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**LAW & MORALITY IN AFRICA:
TOWARDS A RATIONAL
PUBLIC POLICY FRAMEWORK
FOR REGULATING INTIMATE
HUMAN CONDUCT IN GHANA**

Kwaku Agyeman-Budu
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LAW & MORALITY IN AFRICA: TOWARDS A RATIONAL
PUBLIC POLICY FRAMEWORK FOR REGULATING
INTIMATE HUMAN CONDUCT IN GHANA

By

Kwaku Agyeman-Budu

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We, the dissertation Committee for the above candidate for the Doctor of
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LAW & MORALITY IN AFRICA: TOWARDS A RATIONAL PUBLIC POLICY FRAMEWORK FOR REGULATING INTIMATE HUMAN CONDUCT IN GHANA

*Kwaku Agyeman-Budu**

ABSTRACT¹

Law and morality have always been uneasy bedfellows; for whose morality should the law protect and enforce? Is there a collective form or sense of morality that societies accept and agree to be bound by at any particular point in time? If so, how is this done? What does morality even mean? And should the law concern itself with enforcing religious and/or cultural moral codes in the modern secular State? These and other questions have been at the heart of philosophical and jurisprudential debates concerning the intersection between law and morality and its impact on public policy from time immemorial. This dissertation is therefore an attempt to revisit and review the concept of morality from the perspective of law and public policy in a modern African State. The main focus of the dissertation is to examine and evaluate the moral content and underpinnings of the offence of sex work in Ghana, and propose a new neutral form of “morality” that is more rational, devoid of stigma and is incapable of being used as justification for criminalization of the conduct of persons who are the subject matter of the offence in question. Ultimately, the dissertation proposes a new approach to dealing with criminal offences that involve the balancing of individual autonomy of action and the legitimate State interest in regulating the scope and extent of such conduct or actions, since the old approach has not only failed, but has also led to the proliferation of sex work in Ghana over the years.

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¹ The S.J.D. dissertation project of the author focuses on the intersection between law and morality in

¹ The S.J.D. dissertation project of the author focuses on the intersection between law and morality in Africa, and proposes a new approach to dealing with criminal offences (like sex work), which involve the balancing of individual autonomy and legitimate State interest in regulating such conduct in Ghana.

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CHAPTER ONE

INTRODUCTION

“As a general proposition it will be universally accepted that the law is not concerned with private morals or with ethical sanctions. On the other hand, the law is plainly concerned with the outward conduct of citizens in so far as the conduct injuriously affects the rights of other citizens. Certain forms of conduct it has always been thought right to bring within the scope of the criminal law on account of the injury which they occasion to the public in general.” The Street Offences Committee Report, 1928.

A) OVERVIEW OF DISSERTATION TOPIC

The morality of laws has always been deemed critical in some quarters in terms of the validity of laws in the first place.² A law that conforms to certain moral precepts and dictates was seen by many as law that was whole.³ On the contrary, laws that lacked fundamental moral content were seen as either incomplete, or lacking the necessary quality of law that all laws necessarily required.⁴ Discussions on morality however have been a very slippery-slope from time immemorial, for many scholars and theorists have tried in vain to fully conceptualize or understand the value and essence of law in itself, and the idea of inherent morality of laws.⁵ For example, questions involving the moral construct of law have never been fully resolved despite the vast amount of literature that exists on that particular subject matter.⁶

² Mark C. Murphy, 'Natural Law Jurisprudence', 9 LEGAL THEORY 241-67 (2003).

³ John Finnis, *Natural Law and Legal Reasoning*, 38 CLEVELAND S. L. REV. 1-13 (1990).

⁴ John Finnis, *The “Natural Law Tradition”*, 36 J. L. EDUCATION 492-95 (1986).

⁵ Brian Bix, *On the Dividing Line Between Natural Law Theory and Legal Positivism*, 75 NOTRE DAME L. REV. 1613-24 (2000).

⁶ See for example, J.V. Gomez, *The Hart Fuller Debate*, PHILOSOPHY COMPASS, 9: 45-53 (2014); B. Zipursky, *Practical Positivism versus Practical Perfectionism: The Hart-Fuller Debate at Fifty*, NYU LAW

Also, even more fundamental questions like what morality even means remain controversial, as there are a plethora of views and ideas in that regard. Some schools of thought are of the view that morality refers to certain variables that dictate the inner or inherent quality of rules and regulations.⁷ There are also other schools of thought that do not necessarily ascribe any inherent quality to rules and regulations, but rather view morality from the perspective of ideals that societies from time to time agree to have as a sort of moral conscience that dictate day to day life.⁸ Others also view morality purely and solely from a religious perspective.⁹ Hence, Judeo-Christian conceptions of morality have been the foundation and fundamental basis for many laws that have been promulgated in most parts of the world for more than two centuries.¹⁰

Similarly, for many years now, scholars and philosophers have attempted to define what a crime is, and its essence.¹¹ Although there isn't a universally accepted definition of what a crime is, it is generally understood to mean acts and omissions which are prohibited by law, and which attract penal consequences for their breach thereof.¹² Crime has also been described as a legal wrong, which is usually followed by criminal proceedings resulting in some form of punishment.¹³ In the famous case of *Amand v.*

REV., Vol. 83: 1170 (2008); G. Dworkin, *Devlin was Right: Law and the Enforcement of Morality*, 40 WM. & MARY L. REV. 927 (1999); J. Feinberg, *The Moral Limits of the Criminal Law: Harmless Wrongdoing* (1988); R. Dworkin, *Taking Rights Seriously* (1977); and P. Devlin, *The Enforcement of Morals* (1965).

⁷ LON. L. FULLER, *THE MORALITY OF LAW* (1964).

⁸ H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARVARD L. REV. 593-629 (1958).

⁹ JOHN FINNIS, *NATURAL LAWS AND NATURAL RIGHTS* 371-413 (1980).

¹⁰ *Id.*

¹¹ See COURTNEY STANHOPE KENNY, *OUTLINE OF CRIMINAL LAW* 16 (1936) ("crime is a wrong whose sanction is punitive, and which is in no way remissible by any private person, but is remissible by the crown alone, if remissible at all."); see also, GLANVILLE WILLIAMS, *LEARNING THE LAW* 27 (1983) (defining crime as "a legal wrong that can be followed by criminal proceedings which may result in punishment.")

¹² WILLIAMS *supra* at 27.

¹³ *Id.*

Home Secretary and Minister of Defence of Royal Netherlands Government it was held that ‘a cause or matter is criminal in nature if it is one which if carried to its conclusion might result in the conviction of a person charged and in a sentence or some punishment.’¹⁴ The Criminal Offences Act of Ghana¹⁵ defines a crime as ‘any act punishable by death or imprisonment or fine.’¹⁶

In *Proprietary Articles Trade Association v. Attorney General for Canada*, Lord Atkin held as follows: ‘[t]he domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.’¹⁷ From the foregoing description, we may deduce three essential elements or characteristics constituting a crime: (1) a prohibited act; (2) prohibited by law or a statute for the time being in force; and (3) the provision of penal consequences for breach thereof. Thus, when a State considers an act and/or omission injurious to the public welfare, then the doing of any such act or an omission thereof is prohibited. The prohibition must however be made under the authority of law – a statute in force. Finally, there must be penal consequences associated with the prohibited act.

¹⁴ *Amand v. Home Secretary and Minister of Defence of Royal Netherlands Government*, [1943] AC 147.

¹⁵ See Criminal Offences Act (Act 29) (1960) (Ghana).

¹⁶ *Id.* § 1.

¹⁷ *Proprietary Articles Trade Association v. Attorney General for Canada*, [1931] AC 310; see also *id.* at 324 (“the criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: is the act prohibited with penal consequences?”).

The 1992 Constitution of Ghana therefore provides that: ‘[n]o person shall be convicted of a criminal offence unless the offence is defined and the penalty for it is prescribed in a written law.’¹⁸ An act or omission cannot therefore be a crime unless it is expressly prohibited by law, which is known to all, and the punishment is also provided for. This principle of legality is what has been captured by the famous Latin expression ‘*nullum crimen sine lege, nulla poena sine lege*.’¹⁹ It must be noted that the penalties for the infraction of the criminal law are almost never pleasant, including imprisonment, fine, and death. It has thus been asserted, although arguable, that it is as a result of these potentially unpleasant consequences that obedience to the criminal law is usually achieved.²⁰

The essence of the criminal law is therefore to regulate human conduct for social cohesion. Without it, there will be chaos, as human beings will be free to engage in acts that are likely to be inimical to the progress of society in general, and human development in particular. It is important to therefore note that crimes are considered to be injurious to the State as a whole, and not just the victim. It is therefore the State that is usually mandated to seek redress for such wrongs, and not necessarily the individual victim of the crime, no matter how heinous it may have been.

This dissertation is an attempt to revisit the oft-debated relationship between law – in particular, the criminal law – and morality, and the place of both within the realm of

¹⁸ See CONSTITUTION Art. 19(11) (1992) (Ghana).

¹⁹ Or, “an act is not a crime unless it is expressly prohibited by law.”

²⁰ See Annalise Acorn, *Fear of Crime and Punishment*, 1 J. THEORETICAL & PHIL. CRIMINOL. 79–89 (2009); see also, Andrew V. Papachristos et al., *Why do Criminals Obey the Law? The Influence of Legitimacy and Social Networks on Active Offenders*, 102 J. THEORETICAL & PHIL. CRIMINOL. 397–440 (2012).

public policy making. It focuses on how conceptions of religious and cultural morality have over the years been the driving force for the continuous criminalization of certain conduct in Ghana, which involve individual autonomy but is fraught with moral judgments and negative stereotypes. For example, prostitution or sex work,²¹ sometimes referred to as the oldest profession in the world, remains criminalized in Ghana as in most parts of the world.²² Many States still have restrictive laws that prohibit the act of sex work and solicitation in public places.²³ However, to suggest that sex work thrives despite this criminalization would actually be an understatement. For example, in Ghana, it is a notorious fact that the “night sex trade” has become a permanent fixture of nightlife in the urban centers like Accra, Kumasi and Takoradi, to the extent that certain areas have become known “hotspots” and are synonymous with the sex trade.²⁴ It is also a known fact that the law enforcement agencies, especially the police, continuously and consistently exploit these vulnerable women who are engaged in the trade, for monetary gain, in light of the criminalization of the sex trade.²⁵

The aim of this dissertation is therefore to examine in detail the social cost of the criminalization of sex work in Ghana. It is argued for example that the continuous criminalization of sex work on moral grounds violates fundamental human rights and is

²¹ Both words i.e. ‘prostitution’ and ‘sex work’ are used interchangeably throughout this dissertation, as they connote the same activity.

²² Criminal Code §§ 107(1), 273–77, amendments consolidated in Criminal Code (Amendment) Act, No. 646 (2003).

²³ See, e.g., Chi Mgbako and Laura A. Smith, *Sex Work and Human Rights in Africa*, 33 *FORDHAM INT’L L.J.* 1178 (2009), citing Angola, Equatorial Guinea, Eritrea, Gabon, Ghana, Guinea, Kenya, Liberia, Mozambique, Namibia, Rwanda, Somalia, South Africa, Tanzania, Uganda, and Zambia as States criminalizing prostitution and its procurement.

²⁴ INTERNATIONAL ORGANIZATION FOR MIGRATION, GHANA, BEHAVIOURAL STUDY OF FEMALE SEX WORKERS ALONG GHANA’S TEMA–PAGA TRANSPORT CORRIDOR 9 (2012).

²⁵ See Kwaku Baka, *Ghana Police Sweeps*, INTER PRESS SERVICE THIRD WORLD NEWS AGENCY (Aug. 6, 1998) http://walnet.org/csis/news/world_98/ips-980806.html.

contrary to constitutional dictates. Thus, a newer, more rational and morally neutral based approach is required in regulating sex work as a profession or trade, subject to specific rules and regulations that balance legitimate State interest (including public health and “moral” concerns, for example) with individual liberty and autonomy of action implicating the right to work and to make a decent, honest living, free from victimization and stigma, as well as the rights to dignity and equality. The dissertation is therefore an exercise in social construction that envisages a new approach to public policy, where law and morality intersect. It proposes a new framework within which public policy is underpinned by not just religious and cultural conceptions of morality, but by a new neutral form of morality based on respect for the fundamental human rights principles of dignity, individual autonomy and equality.

B) JUSTIFICATION FOR THE STUDY

Criminal offences are important in legal systems to provide punishment for persons who violate the underlying fundamental social norms that the society through law seeks to protect. However, the conceptualization and framing of some of these offences, especially those purportedly prohibited as a result of religious and culturally based “moral” convictions especially in Africa generally and Ghana in particular, present problems in terms of having a coherent and rational public policy regime or framework for the regulation of particular acts. This then makes it difficult for the full realization of human rights and fundamental freedoms in the rapidly developing and increasingly changing socio-cultural context of Ghana. In this section, I discuss my reasons for

pursuing this topic in the first place, and its relevance for the development of the law in Ghana.

1. *Reasons for pursuing the topic*

- i. Interest & Knowledge Gap

Sexual offences and those involving intimate decisions predicated on individual autonomy have been an often-neglected area of the law in Ghana, in terms of scholarly interest and research. This stems from the fact that it is generally assumed and agreed that it is important to regulate such conduct, especially those acts that involve some violation, whether as a result of the lack of consent, the age of the victim or fundamental societal concerns regarding sexual morality and the maintenance of the religious and cultural beliefs and values of the people. For example, the crime of rape is important in any legal system to provide punishment for persons who sexually violate other persons without their consent. Similarly, “defilement” or statutory rape is an important crime intended to punish persons who sexually violate the chastity of children. Also in Ghana, the cultural context, as well as the religious and moral inclination of an overwhelming majority of the people means that the law prohibiting sex work is generally accepted without much question as morally opprobrious.²⁶

²⁶ Jacquelyn C.A. Meshelemiah, *Tourism and Prostitution in West Africa: A Glimpse of the “Roamers” in Ghana*, in, GLOBAL PERSPECTIVES ON PROSTITUTION AND SEX TRAFFICKING: AFRICA, ASIA, MIDDLE EAST, AND OCEANIA 31, 40 (2011) (citing examples of sex workers characterized as “inferior,” “contagious,” a generative source of all that is bad and wrong and rotten with sex,” “immoral,” “shameful,” and “avaricious”).

As a result of the general acceptance of the utility of these aforementioned crimes in preventing and punishing sexual violations of women and children (in the cases of Rape and Defilement respectively), and maintaining the religious, cultural and moral fiber of the society (with respect to the crime of prostitution, which effectively prohibits sex work), there has not been any serious academic and scholarly exposition regarding any of these offences generally over the years in Ghana.²⁷ The jurisprudence of the courts in Ghana also suggests that they have not critically examined any of these offences in any great detail over the years. They have merely tended to apply the laws as they are, without engaging in any serious critique of the conceptualization of the offences. In particular reference to sex work, there have been few reported trials and dispositions in the past.²⁸ There therefore exists a serious knowledge gap that urgently needs to be filled, in terms of critically exploring the conceptualization and framing of these types of laws within the Ghanaian context and how they implicate human rights in general, and the rights of specific groups of people in particular – devoid of any form of gender stereotypes, stigma, biases and prejudice.

ii. Law Reform

The knowledge gap that exists in relation to intimate sexual offences in Ghana also means that there is significant room for law reform to bring Ghanaian law in

²⁷ For example, see P.K. TWUMASI, CRIMINAL LAW IN GHANA (1985); HENRIETTA J.A.N. MENSA-BONSU, 1 THE GENERAL PART OF CRIMINAL LAW – A GHANAIAN CASEBOOK (2001); HENRIETTA J.A.N. MENSA-BONSU, 2 THE GENERAL PART OF CRIMINAL LAW – A GHANAIAN CASEBOOK (2006) and HENRIETTA J.A.N. MENSA-BONSU, THE ANNOTATED CRIMINAL OFFENCES ACT OF GHANA, (5th Ed., 2008), none of which discuss sexual offences in any detail.

²⁸ For case studies of the few prosecutions under these laws, see United States State Department, 2016 Trafficking in Persons Report, OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS (June 2016), <https://www.state.gov/j/tip/rls/tiprpt/countries/2016/258773.htm>.

consonance with contemporary realities, which have been neglected for far too long. For example, prostitution is defined in section 279 of the Criminal Offences Act of Ghana as including ‘*the offering by a person of that person’s body commonly for acts of lewdness for payment although there is no act or offer of an act or ordinary sexual connection.*’²⁹ Furthermore, section 276 of Act 29 prohibits solicitation or importuning by sex workers. Specifically, section 276(1) stipulates that:

A person who persistently solicits or importunes in a public place or in sight of a public place for the purpose of prostitution commits a criminal offence and is liable to a fine not exceeding twenty-five penalty units and for a second or subsequent offence shall be dealt with as for a misdemeanor.³⁰

A reasonable inference that can be made from these provisions is that the law does not necessarily criminalize the fact of being a sex worker or sex work generally for that matter, rather it prohibits sex workers from seeking clients in public and other ancillary places,³¹ and criminalizes the fact of ‘*aiding, abetting or compelling the prostitution for purposes of living off the earnings of prostitutes,*’ (pimping)³² and keeping of brothels.³³

²⁹ Criminal Offences Act § 279.

³⁰ It is however important to note that section 276(2) provides that “[a] person shall not be tried for an offence in this section without the consent of a superior police officer but this shall not prevent the arrest, or the issue of a warrant for the arrest, of a person in respect of any officer or the remanding in custody or on bond of any person charged with an offence notwithstanding that such consent has not been obtained.” *Id.* § 276(2).

³¹ *Id.* § 276(1).

³² *Id.* § 274.

³³ *Id.* § 277.

The problem with this construction of the law not particularly criminalizing the fact of being a sex worker or sex work but rather prohibiting acts amounting to solicitation or importuning within the meaning of the law, and living off the earnings of prostitutes and keeping a brothel,³⁴ is that it is gravely ambiguous and incoherent. For instance, section 107(1)(a), which criminalizes the offense of “procuration,” seems to suggest the fact that it is possible for persons over the age of twenty-one years to be sex workers or otherwise engaged in sex work.³⁵ Specifically, this statute prohibits the trafficking of persons under the age of 21 for the purposes of “carnal connexion,” so long as those persons are not considered to be ‘*a prostitute or of known immoral character*’.³⁶ Similarly, section 108 of Act 29, which prohibits the seduction or prostitution of children below sixteen years of age, acknowledges the fact of the existence of sex workers and sex work generally.³⁷ Section 108(2) provides that ‘*For the purposes of subsection (1), a person causes or encourages the seduction, carnal knowledge or unnatural carnal knowledge, prostitution or commission of indecent assault on a child, if that person knowingly allows the child to consort with, enter or continue in the employment of a prostitute or person of known immoral character*’.³⁸ Emphasis added. It is important to note that none of these provisions make it a criminal offence to be a sex worker or be engaged in sex work.³⁹

³⁴ *Id.* § 107(1)(a).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* § 108.

³⁸ *Id.* § 108(2).

³⁹ Save for solicitation or importuning in public places, and other persons assisting for the purposes of living off the earnings of prostitutes and keeping brothels for purposes of prostitution.

The above provisions notwithstanding, other provisions of the Act dealing with prostitution criminalize the fact of living wholly or in part on the earnings of prostitution,⁴⁰ exercising ‘*control, direction or influence over the movements of a prostitute in a manner as to aid, abet or compel the prostitution*’,⁴¹ and keeping of brothels for the purposes of prostitution.⁴² Similarly, section 275 provides that:

A person commits a misdemeanor who in a public place or in sight of a public place persistently solicits or importunes

(a) to obtain clients for a prostitute, or

(b) for any other immoral purposes.⁴³

In the same vain, and as already noted, persons who persistently solicit or importune in public and other ancillary places also commit a criminal offence. Therein lies the ambiguity and incoherence in the law; for if solicitation and importuning for clients or for other immoral purposes by or on behalf of a sex worker, and the keeping of brothels for sex work are criminalized, what about other means of solicitation and importuning which do not have the “public place nexus” and do not take place in a brothel?⁴⁴ Is it the case that the law recognizes “private immorality”?⁴⁵ Consequently, what if a person engages the services of a middleman who is expressly given the responsibility to “recruit” clients

⁴⁰ *Id.* § 274(1)(a).

⁴¹ *Id.* § 274(1)(b).

⁴² *Id.* § 277.

⁴³ *Id.* § 275.

⁴⁴ See John Agbemabiese, *Cyberfraud: A New Force and Threat to Ghana’s Image and Security*. GRAPHIC ONLINE. (Apr. 15, 2013), <http://graphic.com.gh/features/cyber-fraud-a-new-force-and-threat-to-ghanas-image-and-security.html> (citing increase in child sex trafficking due to increased access to internet communications technologies).

⁴⁵ See H.L.A. HART, *LAW, LIBERTY, AND MORALITY* (1963).

for said prostitute at a fee? Will the middleman be liable to prosecution for the offences of soliciting or importuning and living off the earnings of prostitutes? What of contemporary means of solicitation and importuning through social media platforms like WhatsApp, Facebook, Instagram, Twitter, or even escort websites?⁴⁶ Are these platforms to be considered “public places” for the purposes of the law?

To stoke the controversy even further, how do we place sex tourism, and other contemporary means of sex work and sex trade that occur in not only most of the prestigious hotels in Ghana, but also at contemporary “Movie Houses”?⁴⁷ It is a notorious fact in recent times, that some hotels and their employees engage in the recruitment of both men and women – but especially women – for sexual purposes for their guests or customers.⁴⁸ Also, it is alleged that some persons known or alleged to be prostitutes or of immoral character are seen frequenting hotel lounges and bars in the hopes of “hooking up” with potential clients.⁴⁹ In recent times, there has also been the proliferation of “Movie Houses” that offer rooms for a few hours to clients, ostensibly for the purposes of private movie screenings. It is however a known fact that these so-called movie houses knowingly and deliberately facilitate the sex trade as well as ordinary sexual encounters by couples, as they provide a cheaper option than hotels.⁵⁰ This thus leads to the question of what the definition of a brothel is. According to section 279 of Act 29, a brothel means

⁴⁶ *Agbemabiese*, *supra* note 44.

⁴⁷ *The New Form of Brothels*, THE HERALD (Aug. 3, 2015), <http://theheraldghana.com/new-form-of-brothels-pop-up-in-accra/>.

⁴⁸ See, MATILDA PAPPOE, THE STATUS OF FEMALE PROSTITUTION IN GHANA (1996); See also, *Two Nigerians arrested for human trafficking*, GHANAWEB (Mar. 30, 2017), <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Two-Nigerians-arrested-for-human-trafficking-523693>.

⁴⁹ Meshelemiah, *supra* note 26 at 36.

⁵⁰ See *The New Form of Brothels*, *supra* note 47.

*‘any premises or room or set of rooms in any premises kept for purposes of prostitution.’*⁵¹ Since it is a notorious fact that the managers of some of the hotels and movie houses (which for all intents and purposes are public places) in Ghana knowingly permit or must be deemed to knowingly permit sex work within rooms in their premises, these hotels and movie houses must also be deemed to be brothels within the meaning of the law.⁵²

However, aside from the proscription or prohibition of the seduction or prostitution of minors – which is totally understandable because of the sexual violation it portends due to their immaturity – sexual and otherwise, and sex trafficking,⁵³ the question remains whether it is the proper function of the criminal law to regulate private consensual adult sexual conduct (albeit involving payment as a *quid pro quo*), of which there are no victims. How does the State even begin to enforce such an offence, the substance of which by its nature is purely private, and thus incapable of enforcement without incursions into the privacy of the homes and sexual lives of consenting adults?⁵⁴ Moreover, technological advancement and the availability of various social media platforms means that new means and mediums of solicitation and importuning for the purposes of sex work are now in existence, and seemingly outside the remit of the law.

⁵¹ Note that, section 277 makes it an offence to keep a brothel. Thus, anyone who knowingly permits a premises or part thereof to be used as a brothel or for habitual prostitution commits a misdemeanor.

⁵² Efia Akese, *Sex Workers Adopt New Tactics*, GRAPHIC ONLINE (Feb. 13, 2015), <https://www.graphic.com.gh/news/general-news/sex-workers-adopt-new-tactics.html>.

⁵³ The Human Trafficking Act (Act 694) (2005) (Ghana) prohibits sex trafficking in all its forms and manifestation, in line with International Law.

⁵⁴ See HART, *supra* note 45.

There is also the issue of the constitutionality of the laws that altogether prohibit sex work. The main dimension of this issue is that such prohibition violates the anti-discrimination clause of Article 17 of the Constitution of Ghana, which prohibits discrimination on the basis of, *inter alia*, social or economic status.⁵⁵ Also, the proscription of sex work is arguably an affront to the right to work and to make a decent living as outlined in international human rights instruments like the Universal Declaration of Human Rights UDHR),⁵⁶ the International Covenant on Economic, Social & Cultural Rights (ICESCR)⁵⁷ and the African Charter on Human & Peoples Rights' (Banjul Charter).⁵⁸ The law also seemingly infringes on the inherent dignity that humans are deemed to possess, and can be seen as an affront on individual autonomy/liberty as well.

Thus, the laws related to sex work are in need of fundamental reform not only because of their potential conflict with constitutional demands, but also because their conceptualization leads to ambiguity and incoherence, whilst social media and the advancement of technology has rendered them practically otiose to a large degree. In working towards reformation in this regard, there is the need for a rational and robust public policy framework that underpins these and other similar offences that are predicated on society's fear of moral decay, maintenance of cultural purity and religious sanctity. It is my contention therefore that public policy dictates that form the basis for the regulation of the offences in question must not be solely based on religious and cultural conceptions of morality in the pluralistic society that is Ghana. Legislation based

⁵⁵ Constitution, Art. 17 (1992).

⁵⁶ See G.A. Res. 217(III), U.N. Doc. A/RES/217(III) (Dec. 10, 1948) art 1.

⁵⁷ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3

⁵⁸ African Charter on Human and Peoples' Rights, Jun. 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

on these conceptions of morality alone regulates human conduct in a way that fails to ensure human progress, but rather drives the conduct that is the subject matter of the legislation underground and practically unenforceable, whilst violating fundamental human rights.⁵⁹

Unfortunately, the Constitution Review Commission of Ghana in its report did not touch on the issue of sex work in its various forms and manifestations.⁶⁰ It is therefore now prudent more than ever for there to be an academic discussion and scholarly exposition grounded in law, which critically evaluates the contending positions in terms of the conceptualization of the crime of sex work in Ghana. Accordingly, this dissertation will serve as a useful resource of information and knowledge, and may provide the basis upon which any future reform of the law may be grounded.

iii. Contribution to Scholarship

The existence of a knowledge gap and the consequent need for law reform makes it imperative for the production of a work that will critically assess and examine the offences connected to sex work in light of contemporary thinking, realities and human rights norms and standards. As a result, this dissertation seeks to make an original and substantial contribution to legal scholarship especially in Ghana, and thereby pave the

⁵⁹ See Isaac Kaledzi, *Prostitutes in Ghana battle for recognition*, DEUTSCHEWELLE (Aug. 21, 2013), <http://www.dw.com/en/prostitutes-in-ghana-battle-for-recognition/av-17036797>.

⁶⁰ The Constitution Review Commission in its report to the Government of Ghana did, however, recommend ratification and domestication of the Protocol on the Prevention of the Sale of Children, Child Prostitution and Child Pornography. See CONSTITUTION REVIEW COMMISSION, FROM A POLITICAL TO A DEVELOPMENTAL CONSTITUTION: FINAL REPORT OF THE CONSTITUTION REVIEW COMMISSION (2011), http://ghana.gov.gh/images/documents/crc_report.pdf.

way for further study and research into similarly placed and often-neglected and controversial areas of the law in Ghana.

2. Relevance of the topic in Ghana

i. Legislative & Policy Reform

The dissertation may also possibly lead to legislative and policy reform. The goals of the dissertation are noble ones, which seek to soberly interrogate often-neglected and controversial issues regarding our criminal law, and thereby provide guidance on the way forward. As a result, a proposal for a new neutral form of morality based on respect for the fundamental human rights principles of dignity, individual autonomy and equality (D.I.E.) is strongly advocated for to form the basis of public policy in terms of the regulation of the offences connected to sex work and other intimate human conduct involving sex.

ii. Enforcement and Realization of Fundamental Human Rights

Human Rights and Fundamental Freedoms are guaranteed in Ghana by virtue of Chapter 5 of the 1992 Constitution of Ghana.⁶¹ In Ghana, the upholding of, and reverence for human rights in general has become part and parcel of our democratic dispensation since the coming into force of the Constitution in 1993.⁶² However, in terms of issues

⁶¹ See CONSTITUTION ch. 5, arts. 12-33 (1992) (Ghana).

⁶² The 1992 Constitution of Ghana entered into force on January 7th, 1993. However prior to this, Ghana's history in terms of respect for and the promotion of human rights has been tumultuous to say the least, as judicial dereliction of duty in terms of protecting and enforcing human rights characterized the post-independence period. Human rights in Ghana is therefore generally discussed in Chapter Five of this dissertation (Human Rights in Ghana) to discover how the concept has evolved through the decisions of the

involving sex, sexuality or sexual morality that have a human rights dimension, Ghanaians generally shy away from openly or publicly discussing them, largely due to long-held gender stereotypes, biases and prejudice. Religion and culture are also reasons why such matters are not usually publicly discussed.

Thus, even though it is a notorious fact that many Ghanaians engage in acts that can easily be categorized as sex work within the meaning ascribed to prostitution and associated conduct by our criminal law, most people may nonetheless be oblivious to the fact that those acts may in fact be proscribed, and that their criminalization is probably even contrary to human rights as their enforcement by the State may constitute violations in and of itself. Therefore, this dissertation is a human rights-based critique of sex work that examines and critically analyzes certain aspects of the conceptualization of its associated offences, by measuring their compatibility with the fundamental human rights and freedoms provisions of the Constitution of Ghana, and thereby prescribing a new way of dealing with such human conduct within the Ghanaian context. It is the hope that the recommendations of this dissertation would eventually lead to litigation, in the form of public interest cases being brought before the Supreme Court, for the purposes of determining the constitutionality of those potentially discriminatory aspects of the offences in question.⁶³

courts in Ghana post-independence, in order to assess the likelihood of the future acceptance of the right to sex work and rights of sex workers as part of the fundamental rights available in Ghana.

⁶³ Litigation is advocated for as part of the recommendations of this dissertation only as a last resort. Other measures and activities must first be undertaken in the pursuance of legal reform, failing which litigation can be resorted to. Chapter Seven of this dissertation (Recommendations) thus outlines and discusses the specific recommendations for law reform in respect of sex work in Ghana in detail.

iii. Reference Materials for teaching and learning of Constitutional Law,
Criminal Law, Human Rights Law & Legal Philosophy

The knowledge gap that exists in relation to offences involving sexual morality in Ghana also means that, there is an urgent need for a well-researched scholarly work in this area of the law. This dissertation can therefore serve as a useful resource for the teaching and learning of Criminal Law and even Constitutional, Human Rights Law and Legal Philosophy at the many Law Faculties in Ghana, and the Ghana School of Law.⁶⁴ The dearth of knowledge and scholarly works in the area of Criminal Law in general in Ghana⁶⁵ creates an urgent demand for such a work, which will contribute to illuminating this often-neglected aspect of the criminal law.

C) METHODOLOGY & STRUCTURE OF DISSERTATION

In this part, I attempt to briefly outline the methodology and structure of the dissertation. It is important to reiterate that the dissertation seeks to propose a new public policy standard for the regulation of intimate human conduct, and is an exercise in dispassionately and impartially examining the utility, legality and constitutionality of one of the most important and controversial offences that exist in Ghana: sex work.

1. *Research Questions*

⁶⁴ There are about ten (10) Faculties of Law presently accredited in Ghana, and they all prescribe Criminal Law and Constitutional Law as Core Subjects, that all students must enroll and pass in their first year in order to progress. The Ghana School of Law also organizes a Post-Call Course (Bar Conversion course), where foreign trained attorneys are expected to study and pass certain core law subjects, including Criminal Law and Constitutional Law, in order to be admitted to the Ghana Bar.

⁶⁵ See note 27, *supra*.

By focusing on sex work in Ghana, a major goal of this dissertation is to ascertain the efficacy, utility and legality of this and other similarly placed offences in contemporary Ghana, within the broader context of fundamental human rights and freedoms guaranteed under Ghana's Constitution and also in respect of Ghana's regional and international human rights obligations. My research questions in this regard are as follows:

- a) **Is it possible to develop a public policy framework for regulating sexual and private morality that is rational, devoid of stigma and incapable of being used as justification for criminalization of the conduct of persons who are the subject matter of offences like sex work?**⁶⁶
- b) **Is the criminalization of aspects of sexual and private morality under the Criminal Offences Act of Ghana, 1960 (Act 29) constitutional?**⁶⁷

2. Challenges

The major challenges that I have encountered in writing this dissertation have been in respect of access to legal scholarship on the subject matter from a Ghanaian perspective. The general dearth in jurisprudential legal scholarship, and socio-legal research in Ghana for that matter has meant that I have had to rely extensively on foreign scholarship, especially in developing my theoretical framework (Chapters Two and

⁶⁶ Chapter Three of the dissertation (Theoretical Framework: A New Morality) is devoted to answering this question. Chapter Six (Constitutionality of Regulating Intimacy & Sexual Morality: Applying the D.I.E. Framework) proceeds to apply the framework with particular emphasis on sex work in Ghana.

⁶⁷ Chapter Six (Constitutionality of Regulating Intimacy & Sexual Morality: Applying the D.I.E. Framework) also examines the constitutionality of the law prohibiting sex work in Ghana.

Three) for a rational public policy regime that should underpin laws that tend to criminalize conduct that involve private and sexual morality. Also, the lack of adequate empirical research on the issue of law and morality in Ghana with specific reference to intimate human conduct has also hampered my ability to address the topic from a sociological point of view. That notwithstanding, I make references to the few available Ghanaian research on the subject matter.

3. Dissertation Structure

The dissertation structure is essentially an outline of each of the various constituent elements of the dissertation. What I attempt to do here therefore is to provide a concise summary of the structure in which the dissertation takes. Thus, the various Chapters of the dissertation are briefly summarized, highlighting the essence of these Chapters within the grand scheme of the overall dissertation objectives.

The introductory chapter of the dissertation provides a broad and general overview of the major themes of the topic, and the controversies that the dissertation seeks to address. It also provides the justification for the study and its relevance for the development of law in Ghana. Chapter One therefore provides a road map and clearly outlines the themes that are discussed and examined throughout the dissertation, including a statement of the research questions. Chapter Two then delves into a review of the major works that have helped me formulate my thoughts and opinions regarding the intersection between law and morality. In Chapter Three, I attempt to propose a new form of morality, underpinned not just by religious and/or cultural beliefs, but also by the

universal human rights principles of Dignity, Individual autonomy and Equality (the D.I.E. framework for developing public policy).

Chapter Four then critically examines sex work in Ghana from a historical perspective and traces the evolution of the practice and the law to present times. The law of prostitution is thus discussed extensively in light of what actually pertains today, as well as the social cost of criminalization. Chapter Five, traces the history of human rights in Ghana since independence and examine the consistency of the laws regarding sex work with the human rights guarantees provided for by Ghana's 1992 Constitution, as well as Regional and International Human Rights treaties that Ghana is a state party to. In Chapter Six, the constitutionality of regulating sexual and private morality is analyzed using the proposed D.I.E. framework of public policy. The 'Right to Sex Work' is thus explored from a constitutional standpoint in this regard. Finally, Chapter Seven is the concluding part of the dissertation, where I make specific recommendations with regard to sex work and how to effectively regulate it in a rational and coherent manner.

CHAPTER TWO

LITERATURE REVIEW

Law and morality are two concepts that have puzzled scholars and theorists and led to countless debates from time immemorial. Theoretically speaking, the concept of “law” has been variously defined from many different perspectives and by many different scholars. Morality on the other hand is also quite dynamic, due to the difficulty of conceptualizing such a complicated idea. This state of flux regarding these two concepts and their relationship presents problems in terms of regulating some aspects of human behaviour through the criminal law – for example, sex work. The problem is further compounded as many people view law through the prism of what is rightful or wrongful moral conduct. Thus, the laws that govern societies are deemed to be some representation of, or form of moral capital that people wish to own, as mirroring the values of their society.⁶⁸ In this Chapter of the dissertation, the concepts of law and morality are re-examined and their relationship further explored; whilst situating the discussion within the context of the criminal offence of sex work in Ghana. I therefore attempt reviewing and critiquing some of the most important works within the field of legal philosophy that has shaped and continue to shape my thoughts on the subject matter of this dissertation.

A) WHAT IS LAW?

⁶⁸ Kenworthy Bilz and Janice Nadler, 'Law, Psychology & Morality, *Moral Cognition and Decision Making: The Psychology Of Learning And Motivation*,' in D. Medin, L. Skitka, C. W. Bauman, & D. Bartels (eds) (Vol. 50, Academic Press, 2009) 101-131, 101

There have been several attempts in the past century and beyond by various scholars and legal philosophers to define the essence, nature and characteristics of law.⁶⁹ Some of these works have been ground breaking and continue to receive wide acclaim.⁷⁰ However, the concept of “law” remains very controversial as there has not necessarily been a general acceptance of the nature of law.⁷¹ Defining what law means is rather elusive as several factors must be considered, and many seemingly contradictory positions must be balanced in order to begin appreciating law’s nature and scope.⁷² Cairns, for example, notes the various descriptions that have been attached to law over the centuries in the following manner:

We have been told by Plato that law is a form of social control, and instrument of the good life, the way to the discovery of reality, the true reality of the social structure; by Aristotle that it is a rule of conduct, a contract, an ideal of reason, a rule of decision, a form of order; by Cicero that it is the agreement of reason and nature, the distinction between the just and the unjust, a command or prohibition; by Aquinas that it is an ordinance of reason for the common good, made by him who has care of the community, and promulgated; by Bacon that certainty is the prime necessity of law; by Hobbes that law is the command of the sovereign; by Spinoza that it is a plan of life; by Leibniz that its character is determined by the structure of society; by Locke that it is a norm established by the commonwealth;

⁶⁹ See H.L.A. HART, *THE CONCEPT OF LAW* (1961); R. POUND, *INTRODUCTION TO THE PHILOSOPHY OF LAW*; AND H. KELSEN, *GENERAL THEORY OF LAW AND STATE* (1949).

