

CLAUSE-BY-CLAUSE ANALYSIS ON THE

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

Abridged Version

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Introduction

Human rights are universal, inherent, indivisible and inalienable. They are the cornerstone of society, and as such, human rights are protected under various treaties and international instruments. Domestically, they are contained within Chapters 5 and 6 of the 1992 Constitution.

The *Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill, 2021* ('the Bill') is undoubtedly one of the most controversial bills to be considered by Parliament. It has been the subject of public debate and attracted mass international condemnation by states and organizations alike. Independent Experts at the United Nations say that the Bill establishes "a system of State-sponsored discrimination and violence...".¹ In an increasingly global village, it is vital that Ghana's reputation as a "champion of democracy" be maintained and enhanced.

Whilst this clause-by-clause legal review addresses all 25 clauses of the Bill, the list of alleged human rights violations mentioned is necessarily non-exhaustive due to restrictions on the length of this document. Further, the potential violations and infringement of globally accepted "soft-laws" are alarmingly numerous and more than adequately demonstrate why legally, this Bill should not be passed.

CLAUSE 1: Application
CLAUSE 2: Interpretation

1. *International Law Violations*

- Articles 1 and 2, Universal Declaration of Human Rights (UDHR), Article 2, African Charter of Human and Peoples' Rights (ACHPR), Article 1, International Convention on Civil and Political Rights (ICCPR)

2. *Constitutional Violations*

- Article 12(2), Article 15(1), Article 17, Article 21(1) (a), (b), (d), (e), (f) and (g)

The UDHR and ACHPR provide that all human beings are born free and equal in dignity and rights; and everyone is entitled to all the rights and freedoms without distinction of any kind such as race, colour, *sex*, language, religion, political or any other opinion, national or social origin, property, birth, or *other status*. The ICCPR in the same vein provides that all people have the right to self-determination and by that right, they freely determine their political status and freely pursue their economic, social, and cultural development.

Clauses 1 and 2 of the Bill have a very wide application from queer people, allies, to intersex persons, people questioning their sexuality and healthcare personnel who provide or participate in the provision of sex or gender reassignment surgical procedures. This wide application is a clear violation of the law that *all human beings are born equal in dignity and rights*. The clauses violate the dignity and rights of all the persons to which the Bill applies, using their sexuality or physiological nature as a basis for discrimination and deprivation of their rights and freedoms.

The 1992 Constitution expressly guarantees equal entitlement of all persons to the fundamental human rights and freedoms, subject to respect for the rights and freedoms of others and for the public interest. The Constitution prohibits the selective application of rights provisions therein unless an exception can be brought within the parameters outlined by the Constitution itself. The Bill purports to curtail the rights of a significant minority and discriminates against them on the grounds of their sexuality and born physiological nature. Since many of the issues around LGBTQ+ are gender issues, discriminating against the group may be argued to amount to discrimination on the grounds of gender, which is expressly prohibited under *Article 12*.

¹ UN Special Procedures, Analysis of the draft bill presented to the Ghanaian government, 9 August 2021 <https://ghana.un.org/sites/default/files/2021-08/Public%20-%20OL%20GHA%2003.08.21%20%283.2021%29.pdf>

Article 15 of the *Constitution* guarantees the inviolability of the dignity of all persons. The application of this Bill to persons in the LGBTQ+ group is not only discriminatory but infringes on their dignity and dehumanizes them. It exposes them to stigma from the idea that their mutually consensual sexual practices are unacceptable, foreign to and in conflict with the values of Ghanaians. This language denigrates their choices as subhuman by putting them together with the offence of bestiality, a crime under Ghanaian law in Section 104 (1)(c).

CLAUSE 3: Duty to Promote Proper Human Sexual Rights and Ghanaian Family Values

CLAUSE 4: Prohibition against Undermining Proper Human Sexual Rights and Ghanaian Family Values

1. *International Law Violations*

- Article 1, Universal Declaration of Human Rights (UDHR), Article 1, International Convention on Civil and Political Rights (ICCPR)

2. *Constitutional Violations*

- Article 26, Article 34, Article 35(4), Article 35(5), Article 37(1), 37(2) (b), Article 39 (2), Article 41(c), (d) and (g)

At the international law level, Clauses 3 and 4 violate the rights to dignity, freedom of thought and expression encapsulated under the UDHR and the ICCPR.

