws criminalise 'unnatural carnal knowledge', which is used to target activities of LGBTQI+ persons. Hostility and violence towards the LGBTQI+ community has peaked with the introduction and consideration of 'The Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill' of 2021. The Bill is the outcome of almost two decades of politicisation of homosexuality.

32 OAU, African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982),

33 Report of the Constitution Review Commission of Ghana 'From a political to a developmental constitution' (Constitutional Review Commission report) (2011) 656-657.

34 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. The author argues that the African Charter and the Ghanaian Constitution protects the rights of LGBTQI+ persons.

35 Ako (n 34) 113-117; see also 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 at 92-97.

36 Section 104(1)(b) of the Criminal Offences Act 29 of 1960, criminalises the offence of 'unnatural carnal knowledge' which is used to target, arrest, and extort money from LGBTQI+ persons in Ghana. See Human Rights Watch 'No choice but to deny who I am' (2018).

37 See 'Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill, 2021'.

38 Criminal Offences Act 29 1960.

39 Atuguba (n 24).

3 A chronicle of politicisation of homosexuality in Ghana

Since transitioning from military rule to the fourth republican democratic state in 1992, Ghana has had five presidents. The first of these five, the late President Rawlings, ruled from 1992 to 2000. Nonetheless, it was during the term of President John Agyekum Kufour, the second president (from January 2001 to December 2008) that the country saw the first significant nationwide and political discussion on homosexuality. It is fair to say that President Kufour did not 'invent' the debate on homosexuality that generated significant controversy in the country at the time. The debate which began in 2006 was triggered by an announcement by the president of the Gay and Lesbian Association of Ghana (GALAG) on radio, to the nation's shock that an international conference of gays and lesbians would be held in the nation's capital, Accra.⁴⁰ At the height of the debate, President Kufour was serving his last term as President.

The minister for information and national orientation at the time, Mr Kwamena Bartels, issued a press statement warning alleged homosexuals to abandon the gay conference, or they would be arrested.⁴¹ The state apparatus headed by the President of Ghana and his ministers ensured that the alleged gay conference did not happen. Claiming homosexuality and lesbianism are against Ghanaian culture and strongly offend the values of Ghanaians, Mr Kwabena Bartels in a press statement warned that the government would arrest anyone who attended the gay conference or carried out any LGBTIQ+ related activity.⁴² Since then, every President of Ghana has been asked by social and political actors to declare their stand on homosexuality, publicly.⁴³

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 could be cut to countries in Africa who do not recognise LGBTIQ+ rights, the President stated that Britain could keep their money because homosexuality was a moral and cultural issue that Ghanaians were not prepared to accept.⁴⁴

40 Mcelhill (n 2); see also Essien & Aderinto (n 3).

41 Mcelhill (n 2). See also Essien & Aderinto (n 3) 127.

42 Mcelhill (n 2).

43 As above.

44 'Ghana refuses to grant gays' rights despite aid threat' *BBC News* 2 November 2011 <https://www.bbc.com/news/world-africa-15558769> (accessed 10 September 2020).

President John Mahama, who succeeded Professor Mills from July 2012 to January 2017, was accused of supporting a gay agenda,⁴⁵ while his vice president, the late Amissah Arthur was accused of being gay during his nomination for the position.⁴⁶ President Mahama had to publicly denounce homosexuality as criminal, in response to pressure from religious leaders to declare his stand on the subject.⁴⁷ Similarly, the late vice president Amissah Arthur publicly stated that he was not a homosexual and like most Ghanaians, did not support the practice.⁴⁸ President Mahama, like most Ghanaian politicians, had to denounce homosexuality in order to gain the support of religious leaders, whose backing is critical to winning political power in Ghana.

The current President Nana Addo Dankwa Akufo-Addo, however, is perceived by many, including persons within his political party to be sympathetic to the rights of LGBTQI+ persons due to his responses in an interview granted to Al-Jazeera television network in October 2019. The President, in response to questions on the legalisation of LGBTQI+ rights in Ghana, noted that when there is a groundswell of opinion, sufficient to galvanise action, homosexuality could be decriminalised in Ghana.⁴⁹ After this interview, political, religious and traditional leaders heavily criticised the President for being sympathetic to LGBTQI+ rights, compelling him to retreat from his positive statements about LGBTQI+ rights and assuring

45 'President Mahama and the powerful gay lobby' *GhanaWeb* 20 March 2016 <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 the accusation that he supported the campaign and election of the then President of Ghana <https://www.nytimes.com/2013/02/10/opinion/sunday/in-bed-with-the-president-of-ghana.html> (accessed 10 September 2020).

46 'Vice President must not be ashamed of being gay' *Modern Ghana* 12 October 2012 <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' *Justice Ghana* 7 August 2012 <http://www.justiceghana.com/index.php/en/features/2-uncategorised/845-i-am-not-gay-amissah-arthur-defends-integrity> (accessed 10 September 2020).

47 A Bonsu 'Homosexuality is criminal – President Mahama' *Graphic Online* 2 February 2013 <https://www.graphic.com.gh/news/general-news/homosexuality-is-criminal-president-mahama.html> (accessed 28 April 2021).

48 'I am not gay; Amissah-Arthur defends integrity' (n 46).

49 'Legalising homosexuality "not on the agenda" but "bound to happen" – Akufo Addo' *GhanaWeb* 26 November 2017 <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 – Akufo-Addo' *GhanaWeb* 26 November 2017 <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Ghana-likely-to-legalize-homosexuality-Akufo-Addo-604066> (accessed 25 October 2019).