⁷⁰ See H.L.A. HART, *THE CONCEPT OF LAW* (1961); L. FULLER, *THE MORALITY OF LAW*; I. KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS*; H. KELSEN, *THE PURE THEORY OF LAW* (1967).

⁷¹ See the Hart-Fuller and Hart-Dworkin debates for example.

⁷² The relationship between law and morality exemplifies the theoretical debates that have exemplified the difficulty in appreciating the full nature and scope of law.

by Hume that it is a body of precepts; by Kant that it is a harmonizing of wills by means of universal rules in the interests of freedom; by Fichte that it is a relation between human beings; by Hegel that it is an unfolding or realizing of the idea of right.⁷³

The above notwithstanding, one of the most important works in terms of the definition, nature and scope of law is *The Concept of Law* by H.L.A. Hart.⁷⁴ This work however transcends legal philosophy and is a useful guide to understanding social construction. As the author notes in the preface, ‘*My aim in this book has been to further the understanding of law, coercion, and morality as different but related social phenomena. Though it is primarily designed for the student of jurisprudence, I hope it may also be of use to those whose chief interests are in moral or political philosophy, or in sociology, rather than in law.*’⁷⁵ I find the work in general intriguing, thought provoking and stimulating, because it addresses almost all aspects of the nature of law. As a matter of fact, this work is critical my understanding of legal philosophy generally, which in turn leads me to propose a new form of morality as the basis of public policy making where the criminal law is concerned in Chapter Three of this dissertation. As such, it is prudent that I begin my literature review with Hart’s work.

In *The Concept of Law*, Hart devotes the first seven chapters to critical issues concerning the essence, nature and characteristics of law. Chapter One for example delves into a critical analysis of the age-old question – what is law? Hart suggests that for

⁷³ Huntington Cairns, *Legal Philosophy from Plato to Hegel* (The John's Hopkins Press, 1949).

⁷⁴ H.L.A. HART, *THE CONCEPT OF LAW* (1961).

⁷⁵ *Id.*, The Preface.

many years several scholars, including lawyers, jurists and philosophers have pondered over this seemingly simplistic question without ever agreeing on a universally accepted answer. This, he attributes to the very problematic nature of law as a concept, and as a tool of social ordering.⁷⁶ Thus, he suggests that the reason this inquiry into law seems to be a never-ending one is the fact that the concept itself is inherently vague, and somewhat stratified into several different categories, depending on the one making the inquiry, and the one who may perceive it from a distance.⁷⁷ Hence, according to him, any inquiry relating to what law is must first begin with a critical examination of what the nature of law is i.e. the essential characteristics of the phenomenon.⁷⁸

Hart therefore believes that there are some recurring and fundamental issues that crop up in any discussion of the nature of law i.e. (1) that law tends to make some human conduct non-voluntary and obligatory; (2) that law and morality are sometimes viewed as two sides of the same coin; and (2) that law consists of rules.⁷⁹ The aforementioned, in my opinion, seem to be the general characteristics of law as we know it. However, they present enormous problems for social ordering when applied in real life settings. For example, Hart contends that the idea that legal systems consist of rules is problematic – because ‘*what are rules*’?⁸⁰ He thus tries to draw a distinction between legal rules on one hand, and what he terms ‘*mere convergent habits of behavior*’ on the other hand.⁸¹ For example, we can consider the now established social norm of “*tipping*” at almost all

⁷⁶ *Id.*, at p. 6.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*, at p. 13.

⁸⁰ *Id.*, at p. 8.

⁸¹ *Id.*, at p. 9.

Western restaurants, and even in Ghana in recent times as well. In Ghana, there is no ascertainable law or rule that requires a customer to give the waiter or waitress who served him or her at a restaurant a tip when the bill is being paid. However, it has now become customary to give a tip of a percentage of your total bill, regardless of the quality of service. Indeed, at some restaurants, the tip is pre-included in the bill. Is this then considered a rule, to which all patrons must abide by? Or is it mere convergent habits of behavior that customers generally adhere to the social norm by providing tips for services rendered, in Ghana for instance?

I believe therefore that, any suggestion that law is merely a system of rules is somewhat simplistic, although it probably captures the essence of what we call “law” in many respects. Hart then discusses the three recurrent issues that in his opinion are at the core of any analysis of the nature and essence of law.⁸² These three recurrent issues or questions, which are derivatives of the aforementioned issues that crop up in any discussion of the nature of law, are as follows: (1) How does law differ from, and how is it related to orders backed by threats; (2) how does legal obligation differ from, and how is it related to, moral obligation; and (3) what are rules, and to what extent is law an affair of rules.⁸³ In my humble opinion, I think the Austinian conception of law, essentially as a collection of commands backed by sanctions, is a simplistic way of examining the nature of law.⁸⁴ This is because, such a description only captures the essence of some types of laws, primarily amongst them is the criminal law.

⁸² *Id.*, at p. 13.

⁸³ *Id.*

⁸⁴ I make reference to Austin here because Hart’s three recurrent issues regarding the nature of law inevitably cites Austin’s command theory of law.

However, there are other types of laws that no sanctions attach from a failure to conform to their dictates – for example marriage laws (for the law cannot and does not compel one to marry at all cost). Similarly, even though it has been strenuously contended in some quarters that law and morality are essentially two sides of the same coin, and that any law that lacks a moral component is somehow valueless or immoral, this in my opinion is simply not true. Admittedly, law and morality have a convergence point sometimes. But the question that ought to be greatly examined in the same way that the question of ‘*what is law*’ has, is what is morality?⁸⁵ For example, whose conception of morality must law adhere to? What standards must a particular behavior be measured against in order to be deemed moral? This list can go on. Thus, the nature and essence of law seems to be one of those theories that are most useful to philosophers and other similarly placed persons, whose mission is to push the frontiers of such inquiries. The practical reality to me however is that, when one comes into contact with the law, one is likely to understand and appreciate its full effects without necessarily engaging oneself in theoretical and philosophical debates, even though it is these same debates that are likely to influence and shape public policy towards the morally neutral public policy framework which I am proposing in this dissertation.

Chapter Two of Hart’s book is essentially a critique of John Austin’s formulation of law as a collection of commands backed by threats i.e. the command theory of law.⁸⁶ Hart acknowledges that it is the theory itself that seems to be at the center of his critique,

⁸⁵ This does not however suggest that the issue of morality has not been vigorously debated and addressed within the legal academy. It is only an indication of the importance that I place on defining morality in a morally neutral manner.

⁸⁶ THE CONCEPT OF LAW, *supra*, note 74, Chapter II.

not Austin.⁸⁷ For my part, I think, any suggestion that law only comprises of commands that are backed by threats of sanctions, is an overly simplistic way of analyzing the essence of law, as I have already noted. For, as I have already suggested, there are different types of laws that do not necessarily coerce people to act one way or the other, and are merely indicative of procedural steps available to people, if they so wish in a given situation or context. Thus, I believe that law should not only be seen through the lenses or prism of commands backed by sanctions, as such a state of affairs only tend to maximize the problem of defining law.

In Chapter Three, Hart discusses three (3) major objections to the construct of law as made up of commands or orders backed by sanctions.⁸⁸ These objections, according to Hart, relate to the content of laws; their mode of origin; and their range of application.⁸⁹ In Ghana for example, there are a wide range of laws that differ in terms of their content, as well as how they are enacted, and their applicability. For instance, the Legal Profession Act⁹⁰ was enacted by Parliament, and deals primarily with the organization and structure of legal education in Ghana, as well the regulation of the legal profession in Ghana.⁹¹ Thus, this Act (or, law) is therefore of little consequence and practically useless to the head porter who plies her trade on the roads of Accra central.⁹² However, it is of great importance to law students and lawyers alike.

⁸⁷ *Id.*

⁸⁸ THE CONCEPT OF LAW, *supra*, note 74, Chapter III.

⁸⁹ *Id.*

⁹⁰ Legal Profession Act, 1960 (Act 32).

⁹¹ *Id.*, the Long Title.

⁹² Head porters, popularly referred to as ‘kayayei’, provide services such as the transportation of goods for a fee within the Central Business District of the capital city of Ghana – Accra, as well as in all the major urban business centers in Ghana.

In fact, quite recently, the General Legal Council that is established by virtue of this law was adjudged by the Supreme Court of Ghana as having acted unconstitutionally in terms of its continuous organization of entrance examinations for law students seeking entry into the Ghana School of Law.⁹³ On the other hand, Accra Metropolitan Assembly (A.M.A.) By-laws are passed by the Assembly itself, and not necessarily by Parliament;⁹⁴ and some of these by-laws may directly affect the head porter or roadside seller. The point is that, Hart is right to identify different categories of law as a critique of the command theory of law. For law does not simply consist of commands, but are a much more complex phenomenon of a variety of rules meant for social ordering (assuming we can properly define the exact meaning of “rules” – that is).

Chapter Four on the other hand discusses the idea that in every society where law exists there is necessarily a Sovereign, who is habitually obeyed as a result of the ‘*fear of sanctions*’ but this Sovereign habitually obeys no one.⁹⁵ I find this idea preposterous to say the least, as such a situation is not tenable with constitutional democracy. In fact, the meaning of constitutionalism itself is limited power – limited power in the sense that the sovereign or in contemporary times, all branches of government are to be limited in terms of the powers that they have. To suggest therefore that a sovereign habitually obeys no one or no laws therefore, is to advocate for autocratic and dictatorial rule. I must however hasten to add that, despite this undesirable situation, there still exist a handful of countries

⁹³ Myjoyonline.com, ‘Supreme Court ‘quashes’ Ghana School of Law Admission Process’ (June 22, 2017, Myjoyonline.com) <https://www.myjoyonline.com/news/2017/June-22nd/supreme-court-quashes-ghana-law-school-admission-processes.php> - last visited November 5, 2017.

⁹⁴ The Constitution of Ghana, 1992 authorizes Parliament to delegate some of its law making power to local authorities for limited purposes.

⁹⁵ THE CONCEPT OF LAW, *supra*, note 74, Chapter IV.

in the world where the sovereigns or political leaders are essentially unaccountable, or are only cosmetically accountable to the people or to the law for that matter.⁹⁶

According to Hart, since the command theory of law fails to mirror what actually pertains in a legal system, it is imperative for a redefinition of law – this is the essence of Chapter Five of his work.⁹⁷ Thus, he introduces the idea of primary and secondary rules as embryonic of the essence of law.⁹⁸ He suggests that primary rules generally impose duties, whereas secondary rules confer public or private powers.⁹⁹ Similarly, primary rules concern actions involving physical movement or changes, whereas secondary rules provides for actions that lead to the creation or variation of duties and obligations.¹⁰⁰ He concludes by suggesting that these two distinct but interrelated rules are the heart of any formal legal system, and I totally agree with him.¹⁰¹

Chapter Six discusses, inter alia, the rule of recognition and legal validity, and dissects the essential characteristics of a legal system.¹⁰² Just like Hart points out, I believe that any formal legal system must have a solid foundation. Thus, the source of validity of the rules that make up a legal system must be necessarily ascertainable to avoid controversies. In Ghana for example, there has been an on-going debate in the legal academy, especially with regard constitutional jurisprudence, as to where our present laws derive their validity. For example, there is one school of thought that believes that

⁹⁶ Countries like China, North Korea and Cuba immediately spring to mind as typical examples of this situation.

⁹⁷ THE CONCEPT OF LAW, *supra*, note 74, Chapter V.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² THE CONCEPT OF LAW, *supra*, note 74, Chapter VI.

since the 1992 Constitution expresses itself to be the supreme law of the land, all other laws must necessarily derive their validity from it.¹⁰³ On the other hand, another school of thought is of the view that the 1992 Constitution itself, being a mere schedule to the Constitution of the Fourth Republic of Ghana (Promulgation) Law, 1992 (P.N.D.C.L. 282), cannot be the source of validity for our present laws; and that our “grundnorm” in Kelsenian terms, must either be P.N.D.C.L. 282, or better still, the P.N.D.C. Establishment Proclamation.¹⁰⁴

Chapter Seven essentially is a description of the difference between statute law (or legislation), and case-law (or judicial precedent).¹⁰⁵ These are what essentially ordinary people see as the law i.e. what the statute says, and what the judges say. Thus, it is imperative that in any society, the law be as clear as possible so as to order the affairs of the people. Certainty of the law, I believe, is therefore of the utmost import in any legal system. This is because, any uncertainty whatsoever may lead to disastrous consequences. For example, if Parliament were to pass a law prohibiting the doing of particular acts, but the courts interpret the law to exclude certain acts, that Parliament included in the law as part of the prohibitions laid down, there could be some confusion in the minds of people. This raises the question of judges legislating from the bench. Is it really the duty of judges to use their position to essentially subvert the will of Parliament (the people’s direct representatives) through legal interpretation? This is a hard question

¹⁰³ This is predicated on the supremacy clause of the 1992 Constitution of Ghana i.e. Article 1(2) – which provides that the constitution is the supreme law of the land and every other law that is inconsistent with the dictates of the constitution is void to the extent of the inconsistency.

¹⁰⁴ See Kwamena Ahwoi, *Kelsen, The Grundnorm and the 1979 Constitution*, 15 U.G.L.J. (1978-1981) 139.

¹⁰⁵ THE CONCEPT OF LAW, *supra*, note 74, Chapter VII.

to answer, as legal interpretation is an essential part of most legal systems, thus a necessary corollary of the nature of law generally.

Moving on from Hart's exposition on the nature of law, *The Bramble Bush* by Karl N. Llewellyn (hereinafter referred to as KNL) is also a classic exposition on the nature, characteristics and the essence of law.¹⁰⁶ KNL introduces the concept of law to his audience by employing humor as well as everyday examples, thereby painting a vivid but somewhat chaotic picture of the law, in the minds of new law students, who generally have no idea whatsoever about the complex nature, as well as the philosophical basis of law. Right from the onset, KNL attempts to disabuse the minds of his readers by suggesting that the study of the law is not just easily compartmentalized as the study of some abstract rules. Rules, he acknowledges are important for the effective functioning of any legal system; but it is how these rules are actually applied in real life situations that gives us a semblance of the true meaning and purpose of law.¹⁰⁷

This is an important point simply because of the misconception in the minds of many people, as to what law really is. Thus, by breaking down the study of law into substantive and procedural (or as he put it "adjective") law, one is left in no doubt that the study of law encompasses not just mere rules that regulate human conduct and behavior on a day to day basis, but also rules as to how to proceed when a legal dispute arises. KNL also suggests that, it is the resolution of these legal disputes, and their subsequent study thereof that enables us to easily predict how similar disputes will be resolved in the

¹⁰⁶ KARL N. LLEWELLYN, *THE BRAMBLE BUSH* (1951).

¹⁰⁷ *Id.*

future, and also somewhat forces us to act in a manner consistent with the law.¹⁰⁸ By cleverly suggesting that the law is what the judges, lawyers and other law officers actually do in practice, I believe KNL exposes us to an element of judicial activism as opposed to restraint, and this is largely in tune with his concept of legal realism which underpin most of his works – including this one.¹⁰⁹

KNL skillfully encourages the student to read case law, because therein lies the law. He attempts at opening up the minds of law students to engage in critical thinking, whilst distilling the various rules that case law inadvertently establishes. This, I believe is necessary because of the peculiar nature of the common law legal tradition that places particular emphasis on judicial precedent – a concept he introduces his readers to as well.¹¹⁰ By delving into the law's ancillary issues like logic and the philosophical underpinnings of some of the most important theories of law, KNL lays the foundation for critical thinking as to the essence and purpose of the law. It is however my opinion that, delving into the law's deep ocean at such an early stage in legal studies, albeit introductory, generally tends to make that which is confusing even more so – which to his credit, he gracefully admits, and prescribes a remedy for.¹¹¹

Ronald Dworkin, on the other hand, addresses the nature and characteristics of law in his work *Hard Cases*¹¹² from the premise of the general belief and assumption that the authority of judges extends only to the application of law, and not the making of law.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² R. Dworkin, *Hard Cases*, 88 Harvard Law Review 1057 (1975).

However, this is not always possible due to the complex nature of adjudication. For example, judges are often confronted with novel cases and situations, which inevitably require the making of new law and the application of conceptions of morality, if such cases are to be resolved. Conventional wisdom however suggests that judges must not seek to usurp the power of the legislature, which is the proper law-making institution. It follows therefore that judges act as “deputies” to the legislature, which of itself shows a certain level of subordination; but also in hard cases, they also actually act as a “Deputy Legislature” in the sense that they are inadvertently required to make law on the basis of the facts and evidence presented before them, which is likely to motivate a legislature to make that particular law any way assuming they were faced with similar facts.

Dworkin’s central thesis however seems to me to be the fact that, he does not think judges should be or act as a deputy legislature. He is thus of the view that, the popular assumption that when judges go beyond political decisions already made then they are legislating from the bench is misleading and inaccurate. According to him, it misses the fundamental distinction between principle and policy – concepts that are central to Dworkin’s work. According to the author, a hard case is one where there exists no settled rule that dictates a decision one way or the other. In such situations, policy or principle will help generate the proper and appropriate decision. Dworkin however favors the reliance and use of principle rather than policy in judicial decision-making, especially in the hard cases.

Dworkin also explores the view that adjudication should be unoriginal in a democratic community by discussing briefly the major objections to judicial originality i.e. the fact that judges are unelected officials and as a result the concept of accountability will be defeated if they are to legislate from the bench; and the fact that retrospective application of new law unfairly punishes losing parties for violation of new duties created *ex post facto*. He is however dismissive of these criticism, and I tend to agree with him. The fact is that, judges in the course of adjudication will often be confronted with numerous hard cases. The question that needs to be resolved in such situations is: how do they go about resolving disputes without overstepping boundaries? Dworkin's distinction between collective goals and individual rights may be of extreme help in such situations. Collective goals for example are grounded in policy objectives, which seek to attain some common ideals that are of benefit to society as a whole – this may involve conceptions of a collective form of morality. On the other hand, individuated rights often seek to uphold and most often reaffirm individual liberty, and may be based on conceptions of private morality.

In my opinion, these two often-competing interests are two sides of the same coin. For example, the right to equality and freedom from discrimination is aimed at protecting individuals from some acts that tend to impinge on the right. By extension, society as a whole (a collection of individuals) also benefit from the existence of this right. This, in my mind, represents a principle. However, this right may be limited in its application, in the sense that it may be the case that it is not absolute. Thus, a policy objective may exist which limits the right and provides for differentiation in the treatment of people, which

actually negates the idea of equality and non-discrimination. These similar, but competing interests I believe should be balanced on a case by case basis, so that we do not create a system of *de facto* and *de jure* majoritarian oppression.

Judges when faced with hard cases, often have to make a choice as to the best possible approach in the resolution of the dispute. Statutory interpretation for example even tends to further obfuscate the lines between judicial decision-making, and legislative functions. For when a judge interprets the law in situations where lacunas may exist, he is in actual fact making law, whether we want to believe it or not. It would be unreasonable therefore to suggest that cases of such nature need not be resolved simply because there is no controlling law applicable to the novel issues that such cases generally present.

Moving on from Dworkin's perspectives on the nature of law, Freeman suggests that positivist philosophers such as Austin and Kelsen in their attempt to define law adopted an essentialist approach.¹¹³ Austin's command theory of law for example has consistently been criticized and berated, even though there remains some support and justification for the Austinian conception of law. As already noted, Austin defines law as a command by a sovereign backed by sanctions. Thus, commands that do not emanate from a sovereign and are not backed by some form of sanction(s) cannot conceivably be referred to as law. This command theory of law is put in the following manner: '*Laws*

¹¹³ M.D.A. FREEMAN, INTRODUCTION TO JURISPRUDENCE (2008) 38.

*proper or properly so called are commands. Laws which are not commands are improper or improperly so called.'*¹¹⁴

Austin thus divides these commands into two broad categories – those prescribed by God on one hand, and those enacted by man. It is this second category of commands that he famously refers to as “positive law”.¹¹⁵ His definition of law is that it is ‘*a rule laid down for the guidance of an intelligent being by an intelligent being having power over him.*’¹¹⁶ Three core ideas can be deduced from this definition, which lies at the heart of Austin’s conception of law i.e. that in any society there are superior and inferior subjects; secondly, that there are superiors who constitute the ruling class; and thirdly, the relationship between the superior ruling class and inferior subjects is one premised on politics.

However, fellow positivist theorists have criticized John Austin, notably amongst them H.L.A. Hart on the three concepts listed above. Hart highlights the fact that laws are not limited to commands backed by sanctions. He recognises broadly the existence of Austinian rules as primary rules and other rules as secondary rules. According to him, these secondary rules include laws which confer powers on private individuals to alter their legal relationship in relation to other people via the creation of wills, contracts, or marriages as well as laws which confer powers to officials, e.g. to a judge to try cases, to

¹¹⁴ John Austin, *The Province of Jurisprudence Determined*, in W. Rumble (ed.), (First Published in 1832) (Cambridge: Cambridge University Press, 1995).

¹¹⁵ It must be noted that Austin further divides positive law into two sub-categories i.e. those set by political superiors, this he referred to as “positive law proper” and those set by superiors in general (laws of non-political character) for example, master – servant rules. He referred to this as “positive morality”.

¹¹⁶ *The Province of Jurisprudence Determined*, supra note 114.

a minister to make rules and so forth. To him, treating law as a matter of orders backed by threats obscures this feature of law.

He also challenged whether laws really express any legislator's actual desires, intentions, or wishes. '*Would an enactment duly passed not be law if (as must be the case with many a section of an English Finance Act) those who voted for it did not know what it meant?*'¹¹⁷ he enquires. This question also becomes important for other critics especially of the utilitarian school of thought in a sense that the legislator's desires wishes and intentions may be contrary to the benefit to be derived from a particular piece of legislation. This is because some laws may be enacted merely on the basis of utility and not necessarily because it expresses the sovereign's desire, intentions or wishes. In its extreme form, Hart argues that Austin's argument would deny that the rules of the criminal law, by their usual wording, are genuine laws. Similarly, Hans Kelsen adopts the argument that law is the primary norm that essentially stipulates sanction. He suggests that there is no law prohibiting certain kinds of conduct but rather there are laws directing officials to apply certain sanctions in certain circumstances to those whose actions or inactions so require. This line of thinking implies that genuine laws are conditional orders to officials to apply sanctions.

Kelsen's theory has been seen as the climax of Bentham and Austin's theories. According to Kelsen, a norm becomes a legal norm only because it is birthed of a definite procedure and a definite rule. Law is valid only as positive law i.e. a statute or (constituted) law. He eliminates anything else and refers to them as alien elements; hence

¹¹⁷ THE CONCEPT OF LAW, supra, note 74,

his ideology is referred to as the pure theory of law.¹¹⁸ Thus, theoretically, a positivist definition of what the law is would be easier to determine in any jurisdiction because it eschews matters of ethics, social policies, metaphysics and morality.¹¹⁹ Hence, law that seems morally reprehensible will however continue to have the force of law until the law is altered by existent legal means.¹²⁰

Another interesting theorist is Karl Marx. Marx's jurisprudence focused on studying the nature of law within a society in flux.¹²¹ He considered law as a tool developed by persons in the ruling class to dominate members of the working class, to their utmost benefit or to maintain their superiority. However, his theory focused on the dependence of the formation of states on a class system. He posited that after this process and the use of a legal system to repress the lower class, there would be a socialist revolution that would lead to a collapse of both the classes and the repressive legal apparatus. This would result in the withering away of the state. Marx's theory has been criticized and classified as one that rejects the rule of law and endorses a continuous abuse of human rights.

Could it be that based on the choice or disposition of a sex worker and to serve the interests of those in the higher classes of society, sex work may be commercialized either for financial, sexual or other gains? Marx described sex work as being merely a

¹¹⁸ L.B. CURZON, JURISPRUDENCE (1995) 84.

¹¹⁹ *Id.*, 82.

¹²⁰ H.L.A. Hart, Positivism and the Separation of Law and Morals, (1957) 71 Harvard Law Review 593, 596.

¹²¹ CURZON, *supra*, note 118, 189.

specific expression of the general prostitution of a labourer.¹²² He also perceived that the abolition of sex work was a necessary part of ending capitalism. Moreover, in *The Communist Manifesto*, he referred to prostitution as the "complement" of the bourgeois family. However, some have used Marxist theory to defend sex work by referring to it as the selling of a service and not of the sex worker.¹²³

Also, it is important to remember that industrialism and modern capitalism have incited labourers to collectively bargain for rights to ensure safe working conditions and that there is a shield from employers who ignore the well-being of the workers in favour of profit.¹²⁴ Female sex workers, unlike other labourers, are at perpetual risk of violence at the hands of both their employers and their clients. Notably, this risk is not incidental. It is the consequence of the literal commodification, the woman's body and self - and not just her labour.¹²⁵ We may view this, in light of Marx's theory as a form of oppression of the prostitute by persons in the upper classes or persons who at any point have the upper hand and can afford their services. Thus, the example of sex work feeds into Marx's conception of law as a tool used for the oppression of the working class by the ruling class.

¹²² Karl Marx, 'Economic and Philosophic Manuscripts of 1844,' <<https://www.marxists.org/archive/marx/works/download/pdf/Economic-Philosophic-Manuscripts-1844.pdf>> Accessed 9th November, 2017.

¹²³ Cecilia Benoit, S. Mikael Jansson, Michaela Smith & Jackson Flagg (2018) 'Prostitution Stigma and its Effect on the Working Conditions, Personal Lives, and Health of Sex Workers', *The Journal of Sex Research*, 55:4-5, 457-471.

¹²⁴ Karl Marx & Frederick Engels, 'The Communist Manifesto,' in Joseph Katz (ed.), Samuel Moore (trs.) (Wash. Square Press, 1964).

¹²⁵ Mathieson, Ane; Branam, Easton; and Noble, Anya "Prostitution Policy: Legalization, Decriminalization and the Nordic Model," (2016) 14/2 *Seattle Journal for Social Justice*

Moving away from Marx's jurisprudence, the rise in modern science came an apparent unanimity on the use of scientific methods for the study law and legal philosophy. With this in hand, philosophers of the sociological jurisprudence school of thought such as Montesquieu, Jhering and Roscoe Pound have laid out their thoughts on what law is as well. However, Sociological jurisprudence has been spoken of as one that is not necessarily legal philosophy but rather attempts to use the various social sciences to study the role of the law as a living force in society and seeks to control this force for the social betterment.¹²⁶ It views law as an instrument of social control, backed by the authority of the state, directed towards achieving certain ends. It seeks to achieve these ends by methods, which may be enlarged and improved through a deliberate effort.¹²⁷

Roscoe Pound talked about “the end of law” as a topic that is more political than jurisprudential.¹²⁸ He explains that in the stage of equity and natural law the prevailing theory of the nature of law apparently answers the question of what the end of the law is. In his view, ideas of what law is for or its ends are so largely implicit in ideas of what law is. Based on this, he propounded twelve conceptions of what law is or how law distinguishes itself from other social phenomena. According to him, first and foremost, a law is the idea of a divinely ordained rule or set of rules for human action, citing the Mosaic law, or Hammurabi’s code as examples.¹²⁹

¹²⁶ James A. Gardner, 'The Sociological Jurisprudence of Roscoe Pound (Part I)', [1961] 7 Vill. L. Rev. 1. <<http://digitalcommons.law.villanova.edu/vlr/vol7/iss1/1>> accessed 9th November, 2017.

¹²⁷ *Id.*

¹²⁸ Roscoe Pound, '*Introduction to the Philosophy of Law*,' (Online Library of Liberty) <http://oll.libertyfund.org/titles/pound-an-introduction-to-the-philosophy-of-law#lf1502_label_009> Accessed on 12th November, 2017

¹²⁹ *Id.*

Second is the concept of law as traditions of the old customs approved by the gods and hence point the way in which man may walk without bringing harm upon himself. For primitive man, for instance, acting contrary to these customs would have incurred the wrath of the gods. Third is the concept of law as recorded from traditional custom of decision and custom of action and wisdom of the sages of old. He cites the example of Demosthenes in the fourth century BC describing the law of Athens in this manner. The fourth idea of law has to do with the conception of law as a philosophically discovered system of principles, which express the nature of things so that men conform their conduct, accordingly. In addition, the fifth idea, conceives law as a body of 'ascertainment's and declarations of an eternal and immutable moral code.¹³⁰

The sixth idea of law is a democratic version of the identification of law. It refers to a body of agreements of men in politically organized society as to their relations with each other. This according to Pound supports the political idea and the inherent moral obligation that a promise would be invoked to show why men should keep the agreements made in their popular assemblies.¹³¹ Seventh is the idea that law is a reflection of the divine reason governing the universe; which determines the "ought" addressed by that reason to human beings as moral entities, as opposed to the "must" which it addresses to the rest of creation.¹³² Such was the conception of Thomas Aquinas.¹³³ The eighth concept is that law is a body of commands of the sovereign

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

authority in a politically organized society as to how men should conduct themselves in that society.¹³⁴

A ninth idea of law comes in variant forms and has been classified by Pound as dividing the allegiance of jurists with the command theory.¹³⁵ It conceives law as a system of precepts discovered by human experience.¹³⁶ The tenth is the idea that law is a system of principles, discovered philosophically and developed in detail by juristic writing and judicial decision.¹³⁷ Within this ideology, the external life of man is measured by reason, or in another phase, the will of the individual in action is harmonized with those of his fellow men.¹³⁸

The Eleventh idea of law aligns with Marx's theory. This idea portrays law as a body or system of rules imposed on men in society by the dominant class for the time being in furtherance, conscious or unconscious, of its own interest.¹³⁹ Finally, the twelfth idea of law is made up of the dictates of economic or social laws as regards the conduct of men in society.¹⁴⁰ Pound's concept of law is thus discovered by observation, and finds expression in precepts worked out through human experience of what is or is not feasible in the administration of justice.¹⁴¹ Pound thus underscored that the aim of these theories was that they enabled us to understand a body of law or that institution and to perceive what the men of the time were seeking to do with them or to make of them. In sum,

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

Pound thought of law as a social institution to satisfy the claims and demands involved in the existence of civilized society. He noted that this was done by giving effect to as much as we may, with the least sacrifice, to order human conduct in a politically organized society or for efficacious social engineering.¹⁴²

B) WHAT IS MORALITY?

Morality or moral values, as it is sometimes referred to as, points to behaviour that may be good or bad, right or wrong. This concept of morality has evolved from a basis or reference to deity and nature, and currently is more self-referencing perhaps, than any other concept in legal and social philosophy. Thus, discovering what is moral from a self-referencing perspective is difficult to achieve and is an entirely personal and subjective exercise. Attempting to do this for a society in a manner that represents it as a whole may prove to be a daunting task, and rather impossible to achieve. Many have therefore argued that there is no objective moral truth or authority. Therefore, there is no objective legal truth or authority. It is wholly a personal and subjective exercise, just as any moral viewpoint is a wholly personal and subjective viewpoint.¹⁴³

Positivists argue that private moral views are not a proper basis for legislation and moral disapproval alone is an improper basis on which to deny rights. According to them, given that our whole human history is essentially a litany of opposing moral camps waging war upon one another and the most powerful moral groups oppressing and

¹⁴² *Id.*

¹⁴³ Hart, *supra*, note 120.

terrorizing the less powerful, positivist would prefer that societal rules be spared similar chaos. Morality seems to lack consistency because it is largely based on people's opinion about good or evil. What one considers moral may change depending on the time and many other circumstances. Law on the other hand must reflect consistent rules that govern human behaviour.¹⁴⁴ Where there is lack of consistency it may lead to chaos and disrespect of the law.

However, some theorists perceive positive law classically as a very potent tool for shaping morality of people¹⁴⁵. In their view, it advises society on the content of morality; provides examples of how to act morally, and actually helps people to become moral through its unique ability to motivate people to act in accordance with the dictates of morality.¹⁴⁶ This advice model has to do with propositional knowledge (i.e. knowing what to do). The second is the *emulation model* of moral expertise. The emulation model is about performative knowledge (i.e. knowing how to do something). It is therefore suggested that some experts – perhaps the best experts – know both *what* to do and *how* to do it.¹⁴⁷ Positive law provides the avenue to do this.¹⁴⁸

The motivational power of law might contribute to helping people to be moral through directly communicating coercive orders to us; through the indirect pressure to

¹⁴⁴ RICHARD BRANDT, A THEORY OF THE GOOD AND THE RIGHT (1979). (First published in 1979) (Prometheus books, 1998).

¹⁴⁵ Kenworthy Bilz And Janice Nadler, 'Law, Moral Attitudes, And Behavioral Change,' in Eyal Zamir & Doron Teichman (eds.), (2014) Oxford handbook of Behavioral Economics and the Law 241, 241.

¹⁴⁶ Kimberley Brownlee and Richard Child, 'Can the Law Help Us to be Moral?' <www.mancept.com/.../Brownlee-and-Child-Can-the-Law-Help-us-to-be-Moral-1.June> Accessed on 24th September, 2016.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

respect the law exerted by wider society; and through the law's role in supporting mutually beneficial practices by underpinning duties of reciprocity.¹⁴⁹ Once people recognise a corpus of instructions as law, they inevitably experience the effects of the law because as they abide by it, they begin to live in a particular way. Kant could not put it more tacitly: '*A good constitution is not to be expected from morality, but, conversely, a good moral condition of a people is to be expected only under a good constitution.*'¹⁵⁰

Natural law doctrine generally suggests that there are principles of law stronger than statute to which the latter must conform.¹⁵¹ Natural law theorists test the validity of law by referring to "absolute value" such that any law that lacks such values or does not match up with this threshold is wrong and unjust. Aquinas, for instance, thought of law as an aspect of God's plan for mankind. He categorised law into *lex aeterna* which is God's rational direction for all things; *lex divina*, which is God's law as revealed in scripture; *lex humana*, which is human law which must conform with reason and God's law; and *lex naturalis*; which emerges from man's exercise of his reason in light of God's word. According to Aquinas law must be good and for the common good.¹⁵²

Aquinas viewed marriage, for example, as a primary human good, which had two ends.¹⁵³ One of such ends is procreation and nurturing of children in a manner aimed at their good. The other is *fides*. This word implies faithfulness in terms of exclusivity and permanence but is not limited to it. It also implies commitment to being united with one's

¹⁴⁹ *Id.*

¹⁵⁰ IMMANUEL KANT, PERPETUAL PEACE: FIRST SUPPLEMENT (1795).

¹⁵¹ Curzon, *supra*, note 118, 45.

¹⁵² *Id.*

¹⁵³ Stanford encyclopedia of philosophy, 'Aquinas' Moral, Political and Legal philosophy,' 30.

spouse in mind, body, and a mutually assisting domestic life. He cited *fides* as good and sufficient reason to engage in *usus matrimonii* or the sexual act intended for a husband and wife to experience, actualise and express the good of their marriage.¹⁵⁴ Against this backdrop, he described depersonalised human acts such as sex work as instances of 'willing against the good of marriage'.¹⁵⁵ This is because, according to him, promoting sex work would be against reason's directive to respect and pursue the good of marriage i.e. *contra bonum matrimonii*.¹⁵⁶

In Aquinas' day, as in ours, many hold the view that mutually agreed/negotiated sex could be classified as a moral issue. Even though Aquinas did not overlook this, he noted that acts *contra bonum matrimonii* were wrong because individuals and societies depended on the institution of marriage to flourish. It is also worth noting that Aquinas gave credence to the Platonic-Aristotelian concept of the four virtues, on which morality and all other virtues are based. These virtues constitute: understanding the reasons and principles behind making and implementing choices (*prudentia*); a steady and lasting willingness to give others what they are entitled to (justice); the integration of passions (not just sexual passion) with reason to avoid becoming enslaved by it (*temperamento*); and the quality of keeping disinclinations in check (*fortitudo*). Flowing from his moral argument, Aquinas would certainly refer to any legislation permitting sex work, as bad law.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

Aquinas' account of law also set out four areas of focus for finding the meaning of law. First, he notes that law is an appeal to the mind choice and moral strength of persons subject to it. Second is that, law is for the common good of a community. Third is that law is posited by the responsible authority. Finally, it must be coercive. However, if the lawmaker is not concerned for the community's common good or if while acting for the common good there is an infraction as regards the fairness of the law, then the law is unjust and lacks moral authority. According to Aquinas, '*Laws can be unjust because they are contrary to the divine good. In no way is it permissible to observe them.*'¹⁵⁷ Thus, when laws are just and are made by a just State, there is an obligation to obey them; otherwise, the obligation is extinguished. To some positivists, this dissention to obeying law as a command is characterised by disobedience, which is arguably immoral. Disobedience, even to a so called bad law, sets an example and inclines other people to disobey those laws as well as break "good laws" together with "bad ones".¹⁵⁸

The assertion '*an unjust law is no law at all*' has the same logic as, for instance, '*a disloyal friend is not a friend*' or '*a quack medicine is not medicine*'.¹⁵⁹ It assumes that there is a particular moral standard that law must meet. This moral standard determines the validity of the law. Thus, Kant has argued that even the most unjust laws create an obligation to obey, which is both legal and moral. He rejects a right to resist unjust laws and the denial that they are fully legal.¹⁶⁰ Immanuel Kant, although a

¹⁵⁷ *Id.*

¹⁵⁸ Joseph Raz, 'The obligation to obey: revision and Tradition, Journal of law, ethics and public policy' <<http://scholarship.law.nd.edu/ndjlepp/vol1/iss1/10>> Accessed on 16th September, 2016.

¹⁵⁹ Stanford Encyclopedia of Philosophy, "'*lex iniusta non est lex*'? Do seriously unjust laws bind legally?"¹⁷³.