Article 26 of the *1992 Constitution* guarantees the freedom to practice traditions, religion or culture or other beliefs, with the caveat that these must not be dehumanizing or injurious to the physical and mental well-being of others. *Article 39(2)* further reinforces this by requiring the State to ensure that appropriate customary and cultural values are adapted and developed to the growing needs of society and reiterates the need to ensure that these are not injurious, particularly to the health and well-being of the person. Thus, the values that are sought to be imposed on must be consistent with the above caveats.

In any case, that which is referred to as “Ghanaian family values” is hardly something that can be readily defined, there is no state proclamation indicating what these values are and how they embody the true Ghanaian spirit. Ghana, like any other State, is not a homogenous state. Ghanaian cultures may have some common values; however it is disingenuous and unlawful both under domestic and international law to say there is one definition for Ghanaian family values to which every Ghanaian must ascribe to or face criminal sanctions.

CLAUSE 5: Duty to Report

1. *International Law Violations*

- Articles 1, 16(3), Universal Declaration of Human Rights

2. *Constitutional Violations*

- Article 28(1) (e)

The UDHR provides that all human beings are born free and equal in dignity and rights, are endowed with reason and conscience, and should act towards one another in the *spirit of brotherhood*. Clause 5 of this Bill by the imposition of such a duty on all citizens, attempts to deprive them of their freedom and puts a strain on their ability to reason and act in good conscience. It also takes away the spirit of brotherhood. This clause has the potential to propagate and fuel hatred, mistrust, fear, and instability amongst members of society at large and will invariably lead to a divisive society with some sections of the community living in fear.

On the domestic front, under *Article 28(1)(e)*, Parliament is required to enact laws for “the protection and advancement of the family...”. It is in the interest of the State to ensure that families are stable, united and provide a strong sense of belonging and inclusion for all members. Clause 5 does not comply with this provision as it seeks to ensure that some members of a family and the larger community may become targets of the coercive element of state power through the deployment of the police. This will

not encourage openness, honesty and the stability and unity that must exist for a family and indeed the larger society to thrive.

CLAUSE 6: Prohibition of LGBTTTQQIAAP+ and Related Activities

1. *International Law Violations*

- Article 1, 2; Universal Declaration of Human Rights (UDHR), Article 2; African Charter of Human and Peoples' Rights (ACHPR), Article 1; International Convention on Civil and Political Rights (ICCPR)

2. *Constitutional Violations*

- Article 12(2), Articles 15(1), 15(2)(a) and (b), Article 17, Article 21

Clause 6 violates the dignity of persons on several levels, even by the standard of prohibition of sex between a human and an animal. This is an affront to dignity and an insult to any person by placing same-sex sexual intercourse on the same level as bestiality is especially insulting to LGBTQ+ persons. Having sex with animals is in no way akin to sex between two consenting adults. By putting both activities in the same bracket, Clause 6 - through the language used and treatment of the issues - is disrespectful, degrading, dehumanizing, detracts from their worth as human beings and denies them the dignity that the State is constitutionally and internationally obligated to afford all its citizens.

Clause 6(1)(e) attacks the identity of LGBTQ+ and their allies whilst stating that holding oneself out as such is a criminal offence. The clause purports to criminalize a state of being, rather than an act. This is contrary to the theories underpinning criminal law, which oppose "thought crimes" and note that a person is punished for doing or failing to do something or causing harm, and not merely for a state of being. There is no definition of "holds out as" in the Bill. Thus, a person who is simply viewed as an ally can be arrested and subjected to the criminal trial process simply due to perception whether or not the person was in fact doing anything pursuant to that State.

Again, the decision to undergo sex/gender reassignment should not be made the subject of a criminal offence. There is neither injury to the person warranting the limit of consent as provided within the criminal law, nor is there any harm to the State's interest. Reference to the fact that being intersex is an "anomaly", may be argued to be a denigrating term. Anomaly here does not only mean unusual from the standard but also an abnormality. This provision further stifles the advancement of medicine and surgery in Ghana and consequently, social protection and development as well as economic opportunities for practitioners. Sex reassignment is a modern development in the medical field which is producing more developments and cutting-edge knowledge and techniques. However this will not be the case in Ghana should this Bill be passed as it intends to forbid such medical services. Similarly, the Ghanaian medical professionals' right to utilize their existing knowledge, obtain new knowledge and explore to push groundbreaking medical barriers will be interrupted by the Bill.