Ghanaians that he will not decriminalise homosexuality.⁵⁰ Also, when the Ministry of Education introduced a Comprehensive Sexuality Education (CSE) Policy in 2019, which critics claimed was a ploy to teach children about homosexuality in public schools, the President openly declared that he will not support anything that offends Ghana's culture.⁵¹

His political opponents have challenged him with taunts that he supports homosexuality and is on course to legalise it.⁵² Even the immediate past speaker of Parliament, Mike Ocquaye, while in office and a member of the President's party, condemned homosexuality. The former Speaker stated, in an apparent swipe at the President, that if any bill was brought to parliament to decriminalise homosexuality, he will fight against it and even resign his position in parliament.⁵³

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.⁵⁴ 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

50 'Homosexuality won't be legalised under Nana Addo – Presidency' *GhanaWeb* 28 April 2018 <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Homosexuality-won-t-be-legalized-under-Nana-Addo-Presidency-647221> (accessed 25 October 2019).

51 D Kenu "'CSE no-no" President Akufo Addo vows' 7 October 2019 <https://www.graphic.com.gh/news/general-news/ghana-news-cse-no-no-president-akufo-addo-vows.html> (accessed 7 October 2019).

52 "'Prof Do little" Mills boldly kicked against homosexuality, "Prof do plenty", can you? – Koku dares Akufo-Addo' *GhanaWeb* 30 September 2019 <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).

53 'I will resign if Akufo-Addo legalises homosexuality – Speaker' *GhanaWeb* 14 May 2018 <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/I-will-resign-if-Akufo-Addo-legalizes-homosexuality-Speaker-651656> (accessed 25 October 2019).

54 The December 2020 election in Ghana has changed this dynamic. 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 <https://thechronicle.com.gh/parliament-adopts-private-members-bill/> (accessed 28 April 2021).

state who are part of the President's cabinet.⁵⁵ 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 former Speaker of Parliament.

Apart from the inter and intra party debate on homosexuality in Ghana, there is also some tension between political leaders of Ghana and their foreign counterparts. Tweneboah appreciates this international political tension relating to homosexuality and captures it neatly.⁵⁶ 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 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.⁵⁷

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'.⁵⁸ 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 Akufo-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 Akufo-Addo of missing the opportunity to unequivocally state his unwillingness

55 Article 78(1) of the Constitution of Ghana 1992 instructs the president to appoint a 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 are subsequently passed by parliament into law.

56 S Tweneboah 'Religion, international human rights standards, and the politicisation of homosexuality in Ghana' (2018) 24 *The African Journal of Gender and Religion* 25.

57 Tweneboah (n 56) 42.

58 As above.

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 toward homosexuals. As long as members of the LGBTIQ+ community remain silent and conduct their activities without public attention, people are happy to let them be. When the LGBTIQ+ community announced the convening of an LGBTIQ+ international conference in the capital of Ghana in 2006,⁵⁹ 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 LGBTIQ+ persons that if the state does not do enough to protect their rights, sexual minorities will not vote in national elections,⁶⁰ has also placed LGBTIQ+ rights in the political spotlight.

However, can a 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:

[N]ot 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.⁶¹

59 Essien & Aderinto (n 3) 121.

60 'Gays to boycott elections?' *GhanaWeb* 23 May 2008 <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Gays-To-Boycott-Elections-144227> (accessed 29 October 2019).

61 Tweneboah (n 56) 40.

Homosexuality is politicised 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 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 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 pulpits for politicians to make statements 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.

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.⁶² As a follow up to this rhetoric, politicians and their allies have introduced bills in Parliament to further criminalise consensual same-sex conduct between adults and have even engaged in hate speech.⁶³

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 issues of bread and butter, identity, freedoms, and human rights 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.⁶⁴

62 'President Mills: Homosexuality, lesbianism foreign to our culture' *Modern Ghana* 10 July 2011.

63 'Bill to criminalise homosexuality coming soon – Foh Amoaning' (n 10).

64 Tettey (n 4) 86.

After all, a significant majority of Ghanaians belong to the Christian and Islamic faith,⁶⁵ 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 the majority of ordinary people are against homosexuality. Therefore, they have an opportunity to say what resonates with these supporters to win their trust and votes. Politicians who have made homosexuality a central issue for political campaigning have realised that the issue of homosexuality is one that easily secures consensus and popular support, and therefore a powerful tool to secure votes and popularity. It is also a good issue to divert attention from failure to deliver on ‘bread and butter’ campaign promises.

3.1 Moral entrepreneurs’ contribution to politicisation of homosexuality

The response of political leaders to issues concerning LGBTIQ+ rights in Ghana has often been at the instance of moral entrepreneurs and social institutions who put pressure on the politicians to act. Matters relating to sexual minority rights are sensationalised in the media, and politicians following the bait and coupled with a seeming lack of understanding of the rights of LGBTIQ+ persons,⁶⁶ make negative comments about homosexuality. Apart from the response of politicians to sensationalised reports in the media and comments by moral entrepreneurs concerning LGBTIQ+ activities, politicians have also responded to statements made by leaders in other countries, particularly the global north, to denounce homosexuality and attempt to affirm the sovereignty of the state capable of managing its affairs including the subject of homosexuality.⁶⁷

Moral entrepreneurs comprise individuals who demand certain moral standards, often subjective of the state.⁶⁸ These persons are usually

65 Statistics Ghana ‘2010 population and housing census’ https://statsghana.gov.gh/gssmain/fileUpload/pressrelease/2010_PHC_National_Analytical_Report.pdf (accessed 10th January 2022).

66 Rights of LGBTIQ+ persons do not mean a new set of rights but the claim that existing rights also cover LGBTIQ+ persons. Politicians in Ghana often overlook or are ignorant of this distinction.