¹⁶⁰ *Id.*

naturalist, however aimed to render morality undogmatic – to ground it in the fact of reason. This led Kant to develop a theory of subjectivity. Kant's theory of the subject relies heavily on his theory of epistemology. In Kant's view, we only know things by our thought of them (the phenomena). We never know the things in themselves (the noumena). Both Kant and Aquinas believed that virtue's priority should not be reduced to happiness or self-fulfilment, which is important but must be considered with others in our order of priorities.¹⁶¹ Kant noted that the fact that humans have reason and will and not just instinct proved this point.¹⁶²

The above notwithstanding, those who consider the virtue of utility as a basis of law hold a contrary view. According to Jeremy Bentham, the father of utilitarianism, utility is *'that property of any object whereby it tends to produce benefit, advantage, pleasure, good or happiness; or to prevent the happening of mischief, pain, evil or unhappiness to the party whose interest is considered: if that party be the community in general, then the happiness of the community; if a particular individual, then the happiness of that individual.'*¹⁶³ He equated pleasure with good, and pain with evil.¹⁶⁴ Using his felicific calculus, an algebraic sum of all the good a person suffered together with their pain would be calculated to arrive at whether or not an act had good or bad tendencies.¹⁶⁵ This arithmetic applied to societies as well such that the summation of

¹⁶¹ Stanford encyclopedia of philosophy, 33-34

¹⁶² Immanuel Kant, *Groundwork for the Metaphysic of Morals*, Jonathan Bennett (ed.) (July 2005; Last amended: September 2008) 15.

¹⁶³ JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

individual happiness would give the social sum.¹⁶⁶ Based on this theory, he posited that the science of legislation is knowledge of the good and the art of legislation was his method of arriving at the good.¹⁶⁷ The foundation he proffered for legislation was the principle of utility.¹⁶⁸

According to Bentham, legislation must prevent evils or unhappiness but rather promote happiness.¹⁶⁹ With this aim legislation must reflect a desire to attain subsistence or abundance, diminish inequalities and provide security.¹⁷⁰ However, he was opposed to natural law concepts especially that of human rights. He argued that these could not be philosophically proven and held them out as concepts, which oppose political sovereignty and its practices.¹⁷¹ However, his theory was very relevant in transforming criminal law. His theory rather influenced the evolution of more utilitarian sanctions.¹⁷² He also posited that acts, which had a high possibility of producing harm, ought to be prohibited.¹⁷³

Pleasure and pain are very subjective and the felicific calculus seemed and was manifestly impracticable. Riding on these as well as an attempt for a clearer view of the moral standards set out by utilitarianism, John Stuart Mill restated the concept.¹⁷⁴ Instead of the quantitative approach, Mill adopted a qualitative approach.¹⁷⁵ In this approach, he classified pleasure into superior or high-quality ones and inferior ones so that mere

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ JOHN STUART MILL, UTILITARIANISM (1863).

¹⁷⁵ *Id.*

pleasure would cease to be the standard of morality.¹⁷⁶ The higher pleasures to him, were those derived from more intellectual activities whereas the inferior ones had to do with basic needs such as food, drink, sex and so on.¹⁷⁷ He added that it is the true expression of our faculties that would lead to true happiness.¹⁷⁸ Both Bentham and Mill believed that a person should pursue their own happiness in relation to the happiness of the community as well.

However, as regards his views on law, Mill wished to infuse general principles into social and legal practices.¹⁷⁹ According to him these practices ought to balance the interest of every individual with that of the whole.¹⁸⁰ Also, he diverged from Bentham's perception about rights and justice. To Mill, Justice encompassed considerations of what was not only right or wrong to do but also that which an individual can claim as his moral right.¹⁸¹ These considerations are important because legislators must decide what or whose policy, virtue or morals must inform legislation relating to sex work, and abortion for example. With regards to sex work, should the issue be approached as a question of protecting rights of sex workers as victims or a question of protecting persons who should be at liberty to do whatever they please with their bodies? Practically, how should society react if children start saying: '*I want to be a sex worker when I grow up?*' Should society be alarmed at this depending on the approach which it adopts?

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

C) THE LAW AND MORALITY DEBATES

Hart noted in the preface of his book, *The Concept of Law* that his aim for writing the book was to further the understanding of law, coercion, and morality as different but related social phenomena.¹⁸² According to him, the essence of legal positivism is the “separation thesis”. This thesis is illustrated below:

Having a legal right to do 'x' doesn't entail having a moral right to do it, and vice versa; having a legal obligation to do something doesn't entail having a moral right to do it, and vice versa; having a legal justification to do something doesn't entail having a moral justification, and vice versa; and so on.¹⁸³ In order to know what your legal rights are, you need to look at what laws your society has. In order to know what your moral rights are, you need to figure out what is the true morality. You might have legal rights that the true morality says you shouldn't have (e.g. the right to be a commercial sex worker, to own slaves to have an abortion, the right to be mutilated), and your society might deny you legal rights that the true morality says you should have (e.g. the right to be free, to stand by what you believe, to own one's own body and labour power).¹⁸⁴

In a world of relative morality, one common ground has been the fact that the law is applicable to all within a jurisdiction. People turn and run to the law whether it speaks to

¹⁸² THE CONCEPT OF LAW, *supra*, note 74,

¹⁸³ Legal Positivism vs. Natural Law Theory, < web.nmsu.edu/~dscoccia/376web/376lpaut.pdf > Accessed on 26th October, 2016.

¹⁸⁴ *Id.*

an issue or is silent on it, and almost regardless of what field may be more applicable in finding a solution to any dilemma in society.

Williams J. noted in a speech he delivered that, *‘My concern is that, as we turn increasingly to the “Temple” of the law for solutions to social problems and as a guide to conduct, we give less and less recognition to any concept of values and morality above the law; and that is a trend which is unhealthy for the law and for the society.’*¹⁸⁵ The heavy reliance on law should be expected because law is such a basic foundation required in statehood, as John Locke's social contract theory suggests. However, history also teaches us that law when allowed to be put in force and operate within a vacuum can cause more damage than anticipated. There is also the other extreme of running into error by basing legal operations on moral dictates. How then do we solve this dilemma? Or must we just allow the wrangling of these concepts to continue and use the back and forth as a vehicle to shape the law?

These questions regarding the nature of law rear their heads in the practice of the law. These are demonstrated by what Hart refers to as an appeal by men who experience hell-created by other men - on earth.¹⁸⁶ Some of these difficulties are demonstrated in the following examples. First is the case of *Oppenheimer v Cattermole*.¹⁸⁷ The contention in this case, was whether an English Court should disregard Nazi laws that stripped a German Jewish refugee of his citizenship in line with German Basic law at the time. The

¹⁸⁵ Harold M. Williams J., Keynote address: 'The Role Of Law In Society' <<https://www.sec.gov/news/speech/1980/031380williams.pdf>> Accessed on 5th November, 2017.

¹⁸⁶ H. L.A. Hart, Positivism and the Separation of Law and Morals, (1957) 71 Harvard Law Review 593, at 639

¹⁸⁷ [1976] AC 249.

House of Lords felt itself bound to hold that Oppenheimer had lost his citizenship. Lord Cross stated in *obiter* that the Nazi law constituted so grave an infringement of human rights that the Courts ought to refuse to recognise it as a law at all. In light of this Freeman writes:

But what are 'human rights'...and what is sufficiently 'grave' infringement ... Is such a law not a law at all? And if it is not, are citizens released from their obligation to obey? Indeed, do citizens have a reason to obey law and if so what is the nature of this obligation and is it absolute or qualified and if qualified in which ways?¹⁸⁸

This example seems light compared to the genocidal atrocities committed by the Nazi regime. However, Hart argues that the spiritual message of liberalism must not be overvalued. He insists that Law is not morality and society could equally refuse to allow it to supplant morality.

However, Radbruch's conception of law underscored the essential moral principle of humanitarianism.¹⁸⁹ This principle was applied in practice by German courts in certain cases in which local war criminals, spies, and informers under the Nazi regime were punished.¹⁹⁰ Notably, persons accused of these crimes claimed that what they had done was legal under the laws of the Nazi regime when their actions were performed.¹⁹¹ The

¹⁸⁸ M.D.A. FREEMAN, *supra*, note 113, 38.

¹⁸⁹ *Id.*, 55.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

position of the courts was that their actions lacked legal validity because their stance contravened the fundamental principles of legality and morality.¹⁹² One of such cases cited by Hart based on which the Hart-Fuller debate ensues is the case concerning the Grudge informer.

In 1944 a man made insulting remarks about Hitler while home on leave from the German army. With the aim of getting rid of her husband, his wife denounced him to the authorities based on those remarks. His utterances were apparently in violation of statutes that criminalized statements detrimental to the government of the Third Reich; however, she had no legal obligation to report him. The man, upon arrest, was sentenced to death, pursuant to these statutes. Though he was not executed upfront, he was sent to the front. In 1949 the wife was prosecuted in a West German court for the offense of illegally depriving a person of his freedom under the German Criminal Code of 1871, which had remained in force since its enactment. According to the reasoning of the court, the statute *‘was contrary to the sound conscience and sense of justice of all decent human beings.’*¹⁹³

Though this reasoning was followed in many cases and has been regarded as a triumph for the doctrine of natural law, Hart spells out two other choices. Firstly, the courts could have let the woman go unpunished; and the other was to face the fact that if the woman were to be punished it must be pursuant to the introduction of a retrospective law and with a full consciousness that the basic principles of *Nullum crimen, nulla poena*

¹⁹² *Id.*

¹⁹³ *Id.*

sine lege were sacrificed in securing her punishment in this way. Indeed, very precious principles of morality endorsed by most legal systems had been sacrificed. Hart's point was that there may well be moral reasons to revolt against such oppressive legal systems but that it would be absurd to say that no legal system existed at all - because parts of it were unjust.

However, herein lie the seeming contradictions, which Lon Fuller points out.¹⁹⁴ Fuller explains by reiterating Hart's warning about thoughts expressed regarding the maintenance of distinctions between positivism and morality when he posits that '*we may lose a "precious moral ideal," that of fidelity to law.*'¹⁹⁵ Fuller notes that even though there is no reason why the argument for a strict separation of law and morality cannot be rested on the double ground that this separation serves both intellectual clarity and moral integrity those who find the "positivist" position unacceptable base their argument on '*the double ground that its intellectual clarity is specious and that its effects are, or may be, harmful.*'¹⁹⁶

My position is that, even though law and morality are essentially different, it is difficult and at times absurd to completely alienate them from each other. Untainted positivism has implications of disregarding the merits or demerits of law and its effect on society - even across different jurisdictions. Whereas the other extreme may lead to some form of oppression as well. Thus, the Hart-Devlin Debate on the other hand was sparked off by the Report to the Committee on Homosexual Offences and Prostitution

¹⁹⁴ Lon Fuller, 'Fidelity to the law' [1957] 71 Harv. L. Rev. 630.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*, 631.

(hereinafter, the Wolfenden Report), which recommended some changes in British law on sexual offences.¹⁹⁷ The Wolfenden report was premised on these: first, that the function of criminal law as regards prostitution and homosexual offences was to '*preserve public order and decency, and to protect the citizen from what is offensive or injurious and to provide sufficient safeguards against the exploitation and corruption of others.*'¹⁹⁸ The second theory was that '*unless a deliberate attempt is to be made by society, acting through the agency of law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.*'¹⁹⁹

Even though Devlin was in favour of easing sanctions for certain homosexual crimes, he rejected the philosophy of the report. He noted that England's criminal law had from the beginning concerned itself with moral principles. He also contended that in the interest of preservation of order and the smooth running of society, certain activities had to be regulated. Hart rejected Devlin's approach decrying his views and reasoning that it was not morally permissible to enforce the tenets of morality. Devlin inquired whether there ought to be a public morality or whether morals were always a matter for private judgement. Secondly, he queried whether if society had a right to pass judgment it also maintained a right to enforce it. Third, if the second question were answered in the

¹⁹⁷ Report of the Departmental Committee on Homosexual Offences and Prostitution, 1957 (Wolfenden Report).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

affirmative, must society use this in all cases or only in some; and for what reasons may the cases be distinguished?²⁰⁰

Devlin answered his first two questions in the affirmative.²⁰¹ His view was that the Wolfenden report took the existent public morality, which condemned both homosexuality and prostitution at the time for granted. In defending his answer to the second question, Devlin noted that society may use its laws to protect morality in the same manner in which it protects other things essential to the community's existence. To the third question, he underscored the necessity to discuss how the society's moral judgements could be ascertained making reference not necessarily to the reasonable man but perhaps the man in the jury box or the “right thinking man”. Hart disagreed and felt that Devlin's approach could not adequately solve the problem. Hart argued, on various points among which was his agreement with utilitarian concepts that the punishments for sexual misdemeanours often resulted in disproportionate social misery. Hart also cautioned legislators to pause and think on what the nature of general morality is as well as the concept of the “right thinking man”.

Thus, in Chapter eight *The Concept of Law*,²⁰² captioned “Justice and Morality”, Hart once again challenges the notion that in analyzing or elucidating the concept of law, the necessary focal point is the connection between law and morality.²⁰³ He states as follows:

²⁰⁰ CURZON, *supra*, note 118, 84.

²⁰¹ *Id.*

²⁰² THE CONCEPT OF LAW, *supra*, note 74.

²⁰³ THE CONCEPT OF LAW, *supra*, note 74, Chapter VIII.

The claim that between law and morality there is a necessary connection has many important variants, not all of them conspicuous for their clarity. There are many possible interpretations of the key terms ‘necessary’ and ‘morality’ and these have not always been distinguished and separately considered by either advocates or critics. The clearest, perhaps, because it is the most extreme form of expression of this point of view, is that associated with the Thomist tradition of Natural Law. This comprises a twofold contention: first, that there are certain principles of true morality or justice, discoverable by human reason without the aid of revelation even though they have a divine origin; secondly that man-made laws which conflict with these principles are not valid law. “Lex iniusta non est lex.” Other variants of this general point of view take a different view of both the status of principles of morality and of the consequences of conflicts between law and morality. Some conceive morality not as immutable principles of conduct or as discoverable by reason, but as expressions of human attitudes to conduct which may vary from society to society or from individual to individual.²⁰⁴

Critiquing these ideas, Hart examines the concept of justice and suggests that it is essentially an element of morality and is subjective depending on the perspective one has. He uses several real-life examples like race relations, slavery and inequality between the sexes in arriving at his conclusions. He concludes that justice is only one aspect of

²⁰⁴ HART, *supra* note 74, at 156.

morality focused not on individual conduct *per se*, but rather on how classes of individuals are treated.²⁰⁵

Hart also suggests that moral rules and legal rules are both similar, but yet dissimilar. Their similarity in scope is what he attributes to their “common vocabulary”, and also the fact that conformity to both is dictated by serious social pressure. However, he differentiates law and morality in the following manner: whereas legal rules require external behavior, morality does not require any specific external action. He goes on further to examine four essential features that he believes distinguishes morality not just from law, but also from all other social rules.²⁰⁶ I therefore agree with his conclusions that some aspects or derivatives of morality are personal to the individual and may not necessarily mirror that of society. Finally, in chapter nine, Hart discusses law and morality in some more detail and concludes that any conception of law must have at its core the idea that the invalidity of a law can be distinguished from its immorality. This he says will ‘*enable us to see the complexity and variety of these separate issues; whereas a narrow concept of law which denies legal validity to iniquitous rules may blind us to them.*’²⁰⁷ Regardless of all the criticisms to Hart’s approach, I tend to agree with him on the distinction between law and morality.

²⁰⁵ *Id.* at 167.

²⁰⁶ These are: (1) importance of the moral rule; (2) immunity of morality from deliberate change unlike legal rules; (3) the voluntary character of moral offences; and (4) the form of moral pressure.

²⁰⁷ HART, *supra* note 74, at 211.

On the other hand, Lon Fuller's *The Morality of Law*,²⁰⁸ one of the most oft-cited jurisprudential works in any inquiry into the nature and character of law and its relationship with morality, essentially challenges Hart's views. Fuller's central argument revolves around eight canons of a legal system properly so-called or legal procedure for that matter. These eight canons can be deduced from the long narrative/parable about a good-natured King (Rex) who intends to make law for his subjects, which Fuller describes in the book.²⁰⁹ The canons are as follows: (1) laws should be general; (2) laws should be promulgated in a way that the citizens know the standards to which they are being held; (3) retroactive laws or rule-making and application should be minimized; (4) law should be easily comprehensible; (5) laws should not be contradictory; (6) laws should not require behavior or conduct beyond the capabilities of those affected; (7) laws should be stable and predictable i.e. they should remain constant for long periods; and (8) promulgated laws and their actual application must have a convergence point.²¹⁰

According to Fuller, failure to adhere to these eight canons essentially deprives a legal system of the legality it requires, hence his idea of the 'internal morality' of law. He puts it this way: '*A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract.*'²¹¹ This "inner" or "internal" morality of law is what according

²⁰⁸ LON FULLER, *THE MORALITY OF LAW* (1964).

²⁰⁹ *Id.* pp. 33-41.

²¹⁰ *Id.*

²¹¹ *Id.* at p. 39.

to Fuller makes law whole.²¹² Law must therefore have a moral content, which must be ensured by those who make law, who according to Fuller have a moral duty so to do.²¹³

Fuller has however been criticized for failing to adequately define his concept of morality in a clear and coherent manner. Dworkin for example states that:

It is difficult to see how the argument from Rex justifies these moral characterizations and designations: it is difficult, indeed, to see what they mean. Fuller seems not even to recognize that such terms present difficulties of interpretation—he moves from the language of strategy to the language of morals without the slightest caesura of transition. We are left on our own to work out and identify the claims latent in the terms he uses. He cannot mean, by speaking of an “internal morality” without which even bad law would not be possible, that a tyrant who curbs his instincts for iniquity only to the extent necessary to maintain a legal system has done anything morally praiseworthy.²¹⁴

H.L.A. Hart also criticizes Fuller’s internal morality of law as being ‘*unfortunately compatible with very great iniquity*.’²¹⁵

Another major work that has captivated my attention and influenced my thoughts is *The Path of the Law* by Oliver Wendell Holmes.²¹⁶ This work is striking for several

²¹² *Id.* at p. 33.

²¹³ *Id.* at p. 43.

²¹⁴ Ronald Dworkin, *Philosophy, Morality, and Law— Observations prompted by Professor Fuller’s Novel Claims*, University of Pennsylvania Law Review, Vol. 113 [1965] 668 at p. 670.

²¹⁵ THE CONCEPT OF LAW, *supra*, note 74 at p. 202.

reasons. The structure of the address and the underpinning philosophical contradictions that I believe are inherent in the work makes for interesting, but sometimes poignant reading. As a result, my critique is structured along the lines of Holmes' arguments on law & morality only; as I do not think it necessary to focus on his arguments relating to the content and growth of the law and on the study of jurisprudence.

On Law & Morality, Holmes begins by suggesting that, law is simply the study of '*dogma and systematized predictions.*'²¹⁷ By far his most famous words '*the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law*'²¹⁸ exposes us to his deep-seated belief in judicial activism, by pitting two contrasting views of law against one another i.e. judicial restraint towards legislation on one hand, and strict constructionism of legislation on another hand. Holmes suggests that the law is what the judges say it is, and not necessarily what the legislature intended it to be.²¹⁹ To buttress his point, Holmes spectacularly dispels the confusion naturally associated with the law and morality by giving us "the bad man/good man" analogy.²²⁰ We must note that, Holmes' bad man has little or no regard for morality.²²¹

Although, he admits that morality has played a crucial role in the development of the law and cannot wholly be divorced from it, he nonetheless envisages a time where

²¹⁶ O.W. Holmes, *The Path of the Law*, 10 Harvard Law Review 457 (1897). Reproduced in *The Canon of American Legal Thought* (2006) edited by David Kennedy and William W. Fisher III – from pp. 29 – 43.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

law would be devoid of the moral ambiguity that some legal concepts portend.²²² Enforceability of the law is also at the heart of Holmes argument, and I totally agree with this aspect – for what is the value of a law that is incapable of enforcement? Enforceability however, intrinsically is premised somewhat on morality. Holmes views here can thus be juxtaposed with some classical natural law theorists like Augustine & Aquinas who both suggested that an immoral law was no law at all. Thus, the right to disobey laws that are devoid of any moral content or value/that runs counter to common sense had long been established in legal thought before the time of Holmes.

Holmes also tries to draw a distinction between legal positivism and natural law. In this regard, he considers some well-established legal concepts by approaching it from the point of view of the bad man. He asks whether the bad man can draw a distinction between a penalty and a tax.²²³ In my mind, to suggest that a man of little or no morals is incapable of, or totally oblivious to the fundamental legal distinction between a tax (a compulsory levy imposed by the State to aid development) and a penalty (a punishment for breaking the law – which may be monetary in nature) suggests to me that Holmes could care less about the reasoning ability of persons not conversant with the law.

D) SEX WORK, THE LAW AND MORALITY

There are various ways of viewing sex work, leading to different kinds of reactions. If sex workers are viewed as victims it implies they have to be protected by

²²² *Id.*

²²³ *Id.*

society. If they are merely workers in a trade a different regime of protection arises. Also, if they are seen as culprits and merely as an affront to the moral standards of the society a different legal regime is employed to protect society from them. Therefore, various States have used different approaches in dealing with sex work. Most secular States are moving away from laws based on morality or religion to either the sex work model or the sexual exploitation model; while others stop at some point within the continuum between the two.

Each model corresponds with a particular legal approach. The best way to end this industry is debatable. The sex work approach favours across-the-board decriminalization with structured legalization. The goal of this model is to remove criminal sanctions from all actors in the sex industry. Consequently, sex work, under this model, will become as legitimate as any other mode of livelihood. Various countries and communities that have adopted this model in various forms include The Netherlands, Germany, New Zealand, and Victoria in Australia. Also, about ten counties in Nevada, United States, have adopted versions of this approach, although some are retreating from it.²²⁴

The sexual exploitation approach seeks to abolish sex work. However, key features of this model include criminalizing the demand (including the buyers) — as well as the sellers (pimps and traffickers), while decriminalizing prostituted people—the sold—and providing them services and job training that they require. This is popularly known as the Swedish approach as it is believed to have been pioneered in Sweden.

²²⁴ Catharine A. MacKinnon, Speech: 'Trafficking, Prostitution, and Inequality,' 46 Harvard Civil Rights-Civil Liberties Law Review 272

Countries that have adopted this model include Iceland and Norway. The U.K. seems to be leaning in this direction as well.

In August 2014, the Guardian noted that without the correct information, myths abound and debates on sex work become polarised.²²⁵ This, according to the news agency, was illustrated by the recent reactions to Amnesty International's endorsement of decriminalising sex work.²²⁶ The recommendations by Amnesty International included among others the need for States to refrain from enacting and/or review and repeal laws that make sex workers vulnerable to human rights violations.²²⁷ Also, States were to protect every individual in their jurisdiction from discriminatory policies, laws and practices which increase vulnerability to human rights violations while engaged in sex work and limit options for voluntarily ceasing involvement in sex work.²²⁸ Moreover, States were to incorporate into their strategy, the harm reduction principle.²²⁹ They are also to prevent and combat trafficking for the purposes of sexual exploitation and to protect the human rights of victims of trafficking.²³⁰

Also, States have been tasked to criminalize the sexual exploitation of children; recognizing that a child involved in commercial sex work is a victim of sexual exploitation, entitled to support, reparations, and remedies, in line with international

²²⁵ Sex workers' rights: mapping policy around the world <<https://www.theguardian.com/global-development-professionals-network/2015/sep/15/laws-against-sex-workers-can-a-map-help-to-move-the-discussion-forward>>

²²⁶ *Id.*

²²⁷ DECISION ON STATE OBLIGATIONS TO RESPECT, PROTECT, AND FULFIL THE HUMAN RIGHTS OF SEX WORKERS <https://www.amnesty.org/en/policy-on-state-obligations-to-respect-protect-and-fulfil-the-human-rights-of-sex-workers/>

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

human rights law, and that States must take all appropriate measures to prevent sexual exploitation and abuse of children.²³¹ Finally, Amnesty International urged States to take appropriate measures to realize the economic, social and cultural rights of all people so that no person enters sex work against their will or is compelled to rely on it as their only means of survival, and to ensure that people are able to stop sex work if and when they choose.²³²

Some of the reactions to this have included the reiteration of public morality. Thus, there is evidence that decriminalisation causes trafficking to skyrocket in any country – this has been noted in countries such as the Netherlands who employ the sex work model.²³³ Also, proponents of the feminist agenda such as Catherine MacKinnon, Andrea Dworkin and Katherine Berry have done extensive work in this area and also present formidable arguments for seeing sex workers - especially females - as victims (the sexual exploitation model). Mackinnon, for example, notes that whichever way sex commercialisation is regarded, it impacts not only the law but also the culture and the policy of any people. She does not contend that States should not adopt measures to realize the economic, social and cultural rights of all people so that no person enters sex work unwillingly. However, she challenges the notion that people enter into or remain in sex work willingly.

²³¹ *Id.*

²³² *Id.*

²³³ Katie Beran, 'Revisiting the Prostitution Debate: Uniting Liberal and Radical Feminism in Pursuit of Policy Reform', 30 *Law & Ineq.* 19 (2012). Available at: <http://scholarship.law.umn.edu/lawineq/vol30/iss1/2>

According to research, most sex workers enter the system as minors²³⁴ who according to many jurisdictions are incapable of consenting or willingly able to enter such a trade. Truly few people may ever enter willingly; however, many females began sex work as infants or many suffered abuse while they were minors and this has catapulted them into the trade.²³⁵ According to Mackinnon, carving out a definition of prostitution is not necessarily profitable as people usually took advantage of inadequacy of definitions to perpetuate this level of trafficking. However, she described it as essentially any sexual act, the consideration for which is not sex. Sexual intercourse is an interaction (call for and response with sex) between consenting people. Therefore, she notes, as regards the sexual act itself, that money or the consideration provided coerces the sex worker rather than guarantees their consent. When people pay for sex, they would demand value for their money. That demand is well against the will of any sex worker.

She proves this by noting that a vast majority of sex workers suffer from Post-Traumatic Stress Disorder (PTSD). The degree of their suffering is comparable to that which is suffered by victims of rape and veterans of war. This has led many of them to become dependent on drugs and pimps who would give them more drugs to numb their pain at the cost of their freedom. These facts are similar to facts gathered in Sweden according to which usually young women or girls below 25 years who were sex workers were also found to be drug addicts.²³⁶ This plunges them deeper into the sex trade. She therefore alludes to the fact that many of the female sex workers who voluntarily engage

²³⁴ *Id.*, 21.

²³⁵ *Id.*, 20-21.

²³⁶ Working Group on the legal regulation of the purchase of sexual services, '*Purchasing Sexual Services in Sweden and the Netherlands - Legal Regulation and Experiences*' An abbreviated English version of the Report (2004)

in sex work are victims, essentially blinded by a false consciousness. These facts, in her view, point to sex work as systemic dehumanisation and objectification of persons especially females regardless of their age.²³⁷

Furthermore, the concept of “elimination of harm”, which Amnesty International recommends, is not central to the sex work agenda because it is incoherent with sex for sale. It has been argued that when sex work is understood as sexual exploitation we recognise that it cannot be made safe. According to the statistics on the multiplication of trafficking, decriminalising legislation seems to be a failed experiment.²³⁸ Where pimping and brothel keeping were legalized, trafficking increased and the welfare of sex workers suffered.²³⁹ In 1999, when Sweden passed a law criminalizing the buying but not the selling of sex, many outsiders were sceptical of this regime. However, in recent times the Swedish model has gathered lots of momentum. Norway and Iceland subsequently adopted it. Critics are however of the view that, such laws increases the stigma on sex workers, with occasionally grave repercussions.

On the basis of the Utilitarian theories of Mill and Bentham, and the Deontological views of Kant, some people have suggested that sex work is unethical.²⁴⁰ Mill's theory of utilitarianism proposes the concept of a higher form of pleasure. He categorised these into two: first, duties of good-will, or benevolence, and second, duties of indebtedness or justice. Bentham subscribed to the first as well - which he referred to

²³⁷ MacKinnon, *supra*, note 224.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ Dean Loannou and Professor Campisi, 'The Utilitarian and Kantian Views on Prostitution'. (Ethics Paper, 2009).

as altruism.²⁴¹ Actions falling under the first group were benevolent; those falling under the second are righteous and compulsory, according to Kant. Kant adds that, the chief of these duties is respect for the rights of others. It is our duty to regard them as sacred and to respect and maintain them as such.

Kant also proposes a test for determining whether or not something is ethical.²⁴² The first of these is, whether the act in question allows for the universality of moral judgments, whether it is applicable to anyone, anywhere, and at anytime. The second test is whether the act deals with all persons in ways that treat them as ends. In other words, persons cannot use people for their own benefit. Applying Kant's standards, first the act sex work will be deemed unethical because it is not universal. According to Kant, if the intent of an action in question can without self-contradiction be universalized, it is morally possible; if it cannot be so universalized without contradicting itself, it is morally impossible.²⁴³ It is ridiculous to think that everyone could be a sex worker or partake in sex work. Indeed, if children began to say to their parents that they would like to be sex workers in future, many parents would either be in a state of shock or take really drastic measures to avoid this.

Kant also disagreed with the use of people to satisfy the sexual desires of others. He asked: *'May a man for instance, mutilate his body for profit? May he surrender himself at a price to the highest bidder?'*²⁴⁴ Sex work, like slavery, consists of one person

²⁴¹ CURZON, *supra*, note 118, 70.

²⁴² *Id.*, 80.

²⁴³ *Id.*

²⁴⁴ Loannou, *supra* note 240.

selling their body to another and this violates even their duty to themselves, according to him. He underscored that, *'If a man for gain or profit submits to all indignities and makes himself the plaything of another, he casts away the worth of his manhood.'*²⁴⁵ Kant's position is that sex workers give up their freedom and perhaps give away bits of their person because of the inherent objectification. Kant adds that sexual love makes the person an object of appetite, and as soon as that appetite has been stilled the person is cast aside as one cast away a lemon which has been sucked dry.²⁴⁶

It has thus been suggested that sex workers have enormously restricted life choices, and many of these women have been physically coerced into the profession. Coupled with statistics on Post Traumatic Stress Disorder (PTSD), stigmatisation and the prevalence of diseases such as HIV/AIDS, sex work seems to cause more pain than pleasure. While it causes one party pleasure, which may be fleeting, it is argued that it causes the other equal - if not more - pain. To some writers these qualities negate each other. Using this analysis, some have argued that Bentham, Mill and Kant would oppose sex work because of its lack of utility and because it is unethical.²⁴⁷

It is important to however note that most of the theoretical frameworks regarding violence against women emanated from feminist theories.²⁴⁸ Feminist theory is broad and largely inter-disciplinary in approach. Its goal is to understand

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ Lara Gerassi, 'A Heated Debate: Theoretical Perspectives of Sexual Exploitation and Sex Work' (NBCI, HHS Public Access, 2015) <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4730391/>> Accessed on 13th November, 2017

the roles, experiences, and values of individuals on the basis of gender.²⁴⁹ In the arena of sexual exploitation, the main feminist question is whether sex work or any exchange of sex for something of financial value is or can be voluntary.²⁵⁰ This discussion actually sets the tone on what legal approach should be used by States in addressing issues regarding sex work. With regard to sexual exploitation or sex work, scholars and advocates are generally divided into two opposing theoretical camps. One group condemns all forms of voluntary and involuntary sex work as a form of oppression against women. This group is usually referred to as neo-abolitionists. According to them, sex work is never entirely consensual and cannot be regarded as such.²⁵¹ The other group contends that a woman has a right to choose sex work as a form of employment or even as a career.

Out of these two camps, four strands of feminism have however been identified, each of which approaches the issue of sex work somewhat differently, according to Professor Patricia Cain.²⁵² They are Liberal, Cultural, Postmodern and Radical feminism. Liberal feminism concerns itself with equal rights and opportunities and the intensification of constitutional rights to women. Radical feminism on the other hand stresses that women must be perceived as one class dominated by another (Marxist feminism), with resulting class struggle. It also advocates changes in laws that favour the male class to curtail inequalities of

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² CURZON, *supra*, note 118.

power.²⁵³ Neo-abolitionist perspectives with regard to sexual exploitation of women and girls emerged from Radical and Marxist feminism. Radical feminism sees social organization and structure as inherently patriarchal, as sexism exists to maintain male privilege and the patriarchal social order.²⁵⁴ This theory stipulates that violence against women is a systemic form of men's domination and social control of women. Thus, assaults occur primarily because of institutionalized male privilege, as men believe it is their right to inflict violence against women.

The perception is that sexual commerce provides a patriarchal right of access to women's bodies. Hence, it perpetuates women's subordination to men.²⁵⁵ Like radical feminism, Marxist feminism is another neo-abolitionist stance that generally views all forms of sexual commerce as a form of violence against women. Marxist feminists have contended that sexuality corresponds to feminism in the way work does to Marxism i.e. that which is most one's own and yet is taken away.²⁵⁶ According to Marxist feminism, women's oppression stem from economic dependence on men in a male-centric society²⁵⁷ and capitalism continues to be the overarching oppressor of women. Marxist feminists thus postulate that for so long as capitalism exists, women will live in a patriarchal state and economically depend on men in a society structured around social class.²⁵⁸

²⁵³ Gerassi, *supra*, note 248.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

Flowing from this, Marxist feminists believe that economic exploitation takes up many forms such as sex work and pornography. This to them is the oppression of sex and class as *'Women's sexuality and sexual energy is appropriated by the men who buy or control the sexual services exchange (i.e., pimps) just as any worker's energy is appropriated to the capitalists for their profits, leading to alienation of one's bodily capacities and very bodily being.'*²⁵⁹ Catherine MacKinnon, who has been described as a Marxist feminist legal scholar, argues that all forms of pornography, sex work, and sex trafficking are abuses of sex and a form of power taken away from women.²⁶⁰

Critics have however argued that these forms of feminism do not support the autonomy of women currently or previously engaged in sex work when they choose to leave the field or provide any subsequent form of advocacy work.²⁶¹ In response to these criticisms, and adding to an entrenched debate of feminism, choice, and freedom, a new feminist framework arguing for women's right to choose sex work has emerged.²⁶² The pro-sex work perspective, or sex positivism is one of its off shoots.²⁶³ Advocates of this perspective hold that all forms of sexuality – whether paid or unpaid is consensual in many cases and that a woman should be free to make her own decision regarding the type of work in which she chooses to partake.²⁶⁴ According to this school of thought, any mandate or perspective dictating to women that their choice of work is wrong remains

²⁵⁹ *Id.*

²⁶⁰ MacKinnon, *supra*, note 224.

²⁶¹ Gerassi, *supra*, note 248.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

dangerous and inherently patriarchal.²⁶⁵ Sex positivists shift the model of sex work from a typically neo-abolitionist model that rescues and protects victims from sex work and sexual exploitation to providing services for women who work in the sex industry.²⁶⁶

The Neo-abolitionist view is very critical of sex positivism however, hence the tension in the approach of dealing with pornography and sex work.²⁶⁷ Mackinnon argues for example that the presence of consideration creates a demand for sex and negates consent.²⁶⁸ The consent is purchased as opposed to being granted. Others have argued that sex positivism and the issue of consent cannot be addressed without also considering the high rates of sexual assault and abuse histories, in addition to a lack of economic options.²⁶⁹ Moreover, some religious organizations contend that this framework jeopardizes sexual integrity on a national level because moral culture is damaged when sex becomes commercialized.²⁷⁰

Intersectionality, as another model of conceptualizing sex work, adopts various opposing feminist views to explain a woman's varied experiences based on her race, class, sexual orientation or other identity she holds in addition to her sex.²⁷¹ This framework has been criticized for its lack of a defined intersectional methodology and empirical validity, and the fact that, primarily, it has been used to address Black women's

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

experience and is not politically and empirically inclusive of other identity intersections, such as sexual orientation or race.²⁷² It is further criticized for contributing to or creating additional hierarchies for women.

On another hand, the political economy perspective or framework recognizes important principles of intersectionality and argues that violence against women occurs because of the economic welfare and political processes driving the State.²⁷³ Marxist feminism and the political economy perspective are alike in this sense. However, the political economy perspective is mainly based on capitalistic differences in wealth alone, as opposed to systemic oppression against women, which are engendered by disparities in wealth. They highlight the lack of cultural or social capital of women who struggle against economic, social, and sexual oppressions. They believe that women are compelled to sell sexual or erotic services because the political environment at the policy level does not offer equal opportunities for women to gain social capital generally.²⁷⁴ This framework like the Marxism or Radical Feminism also questions the woman's ability to choose. For this reason, they face similar criticism on those grounds.

These contrasting theoretical frameworks drive the debate with regard to the prohibition, decriminalization, partial criminalisation, partial legalization, or complete legalization of prostitution and commercial sex work. Although various States apply the

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

theories in variant forms, the debate would never really end.²⁷⁵ With the exception of parts of Nevada, the United States currently maintains a prohibitionist stance on sex work, as anyone who participates in the promotion or participation of sexual activities for profit in the U.S. may be charged with prostitution and commercial vice. No distinction is made between those who buy, sell, or facilitate the selling of sex acts. Exceptions include cases that involve: (1) minors, in which any commercial sex act is illegal; and (2) adults, only when elements of force, fraud, or coercion are present. Many other States adopt this model.²⁷⁶

Those who support prohibition of sex work base their arguments on the high rates of homelessness; mental health trauma, drug addiction and sexual/physical assault over the course of sex work and indicate that most people engaged in sex work do not freely consent.²⁷⁷ According to them, legalization and decriminalization would not decrease its harm to women and girls.²⁷⁸ The Sex positivist movement however argues that countries like the U.S. set a high standard or burden of proof for trafficking victims and criminalize the activities of women who sell sex and those who may also be in need of services. Also, because sex workers would have a criminal record they may never be able to exit the trade. Others argue that these standards are detrimental to women because they are viewed and treated as criminals unless there is proof of force or coercion.²⁷⁹

²⁷⁵ *Id.*

²⁷⁶ Cheryl Overs, Sex workers' rights: mapping policy around the world (The Guardian 2015) <<https://www.theguardian.com/global-development-professionals-network/2015/sep/15/laws-against-sex-workers-can-a-map-help-to-move-the-discussion-forward>> Accessed on 5th November, 2017

²⁷⁷ Gerassi, *supra* note 248.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

CHAPTER THREE

THEORETICAL FRAMEWORK: A NEW MORALITY

A morally neutral public policy framework underpinning laws is an ideal that many scholars in recent times have argued is impossible to achieve and even undesirable.²⁸⁰ Some commentators even suggest that it amounts to a moral claim to suggest that law ought to be neutral.²⁸¹ However, in advocating for “moral neutrality” and a public policy regime for regulating human conduct with that as its basis, I am not suggesting that there is a universally accepted construct of morality, free from value judgments. What I however mean and intend to do is to remove or dissociate the underlying “moral” content of some laws which are predicated on religious and/or cultural conceptions of morality, from the conduct that is the subject matter of the law in question or the criminal prohibition thereof.²⁸² Thus, the conduct devoid of religious and/or cultural overtones will then have to be examined within the context of our pluralistic society in order to determine the values that must replace or augment some aspects of the religious and/or cultural values that usually frown upon or prohibit such conduct.

