

Ghana's Constitutional Evolution Since 1960: A Comparative Analysis of the Country's Equality and Anti-Discrimination Legal Provisions



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ABSTRACT

Ghana has had four republican constitutions since it attained independence on 6th March 1957. Ghana's first republican constitution arguably provided for fundamental human rights and freedoms. The 1992 Constitution also guarantees equality before the law. However, Article 17(4) of the 1992 Constitution allows the Parliament of Ghana to make certain laws which might be advantageous to a certain class of people as far as it conforms to the provisions of the Constitution. A group of Parliamentarians in 2021 introduced a Bill in the Parliament of Ghana to criminalize LGBTQI+ groups and related activities since the Criminal Offences Act 1960 (Act 29) does not expressly refer to them. The Bill has fuelled debates on the discrimination or otherwise of LGBTQI+ persons in Ghana and the criminalisation of their activities. Using a comparative and doctrinal legal research approach, this paper analyses Article 17 of the 1992 Constitution of Ghana in the context of Ghana's constitutional evolution since 1960. The paper reveals that a comparison of the legal provisions on equality and discrimination in the various constitutions of Ghana since 1960 shows that the relevant provisions on the right to equality before the law and freedom from discrimination have undergone significant changes. The paper also shows that, unlike the 1969 and 1979 Constitutions, the 1992 Constitution does not list 'sex' or 'sexual orientation' or both as prohibited grounds for discrimination.

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INTRODUCTION

Ghana, on 6th March 1957, became the first country in sub-Saharan Africa to attain independence. Ghana also attained an independent republic under the Independence Act of 1957. The country enacted its first republican constitution on 29th June 1960 and has since had three other republican constitutions namely - the 1969 Constitution, the 1979 Constitution and the 1992 Constitution. Ghana's 1960 Constitution (the first republican constitution) came into force on 1st July 1960. It arguably provided for fundamental human rights and freedoms. Article 13 of the Constitution prohibited discrimination based on race, sex, tribe, political or religious belief. Article 17(1) and (2) of the 1992 Constitution also guarantees equality of all persons before the law. It also proscribes discrimination on grounds of ethnic origin, race, gender, religion, colour, creed or economic or social status. This means that the 1992 Constitution promotes equality before the

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law. Consequently, the 1992 Constitution prohibits acts or conducts that give unequal treatment to different persons mainly based on their respective descriptions by law, political opinions, gender, place of origin, colour, occupation, creed or religion. It also forbids a situation where a group or class is granted privileges or is subjected to restrictions to which another group or class is excluded.

Notwithstanding the foregoing provisions, Article 17(4) of the 1992 Constitution empowers the Parliament of Ghana to make legislations that are reasonably necessary to:

- a. implement policies and programmes to redress economic, social, or educational imbalance in the Ghanaian society;
- b. provide for matters involving marriage, adoption, divorce, burial, devolution of property on death or other matters relating to personal law;
- c. impose restrictions on foreigners in relation to the acquisition of land by them or restrictions on the economic and political activities of such persons and other matters relating to them; or
- d. make different provisions for different communities due to their special circumstances except that that provision must be consistent with the spirit of the Constitution.

Article 17(4) of the 1992 Constitution implies that the constitution allows the Parliament of Ghana to make laws to achieve any of the above-stated objectives although such laws may create a situation where a class or group of individuals are granted privileges or advantages or are subjected to disabilities or restrictions, which another class or group are not made to benefit or are not subjected to. The only limitation placed on the Parliament of Ghana in this regard is that the relevant laws should conform to the provisions of the 1992 Constitution.

Using a comparative and doctrinal legal research approach, this paper analyses Article 17 of the 1992 Constitution of Ghana in the context of Ghana's constitutional evolution since 1960. The paper reveals that a comparison of the legal provisions on equality before the law and freedom from discrimination in the various constitutions of Ghana since 1960 shows that the relevant provisions have undergone significant changes. The paper also shows that, unlike the 1969 and 1979 Constitutions, the 1992 Constitution does not list 'sex' or 'sexual orientation' or both as prohibited grounds for discrimination. The purpose of this paper is therefore to analyse relevant constitutional provisions on equality and discrimination in Ghana since 1960. The paper is a build-up of a conference paper presented by the author on 15th July 2021 at BCCE Virtual Conference 2021.¹

The paper consists of six parts. Part one introduces and outlines the structure of the paper. Part two discusses the concepts of equality before the law and freedom from discrimination. A brief political history of Ghana from 1960 to 1992 is stated under part three. Part four focuses on Ghana's constitutional evolution in the context of the concepts that will be discussed in part two. The findings and analysis of the paper are presented in part five. Part six outlines the concluding remarks of this paper.