Finally, clause 6(3), defines sexual intercourse to include the use of sex toys, and other forms of sex including oral sex which means criminalizing not just LGBTQ+ activities, but sexual activities between heterosexual persons, which not only falls outside of the purpose of the Bill but also creates the situation where the State determines the sexual affairs of consenting persons of sound mind, including married couples. This falls beyond circumstances that justify the State's interference with the sexual proclivities of its people.

CLAUSE 7: Procurement

1. *International Law Violations*

- Articles 1, 3, 18, African Charter on Human and Peoples' Rights (ACHPR)

2. *Constitutional Violations*

- Article 15

The African Commission on Human and People’s Rights *Resolution 275 on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity* place certain obligations on States including, “...ensuring proper investigation and diligent prosecution of perpetrators and the establishment of judicial procedures responsive to the needs of victims” who have been targeted on the “basis of their imputed or real sexual orientation or gender identities”.² Clause 7 achieves the opposite of this mandate by attempting to create an offence by which persons would be unjustly treated by the criminal justice system entirely based on their imputed or real sexual orientation or gender identities.

Whilst the act of procuring a person (whether by threats, intimidation, false pretence or false representation), into any sexual relationship could reasonably be considered unlawful, the offence of procuration as defined in Clause 7 of the Bill has the effect of only criminalizing non-heterosexual sexual relations. This is discriminatory and likely to detract from the worth of non-binary persons as human beings in violation of *Articles 15(2)(b)*.

CLAUSE 8: Detention with intent to Commit Prohibited Sexual Activity
CLAUSE 9: Keeping a Brothel for Prohibited Sexual Activity

1. *International Law Violations*

- Article 26, International Covenant on Civil and Political Rights (ICCPR), Articles 12, and 25.1, Universal Declaration of Human Rights (UDHR), Articles 2(2), 4, and 11.1, International Covenant on Economic, Social and Cultural Rights (ICESCR)

2. *Constitutional Violations*

- Article 18(2), Article 17, Article 15

Clause 8 makes it an offence to detain a person intending to commit the prohibited activities, two of which apply only to non-heterosexuals. This violates *Article 26* of the *ICCPR* which provides that laws “shall prohibit *any* discrimination”...including on “any ground such as...other status”.

The application of criminal punishment to consensual same-sex and pansexual activities which take place in private premises and without harm is an unjustifiable and arbitrary interference with privacy and home in violation of the UN Declaration of Human Rights.

Clause 9 could also exclude LGBTQ+ persons from the rental housing market as landlords will be fearful of the potential liability under Clause 9(2). This infringes on the right to housing under the ICESCR. Under *Article 4 ICESCR*, Ghana may only limit the rights in the ICESCR by laws which are “compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society”. Clause 9 is neither compatible with the nature of the right to housing nor is it *solely* for the purpose of promoting the general welfare in a democratic society”.

The association of the prohibited sexual activities with the notion of a brothel, as reflected in the title of Clause 9, conjures thoughts of prostitution and commercial sex work, however, the offence under Clause 9 does not contain any element of prostitution or commercial sex work. It is thus another “moral panic” employed by advocates of the Bill to stigmatize, ostracise, and demean LGBTQ+ persons.

The right to protection of privacy of home and other property under Article 18(2) can be interfered with by law but any law which does so must 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*”. There is neither an issue of public safety nor of economic well-being of the country nor any issue relating to the protection of health or the rights or freedoms of others to justify Clause 9 of the Bill.

²ACHPR/Res.275(LV)2014.

It is important to note that *the Criminal Offences Act, 1960 (Act 29)* section 277 covers similar conduct to that stated in Clause 9, the offences in Clause 9 are classed as second-degree felonies which are more severe than the offence which already exists under *Act 29*.

CLAUSE 10: Prohibition of Gross Indecency

1. *International Law Violations*
 - Articles 1, 2 and 22, Universal Declaration of Human Rights (UDHR), Articles 5, 16, 28, African Charter on Human and People's Rights (ACHPR)
2. *Constitutional Violations*
 - Article 19, Article 21(1)(e), Article 37

Clause 10 criminalizes the “public show of amorous relations” between persons of the same-sex or between persons who have undergone gender or sex reassignment as a “grossly indecent act”. Clause 10 may be said to violate the right to dignity and the best attainable mental health under the African Charter on Human and People's Rights as well as a violation of *Article 22* of the *UN Declaration of Human Rights* with the right to, *inter alia*, the social and cultural rights “indispensable for his dignity and the free development of his personality”.