Social mores however are usually developed over a long period of time and in many instances have been entrenched without much debate. In Ghana for instance, the impact of religion is arguably part and parcel of the identity of the people.²⁸³ Many

²⁸⁰ See, G.V. BRADLEY, *ESSAYS ON LAW, RELIGION AND MORALITY* (2014).

²⁸¹ See, Robert P. George, ‘Marriage and the Illusion of Moral Neutrality’, in *Toward the Renewal of Civilization* 114, 124-27 (T. William Boxx & Gary M. Quinlivan eds., Eerdmans Pub. Co. 1998).

²⁸² The specific focus of my analysis, which is explored further, in Chapters 5 and 6 of this dissertation is the prohibition of sex work under the Criminal Offences Act of Ghana.

²⁸³ According to the 2010 Population and Housing Census conducted throughout Ghana, out of the total population of 24,658,823, 71.2% of Ghanaians (17,546,837) profess to be Christians; whilst 17.6%

Ghanaians are therefore not afraid to tout their religious beliefs and be guided in their day-to-day interactions adhering to religion imposed moral codes. As an undergraduate student at the University of Ghana a few years ago, I once interacted with another student who vehemently opposed any notion that the supreme law of Ghana was the Constitution, 1992. To this person, as a Christian, it was the Bible that was the supreme law and no human or earthly edict could claim supremacy over it. I was at pains to explain the position that Ghana was a secular state and as such it was the Constitution that was the supreme law; but I was rebuked and described as a blasphemous person for daring to suggest what I was suggesting.²⁸⁴ Such is the common misunderstanding and blurring of the lines and issues that is commonplace within the Ghanaian society where secular law and religion conflate.²⁸⁵

Similarly, Ghanaians are proud to boast of our culture, which we deem virtuous and which influences our views and opinions regarding contemporary and controversial issues.²⁸⁶ Cultural validity is thus a jealously guarded treasure of national import, and this has been the justification for the condemnation of several conduct that do not meet standards of our conception of cultural morality.²⁸⁷ Thus, cultural morality continues to

(4,345,723) are Muslims. Traditionalists account for 5.2% (1,270,272) of the population, whereas other religions account for 0.8% (193,914) of the population. Interestingly, only 5.3% (1,302,077) of Ghanaians have no religion or religious affiliation whatsoever. *See* GHANA STATISTICAL SERVICE, 2010 POPULATION & HOUSING CENSUS: SUMMARY REPORT OF FINAL RESULTS (2012).

²⁸⁴ It is a notorious fact that in Ghana, many religious people (particularly Christians) hold similar views especially where the secular law purports to set standards that are contrary to Christian beliefs or ethics.

²⁸⁵ Maame A.S. Mensa-Bonsu & Samuel Nartey, 'Though we are many, we are one body – Under the Constitution' (*Citifmonline*, 21 April 2015) <<http://citifmonline.com/2015/04/21/though-we-are-many-we-are-one-body-under-the-constitution/>> accessed on 10 October 2017.

²⁸⁶ Ghana News Agency (GNA), 'Ghana Must Sustain Culture for Future Generation' (*Peacefmonline*, 2 August 2013) <http://www.peacefmonline.com/pages/local/social/201308/170656.php> accessed on 10 October 2017.

²⁸⁷ It is not unusual to hear many Ghanaians suggest that prostitution or sex work is immoral and culturally unacceptable, for example.

be one of the underlying values that influence public policy making, which in turn justifies the existence of certain laws.²⁸⁸ The questions that need to be addressed as a result are as follows: should conceptions of religious and cultural morality continue to be the only factors that determine public policy, and subsequently determine conduct that are deemed not to be in the public interest and as a result criminalized? If the answer to this first question is in the negative, then what other variables must we consider in public policy making?

In this chapter, I delve into public policy making and examine certain *prima facie* “morally neutral” variables which I believe must be considered and balanced against the religious and cultural justifications that will continue to play a role where the morality of Ghanaian laws and specific intimate conduct are concerned.²⁸⁹ I thus examine sexual morality generally, from the religious and cultural perspectives, and briefly discuss feminist jurisprudential thoughts within this field as well. In order to propose my framework for the proper regulation of sexual morality, I draw inspiration from the making of the Universal Declaration of Human Rights (UDHR), which is significant because many diverse groups of people for the first time were able to agree on a framework for the promotion and protection of human rights, despite their many differences including religious, cultural, language and other barriers.²⁹⁰ The lessons from

²⁸⁸ The prohibition of unnatural carnal knowledge for example, has been justified by many in the sense that it is claimed that such acts are foreign to Ghanaian and African culture, beliefs and practices.

²⁸⁹ It is not my intention to advocate for a complete rejection of religious and/or cultural values as justification for laws generally in Ghana, as I am aware of the fruitlessness of such a venture within the Ghanaian social context. What I seek to do however is to start a conversation on the limits of religion and culture as the primary influencer of public policy making in the pluralistic society of Ghana.

²⁹⁰ Even though the UDHR was not intended from the onset to be a binding legal document, its impact on contemporary human rights activism cannot be overstated. I therefore use it as the standard and launchpad for developing my theory of moral neutrality where the criminal law is concerned.

the UDHR drafting process are important because it shows the possibility of achieving a rational public policy framework for the regulation of controversial human conduct involving individual autonomy.²⁹¹

In summary, my proposal for a new form of morality first considers that all human beings are created and born equal. Equal in dignity, equal in rights, and equal in terms of their individuality and the ability to potentially act in an autonomous manner free from external influence. Thus, Dignity, Individual autonomy and Equality (D.I.E.) are the core standards and variables that I propose must be considered when determining the morality of laws generally. Intimate human conduct, involving no victims *per se*, which is sought to be regulated through the criminal law must measure up to these standards. Hence, the criminalization must ensure dignity, not unreasonably be an affront to individual autonomy, and must have the quality of equality about it. I therefore postulate that it is only when these values subsists in the law that the religious and cultural conceptions of morality underpinning the law in question can be deemed valid. The absence of these fundamental human values invalidate, in my opinion such repressive laws, for religious and cultural conceptions of morality alone cannot be a good yardstick for social ordering.

A) SEXUAL MORALITY GENERALLY

²⁹¹ The fact that many different States and peoples from almost all parts of the world were able to agree on a 'Universal' standard for human rights protection is a lesson that must be applied in contemporary public policy making.

The Black's law dictionary offers three very general definitions of the word “morality”. It describes it as '*conformity with recognized rules of conduct*' or as '*the character of being virtuous especially in sexual matters*.'²⁹² According to its third definition, “morality” is a system of duties or ethics.²⁹³ The origins of the word morality can however be traced to the Latin word *Mos* (plural *Mores*) which means customs or people's values and traditions, people's heritage or ways of life and conduct in a given community.²⁹⁴ Although these definitions seem helpful in describing morality generally, and examples of moral conduct and behaviour, morality is generally a very subjective concept or ideal that differ from person to person, community to community etc. However, the general consensus is the fact that the word encompasses some core values that individuals and communities accept as regulating their day to day lives. It is likely for this reason that many scholars from time immemorial have equated morality to moral law.²⁹⁵ They equate morality with a system of law or regard it as a species of internal legislation.²⁹⁶ Taylor expresses this succinctly by suggesting as follows:

The jurist inevitably gravitates towards the view of morality as a code of rules of conduct, either established directly by divine legislation, or revealed by reason. For him all the significance of morality is contained in the moral law, and is summed up in a series of comprehensive 'Thou-shalt-not's'.²⁹⁷

²⁹² *Black's law dictionary*, (8th edition, 2004).

²⁹³ *Id.*

²⁹⁴ John Mary Waliggo (Rev. Prof.), 'Law And Public Morality In Africa: Legal, Philosophical And Cultural Issues' (The ALRAESA Annual Conference, Entebbe, September, 2005).

²⁹⁵ T. W. Taylor, Jnr, *Morality And Jurisprudence: The Conception of Morality in Jurisprudence* (Jan., 1896) 5 *The Philosophical Review* 1, 36-50.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

The definitions of morality inevitably highlight its communal nature. Indeed the term “public morality” has been used to describe *‘the total set of ethical-moral, legal-human rights values, customs or traditions which define, describe, promote and defend a given society’s or community’s common good, shared values and vision, their public ethos, and the common pursuit of the good in order to achieve their full potential and civilization.’*²⁹⁸ However, it must be noted that it is individuals that come together to form communities, societies and ultimately States. Thus, a collective sense of public morality has invariably been recognized as the standard, which regulates behaviour and values of both the community and the individual.²⁹⁹

Many, including the present author, however hold the view that moral values vary from community to community and from time to time.³⁰⁰ However, especially with regard to Africa, Professor John Waliggo has noted that among people who share a common heritage, cultures or religious beliefs, some of these values cut across communities.³⁰¹ For others, the prevalent law is the determinant of what the standard of morality for the community is.³⁰² In other words, law determines what standard of morality prevails within the time and space in which the law is operating.³⁰³ The general idea of the link between law and morality is that in some way the law exists to *‘promote morality, to preserve those conditions which make the moral life possible, and thus to enable men to lead sober and industrious lives. The average man regards law as justice*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ Law and Public Morality in Africa, *supra*, note 294.

³⁰² Kimberley Brownlee and Richard Child, 'Can the Law Help Us to be Moral?' Warwick School of Law Research Paper No. 2012/17.

³⁰³ *Id.*

*systematized, and justice itself as a somewhat chaotic mass of moral principles.*³⁰⁴ That notwithstanding, morality is not only a community based or public phenomenon. This idea has however been debated and questioned in legal scholarship due to the difficulty in ascertaining especially for pluralistic communities what the moral standard is at any given time.³⁰⁵ Indeed it was the crux of the debate between Hart and Devlin in regard of the Wolfenden report.³⁰⁶

John Stuart Mill for instance is known for his criticisms of collective or public morality whilst advocating for a system of individualized or personal morality.³⁰⁷ Mill notes that the tyranny of the majority can likely operate not only through laws or acts of the public authorities, but also through society's collective tyranny over individuals within it.³⁰⁸ He noted that a social tyranny, more formidable than many kinds of political oppression, could exist where societies enforce their own commands or customs.³⁰⁹ Although such rules may not attract extreme penalties, Mill noted that such community-wide "accepted" norms make few exceptions, infiltrate the details of life and enslave the soul itself.³¹⁰ His concern seems to flow directly from the manner in which these collective commands or values infringe on the independence of individuals without limits. Mill thus manages to secure a basis for protecting fundamental human rights of minorities especially within Bentham's Utilitarian school of thought.³¹¹

³⁰⁴ Taylor, *supra*, note 295, 36-50.

³⁰⁵ CURZON, *supra*, note 118, 225-229.

³⁰⁶ *Id.*

³⁰⁷ JOHN STUART MILL, ON LIBERTY (1859).

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

This human rights consideration is important because sex or sexuality are usually very sensitive topics, and more so within an African context. Sexuality is by far the most intimate feature of humanity.³¹² People usually guard their sexual secrets and intimate experiences very closely. They may do this so well that even their partners in long-term relationships, may never share all their sex related experiences, or admit to themselves their longings for a particular kind of arousal or pleasure, because it seems inappropriate.³¹³ In fact, a few decades ago, women usually had difficulty with acknowledging to themselves that sex was in general something they wanted.³¹⁴ In Ghana for instance, women have been socialized from time immemorial to believe that actively discussing sex or having sexual desires was attitude unbecoming of a good woman. Thus, the patriarchal nature of the society dictates that it is men who should want and freely talk about sex without any consequences whatsoever.

It is however a fallacy to pretend that only men have sexual desires, or can appropriately voice out such desires. In fact, a few years ago a number of international experts at a meeting convened by the World Health Organization (WHO) adopted a definition that addresses sexuality on four different levels:³¹⁵ 1) Sexuality is a central aspect of being human throughout life and encompasses sex, gender identities and roles, sexual orientation, eroticism, pleasure, intimacy and reproduction; 2) Sexuality is experienced and expressed in thoughts, fantasies, desires, beliefs, attitudes, values, behaviours, practices, roles and relationships; 3) Sexuality is influenced by the interaction

³¹² OSMO KONTULA, *BETWEEN SEXUAL DESIRE AND REALITY: THE EVOLUTION OF SEX IN FINLAND* (2009).

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ World Health Organization, *Defining Sexual Health: Report of a Technical Consultation on Sexual Health*, 28-31 January 2002, Geneva, Switzerland.

of biological, psychological, social, economic, political, cultural, ethical, legal, historical and religious and spiritual factors; and 4) Sexuality includes the basic need for human affection, touch and intimacy, as consciously and unconsciously expressed through one's feelings, thoughts and behaviour.³¹⁶

Sexuality therefore may either bring joy, happiness and fulfilment or pain and suffering as the case may be. Sexual experiences vary greatly and as a result it is difficult to determine the utility of sexual acts since these are the most private of human behaviour. However, it cannot be dismissed that certain values cut across the various communities of the world, as a result of our common humanity, religion, culture etc. The issues that must however be addressed regarding the morality of sexual conduct are: 1) whether there a universally accepted construct of what is sexually moral conduct; and 2) If there is, to what extent are they divergent? For natural law theorists and thinkers, legislation must always be in conformity with principles of morality. After experiencing the Nazi tragedy, the German philosopher, Gustav Radbruch, was of the view that *'the fundamental principles of humanitarian morality were part of the very concept of legality and that no positive enactment or statute, however clearly it expressed and however clearly it conformed with the formal criteria of validity of a given legal system, could be valid if it contravened the basic principles of morality'*.³¹⁷

³¹⁶ *Id.*

³¹⁷ Law and Public Morality in Africa, *supra*, note 294.

Traditional African culture seems to embrace this position in that they emphasize morality more than legislation.³¹⁸ In Africa children are socialized from a tender age to acquire habits, attitudes, beliefs, skills and motives that enable them fit into the community. Morality has been and remains an integral part of African communities.³¹⁹ Contrary to Austin's argument that law is a command of the sovereign backed by sanctions, in traditional African societies, there seems to be no clear-cut distinction between law and morality since the rules of moral conduct in a way amount to law.³²⁰ Usually, if a person behaves contrary to moral standards, they would be isolating themselves from their community and the society was structured such that no one could exist outside a community.³²¹ For this reason, banishment or exclusion of a person from their community or communal life was a grave punishment feared by all.³²² This also perhaps explains the nature of some of our laws criminalizing sexual behaviour such as sex work and unnatural carnal knowledge.

Sexual Morality is however one of those concepts that remains very controversial and topical all around the world. Even in countries with liberal policies regarding sex and its many manifestations, there remains some form of State control over sex, and its expressions thereof.³²³ Thus, the question of what is sexually moral generally, and to wit private individual sexual morality takes on a whole new dimension when viewed, for example, within the context of State laws that criminalize private consensual homosexual

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.*

³²³ The United States is a typical example, where commercial sex work is essentially prohibited.

acts, private consensual heterosexual acts that are not in conformity with “traditional” forms/notions of sex, and even sex work.³²⁴ By far, religious and cultural conceptions of sexual morality are what have greatly influenced the outward prescription of a uniform code of sexual morality in a country like Ghana; therefore “officially” subjugating the individual’s inherent propensity to be “sexually immoral”, in line with the religious and cultural proscriptions.

Feminist jurisprudential thought has also arguably contributed greatly to the issue of sexual morality, although this is not an aspect of legal philosophy that much attention has been paid to within the Ghanaian legal academy. However, any discussion of the regulation of sex work will be incomplete without engaging that strand of feminist jurisprudence that asserts that sex work fits into the patriarchal nature of almost all societies, and that it maintains male dominance over females, is degrading, dehumanizing and treats women merely as objects of male desire in the same way as pornography does.³²⁵ To this strand of feminism, it is the historical heterosexual male erotic desire that has systematically transformed women into mere pleasure objects.³²⁶ Women who engage in sex work freely and voluntarily are thus considered as victims who have been coerced into that line of work as a result of societal patriarchy and male subjugation of women generally.³²⁷ The partial truth in this statement is quite evident, as admittedly women have generally been oppressed and discriminated against from time immemorial, in terms of employment opportunities, for example.

³²⁴ Ghana is an example of a State where sexual morality is essentially regulated through the criminal law.

³²⁵ Catherine MacKinnon is one such proponent of Radical Feminism.

³²⁶ Laurie Shrage, *Exposing the fallacies of Anti-Porn Feminism*, *Feminist Theory* 2005; 6; 45 – critiquing Catharine MacKinnon’s ‘Kantian’ based theory of sexuality.

³²⁷ *Id.*

However, there has always been another wave of feminism (sex-positive feminism) that believe that women who choose to engage in sex work must not be considered as oppressed, coerced or even victims *per se*, but rather should be seen as expressing their inherent sexual freedom and/or making rational economic decisions.³²⁸ Hence, male subjugation of women is what has actually led to female empowerment in the field of sex work for example, manifested by the proliferation of sex worker activists and movements across Africa for instance.³²⁹ Similarly, this movement is further fueled by the attempt by the same male dominated society to redress the social inequalities it created, through rehabilitation programs for sex workers, which in itself arguably continues the trend of male dominance and female subjugation. Chi Mgbako puts it in the following manner:

In order to be eligible for a rehabilitation program's skills-training courses, participating sex workers often must agree to stop engaging in sex work. But there's long been a running joke among sex workers that participants in these programs do so during the day only to surreptitiously return to the streets at night where they continue to earn more money through sex work. The reason many sex workers in rehabilitation programs revert to sex work is that the income from these programs' alternative livelihoods simply can't match the money sex workers make. As I've noted in earlier chapters, African sex workers who enter the industry are in many cases choosing sex work over other forms of low wage work because sex work pays more. They are making economic decisions that are utterly

³²⁸ CHI A. MGBAKO, *TO LIVE FREELY IN THIS WORLD: SEX WORKER ACTIVISM IN AFRICA* (2016).

³²⁹ *Id.*

rational in light of the financial pressures they face. This same economic rationale applies to the rehabilitation context. A sex worker with financial responsibilities will likely not permanently leave the industry if the beadwork or candle-making skills she's acquired through a rehabilitation program don't generate the type of income she enjoys as a sex worker.³³⁰

It is clear therefore that sexual morality is a contested claim even within feminist jurisprudential thought, as the anti-pornography/anti-prostitution wing and the sex-positive feminist have engaged in the so-called "sex wars" for more than three decades. Hence, these seemingly contradictory positions must also be briefly explored, together with the religious and cultural conceptions and understandings of sexual morality in order to fully appreciate the landscape regarding sexual morality generally, so as to present us with a backdrop from which the proposal for a rational public policy framework for regulating or de-regulating sexual morality may be made.

1. *Religion and Sexual Morality*³³¹

Religion is a great force that from time immemorial has influenced and continues to influence human conduct and behavior. As already noted, many Ghanaians profess to be religious and thus largely belong to one religious group or another. Many therefore acknowledge religious conceptions of morality as being the standard by which activities like sexual conduct must be measured against. Indeed, almost all the major religions of

³³⁰ *Id.* 164.

³³¹ The focus here is on Christianity and Islam, because they represent the largest religious denominations that a majority of Ghanaians are associated with.

this world conceive of sexual morality within the context of marriage; non-conformity amounts to sexual immorality and is thus frowned upon.

In Christianity for example, sex is the preserve of married heterosexual couples. Infidelity, adultery and even pre-marital sex are greatly frowned upon. Similarly, homosexuality, sex work and other forms of non-procreative sex are all abhorred and participants in these “deviant” expressions of sexuality are rebuked and considered immoral persons. Thus, according to PG Nelson there are eleven (11) sexual prohibitions in the Bible that essentially confine sexual activity to marriage with the intent of protecting married life.³³² They are: Adultery;³³³ Bestiality;³³⁴ Homosexuality;³³⁵ Incest;³³⁶ Pre-Marital Sex;³³⁷ Prostitution;³³⁸ Rape;³³⁹ Shrine Prostitution;³⁴⁰ Transvestism;³⁴¹ Unclean Acts;³⁴² and Violation of Betrothal.³⁴³

These manifestations of sex, sexuality or incidents of both are prohibited in Christianity because of their inherent immorality. Thus, Christians must therefore refrain from the doing of any of these acts; and there is no doubt that Judeo-Christian beliefs in this regard have from time immemorial been the basis for laws that seek to criminalize

³³² PG Nelson, *Jesus's Teaching on Divorce and Sexual Morality*, 2nd Ed. 1996.

³³³ See Exodus 20:14; Leviticus 18:20; and Deuteronomy 5:18.

³³⁴ Leviticus 18:23; and Deuteronomy 27:21.

³³⁵ Leviticus 18:22.

³³⁶ Leviticus 18:6-18; Deuteronomy 22:30; 27:20, 22-23.

³³⁷ Exodus 22:16-17.

³³⁸ Leviticus 19:29; and Deuteronomy 23:18.

³³⁹ Deuteronomy 22:25-19.

³⁴⁰ Deuteronomy 23:17.

³⁴¹ Deuteronomy 22:5.

³⁴² Leviticus 18:19.

³⁴³ Deuteronomy 22:23-27.

certain sexual behavior and/or regulate such conduct. But by far the most important fact about sexual morality within the context of Christianity is the marriage nexus that it espouses. Thus, sex or all forms of expressions of human sexuality thereof must conform to certain laid down standards and must occur within the context of marriage between a man and a woman.

i. Christianity and Sexual Morality

In Christianity, every moral question is necessarily connected with the Christian God at some point because it is He that created everything including sex. For instance, Ravi Zacharias a Christian apologist in a talk on Absolute Moral Law & the existence of God, in answering a question on why there is so much evil if God exists noted as follows:

If there is a thing as evil, there is a thing as good. If there is a thing as good, there is a thing as a moral law which provides the standard by which we ascertain that there is good or evil. If there is a moral law, then there is a moral law giver.³⁴⁴

Indeed, Jesus Christ summed up the Christian moral law into two distinct, but interconnected parts in the New Testament.³⁴⁵ First is to love God with all of one's heart, soul, and strength and the second was to love thy neighbour as thyself.³⁴⁶

³⁴⁴ Ravi Zacharias, 'Absolute Moral Law & the Existence of God', <
https://www.youtube.com/watch?v=dXxc4_lxNnk> Accessed on 1 December, 2017.

³⁴⁵ The Bible, Matthew 22: 37-40 New International Version.

³⁴⁶ *Id.*

Another Christian philosopher differentiates between laws.³⁴⁷ C. S. Lewis notes that there are laws peculiar to man's human nature that is not shared with animals or vegetables or inorganic things, and man can disobey if he chooses. He notes that it was previously referred to as the law of nature because people thought that everyone knew it by nature and did not need to be taught it. He acknowledged that just as there are a few people who are colour-blind or have no ear for a tune there must definitely have been some individuals who did not know this law of nature. However, generally, the human idea of decent behaviour was obvious to everyone. According to Lewis, if these were not right, the First World War would be nonsense. He notes that there was no sense in *'saying the enemy were in the wrong unless right is a real thing which the Nazis at bottom knew as well as we did and ought to have practised.'*³⁴⁸

Due to differences in civilisations and different ages, culture, beliefs and self-relativist ideas, the idea of a law of nature or decent behaviour known to all men appears unsound, and many argue that there are, have been and will be different moralities. Lewis however notes that though there have been differences between their moralities, these have never amounted to anything like a total difference. According to him, the moral teaching of the ancient Egyptians, Babylonians, Hindus, Chinese, Greeks and Romans, are similar to each other as well as to ours.³⁴⁹ He also points to human anxiety as regards their eagerness to make excuses or shift responsibility for not having behaved decently as another pointer to human conception of a general law of nature. He underscores the two points: *'First, that human beings, all over the earth, have this curious idea that they*

³⁴⁷ C. S. Lewis, *Right and Wrong: A Clue to the meaning of the universe*.

³⁴⁸ *Id.* 9.

³⁴⁹ *Id.*

*ought to behave in a certain way, and cannot really get rid of it. Secondly, that they do not in fact behave in that way. They know the Law of Nature; they break it.*³⁵⁰

Lewis thus fully agrees that we learn the rule of decent behaviour from parents and teachers, and friends and books, as we learn everything else. However, according to him, some of the things we learn are mere conventions which might have been different: such as learning to keep to the left of the road, but it might just as well have been the rule to keep to the right. He distinguishes this from other facts of humanity such as mathematics, which he refers to as real truths.³⁵¹ He further argues that if this were not the case, there could never be any moral progress. He defines progress not just as change, but change for the better. Flowing from these he argues that if no set of moral ideals were truer or better than any other, there would be no sense in preferring civilised morality to savage morality, or Christian morality to Nazi morality. He points out the fact that all humans believe that some moralities are better than others. He then adds that once a set of moral ideas can be better than another, it is in fact implied that both ideas are being measured by a standard; with the undeniable conclusion being that one of them conforms to that standard more nearly than the other.³⁵² Essentially he argues that it is one thing to implicitly admit that there is some higher standard and quite another thing to admit that because of reasons that we may give, we may prefer other standards.

With regard to Christian sexual morality, Lewis notes that this must not be confused with the social rule of "modesty" or propriety/decency. He describes the social

³⁵⁰ *Id.*10.

³⁵¹ *Id.*13.

³⁵² *Id.*13.

rule of propriety for example as those rules that lay down how much of the human body should be displayed and what subjects can be referred to, and in what words, according to the customs of a given social circle. He underscores that even though the rule of chastity has been the same for all Christians at all times, the rule of propriety changes. He gave the following example:

A girl in the Pacific islands wearing hardly any clothes and a Victorian lady completely covered in clothes might both be equally "modest," proper, or decent, according to the standards of their own societies: and both, for all we could tell by their dress, might be equally chaste (or equally unchaste). Some of the language which chaste women used in Shakespeare's time would have been used in the nineteenth century only by a woman completely abandoned. When people break the rule of propriety current in their own time and place, if they do so in order to excite lust in themselves or others, then they are offending against chastity. But if they break it through ignorance or carelessness they are guilty only of bad manners. When, as often happens, they break it defiantly in order to shock or embarrass others, they are not necessarily being unchaste, but they are being uncharitable: for it is uncharitable to take pleasure in making other people uncomfortable. I do not think that a very strict or fussy standard of propriety is any proof of chastity or any help to it, and I therefore regard the great relaxation and simplifying of the rule which has taken place in my own lifetime as a good thing.³⁵³

³⁵³ *Id.* 54.

Lewis also describes chastity as the most unpopular of the Christian virtues. He sums it up as follows: '*Either marriage, with complete faithfulness to your partner, or else total abstinence.*' He observes that this is so difficult and so contrary to our instincts that one may conclude that either Christianity is wrong or our sexual instinct, as it now is, has gone wrong.³⁵⁴

In his view, human appetite is in ludicrous and preposterous excess of its function. To illustrate this he notes as follows:

You can get a large audience together for a striptease act — that is, to watch a girl undress on the stage. Now suppose you came to a country where you could fill a theatre by simply bringing a covered plate on to the stage and then slowly lifting the cover so as to let everyone see, just before the lights went out, that it contained a mutton chop or a bit of bacon, would you not think that in that country something had gone wrong with the appetite for food? And would not anyone who had grown up in a different world think there was something equally queer about the state of the sex instinct among us? If the evidence showed that a good deal was being eaten, then of course we should have to abandon the hypothesis of starvation and try to think of another one. In the same way, before accepting sexual starvation as the cause of the strip-tease, we should have to look for evidence that there is in fact more sexual abstinence in our age than in those ages when things like the strip-tease were unknown. But surely there is no such evidence. Contraceptives have made sexual indulgence far less costly within

³⁵⁴ *Id.*

marriage and far safer outside it than ever before, and public opinion is less hostile to illicit unions and even to perversion than it has been since Pagan times. Nor is the hypothesis of "starvation" the only one we can imagine. Everyone knows that the sexual appetite, like our other appetites, grows by indulgence. Starving men may think much about food, but so do gluttons; the gorged, as well as the famished, like titillations.³⁵⁵

Lewis is clearly suggesting that there is more sexual abstinence in our age than in those ages when things like the strip-tease were unknown, and if this is so then his view is that we could not possibly accept the starvation hypothesis because now more than ever all forms of sexuality and sexual intercourse have been greatly facilitated. Thus, people are less appalled at the mention of homosexuality, bestiality and other forms of sex considered as sexually immoral by the Christian faith; some of which would have carried a penalty of death in times past.

That notwithstanding, in Christianity, there is a clear nexus between sex and marriage.³⁵⁶ Christianity frowns on premarital and extramarital sexual activity. The Christian standard is a rather high one such that immorality does not begin only in sexual acts but in all lustful thoughts towards a person who is not the spouse of the one engaging in the lustful thinking. According to the Bible, Jesus taught his followers: *‘But I tell you that anyone who looks at a woman lustfully has already committed adultery with her in*

³⁵⁵ *Id.* 55.

³⁵⁶ Jackie Hill Perry, *Sexuality & The Gospel*, |<<https://www.youtube.com/watch?v=ujxD7FVyyI&t=8s>> Accessed on 1 December, 2017.

his heart'.³⁵⁷ The Bible also notes that: *'Marriage should be honoured by all, and the marriage bed kept pure, for God will judge the adulterer and all the sexually immoral'*.³⁵⁸

Paul in his first letter to the Corinthians, in the 6th chapter, notes that the body was not made for sexual immorality. Fornication, adultery and homosexuality or all forms of sexual acts that do not conform to or are contrary to heterosexual sex within the context of marriage, are seen as directly infringing upon the marriage covenant with the sole purpose of satisfying immoral sexual desires.³⁵⁹

These arguments are in line with the Bible, specifically in the Book of Romans, where it is noted as follows:

For although they knew God, they neither glorified him as God nor gave thanks to him, but their thinking became futile and their foolish hearts were darkened. Although they claimed to be wise, they became fools and exchanged the glory of the immortal God for images made to look like a mortal human being and birds and animals and reptiles. Therefore God gave them over in the sinful desires of their hearts to sexual impurity for the degrading of their bodies with one another. They exchanged the truth about God for a lie, and worshiped and served created things rather than the Creator—who is forever praised. Amen. Because of this, God gave them over to shameful lusts. Even their women exchanged natural sexual relations for unnatural ones. In the same way the men also abandoned natural relations with women and were inflamed with lust for one another. Men

³⁵⁷ The Bible supra note 345, Matthew 5:28.

³⁵⁸ *Id.* Hebrews 13:4.

³⁵⁹ Lewis, supra note 347, 58.

committed shameful acts with other men, and received in themselves the due penalty for their error.³⁶⁰

The Hebrew and Christian Bibles contain many examples of the moral code of the Jewish and Christian religions. In the Book of Leviticus (20:10–17), for example, there are explicit prohibitions against adultery, incest, sexual activity with people of one's own gender, and bestiality. The Bible is however seemingly silent on oral sex and masturbation;³⁶¹ although it may be inferred from the Christian conception of sexual morality that such acts will necessarily be deemed immoral and unwholesome. However, other parts of the Bible such as Paul's letter to the Corinthians bring to the fore the concept that a Christian's body is a miniature temple of their God and must not be a tool for sexual immorality or prostitution for that matter.³⁶²

ii. Islam and Sexual Morality

As a religion, Islam recognizes the sexual needs of human beings and believes this natural instinct should be nurtured, not suppressed and be fulfilled in a responsible way.³⁶³ In Islam, sex is neither expressly nor impliedly or apparently equated to inherent evil or sin; as has been taught by the Qur'an, the Prophet Muhammad and his Ahlu'l-bayt. Islam however highly recommends marriage as a good deed and thus very strongly

³⁶⁰ *Id.* Romans 1:21-27.

³⁶¹ Daniel Osei Bediako-Akoto, Towards Holistic Sexual Flourishing in Africa (2017) 224-230.

³⁶² The Bible, *supra* note 345, 1 Corinthians 6:12-19.

³⁶³ Sayyid Muhammad Rizvi, *Marriage and Morals in Islam* (Islamic Education & Information Center,) <<https://www.al-islam.org/printpdf/book/export/html/13059>> Accessed on 1 December, 2017.

opposes celibacy and monasticism.³⁶⁴ The legal term for marriage in Islam is "nikah" which literally means sexual intercourse. According to the Quran 24:32, Allah says, *'Marry the spouseless among you...if they are poor, God will enrich them of His bounty'*. The first word of this verse begins with "ankihu" (Marry). This is an imperative form of the word "nikah". According to the principles of Islamic jurisprudence, any communication in imperative form from God can have two levels of meaning. It may be an obligatory command or a very high recommendation. By implication, celibacy is not considered a virtue. Flowing from the verse, the Prophet continues by saying that, *'Whoever refrains from marriage because of fear of poverty, he has indeed thought badly of God.'* Again, Allah says: *'... Then marry such women as seem good to you two, three or four. But if you fear that you will not do justice between your wives, then marry only one.'*³⁶⁵

It is also worth noting that Islam forbids celibacy³⁶⁶ and monasticism is also forbidden for both men and women. 'Uthman bin Maz'un, a close companion of the Prophet, had his wife complain that he was abstaining from sexual relations during the night as well as the day. The Prophet was angered and is reported to have said, *'O 'Uthman! Allah did not send me for monasticism, rather He sent me with a simple and straight. I fast, pray and also have intimate relations with my wife. So whosoever likes my tradition, then he should follow it; and marriage is one of my traditions.'*³⁶⁷ Since

³⁶⁴ *Id.*

³⁶⁵ Surah An-Nisa [4:3].

³⁶⁶ *Id.* See also, Maulana Feizel Chothia, *Sex and Sexuality in Islam*, <<https://www.scribd.com/document/324458106/BOOK-Sex-Sexuality-in-Islam-pdf>> Accessed on 1 December, 2017, 9-19.

³⁶⁷ Wasa 'il ul-Shi'a, Vol. 14, p. 10.

Uthman was already married, the word "marriage" in this Hadith can only be applied to sexual relations. Thus, marriage and sex are among the signs of God's power and blessings in Islam. The Qur'an (30:21) says, '*And among His signs is that He has created for you spouses from among yourselves so that you may live in tranquillity with them; and He has created love and mercy between you. Verily, in that are signs for those who reflect.*' From these few verses of the Qur'an, it is apparent that according to Islam sex is limited to marriage and marriage is a manifestation of God's power and blessings. Also, sexual urge is a creative command of God placed in human nature and cannot be equated with guilt, sin or evil.

In Islam, sexual desire can be enjoyed both in this life and the afterlife. In the Qur'an [3:14], Allah says, '*The love of desire of women has been made to seem fair to people.*' The sexual act can however only be realized only in marriage between a man and at most four women. Islam frowns upon divorce. It is seen as '*the lawful thing most hated of Allah*'. A famous saying of the Prophet recommends: '*Always marry, never divorce. Allah certainly does not love tasters*', that is, those who marry simply to "taste" a variety of women. The Quran also provides explicitly that: '*Marry the spouseless among you and your slaves and handmaidens that are righteous; if they are poor, God will enrich them of His bounty. A pious son must watch over the chastity of a father who has been made a widower by helping him to marry again.* This duty of the ta'fif (sexual purity) is no less important than that of the kafala (food pension).

There are also recommendations in Islam intended to integrate fantasy in the sexual relations between spouses and to revive extinct desire by provoked desire. An example of this is as follows: the analogy that if a man sees a woman who attracts him, he should run home quickly and make love with his wife, and that will appease the ardour he feels in his heart. Islam does not therefore repress the libido. According to Islamic beliefs, even in the afterlife or in paradise our desires will be accommodated or taken seriously. In paradise everyone will have at least one companion, for it is believed that there is no celibacy in paradise. Paradise, it is believed, is the time of suspended pleasure.³⁶⁸ Hence, it is also the place of perpetual arousal and orgasm that is believed to lasts for twenty-four years.³⁶⁹ Earthly orgasm therefore gives us a foretaste of paradise and thus, life in paradise is potentially an infinite, eternal orgasm according to Islamic jurisprudence.³⁷⁰

With regard same-sex relations, Islam views homosexuality as unnatural, impure and against the law of nature in which we have been created. Sodomy is an atrocious sin that warrants Allah's wrath because it is suggested that Allah will not have mercy on a man who lusts after other men or have anal sex with a woman. These acts are considered detestable and persons who engage in them are seen as wicked. Homosexuality is seen as a selfish and unworthy attitude, which is both useless and positively harmful to the collective morality.

³⁶⁸ ABDELWAHAB BOUHDIBA, *SEXUALITY IN ISLAM* (1975) 85.