THE CONCEPT OF EQUALITY AND FREEDOM FROM DISCRIMINATION

Just like the preamble and Article 17 of the 1992 Constitution of Ghana; Articles 1, 2 and 7 of the Universal Declaration of Human Rights (UDHR)² and Articles 2 and 3 of the African Charter on Human and Peoples' Rights (Banjul Charter),³ and their preambles, provide for the right to equality before the law and freedom

¹ RO Mensah, 'Ghana's Constitutional Evolution since 1960: Comparative Analysis of the Country's Equality and Anti-Discrimination Law Provisions' in *Inequality in a Time of Global Crisis: What have we Learned about Effective and Proportionate Response* (Cape Town, 2021). Accessed, May 25, 2021. <https://www.law.berkeley.edu/research/berkeley-center-on-comparative-equality-anti-discrimination-law/ourannual-conference-programs/>

² United Nations, 'Universal Declarations of Human Rights' (United Nations), Accessed, July 10, 2021. <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

³ African Commission on Human and Peoples' Rights, 'African Charter on Human and Peoples' Rights' (African Commission on Human and Peoples' Rights (ACHR) 2021), Accessed 10 July 2021. <https://www.achpr.org/legalinstruments/detail?id=49>

from discrimination. Article 1 of the UDHR, for instance, provides that everyone is born free and equal in dignity. It is also provided under Article 7 that everyone is equal before the law and is entitled to equal protection of the law without any discrimination. Article 3 of the Banjul Charter falls on all fours with Article 7 of the UDHR. The preamble of the Charter states the conscious resolve to eradicate discrimination of all forms. The binding force of the foregoing legal instruments, however, depends on relevant factors.

The concept of discrimination is a dominant topic in the practice and discussion of human rights as it is quite an influential and highly contested issue.⁴ Besides, both members of the legal community and the public usually probe issues bothering on discrimination. Discrimination is generally defined as a failure to treat all persons equally.⁵ However, this understanding seems to contradict the idea of equality before the law which maintains that laws should apply equally to all citizens. Equality before the law simply means no one is above the law.⁶ If it is this simple, why then is the issue of discrimination still an inherently contested concept?⁷

The meaning of equality before the law; a meaning also applicable to the rule of law, is consistent with many constitutions today. It is seen as central to a fair and just legal system.⁸ Within the context of constitutional law, discrimination denotes the effect of a statute which confers particular privileges on a class which is arbitrarily selected from a large number of groups of persons. This is notwithstanding the fact that all members of the larger group stand in the same relation to the privileges granted, and no reasonable distinction can be found between the privileged class and those not favoured.⁹ This implies that discrimination is sometimes allowed by a statute for a privileged group of people within the larger citizenry where it is reasonably necessary to do so. In the recent Ghanaian case of *Targhuy v Achimota School*,¹⁰ the court reasoned as follows:

Determining therefore whether a person has been discriminated against in relation to the practice and manifestation of the person's religion, must be contextually construed and not generalized. That is, it will be legally flawed to contend that all Ghanaians must be treated equally. Rather the construction must be hinged on treating equal persons equally and unequal persons unequally. [Emphasis is mine].

As the concept of equality before the law is based on the constitutional concept of rule of law which denotes the idea that all persons are equal and must be treated equally, what makes a person unequal enough to enjoy unequal benefits of legal discrimination? It is argued that if a person can be disallowed from enjoying a certain right conferred on him by the law, then it must be that the law which sets the parameters for such a prohibition can in itself be allowed.¹¹ It thus makes sense that if a person would enjoy certain rights that others are not allowed to enjoy, then same must be allowed by the law which grants special rights to others and excludes others. The ordinary man may construe this to be a form of discrimination. It is for this reason that discrimination within a legal context must not be looked at through the lenses of dictionary definitions and common use, but rather its meaning must be determined through legal disputes be it by the avenue of case law or through scholarly analysis.¹²

⁴ George Rutherglen, 'Discrimination and Its Discontents' *Virginia Law Review*, 81 no. 1 (1995): 117.

⁵ Henry Campbell Black, *Black's Law Dictionary* (4th edn, West Publishing Co 1968).

⁶ Daron Acemoglu and Alexander Wolitzly, 'The Theory of Inequality before the Law' *The Economic Journal* 131, (2020): 1429.

⁷ Rutherglen, 'Discrimination and Its Discontents' 127.

⁸ Acemoglu and Wolitzly, 'The Theory of Inequality before the Law', 1429.

⁹ Rutherglen, 'Discrimination and Its Discontents' 127.

¹⁰ Gifty Adjei, Addo J in *Tyron Marghuy v Achimota School* [Suit No. HR/0055/2021] at page 17.

¹¹ Addo in *Tyron Marghuy v Achimota School* [Suit No. HR/0055/2021] at page 15.

¹² Rutherglen, 'Discrimination and Its Discontents' 127.