67 ‘Ghana refuses to grant gays’ rights despite aid threat’ (n 44); see also AA Asiedu ‘LGBTIQ+ is an abomination that won’t be accepted in Ghana – Bagbin tells Australian High Commissioner’ *My Joy Online* 2 April 2021 <https://www.myjoyonline.com/LGBTIQ+I+-is-an-abomination-that-wont-be-accepted-in-ghana-bagbin-tells-australian-high-commissioner/> (accessed 14 April 2022).

68 Tetley (n 4).

religious, political and traditional leaders. Sometimes they are people who have some standing or popularity in the eyes of the public. When these moral entrepreneurs speak on media platforms, particularly the radio, they quickly get the attention of political officeholders or those seeking political office.⁶⁹

It is generally the case in Ghana 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 sustained for weeks⁷⁰ and politicians have been compelled to act to save their political careers. Politicisation of homosexuality had led to some traditional leaders warning people in their locality to desist from homosexual activity and in extreme cases, banished individuals perceived to be homosexuals from their traditional community.⁷¹ However, the call to action, announced by moral entrepreneurs is usually targeted at politicians. These entrepreneurs know that politicians wield power to make laws to criminalise LGBTQI+ activities and also use the state's coercive forces, which should be used for the collective good of the country, to harass and violate the rights of LGBTQI+ persons.

Politicians have failed to protect the rights of LGBTQI+ persons, leading to increased hate speech and assault against the latter.⁷² Also, when

69 Essien & Aderinto (n 3).

70 'Ghana Anti-LGBTQI+ Bill: Ghana church leaders intensify pressure on parliament to pass anti-gay bill' *BBC News* 11 October 2021 <https://www.bbc.com/pidgin/tori-58867937> (accessed 9 May 2022). See also "'We won't tolerate LGBTQI+'" Ga Chiefs Warn' *Daily Guide Network* 24 October 2021 <https://dailyguidenetwork.com/we-wont-tolerate-LGBTQI+-ga-chiefs-warn/> (accessed 8 May 2022).

71 Tinchie 'Gay man caught by Nkoranza Chiefs: Asked to bring 24 sheep, Schnapps to pacify Gods' *Opera News* <https://gh.opera.news/gh/en/society/6c9d827f36347d2d55a086313dd2094a> (accessed 8 May 2022); see also Cobbinna 'The traditional rulers of Nkoranza has baptized a gay with the blood of a sheep' *Opera News* <https://gh.opera.news/gh/en/religion/8fcef4da36230863d8df5e8e2dc9580c> (accessed 8 May 2022); A Cromwell 'Alleged homosexual banished from Nkoranza community' *My Joy Online* 8 October 2021 <https://www.myjoyonline.com/alleged-homosexual-banished-from-nkoranza-community/> (accessed 8 May 2022); '21-year-old suspected gay confesses after being threatened with an oath' *GhanaWeb* 8 October 2021 <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/21-year-old-suspected-gay-confesses-after-being-threatened-with-an-oath-1375618> (accessed 8 May 2022); 'Nkoranza Traditional Council banishes suspected gay' *Daily Guide Network* 9 October 2021 <https://dailyguidenetwork.com/nkoranza-traditional-council-banishes-suspected-gay/> (accessed 8 May 2022).

72 Human Rights Watch (n 36) 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. Youths 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.

people have been declared unwanted and banished from a community by a traditional authority, contrary to their Constitutional rights, politicians have failed to protect them.⁷³ Therefore, not only do politicians attack and speak against LGBTIQ+ persons and their rights when goaded by moral entrepreneurs, but they also fail to act when the rights of LGBTIQ+ individuals are threatened or violated, as required by the 1992 Constitution of Ghana.⁷⁴ Politicians affirm moral entrepreneurs' views to maintain political relevance and popularity, and ultimately to maintain power.

When there is violence and violations of the rights of LGBTIQ+ persons, politicians ignore the subject and refuse to speak against such acts. 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.⁷⁵ 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.⁷⁶ 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.⁷⁷ If political leaders issue threats that homosexuals would soon be lynched,⁷⁸ it emboldens citizens to assault and record such shameful acts against alleged homosexuals.

73 As above.

74 Constitution of Ghana, 1992, chap 5 contains provisions such as the protection of personal liberty (art 13); human dignity (art 15); protection of privacy and home (art 18); and general fundamental freedoms (art 21) which are often violated in relation to LGBTIQ+ persons.

75 Human Rights Watch (n 36) 44; see also Human Dignity Trust 'Ghana' <https://www.humandignitytrust.org/country-profile/ghana/> (accessed 26 April 2021).

76 Human Rights Watch (n 36) 44-46. 'Nima youth assault gay man' *GhanaWeb* 17 August 2015 <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Nima-youth-assault-gay-man-375655> (accessed 10 May 2022).

77 'Nima youth assault gay man' (n 76); 'Anti-LGBTIQ+ Bill Controversy: Man assaulted for engaging in a homosexuality act in Nkoranza' *JoyNews* 9 October 2021 <https://www.youtube.com/watch?v=i1aKJzGXX4E> (accessed 10 May 2022); see also 'Suspected gay man beaten badly by Nkoranza residents' *MyInfoGh* 11 October 2021 <https://myinfo.com.gh/2021/10/suspected-gay-man-beaten-badly-by-nkoranza-residents/> (accessed 10 May 2022).

78 'Homosexuals could soon be lynched in Ghana – MP warns' *Ghanamps* 17 June 2011 <https://ghanamps.com/homosexuals-could-soon-be-lynched-in-ghana-mp-warns/> (accessed 30 June 2017).