³⁶⁹ *Id.*

³⁷⁰ *Id.*

2. *The Ghanaian Cultural Conception of Sexual Morality*

It is true that sex is one of man's basic instincts and inclinations, but nonetheless the influence of factors such as morality, be it religious or cultural, as well as traditional beliefs, superstitions and even folklore cannot be entirely discounted.³⁷¹ Societies differ in how sex is perceived. Even in homogeneous communities, there are usually differences regarding sexuality and perceptions of what conduct is deemed sexually moral or immoral. In Ghana for example, such differences persist. Therefore in some communities in Ghana, polygamy (specifically polygyny) is accepted as generally the norm.³⁷² In other communities, a widow is expected to marry the brother of her deceased husband,³⁷³ and a man can marry his wife's sister(s).³⁷⁴ The Krobos are particularly noted for their "Coming of Age" events called "*Dipo*", which is meant to showcase naked adolescent girls to the world as a sign of their maturity and eligibility for marriage. It is therefore not possible to point to a distinct "Ghanaian culture", but rather it is the amalgamation of many different and diverse cultural practices that is usually collectively referred to as "Ghanaian culture". The Constitution of Ghana recognizes this and provides for the protection of all cultural practices, as long as they are not inimical or injurious to the well-being of the individual, and do not violate provisions of the Constitution.³⁷⁵

Thus, even though the Ghanaian cultural and traditional perspective regarding sexuality is often times obscured by religious judgements or prejudices, the traditional or

³⁷¹ What Is Human Sexuality? <https://catalogue.pearsoned.co.uk/assets/hip/gb/hip_gb.../0205909469.pdf>

³⁷² See L. Bowan, *Polygamy and Patriarchy: An Intimate Look at Marriage in Ghana through a Human Rights Lens*, 1 CONTEMPORARY JOURNAL OF AFRICAN STUDIES, 45-64 (2013).

³⁷³ *Id.*

³⁷⁴ See The Marriages Act, 1884-1985 (Cap 127), Section 74.

³⁷⁵ See CONSTITUTION Art. 26(2) (1992) (Ghana).

cultural conception of sexual morality however differs significantly from the religious ones discussed in the previous section. For instance, many of the ethnic groups do not practice female genital mutilation/cutting (FGM) while the practice is prevalent in the three most Northern regions in Ghana.³⁷⁶ The reasons behind the practice of FGM are many and very complex.³⁷⁷ They include the belief of some parents that the practice empowers their daughters, ensures their ability to get married and protect the family's reputation or serves as a rite of passage into womanhood.³⁷⁸ In some communities, it is also performed to apparently preserve a woman's chastity by restraining or curbing her sexual behaviour and appetite/desire.³⁷⁹ The practice of this custom may also be due to the patriarchal nature of African culture generally, especially in respect of how both men and women are perceived, with regard their sexual organs i.e. the penis and the vagina.³⁸⁰ Generally, men can be polygamous, and are often expected to be. The penis is therefore spoken of freely and even sang about.³⁸¹ Good women however, are expected to keep their feelings in check to the point of suppression. Female sexual pleasure is thus disregarded or taken for granted because the vagina is seen to serve no useful purpose but receive the male penis, for the purpose of reproduction.³⁸²

³⁷⁶ Michael Ofori Fosu, Peter Romeo Nyarko & Martin Anokye, *Female Genital Mutilation/Cutting among Ghanaian Women: The Determinants* <<http://www.iiste.org/Journals/index.php/RHSS/article/viewFile/14881/15689>> Accessed on 1st December, 2017.

³⁷⁷ Ghana Health Nest, 'Female Genital Mutilation – the FAQ's' (June 2012)<<http://ghanahealthnest.com/female-genital-mutilation-the-faqs/>> Accessed on 1st December, 2017.

³⁷⁸ *Id.*

³⁷⁹ *Id.*

³⁸⁰ Bediako-Akoto, *supra*, note 361.

³⁸¹ *Id.*

³⁸² *Id.*

Despite the constitutional prohibition of unwholesome cultural practices, FGM continues to be practiced in some communities in Ghana, where it is believed to lower a woman's sexual desire. Moreover, in other communities, uncircumcised women are sometimes perceived as being impure and treated as outcasts. Though the major religions in Ghana have all condemned the practice, religion has also been used to perpetuate the practice. Hence, some communities in Ghana still hold on to the belief that in order to be a good Muslim, one must circumcise their daughters.³⁸³ On the other hand, among the Sisala people, located mainly in the Northern regions of Ghana, it has been noted that premarital sex may not necessarily be an immoral activity. As part of the Sisala custom, a man who sees a girl he deems attractive to him may approach her with a small "love gift" known as *helating*, which he purchases himself.³⁸⁴ Mendosa has noted that between the time the "love gift" is given and when the marriage is formally conducted and consummated the man may have had pre-marital access to her by virtue of the "love gift".³⁸⁵

In light of Africa's general attitude towards sexuality, it has been suggested that sexual relations are not necessarily regarded as moral issues. However, Bediako-Akoto believes that this is misleading. He argues that sexuality is a very serious subject and is usually considered sacred. Taboos that have existed, according to him, have served as barriers to, or limitations on unaccepted sexual behaviour.³⁸⁶ Some of these taboos

³⁸³ *Id.*

³⁸⁴ Eugene L. Mendosa, *Aspects Of Sisala Marriage Prestation*, <http://pdfproc.lib.msu.edu/?file=/DMC/African%20Journals/pdfs/Institute%20of%20African%20Studies%20Research%20Review/1973v9n3/asrv009003003.pdf> - Accessed on 1st December, 2017, 15, 38.

³⁸⁵ *Id.*

³⁸⁶ Bediako-Akoto, *supra* note 361.

include prohibitions on oral sex, incest (*mogyafra*), adultery among others. The various ethnic groups in Ghana however have different perspectives regarding sexual morality. Pleasure for women is not necessarily immoral. However, actual or overt talk about sex is what is usually frowned upon.³⁸⁷ Also, chastity may not be a virtue that cuts across these communities. Usually it only does till before puberty, such that there are rites of passage such as “*Dipo*” and “*Bragoro*”, which celebrate not only the girl's puberty but her chastity as well.³⁸⁸

Ghanaian culture is however really an amalgamation of several different and distinct beliefs and value systems that has over a long period of time seemingly morphed into a somewhat homogenous one. However, the cultural conception of sexual morality from the traditional and age-old Ghanaian context is best understood through the lenses of polygamy; specifically polygyny. A.B. Ellis for example observes among the Akans thus:

It is commonly supposed that where polygamy prevails conjugal fidelity is, as a consequence, very lax; but it appears that the infidelity which prevails amongst polygamic people is due to the low state of civilization of such peoples; to the degraded condition of women, who are regarded as property, and frequently as mere beasts of burden; to the absence of domestic affection; and to the general

³⁸⁷ *Id.*

³⁸⁸ ‘*Dipo*’ and ‘*Bragoro*’ are cultural rites of passage celebrated by the Krobo and Akans respectively, and are performed for adolescent girls who have reached the age of puberty where the young girls are paraded through the community, sometimes topless, to signify their coming of age and their maturity and eligibility for sexual relations.

want of abstract ideas of morality rather than to polygamy, which does not, of itself, seem to favour immorality....[I]n fact, the women prefer polygamy to monogamy.³⁸⁹

Historically, polygamy was therefore not necessarily considered immoral in itself, or the sexual promiscuity that occurs as a consequent thereof regarded as manifestations of immorality. How then did 'Ghanaian culture' become a yardstick for the measurement of sexual morality generally, or the acceptable norm regarding Ghanaian sexuality in particular?

This must have occurred as a result of contact with foreigners, in particular Europeans. The introduction of Christianity and the subsequent Missionary activities that took place in the Gold Coast from the 17th Century thereabout had a significant impact on the cultural practices and beliefs of the inhabitants of the Gold Coast generally. It has been noted that:

After an intercourse of some years with Europeans, the Tshi-speaking inhabitants of the towns and villages in the vicinity of the various forts, added to their system of polytheism a new deity, whom they termed Nana-Nyankupon. This was the god of the Christians, borrowed from them, and adopted under a new designation. The great superiority manifested by the whites in their weapons, ships,

³⁸⁹ A.B. Ellis, *The Tshi-Speaking Peoples of the Gold Coast of West Africa*, (1964), pp. 287-288.

manufactures-in short, in every respect–convinced the natives with whom they had intercourse, that they must necessarily be protected by a deity of greater power than any of those to which they themselves offered sacrifice; since their own deities had not, except very remotely, helped them to attain such prosperity. They, therefore gladly enrolled themselves amongst the followers of the god of the whites; and, being informed that he dwelt in the heavens above, they denominated him Nana-Nyankupon, which may be freely translated “Lord of the Sky.”³⁹⁰

Hence, contact with the Europeans brought about the advent of Christianity to the Gold Coast and this had the effect of permeating all aspects of the culture of the people, including imposing a sexual moral code, which hitherto may have been absent as A.B. Ellis alludes to.³⁹¹

As already noted, Christian sexual morality restricts sex and sexual activities to marriage; to wit monogamy. Thus, the importation of Christian morals into the culture of the native people, in particular the Akan people, transformed to some extent their concept of sexual morality, or lack thereof. Thus, even though polygamy still remains in almost all the ethnic groups that make up present day Ghana, many people have accepted monogamy in accordance with Christianity and its ethos in relation to sexual morality – at least on the surface. Hence, the cultural conception of sexual morality in present-day

³⁹⁰ A.B. Ellis, *The Tshi-Speaking Peoples of the Gold Coast of West Africa*, (1964), p. 24.

³⁹¹ *Id.*

Ghana has been conflated with religious conceptions of sexual morality to a large extent.

That notwithstanding, when it comes to morality within the context of sex or sexuality, traditional Ghanaian culture that permits polygamy does not necessarily consider a man engaged in such plural marriages immoral. In the same vain, it is a notorious fact in contemporary Ghana, that society does not necessarily see a man in a monogamous marriage, who has extra-marital affairs as immoral. The same goes for a single man who maintains multiple sexual partners. However, the same cannot be said for females; for they are rebuked, ridiculed and deemed immoral if they engage in extra-marital affairs or are considered as having more than one sexual partner in the case of single women. Ghanaian culture therefore today is generally patriarchal in its outlook in terms of how it characterizes and differentiates what is sexually moral according to the sexes.

3. *Feminism and Sexual Morality*

There are various strands of feminist ideology and they have their peculiar perceptions on what may be moral or otherwise. According to Professor Patricia Cain, there are four stands of feminism. These are Liberal, Cultural, Postmodern, and radical feminism. The following paragraphs would focus briefly on the liberal and radical feminist views on what may be right or wrong as regards sexual morality. Liberal feminism concerns itself with equal rights and opportunities and the intensification of constitutional rights for women. Radical feminism on the other hand stresses that women

must be perceived as one class dominated by another (Marxist feminism), with a resulting class struggle. It also advocates changes in laws that favour the male class, to curtail inequalities of power.³⁹²

Thus, for more than three decades, feminist jurisprudential thought has been dominated by the debate regarding the role of sex and sexuality in a male dominated world. The so-called “sex-wars” between the different strands or wings of feminism, begun as a result of the diametrically opposing nature of both points of view regarding sex. On the one hand, sex is viewed as a tool of oppression used by the male dominated society to subjugate women. To this school of thought therefore, depictions of sex in pornography for example, has the aim of perpetuating the aforementioned status quo. Sex work, however voluntary it may be, is also seen as a means of the continuous control and/or suppression of female sexuality by men.

On another hand, there is a different school of thought who view sex from a positive angle. The sex-positive feminists thus consider sex, female sexuality or its expressions thereof as a means towards entrenching female independence and autonomy. To this school of thought, sex work is not necessarily a social construct that seeks to perpetuate inequality amongst the sexes; but even if it was, it nonetheless provides an avenue for females who voluntarily participate in sex work the opportunity to take

³⁹² Lara Gerassi, *A Heated Debate: Theoretical Perspectives of Sexual Exploitation and Sex Work* (NBCI, HHS Public Access, 2015) <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4730391/>> Accessed on 13th November, 2017.

control of their sexuality and even profit from it i.e. the rational economic choice theory.³⁹³

Radical feminism however sees social organization and structure as inherently patriarchal, as sexism exists to maintain male privilege and the patriarchal social order.³⁹⁴ With this in mind, it is not surprising that radical feminists have been historically associated with the lesbian-feminist community that essentially rejects male dominated heterosexual sex.³⁹⁵ Radical feminists are inclined to condemn pornography, prostitution, sadomasochism, promiscuous sex with strangers and even sexual role-playing³⁹⁶ and the use of sex robots.³⁹⁷ This is because of the nexus they make between dominant-subordinate power relations and the perpetuity of male dominance. For example according to Catherine Mackinnon '*pornography conditions male orgasm to female subordination*.'³⁹⁸

Liberal feminists, on the other hand support any form of consensual activity so long as the participants derive pleasure from their activities. These may include pornography, sex work, sadomasochism, promiscuous sex with strangers and sexual role-playing. According to them the morals of radical feminists stigmatises sexual minorities

³⁹³ Mgbako, supra, note 328.

³⁹⁴ Gerassi, supra note 392.

³⁹⁵ Ann Ferguson, *Sex War: The Debate between Radical and Libertarian Feminists* (1984) 10 UCPJ 1, 106-112 <http://www.jstor.org/stable/3174240?loggedin=true&seq=2#page_scan_tab_contents> Accessed on 2nd January, 2018.

³⁹⁶ *Id.*

³⁹⁷ D.R., '*Why radical feminists oppose sex robots*', < <https://www.tremr.com/Duck-Rabbit/why-radical-feminists-oppose-sex-robots> > Accessed on 1st December, 2017.

³⁹⁸ *Stanford Encyclopedia of Philosophy, Feminist Perspectives on Sex Markets* (Feb 18, 2004; rev Wed Sep 7, 2016) <<https://plato.stanford.edu/entries/feminist-sex-markets/>> Accessed on 3rd January, 2018.

such as the butch-femme couples, sadomasochists and man-boy lovers. The key word that legitimises any sexual activity regardless of form is consent according to them.³⁹⁹ Though this seems to be a simplistic view, consent is seen as a morally decisive factor because it has been noted to play that role in other contexts. For instance Primoratz notes that consent makes all the difference between murder and voluntary euthanasia, between battery and sport, or between theft and gift.⁴⁰⁰ This liberal view that valid consent is sufficient to morally legitimize any sexual act is challenged and disputed by three major philosophies regarding sex: the Christian (Catholic) perception – which views sex as ordained for procreation purposes and properly confined to marriage; the romantic view of sex – which considers sex as a corollary of love; and the radical feminist analysis of sex – which considers sex as perpetuating the continuous domination of women by men.⁴⁰¹

Catharine MacKinnon, a leader of the radical feminist school of thought has devoted attention to sexuality, sexual morality and the subordination of women. For example, she suggests that '*sexuality is to feminism what work is to Marxism: that which most one's own, yet most taken away*'.⁴⁰² Here, she tries to draw out a similar trajectory that legal theory grounded in Marxism and Feminism usually takes. For instance, she suggests that the underlying idea of Feminism as a legal theory is the inherent and inalienable right of females to have absolute control over their sexuality and the means

³⁹⁹ Igor Primoratz, *Sexual Morality: Is Consent Enough?* (2001) 4 Ethical Theory and Moral Practice, 201.

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² Catharine A. MacKinnon, 'Feminism, Marxism, Method, and the State: An Agenda for Theory', 7:3 *Signs: Journal of Women in Culture and Society* 515 (1982).

they choose to express it. However, an aspect of this same expression of sexuality is what has essentially ensured that society, according to Feminist legal theorists, is organized into two sexes i.e. male and female.

On the other hand, Marxism has at its core the control of capital (which is the means of production) by the bourgeoisie, who have also essentially organized society into a class-based system, where the proletariat (the majority of the people) are manipulated and exploited for gain. The parallel that can be drawn between Feminism and Marxism from the point of view of feminist legal theory is that, sex roles have been somewhat pre-determined and controlled by men, in the form of gender identity and conceptions of family and family life – the end result being reproduction; and all this organized on the basis of a heterosexual structure of society.

I thus tend to generally agree with MacKinnon especially when she suggests that Marxism and Feminism are both theories of power resulting in the “*domination of the dominant*” by the more privileged classes of society (i.e. men), the end result being social inequality and inequity. Thus, a fundamental issue regarding these two distinct, yet similar legal theories come to the fore: the fact that males are the common denominator. Despite the apparent accuracy of this observation, there still exists a seemingly deep-seated mistrust between proponents of these two schools of thought. Marxists for example often accuse feminists of dividing the proletariat front, through their means of advocacy, especially for ideals, which according to Marxists generally fits into the aims of the bourgeoisie. However, MacKinnon raises a question: Whether it would make a

difference if females, for example were at the forefront of running modern capitalist systems.

In contemporary times in Africa, females have been increasingly ‘liberated’ from the shackles of total male domination, and have in many instances taken control of, and directed how and the means through which they express their sexuality. This is not however to suggest that feminism as a legal theory is not valid, but rather it is a recognition of the important and somewhat radical role and impact that feminist theory has had on legal theory as a whole. For example, far gone are the days when a female’s role was circumscribed – i.e. as a caregiver, the primary duty of which was to nurture and raise children and stay at home.

In recent times, women cannot necessarily be categorized as the dominated gender class. That is not also to suggest that chauvinistic and misogynistic attitudes have been completely eradicated. However, even in Africa, it can be observed that many women have on their own chosen to ‘deviate’ from the ‘pre-determined’ sex roles that heterosexuality all but prescribes. For example, some women choose to stay single and thereby avoid subordination in the form of the delimited gender roles that have from time immemorial existed. Others express their sexuality in a homogeneous manner by relying on their innate being and personality. Similarly, some females voluntarily choose to become single mothers through the reliance on artificial insemination for example.

Quite clearly, female autonomy has increasingly become topical, and many even view this as a driving force for development, generally speaking. However, an important observation seems to be the fact that, not all women have been or are generally liberated to the point of autonomy, bodily or otherwise. This somewhat ties in with some of the Marxist criticisms of feminist legal theory – i.e. that it emphasizes and focuses on only a few educated women, who themselves resemble and constitute a subset of the bourgeoisie class – thus ensuring a divided front against oppression of the minority.

Thus, Janet Halley in *Split Decisions* explores the contours of classical feminism and its relationship with other movements that have drawn inspiration from it, or sought to challenge particular tenets of its theory.⁴⁰³ One argument she makes that strikes a cord is the position long adopted by “Governance Feminists” who have sought to address the issue of sexual exploitation of women by men that tend to scar the former perpetually. However, Halley seems to double down on the effect that this brand of feminism has on the wider society by suggesting that: *‘Unless it Takes a Break from itself, it can’t see injury to men. It can’t see injury to men by women. It can’t see other interests, other forms of power, other justice projects’*.⁴⁰⁴

Following from this, another important aspect of the whole feminist debate that seems problematic, which Halley alludes to is the anti-pornography stance adopted by MacKinnon & Dworkin. For example, the definition of pornography and the criteria of materials that potentially have a subordinating effect in respect of women as outlined in

⁴⁰³ JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006).

⁴⁰⁴ *Id.*

the Indianapolis ordinance (which is a subject on inquiry) seem quite out of touch with social realities in contemporary times.⁴⁰⁵ For example, all the six second second-order criteria that according to the ordinance depict women negatively can equally be applicable to men.⁴⁰⁶

Also, the concept of sadomasochism cannot be ignored in any discussion of contemporary feminism. In popular culture, it is increasingly becoming a trend for females to play the role of the sadist or the dominant person in sadomasochistic relationships or situations, who invariably derive sexual pleasure by humiliating, degrading and/or inflicting pain and suffering upon the subservient or submissive partner (usually a male, or even a female). However, admittedly, women have probably been on the receiving end of such treatment far longer than men – feminists would invariably argue.

In traditional African societies, like Ghana for example, it is a known and notorious fact that some women actually desire to be subordinated in ways that radical feminists will find disgusting and probably explain away through the use of the controversial “false consciousness” concept. However, it is not unusual to hear some women in Ghana even suggest that their husbands do not love them if they do not physically abuse them one way or the other. As shocking as this may seem, it remains a constant reminder of why Halley suggests that feminism (especially, radical feminism)

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*

needs to take a break from itself in order to explore and internalize some of these social realities.

On the issue of marriage for instance, it has already been noted that customary law in Ghana permits polygamy in the sense that a man can take more than one woman as a wife, but the reverse is not true. The point of sympathy with traditional feminists however is the societal attitudes towards a woman who dares to explore her sexuality by even engaging in sexual relations with more than one man at the same time. It is deemed an abomination and a deviation from traditional and stereotypical assigned gender roles. This tends to reinforce the classical radical feminist position of subordination of the female.

Thus, although Halley tries to find a middle ground between radical and liberal feminism by suggesting that the whole idea of feminism needs to take a break, it is nonetheless difficult in practice so to do, or even reconcile these two diametrically opposing views. It seems as if there is not much middle ground that can be found. The critical point however is that sexual morality from the feminist perspective seems to be bifurcated in nature, and as such very difficult to construct. This is because the ‘evils’ associated with sex work have been greatly espoused, and its nexus with human trafficking for example, and even child prostitution cannot be overlooked – although their confluence point seems rather fluid. At another level of abstraction however, it is difficult to understand how and why we should theorize rational economic choices and decisions made voluntarily (arguably), through the lenses of doctrinaire legal theory

B) SOME LESSONS FROM THE MAKING OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)

The many and major events that triggered both World Wars of the Twentieth Century have been well documented. However, it was not until the aftermath of the Second World War that the International Human Rights movement gained real traction. This was as a direct consequence of the widespread Nazi oppression of Jews and other minority groups as well as the rise of fascist regimes and their attendant oppressive and discriminatory policies; reasons that united the Allies in bringing the war to an end.⁴⁰⁷ Thus, in 1942, the Allies issued a joint declaration that victory in the war was necessary in order to defend life, liberty, independence and religious freedom.⁴⁰⁸ To ensure that these ideals were jealously guarded and protected, the Allies had to overcome several political, ideological, cultural and economic challenges.⁴⁰⁹ Hence, the initial draft of the United Nations Charter did not expatiate on human rights *per se*. However, the principle of self determination was guaranteed by the Charter,⁴¹⁰ and it was agreed that a Human Rights Commission be set up as a major body of the UN.⁴¹¹

Thus, during the drafting of the UN Charter at the San Francisco Conference of 1945, representatives of Cuba, Mexico, and Panama each proposed the inclusion of a Declaration on the Rights and Duties of Nations and a Declaration on the Essential Rights

⁴⁰⁷ Jeffery L. Dunnof, Steven F. Ratner, David Whippman, *International Law: Norms Actors, Process: A Problem Oriented Approach*, 2006.

⁴⁰⁸ Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001).

⁴⁰⁹ *Id* at p.10.

⁴¹⁰ Glendon, *supra*, note 408, 15-17.

⁴¹¹ Glendon, *supra*, note 408, 18.

of Man.⁴¹² President Harry Truman of the United States, in his final remarks for the conference, also anticipated that an International Bill of Rights would be attached to the Charter; whilst Field Marshall Jan Christiaan Smuts of South Africa envisioned the addition of a human rights instrument to the Charter. However, the Conference decided to adopt Article 55 and 56 of the Charter, which provide for the promotion of universal respect for, and observance of, human rights, and impose obligations on member States to take joint and separate action for the achievement of the purposes of the UN set forth in the Charter, including the promotion of human rights.⁴¹³ The Charter also refers to human rights in the Preamble as well as in articles 1, 13, 62, 68, and 76. However the idea of universal human rights was not enumerated on in terms of exactly what they entailed.⁴¹⁴ An International Declaration on Human Rights or an International Bill of Rights, which would enumerate specific instances of human rights, was deferred until the establishment of a Commission on Human Rights by the Economic and Social Council (ECOSOC).

The adoption of the Universal Declaration of Human Rights (UDHR) in 1948 was therefore arguably the most important step that was taken in the post-war era in ensuring a common standard of treatment of individuals and states alike. This is however in no way a suggestion that the formation of the United Nations (UN) itself was not a monumental step towards a universal claim of human rights; for the UN paved the way and made it possible for the adoption of the UDHR in the first place. The UDHR is however of monumental import also in the sense that it arguably represented a first and

⁴¹² David Weissbrodt and Mattias Hallendorff, *Travaux Préparatoires of the Fair Trial Provisions--Articles 8 to 11--of the Universal Declaration of Human Rights*, 21 Hum. Rts. Q. 1061 (1999).

⁴¹³ United Nations Charter 1 U.N.T.S. XVI (1945).

⁴¹⁴ Glendon, *supra*, note 408, 19.

somewhat successful attempt at developing a regime of human rights protections that would be applicable to and available for all persons regardless of race, ethnicity, sex, language, religion etc.⁴¹⁵ It essentially reconciled varied perceptions of law and morals in a fragmented post-war world.

However, the road towards the making of the UDHR was not a smooth one. In fact, many obstacles and disagreements characterized the work of the Human Rights Commission, which was the body that had been established by the ECOSOC of the UN specifically to oversee the drafting of a binding legal document that protected and promoted the human rights of all the peoples of the world.⁴¹⁶ But this was a herculean task in the sense that even though the UN Charter had announced the idea of human rights for all, there was no categorical mention in the Charter of exactly what these rights were as has already been noted.⁴¹⁷ How was the Human Rights Commission therefore going to be able to determine the substantive content of human rights that were to be considered universal and acceptable by the diverse nations of the world at the time, and

⁴¹⁵ Suffice it to note that prior to the adoption of the UDHR in December 1948, American States had adopted the American Declaration of the Rights and Duties of Man in April 1948, even though this instrument was more regional in character as opposed to the potential global outlook of the UDHR right from its adoption.

⁴¹⁶ It is important to note that in February 1946, ECOSOC established a Commission on Human Rights and a Sub-Commission on the Status of Women (referred to collectively as the nuclear Commission on Human Rights), which was mandated to consider its terms of reference, composition and structure and report back to ECOSOC on the possibility of adopting a binding human rights instrument. After presenting its report (document E/38/Rev.1) to ECOSOC on 21st May 1946, ECOSOC adopted a resolution on 21st June 1946 establishing a standing Commission on Human Rights.

⁴¹⁷ A careful reading of the United Nations Charter will reveal that the provisions that the only specific human right that is explicitly mentioned therein is the right to equality and equal protection of the law. All other reference to human rights in the Charter are general in nature. *See* for example, articles 56, 62(2) and 68.

those yet to come? The Commission's first task was to draft a Bill of Human Rights and devise a means for its implementation.⁴¹⁸

Luckily, the resolution establishing the Commission on Human Rights made provision for reliance on a 'Working Group of Experts'. Clause 3 of the Resolution provided as follows: '*The Commission is authorized to call in ad hoc working groups of non-governmental experts in specialized fields or individual experts, without further reference to the Council, but with the approval of the President of the Council and the Secretary-General.*' By February 1947, a drafting committee had been set up by the commission to produce a draft Bill on International Human Rights.⁴¹⁹ Around this time, the United Nations Educational, Scientific and Cultural Organization (UNESCO) had also created a theoretical and philosophical committee that will prove crucial in informing the final draft of the Declaration.

Thus, UNESCO as well as the Human Rights Commission conducted ideological investigations to gain a picture of whether there was such a thing as universal human rights; if the concept was not mainly a western idea; and also what the substantive content of human rights were in different contexts. To the amazement of the UNESCO committee, they found out through the responses they received that there generally existed in all parts of the world certain basic rights and values, which were broadly similar even though their foundations were different by virtue of differences in

⁴¹⁸ U.N. Weekly Bulletin, August 12, 1946, 14.

⁴¹⁹ The initial members of this committee were Eleanor Roosevelt of the United States, Pen-Chun Chang from China, and Charles Malik from Lebanon. This committee was however enlarged at the instigation of Eleanor Roosevelt to include representatives from the United Kingdom, the Soviet Union, France, Chile and Australia.

ideology.⁴²⁰ Regardless of these differences the driving idea, as summed up by Glendon was as follows:

If there are some things so terrible in practice that virtually no one will publicly approve of them, and some things so good in practice that virtually no one will oppose them, a common project can move forward without agreement on the reasons for those positions. An international declaration of rights would provide a “framework within which divergent philosophies, religious, and even economic, social and political theories might be entertained and developed.” The challenge was to make the framework “sufficiently definite to have real significance both as an inspiration and a guide to practice” but “sufficiently general and flexible to apply to all men, and to be capable of modification to suit people at different stages of social and political development.”⁴²¹

It is important to note that the UNESCO Committee had sent out questionnaires seeking the views of the many peoples of the world with different political and socio-cultural backgrounds, including but not limited to, Chinese, Indian, Hindu, America, European and Socialist perspectives.⁴²² The responses the committee received were impressive as several leading scholars and philosophers made submissions in response to the questionnaire. These included submissions from Mohandas Ghandi, Aldous Huxley, Benedetto Croce and Pierre Teilhard de Chardin.⁴²³ Although the views and positions on

⁴²⁰ Jacques Maritain, *Human Rights: Comments and Interpretations*, 1949, at pp. 268-271.

⁴²¹ Glendon, *supra*, note 408, 78.

⁴²² Glendon, *supra*, note 408, 73.

⁴²³ *Id.*

human rights varied, the UNESCO committee concluded that they were convinced that there was a common denominator that bound together all the varying ideologies and that the members of the United Nations did share ‘*common convictions on which human rights depend*’.⁴²⁴ The committee summed up what they had discovered in the following terms:

Varied in cultures and built upon different institutions, the members of the United Nations have, nevertheless, certain great principles in common. They believe that men and women all over the world have the right to live a life that is free from the haunting fear of poverty and insecurity. They believe that they should have a more complete access to the heritage, in all its aspects and dimensions, of the civilization so painfully built by human effort. They believe that science and the arts should combine to serve alike peace and the well-being, spiritual as well as material, of all men and women without discrimination of any kind.⁴²⁵

They thus observed that it was possible to achieve cross-cultural understanding and agreement on the core of human rights that man ought to be entitled to.

Ghandi for example had submitted that any conception of universal rights must go hand in hand with the idea of duties, rather than be construed as fundamental entitlements. He posited thus: ‘*I learned from my illiterate but wise mother that all rights to be deserved and preserved came from duty well done. Thus the very right to live*

⁴²⁴ Maritain, *supra*, note 420, 268-271.

⁴²⁵ Maritain, *supra*, 259.

*accrues to us only when we do the duty of citizenship of the world. From this one fundamental statement, perhaps it is easy enough to define duties of Man and Woman and correlate every right to some corresponding duty to be first performed. Every other right can be shown to be a usurpation hardly worth fighting for’.*⁴²⁶

Despite the many different submissions from all parts of the world, it must be stated that at the time of the drafting of the UDHR, there weren't many independent countries at the time in Africa.⁴²⁷ As a matter of fact, during the negotiating stages of the UN Charter, there were less than 100 so states in the world at the time. However, the UN Secretariat nonetheless forwarded the opinions of the groups without consultative status and even individuals to the Commission on Human Rights for their consideration. During the final vote on the draft Bill, the Commission approved the draft by 13 votes, with none against; although the Union of Soviet Socialist Republics (USSR), Byelorussia, the Ukraine and Yugoslavia all abstained.⁴²⁸ The General Assembly, in its third meeting, adopted the Declaration on December 10, 1948 after 48 States approved the draft with none against, but eight abstentions.⁴²⁹ The USSR, the Ukrainian Soviet Socialist Republic (UKSSR), the BSSR, Yugoslavia, Poland, Saudi Arabia and South Africa abstained.⁴³⁰ None of these countries voted against the Declaration. However, it is worth noting that

⁴²⁶ Mohandas Gandhi, “Letter Addressed to the Director-General of UNESCO” in Jacques Maritain, *Human Rights: Comments and Interpretations*, 18.

⁴²⁷ Graphic Business, *Human rights as a global conversation on human dignity*, Sep 08, 2015 <<https://www.graphic.com.gh/features/opinion/human-rights-as-a-global-conversation-on-human-dignity.html>> Accessed on 20th March, 2018.

⁴²⁸ Glendon, *supra* at p. 93.

⁴²⁹ Peter Danchin, UDHR Drafting History, <http://ccnmtl.columbia.edu/projects/mmt/udhr/udhr_general/drafting_history_9.html> Accessed on 20th March, 2018.

⁴³⁰ *Id.*

abstaining delegations had participated and cooperated in the various drafting processes.⁴³¹

Some of the abstentions were revolved around the view that the UDHR did not go far enough. For example, the communist abstentions were due to the fact that the Declaration ought to have explicitly condemned fascism and Nazism in order to be effective.⁴³² They abstained because there was no such explicit condemnation in the text. Some also called for a legal positivist approach regard human rights. To this group, human rights should not be conceived outside the State, because the very concept of rights and law was necessarily connected with the State. However, this positivist interpretation of human rights is counter intuitive as the Nazi regime would thus be deemed a legal one, acting in accordance with the basic law of Germany at the time. Thus, the only way that Nazism could be effectively condemned was the route the Declaration took i.e. conceptualizing human rights as rights as transcending existing national law and geographical jurisdictions.

Also, whereas some countries with majority Muslim populations, such as Syria, Iran, Turkey and Pakistan all voted for the Declaration, the Saudi Arabian delegation abstained in the final vote mostly for two reasons. First, they disagreed with the wording of Article 16 in relation to equal marriage rights for both men and women, and they also objected to the clause in Article 18 that permitted or empowered individuals to change their religion or belief. In a similar vein, the Union of South Africa abstained from

⁴³¹ *Id.*

⁴³² *Id.*

approving the document, because it knew other countries such as the United States would use it as a basis of condemning South African practices of apartheid and racial discrimination.⁴³³ Whereas the Communists thought the Declaration did not state enough, the South African government was of the opinion that it stated far too much.⁴³⁴ To them, it was clear from the provisions that social, cultural, and economic rights had never been intended to be included in the draft declaration.

A close examination of the South African reveals a lack philosophical basis, but rather as an attempt to protect their system of apartheid, which clearly violated several articles in the Declaration.⁴³⁵ For example, the right of a person to participate in the government of his or her country was not a universal right according to the South African representative on the Third Committee.⁴³⁶ According to this position, the right was conditioned not only by nationality and country, but also by qualifications of franchise including race.⁴³⁷ It suffices to note that the South African Constitution at that time only permitted individuals of European descent to be members of the House of Assembly or the Senate.⁴³⁸ This abstention by the Union of South Africa, it has been argued, detracted from the claim to universality of the Declaration. However, their abstention cannot be said to actually detract from the universality of the UDHR as a whole, because racism had by then been unanimously rejected as wrong and untenable.

⁴³³ *Id.*

⁴³⁴ *Id.*

⁴³⁵ *Id.*

⁴³⁶ *Id.*

⁴³⁷ *Id.*

⁴³⁸ *Id.*

What then are some of the lessons that can be drawn from the work of the Human Rights Commission, and in particular the UNESCO philosophers committee that worked towards the adoption of the UDHR? The first important thing to note in my view is the acceptance of culturally relative approaches towards universal human rights. What I mean by this is that the various positions espoused during the preparatory and drafting phases of the UDHR centered on a discussion of what was “moral” and what should be a legal entitlement or right. Hence, many different socio-cultural perceptions of morality clashed, but the underlying value that all races and peoples considered paramount in the ordering of their affairs and ensuring fundamental human rights for all, was the principle of equality and non-discrimination. Equality of cultures, and non-distinction on the basis of specific human differences like origin, race, ethnicity, sex, religion etc.

Yet, the UDHR has been continuously criticized as ‘*an arrogant attempt to universalize a particular set of ideas and to impose them upon three-quarters of the world’s population, most of whom were not represented at its creation*’.⁴³⁹ Makau Mutua for example suggests that ‘*Muslims, Hindus, Africans, non-Judeo-Christians, feminists, critical theorists, and other scholars of an inquiring bent of mind have exposed the Declaration’s bias and exclusivity*’.⁴⁴⁰ He further suggests that:

Non-Western philosophies and traditions particularly on the nature of man and the purposes of political society were either unrepresented or marginalized during the early formulation of human rights... There is no doubt that the current human

⁴³⁹ Steiner, Alston & Goodman, *International Human Rights in Context: Law, Politics, Morals*, 2008 (3rd Edition) – paraphrasing arguments made by Makau Mutua at p. 140.

⁴⁴⁰ *Id.* at p. 140.

rights corpus is well meaning. But that is beside the point.... International human rights fall within the historical continuum of the European colonial project in which whites pose as the saviors of a benighted and savage non-European world. The white human rights zealot joins the unbroken chain that connects her to the colonial administrator, the Bible-wielding missionary, and the merchant of free enterprise.... Thus human rights reject the cross-fertilization of cultures and instead seek the transformation of non-Western cultures by Western cultures.⁴⁴¹

Is this statement an accurate reflection of the contemporary human rights movement spearheaded by the UDHR? And is the Declaration really bias and not inclusive as Mutua suggests? Evidence suggests the contrary.

For instance, even though a majority of the people of the world were not necessarily represented in the UN at the time of its adoption, the drafting process of the UDHR involved some of the most influential and independent minded theorists and philosophers of the time. Thus, by the time the draft Declaration was presented to the General Assembly, *hundreds of individuals from diverse backgrounds had participated.*⁴⁴² Hence, even though not all States and peoples as we know them today were represented during the drafting phase of the Declaration, it cannot be true that the Declaration is biased and non-inclusive. Charles Malik thus notes:

⁴⁴¹ *Id.*

⁴⁴² Glendon, *supra* at p. 225.

The genesis of each article, and each part of each article, was a dynamic process in which many minds, interests, backgrounds, legal systems and ideological persuasions played their respective determining roles.⁴⁴³

What is certain is that the drafters considered the many different philosophical, cultural and ideological worldviews on rights, and sought to balance these in a way that was fair and inclusive.

As a result, the Declaration has been referred to as a Dignitarian rights instrument, which seeks a middle ground between the two most prominent competing philosophical foundations of human rights i.e. individualism and collectivism. Mary Ann Glendon puts this in the following manner:

Dignitarian rights instruments, with their emphasis on the family and their greater attention to duties, are more compatible with Asian and African traditions. In these documents, rights bearers tend to be envisioned within families and communities; rights are formulated so as to make clear their limits and their relation to one another as well as to the responsibilities that belong to the citizens and the state.... In the spirit of the latter vision, the Declaration's "Everyone" is an individual who is constituted, in important ways, by and through relationships with others. "Everyone" is envisioned as uniquely valuable in himself (there are three separate references to the free development of one's personality), but "Everyone" is expected to act towards others "in a spirit of brotherhood."