BRIEF POLITICAL HISTORY OF GHANA

Ghana, formerly known as Gold Coast, was a British colony. Dr Kwame Nkrumah in 1957 led the country to gain independence from the British. This made Ghana the first country in sub-Saharan Africa to gain independence from the British.¹³ Nkrumah's rule degenerated into a dictatorship. He subsequently made Ghana a one-party state under the then Convention People's Party (CPP).¹⁴ During that era, individuals who criticized the Nkrumah-led government were detained under the Preventive Detention Act 1958, and one of such instances where individuals were detained resulted in the landmark case of *Re Akoto and 7 Others*.¹⁵

In 1966, the Nkrumah-led government was overthrown by the National Liberation Council (NLC) in a military coup.¹⁶ Elections were held in 1969 in Ghana leading to the formation of a new civilian government by Dr. K.A Busia and the Progress Party.¹⁷ Dr. Busia and Edward Akuffo-Addo became the Prime Minister and the President respectively.¹⁸ On 13th January 1972, Lieutenant Colonel Ignatius Kutu Acheampong led the National Redemption Council (NRC) to successfully overthrow the Busia-led government.¹⁹ Lieutenant General F. W. K. Akuffo replaced Lieutenant Colonel Acheampong amidst rising discontent in the country.²⁰ Flight Lieutenant Jerry Rawlings and several other junior officers launched a coup against Lieutenant General Akuffo and were successful on their second attempt.²¹

Following the 1979 coup by Rawlings, Dr. Hilla Limann was elected as the President of Ghana on the ticket of the People's National Party (PNP). Rawlings led the Provisional National Defence Council (PNDC) on 31st December 1981 to seize power from Dr. Limann. He (Rawlings) remained in power for over ten years before the advent of Ghana's Fourth Republic. Ghana's Fourth Republic has been characterised by eight successive democratic elections between 1992 and 2020 with the peaceful change of power between the National Democratic Congress (NDC) and the New Patriotic Party (NPP). It is worth pointing out that the 1960, 1969 and 1979 Constitutions were suspended anytime there was a military takeover in Ghana.²²

GHANA'S CONSTITUTIONAL EVOLUTION AND EQUALITY BEFORE THE LAW

The 1960 Constitution

The preamble of the 1960 Constitution of Ghana was silent on equality before the law.²³ It has been opined that the 1960 Constitution also had no clear provisions for fundamental human rights²⁴ except as found in the solemn declaration by the president before the people under Article 13(1) of the 1960 Constitution which stated as follows:

Immediately after his assumption of office the President shall make the following solemn declaration before the people — On accepting the call of the people to the high office of President of Ghana Isolemnly declare my adherence to the following fundamental principles - ...That no person should suffer discrimination on grounds of sex, race, tribe, religion or political belief.
[Emphasis added].

¹³ S.Y. Bimpong-Buta, *The Role of Supreme Court in the Development of Constitutional Law in Ghana* (1st ed, Advanced Legal Publications 2007), 21-28.

¹⁴ Angela Thompsell, "A Brief History of Ghana since Independence" (October 2019), Accessed 6 July 2021. <https://www.thoughtco.com/brief-history-of-ghana-3996070>

¹⁵ [1961] GLR 523.

¹⁶ Thompsell, "A Brief History of Ghana since Independence".

¹⁷ Thompsell, "A Brief History of Ghana since Independence".

¹⁸ Thompsell, "A Brief History of Ghana since Independence".

¹⁹ Thompsell, "A Brief History of Ghana since Independence".

²⁰ Thompsell, "A Brief History of Ghana since Independence".

²¹ Thompsell, "A Brief History of Ghana since Independence".

²² S.O. Gyandoh Jr. and John Griffith in Kofi Kumado and SO Gyandoh Jr. (eds), *Sourcebook of the Constitutional Law of Ghana* (2nd edn, vol 1 part II, Black Mask Limited 2009) 869.

²³ See Preamble of the 1960 Constitution of Ghana.

²⁴ Dennis Dominic Adjei, *Constitutional Law of Ghana: Evolution, Theory and Practice* (Accra: Buck Press Ltd 2020),303.

It is worth pointing out that Article 13 of the 1960 Constitution was described by a marginal note of the Constitution as ‘Declaration of Fundamental Principles’. Section 4 of Ghana’s erstwhile Interpretation Act 1960 (CA 4), as repealed by Interpretation Act 2009 (Act 792), provided that marginal notes and references placed at the side of any provision are intended for convenience of reference only and do not form part of the enactment. It may thus be argued that the ‘Declaration of Fundamental Principles’ did not form part of the 1960 Constitution. Nonetheless, it is submitted that Article 13 of the 1960 Constitution embodied clear human rights provisions of which the first president of Ghana was constitutionally enjoined to solemnly declare his adherence to them.