It is even more intriguing to learn of instances where political leaders have instructed and supervised assault against LGBTQI+ persons in Ghana.⁷⁹ For instance, a District Chief Executive who is the representative of the President of the Republic of Ghana in the district, summoned an alleged lesbian to his office, unilaterally cancelled a contract that the lady had won to provide services to the assembly, ordered his police escort and other persons to severely beat her up and banished her from the traditional community where she lived.⁸⁰ Politicians have also incited citizens to force alleged homosexuals out of their communities. A former minister of the Western Region of Ghana, Mr Paul Aidoo 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.⁸¹ This resulted in demonstrations by the youth and religious organisations, both Christian and Muslim, against LGBTQI+ persons in the region.⁸² 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.

In some instances, moral entrepreneurs have sounded an alarm when media reports of the outcomes of health screenings have been made public. One such occasion, is the sensational publication by media outlets of the Ghana AIDS Commission's Report that homosexuals are a high-risk group. It alleged that homosexuals had undergone health screening and most of them had contracted HIV and other sexually transmitted diseases, which caused people to stigmatise LGBTQI+ persons.⁸³ It was a major argument employed by the moral entrepreneurs and the eight parliamentarians to set up a hostile climate for LGBTQI+ persons in Ghana.⁸⁴ With this information, LGBTQI+ members were presented and viewed by the general population as people who were bent on decimating

79 Human Rights Watch (n 36).

80 As above.

81 'Paul Evans Aidoo's Ghana gay spy call "promotes hatred"' *BBC News* 22 July 2011 <https://www.bbc.com/news/world-africa-14250170> (accessed 9 May 2022); See also 'Council Adopts Resolution Condemning Ghanaian Minister's Anti-LGBTQI+ Comments' *City of West Hollywood* 17 August 2011 <https://www.weho.org/Home/Components/News/News/894/> (accessed 9 May 2022).

82 As above.

83 'Most homosexuals in Ghana are bi-sexual – National AIDS/STI Control Programme Manager' *My Joy Online* 30 July 2021 <https://www.myjoyonline.com/most-homosexuals-in-ghana-are-bi-sexual-national-aids-sti-control-programme-manager/> (accessed 8 May 2022).

84 As above.

society or creating a public health hazard for all Ghanaians because of their promiscuous sexual lifestyle.⁸⁵

Interestingly, there is no space for a reasoned conversation because any attempt to speak for and on behalf of LGBTIQ+ persons is met with insults, assaults 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.⁸⁶ Apart from a few bold human rights activists who speak for LGBTIQ+ persons on the grounds of principle, even human rights organisations are afraid or simply unable to do so, because they suffer hate speech from the general population and from moral entrepreneurs.

4 Lawfare and LGBTIQ+ activism: Responses by the LGBTIQ+ community to the politicisation of homosexuality in Ghana

Since the anti-LGBTIQ+ Bill's tabling in Parliament and the inception of public debates around its motives and necessity, two key factions of activism have developed from the discussions of the Bill. We categorise these activists along two key lines, activists for and activists against the Bill, and discuss how these two groups have engaged the Bill in this section.

While activism against the LGBTIQ+ community is not a new phenomenon, public support for LGBTIQ+ rights by a cross-section of society is rare. The number of activists coming out openly to object to the Bill, defend the LGBTIQ+ community and push back attempts at repressing the rights of LGBTIQ+ persons in Ghana now, is significant. Although the LGBTIQ+ community seems not to have responded resoundingly to the attacks on its members and the new Bill, the number of emerging allies who have challenged it and sparked national debate is worth noticing. These activists against the Bill have employed diverse spaces to challenge it. These include journal articles,⁸⁷ presentation of a memorandum to parliament blogs, and webinars, among others, to

85 As above. See also memorandum to 'Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill, 2021' 5.

86 See for instance the verbal attack on Dr Charles Wereko Brobbey, an elder statesman who challenged an anti-gay activist for pursuing hate against LGBTIQ+ persons: 'Let's help you if you're homosexual: Foh-Amoaning tells Wereko Brobbey' *Peacefmonline* 28 April 2018 <https://www.peacefmonline.com/pages/local/social/201804/350885.php?storyid=100&> (accessed 12 May 2022).

87 See for instance TE Coleman, EY Ako & JG Kyeremanteng 'A critique of Ghana's anti-LGBTIQ+ Bill of 2021' forthcoming in the *African Human Rights Law Journal* 2022.

discuss and express their displeasure with the Bill.⁸⁸ Criticism of the Bill by allies and persons of respectable social standing through various media platforms has created a sense of safety, empathy, and awareness of the depth of politicisation and denigration of LGBTQI+ rights in Ghana.⁸⁹ In social media spaces, for example, LGBTQI+ activists and allies have used pseudonyms and other forms of identities which offer protection, to raise awareness about the dangers that the Bill poses to the rights of Ghanaians and LGBTQI+ persons. Succinctly put by Stewart:⁹⁰

In the context of this revisionist history and pervasive violence, LGBTQI+ Ghanaian activists are creating virtual and physical safe spaces to affirm their identities and speak out about their experiences.