⁴⁴³ *Id.*

“Everyone” is depicted as situated in a variety of specifically named, real-life relationships of mutual dependency: families, communities, religious groups, workplaces, associations, societies, cultures, nations, and an emerging international order. Though its main body is devoted to basic individual freedoms, the Declaration begins with an exhortation to act in “a spirit of brotherhood” and ends with community, order, and society. Whatever else may be said of him or her, the Declaration’s “Everyone” is not a lone bearer of rights.... [The] departure from classical individualism while rejecting collectivism is the hallmark of dignitarian instruments such as the Declaration.⁴⁴⁴

The Declaration has therefore achieved global acceptance, and some scholars even argue that some of its principles derived from the provisions thereof have attained the status of customary international law.⁴⁴⁵

It is important to also note that the universality of the Declaration as was envisioned by the drafters was not one that sought to impose a uniform system of human rights upon the peoples of the world. Rather, by adopting the principles contained therein and practicing promotion and protection of human rights, the various States could accumulate experiences that will all together enrich the Declaration’s purpose by achieving its aim of human rights for all. Another important lesson that can thus be drawn from this is the fact that the drafters recognized humanity’s commonness as a unifying factor that transcended all barriers including racial, religious, linguistic, gender etc. The

⁴⁴⁴ Glendon, *supra* at pp. 227-228.

⁴⁴⁵ Steiner, Alston & Goodman, *supra* at p. 137.

common humanity denominator thus manifests itself in ensuring the right balance between individual freedoms and liberty on one hand, and the collective good of the society as a whole on the other. Thus, it is possible to view variables such as human dignity, individual autonomy and equality from a “morally and culturally neutral” standpoint, just like the UDHR did.

The UDHR in contemporary times is truly seen as universal and has been to a large extent accepted as customary international law.⁴⁴⁶ It is the UDHR that influenced treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The UDHR has clearly strengthened the human rights regime, specifically with respect to the enforcement and implementation of human rights. As a result of the different perspectives on morality, humanity, human dignity and human rights throughout the world, various steps had to be taken in order to develop a uniform framework for defining and enumerating human rights. There were enquiries, consultations, investigation etc. in order to develop a rational framework to fulfil the purpose of promoting and protecting human rights for all. Thus, to develop a rational public policy framework for regulating human morality, a similar approach must be taken in order to incorporate the various worldviews and take them into account when making laws.

Therefore, laws that operate to oppress minorities on the basis on general conceptions of morality must be looked at again with an open mind. We need to repeal

⁴⁴⁶ Hurst Hannum, The Status of the Universal Declaration Of Human Rights in National And International Law, 25 GA. J. Int'l & Comp. L. 287 (1996).

laws that have yielded terrible results in practice (in terms of their unenforceability among other factors) and enact ones that will avert oppression of minorities. To borrow the words of UNESCO, those laws that have outcomes that serve no useful purpose in society practically, must give way to laws that protect all persons from the oppression of the majority, which no reasonable man will oppose. Stakeholders must be assembled with this purpose to allow a common project to move forward with or without agreement on the reasons for their positions on the defining issues.

Ultimately the framework for developing a rational public policy approach with regard laws that seek to regulate human morality must be one that considers divergent philosophies, cultures, religions and even economic social and political theories. It must be sufficiently definite to have real significance both as an inspiration and a guide to practice. However, it must also be sufficiently general and flexible to apply to all individuals and be capable of modification to suit people at different stages of social and political as well as cultural development. So, even though we place great emphasis on a particular idea of what amounts to moral conduct in Africa generally, accepting divergent and minority views and positions on moral questions seem to be more firmly grounded in the African context even more than we are aware. For instance, with regard the general African misconception that human rights and human dignity are a western concepts, it has been suggested that:

The Mandingo people of Mali, in West Africa, had proclaimed similar principles, in 1236 that affirmed the freedom and dignity of “every human being” and not

just the Mandingo nobility. Freedom of religious thought existed in the kingdoms of Congo and Ndongo, in Central Africa, before the Portuguese came there in 1492. Different sexual orientations existed in the Kingdom of Buganda before European missionaries brought Christianity to that East African kingdom, in the late nineteenth century.⁴⁴⁷

However, genuine fears of a breakdown of morality must be anticipated and addressed. For instance, some theorists fear that the overemphasis on human rights for all with regard moral questions would undermine social or legal interventions in society. One of these interventions is affirmative action. It has thus been noted that the search for neutral principles conflicts with affirmative action and accounts for most of the hostility and criticisms that have been expressed against it. Another fear may be based on the theory that laws have a potential for creating a sub-culture. Thus morally neutral laws would erode our existing culture and create an alternative sub-culture, which is diametrically opposed to the status quo. In this regard, there must be a societal stock taking in order to ascertain what the culture was as distinct from what the culture really is today.

Also, perhaps a different outlook on the role culture should play must be highlighted. For instance morality entails issues not only communal in nature but also personal to individuals. As a result, the factor of autonomy should be looked at in light of culture. The effects of culture in shaping individuals cannot be over-emphasized as this generally leads to accepted norms in different cultures. However, we must not lose sight

⁴⁴⁷ Graphic business, *supra*.

of the role the individual plays in society, and the fact that, we cannot necessarily generalize when it comes to intimate human conduct bordering on morality. Thus, just as the UN Charter paved the way and served as the foundation and basis of human rights for all by including human rights lingua (albeit in general terms), the Constitution of Ghana can serve a similar purpose. In our context however, our Constitution is replete with human rights protections, including respect for human dignity, equality and individual autonomy to a large extent. With these in mind we can now focus on the various objectives that should serve as the basis of a rational public policy framework for regulating intimate human conduct. These are: (1) the objective of preserving and promoting the inherent dignity of the individual; (2) the objective of ensuring that the individual's ability to act in an autonomous manner free from social coercion is reflected in laws; and (3) the objective of achieving equality when dealing with personal choices that do not conform with societal standards.

C) TOWARDS MORAL NEUTRALITY

Morality entails or is an amalgamation of a collective sense of societal beliefs and value systems, which in many instances dictates public policy and invariably influences the types of laws in most societies. This collective sense of morality however has the tendency of imposing what I refer to as moral oppression on minorities within that society who may not be inclined to or be susceptible to conformity with such vague and autocratic societal standards. Thus, for so long as the possibility of moral oppression exist in a particular society, and they do exist more often than not, fidelity to the law demands

a neutral form of morality, no matter how imperfect such a concept may be, in order to balance the scales. Moreover, this type of moral oppression that societies tend to superimpose on all is usually predicated on some variables that may not necessarily be universally accepted after all.

For example, the proliferation of religions and religious values and standards remain controversial, in respect of its impact on law in the modern secular state. How then do we achieve a moral construct that considers not just such religious values and beliefs of admittedly the majority of the people, but also the individual moral worldviews of the minority? Let's take the example of the institution of marriage in Ghana. Traditional conceptions of this institution envisage pluralistic marriages in the form of polygamy, as has already been noted.⁴⁴⁸ Hence, it has been authoritatively held that customary marriages in Ghana are potentially polygamous.⁴⁴⁹ It is therefore possible for a Christian man to be customarily married to two women without necessarily feeling morally blameworthy of fornication or adultery under the customary law of Ghana, even though Christianity prescribes monogamy and considers deviations from this immoral.

Critics of this postulation may very well suggest and point to the existence of ordinance marriages in Ghana that provides that such marriages are strictly monogamous – hence true Christians will subscribe and adhere to that.⁴⁵⁰ Pushing the argument further, Islamic marriages are also permitted under the Marriages Act of Ghana, under which a

⁴⁴⁸ It must be noted here that the specific form of polygamy permissible in Ghana by the various ethnic groups who practice it is polygyny – where a man can marry more than one woman at a time. Polyandry is however generally prohibited.

⁴⁴⁹ *Coleman v Shang* [1959] GLR 390.

⁴⁵⁰ See The Marriages Act 1884-1985 (Cap 127). See also Matthew 19: 3-9.

Muslim man is entitled to marry as many women as he is capable of looking after fairly and equitably.⁴⁵¹ Thus, aside the external pluralistic character of marriages in general in Ghana (three types of marriages), there is also an internal pluralistic nature of a majority of the types of marriages in Ghana (Customary law marriages and Islamic marriages). How then does a society with a mixed and diverse sense of morality (when it comes to marriage, for example), and with it – sexual morality⁴⁵² purport to embody a common strand of morality either based on religion or culture? Such a position, I believe should be rejected and not countenanced especially in the 21st century where individual autonomy and equality has gained much prominence in human right discourse.⁴⁵³

Thus, laws especially criminal laws that purport to prohibit certain intimate and sexual conduct because "society" finds it morally opprobrious, misrepresent the public policy demands of the 21st century. Public policy must not just reflect the religious views and subjective cultural perceptions of the collective group; but it must also mirror the independent moral or amoral outlook of the minority as well whatever that may be, no matter how unflattering and controversial it may seem. Hence, it must be dignitarian in outlook. In making public policy for the purposes of regulating human behavior, it is my position that certain morally neutral values must be explored and should form the basis of laws that seek to intrude and inquire into the most intimate of all human desires – sex.

⁴⁵¹ See Qur'an, Sura 4 (An Nisa), Ayah 3.

⁴⁵² It is important to note that even though the concept of marriage is not and does not necessarily equate to or exemplify sexual morality, one of the fundamental tenets of marriage is sex. Sexual morality therefore is arguably a necessary corollary of marriage; as a result, it is irrational to pretend that there is a universal concept of sexual morality when religion and culture all have different standards in this regard as evidenced by the example of Customary, Christian and Muslim marriages in present day Ghana.

⁴⁵³ See International Covenant on Civil & Political Rights (ICCPR), 1966.

Although it can be argued and it has indeed been argued that all principles, values, variables and concepts at a certain abstract level are laden with subjective and/or objective value judgments of morality, we can nonetheless attempt construing some of these variables from a neutral standpoint, applying contemporary perspectives to the inquiry. Three such key concepts that I propose as fundamental in ensuring a more rational public policy framework for regulating intimate human conduct are (1) Human Dignity; (2) Individual Autonomy; and (3) Equality. These, to me, must form the core of any public policy approach towards the regulation of intimate human conduct. This is because, at the heart of the debate regarding sexual morality from the perspectives of religion, culture and feminism lay these three ideals.

As has already been discussed, both Christianity and Islam invariably preach the need to uphold the dignity of the individual in the form of sexually moral conduct. Religion thus considers sexual immorality in the form of adultery, pre-marital sex, sex work, homosexuality etc. as undignified, irresponsible and reprehensible. Sexual morality can only be attained within the confines of heterosexual marriage. Similarly, the core ideals that the two most vocal and important wings of feminism have been fighting for over the years with regards to sexual morality is female autonomy. Thus, radical feminists argue that females are a subordinated sex and ought to break free of the chains of patriarchal gender roles i.e. sex work, pornography etc., whilst liberal feminists simply assert that most females engaged in sex work, for example, are asserting their autonomy by making those individual choices free from coercion. Also, traditional African culture's prescriptions for sexual morality is more fluid as promiscuity is not necessarily prohibited

as can be ascertained from the existence of polygyny. However, sexual morality from the cultural perspective has been greatly influenced by religion – which as I’ve noted places a great emphasis on the dignity of the individual and the community at large.

However, contemporary human rights place an even greater emphasis on equal rights, equality and non-discrimination. It is for this reason that no discussion of sexual morality can be had without considering this ideal/variable. Thus, religious, feminist and cultural conceptions of sexual morality must be considered alongside the contemporary and basic human need for equal rights of all persons, and non-discrimination on the basis of sexuality and how one chooses to express it. These three variables at the core of the discussion of sexual morality (dignity, autonomy and equality) must be re-examined and made “morally neutral” as far as possible (having in mind the religious, feminist and cultural viewpoints) in relation to specific intimate human conduct. This will ensure that the framework that is developed in relation to the regulation of criminalized intimate human conduct of a sexual nature, is more productive and will be a far better basis than what presently exists, which only has religious and/or cultural conceptions of morality alone as its backbone and justification.

1. *Human Dignity*

In human rights discourse, the idea of human dignity is a reference to the primary characteristic of human beings i.e. their humanity, which entitles us to respect so we are

not taken for granted or abused by others.⁴⁵⁴ The idea of human dignity is a nod to the recognition and respect for the inherent humanity that all humans possess, and an affirmation of the inherent or fundamental value of human beings generally.⁴⁵⁵ This concept is universally accepted as a basic ethical and legal principle, and a yardstick for assessing the efficacy of human rights. As Lebech has noted, *'it clearly is in everyone's interest to be respected as having human dignity, i.e. as having the highest value due to an inalienable humanity.'*⁴⁵⁶ The principle of human dignity, as a universal affirmation that human beings have the highest value, has thus been the basis and underlying principle for many international human rights instruments. Consequently it has been adopted in the national legislations and constitutions of a vast majority of the States of the world.⁴⁵⁷

One of the first applications of human dignity however in international instruments can be found in the preamble of the Charter of the United Nations (1945), where it states in part that:

We the people of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and

⁴⁵⁴ Mette Lebech, *What is Human Dignity?* < <http://eprints.maynoothuniversity.ie/392/>> Accessed on 15th January 2018.

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.*

⁴⁵⁷ It must be noted that, the idea of human dignity can be found as far back as 1486, in a speech ('Oration on the Dignity of Man') given by Giovanni Pico della Mirandola, an Italian Renaissance philosopher.

worth of the human person, in the equal rights of men and women and of nations large and small...⁴⁵⁸

Also, parts of the preamble of the Universal Declaration of Human Rights provide that *‘Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world..’*⁴⁵⁹ Article One of the UDHR also states: *‘All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.’*

The International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) further reiterate the point that the inherent dignity of humans is to be recognized as the foundation of human rights itself. Thus, both Covenants provide in their preamble the following words: *‘Recognizing that these rights derive from the inherent dignity of the human person...’*⁴⁶⁰ Furthermore, the American Declaration of the Rights and Duties of Man (1948) declared that *‘the American peoples have acknowledged the dignity of the individual, and their national constitutions recognize that juridical and political institutions, which regulate life in human society, have as their principal aim the protection of the essential rights of man and the creation of circumstances that will permit him to achieve spiritual and material progress and attain happiness’*.⁴⁶¹ This

⁴⁵⁸ Preamble of the United Nations Charter, 1945.

⁴⁵⁹ Preamble of the Universal Declaration of Human Rights, 1948.

⁴⁶⁰ Preamble of the ICCPR and Preamble of the ICESCR.

⁴⁶¹ Preamble to the American Declaration of the Rights and Duties of Man, 1948.

convention also provides that '*All men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another*'.⁴⁶²

In Africa, the African Charter on Human and Peoples Rights, also known as the Banjul Charter, stipulates that, '*Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited*'.⁴⁶³ The inherent and inalienable nature of human dignity is therefore not in doubt as all the major human rights instruments confirm.⁴⁶⁴ Human dignity thus encompasses the essential characteristics of human beings. It is important to however note that all these human rights instruments do not state what exactly human dignity consists of.⁴⁶⁵ That notwithstanding, the bottom line is that human dignity is fundamental, essential and inalienable to all humans. Some authors have also argued that the specific incidents of human dignity are socially constructed in accordance with particular cultural and historical contexts and that it is not possible to ascertain only one "true" meaning of human dignity.⁴⁶⁶ The argument is that what constitutes human dignity is culturally determined in each society and thereby widely differs. Shultziner for instance has posited that the term human dignity is used in the legal parlance – as a justification for human

⁴⁶² *Id.*

⁴⁶³ Article 5, African Charter on Human and Peoples' Rights, 1981.

⁴⁶⁴ The European Convention on Human Rights of 1950 also recognizes the inherent dignity of man and thereby prohibits degrading treatment and punishments that seek to infringe on the dignity of the human being.

⁴⁶⁵ Lebech, *supra*.

⁴⁶⁶ *Id.*

rights in legal documents; and in the moral-philosophical parlance – as related to rights and duties, honour and a degrading attitude or humiliation of human worth.⁴⁶⁷ However, because human dignity provides a minimum legal standard by which people should be treated, it seems a reliable basis for neutrality.

In promoting the respect for and promotion and protection of human rights for all, it has been suggested that theoretical examinations of the concept of human dignity may be troublesome, irrelevant and even a distraction.⁴⁶⁸ For example, Kateb summarizes the postulations of this school of thought as follows:

[T]he first contention is that despite the efforts of Kant, the idea of human dignity adds nothing but a phrase to the theory of human rights; it surely does not provide, or help to provide, an indispensable foundation. The second is that the historical record shows such human savagery toward human beings that to speak of human dignity is to mock human suffering by refusing to make paramount the moral difference between victims and victimizers; we must grant dignity only to those persons who have acted morally. The only human beings who have human dignity are those who are morally blameless or at least much less guilty; violators of rights, the victimizers, have forfeited their chance to acquire dignity. The theory of rights must distinguish between those who have dignity and those who have (not yet) lost it. The third contention is that the affirmation of human dignity

⁴⁶⁷ Doron Shultziner, *Human Dignity - Functions and Meanings*, Doron Shultziner Volume 3, Global Jurist Topics, Issue 3, 2003.

⁴⁶⁸ George Kateb, *Human Dignity*, The Belknap Press of Harvard University Press, Cambridge, Massachusetts, and London, England 2011.

is dangerous because, when extended to the human species vis-à-vis other species, it leads to monstrous human pride, which drives people to exploit nature for human purposes and hence to ravage nature and ultimately make the earth uninhabitable for many species, including humanity. The fourth contention is that human species' pride is not only dangerous but false: there is no basis for thinking that the human species is anything special; or that it alone has dignity among all the species; or that if the human species does have dignity, that its dignity is greater than, or even incomparably greater than, the dignity of any other species.⁴⁶⁹

In response to these arguments, Kateb notes that the human species is indeed something special, and '*possesses valuable, commendable uniqueness or distinctiveness that is unlike the uniqueness of any other species*'.⁴⁷⁰ To him, human dignity is higher than the dignity of all other species, or is a qualitatively different dignity from all others.⁴⁷¹ He adds that the two basic propositions that make up the concept of human dignity are that: '*All individuals are equal; no other species is equal to humanity*'.⁴⁷²

Kateb also observes that in comparison to other species, humanity has a stature beyond comparison. He also posits that human dignity is an existential value and that '*the idea of human dignity insists on recognizing the proper identity of individual or species; recognizing what a person is in relation to all other persons and what the species is in*

⁴⁶⁹ *Id.*, 4.

⁴⁷⁰ *Id.*, 5.

⁴⁷¹ *Id.*

⁴⁷² *Id.*

relation to all other species'.⁴⁷³ He adds that:

The truth of personal identity is at stake when any individual is treated as if he or she is not a human being like any other, and therefore treated as more or less than human. The truth of identity is also at stake when a person is treated as if he or she is just one more human being in a species, and not, instead, a unique individual who is irreplaceable and not exchangeable for another.⁴⁷⁴

Therefore, these two notions of commonness and distinctiveness, according to Kateb, work together in constituting the idea of equal individual status.⁴⁷⁵

Many other scholars have however in recent times also identified three general characterizations of human dignity in human rights discourse. The first of these is the idea that human dignity and human rights bear some equivalency and are similar in certain respects i.e. regarding the standards or norms that fall under both. So for example, Tobin cites language used in the preamble to the Universal Declaration of Human Rights as evidence of such equivalence.⁴⁷⁶ The second characterization or function of human dignity is succinctly captured by Jürgen Habermas.⁴⁷⁷ Tasioulas sums it up in the following manner:

⁴⁷³ Kateb, *supra* at p. 10.

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.*

⁴⁷⁶ J. Tobin, *The Right to Health in International Law* (Oxford, 2012) p. 56.

⁴⁷⁷ J. Habermas, *The concept of human dignity and the realistic utopia of human rights* in *The Crisis of the European Union: A Response* (Cambridge, Polity Press, 2012), pp. 81-87.

[T]he idea of human dignity is a “portal” or “conceptual hinge”, one that discharges a ‘mediating function’ between a morality of duties that pervades all human life, on the one hand, and the limited schedule of enforceable legal rights properly enacted by a democratic constitutional state, on the other. So understood, human dignity is a threshold at which the operative grounding values – the morality of equal respect – give rise to the rights that individuals can claim in virtue of their status as citizens of a democratic state.⁴⁷⁸

This idea of human dignity constituting enforceable legal rights has been rightly criticized as “*offering little in the way of substantive criteria for determining the content of those rights*”.⁴⁷⁹

The third meaning of human dignity treats the concept as the most fundamental value of human rights, or even as its exclusive normative basis.⁴⁸⁰ Thus, both the International Covenants on Civil and Political Rights, and Economic, Social and Cultural Rights has been pointed to as evidence of human rights in general deriving from the inherent dignity of man.⁴⁸¹ This characterization of human dignity places emphasis on the fact that all human rights derive from the dignity of man. Can we therefore say that the inherent dignity of man is a principle or value that is neutral? Better still, can human rights really be claimed to deriving from inherent human dignity?

⁴⁷⁸ J. Tasioulas, *Human Dignity and the Foundations of Human Rights* (2013), discussing Jürgen Habermas. P.1324.

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.* at pp. 1324-1325.

⁴⁸¹ See the ICCPR and the ICESCR.

The answers to the aforementioned questions seems obvious to the idealistic pro-human rights advocate. The neutrality of human dignity is seen, for example, in the fact that regardless of the circumstances of one's birth, that quality of life that is personified by the individual must remain intact and be guaranteed by the State. It is also as a result of the inherent dignity associated with man that the idea of human rights is manifested – for if humans have no dignity, there will be no need for rights in the first place. The inherent dignity of man, to me, is therefore a neutral value in the sense that it is the fundamental basis for the existence of human rights in the first place, and this is manifested in both the commonness and distinctiveness notions of equal individual status, as espoused by Kateb.

Human dignity is therefore neutral, as no one can convincingly argue that humans are bereft of dignity. As a matter of fact, even the down trodden and poor in society retain this essential characteristic of humanity. It is therefore not surprising for example that, aside age restrictions or mental health hindrances, all persons in society are given the opportunity to take part, whether through their representatives or otherwise, in making policies and governing the society generally. Inherent dignity of man should thus be above subjective analysis and unnecessary theorizing, although I admit that theoretical discussions can advance the frontiers of the concept generally and enhance understanding. Therefore, even though human dignity can be considered as a moral ideal, it is also morally neutral because its conceptualization places strong emphasis on the value and worth of man, without any distinction whatsoever.

2. Individual Autonomy

In recent times the European Court of Human rights has been noted for suggesting autonomy as the underlying principle of the European Human Rights Convention.⁴⁸² Even though it has not clearly defined it within its jurisprudence, its prevailing notion of autonomy originated in a case concerning the United Kingdom.⁴⁸³ The legal system of the UK is that of the common law. Autonomy has featured within its jurisprudence and that of analogous systems.⁴⁸⁴ The principle of autonomy was given legal effect in the ECtHR by virtue of the often-cited dictum of judge Cardozo J.: ‘*every human being of adult years and sound mind has a right to determine what shall be done with his own body.*’⁴⁸⁵ In the decision of *United Pacific Railway Co v. Botsford*,⁴⁸⁶ the Supreme Court of the United States of America noted that:

No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint of interference of others, unless by clear and unquestionable authority of law.⁴⁸⁷

⁴⁸² Lapin Yliopisto, *The Right and the Principle of Autonomy A Discussion of Autonomy as a Concept in Constitutional Law*, 2017

<<http://lauda.ulapland.fi/bitstream/handle/10024/62927/Lundbom.Janne.pdf?sequence=1>> Accessed on 15th January 2018.

⁴⁸³ *Id.*

⁴⁸⁴ *Id.*

⁴⁸⁵ *Schloendorff v. Society of New York Hospital* (1914) 211 NY 125, 128.

⁴⁸⁶ (1891) 141 US 250.

⁴⁸⁷ *Id.*

Again, in the case of *Planned Parenthood v. Casey*⁴⁸⁸ it was held that ‘*matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth amendment.*’⁴⁸⁹

Autonomy is the quality of deserving respect for one's own ability to decide for oneself, control one's life, and absorb the costs and benefits of one's choices.⁴⁹⁰ Children - for instance lack autonomy, and as a result invite sympathy, pity, or invasive paternalism.⁴⁹¹ There are various notions of Autonomy. There is the distinction between local and global autonomy, for instance.⁴⁹² The former has to do with autonomy as applied to a person's life as a whole; whereas the latter has to do with autonomy associated with specific actions or decisions.⁴⁹³ There is the idea of basic autonomy that is the minimal status of being responsible, independent and able to speak for oneself.⁴⁹⁴ There is also ideal autonomy: “*an achievement that serves as a goal to which we might aspire and according to which a person is maximally authentic and free of manipulative, self-distorting influences.*”⁴⁹⁵

⁴⁸⁸ (1992) 505 US 833.

⁴⁸⁹ *Id* at 851.

⁴⁹⁰ Stanford Encyclopaedia of Philosophy, Autonomy in Moral and Political Philosophy (Jul 28, 2003; rev. Aug 27, 2003) <<https://stanford.library.sydney.edu.au/archives/spr2009/entries/autonomy-moral/#ConAut>> Accessed on 12th January 2018.

⁴⁹¹ *Id.*

⁴⁹² John Christman, The Oxford Handbook of the History of Ethics (ed. Roger Crisp, Oxford University Press, 2013) 698.

⁴⁹³ *Id.*

⁴⁹⁴ Stanford Encyclopaedia of Philosophy, *supra*.

⁴⁹⁵ Stanford Encyclopaedia of Philosophy, *supra*.

Individual autonomy thus connotes the idea that human beings are capable of acting in an autonomous manner, and free from external influences or pressures. The ability of an individual to make rational decisions based on the choices he or she is presented with on a daily basis is what epitomizes this concept. Admittedly, at an abstract level, all life decisions and choices are influenced one way or the other by external forces. One's experiences therefore shape his or her worldview, sometimes even subconsciously. Thus the question is: Is there really individual autonomy?

My answer to this question is two-fold. First, the sum total of one's experiences is what distinguishes an individual from another person. As a result of the internalization of life's lessons, experiences or even inherent beliefs or those made on the basis of mere whims, an individual's autonomous nature is created. This autonomy is easily manifested when that person is faced with choices regarding what school to go to, what kind of employment to seek etc. Hence, the first dimension of my response is that external influences and forces inevitably shape the 'inherent' autonomous nature of an individual.

Secondly, individual autonomy exists because humans are mostly motivated by self-interest. Thus, when faced with a difficult decision, human beings have the propensity of choosing the path that will lead to some benefit, or at least will provide the least unpleasant consequences – especially in situations where the options available are equally bad. Although, any decision made under the circumstances just described could be based on some external influences that have been internalized by the person concerned, I believe that humans are instinctively wired to pursue self-preservation and

place their self-interest above any other; and this is an inherent characteristic of humanity generally.

Thus, it is my belief that Individual Autonomy as a variable of social construction can be neutral in the sense that all humans, absent the exceptions in relation to mental capacity and lack of maturity, must be deemed as possessing the free will to acting in a rational manner. The neutrality of the autonomous behavior of an individual must thus be respected within broad and rational public policy dictates. Thus, although societal influences are a major factor in shaping the behavior of people generally, the capacity to act in an autonomous manner in promoting the self-interest of individuals and their individuality should be generally respected and not infringed upon. Therefore, even though individual autonomy can also be considered as a moral ideal, it is also morally neutral because its conceptualization places strong emphasis on the ability of human beings to make rational individual choices.

3. *Equality*

The concept of equality is probably the easiest right to explain, but the most difficult to achieve in our contemporary world. This is because the classical idea of equality suggests that all persons are born equal. Equal in rights, and equal in dignity. Thus, they must be treated the same without any distinction whatsoever. The problem with this is that in actual fact human beings have never been deemed to be equal from time immemorial. Hence, humans have been often divided into classes i.e. the bourgeoisie and the proletariat, men and women, white and black, king and subject etc.

Hence, inequality has been one of the essential characteristics of human existence since the beginning of time.

Recently in Ghana, the Supreme Court in discussing notions of equality limited equality to non-discrimination among equals. According to the court, only equals could be treated equally. One would have thought that if humans are human and therefore equal, they ought to be treated equally regardless of their different status. The court however reasoned as follows:

No two human beings are equal in all respects. Accordingly, if the law were to treat all human beings rigidly equally, it would in fact result in unequal outcomes. Rigid equal treatment would often result in unfair and unequal results. Accordingly, it is widely recognized that equality before the law requires equal treatment of those similarly placed, implying different treatment in respect of those with different characteristics. In simple terms, equals must be treated equally, while the treatment of unequals must be different. The law must be able to differentiate between unequals and accord them the differentiated treatment which will result in enabling them, as far as practicable, to attain the objective of equality of outcomes or of fairness. In effect, equality of opportunity will often entail the law treating people differently in order to give them a fighting chance of attaining equality of outcomes or of fairness. If the differentiated legal rights arising from such an approach to the law were to be struck down as not

conforming with the constitutional prescription that all persons are equal before the law, it would be thoroughly counterproductive.⁴⁹⁶

If equality were explained as inherently intertwined with the concept of inequality, it would imply that a state would be able to infringe on the rights of a citizen once the state discovers a loophole. One such instance is where a criterion for discrimination has not been spelled out. On the other hand, this interpretation seems to make room for the operation and justification of concepts such as affirmative action. This seems to make the debate a tough one. However it is helpful to remember that it is not the apparent inequality within the concept of affirmative action that is the basis of this intervention.⁴⁹⁷ It is rather based on compensatory and distributive principles of justice applied in order to restore social equilibrium.

The questions that remain to be answered as a result are: how do we conceptualize the idea of equality? Does equality mean treating similarly placed persons in an equal manner? Is it right to treat persons not similarly placed differently? My view is that, equality as a variable of social construction is fraught with inherent problems, as has been witnessed as a result of the inequality that has been part and parcel of man's history. However, when we consider equality within the context of discussions of law and morality, we must elevate this variable to the point where rational public policy choices are made on the basis of the classical conception of the principle of equality and non-discrimination.

⁴⁹⁶ Nartey v. Gati [2010] SCGLR 745.

⁴⁹⁷ Johan Rabe, *Equality, Affirmative Action and Justice* (Books on Demand GmbH, 2001) 71 – 83.

Thus, laws promulgated in modern secular States must be rational, and equally applicable to all persons. Further, law must ensure that the interests of no one individual or groups of persons are elevated above others. This conceptualization of equality is neutral in the sense that it treats all persons in an equal manner without any distinction whatsoever. In practice, this may be impossible to achieve, as a result of systemic inequality that has been ingrained in the social ethos of most societies. However, pursuing public policy on the basis of an equal applicable standard for all persons presents the best opportunity in ensuring and safeguarding individual liberty generally. Equality as a principle can therefore be made neutral if adopted and vigorously pursued as an inherent good in itself, which all persons are entitled to by virtue of their membership of the human race alone. No other qualification factor, in my opinion, is required in theorizing that the principle of equality can and must indeed be morally neutral. Therefore, even though equality can also be considered as a moral ideal, it is nonetheless also morally neutral because of its concern with individual liberty.

D) THE DIGNITY, INDIVIDUAL AUTONOMY AND EQUALITY (D.I.E.) FRAMEWORK

Having theorized about moral neutrality, it is important to reiterate that there are many who believe that neutrality is itself not neutral. That notwithstanding, some scholars regard concepts such as the Rule of Law as value-neutral, even though they believe neutrality as a concept is far from neutral.⁴⁹⁸ However, it has been noted that insofar as some people perceive a concept as desirable, they will believe it has some

⁴⁹⁸ Tara Smith, *Neutrality Isn't Neutral: On the Value-Neutrality of the Rule of Law*, 4 Wash. U. Jur. Rev. 49 (2011).

value.⁴⁹⁹ The difference is however in relation to the exact character of that value, in particular, whether the Rule of Law as an example offers moral value.⁵⁰⁰ It has also been argued that the neutralists are mistaken, and that theirs is a costly mistake.⁵⁰¹ According to Smith, governance by the Rule of Law is a valid ideal only because it is a moral good that serves a morally worthy purpose.⁵⁰² Thus, the conception of the Rule of Law as value-neutral actually thwarts our ability to enjoy the benefits that it can and should provide.⁵⁰³ Smith goes on to suggest that:

More exactly, its ideal-ness is ambiguous. Is it an ideal which, when satisfied, delivers a positive good? A state of affairs desirable in its own right? Such that a government that provides the Rule of Law is, in virtue of that, morally superior to a government that does not? Or is its value relative to the particular ends of the government that it serves, a strictly internal and instrumental value, such that a regime that conforms to Rule of Law standards is not thereby better than alternatives in any very robust sense? [T]he Rule of Law has become something of a gold standard of legitimacy. Domestically, as well, over the last decade in the U.S., many on both the left and right have charged our government with serious breaches of the Rule of Law, whether in regard to detention and surveillance policies adopted in the war on terror, the powers assumed by central bankers at the Federal Reserve and Treasury Departments in the face of the 2008 financial crisis, uses of Presidential signing statements, executive privilege, reconciliation processes for enacting legislation, or the Supreme Court's ruling in

⁴⁹⁹ *Id.*

⁵⁰⁰ *Id.*

⁵⁰¹ *Id.*

⁵⁰² *Id.*

⁵⁰³ *Id.*

Bush v. Gore. My contention is that a hazy grasp of the character of the Rule of Law will naturally infect our understanding of its precise requirements and the value that is attained by satisfying them. Without a clear understanding of the value of this ideal, we cannot accurately identify its necessary conditions, and thus we will lack a sound basis for judging whether a given government is or is not upholding it.⁵⁰⁴

Even though her argument centers on the Rule of Law, she highlights the intrinsic superiority a principle conveys once it is recognized as better than others. This seems to establish rather that the conception of morally neutral concepts may rather be tantamount to imposing a ‘new normal moral.’

Again, in a report on neutrality in Germany, Human Rights Watch defined the principle of State neutrality as the duty of the State to preserve neutrality in ideology and religion. Some proponents of State legislation restricting the headscarf and other religious clothing claim that it is designed to ensure the neutrality of the teaching environment and public services as well as the political and religious peace of schools and of the State. They argue that the wearing of headscarves by teachers must be prohibited. Some Church representatives and mainly Christian Democrat politicians justify privileging Christianity in terms of such restrictions on the grounds that it is an integral part of German culture and the German value system. To them, the headscarf represents a threat to the Christian heritage that underpins German constitutional values. By this logic, Christian symbols are

⁵⁰⁴ *Id.*

not considered a threat to the principles of the Constitution because they are cultural rather than religious and therefore neutral. Based on this some may argue that underlying every concept of neutrality is some standard which renders the concept non-neutral. This may not necessarily be the case. The form of moral neutrality as has been discussed must necessarily be applicable to individuals because it must respect their autonomy, dignity and must have equality as its basis. This leaves no room for the operation of such public or mass concepts of morality in general, which leads to the oppression of minorities.

The Dignity, Individual Autonomy and Equality framework for public policy making, which I propose, drawing on the lessons from the UDHR drafting process (in particular, the work of the UNESCO Committee) therefore, can be summarized as follows:

- 1) All laws that seek to regulate intimate human conduct must have at its core the objective of preserving and promoting the inherent dignity of the individual;
- 2) The individual's ability to act in an autonomous manner free from social coercion must be reflected in laws that seek to regulate intimate human conduct; and
- 3) All laws that seek to regulate intimate human conduct must have the quality of equality about it i.e. it should not criminalize particular groups of people because of personal choices that do not conform to societal standards.

This framework for public policy making must be applied, employed and be the basis of analysis in determining whether laws that seek to regulate morality are generally sound, and accord with the public policy demands of the 21st Century.

CHAPTER FOUR

THE CRIMINAL JUSTICE SYSTEM AND THE REGULATION OF INTIMACY AND SEXUAL

MORALITY

The Legal System of Ghana as it is today is modeled along the lines of the British common law system. Ghana, formerly referred to as the Gold Coast, attained independence in 1957. Prior to that, the entity was a colony of Great Britain between 1843 and 1957. The British thus imported aspects of their political and legal system to their colonies, including the Gold Coast, by virtue of their “indirect rule” governance style.

A) THE GHANA LEGAL SYSTEM

1. *Historical Foundations of the Ghanaian Legal System*

The Gold Coast, now Ghana, is located on the Gulf of Guinea in West Africa. It is estimated that the indigenous peoples of this territory first came into contact with Europeans somewhere in the fifteenth century.⁵⁰⁵ The first to arrive were the Portuguese, who were subsequently followed by the Danes, Dutch and the British. The early Europeans were mainly traders, who sought trade relations with the indigenous people. William B. Harvey captures this initial phase of colonialism in the following words:⁵⁰⁶

⁵⁰⁵ H.A. Amankwah, *Ghanaian Law: Its Evolution and Interaction with English Law*, 4 CORNELL INT’L L. J. 38 (1970).

⁵⁰⁶ W.B. HARVEY, *LAW AND SOCIAL CHANGE IN GHANA* 5-6 (1966).

The first to arrive were the Portuguese, and in the centuries that followed, the English, French, Dutch, Swedes, Danes and Brandenburgers competed for footholds on the Guinea Coast from which to pursue their trading activities. The pattern of contact and exploitation was fairly uniform. The European traders established coastal fortified posts, many of which remain today, and developed working relations with the chiefs and people of the surrounding area. European guns, cloth and spirits were traded for slaves, gold, ivory and pepper. Trade was not limited to the people in the immediate environs of the forts, however. Native traders from far in the interior brought their human, or other, cargoes to the coast to trade with the Europeans. As the region's early name indicated, gold was an important export, as it is today. Through the dark period of the slave trade, however, enormous numbers of Africans were sold at the forts and loaded aboard ships bound for the new world.

Missionary activity was also an important fixture in the history of the Gold Coast, as the so-called 'explorer-traders' believed themselves to be "the bearers of Christianity and civilization to the pagan people."⁵⁰⁷ However, it was not until the middle of the eighteenth century that there begun organized missionary activity in the Gold Coast.⁵⁰⁸ These included representations from the Society of the Propagation of the Gospel; the Basel Missionaries; the Methodist Missionaries; the Breman Missionaries; and the Catholic Missionaries.⁵⁰⁹

⁵⁰⁷ *Id.*, 6.