In *Re Akoto and 7 Others*, the Supreme Court of Ghana opined that the provisions under Article 13 were mere declarations and not binding on the President. The court held as follows:

It will be observed that Article 13 (1) is in the form of a personal declaration by the President and is in no way part of the general law of Ghana. In the other parts of the Constitution where a duty is imposed the word “shall” is used, but throughout the declaration the word used is “should”. In our view the declaration merely represents the goal which every President must pledge himself to attempt to achieve. It does not represent a legal requirement which can be enforced by the courts. [Emphasis added].²⁵

This decision meant that fundamental human rights in Ghana under the First Republic were not constitutionally enforceable. This allowed the rights of some Ghanaians, especially some political activists, to be abused under the 1960 Constitution.²⁶ Certainly, this should not have been the case because if the framers of the 1960 Constitution did not intend for it to be legally enforceable, they would not have described them as fundamental principles.²⁷ The decision in *Re Akoto* has since received scathing criticisms by academics, text writers, legal practitioners and jurists. Charles Hayfron-Benjamin JSC in *New Patriotic Party v Inspector-General of Police*²⁸ opined that the Supreme Court of Ghana squandered the opportunity to construe Article 13 of the 1960 Constitution as a Bill of Rights.²⁹

The 1969 Constitution

Ghana in 1969 seemed to have learned from its past and had resolved not to repeat the human rights violations which had occurred under previous regimes. The 1969 Constitution therefore protected and preserved the fundamental human rights of Ghanaians.³⁰ The preamble of the Constitution made rule of law a foundation of the Ghanaian society.³¹ Chapter Four of the Constitution was titled ‘Liberty of the Individual’ and was sub-headed under ‘Fundamental Human Rights’. The 1969 Constitution thus explicitly provided for fundamental human rights unlike the 1960 Constitution, which arguably framed human rights as a part of the President’s optional obligation.

Article 12 of the 1969 Constitution provided that subject to the respect for the rights and freedoms of others and for public interest, everyone in Ghana was entitled to the fundamental rights and freedoms regardless of a person’s place of origin, political opinions, race, creed or sex, colour.³² In the history of Ghana’s constitutional evolution, exceptions for the first time were made for discrimination. Article 25(3) of the 1969 Constitution defined ‘discriminatory’ as giving dissimilar treatment to different persons mainly because of their respective descriptions by place of origin, race, colour, political opinions, sex, creed or occupation. This implies that while persons of a particular description are made subject or granted privileges

²⁵ [1961] GLR 523.

²⁶ Adjei, *Constitutional Law of Ghana: Evolution, Theory and Practice*, 301.

²⁷ Bimpong-Buta, *The Role of Supreme Court in the Development of Constitutional Law in Ghana*, 352.

²⁸ [1993-94] 2 GLR 459, SC.

²⁹ Bimpong-Buta, *The Role of Supreme Court in the Development of Constitutional Law in Ghana*, 353.

³⁰ Adjei, *Constitutional Law of Ghana: Evolution, Theory and Practice*, 302.

³¹ See Preamble of 1969 Constitution of Ghana.

³² See Article 12 of the 1969 Constitution of Ghana.

or advantages, persons of another description are denied such privileges and further subjected to restrictions or disabilities. Article 25(4) of the 1960 Constitution, which is similar to the provisions of Article 17(4) of the 1992 Constitution, nonetheless specified certain exceptions to the freedom against discrimination. The 1969 Constitution thus made provisions for lawful discrimination.

The 1979 Constitution

The 1979 Constitution shares a lot of similarities with the 1969 Constitution with regards to equality and anti-discriminatory provisions. The preamble of the 1979 Constitution also affirmed rule of law, and the protection and preservation of fundamental human rights.³³ Article 19 of the Constitution provided as follows:

Every person in Ghana, whatever his race, place of origin, political opinions, colour, creed or sex, shall be entitled to the fundamental rights and freedoms of the individual contained in this chapter, but subject to the respect for the rights and freedoms of others and for public interest...

Article 19 was placed under Chapter Six of the 1979 Constitution and was headed as ‘Fundamental Human Rights’ and sub-headed under the title ‘Liberty of the Individual’. This was a direct switch of title from the 1969 Constitution and a repetition of the relevant heading and subheading under the 1969 Constitution. Article 31 of the 1979 Constitution provided for protection from discrimination subject to stated exceptions just like Article 25 of the 1969 Constitution.

The 1992 Constitution

The 1992 Constitution, borrows well from the preamble of its predecessors in establishing the importance of the rule of law, and the protection and preservation of fundamental human rights and freedoms.³⁴ The preamble of the 1992 Constitution has the same wording as that of the 1979 Constitution. Chapter Five of the 1992 Constitution is headed ‘Fundamental Human Rights and Freedoms.’ Article 12(2) provides as follows:

Every person in Ghana, whatever his race, place of origin, political opinions, colour, creed or gender shall be entitled to the fundamental rights and freedoms of the individual contained in this chapter but subject to the respect for the rights and freedoms of others and for public interest.