Prominent amongst these emerged activists have been a group of 18 academics, lawyers, and social justice advocates under the name 'a group of concerned citizens of Ghana'.⁹¹ Founding their arguments on the issues of human rights,⁹² they have through a memorandum, submitted to Parliament in response to the Bill highlighted its ills and why it should not be passed into law.⁹³ Other individuals and groups have also appeared before the parliamentary select committee and presented various memoranda to justify why the Bill needs to be withdrawn.⁹⁴ During the public hearing in Parliament of memoranda submitted in support of and against the Bill in November 2021,⁹⁵ LGBTQI+ activists and allies raised

88 Odoi (n 2); Coleman, Ako & Kyeremanteng (n 87); AO Gyamerah & A Hutchful 'Ghana's proposed hate bill threatens safety, livelihood, and the health of LGBTQI+ People' *Think Global Health* 6 January 2022 <https://www.thinkglobalhealth.org/article/ghanas-proposed-hate-bill-threatens-safety-livelihood-and-health-lgbtqi+-people> (accessed 15 April 2022); see also 'Kill the bill Ghana: Socialists and LGBTQI+ Liberation' *Socialist Solidarity Gh* 23 August 2021 https://www.youtube.com/watch?v=pbx_b1gUBgQ (accessed 17 April 2022).

89 'Archbishop of Canterbury criticises Ghana anti-LGBTQI+ bill' *BBC News* 27 October 2021 <https://www.bbc.com/news/world-africa-59062483> (accessed 16 April 2022).

90 'Ghana's proposed hate bill threatens safety, livelihood, and the health of LGBTQI+ People' (n 88).

91 Memorandum submitted to select on constitutional, legal, and parliamentary affairs committee on the Promotion of proper human sexual rights and Ghanaian family values bill, 2021. On file with authors.

92 'Ghana Anti-LGBTQI+ Bill: Why high-profile Ghanaian professors, lawyers dey fight against anti-gay bill' (n 20).

93 Memorandum (n 91).

94 'LGBTQI+ Bill: Proposed bill will promote violence when passed – Group' *GhanaNews* 21 February 2022 <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/LGBTQI+-Bill-Proposed-bill-will-promote-violence-when-passed-Group-1473881> (accessed 17 April 2022).

95 Parliament of Ghana 'House Select Committee Begins Public Hearings on Anti-LGBTQI+ Law' (12 November 2021) <https://www.parliament.gh/news?CO=153>

concerns about the danger the Bill poses to the safety of persons perceived to belong to the LGBTIQ+ community.⁹⁶ While the concerns raised by the pro LGBTIQ+ groups might be legitimate, moral entrepreneurs and their allies also submitted memoranda to Parliament, fiercely opposing these concerns.⁹⁷

LGBTIQ+ activists have however not approached the courts to resist violations of their rights. The first reason is the hostile socio-political environment and attitudes towards the LGBTIQ+ community. The Ghanaian society believes that homosexuality is a western concept unknown to Ghanaian culture.⁹⁸ Yet, critical historical writings point to the existence of same-sex relationships in early Ghanaian communities before the arrival of colonial administrators.⁹⁹

The second reason the LGBTIQ+ community may not have resorted to using the courts, flowing from the evidence in the debates, is a lack of conviction that the 1992 Constitution of Ghana protects the rights of every person, including LGBTIQ+ persons. The (non-)appreciation that the Constitution protects the rights of all persons is replicated in the Constitutional Review Commission Report of 2011, which claimed that constitutional rights do not extend to LGBTIQ+ persons and that the majority of Ghanaians think it should not be amended to protect such rights.¹⁰⁰ This belief is strengthened by the provision in the Criminal

(accessed 17 April 2022); See also 'LGBTIQ+ Bill: Rightful Ghana group meeting with committee to be held in-camera' *GhanaWeb* 17 March 2022 <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/LGBTIQ+-Bill-Rightful-Ghana-group-meeting-with-committee-to-be-held-in-camera-1492844> (accessed 17 April 2022).

96 'LGBTIQ+ Bill: Proposed bill will promote violence when passed- Group' (n 94).

97 'House Select Committee Begins Public Hearings on Anti-LGBTIQ+ Law' (n 95).

98 L Ossé 'Ghanaians are united and hospitable but intolerant toward same-sex relationships' *Afrobarometer Dispatch* 461 (1 July 2021) 2, reports that about 93 per cent of Ghanaians are intolerant of people in same-sex relationships. See also Odoi (n 2) 2; Report of the Constitution Review Commission of Ghana 'From a political to a developmental constitution' (n 33) 657.

99 M Epprecht 'The 'unsaying' of indigenous homosexualities in Zimbabwe: Mapping a blindspot in an African masculinity' (1998) 24 *Journal of Southern African Studies* 631; N Ajen 'West African homoeroticism: West African men who have sex with men' in SO Murray & W Roscoe *Boy-wives and female husbands: Studies of African homosexualities* (1998); 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 at 23-24. 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.

100 Constitution Review Commission 'From a political to a developmental Constitution' (2011) 652-653 https://constitutionnet.org/sites/default/files/crc_research_report_final.pdf (accessed 14 July 2022).

Offences Act of Ghana that criminalises the offence of ‘unnatural carnal knowledge’.¹⁰¹ Therefore, many Ghanaians believe that because the Constitution does not expressly protect LGBTQI+ rights and the criminal law also criminalises same-sex sexual relations, LGBTQI+ rights are a new form of rights that should not be introduced into the Constitution.¹⁰² This impression by most Ghanaians that the Constitution does not protect the rights of LGBTQI+ persons is erroneous.

The case of *Toonen v Australia*,¹⁰³ shows that ‘sex’ could be interpreted as including sexual orientation,¹⁰⁴ thereby widening the scope of prohibition of discrimination on grounds of sex to include sexual orientation. The recent case of *Flamer-Caldera v Sri Lanka*¹⁰⁵ that found Sri Lanka in breach of article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is also instructive.¹⁰⁶ The CEDAW Committee held that ‘criminalisation of same-sex sexual activity by women compounds discrimination against women in Sri Lanka’.¹⁰⁷ This decision underscores the fact that even in the absence of express words protecting LGBTQI+ rights, existing corpus of human rights protects the rights of every person including LGBTQI+ persons.