⁵⁰⁸ *Id.*

⁵⁰⁹ *Id.*

It is important to note that by the early parts of the nineteenth century, the British were virtually the last ‘surviving’ European power in the Gold Coast. Prior to 1821 however, it was the Company of Merchants trading to Africa (successors to the Royal African Company of England) that governed the British trading forts and posts in the Gold Coast.⁵¹⁰ However, the abolishing of the slave trade in Britain in 1807⁵¹¹ meant that the Company lacked the necessary funding and incentive to continuously maintain the British forts, and as a result required governmental subsidy for same.⁵¹² As a result of allegations and accusations of misuse of this subsidy, as well as its failure to prevent ‘black market’ trade in slaves, the West Africa Act of 1821 was passed. This Act dissolved the Company of Merchants, and vested its forts and other possessions in the Crown. Furthermore, these possessions of the Crown, as well as future ones located between latitudes 20 degrees North and 20 degrees South along the West Coast of Africa, were to be annexed and made dependencies of the Colony of Sierra Leone.⁵¹³ Thus, formal British rule in the Gold Coast dates back to 1821, although the territory was at this time a dependency of the Colony of Sierra Leone.

In 1828, the British government decided to hand over the administration of the Gold Coast to a Committee of Merchants it selected.⁵¹⁴ Under the leadership of Captain George Maclean, the Committee extended its powers beyond the forts and settlements. In 1842 however, a Parliamentary Select Committee recommended that the Crown resume administration of the Gold Coast, and that it be severed from the Colony of Sierra

⁵¹⁰ F.A.R. BENNION, CONSTITUTIONAL LAW OF GHANA 4 (1962).

⁵¹¹ An Act for the Abolition of the Slave Trade, 47 Geo. 3, Sess. I, c. 36 (UK).

⁵¹² BENNION, *supra* note 510, at 5.

⁵¹³ *Id.*

⁵¹⁴ *Id.*

Leone.⁵¹⁵ The idea was to regularize the “irregular judicial jurisdiction de facto exercised by Maclean and the magistrates at the forts.”⁵¹⁶ This was intended to be achieved through pacts and agreements with the native chiefs, and with the appointment of a British judge “who, in administering justice to the African population, should follow the principles, while not being restricted to the technicalities, of English law and should be allowed a large discretion.”⁵¹⁷ The Report of this Parliamentary Select Committee therefore outlined the envisaged relationship between the Crown and the natives in the following terms:⁵¹⁸

... not the allegiance of subjects, to which we have no right to pretend, and which it would entail an inconvenient responsibility to possess, but the deference of weaker powers to a stronger and more enlightened neighbor, whose protection and counsel they seek, and to whom they are bound by certain definite obligations.

Thus, in 1843, the Crown resumed control of the Gold Coast. To enable the effective administration of the Gold Coast, there was the enactment of the British Settlements Act of 1843⁵¹⁹ and the Foreign Jurisdiction Act of 1843.⁵²⁰ Collectively, these Acts made it possible for the British to exercise legal and political control over the Gold Coast.

⁵¹⁵ *Id.*

⁵¹⁶ *Id.*

⁵¹⁷ *Id.*

⁵¹⁸ See SELECT COMMITTEE ON THE WEST COAST OF AFRICA, REPORT, 1842, [551], at iv-vi (UK).

⁵¹⁹ British Settlements Act 1843, 6 & 7 Vict. c.13 (UK).

⁵²⁰ Foreign Jurisdiction Act, 6 & 7 Vict. c.94 (UK).

In order to solidify and legitimize their claim to the political and legal administration of the Gold Coast, the British entered into an agreement with some coastal chiefs (mainly Fanti chiefs) in 1844. This is what has come to be famously known as the Bond of 1844, whereby the chiefs sought the protection of the British against attacks from the inland by the Ashanti and other ethnic groups. Thus, irrespective of the many British laws that were passed concerning the administration of the Gold Coast, it is this agreement that signifies, to a large extent, the cession of the legal administration of the Gold Coast to the British, by the natives themselves represented by their chiefs. As a result of the importance of this agreement in the legal development of the Gold Coast, it is imperative that the full text of the Bond is reproduced below:

1. Whereas power and jurisdiction have been exercised for and on behalf of Her Majesty the Queen of Great Britain and Ireland, within divers countries and places adjacent to Her Majesty's forts and settlements on the Gold Coast; we, chiefs of countries and places so referred to, adjacent to the said forts and settlements, do hereby acknowledge that power and jurisdiction, and declare that the first objects of law are the protection of individuals and of property, that,
2. Human sacrifices, and other barbarous customs, such as panyarring, are abominations and contrary to law, and, that,
3. Murders, robberies, and other crimes and offences, will be tried and inquired before the Queen's judicial officers and the chiefs of the districts, moulding the customs of the country to the general principles of English law.

Done at Cape Coast Castle before his Excellency the Lieutenant Governor; on this 6th day of March, in the year of our Lord 1844.

From this point onwards, a juridical link was formed between Britain and the Gold Coast that paved the way for the introduction of the common law, previously unknown to the Gold Coast.

Thus, by 1844 the British had essentially ensured that the people of the Gold Coast were subject to British rule. However, the official creation of the ‘Gold Coast Colony’ was not until 1874, following the defeat of the Ashantis in the Anglo-Ashanti war that began on 22nd January 1873, and ended on 13th February 1874.⁵²¹ The 1874 Treaty of Fomena that ended the war provided that the Asantehene⁵²² had renounced all claims to the coastal territories, including Elmina.⁵²³ On the formal creation of the Colony, Bennion notes the following:

Having at last achieved the position of sole European power on the Gold Coast, and having, at considerable cost in life and resources, at last brought about the decisive defeat of the Ashantis, the British Government, disregarding those who still pleaded for the abandonment of this troublesome region, decided that further temporizing was impossible. By a Royal Charter signed on July 24th, 1874, the

⁵²¹ F.A.R. BENNION, CONSTITUTIONAL LAW OF GHANA 4 (1962).

⁵²² The “Asantehene” is the traditional ruler/king of the Ashanti people in Ghana.

⁵²³ BENNION, *supra* at 17.

Gold Coast and Lagos were separated from Sierra Leone and together constituted a separate colony under the title of the Gold Coast Colony.⁵²⁴

The Royal Charter of 1874 also provided for the position of a Governor, and established the Legislative and Executive Councils. The Supreme Court of the Gold Coast was also re-established by virtue of the Supreme Court Ordinance of 1876, having been initially established pursuant to the Ordinance of 1853. The Chief Justice and not more than four puisne judges⁵²⁵ constituted the court. The court had both civil and criminal jurisdiction within the colony, similar to that of the Courts of Queen's Bench, Common Pleas and Exchequer in Britain.⁵²⁶ Thus, the court's jurisdiction was equivalent to that of the then recently created High Court of Justice in England.

There were to be three divisional courts of the Supreme Court that were to sit in each of the three Provinces that the colony had been sub-divided into for the purposes of administration. The "Full Court" of the Supreme Court, comprising the Chief Justice and one or two puisne judges, was to act as a Court of Appeal, sitting in both Accra and Lagos. Also, district commissioners were ex officio commissioners of the Supreme Court and, as such, they exercised the powers of a judge of the Supreme Court within their respective districts. Decisions of the Supreme Court could be appealed to the Privy Council in Britain; and the Petition of Right Ordinance of 1877 made it possible for claims to be brought against the colonial Government in the Supreme Court.

⁵²⁴ *Id.*

⁵²⁵ This simply refers to Associate Judges or Justices of a Court.

⁵²⁶ BENNION, *supra* at 19.

The Gold Coast Native Jurisdiction Ordinance, 1883 (No. 5) regulated the administration and dispensation of justice at the local level through the native tribunals system. The head chiefs and other divisional and sub-divisional chiefs and their advisors within particular localities constituted these tribunals. They exercised both civil and criminal jurisdiction, and appeals from their decisions lay in the Supreme Court. A police force was also established in the colony pursuant to the Police Ordinance of 1894. This ensured that by the beginning of the twentieth century, the formal structure of the Gold Coast legal system had taken shape, and was up and running.

2. Structure of the Ghana Legal System

By the time the Gold Coast became independent in 1957, the legal system that had been put in place in the mid-nineteenth century had taken root. The Ghana Legal System today is thus a complex system comprising formal as well as traditional courts and written and unwritten laws. The English common law still plays a significant role in justice delivery in Ghana today, as many areas of the law have remained unaffected by statutory incursions – for example contract law and the law of torts.

i. Sources of Law

The 1992 Constitution of Ghana provides a definitive list of all the sources of law underpinning the legal system in present day Ghana.⁵²⁷ Article 11 of the Constitution provides as follows:

⁵²⁷ See CONSTITUTION Art. 11 (1992) (Ghana).

The laws of Ghana shall comprise–

- (a) this Constitution;
- (b) enactments made by or under the authority of the Parliament established by this Constitution;
- (c) any Orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution;
- (d) the existing law; and
- (e) the common law.

The Constitution is therefore at the apex of the hierarchy of laws in Ghana, as set forth in article 1(2), which provides that ‘*This Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void.*’ Acts of Parliament or statutory law is second in the hierarchy of laws, followed by subsidiary legislation in the form of Orders, Rules and Regulations.

The Constitution defines the “existing law” to comprise ‘*the written and unwritten laws of Ghana as they existed immediately before the coming into force of this Constitution, and any Act, Decree, Law or statutory instrument issued or made before that date, which is to come into force on or after that date.*’⁵²⁸ Therefore, all the previous enactments of the previous Parliaments of Ghana and the Military Regimes as well as customary law, to the extent that they are consistent with the present Constitution, are all legally valid laws. In terms of the common law, the Constitution states that: ‘*The common*

⁵²⁸ *Id.* art. 11(4).

*law of Ghana shall comprise the rules of law generally known as the common law, the rules generally known as the doctrines of equity and the rules of customary law including those determined by the Superior Court of Judicature.’*⁵²⁹

The English common law rules and doctrines of equity that were introduced and assimilated into the legal system of the Gold Coast have endured to this day. However, the “common law of Ghana” is defined to include customary law.⁵³⁰ Customary law is then defined as ‘*the rules of law which by custom are applicable to particular communities in Ghana.*’⁵³¹ It is important to note that modern day Ghana is an amalgamation of several distinct ethnic groups, most of them having distinct cultural norms, practices and beliefs. The Constitution therefore seeks to recognize these diverse cultural systems and their inherent rules so long as they do not offend the Constitution and/or ‘*dehumanize or are injurious to the physical and mental well-being of a person.*’⁵³²

ii. Court Structure

Judicial power in Ghana is vested in the Judiciary and ‘*neither the President nor Parliament nor any organ or agency of the President or Parliament shall have or be given final judicial power.*’⁵³³ The Judiciary consists of the Superior Courts of Judicature and the Lower Courts. The Superior Courts of Judicature comprises the Supreme Court,

⁵²⁹ *Id.* art. 11(2).

⁵³⁰ *Id.*

⁵³¹ *Id.* art. 11(3).

⁵³² *Id.* art. 26(2).

⁵³³ *Id.* art. 125(3).

the Court of Appeal and the High Court.⁵³⁴ The Lower Court structure is made up of the Circuit Court and the District Magistrates Court.⁵³⁵ There is also the traditional “court” system that primarily deals with causes or matters affecting the institution of Chieftaincy in Ghana. These “courts” are made up of the National House of Chiefs;⁵³⁶ the Regional Houses of Chiefs⁵³⁷ for each of the ten administrative regions of the country; and traditional and divisional councils.⁵³⁸

The Supreme Court consists of the Chief Justice and a minimum of nine other Justices.⁵³⁹ The original jurisdiction of the Supreme Court extends to all matters relating to the enforcement and interpretation of the Constitution, as well as matters regarding whether or not an enactment was made in excess of the powers of Parliament or the enacting authority, as the case may be.⁵⁴⁰ The Supreme Court also has appellate jurisdiction in respect of decisions of the Court of Appeal and those from the National House of Chiefs.⁵⁴¹ The Court of Appeal is primarily an appellate Court that hears appeals from the High Court and Circuit Court.⁵⁴² The High Court is a court of first instance in some matters and has civil as well as criminal jurisdiction, including original jurisdiction in terms of the enforcement of the fundamental human rights and freedoms provisions contained in the Constitution.⁵⁴³ The Circuit and District Magistrates Courts, including the Family Tribunals and Juvenile Tribunals, handle most of the cases in Ghana

⁵³⁴ *Id.* art. 126(1)(a).

⁵³⁵ *Id.* art. 126(1)(b).

⁵³⁶ *Id.* arts. 271, 272, 273.

⁵³⁷ *Id.* art. 274.

⁵³⁸ *Id.* art. 274(3)(c).

⁵³⁹ *Id.* art. 128(1).

⁵⁴⁰ *Id.* art. 130(1).

⁵⁴¹ *Id.* art. 131.

⁵⁴² *Id.* art. 137.

⁵⁴³ *Id.* arts. 33, 130(1), 140.

since they are more easily accessible to the masses, and are more widely distributed across the country.

3. *Overview of the Criminal Justice System*

The Criminal Justice System of Ghana is made up of the sum total of laws and institutions that exist for the purposes of maintaining social stability, in terms of preventing the commission of the criminal offences promulgated, and prosecuting offenders. The major institutions that make up the Criminal Justice System of Ghana are as follows: the Courts (i.e. District Courts, Circuit Courts and High Courts);⁵⁴⁴ the Ghana Police Service; the Ghana Prisons Service; and the Attorney General's Department & Ministry of Justice.⁵⁴⁵ On the other hand, the major laws that set out the criminal offences in Ghana, and its procedural aspects are: the Criminal Offences Act, 1960 (Act 29); and the Criminal and Other Offences (Procedure) Act, 1960 (Act 30).⁵⁴⁶

Crimes in Ghana are classified as follows: offences punishable by death i.e. capital offences; first and second-degree felonies; misdemeanours; and offences punishable by a fine. These classifications are important because they determine the punishment to which one is liable for the commission of a particular offence.⁵⁴⁷ At common law, the offence of treason was the most serious of offences for which a person

⁵⁴⁴ These are the main trial courts where criminal offences are prosecuted. The Court of Appeal and Supreme Court serve as courts with appellate jurisdiction for the purposes of the criminal law in Ghana.

⁵⁴⁵ This is by no means intended to be an exhaustive list of all the institutions that play a role one way or the other for the purposes of giving effect to the criminal law of Ghana; but rather it represents the main players and key stakeholders.

⁵⁴⁶ Once again, this is not an exhaustive list, for several other pieces of legislation proscribe certain acts and characterize them as offences.

⁵⁴⁷ See Henrietta Mensa-Bonsu, *The General Part of Criminal Law: A Ghanaian Casebook* (2001).

was liable to suffer a death. Under the 1992 Constitution of Ghana and the Criminal Offences, 1960 (Act 29), the offences that are punishable by death are: high treason, treason and murder.

Felonies on the other hand are offences that are punishable by terms of imprisonment of up to life imprisonment. Under the Criminal and Other Offences (Procedure) Act, 1960 (Act 30), there are two kinds of felonies: first-degree felonies and second-degree felonies. Section 296 of Act 30 provides that the punishment for a first-degree felony is a term of imprisonment from one day to life imprisonment. A second-degree felony is punishable by a term of imprisonment not exceeding ten years.

At common law, misdemeanours were offences that were not very serious and were thus not felonies. The rule was such that it covered whatever openly outraged decency and was injurious to public morals. In Ghana, an offence that is classified as a misdemeanour is tried by summary proceedings, and is punishable by a term of imprisonment not exceeding three years. Examples of misdemeanours are offences against public order such as fighting in a public place. Finally, a fine is a sum of money, the payment of which is imposed on an individual for the commission of an offence. Under section 297 of Act 30, it may be imposed in addition to any term of imprisonment. Where the only penalty for the commission of an offence is a fine, then that offence is a very minor one.

B) SEX WORK AND THE LAW IN GHANA

1. *The History of Sex Work in Ghana*

It has been suggested that sexuality is too powerful a force to leave unregulated.⁵⁴⁸ Regulating sexuality is however a complex task due to the private and intimate nature of sex. However, an aspect of human sexuality that from time immemorial has been “cosmetically” regulated through the criminal law is the sale and purchase of sex. The first comprehensive statute on such matters introduced to the Gold Coast by the British, was the Criminal Code of 1892.⁵⁴⁹ This law was expressed as ‘An Ordinance to establish a Code of Offences punishable on Summary Conviction and on information.’⁵⁵⁰ At this point, it must be noted that during the early parts of the nineteenth century, the British had already begun a movement towards comprehensively codifying sexual offences for its colonies, beginning with India. It is well known, for example, that Thomas Babington Macaulay was the one tasked in 1825 to do this.⁵⁵¹ He was the Chairperson of the first Law Commission of India, and led the drafting process of the Indian Penal Code (IPC), which is believed to be the first comprehensive penal code produced within the British Empire.⁵⁵² The draft Indian Penal Code was completed in 1837 but did not come into force until 1860.⁵⁵³

⁵⁴⁸ Eugenia W. Herbert, *Iron, Gender and Power: Rituals of Transformations in African Societies* (Bloomington, 1993), 227.

⁵⁴⁹ See ORDINANCES OF THE GOLD COAST COLONY AND THE RULES AND ORDERS THEREUNDER IN FORCE 31ST MARCH, 1903 (William Brandford Griffith, ed., 1903) (hereinafter “ORDINANCES”), at 667.

⁵⁵⁰ *Id.*

⁵⁵¹ M.L. Friedland, *Codification in the Commonwealth: Earlier Efforts*, 18 COMMONWEALTH L. BULL. 1172 (1992).

⁵⁵² See generally, *This Alien Legacy: The Origins of ‘Sodomy’ Laws in British Colonialism*, HUMAN RIGHTS WATCH (Dec. 17, 2008), <https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism>.

⁵⁵³ *Id.*

It is however believed that Section 372 and 373 of the Indian Penal Code of 1860, captioned “Selling minor for purposes of prostitution, etc.” and “Buying minor for purposes of prostitution, etc.” respectively, is what in many diverse forms, influenced colonial prostitution laws within the British Empire.⁵⁵⁴ For ease of reference these provisions are reproduced in full below:

Selling minor for the purposes of prostitution, etc. – Whoever sells, lets to hire, or otherwise disposes of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such a person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.⁵⁵⁵

Similarly, the offence of buying minor for purposes of prostitution, etc. provided that *‘Whoever buys, hires or otherwise obtains possession of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed*

⁵⁵⁴ *Id.* However, it must be noted that the IPC’s influence within the British Colonies was not absolute. This is as a result of the fact that even though the penal codes in colonies like Pakistan, Mauritius, Sri Lanka, Malaysia and Singapore were largely influenced by the IPC, other later codes like the Queensland Code of 1899 as well as R.S. Wright’s Draft Criminal Code for Jamaica of 1877 and Albert Ehrhardt’s 1925 Colonial Office Model Code were the basis for the Penal Codes in some of the other British colonies in Africa.

⁵⁵⁵ Section 372 of Indian Penal Code of 1860.

*or used for any such purpose, shall be punished with imprisonment of wither description for a term which may extend to ten years, and shall also be liable to fine’.*⁵⁵⁶

Remnants of this provision and other similar provisions in other codes are what still pertain on the statute books in a majority of former British colonies in Africa today.⁵⁵⁷ In the Gold Coast therefore, the Criminal Code of 1892 for the first time introduced to the colony, the offence known as ‘Procuration’. Section 183 of the Criminal Code (No. 12 of 1892) i.e. ‘Procuration’ provided as follows:

Whoever–

- (1) Procures any female under twenty-one years of age, not being a common prostitute or of known immoral character, to have unlawful carnal connexion, either within or without Her Majesty’s dominions, with any other person; or
- (2) Procures any female to become, either within or without Her Majesty’s dominions, a common prostitute; or
- (3) Procures any female to leave this Colony, with intent that she may become an inmate of a brothel elsewhere; or
- (4) Procures any female to leave her usual place of abode in this Colony (such place not being a brothel) with intent that she may, for the purposes of

⁵⁵⁶ Section 373 of Indian Penal Code of 1860.

⁵⁵⁷ For example, R.S. Wright’s Draft Criminal Code for Jamaica (although never adopted in Jamaica) was nonetheless enacted in many colonies in the Caribbeans as well as in the Gold Coast (now Ghana), and was supposed to be the model for the British African colonies. See M.L. Friedland, *The Canadian Criminal Code: Past, Present, Future?* 7 (2011), http://www.law.utoronto.ca/utfl_file/count/documents/Friedland/Jan12,2011Presentation.pdf.

prostitution, become an inmate of a brothel, either within or without Her Majesty's dominions, shall be liable to imprisonment for two years: Provided that no person shall be convicted of any offence under this section upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused person.⁵⁵⁸

This provision in this Criminal Code of 1892 is what marked the beginning of the criminalization of sex work generally in Ghana that has endured to this day. Following the introduction of this law, the Criminal Code was re-enacted in 1898 as Chapter 16 of the Laws of the Gold Coast Colony.⁵⁵⁹ Section 185 (Procuration) of this Ordinance, is identical to the corresponding provisions of the 1892 Ordinance. Just like the law of Britain at the time, the Criminal Code of the Gold Coast criminalized and punished enforced sex work. From the records of decided Gold Coast cases, it is doubtful that there was ever a reported case of 'Procuration', although this is by no means indicative of the absence of such acts in the colony.

That notwithstanding, in Africa today, sex work is generally viewed as immoral, and African cultural apologists are quick to add that such behaviour (voluntary or

⁵⁵⁸ Criminal Code, Ordinance No. 12 of 1892, *in* ORDINANCES, *supra*, section 183.

⁵⁵⁹ *See* THE LAWS OF THE GOLD COAST COLONY CONTAINING THE ORDINANCES OF THE GOLD COAST COLONY AND THE ORDERS, PROCLAMATIONS, RULES, REGULATIONS AND BYE-LAWS MADE THEREUNDER IN FORCE ON THE 31ST DAY OF DECEMBER 1919, AND THE PRINCIPAL IMPERIAL STATUTES, ORDERS IN COUNCIL, LETTERS PATENT AND ROYAL INSTRUCTIONS RELATING TO THE GOLD COAST COLONY, ch. 16 at 260 (Donald Kingdon ed., 1920).

enforced sex work) is foreign and un-African.⁵⁶⁰ However, this is far from the truth, as research has established the existence of traditional forms of enforced sex work for example, in pre-colonial African societies; one scholar aptly referring to the sex workers within this context as ‘*conscripted public servants*’.⁵⁶¹ The fact therefore is that, enforced sex work must have existed prior to the introduction of colonial procurement laws that only sought to prohibit this form of sex work. Akyeampong refers to the traditional sex workers as “*public women*”.⁵⁶² He distinguishes between pre-colonial sex work and post-colonial sex work in the following manner:

A distinguishing feature of prostitution in the Gold Coast is the relative absence of male pimps. Mention can be made of male intermediaries like the ‘pilot boys’ of Sekondi-Takoradi in the 1940’s, but they were more like ‘brokers’ who brought potential clients to prostitutes for a commission. Their activities peaked during World War II with the presence of foreign sailors and soldiers. But the pilot boys lacked the control that characterizes the relationship between pimps and prostitutes. Instead, prostitutes in the Gold Coast sometimes formed informal associations for mutual support; moreover, they controlled their sexuality and their earnings. Therein lies one important difference between prostitutes and what I refer to as the ‘public women’ of the pre-colonial Gold Coast. Public women were often female slaves acquired by the political elite of Akan villages and towns, and compelled to provide sexual services for the local bachelors. Their

⁵⁶⁰ See Nicole Fick, *The Stigmatisation of Sex Workers*, Pambazuka News (Oxford), 2006.

⁵⁶¹ Emmanuel Akyeampong, Sexuality and Prostitution among the Akan of the Gold Coast c. 1650-1950, *Past & Present*, No. 156 (Aug., 1997), pp. 144-173.

⁵⁶² *Id* at 146.

institutionalized role – indeed, their very existence – sheds important light on how perceptions of sexuality informed gender relations.

Quite clearly, sex work existed in pre-colonial Africa, but its nature must have evolved from the public women phase or conscripted civil servants era, to a more autonomous phase, where sex workers controlled their sexuality and earnings, beginning the wave of voluntary sex work as distinct from enforced sex work in Ghana.

There is ample proof to buttress Akyeampong's assertion of the existence of traditional forms of sex work in pre-colonial Gold Coast.⁵⁶³ Olfert Dapper for instance had this to say about the people of Axim in the 1660's, albeit in somewhat crude but vivid terms:

Although the Blacks along this coast and in the interior marry as many wives as they can maintain, it is customary in Atzijn [Axim] and all the surrounding areas, as far as the Quaqua Coast, for every village to maintain two or three whores, whom they call Abrakrees. They are initiated and confirmed for the conduct of this work by their Kabaseros or headmen in the presence of a large crowd of people, in the following manner. First, they place these whores, who are certain purchased slaves, with many foolish and ridiculous ceremonies upon a straw mat and display them. Then one of the oldest among them, standing up, takes a young

⁵⁶³ See, Olfert Dapper, *Naukeurige beschrijvinge der afrikaensche gewesten*, 2nd edn (Amsterdam, 1676); W. Bosman, *A New and Accurate Description of the Coast of Guinea, Divided into the Gold, the Slave, and the Ivory Coasts* (London, 1705); and Jean Godot, *Voyages de Jean Godot* (Paris, 1704): Bibliotheque Nationale, Paris, MS francais 13,830–1.

hen, opens its beak with a knife and lets a few drops of blood drip on her head, shoulders and arms. At the same time, she utters upon it terrible adjurations, saying that [she?] shall die unless she accept as lover for three or four kakraven (worth two or three stuivers), notwithstanding the applicants be of rich means; and this without excluding their own blood relatives. Everything she gains in this way she must hand to the Kabasero, and in return she enjoys the liberty of being allowed to take food, whether it stands in someone's house or in the market, for her sustenance, and nobody may prevent her from doing so, upon a fixed penalty. When this has happened, one person from the crowd is sent to one side with her and, upon their return, testifies that she has been found to be not a man but a woman. Then her companion, namely the other Abrakree or whore, takes her home; she is washed, and a clean bed-sheet is wrapped around her. She then sits down on the mat, a bracelet of beads is put on her arm, and her shoulders, arms and breast are painted with lime or chalk. Finally this Abrakree is put on a stool and carried by two young men on their shoulders; they run into the village with much cheering by those following them, and they greatly enjoy themselves dancing and drinking palm or bordon wine. On eight consecutive days thereafter she goes to sit at her appointed place, where all passers-by must give her two or three kakraven.⁵⁶⁴

This elaborate initiation process as described by Dapper gives credence to Akyeampong's assertion that such public women were conscripted public servants; for they existed to satisfy the sexual desires of the men in the village.

⁵⁶⁴ Olfert Dapper, *Naukeurige beschrijvinge der afrikaensche gewesten*, 2nd edn (Amsterdam, 1676) 106.

By all indications, this was a system that had been instituted as a means of curbing adultery among married men, and providing sexual satisfaction and gratification for the unmarried young men in society. Akyeampong, paraphrasing Godot's discovery of the role of public women in the area to the West of Axim, and now present day Ivory Coast, states that, *'the King of Assini maintained six young women in every village and town who gave themselves to bachelors. In addition to these six, the French Governor was also obliged, according to his means, to maintain one or two more. These women went through the towns and villages of Assini and did not risk turning anyone away for fear of severe punishment. In order to be distinguished from other women, they wore a piece of white linen around their heads. They lived on the outskirts of the towns and villages, where they welcomed all bachelors. Married men who were caught patronizing them were heavily fined. It was forbidden for these women to demand anything from their male visitors, although they could accept gifts when offered.'*⁵⁶⁵

The final proof of the existence of sex work in post-colonial Africa generally and in the Gold Coast in particular, comes from the account of Bosman. Although his description of the institution of traditional sex work in Axim comes more than thirty years after Dapper's account, the similarities are far too glaring to ignore. He states as follows:

When the *Mancevos* find they want a common whore, they go and petition the *Caboceroes* that they will please graciously to buy one for the publick: upon which they buy a beautiful female slave, or else the *Mancevos* buy one

⁵⁶⁵ Akyeampong *supra* at p. 149.

themselves. The woman no matter by whom she was bought, is brought to the publick market-place, accompanied by another already experienced in that trade, in order to instruct her how she should deport herself for the future: which being perfectly accomplished, the Novice is smeared all over with earth, and several offerings offered in order that she may be happy in her future *station* and earn much *Money*. This over, a little Boy, yet immature for love affairs, makes a feint or representation of lying with her before all the people both young and old; by which 'tis hinted to her that from this time forwards, she is obliged to receive all persons indistinguishable who offer themselves to her, not excepting little boys. Then a little out of the way, a hut is built for her; in which she is obliged to confine herself for eight or ten days, and lye with every man who comes thither: After which, she obtains the Honourable name of *Abelcre* or *Abelecre*, signifying a common or public whore; and she has a dwelling place assigned her near one of her Masters, or in a separated part of the *Village*, she being for the remainder of her life obliged to refuse no man the use of her Body; though he offers never so small a sum.⁵⁶⁶

It is important to note that the *mancevos* were the young men in the community and the *caboceroes* were the chiefs and elders of the community.

Aside the existence and proliferation of the so-called public women within certain parts of the Gold Coast in pre-colonial times, there are other accounts that describe contemporary forms of sex work that existed in the Seventeenth and Eighteenth Centuries

⁵⁶⁶ Jean Godot, *Voyages de Jean Godot* (Paris, 1704): Bibliotheque Nationale, Paris, MS francais 13,830–1.

among the Akan. For instance, some scholars believed that the coastal Akan women were quite promiscuous where Dutchmen were concerned, and were even prone to whoredom.⁵⁶⁷ Others have noted that, *etiguafo* (prostitutes) were different from other women by virtue of their '*fine appearance and their clothing*'.⁵⁶⁸ There were also some Elmina, Fetu, Asebu and Fante women who were notorious for providing sexual favours for negotiated amounts.⁵⁶⁹ Bowdich also observed among the early nineteenth century Ashanti that '*Prostitutes are numerous and countenanced. No Ashantee forces his daughter to become the wife of the man he wishes, but he instantly disclaims her support and protection on her refusal, and would persecute the mother if she afforded it; thus abandoned, they would have no resource but prostitution*'.⁵⁷⁰

Despite the various accounts of the existence of contemporary forms of sex work between the seventeenth and nineteenth centuries in the Gold Coast, there seems to be a lack of information that would have made it possible to compare this institution with that of the public women. However, what is clear is that this category of sex workers were not slaves, but as Akyeampong puts it '*they were insiders with kinship ties who had been forced into prostitution because they asserted their autonomy*'.⁵⁷¹ Thus, they engaged in sex work within their own communities. The public women as described by the accounts of Dapper, Bosman and Godot on the other hand, were acquired as slaves from elsewhere, and conscripted to provide sexual services in places where they had no kinship

⁵⁶⁷ Pieter de Marees, *Description and Historical Account of the Gold Kingdom of Guinea*, trans. And e. Albert van Dantzig and Adam Jones (Oxford, 1987), ch 7.

⁵⁶⁸ Jean Barbot, *Barbot on Guinea: The Writings of Jean Barbot on West Africa, 1678-1712*, ed. P.E.H. Hair, Adam Jones and Robin Law, 2 vols. (London, 1992), ii, 495.

⁵⁶⁹ Bosman, *New and Accurate Description of the Gold Coast*, *supra* at p. 214.

⁵⁷⁰ T.E. Bowdich, *Mission from Cape Coast Castle to Ashantee*, 3rd edn (London, 1966) at p. 303.

⁵⁷¹ Akyeampong *supra* at p. 156.

ties.⁵⁷² This peculiar feature seems to create parallels with enforced sex work or sex trafficking in contemporary times, which is generally prohibited.

It is my belief that it was this peculiar nature of the traditional conception of sex work that led to the adoption or imposition of British standards in the Gold Coast in terms of the criminalization of procurement during colonial rule. As has already been noted, section 183 of the 1892 Criminal Code of the Gold Coast provided that:

Whoever–

(1) Procures any female under twenty-one years of age, not being a common prostitute or of known immoral character, to have unlawful carnal connexion, either within or without Her Majesty's dominions, with any other person; or

(2) Procures any female to become, either within or without Her Majesty's dominions, a common prostitute; or

(3) Procures any female to leave this Colony, with intent that she may become an inmate of a brothel elsewhere; or

(4) Procures any female to leave her usual place of abode in this Colony (such place not being a brothel) with intent that she may, for the purposes of prostitution, become an inmate of a brothel, either within or without Her Majesty's dominions,

shall be liable to imprisonment for two years: Provided that no person shall be convicted of any offences under this section upon the evidence of one witness,

⁵⁷² K.A. Busia, *Report on a Social Survey of Sekondi-Takoradi* (London, 1950), ch. 8.

unless such witness is corroborated in some material particular by evidence implicating the accused person.⁵⁷³

Despite the criminalization, it will be an understatement to suggest that sex work thrived in the Gold Coast in the Nineteenth and Twentieth Centuries. This is because, as already noted, female sex workers were controlling their earnings in the trade – which was a means of asserting their autonomy unlike in previous times.

In fact, the rapid urbanization that was characteristic of colonial rule and the proliferation of European as well as other migrant male workers in the Gold Coast Colony brought about economic opportunities for women in the sex trade. By rendering sexual favours, some women found a way of surviving in the big cities, thereby asserting their autonomy and not conforming to the prevailing gender stereotypes. It has been noted that *‘the sale of sexual services could secure migrant women their first, temporary residence. Unlike the sale of foodstuffs or liquor, prostitution did not necessarily require start-up capital’*.⁵⁷⁴ A notable fact that was discovered in both post-colonial and colonial Ashanti was the large number of Krobo women engaged in the sex trade.⁵⁷⁵ It is this fact that led to the belief that Okomfo Anokye, a traditional Ashanti priest who helped establish the Ashanti Kingdom, had cursed Krobo women with prostitution.⁵⁷⁶

⁵⁷³ Criminal Code, Ordinance No. 12 of 1892, in ORDINANCES, *supra*, section 183.

⁵⁷⁴ Akyeampong *supra* at p. 157.

⁵⁷⁵ Akyeampong *supra* at p. 159.

⁵⁷⁶ *Id.* It suffices to also point out that in 1980, a group calling itself the Dangbe Reformers Association sent a memorandum to the Paramount Chief of the Dangbe Traditional Area (the ancestral home of the Krobo people), stating that *“Our young girls move about without husbands, thus rendering them unemployed and consequently engaging themselves in prostitution both in and outside the country”*. See, Matilda Pappoe, *The Status of Female Prostitution in Ghana* (1996).

However, this assertion is merely symptomatic of the fact that women in post-colonial and colonial Gold Coast mainly migrated from their towns and villages to engage in sex work in other places. Thus, Kru women from Liberia begun migrating to Ghana and settled in Takoradi where they engaged in sex work.⁵⁷⁷ Akyeampong summarizes increased female autonomy in colonial Gold Coast in the following manner:

The absence of social barriers between ‘prostitutes’ and ‘respectable women’ in working-class leisure activities in Sekondi-Takoradi facilitated the exchange of beliefs and mannerisms. Social life in Takoradi in the 1930s and 1940s revolved around spots like Columbia Hotel, famous for its dances. The ‘Liberian Bar’, owned by a Liberian in Takoradi, was another active social spot in the 1930s and 1940s ... [A]s prostitutes and non-prostitutes patronized these places, mannerisms were exchanged. The ability to chew gum and make it snap was introduced into Sekondi-Takoradi by Kru women, but it expanded to become the badge of female nonchalance. With their social drinking at popular bars and their fashionable clothing, Kru and Nigerian women became the pace-setters where female autonomy was concerned.⁵⁷⁸

Thus, sex work thrived in colonial Gold Coast, a major reason being the money that these sex workers were making from the trade. Even though it was not a given that one could acquire wealth by engaging in sex work, it is believed that the average amount that was

⁵⁷⁷ Akyeampong *supra* at p. 160.

⁵⁷⁸ Akyeampong *supra* at p. 161.

made on a monthly basis by sex workers ranged between ten and thirty pounds.⁵⁷⁹ It has also been noted that the average charge for sexual intercourse was two shillings.⁵⁸⁰ This is what earned sex workers in Ghana the infamous tag of “*two-two women*”.⁵⁸¹

In contemporary Ghana, sex work still thrives in the major urban centers. The lack of economic opportunities, and even the meager income generated from the little opportunities that are available to women generally, seems to be an important factor in the proliferation of sex workers and sex work in Ghana. Rural-urban migration has further exacerbated the problem, as many young girls move to urban areas in search of opportunities, and sometimes end up in the sex trade. It has been suggested for instance that ‘*increased urbanization, increased mobility and high cost of living have brought significant changes in sexual ethos in the urban centres. It also exposes young women to new socio-sexual lifestyles such as attending night clubs and bars, parties etc.*’⁵⁸² The law prohibiting sex work seems to have done little in curbing the practice, as it remains practically and purposefully unenforceable – due, in part, to the high demand for sex, and the posture of law enforcement generally.

2. *The Law of ‘Prostitution’ in Ghana and the ‘Living Law’*

⁵⁷⁹ *Id.*

⁵⁸⁰ Ione Acquah, *Accra Survey* (London, 1958) at p. 73.

⁵⁸¹ David Brokensha, *Social Change at Larteh, Ghana* (Oxford, 1966) at p. 140. In fact, it is believed that in colonial times, the general fee for a sexual encounter with sex workers was two shillings two pence, hence the tag “*two-two*” or “*tuutuu*” women.

⁵⁸² A. Ankomah & N. Ford, *Pre-Marital Sexual Behaviour and its Implications for HIV Prevention in Ghana*, Institute of Population Studies, University of Exeter (1993).