It was held in *CHRAJ v Ghana National Fire Service* that Regulation 33(6) of the Conditions of Services of the Ghana National Fire Service was discriminatory, unjustifiable, illegitimate and illegal because it was inconsistent with Article 17(2) of the 1992 Constitution of Ghana which prohibits discrimination on certain grounds including gender.³⁵ The Regulation 33(6) stated that a female employee shall not be dismissed on the ground that she is pregnant provided she has served the first three years. The court reasoned that the Regulation affected the marriage and sex life of female employees and the reason for such a treatment can only be because of their gender. In the foregoing case, an example is seen of the application of equality and anti-discriminatory rules in the 1992 Constitution under Article 17 which states as follows:

1. *All persons shall be equal before the law.*
2. *A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status.*
3. *For the purposes of this article, “discriminate” means to give different treatment to different persons attributable only or mainly to their respective descriptions by race, place of origin, political opinions, colour, gender, occupation, religion or creed, whereby persons of one description are subjected to disabilities or restrictions to which persons of another description are not made subject or are granted privileges or advantages which are not granted to persons of another description.*
4. *Nothing in this article shall prevent Parliament from enacting laws that are reasonably necessary to*

³³ See Preamble of the 1979 Constitution of Ghana.

³⁴ See Preamble of the 1992 Constitution of Ghana.

³⁵ Suit No. HR 00063/2017.

provide:

- (a) for the implementation of policies and programmes aimed at redressing social, economic or educational imbalance in the Ghanaian society;
 - (b) for matters relating to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;
 - (c) for the imposition of restrictions on the acquisition of land by persons who are not citizens of Ghana or on the political and economic activities of such persons and for other matters relating to such persons; or
 - (d) for making different provisions for different communities having regard to their special circumstances not being provision which is inconsistent with the spirit of the Constitution.
5. Nothing shall be taken to be inconsistent with this article which is allowed to be done under any provision of this Chapter.

The 1992 Constitution has therefore generally upheld the concept of equality and anti-discrimination as established under the 1969 and 1979 Constitutions subject to some variations. Article 17(4) of the Constitution states exceptions that may allow discrimination and this is because fundamental human rights are subject to public good and interest.³⁶ This constitutional provision implies that not every Ghanaian will have exactly the same rights as all other Ghanaians in the country.³⁷ The Supreme Court of Ghana in the case of *Nartey v Gati* unanimously held that ‘Article 17 did not mean that every person within the Ghanaian society had, or must have, exactly the same rights as all other persons in the jurisdiction...’³⁸

FINDINGS AND ANALYSIS

Winter Jr. contends that the concept of equality before the law was introduced to prevent governments from taking undue advantage of the powers granted them and treating individuals unfairly.³⁹ To him, the fact that everyone was created equal does not mean that in reality, all persons are equal in terms of merit, ability, or possessions.⁴⁰ Consequently, equality should rather be viewed as all persons standing equal before the law.⁴¹ As emphasised by Justice Adjei Addo in the recent Ghanaian case of *Tyron Marghuy v Achimota School*,⁴² in every part of the world, human rights are not absolute and the enjoyment of these rights are subject to public good and interest. Article 295 of the 1992 Constitution defines ‘public interest’ to include any advantage or right which safeguards or generally seeks to benefit Ghanaians.⁴³

Unlike Article 13 of the 1960 Constitution; the provisions in Articles 12, 19 and 12 (2) of the 1969, 1979 and 1992 Republican Constitutions respectively, demonstrate that the enjoyment of fundamental human rights and freedoms are subject to ‘respect for the rights and freedoms of others and for public interest’. It must be stressed that although the 1969, 1979 and 1992 Constitutions have express provisions on the right to equality before the law and the freedom from discrimination, these Constitutions also outline elaborate exceptions on the right and freedom from discrimination. For instance, Article 17(4) of the 1992 Constitution is a clear indication that the Constitution permits ‘lawful discrimination’. The instances where the 1992 Constitution permits lawful discrimination include the implementation of programmes and policies designed to restore economic, educational or social imbalance in the society.⁴⁴ This provision implies that the 1992 Constitution only prohibits unlawful discrimination that is inconsistent with its provisions or the

³⁶ Addo in *Tyron Marghuy v Achimota School* [Suit No. HR/0055/2021] 1.

³⁷ *Nartey v Gati* [2010] SCGLR 745.

³⁸ *Nartey v Gati* [2010] SCGLR 745.

³⁹ Ralph K Winter Jr., ‘Changing Concepts of Equality: From Equality Before the Law to the Welfare State’ *Washington University Law Review* 3, (1979): 743.

⁴⁰ Winter Jr., ‘Changing Concepts of Equality, quoting William Jennings Byran.

⁴¹ Winter Jr., ‘Changing Concepts of Equality quoting William Jennings Byran.

⁴² Addo in *Tyron Marghuy v Achimota School* [Suit No. HR/0055/2021] at page 15.

⁴³ 1992 Constitution of Ghana, Article 295.

⁴⁴ 1992 Constitution of Ghana, Article 17 (4).

purpose of any existing law.