Again, Clause 10 starts from the premise that the manner of dress determines or is associated with gender. However throughout the world, including in Ghanaian culture, men may wear garments that could be labelled as womens. It prohibits intentional cross-dressing where the person has the intention to portray a gender different from the gender assigned at birth with intent to engage in an act prohibited under the Bill. Consequently, Clause 10(1)(c) infringes on the freedom of expression. *Section 278* of the *Criminal Offences Act, 1960 (Act 29)* already prohibits grossly indecent acts. Thus, clause 10 is unnecessary.

CLAUSE 11: Void Marriage

Clause 11 does not directly violate any laws as states are entitled to determine the types of marriages recognized as valid. However, there is a growing recognition of the importance of not discriminating between heterosexual and non-heterosexual persons, due to the companionship, social status, and other benefits that entail as a result of marriage.

CLAUSE 12: Prohibition of Propaganda of Promotion of and Advocacy for Activities Prohibited under this Act

1. *International Law Violations*
 - Articles 1, 2,7 and 19 Universal Declaration of Human Rights (UDHR), Articles 2 and 9, African Charter of Human and Peoples' Rights (ACHPR), Articles 2(1), 17, 18, 19, 22, International Covenant on Civil and Political Rights (ICCPR),
2. *Constitutional Violations*
 - Article 15(1) , Article 21 (1)(a), (b), (e), Article 34(1), Article 35(1) and (5), Article 37(1), (2)(a) , Article 41, Article 162(1) and (2), Article 163 , Article 164

Discrimination based on, *inter alia* status is prohibited. Clause 12 violates *Articles 2* and *7* of the *UDHR*, *Article 2* of the *ACHPR*, and *Article 2(1)* of the *ICCPR* by which Ghana is obligated to ensure that all individuals within its jurisdiction are provided with the rights contained therein “without distinction of any kind”. Further, *Article 26* of the *ICCPR* requires the law of all States Parties to ensure “equal and effective protection against discrimination” on various attributes including “other status”.

Under international law, everyone has “the right to hold opinions without interference” as found in *Article 19(1) ICCPR* and similar rights in *Article 9(2) of the ACHPR* and *Article 19* of the *UN Declaration on Human Rights*. By virtue of *Article 19(2) ICCPR* and similar rights in *Article 9* of the

ACHPR and Article 19 of the UDHR, individuals have the right to freedom of opinion and expression, including the right to request, pursue, receive and share information and ideas. This right may be expressed in print, orally, through art or any other media. According to the Human Rights Committee this right includes the protection of expressing information that may be deemed disturbing, offensive or alarming.³

Clause 12(1) severely restricts the freedom of expression and speech both for the general public and the media by denying their use of electronic and other forms of communication in stated circumstances.

In *NPP v. IGP* the Supreme Court stated,

“In countries that practice true democracy, supporters and opponents of every conceivable cause are given freedom to associate and express their views... it is not for the government or our neighbour to tell us what to think or feel or do?...Except in a time of war, when a state of emergency has been declared, it cannot be right for any agency of the executive to suppress the free expression of any opinion, however unpopular that opinion may be. The believer in absolutism, the anarchist, those who oppose equal rights for women – yes lesbians and homosexuals too - are all entitled to the free expression of their views, and the right to assemble and demonstrate in support of those views.”⁴

In expressing the above, the Supreme Court gave a dire warning: “Once the state takes for itself the power to licence association...the only way of changing the prevailing state of affairs is by use of force.”⁵ (emphasis added). None of the exceptions which would permit the curtailment of these freedoms may be said to be reasonably applicable. Similarly under Clause 12, media houses would be banned from broadcasting or otherwise publishing any information, dialogue or conversation. Article 162(1) and (2) of the Constitution guarantees the freedom and independence of the media and bans censorship in Ghana, subject to any law not inconsistent with the Constitution. On a reasonable analysis, there are no issues of national security, public order, public morality or the protection of other persons' reputations, rights and freedoms. Moreover, Clause 12 denies state-owned media from complying with its obligations under Article 163 of the Constitution, namely affording “fair opportunities and facilities for the presentation of divergent views and dissenting opinions’. Clause 12 infringes Articles 162, 163 and 164 of the Constitution and if passed would equate to an unjustifiable form of censorship.