Some domestic courts have also followed in the footprints of global treaty monitoring body decisions and have also held that despite the lack of express provisions in their constitutions, LGBTQI+ persons are also entitled to constitutional rights protections.¹⁰⁸ Therefore, Ghana will not be the first country to have its courts recognise the rights of LGBTQI+ persons. The point being made here is that recognising that the Constitution protects the rights of LGBTQI+ persons does not amount to the creation of a new right. It is simply an affirmation of existing rights that protects every person, including LGBTQI+ persons. The Supreme Court of Ghana

101 Section 104(1)(b) of the Criminal Offences Act of Ghana 29 of 1960, as amended.

102 See Constitution Review Commission Report (n 100) 654-655.

103 In *Toonen v Australia* Communication 488/1992, Merits, UNHR Committee, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) para 8.7, the Human Rights Committee held that the ICCPR prohibited discrimination on the ground of sex, which includes sexual orientation.

104 *Toonen v Australia* para 8.7.

105 *Rosanna Flamer-Caldera v Sri Lanka*, CEDAW Committee, Communication 134/2018, UN Doc CEDAW/C/81/D/134/2018 (21 February 2022).

106 As above.

107 *Rosanna Flamer-Caldera v Sri Lanka* para 9.2.

108 In India, see *Navej Singh Johar v Union of India Thr Secretary Ministry of Law and Justice* Writ Petition (Criminal) 76 of 2016. See also in Botswana, *Letsweletse Motshidiemang v Attorney General & Lesbians, Gays, and Bisexuals of Botswana (LeGaBiBo) (Amicus Curiae)* MAHGB-000591-16.

increasingly relies on international case law of regional and global human rights bodies to interpret the Bill of Rights in the 1992 Constitution.¹⁰⁹ This portends well for the future of human rights litigation in Ghana, even though the Court is yet to decide a matter relating to LGBTIQ+ persons rights.

The third and last impediment to using the courts is the lack of a coordinated and well-rehearsed strategy that will attract the sympathy of the public and the courts. Since national debates on homosexuality started in 2006, the anti-LGBTIQ+ community have always had a simple coordinated message that convinces the public that homosexuality is alien to the culture of Ghanaians and a threat to the moral fibre of society. On the other hand, the LGBTIQ+ community and allies have not been able to convince Ghanaians, as the Botswana High Court put it, that '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'.¹¹⁰ The LGBTIQ+ community has failed to articulate a simple message that encapsulates their lived experiences that the public will identify and empathise with. Such a simple message could form the basis of a strategy that is attractive to a court of law. As Tamale cautions, Africans need to articulate their own lived experiences to dispel the notion that homosexuality is foreign driven and has a neo-colonial agenda.¹¹¹ Unfortunately, in the Ghanaian context, not much has been done by LGBTIQ+ led civil society organisations and human rights bodies to displace the notion that homosexuals are seeking to impose their 'lifestyle' on Ghanaians, recruit children, decimate the population and upset the traditional Ghanaian family. While the LGBTIQ+ community is largely closeted, newly formed LGBTIQ+ civil society groups led by young activists are beginning to change the narrative, leading to the backlash discussed above.¹¹²

109 See for example the case of *Mrs Abena Pokuaa Ackah v Agricultural Development Bank (ADB)* Civil Appeal J4/31/2015, where the Supreme Court relied on case law of the European Court of Human Rights to interpret the right to privacy in the Constitution of Ghana. For a full discussion of the application of international law in human rights litigation in Ghana, See Ako EY 'Towards the decriminalisation of consensual same-sex conduct in Ghana: A decolonisation and transformative constitutionalism approach' LLD thesis, University of Pretoria, 2021, 201-265.

110 *Letsweletse Motshidiemang v Attorney General & Lesbians, Gays, and Bisexuals of Botswana* (n 108) 79-80.

111 S Tamale 'Confronting the politics of nonconforming sexualities in Africa' (2013) 56 *African Studies Review* 41.

112 These groups include Rightify Ghana and LGBT+ Rights Ghana.

5 Rethinking LGBTQI+ lawfare in response to state-sponsored homophobia

Interestingly, the introduction of the anti-LGBTQI+ Bill in Ghana,¹¹³ has sparked a new wave of lawfare. LGBTQI+ led civil society organisations and the LGBTQI+ community have received a significant boost from allies, drawing from academia, the legal fraternity and other civil society organisations.

We recommend that civil society groups sympathetic to LGBTQI+ rights in Ghana should form a coalition to contest the constitutionality of section 104 of the Criminal Offences Act and the Anti-LGBTQI+ Bill currently before parliament, if passed into law. Taking a cue from countries such as South Africa, Botswana, Kenya and Uganda, members of the LGBTQI+ community must conduct a legitimate lawfare in defence of their rights. The coalition could also contest ongoing violations against LGBTQI+ based on their sexual orientation in the short term. For instance, the announcement of an LGBTQI+ conference scheduled for July 2020 caused adverse reactions in Ghana.¹¹⁴ Individuals, organisations and government officials threatened to shut down such a gathering and prevent persons who were travelling to Ghana from doing so.¹¹⁵ It is only appropriate to contest such attempts which infringe on the right to freedom of association¹¹⁶ and threats to the lives of the participants¹¹⁷ in

113 Promotion of proper human sexual rights and Ghanaian family values Bill, 2021.

114 'We'll halt LGBTQI+ conference in Ghana by all means – Christian group' *The Independent Ghana* 4 March 2020 <https://theindependentghana.com/2020/03/well-halt-LGBTQI+-conference-in-ghana-by-all-means-christian-group/> (accessed 26 September 2020).