Contrasting Articles 13(1), 25(3), 31(3) of the 1960, 1969 and 1979 Constitutions respectively; Article 17 of the 1992 Constitution does not list 'sex' as one of the prohibited grounds for discrimination. It has been observed that the framers of the 1992 Constitution replaced 'sex' with 'gender' to recognise the natural or biological state of a woman and a man.⁴⁵ Again, Article 17(2) of the 1992 Constitution does not provide for discrimination on the grounds of 'sex' or 'sexual orientation'. It has been argued that this silence could be interpreted as a failure to recognise same-sex relationships and marriages⁴⁶ and could constitute lawful discrimination in Ghana. It has further been observed that the exclusion of 'sex' from Article 17(2) of the 1992 Constitution weakens the argument that the Constitution detests discrimination on the grounds of 'sexual orientation'.⁴⁷ It has also been argued that once 'sex' is not mentioned in the anti-discriminatory clause of the 1992 Constitution, one cannot say that the Constitution cares about it as a ground for discrimination.⁴⁸

Criminalization of Homosexuality and The Wolfenden Report

Before the Wolfenden Report⁴⁹ was commissioned, homosexuality had been a crime in Britain for 400 years; punishable by years in jail, deportation, or death. Wolfenden believed the law's role was to protect the public, not to interfere in private lives. According to him, there must remain a realm of private morality and immorality which is, in brief, and crude terms, not the law's business. In *R v Allen*,⁵⁰ the accused induced a twelve-year-old boy to sodomize him. It was held that although the accused was the one sodomized, he was guilty of unnatural carnal knowledge. Following the Wolfenden Commission Report, Britain repealed her anti-sodomy laws in 1967. The criminalization of homosexuality in most former British colonies such as Ghana is traceable to colonial laws received from Britain.

Atuguba⁵¹ believes that Ghana's legal framework (laws and policies) such as the Criminal Offences Act 1960 (Act 29)⁵² discriminates against Lesbians, Gays, Bisexuals and Transgenders (LGBT). Section 104 of Act 29 criminalizes 'unnatural carnal knowledge', a term that is generally understood to cover sexual behaviour other than the penetration of the male sexual organ into the female sexual organ. According to him, practically, the only persons who face threats of prosecution under Act 29 or have been prosecuted are those who engage in bestiality and LGBT. To him, this is outrightly discriminatory. Arguably, these views appear to be inconsistent with the spirit and letter of Article 17 (4) (b) of the 1992 Constitution.

⁴⁵ Constitutional Review Commission, 'from a Political to a Developmental Constitution' (2011) Constitutional Commission Review at pages 626 and 653, Accessed 28 June 2021.

<https://s3.amazonaws.com/ndpc-static/CACHES/NEWS/2015/07/22//CRC+Report+2011.pdf>

⁴⁶ Constitutional Review Commission, 'from a Political to a Developmental Constitution', 656.

⁴⁷ Richard Obeng Mensah, 'Constitutional Boundaries to Human Rights in Ghana: Measuring the Scope of Private and Public Interests in the 'Right' to Sexual Orientation' in Michael Addaney (eds), *Women and Minority Rights Law in Africa: Reimagining Equality and Addressing Discrimination* (Eleven International Publishing 2019) 155-156.

⁴⁸ Mensah, 'Constitutional Boundaries to Human Rights in Ghana, 155-156.

⁴⁹ British Library, "Wolfenden Report, 1957." Accessed 3 May 2022.

<https://www.bl.uk/collection-items/Wolfenden-report-conclusion>

⁵⁰ (1848-50) 3 COX CC 270 in Henrietta J.A.N. Mensa-Bonsu, "The Annotated Criminal Offences Act of Ghana and Domestic Violence Act 2007 (ACT 732)" (6th edn, Black Mask Limited 2019): 153.

⁵¹ Raymond Atuguba, Homosexuality in Ghana: Morality, Law, Human Rights. *Journal of Politics and Law*. 12.(2019): 113. 10.5539/jpl.v12n4p113 at page 118.

⁵² See Section 104 of the Criminal Offences Act 1960 (Act 29) as amended.

The LGBTQI+ Situation in Ghana and the Anti-LGBTQI+ Bill

According to the US Department of State's Country Reports on Human Rights Practices for 2021,⁵³ there were some reports in Ghana of police violence against Lesbian, Gay, Bisexual, Transgender, and Queer or Questioning (LGBTQI+),⁵⁴ who faced police harassment and extortion attempts. There were also reports that police were reluctant to investigate claims of assault or violence against LGBTQI+ persons. LGBTQI+ persons were unable to report incidents of abuse due to stigma, intimidation, and the perceived negative attitude of some police. LGBTQI+ persons in prison were reportedly vulnerable to sexual and other physical abuse, which authorities generally did not investigate. Beatings and public humiliation of LGBTQI+ persons by community members were common and growing in number. The report also revealed that the attacks were sometimes shared on social media in an effort to further humiliate and ostracize LGBTQI+ persons. It also noted that there was a notable increase in anti-LGBTQI+ statements by political, religious, and community leaders, and media coverage of these statements in 2021.⁵⁵