Clause 12(3) prohibits a person from offering any moveable or immoveable asset or to provide any form of assistance for the purpose of promoting an activity prohibited under the Act. This clause effectively denies any LGBTQ+ or human rights Non-Governmental Organization (NGO) or Civil Society Organisations (CSO) from being able to rent premises to be used as offices, safe houses or training facilities. This is a flagrant violation of Article 37(2) of the Constitution which includes ““the rights of people to form their own associations free from state interference and to use them to promote and protect their interests...”” It also indirectly violates Article 21(1)(e).

CLAUSE 13: Prohibition of Propaganda of, Promotion of and Advocacy for Activities Directed at a Child

1. *International Law Violations*

- Articles 12 and 13, Convention on the Rights of the Child (CRC)

2. *Other Domestic Law Violations*

- Section 8 and 11, Children’s Act, 1998 (Act 560)

³ Communication No. 736/97, *Ross v. Canada*, Views adopted on 18 October 2000, CCPR/C/GC/34.

⁴ [1993–1994] 2 GLR 459.

⁵ *Ibid* at 470-471.

Article 13 of the *Convention on the Rights of the Child*, provides children with freedom of expression which includes the “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or print, in the form of art, or through any other media of the child’s choice”. By *Article 13(2)*, this right is only subject to national security, public health, public morals or respect for the rights or reputation of others. None of the justifications for an incursion into this right is justified by the Bill. The attempt therefore to criminalize the availability of information directed at children would indirectly infringe upon the right of the child to information as stated in *Article 13(1)* of the *Convention on the Rights of the Child*. Clause 13 also, indirectly, infringes *Article 12* of the *Convention on the Rights of the Child* as it deprives the child of the ability of forming their own views and freely expressing those views. A limit on the scope of information could be determined by the “age and maturity” of the child in order to ensure that the information is age appropriate.

Clause 13 violates *Section 8* of the *Children’s Act* which forbids children from being deprived of education. Education does not only occur in the classroom, it is a process of learning that may take place in various environments. Thus the objective appears to be of precluding children from being the target of information.

Seeking to prevent individuals from using the media, internet, films or any electronic device to disseminate materials aimed at children, whether directly or indirectly, the Bill violates *Section 11* of the *Children’s Act 1998* which requires that no person should deprive a child “capable of forming views the right to express an opinion, to be listened to and to participate in decisions which affect his well-being”. Reasonably, the *Children’s Act* requires that this right to express an opinion, be listened to and to participate in decisions that affect his well-being is to be “given due weight in accordance with the age and maturity of the child”.

CLAUSE 14: Prohibition of Funding or Sponsorship for Prohibited Activities
CLAUSE 15: Disbandment of LGBTQIAAP+ Group, Society, Association, Club or Organization
CLAUSE 16: Prohibition of LGBTQIAAP+ Group, Society, Association, Club or Organization

1. *International Law Violations*

- Article 1, and 2; Universal Declaration of Human Rights (UDHR), Article 3; African Charter of Human and Peoples’ Rights (ACHPR), Article 1; International Convention on Civil and Political Rights (ICCPR)

2. *Constitutional Violations*

- Article 17, Article 21(1), Article 21(3), Article 35(4), Article 35(9), Article 37

Articles 7 and 8 of the UDHR recognizes equality of all persons before the law and the right of all persons to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law. Similarly, Article 3 of the ACHPR provides for the right to equality before the law and equal protection of the law. Article 8 of the UDHR Charter also provides the right to justice.

Clauses 14, 15 and 16 of the Bill purport to govern the formation and/ or organization, support, sponsorship/funding of, and participation in activities to support or sustain, promote or facilitate an LGBTQ+ group, society, association, club or organization. These clauses infringe on the above human rights articles by restricting the ability to litigate or lobby for the rights of LGBTQ+ persons and consequently, the ability to have a judicial or administrative remedy for the violation of the rights of an LGBTQ+ person or allies. Proscribing funding of these organizations and/ or activities is to effectively curtail those rights as advocacy and campaigning costs money. Advocacy may sometimes require strategic litigation for the declaration and assertion of rights, which requires funding, therefore, to prohibit funding is to bar the access of the LGBTQ+ community to justice in respect of their rights when violated.