115 As above. See also KG Asiedu 'Ghana bans LGBTQI+ conference after Christian groups protest' *Reuters* 12 March 2020 <https://www.reuters.com/article/us-ghana-LGBTQI+-religion-idUSKBN20Z31L> (accessed 26 September 2020); "'Wallahi Tallahi", we will stop any LGBTQI+ conference in Ghana – Chief Imam swears' *GhanaWeb* 27 February 2020 <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Wallahi-Tallahi-we-will-stop-any-LGBTQI+-conference-in-Ghana-Chief-Imam-swears-878911> (accessed 26 September 2020).

116 Article 21(1)(e) of the Constitution of Ghana 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) on the manufacture and sale of spirits regulations which required membership of a registered distillers association before obtaining and operating the sale of alcohol.

117 Essien & Aderinto (n 3) 121 recount that a planned LGBTQI+ conference in Ghana in 2006 prompted a response from Ghanaians and the state that threatened the rights of association and other rights of LGBTQI+ persons.

court. Contesting such issues in court will 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. As Jjuuko rightly observes, such litigation requires strategic planning as such cases may, even if successful, have negative consequences including backlash and countermobilisation.¹¹⁸ The examples of India,¹¹⁹ Botswana,¹²⁰ and Kenya¹²¹ confirm that strategic litigation requires adequate planning to challenge the constitutionality of sodomy laws.

Apart from using the courts, the Commission on Human Rights and Administrative Justice (CHRAJ),¹²² which is Ghana's National Human Rights Institution (NHRI) offers an avenue to protect LGBTIQ+ rights. Historically, NHRIs are set up to protect the rights of all persons regardless of their sexual orientation.¹²³ The mandate of NHRIs encompass investigation of human rights abuses, offering avenues for redress and reparation, and educating the public about the rights of

118 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.

119 *Navej Singh Johar v Union of India Thr Secretary Ministry of Law & Justice* (n 108). See the earlier case of *Suresh Kumar Koushal v Naz Foundation* Civil Appeal 10972 (2013).

120 *Letsweletse Motshidiemang v Attorney General & Lesbians, Gays, and Bisexuals of Botswana* (n 108), which declared sodomy law as unconstitutional in Botswana. The decision has since been affirmed by the Apex Court of Botswana. For a discussion of this case see F Viljoen 'Botswana court ruling a ray of hope for LGBTIQ+ people across Africa' *The Conversation* 12 June 2019 <https://theconversation.com/botswana-court-ruling-is-a-ray-of-hope-for-LGBTIQ+-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'.

121 *EG & 7 Others v Attorney General; DKM & 9 Others (interested parties); Katiba Institute and Another (amicus curiae)* consolidated suit of Petition 150 of 2016 and Petition 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.

122 Article 216 of the Constitution of Ghana establishes CHRAJ as an independent constitutional body with a tripartite power of human rights, anti-corruption, and administrative justice.

123 A-E Pohjolainen 'The evolution of national human rights institutions – The role of the United Nations' The Danish Institute for Human Rights (2006).

citizens. As an 'A-rated' human rights institution,¹²⁴ CHRAJ is required by its constitutional mandate to investigate instances of human rights violations, ensure appropriate redress, and educate the public about the rights and responsibilities.¹²⁵

This chapter makes two recommendations relating to CHRAJ. First, CHRAJ must take the lead on educating the Ghanaian public on the rights of all persons, including LGBTQI+. CHRAJ's mandate includes educating the public on fundamental human rights and freedoms¹²⁶ and has representation in almost every district of Ghana. Evidence available points to the fact that most of the public lack adequate education about sexual minority rights,¹²⁷ and the Commission must find ingenious ways to execute this constitutional mandate. Educating the public on LGBTQI+ 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,¹²⁸ 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.

Second, LGBTQI+ activists 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

124 CHRAJ is recognised by the global alliance of national human rights institutions as an 'A-rated' human rights institution, compliant with the *Paris Principles* [ohchr.org/sites/default/files/Documents/Countries/NHRI/Chart_Status_Nis.pdf](https://www.ohchr.org/sites/default/files/Documents/Countries/NHRI/Chart_Status_Nis.pdf) (accessed 14 May 2022). CHRAJ operates an anonymous online system that receives and investigates complaints of human rights violations against LGBTQI+ persons.

125 Articles 216-230 of the Constitution of Ghana, 1992; See also Commission on Human Rights and Administrative Justice Act 456 of 1993.

126 Article 218(f) of the Constitution of Ghana, 1992 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 sec 7(g) of the Commission on Human Rights and Administrative Justice Act.

127 Odoi (n 2).

128 Article 217 of the Constitution of Ghana, 1992, requires the President of Ghana to appoint the members of CHRAJ. Arguably, even though appointed by the president, the commissioners of CHRAJ have displayed high levels of independence since its formation in 1993, with high profile investigations of government ministers and organs, finding them culpable. The Commission has also taken a bold stand on the discussion on the Anti-LGBTQI+ Bill 2021, currently before parliament. For a discussion of the independence, powers, and functions of CHRAJ see EY Ako 'An examination of the powers and functions of CHRAJ' LLB thesis submitted to the Faculty of Law, KNUST, 2007 (on file with authors).

a body of human rights jurisprudence which includes the ground-breaking case on sexual harassment.¹²⁹

While CHRAJ operates an anonymous online service for LGBTIQ+ persons, the efficacy of such a system is unknown, and a visit to their online website suggests this service might no longer be available.¹³⁰ CHRAJ should also strive to protect the identity of LGBTIQ+ persons who lodge complaints of human rights violations while delivering 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.¹³¹ The Commission has been under-resourced for several years, and its annual budget has been 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 levels.