Despite the foregoing information, the report acknowledges that Ghanaian law criminalizes unnatural carnal knowledge⁵⁶ (sexual intercourse with a person in an unnatural manner or with an animal). The offence arguably covers only persons engaged in same-sex male relationships and those in heterosexual relationships.⁵⁷ There were no reports of adults prosecuted or convicted for consensual same-sex sexual conduct.⁵⁸ The report also acknowledged that the law does not explicitly prohibit discrimination based on sexual orientation and gender identity. The report⁵⁹ further indicates that in 2021, LGBTQI+ persons faced widespread discrimination in education and employment. Activists working to promote the human rights of LGBTQI+ persons faced great difficulty in engaging officials on LGBTQI+ problems because of social and political sensitivity. Media coverage regarding homosexuality and related topics was also almost always negative. According to the report, there were instances where some people alleged to be involved in LGBTQI+ related activities were arrested and later released by authorities due to lack of evidence. Twenty-one LGBTQI+ activists were arrested for attending a conference in the city of Ho in the Volta Region of Ghana. They reported harassment and humiliation by police during their detention. They also reported their inability to return to their previous lives, since they were suspended from work and banned from their communities after their identities were broadcast by police.⁶⁰

In 2021, a draft legislation by the Ghanaian Parliament to criminalize LGBTQI+ activities and advocacy in Ghana fueled public debate and sensitivity on the issue. The 'Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill, 2021', popularly known as the Anti-LGBTQI+ Bill, seeks to:

- a. provide for Ghanaian family values, proper human sexual rights, and prohibit LGBTQ+ and related activities;
- b. prohibit advocacy for, and promotion and propaganda of Lesbian, Gay, Bisexual, Transgender, Queer, Questioning, Intersex, Asexual, Allies and Pansexual (LGBTQQIAAP+)⁶¹ and related activities; and
- c. provide protection and support for children, as well as persons accused of or are victims of LGBTQQIAAP+ and related activities.⁶²

⁵³ Bureau of Democracy, Human Rights, and Labor, "2021 Country Reports on Human Rights Practices: Ghana", (United States Department of State). Accessed May 1, 2022.

<https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/ghana/>

⁵⁴ LGBTQI+ refers to Lesbians, Gay, Bisexual, Transgender, Queer and Intersex. See clause 2 of the Anti LGBTQI+ Bill.

⁵⁵ Bureau of Democracy, Human Rights, and Labor, "2021 Country Reports on Human Rights Practices: Ghana".

⁵⁶ See section 104 of Act 29.

⁵⁷ Bureau of Democracy, Human Rights, and Labor, "2021 Country Reports on Human Rights Practices: Ghana".

⁵⁸ Bureau of Democracy, Human Rights, and Labor, "2021 Country Reports on Human Rights Practices: Ghana".

⁵⁹ Bureau of Democracy, Human Rights, and Labor, "2021 Country Reports on Human Rights Practices: Ghana".

⁶⁰ Bureau of Democracy, Human Rights, and Labor, "2021 Country Reports on Human Rights Practices: Ghana".

⁶¹ See the meaning of LGBTQQIAAP+ in clause 2 of the Anti LGBTQI+ Bill.

⁶² Memorandum for the Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill, 2021.

According to the advocates of the Anti-LGBTQI+ Bill,

[T]he bill gives a consideration to the issue whether or not prohibiting LGBTIQIAP+ persons from forming associations, groups and organizing people in any form for the purpose of advocating for and promoting their rights constitutes an infringement of the fundamental human right of freedom of speech and expression or assembly or whether it constitutes discriminatory treatment, which are guaranteed in Chapter Five of the 1992 Constitution, particularly Articles 12(2), 17(1) and 21(1)(a) and (d).⁶³

They acknowledge that such rights or freedoms are not absolute. They also opine that the Constitution prescribes reasonable restrictions to these rights and freedoms to safeguard public safety, order, or health.

The question is, can the passing of 'The Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill 2021' be justified under any of the instances of Article 17 (4) of the 1992 Constitution which appears to grant Parliament the powers to enact laws that may be discriminatory in nature? If it can be justified under one of the instances which appear to permit lawful discrimination, then it may be argued that Parliament has legitimate authority to enact a law that discriminates against persons within the LGBTQI+ community in Ghana.

Nana Dr. S.K.B. Asante, a renowned Ghanaian scholar and transnational legal expert and Chairman of Committee of Experts that made the technical proposals leading to the 1992 Constitution, recently shared his opinion regarding the rights of the LGBTI+ in Ghana.⁶⁴ Asante, was of the view that Ghanaians have to be sure of what the provision in the 1992 Constitution says. The rights enumerated in the Constitution under Article 33(5)⁶⁵ depicts that there is room for the recognition of rights which are feasible in a democratic system and also enhance the freedom and dignity of individuals. He rhetorically asked how the right of a man to marry another man is a human right enhancing the freedom and dignity of a man? He quipped that although certain societies may have such concepts, Ghanaians are admonished not to follow blindly and must take cognisance of their society.

The real challenge, however, is whether homosexuality should be criminalised? According to Asante, Ghanaian law on unnatural carnal knowledge as provided for under section 104 of Act 29 has been interpreted by some lawyers to cover homosexuality. However, he posed a question to every social scientist, lawyer or criminologist on how many people have been prosecuted under this law? In 2020,⁶⁶ the United State Department of State report found that there were no reports of adults being prosecuted or convicted for consensual same-sex sexual activity in Ghana. This finding has been consistent in these reports since 2017.