Article 37 of the *Constitution* also directs the State to enact laws to secure amongst others the enjoyment of rights of effective participation in development processes *including rights of people to form their own associations free from State interference*. These rights are so important that any limitation must be shown to be necessary for the enhancement of democracy and freedoms for all for the public good, and that the limitation is proportional, meaning that the limitation must not be so disproportionate in effect as to render a constitutionally guaranteed right nugatory.⁶

CLAUSE 17: Prohibition of Adoption Order for LGBTQQIAAP+ Persons

CLAUSE 18: Prohibition of Grant of Fosterage for LGBTQQIAAP+ Persons

1. *International Law Violations*

- Article 16, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Articles 2 and 18, African Charter on Human and Peoples' Rights (ACHPR), Articles 4, 19 and 21, African Charter on the Rights and Welfare of the Child (ACRWC)

2. *Constitutional Violations*

- Article 29

3. *Pre-Existing Legislation*

- Children's Act, 1998 (Act 560)
- Adoption Rules, 2003 (C.I. 42)

At the international level, the right to family is seen as a core right, given that “family” is given special recognition as the basic unit of all society. For which reason it must be protected.⁷ Discrimination on the grounds of one's sexuality, or one's advocacy for or alliance with LGBTQ+ persons, or on one's quest to understand their sexuality in a non-binary way, is to discriminate against certain categories of women, even where their biological reproductive organs conform to the standard women's organs, as in the case of lesbians, bisexual women, and transgender women. This is in contravention of *Article 16 (f)* of *CEDAW*, which requires states to ensure that women and men have equal rights in respect of guardianship, wardship, trusteeship and adoption of children.

The protection and advancement of the family is a constitutionally guaranteed right. However, the *Constitution* (rightly) does not define “family”. This is, arguably, because it is now accepted that families come in all shapes and sizes. Blood relations are not always the most important factor. In the words of the oft-quoted description of a written constitution, the *Constitution of Ghana* 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*”.⁸ This is why such important terms are undefined to allow for fluidity and growth because definitions may change over time, as a nation progresses and develops. As such, there should be no static definition of “family” that would tie us down to an idea of strictly a mother, father and children. Whilst it is true that children come into existence (usually) through heterosexual sexual intercourse, it is not true that that is the only way to have children. To prohibit the fosterage or adoption of a child by an LGBTQ+ person, including a person who is intersex and even a person of any other socio-cultural notion of sex or sexual relationships is both retrogressive and in dissonance with the aspirations of the Ghanaian society to provide a stable, viable home, particularly for children.

Secondly, *Act 560* already provides for fosterage, and the only conditions for being a foster parent is that the person must be above the age of 21 and of high moral character and proven integrity. The sexual identity and/ or gender of the person is neither required nor is the person's advocacy objectives. This exclusion amounts to the Bill saying that heterosexuals are *prima facie* of high moral character, while those who do not themselves hold these ideas, or support non-conforming persons do not possess moral

⁶ *Civil and Local Government Staff (CLOSSAG) v. The Attorney-General & Ors* [2017] DLSC 2590.

⁷ Article 18, African Charter on Human and Peoples' Rights.

⁸ *Tuffour v the AG* (1980) GLR 634 C.A.

character. This is discriminatory and there is no basis for suggesting that moral character lies in heterosexual sexual practices.

In any case, the existing law requires that in all matters pertaining to the child, the best interests of the child are paramount.⁹ The exclusion of LGBTQ+ persons, allies and a person holding socio-cultural notions of sex or sexual relationships that are non-binary and non-heterosexual from fosterage and adoption has not been shown to be in the best interest of the child.

CLAUSE 19: Protection of Victims of Prohibited Sexual Activities

1. International Law Violations

- Article 1, Universal Declaration of Human Rights (UDHR), Articles 6 and 7, African Charter on Human and Peoples' Rights (ACHPR)

2. Constitutional Violations

- Article 15, Article 19(5), Article 19(11)

Article 1 of the UDHR, Articles 6 and 7 of ACHPR and Article 15 of the Constitution, recognize the right to dignity as fundamental and inviolable.