The financial and human resource challenges of CHRAJ notwithstanding, it is important to dispel the notion that educating the public about LGBTIQ+ rights requires finances rather than a mindset of tackling this all-important human rights issue. To this end, CHRAJ should be commended for its public comments on the Anti-LGBTIQ+ Bill before Parliament.¹³² Through this memoranda and public defence of it in parliament, CHRAJ pointed out unequivocally that a better national response to the issue of homosexuality is to engage constructively with the LGBTIQ+ community and other stakeholders instead of the state

129 *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 the Commission on Human Rights and Administrative Justice Act.

130 Human Rights Committee 117th Session 'Summary record of the 3274th meeting held at the Palais Wilson, Geneva, on Friday, 24th 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 LGBTIQ+ violations.

131 See for instance CHRAJ 'Twenty-seventh annual report 2020' submitted to parliament in 2021. At page 80 CHRAJ states that it received only '93.5% of the total annual estimated budget' for 2020. This budget is an improvement on previous years' budgets.

132 See CHRAJ 'Memorandum on the proper human sexual rights and Ghanaian family values bill, 2021, comments from the Commission on Human Rights and Administrative Justice (CHRAJ)' chraj.gov.gh/wp-content/uploads/2021/12/memorandum-LGBTIQ+-bill.pdf (accessed 14 May 2021).

passing a law to criminalise the phenomenon.¹³³ The recommendation is that CHRAJ should engage more on LGBTQI+ rights through press releases, sensitisation workshops and other forms of media publicity and engagement with citizens.

The Human Rights Council of the United Nations has advised the government of Ghana to consider resourcing CHRAJ adequately for the effective execution of the Commission's mandate.¹³⁴ The profound nature of LGBTQI+ 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,¹³⁵ CHRAJ must prioritise strengthening staff capacity 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, challenging the constitutionality of laws that criminalise consensual same-sex adult relationships is the way to go. Successful litigation approaches in other jurisdictions, and the seeming lack of resort to the courts to vindicate the rights of LGBTQI+ persons, could be the focus of future research in Ghana.

6 Conclusion

This chapter has argued that there is a culture of politicisation of LGBTQI+ rights in Ghana, where politicians focus on making denigrating comments about the LGBTQI+ community and threats to arrest or pass new restrictive laws to regulate LGBTQI+ activities in order to score political points instead viewing it as a human rights issue. As a result of the politicisation of homosexuality, LGBTQI+ persons have endured verbal and physical assaults and routine violations of their rights.

133 CHRAJ 'Twenty-seventh annual report 2020' (n 131).

134 Human Rights Council 'Universal Periodic Review – Ghana Third Cycle' <https://www.ohchr.org/EN/HRBodies/UPR/Pages/GHIndex.aspx> (accessed 10 July 2020); See also HRC 'Report of the Working Group on the Universal Periodic Review Ghana' A/HRC/37/7 (26 December 2017) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/367/88/PDF/G1736788.pdf?OpenElement> (accessed 10 July 2020).

135 CHRAJ 'Twenty-seventh annual report 2020' (n 131).

Despite sporadic media challenges to the law that criminalise same-sex relationships, the LGBTIQ+ community in Ghana has endured state and non-state actors' infringement on their rights. On the promptings of moral entrepreneurs, including politicians, and traditional and religious leaders, the state has used its coercive forces to violate the rights of LGBTIQ+ persons. Whenever LGBTIQ+ persons have created visibility in public, the state has been urged to clamp down on their activities, leading to violations of constitutional rights such as privacy, association and expression. Even during the height of the COVID-19 pandemic, when the LGBTIQ+ community, as a vulnerable group, had access to a few places for security, health, and other purposes to realise their potential, the state moved to arrest, detain, and restrict their movement for exercising their rights to freedom of association and expression.¹³⁶ Where offices were opened to offer safe and secured access for members of the LGBTIQ+ community to exchange ideas for the betterment of the community freely, those safe spaces were shut down with brute force, simply because anti-LGBTIQ+ persons and groups who think 'others' should not be visible argue for such areas to be eliminated.¹³⁷

Therefore, this chapter argues that the time has come for LGBTIQ+ led organisations and the LGBTIQ+ community to adopt some of the lawfare strategies employed by their counterparts in other African countries like Botswana, South Africa, Kenya, and Uganda to fight oppression and violation of their rights. The current Anti-LGBTIQ+ Bill before Parliament that seeks to eliminate anything associated with the LGBTIQ+ community, including allies, and civil society organisations, create a police state, which is very concerning. The resistance to the Bill by allies of the LGBTIQ+ community suggests that everyone that is sympathetic to the rights of human beings must come on board to fight the violation of the rights of LGBTIQ+ persons. Whether the Bill is passed in its current form or not, it must be contested in court because a secular, open and democratic society like Ghana has no place for bigotry laws that criminalise a section of society and create second class citizens.

The LGBTIQ+ community and allies should reckon that using the courts as an avenue to protect their rights, will play a vital role in dismantling colonialism, bigotry and homophobia. The time to employ lawfare is now, and the LGBTIQ+ community has nothing to lose but a lot to gain to stand up and be counted in the fight against the violation of their fundamental human rights.

136 'Outcry after 21 people arrested in Ghana for 'advocating LGBTIQ+ activities' (n 13).

137 Williams (n 6).

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