In Asante's view, if Ghana wants to expand the law on unnatural carnal knowledge by criminalizing homosexuality it will mean that a special task force or a special department would have to be set up to investigate and prosecute people who are alleged to be in this kind of relationship. He argued that the country already faces some challenges with regards to prosecuting ordinary crimes and an upsurge in the incidence of defilement of young people, and teenage pregnancy among others which have not experienced a major campaign to prosecute perpetrators of such crimes. He thus opined that the issue of homosexuality is an extended debate in Ghana since many churches have their international headquarters allowing such practice and are therefore attempting to institute it in their affiliate churches in Ghana even though there is strong objection to it.⁶⁷ He admonished Ghana to consider the actual process of criminalization and the effect of it, especially in issues such as the activities of the LGBTQI+ which would be difficult to police. For Asante, since Ghana has not been able to prosecute anyone for unnatural carnal knowledge, it will really be a waste

⁶³ Memorandum for the Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill, 2021.

⁶⁴ Nana Dr. S. K. B. Asante, KNUST Faculty of Law Forum for Current Legal Issues, "The 1992 Constitution, Law and Development: Agenda for Reform". <https://www.facebook.com/lawknust/videos/1054623068798991/>

⁶⁵ See Article 33(5) of the 1992 Constitution of Ghana.

⁶⁶ Human Dignity Trust, "Types of criminalisation." Accessed May 1, 2022. <https://www.humandignitytrust.org/country-profile/ghana/>

⁶⁷ Asante, "The 1992 Constitution, Law and Development: Agenda for Reform".

of effort and resources to criminalize LGBTQI.⁶⁸

The argument in this stance is whether or not the non-prosecution under an existing law prevents the criminalisation of other activities in Ghana since it is possible that an existing law would not be comprehensive enough as is generally said in section 104 of Act 29. It is argued that the real question that needs to be addressed in the light of Article 17(4)(b) of the 1992 Constitution is whether a law criminalizing LGBTQI+ in Ghana is 'reasonably necessary' to provide for matters relating to marriage or personal law in Ghana.⁶⁹ With Article 17(4) of the 1992 Constitution in mind which depicts exceptions that may allow discrimination against fundamental human rights which are subject to public good and interest, the criminalisation of activities which do not enhance public good and interest would be in the right order. The customs and cultural values of the people of Ghana do not regard the activities of the LGBTQI+ which is evident in the number of Ghanaians who are against the legalization of LGBTQI+. Gleaning from this, it is quite certain, that the framers of the 1992 Constitution had the customs and cultural values of Ghanaians in mind when putting together the 1992 Constitution.

RECOMMENDATION

Although Article 17(4) of the 1992 Constitution permits Parliament to legislate on certain matters that may amount to discrimination, it should not be a basis to allow the use of discretion to determine rights or to limit rights. The basis of this intrusion should be objective and not subjective. Article 17(5) of the 1992 Constitution reveals that the scope of any such legislation by Parliament must be consistent with the tenants of Chapter five of the 1992 Constitution. To this end, when Parliament empowers certain bodies or persons to act in a manner that involves discretion in limiting others' rights or allows positive discrimination, it must be done in a manner that is consistent with the Constitution.⁷⁰ As opined by Lord Bingham in his second subrule of the Rule of Law, questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.⁷¹ Article 296 of the 1992 Constitution requires the exercise of discretionary powers to be done not in an arbitrary manner. It rather requires those exercising the discretion to at all times eschew bias, prejudice, and also act in accordance with due process of the law. This implies the exercise of discretion must conform to the full tenets of natural justice, principles of fairness, and rule of law.

CONCLUSION

The notion of equality before the law underpins many constitutions around the world and is deemed as a major characteristic of a fair and just legal system. In the same vein, a constitution or statute may allow for discrimination as a privilege for groups of people within the larger citizenry based on certain factors such as public interest. As discussed in this paper, a comparison of the legal provisions on equality and discrimination in the various constitutions of Ghana since 1960 shows that the relevant provisions on right to equality before the law and freedom from discrimination have undergone significant changes. Article 17 of the 1992 Constitution, just like the relevant provisions of the 1969 and 1979 Constitutions, allows for lawful discrimination in order to meet certain stated objectives in the Constitution. In a continuously evolving society, it makes sense that though the 1992 Constitution promotes equality before the law; it also permits lawful discrimination to secure public interest and public good.

⁶⁸ Asante, "The 1992 Constitution, Law and Development: Agenda for Reform".

⁶⁹ Article 17(4)(b) of the 1992 Constitution of Ghana allows Parliament to make relevant laws on matters relating to marriage, personal law and among others.

⁷⁰ 1992 Constitution of Ghana, Article 17(5).

⁷¹ Lord Bingham, 'The Rule of Law' Cambridge Law Journal 66, no. 1 (March 2007): 72.

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