Framing sexual activities falling under LGBTQ+ as predatory and an attack on “innocent” persons, who are “victims” is not only erroneous but also strips the affected persons of their right to dignity. It positions LGBTQ+ persons as predatory and being of such nature to force themselves on unwilling persons.

Articles 6 and 7 of the ACHPR prohibit arbitrary arrest and detention, which includes an arrest for an offence that was not in existence or punishment for an offence not in existence. This clause violates these provisions because the vagueness of the would-be offence renders it void. There are no parameters to this offence, and therefore it is difficult to see on what basis a person may be punished for this. This also impedes the right to a defence, which by its very nature, implies that the offence must be clear enough to enable the accused person provide an appropriate defence.

Secondly, Clause 19 exculpates a person who engages in a sexual activity prohibited under the Act but who did so as a victim. This necessarily implies the existence of a perpetrator, that is, the person with whom the sexual activity was done. What the ingredients of the offence are and how one becomes a victim is also not clearly indicated, yet it appears that the perpetrator's act is distinguished by the use of some force or harm as implied by Clause 19 (3).

Clause 19 is redundant because forced sexual activity is already provided under *Act 29. Section 97 of Act 29* provides for non-consensual sexual intercourse in the case of a female to be punishable as a first-degree felony. Here, it is clear that the female is a victim because the sexual intercourse is without her consent, thereby violating her rights to personal autonomy. *Section 101* provides for defilement of a girl child under 16 and punishes this act by a clearly stated penalty of 7- 25 years imprisonment. The child in such a situation is clearly the victim as the law disregards any consent given for the act, however, informed and self-aware the child may be. The child is the victim because they are deemed too young to understand the nature and consequences of the sexual act. Thus, there is already existing penal legislation to deal with non-consensual or forced sexual intercourse.

CLAUSE 20: Access to medical help or treatment by accused

1. International Law Violations

⁹ Section 2 of Act 560.

- Article 12 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- Article 3, 4 And 14 African Charter on the Rights And Welfare of the Child (ACRWC)
- Article 5, 9(2), 13 And 16 African Charter on Human and Peoples’ Rights (ACHPR)
- Article 12, International Convention on Economic, Social and Cultural Rights (ICESCR)
- Article 1, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention)

2. *Constitutional Violations*

- Article 15, Article 17, Article 28

Clause 20 contravenes several international instruments. The right to health, including the right to access appropriate medical care is recognized in several international instruments, including the ACHPR, CEDAW, the ACRWC, and the ICESCR, amongst others. Medical care includes both access to general healthcare and mental health facilities and treatments.

This clause limits access to appropriate medical care to only those LGBTQ+ members who recant their sexuality or sexual affiliations. Thus, in the instance where an LGBTQ+ person suffers mental health challenges stemming from being arrested or subjected to unwarranted criminal investigation and/or criminal trial, they would not be entitled to medical care to help unless they were prepared to recant their sexuality. A person subjected to criminal processes because of being LGBTQ+ or even merely questioning their sexual identity (in particular, young people and children) may suffer challenges to their mental health. Such persons should not be required to deny themselves dignity and their sexual autonomy to be able to receive medical assistance.

This clause also violates the rights of children and other persons to medical care, particularly mental health support and care under domestic law.

CLAUSE 21: Flexible Sentencing

1. *Constitutional Violations*

- Chapter 5, 1992 Constitution, Chapter 6, 1992 Constitution

The purpose of the criminal law, *among other things*, is to ensure the safety and security of all persons. It is not meant to suppress the legitimate interests or well-being of a group of persons within society. Therefore, using it as a tool to force compliance with another group of people’s notion of morality is a gross misuse of the state’s coercive power. Under *Article 36* of the *Constitution*, the State has an obligation “to secure the maximum welfare, freedom and happiness of *every* person in Ghana” including LGBTQ+ individuals. Clause 21 is thus a violation of that obligation.

CLAUSE 22: Prohibition of Extra-Judicial Treatment

This clause does not appear to violate international or domestic law.

CLAUSE 23: Assistance for Questioning and Intersex Persons

1. *International Law Violations*

- Article 1, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention), Article 14, African Charter on the Rights and Welfare of the Child (ACRWC)

2. *Constitutional Violations*

- Article 15

Clause 23 infringes on *Article 16* of the *ACHPR*, which states that every individual shall have the right to enjoy the best attainable state of physical and mental health. Practices of “conversion therapy” target a specific group on the exclusive basis of sexual orientation and gender identity, with the specific aim

of interfering in their integrity and autonomy. Conversion therapy may also be classified as torture according to the Statement of the Independent Forensic Expert Group on Conversion therapy published in 2020.¹⁰ Therefore, this clause may be argued to contravene the Torture Convention.

It is important to understand that intersex is a spectrum with several variations. In some cases, external genitalia will indicate intersex status, whilst in other cases, intersex traits may be internal and thus hidden. One example is an individual born with both a uterus and testicles.¹¹ Forcing parents to choose a binary designation for their children simply to conform to a doctor's view of the "appropriate binary designation" is not only a violation of dignity but one which may prove detrimental to the child if they later develop dominant traits of the sex that was "removed" based on the information available at the time of the therapy or surgery. These surgeries are generally irreversible, risky, often medically unnecessary and may cause life-long injuries.¹²

The clause creates stigma and shame for intersex persons by designating them as a "biological anomaly" and, therefore, something that must be cured or altered to ensure conformity with approved societal categories. This is likely to detract from the self-worth of both the parents and children, as prohibited by *Article 15(2)(b)* of the *Constitution*.

CLAUSE 24: Regulations

This clause does not appear to violate international or domestic law.

CLAUSE 25: Consequential Amendments

While not immediately infringing on any specific provision, this clause will pose significant challenges and may lead to friction between Ghana and its international partners with whom she has treaties. This is because many countries with which Ghana has extradition treaties have not only decriminalized sexual relations between LGBTQ+ consenting adults, many have also legalized LGBTQ+ unions, partnerships or marriages and recognised their human rights. It would thus make it impossible or politically costly to successfully request the extradition of a person to Ghana because the person is a member of the LGBTQ+ community or engaging in LGBTQ+ activities.

Conclusion

Many constitutional and international legal provisions are offended by this Bill. In particular, a common thread throughout the Bill is the attack on human dignity, the right to which the *Constitution* unequivocally declares as "inviolable". When fundamental human rights and freedoms are usurped, the legitimacy and authority of our institutions and laws will be destabilized. In turn, injustice, violence and disorder will follow.

The development and maintenance of a citizenry which adheres to principles of pluralism, tolerance, unity, national stability, justice, probity, friendship, opportunity, peace and equality before the law, as stated in the Preamble to the *Constitution*, requires openness, dialogue and the ability to debate and disagree peacefully without fear of punishment.

For the State to lawfully restrict the enjoyment of human rights, the restriction must be shown to be "reasonably necessary or required" in the public interest and national security and must be proportionate

¹⁰ 'Statement of the Independent Forensic Expert Group on Conversion Therapy' available at [https://pubmed.ncbi.nlm.nih.gov/32657772/].

¹¹ <https://www.healthline.com/health/baby/what-does-intersex-look-like#next-steps>

¹² <https://www.hrw.org/report/2017/07/25/i-want-be-nature-made-me/medically-unnecessary-surgeries-intersex-children-us>.

to the objective of the restriction.¹³ Thus, for laws to qualify as reasonably necessary or required, the objective of that law must be sufficiently important to override a constitutionally protected right or freedom. It must further be shown that “the law itself is a fairly proper means of achieving this important objective.”

It is submitted that the Bill is neither reasonably necessary nor required in the public interest or national security. The objective of the Bill is to impose the views and values of a section of society on the rest of the population and to stifle legitimate dissent, the expression of opinion and the freedom of conscience, thought, association and assembly.

In assessing the Bill, it is important to recall that the *Constitution* not only has its letter but also its spirit. Parliament must take cognizance of the overarching and fundamental notion that “recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.¹⁴ It is essential, therefore to protect, rather than deny, human rights by the rule of law, for indeed, it is for the protection and preservation of fundamental human rights and freedoms, amongst other things, that the people of Ghana enacted the 1992 Constitution.¹⁵

7 July 2022
Accra, Ghana

¹³ The Ghanaian formulation of the Oakes Test, as explained in *Republic v Tommy Thompson Books Ltd. (No2)* [1996-97] SCGLR 484, at 500-501.

¹⁴ Preamble, Universal Declaration of Human Rights, para 1.

¹⁵ Preamble, 1992 Constitution.