As already noted, Act 29 is the major piece of legislation that deals with criminal offences in Ghana.⁵⁸³ In Ghana, sex work is essentially criminalized, in the form of the proscription of “prostitution”.⁵⁸⁴ Although Act 29 does not mention the phrase “sex work”, its emphasis on the prohibition of “prostitution” leads to the reasonable conclusion that sex work is prohibited in Ghana. Thus, section 279 of Act 29 as amended by Act 554 defines prostitution to ‘*include the offering by a person of his body commonly for acts of lewdness for payment although there is no act or offer of an act of ordinary sexual connexion.*’⁵⁸⁵ As such, “sex work”, which involves the exchange of sex for monetary compensation, and “prostitution” can be used interchangeably, and in Ghana it includes performing, offering, or agreeing to perform a sexual act for money, property, token, favour, article, or anything of value by a person through bargaining. Sex work has also been referred to as paid sexual relations between a woman and her client; the remuneration providing part of the woman’s entire livelihood.⁵⁸⁶ However, the definition of prostitution in Act 29 does not focus on a particular gender. Nevertheless, in Africa generally and Ghana in particular, female sex workers seems to be predominant as compared to male sex workers.

Chapter 7 of Act 29 is captioned “Offences against Public Morals” and deals *inter alia* with Brothels and Sex work. This heading suggests that Ghanaian society abhors such conducts, hence their criminalization. According to Section 277 therefore, the keeping of a brothel is illegal and amounts to a misdemeanor. Furthermore, managing or

⁵⁸³ Criminal Offences Act, 1960 (Act 29)

⁵⁸⁴ Section 274 of Criminal Offences Act, 1960 (Act 29)

⁵⁸⁵ Section 279 of Criminal Offences Act, 1960 (Act 29)

⁵⁸⁶ Lauer, R. H. (1998). Social problems and the quality of life. Boston, Massachusetts: McGraw-Hill.

assisting in the management of a brothel, and also being a tenant, lessee, lessor or a landlord and allowing use of premise for a brothel are criminal offences.⁵⁸⁷ A brothel is however defined to mean “*any premise or room or set of rooms in any premises kept for purposes of prostitution*”.⁵⁸⁸ It seems therefore that regular hotels given certain circumstances can be characterized as brothels within the meaning of the law.

Section 274 on the other hand specifically prohibits persons from trading in prostitution. Thus, trading in prostitution amounts to a misdemeanor.⁵⁸⁹ A person who knowingly lives wholly or in part on earnings of sex work, or exercises control or influence over movements of a sex worker in a manner to aid or compel the sex work being engaged in with any other person, is trading in prostitution.⁵⁹⁰ Section 274 aims at punishing all persons who benefit from earnings of a sex worker knowingly. However, implementation of this provision becomes complicated in situations where minors or elderly persons who are usually dependent on the earnings of sex workers are concerned. Can they be considered as trading in prostitution, and thus be potentially liable for the commission of a criminal offence? Pimps on the other hand, clearly fall within this provision.

The law on prostitution as such actually widens those considered to trade in prostitution to include all persons who benefit directly and indirectly by an act of

⁵⁸⁷ Section 279 of Criminal Offences Act, 1960 (Act 29).

⁵⁸⁸ *Id.*

⁵⁸⁹ Criminal Offences Act, 1960 (Act 29).

⁵⁹⁰ Section 274 of Criminal Offences Act, 1960 (Act 29).

prostitution.⁵⁹¹ Persons also commit a misdemeanor if in a public place or in sight of a public place they persistently solicit to obtain clients for a sex worker or for any other immoral purpose.⁵⁹² The above notwithstanding, sex work, considered the oldest profession in the world, has evolved over time; as such persons can still operate brothels and trade in prostitution without being noticed in public. This is the main challenge in enforcing the law against sex work, especially as a result of the increase in technology particularly the proliferation of social media platforms where solicitation and importuning is easily done.

Despite the criminal prohibition, sex work is prevalent in Ghana and occurs in all major towns and cities, for example Accra, Takoradi, Tamale, Kumasi etc. – just like it did in pre-colonial and colonial Gold Coast. In Ghana, like some other countries, sex work is not necessarily illegal but rather the soliciting for sex in public places, brothel keeping, and living on the earnings of sex work are what are deemed illegal. The law however heavily restricts the life of the sex worker and the only sex work that cannot conceivably attract prosecution is that which is carried out by a person working alone in a house or flat that he or she owns.⁵⁹³ It is important therefore to consider the categories of sex workers that exist in Ghana in contemporary times. Generally, classification of sex workers is based on four important factors: (1) their appearance (dressing and grooming); (2) their means of soliciting clients; (3) the type of clients who patronize their services; and (4) their range of prices for sexual acts. However in 1980, a report submitted to the

⁵⁹¹ *Id.*

⁵⁹² Section 275 of Criminal Offences Act, 1960 (Act 29).

⁵⁹³ Seaters or Home-based sex workers can therefore technically engage in sex work without infringing the law it seems. However increasingly, this type of sex work is dying out or is being engaged in very discretely.

National Council on Women and Development, identified five main categories of sex workers in Ghana: (1) Mame-I-Come/”Tuutuu” women; (2) Bobby-Stand girls; (3) the Monkey Don; (4) the Diga; and (5) the Krobo group.⁵⁹⁴

That notwithstanding, one Ghanaian researcher has classified sex workers into two main categories: (1) *Seaters or Home-based sex workers*; and (2) *Roamers or Bar, Hotel and Street-based sex workers*.⁵⁹⁵ According to her, Seaters or Home-based sex workers ‘*operate from their living quarters, usually in densely populated areas of cities and towns, e.g. the Zongos or immigrant areas*’.⁵⁹⁶ On the other hand, the Roamers or Bar, Hotel and Street-based sex workers ‘*usually operate at night and can be found in drinking bars, hotel waiting areas, popular eating and drinking spots, and on some streets well known as pick-up spots*’.⁵⁹⁷ In recent times, it seems as though the Seaters are becoming extinct or are increasingly being more discreet. On the other hand, there is a proliferation of the Roamers. Another group that can be added to the category of sex workers in Ghana today are what I call the “*Freelance/High Class*” sex workers. This group, originally a subset of the Roamers, can be classified separately due to their *modus operandi*.

⁵⁹⁴ See, Matilda Pappoe, *The Status of Female Prostitution in Ghana* (1996) at p. 22. The Mame-I-Come or Tuutuu women were believed to have originated from Nigeria, with most leaving in the early 1970’s. The Bobby-stand girls refer to younger girls with firm breasts who provided sexual services mainly for the Syrian and Lebanese men in Ghana. The Monkey don group refers to women who had processed hair – a novelty at the time. The Diga were mostly illiterate women, who received training from ‘Madams’ in order to take part in the trade; whilst the Krobo group is reference to indigenous Krobo women who participated in the sex trade.

⁵⁹⁵ Pappoe, *Status of Female Prostitution supra* at p.22.

⁵⁹⁶ Pappoe, *Status of Female Prostitution supra* at p.23.

⁵⁹⁷ Pappoe, *Status of Female Prostitution supra* at p.27.

The hunting grounds for the Freelance/High Class sex workers are usually the most prestigious hotels, due to the fact that Ghanaian men of substantial means and foreigners often patronize these places. It has been observed for example that ‘*Every hotel or night club has at least one worker who is designated to deal with prostitutes and pimps who operate on the premises*’.⁵⁹⁸ However, their activities are more discreet in recent times, where it is believed that all the prestigious hotels maintain a list of these Freelance/High Class sex workers (some of whom are believed to be local celebrities), and often engage their services on behalf of their guests. This assertion, although obviously difficult to prove, must not be discounted, as it is more likely than not to be in existence. In recent times, it seems as though a further sub-group within the Freelance/High Class sex workers, mainly made up of local celebrities (especially actresses), are engaged in trans-national sex work, with Dubai as the prime destination.⁵⁹⁹

It is believed, for example that some of these so-called celebrities earn around five thousand dollars (\$5,000) for a weekend when engaged mainly as escorts.⁶⁰⁰ The accusations and counter-accusations of prostitution between some celebrities that have characterized the entertainment industry in recent times must not therefore be entirely discounted.⁶⁰¹ What is interesting is that in the midst of all this, we have laws that are supposed to essentially prohibit sex work. Is it that the law is just not realistic in light of

⁵⁹⁸ Pappoe, Status of Female Prostitution *supra* at p.31.

⁵⁹⁹ Ghana Celebrities, *Insider Exclusive: Over 90 Percent of Female Ghanaian Celebrities Are Posh Prostitutes – Serving the Rich and Highest Bidders for About 5000 Dollars Per Weekend*, <https://www.ghanacelebrities.com/2018/02/23/insider-exclusive-90-percent-female-ghanaian-celebrities-posh-prostitutes-serving-rich-highest-bidders-5000-dollars-per-weekend/> - accessed 23rd March 2018.

⁶⁰⁰ *Id.*

⁶⁰¹ Ghana Celebrities, *Dirty Beef – Efiya Odo Reveals Fake A*s Fella Makafui Sleeps with Politicians for Luxurious Lifestyle*, <http://www.ghanacelebrities.com/2018/02/20/dirty-beef-efiya-odo-reveals-fake-fella-makafui-sleeps-politicians-luxurious-lifestyle-video/> - accessed 23rd March 2018.

societal changes? Also, regardless of the above categories of sex workers, does it amount to sex work where a woman engages in sexual intercourse with a man (be it casual sex or within the context of a non-marital relationship), ostensibly in exchange for some pecuniary reward? This trend seems to be popular in Ghana as captured by Ankomah and Ford:

While not every sexual contact of single women in the urban centre of Ghana is commercial, sexual services tend to be regarded as something which is obtained by favour or bargaining, a practice quite different from prostitution in the classic Western sense. Pecuniary interest may, in expediency, take precedence over the relationship itself. Economic pressures provide the background for most sexual relationships from which material gain is expected.⁶⁰²

It is however inconceivable to categorize such sexual encounters as amounting to sex work. However, the socio-cultural shift from traditional conceptions of moral conduct to a more modern and generally fluent amoral outlook may be the reason why the law prohibiting sex work, as well as those prohibiting other intimate sexual conduct, like same-sex relations remain practically unenforceable.

For example, despite the prohibition of unnatural carnal knowledge, the prevalence of male same-sex desire as well as lesbianism has become a permanent fixture

⁶⁰² Ankomah & Ford, Pre-Marital Sexual Behaviour, *supra*.

of contemporary “Ghanaian culture” as has been recently pointed out by empirical research.⁶⁰³ The research findings showed that:

Looking at religious orientation and sexuality, it was revealed that 184/442 (42%) of Christians and 45/108 (42%) of Moslems reported being bi-sexual. Among those aged between 16 and 20, 53% of them had had bi-sexual encounter before, while only 39% of those aged 21 and 25, and 48% of those aged between 26 and 30 reported being bi-sexual. Despite their small number, 7/38 (18%) of those aged 46 and above said that they were homosexuals, with another 13/38 (34%) reporting bi-sexuality among both sexes. A separate look at gender revealed that, 134/344 (39%) of the females were bi-sexual, while the males were even greater, recording 149/357 (42%) as bi-sexual. Marital status was not a bar to bi-sexuality. Among the married, 68/205 (33%) reported being bi-sexual with another 6/205 (3%) being homosexual. This could simply mean that even though the individual is married, he or she considers himself or herself as a homosexual. Homosexuality amongst the divorced was 10/63 (16%) and bi-sexuality in their group was 29/63 (46%).⁶⁰⁴

It is fair to admit that there are Ghanaians who are homosexuals. However, it is irrational to erroneously suggest that it is culturally an abomination to be lesbian or gay. Even if that was the case, the dynamic nature of culture and the influence of external forces and

⁶⁰³ See I.D. Norman et al., *Homosexuality in Ghana*, 6 ADVANCES IN APPLIED SOC. 12-27 (2016).

⁶⁰⁴ *Id.*

factors means that homosexuality has come to stay, and no amount of criminalization can automatically or magically convert self-proclaimed homosexuals into heterosexuals.

The socio-cultural shift regarding perspectives of morality and moral behavior, essentially invalidate the criminal prohibitions that seek to root out moral decay. In fact, the decadence is already in motion and entrenched as a result of the over-sexualization of Ghanaian society, which has been appropriately described as a paradox.⁶⁰⁵ On this point, it has been further argued that, *'though many cultural artefacts such as Ghanaian traditional fables, tales and 'high life' music, dances, jokes, and gibes were frequently woven around sex, the topic hardly came into the forefront for any formal discussion. Music, dance, jokes and gibes are not contradictory, neurotic or evanescent expressions. They are alternative media through which communication is established as a means of aggregation and abstraction of current socio-economic developments and its influences on the body politic.'*⁶⁰⁶ As a matter of fact, sexual promiscuity and the exchange of sexual favours for pecuniary rewards are as present today as they were at the time Ankomah and Ford made their observation in 1993, that increased urbanization, mobility and the high cost of living had brought a significant change in sexual ethos in the urban centres in Ghana.⁶⁰⁷ A recent list of the top twenty songs that received the most airplay on radio in Ghana in 2017 revealed that the most played song was one entitled "Sponsor" – (a song that glorifies sexual relationships with older men for pecuniary rewards) by the now

⁶⁰⁵ *Id.*

⁶⁰⁶ *Id.*

⁶⁰⁷ Ankomah & Ford, Pre-Marital Sexual Behaviour, *supra*.

deceased female dancehall artiste named Ebony.⁶⁰⁸ Interestingly, not even one gospel song made it on this list; which seems strange for a country where we pride ourselves with our religious faith. This however goes to buttress my earlier point of the over-sexualization of Ghanaian society, epitomized by indigenous music, which Norman tells us are a means of determining socio-economic developments and its influence on society as a whole.⁶⁰⁹

In light of the obvious socio-cultural changes occurring rapidly in Ghana, intimate human conducts that are criminalized have been given renewed attention. For example, a lot of discussions have focused on whether sex work should be legalized as exists in some countries.⁶¹⁰ It has been recommended, for example, that all national legislation, which in intent or in practice, results in the placing of sex workers outside the scope of the rule of law, should be repealed. The sex industry continues to be heavily stigmatised and most sex workers take care to keep their occupation secret from their families. Projects established to provide sexual health services to sex workers report that health service personnel generally treat sex workers with disrespect.⁶¹¹ Recently, the Ghana Tourism Authority in collaboration with the National Security and the Ghana Police Service closed down a hotel in Gbawe, a suburb of Accra where sex parties were being

⁶⁰⁸ Ghanaweb, *Musiga lists 2017 Top 20 most played songs*, <https://www.ghanaweb.com/GhanaHomePage/entertainment/MUSIGA-lists-2017-top-20-most-played-songs-617079> - accessed 23rd March 2018.

⁶⁰⁹ Norman et al., *Homosexuality in Ghana*, *supra*.

⁶¹⁰ Examples of some of these countries include The Netherlands and Brazil.

⁶¹¹ Health worker, Praed St Project, London, Personal communication 1997 in Redefining Prostitution as Sex Work on the international Agenda

arranged and advertised.⁶¹² The Ghana Tourism Authority condemned the increasing spate of advertising of sex parties and other related sex activities in hotels, nightclubs, movie houses, pubs and other tourism establishments in the country.⁶¹³ It cautioned stakeholders and the public that it was established and tasked among other things to investigate and take measures to eliminate illegal, dishonorable, unsound and improper activities in relation to any activity regulated under the Act.⁶¹⁴

The fact remains that, commercial sex is extremely difficult to regulate or curtail in contemporary times as a result of technological advancement, and the general difficulty in regulating such human conduct. The moral reprehensibility that is usually attached to sex work as the basis for its criminalization is irrational in the face of the rational economic decisions that participants in the trade make. How is society affected if some people decide to make ends meet by trading their bodies for sex i.e. through the legitimate and voluntary commercialization of sex? Is it that morally reprehensible to make ends meet through such means? As a result of the fact that criminalization has not really addressed these questions, sex work is on the increase generally in Ghana, and newer forms of solicitation for sex have been devised along the way, fueled by the proliferation of social media – and the countless opportunities for online interactions that it presents. To make matters worse, there seems to be no reported case of actual prosecution of sex workers for engaging in the trade.⁶¹⁵ The trend of abuse of sex workers

⁶¹² Myjoyonline, *Tourism Authority to clamp down on sex parties, others* <https://www.myjoyonline.com/entertainment/2017/October-31st/tourism-authority-to-clamp-down-on-sex-parties-others.php> - accessed on December 4, 2017.

⁶¹³ *Id.*

⁶¹⁴ *See*, the Tourism Act 2011, (Act 817).

⁶¹⁵ This could be as a result of the widely known fact that the law enforcement agencies in Ghana, in particular the police, usually harass sex workers and threaten them with arrest etc., and often bargain to

by law enforcement authorities is however not uncommon throughout Africa.⁶¹⁶ As a result, it is imperative that we turn to human rights to ascertain whether we can reasonably deduce a right to sex work, thereby ensuring the protection of the rights of legitimate sex workers.

extend protection to sex workers in exchange for sexual and other favours, from time to time. *See*, Kwaku Baka, *Ghana Police Sweeps*, Inter Press Service Third World News Agency, Aug. 6, 1998, http://walnet.org/csis/news/world_98/ips-980806.html.

⁶¹⁶ Chi Mgbako & Laura A. Smith, *Sex Work and Human Rights in Africa*, 33 *Fordham Int'l. L.J.* (2011) 1178, at p. 1181.

CHAPTER FIVE

HUMAN RIGHTS IN GHANA

From time immemorial sex has been a currency of commerce. The relationship between sex work and the law has often revolved around the debate regarding its morality; whether it should be criminalized or not. In today's liberal world the discussion on the relationship between law and sex work is shifting to a rights based discussion. Can there exist a right to sex work? Is sex work supposed to be considered as a human rights issue? These are however questions that can only be answered based on a finite understanding of the idea of human rights. Interestingly, the idea of human rights only became entrenched as part of International Law discourse not too long ago. The devastating consequence of the Second World War was what led to a renewed wave of human rights protection globally as well as movements towards decolonization.⁶¹⁷

In this Chapter, I continue the discussion pertaining to the criminalization of sex work by focusing on human rights in Ghana; and whether the legal and institutional framework that exists today is receptive to the idea of sex workers' rights and the right to sex work. In order to do this, I examine the historical evolution of human rights in post-independence Ghana, to ascertain the attitude and posture of the country, and the courts in particular, with regard to the promotion and protection of general fundamental human rights and freedoms. By tracing the various phases of human rights development in the country through some of the most seminal cases adjudicated, we may be able to ascertain

⁶¹⁷ Many African colonies attained independence after 1945; specifically from the late 1950's through the early parts of the 1960's.

the posture of the courts in human rights matters, and whether there is room for the acceptance of sex work and the rights of sex workers as deserving of protection in contemporary Ghana.

A) HISTORICAL FOUNDATIONS OF HUMAN RIGHTS

There is a general belief in contemporary times that by virtue of our humanity, all human beings are entitled to certain fundamental rights and freedoms. However, it has been long suggested that the idea of human rights and fundamental freedoms for all persons has its roots and origins in antiquity. The belief that there existed certain norms and principles inherent by virtue of humanity alone can be traced as far back as the writings of the Greek philosophers Aristotle and Plato, and is firmly rooted in traditions and cultures of past. Throughout human history, politically organized societies have invariably developed various systems of justice, with the welfare of the society being of paramount interest. Even all the major religions of the world have one unifying factor – the idea that justice must be done to all.

Although the modern idea and conception of human rights is usually attributed to the writings of philosophers such as John Locke, we cannot dismiss the monumental role that certain foundational documents in the history of man have played in asserting fundamental human rights and freedoms. Some of the precursors to our modern understanding and appreciation of human rights include: the Magna Carta of 1215; the English Bill of Rights of 1689; the French Declaration on the Rights of Man and Citizen

of 1789; and the United States Constitution & Bill of Rights of 1791. The historical irony manifest in these so-called precursors to fundamental human rights is the fact that, most of them excluded rights and freedoms for women and many other minority groups. This inherent discrimination transcended social, religious and political barriers. For instance, the effect of the Trans-Atlantic slave trade meant that African Americans were not fully recognized under the Bill of Rights in the United States.

It was only during the latter parts of the 19th Century and the early 20th Century that there began a wave and movement towards ‘internationalizing’ human rights. This movement gathered steam probably as a result of the abolishing of the slave trade, and also as a response to the scourge of war. Thus, the International Labour Organization (ILO) was established in 1919 to protect the rights of workers everywhere; and most importantly, the League of Nations was formed in the aftermath of the First World War. Unfortunately, the League of Nations failed in its mission of ensuring a peaceful world, free from abuse of human rights and fundamental freedoms – due to the outbreak of the Second World War in 1939.

The extermination of over six million Jewish people, Sinti, Roma as well as many other civilians during the course of this war shocked the collective conscience of the world like never before.⁶¹⁸ The world had to act in the wake of the monstrous atrocities committed by the Nazi Regime and its allies. Thus, President Franklin Delano Roosevelt of the United States famously captured the emerging concept of human rights at the time

⁶¹⁸ It is estimated that a total of over 40 million people lost their lives as a result of the violence of this war.

in his “four essential freedoms” speech to Congress.⁶¹⁹ Hence, the United Nations Organization was formed in 1945 in San Francisco, with the principal aim of maintaining international peace and security.⁶²⁰

The establishment of the United Nations signified the global resolve that had been harnessed to ensure that the atrocities that had occurred during the war were never again repeated.⁶²¹ The colonies of the Allied powers, including the Gold Coast, contributed immensely towards the war efforts as “native” soldiers fought side by side with soldiers from the colonial powers. This, it has been argued, was one of the reasons that led to the demand for self-governance in many of the colonies, including the Gold Coast. The right to self-determination in the United Nations Charter was therefore one of the founding principles that fueled the independence movement across Africa. As a result, many former African colonies attained independence within twenty years after the establishment of the United Nations.

One of the first things that the UN did that gave further impetus to the demand for self governance across the world, was the establishment of a Human Rights Commission under the leadership of Eleanor Roosevelt, with the task of drafting a document spelling out the meaning, scope and content of the fundamental rights and freedoms that the UN Charter had made mention of but failed to define. This show of renewed commitment to the human rights agenda during this post-war period led to the adoption of the Universal

⁶¹⁹ See the 1941 State of the Union Address delivered by President Franklin D. Roosevelt to the US Congress on 6th January 1941.

⁶²⁰ See, the United Nations Charter, 1945.

⁶²¹ See U.N. Charter pmb.

Declaration of Human Rights (UDHR) in 1948 in Paris, France as already noted in Chapter Three.⁶²² In Africa, this new wave of international human rights that had coincided with the struggle for self-government and fight for independence from the colonial powers, mainly Britain and France, led to self-government soon thereafter. The main focus of most of the African colonies at the time, and subsequently the newly independent African States was economic development. Respect for, and promotion and protection of human rights were therefore not on the political agenda of the independence leaders of Africa, and were thus relegated to the backburner. The consequential effect would be the absence of human rights provisions in Constitutions and abuse of rights by these same leaders, who had been hailed as liberating their countries from colonialism and its attendant injustices.⁶²³

That notwithstanding, the UDHR continued to be standard bearer in terms of the acknowledgment of fundamental human rights for all. For example, article 1 of the UDHR provides that:⁶²⁴

All human beings are born equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

⁶²² See Chapter Three of the Dissertation, in particular Section B.

⁶²³ Ghana is a typical example of such a country, where the nationalist and pan-Africanist agenda of Kwame Nkrumah (the first President of Ghana) was hailed the world over; but in actual fact he presided over gross abuse of human rights and freedoms during his reign, as will be discussed subsequently.

⁶²⁴ See G.A. Res. 217(III), U.N. Doc. A/RES/217(III) (Dec. 10, 1948) art 1.

In a similar vain, the UDHR provides for the principle of non-discrimination in terms of the enjoyment of the fundamental human rights and freedoms available to all.⁶²⁵ Unfortunately, the UDHR being a declaration did not have binding legal effect.⁶²⁶ Therefore, it was not until 1966, that there would be the adoption of legally binding global treaties on fundamental human rights and freedoms.⁶²⁷ The International Covenant on Civil & Political Rights (ICCPR) in particular provides for equality and non-discrimination.⁶²⁸

Several provisions of the ICCPR thus prohibit discrimination on stated grounds, and guarantees equal protection of the law. For example, Article 2(1) states: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 17(1) provides that: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.” Article 17(2) then states: “Everyone has the right to the protection of the law against such interference or attacks.” Finally, article 26 provides as follows:

⁶²⁵ *Id.* art. 2.

⁶²⁶ Since it was not a treaty, it only served as ‘Soft Law’ and thus the States Parties were not legally bound by its provisions.

⁶²⁷ The International Covenant on Civil & Political Rights (ICCPR) and the International Covenant on Economic, Social & Cultural Rights (ICESCR), were both adopted in 1966, but came into effect in 1976. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3,

⁶²⁸ See ICCPR art. 2.

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 28 of the ICCPR establishes the Human Rights Committee, which is mandated to deal with issues involving alleged violations of the rights contained in the ICCPR by States Parties to the Covenant, and by so doing, interpret the provisions of the Covenant. Human rights are therefore fundamental, inherent and inalienable rights that people are entitled to due to the mere fact that they are human beings. In Ghana, the rights and freedoms that people are guaranteed, which can be traced largely to the UDHR, ICCPR and the ICESCR, can be found primarily in the 1992 Constitution, in chapters 5 and 6 to be specific. But this was not always the case, as Ghana had to endure some bitter periods of suppression and wanton disregard of human rights by successive regimes.

B) HISTORY OF HUMAN RIGHTS IN GHANA

The posture of Ghanaian courts in the aftermath of independence up until recent times has been topsy-turvy to say the least. The shocking dereliction of duty by the courts is explored through the seminal cases that laid the groundwork for systemic and constitutionally sanctioned abuse of human rights in Ghana. I will first discuss the immediate post-independence period between 1957 and 1966, and then deal with the

post-first Republican and 1969 Constitutional era, between 1966 and 1972. Here, we realize the courts becoming emboldened in holding the government to account for infringements of human rights unlike what pertained in the immediate post-independence period. I then examine the post 1969 period as well as the 1979 Constitutional period between 1972 and 1981 to gain further insights into the attitude of the courts towards human rights. I also examine the post-1979 Constitutional period, between 1982 and 1992 where Ghana experienced the longest period of military rule, ironically under the Provisional National Defence Council.

1. *The Immediate Post-Independence Period (1957 – 1966)*

From the onset, it must be noted that independence was largely at the behest of the British Parliament, by virtue of its enactment of the Ghana Independence Act. The Ghana (Constitution) Order-in-Council of 1957⁶²⁹ however had its main provisions coming into force on 6th March 1957.⁶³⁰ Section 54 of this Order-in-Council made provision for the existence of the Supreme Court and contemplated the existence of a Court of Appeal as well. This was created by an Ordinance dividing the Supreme Court into the High Court of Justice and the Court of Appeal with effect from 6th March 1957. By another Ordinance, which came into force at the same time, detailed provisions were made for the jurisdiction of the new Court of Appeal, and the right of recourse to the West African Court of Appeal (which was regarded as inconsistent with independence and existed hitherto) was abolished.⁶³¹ The Constitution did not however contain a Bill of

⁶²⁹ (S.I. 1957 No. 277; L.N. 47)

⁶³⁰ This is the official date of independence of the Gold Coast, which then became Ghana.

⁶³¹ F. Bennion, *Constitutional Law of Ghana* (1962).

Rights hence it can be argued that, persons resident in Ghana were not legally entitled to human rights.

The first case that the courts had to deal with during this era concerning human rights was the case of *Lardan v. Attorney-General*.⁶³² This case had to do with a deportation order that had been made pursuant to the Deportation Act of 1957. The order purported to deport the plaintiff from Ghana because it was the position of the government that his presence in Ghana threatened the public good. The plaintiff therefore brought an action in the High Court, seeking a declaration to the effect that the order was null and void as a result of the fact that the Deportation Act itself could not be applied to him because he was a Ghanaian citizen by birth. During the pendency of the matter before the High Court, the National Assembly (Parliament) enacted the Deportation (Othman Larden and Amadu Baba) Act, 1957. This law specifically authorized the Minister of Interior to deport the two named individuals from Ghana. Furthermore, the law purported to terminate proceedings in any court, which had been instituted for the purpose of challenging the validity of the deportation order made against the persons affected by the new law.

Section 4(2) of this new law stated as follows: '*On any order of deportation being made hereunder, any deportation order made under the Deportation Act, 1957, in respect of the same deportee shall be automatically revoked and if the deportee is in custody under the provisions of the Deportation Act, 1957, he may, notwithstanding any proceedings in any court, whether pending or determined, be retained in custody for the*

⁶³² (No. 2) [957] 3 WALR 114.

*purposes of this Act without being released and such custody shall be deemed to be legal custody; and any proceedings in any court instituted for the purpose of impugning the validity of the Alhaji Alufa Othman Larden Lalemie Deportation Order, 1957, or the Alhaji Amadu Baba Deportation Order, 1957, shall be automatically determined.'*⁶³³

The High Court therefore had to determine whether the new law was contrary to the dictates of the Constitution of Ghana, and whether a citizen by birth could be deprived of his right to citizenship. Smith J. (a British judge) however held as follows:

I have considered all the other authorities cited to me and they illustrate the same point that 'the words "peace, order and good government" with no reservation attached, no restriction as to specific subjects and without qualification, give to any country the same plenary powers as are possessed by the Imperial Parliament in England. It was conceded that this Act of Deportation, and that was a momentary indulgence in fantasy, if passed by the Imperial Government would be a matter for Parliament only and the English courts would be powerless to interfere. If, as I hold, the words "peace, order and good government," unqualified in any way, are plenary powers possessed by Parliament and no less than the powers possessed by the Imperial Parliament, then it follows just as it would in England that the court here has no power to inquire into such an Act. I consider, 'therefore, that any law which comes within the ambit of the Ghana (Constitution) Order in Council, s. 31, and which does not contravene any other provision in the constitution can only be challenged in a court of law if it violates or purports to

⁶³³ Deportation (Othman Larden and Amadu Baba) Act, 1957.

violate sub-section (2) or (3) of the section. On that view, the Act deporting these two persons, not being in contravention of any expressed limitation in the Ghana (Constitution) Order in Council, 1957, is a matter for Parliament ... In England it is not open to the court to invalidate a law on the ground that it seeks to deprive a person of his life or liberty contrary to the court's notions of justice and, so far as the Ghana (Constitution) Order in Council, s. 31 (1), is concerned, that is the position in which I find myself. For these reasons I hold that it is not for the court to inquire into this particular Act and the pending actions before the Kumasi Divisional Court are determined under the provisions of section 4 (2) of the Act.⁶³⁴

This decision by Smith J, to essentially prioritize the speedy actions of government over the fundamental rights and freedoms of individuals laid the groundwork for the Executive impunity that subsequently ensued. Ghana will not be the same again, for essentially the court was announcing that the Government could basically do whatever it deemed fit and necessary for the governance of the State, and as a result had the Judiciary's blessings to disregard one of the most fundamental human rights that exists – the right to citizenship. It must however be reiterated that, the independence constitution of Ghana did not necessarily have a Bill of Rights, and may have been the reason why the court chose to turn a blind eye on obvious abuse of human right; justifying it on the basis of Parliamentary sovereignty.

The second case that we must consider in this era is the case of *Balogun v*

⁶³⁴ Lardan v. Attorney General, *supra*.

Edusei,⁶³⁵ which also involved the implementation of the Deportation Act of 1957. The facts of this case were that, four individuals, including Wahabi Balogun, had been arrested pursuant to a deportation order that had been made under the Deportation Act. An *ex parte* motion for the writ of *habeas corpus ad subjiciendum* was filed on their behalf on the ground that all the applicants were Ghanaian citizens and as such they could not be the subject matter of the deportation order. The court directed that notice of this motion be served on the Minister of Interior, the Acting Commissioner of Police as well as the Director of Prisons. However, on the day the notice was served, the applicants had already been deported to Nigeria. The court therefore held the Respondents to be in contempt of court, but stayed execution of their committal to prison, ostensibly in the hope that they would be advised to apologize and be remorseful for their actions.

However, on the morning of the day that the respondents were to appear before the court, the Parliament of Ghana purported to hold an emergency session where it enacted the Deportation (Indemnity) Act (No. 47 of 1958). Section 2 of this Act provided as follows: ‘*The Honourable Krobo Edusei, formerly Minister of the Interior, and Erasmus Ransford Tawiah Madjitey, Commissioner of Police, shall be indemnified from all penalties for contempt of court and exonerated from all other liabilities in respect of any action taken by them in carrying out the deportation order in the Schedule of this Act after the institution by the persons named in those orders of proceedings by way of habeas corpus.*’ Smith J. (the same British judge from the Lardan case) now found himself in a quagmire created by his reluctance to hold the government to account in the Lardan case.

⁶³⁵ [1957] 3 WALR 547.

Obviously annoyed by the blatant interference in the administration of justice by the Executive and the Legislature, he delivered a judgment that was poignant but totally irrelevant in the grand scheme of things. Clearly, he had regretted his actions in the earlier case but could do little to rectify the irreparable harm that he had willingly and knowingly caused. This is what he had to say:

By the passing of this Act I take it that the court's finding that the respondents are in contempt is not challenged by Parliament, but that the intention is to neutralise any consequential order that I might make. It is plain that Parliament prefers that the respondents should not apologise, and it has passed this Act in order to nullify any order which I might make in the absence of the apology. The Courts of Justice exist to fulfill, not to destroy, the law, and it would not make sense for me to record an order which is incapable of being carried out. As to the deportations while the applications for habeas corpus were still *sub judicæ*, I cannot over-emphasize the undesirability of interference by the Executive with the functions of the court. Persistent indulgence in such a practice could not have any other than the most serious ill-effect on the well-being of the country. Decisions of a court are as binding upon the Executive as the laws which Parliament passes are binding upon the ordinary citizen, and it is the court that enforces upon the people obedience to these laws, thereby aiding Parliament in the ordering of the country. In the result, the finding of contempt stands, but I make no further order.⁶³⁶

It is not in doubt that the court's decisions in both the Lardan and Balogun cases

⁶³⁶ *Id.*

provided a great platform for Executive and Legislative impunity in Ghana, in respect of the wanton abuse of fundamental human rights and freedoms. In fact, it emboldened the Executive to act recklessly with the tacit approval and blessings of the Judiciary; and this enabled it to enact the Preventive Detention Act in 1958, which sought to indefinitely detain persons whose actions or suspected actions were deemed to be prejudicial to the security of the State.

The case of *In Re Akoto and Seven Others*,⁶³⁷ is probably the most important case in the post-independence era that captures the extent of the judiciary's endorsement of impunity. The case had to do with some individuals who had been arrested and detained pursuant to the Preventive Detention Act of 1958. The writ of *habeas corpus ad subjiciendum* was applied for on their behalf, but was denied by the High Court. The applicants therefore filed an appeal with the Supreme Court on the grounds, *inter alia*, that the Preventive Detention Act was enacted in excess of the powers conferred on Parliament by the Constitution, and that it contravened the provisions of article 13 of the 1960 Constitution of Ghana.⁶³⁸ In characteristic fashion, the Supreme Court held that the declaration that was to be made by the President upon his assumption of office was akin to the Coronation Oath subscribed to by the British Monarch upon his or her ascension to the throne. The Court therefore held that the declaration was of no constitutional import, unlike a proper Bill of Rights, and as a result no legally enforceable obligation was created and imposed on the President.

⁶³⁷ [1961] GLR 523.

⁶³⁸ It must be noted that on 1st July 1960, Ghana adopted a new Constitution. Article 13 of this new Constitution ostensibly provided for a solemn declaration to be made by the President on assumption of office – these included his adherence to the principles of non-discrimination, freedom of speech and expression, assembly and the right of access to courts of law etc.

It is clear that the Supreme Court wholly adopted the position that had earlier been advanced by Smith J., that Parliament was a power unto itself, and that no courts was competent to challenge the legality of an Act of Parliament, or actions of the Executive for that matter. On the idea that article 13(1) provided a Bill of Rights guaranteed for the protection of the people from governmental abuse, the Supreme Court went stated as follows:

This contention, however, is based on a misconception of the intent, purpose and effect of Article 13(1) the provisions of which are, in our view, similar to the Coronation Oath taken by the Queen of England during the Coronation Service. In the one case the President is required to make a solemn declaration, in the other the Queen is required to take a solemn oath. Neither the oath nor the declaration can be said to have a statutory effect of an enactment of Parliament. The suggestion that the declarations made by the President on assumption of office constitute a "Bill of Rights" in the sense in which the expression is understood under the Constitution of the United States of America is therefore untenable ... In our view the declaration merely represents the goal which every President must pledge himself to attempt to achieve The declarations however impose on every President a moral obligation, and provide a political yardstick by which the conduct of the Head of State can be measured by the electorate. The people's remedy from any departure from the principles of the declaration, is through the use of the ballot box, and not through the courts.⁶³⁹

⁶³⁹ [1961] GLR 523.

This decision marked the final nail in the coffin of human rights in the immediate post-independence era. Impunity became the order of the day, as with the Judiciary's blessings, the government could essentially do any and everything they wanted without any recourse to conceptions of what was just and right.

The case of *In Re Dumoga and 12 Others*⁶⁴⁰ also had to do with the application of the Preventive Detention Act of 1958. The facts were that, on or about the 14th March, 1960, Kofi Dumoga and twelve others were arrested and detained by virtue of two preventive detention orders, Executive Instruments 69 and 70 of 1960, made under powers conferred by section 2 of the Preventive Detention Act, 1958. On the 18th March 1960, the applicants were duly served with the grounds of detention in compliance with the said Act of 1958. The applicants therefore applied to the High Court for orders of habeas corpus directed to the Minister of the Interior and the Director of Prisons to show cause why the applicants should not be released from detention. The court however held that, where a person was in lawful custody an application for habeas corpus does not lie, and that, '*where a statute confers a discretion upon an executive officer to arrest and detain persons, the court cannot enquire into the exercise of that discretion, provided the officer acts in good faith.*'⁶⁴¹

The court in this case further entrenched the ability of the Executive to abuse the rights of individuals without having to provide reasons for the curtailment of these rights. In understanding the extent to which these cases were damaging for human rights in

⁶⁴⁰ [1961] GLR 44.

⁶⁴¹ *Id.*

Ghana at the time, it is important to understand the fact that human rights are inherent rights and all persons are entitled to them based solely and primarily on the fact that they are human beings. In essence, what the Preventive Detention Act did was to deprive individuals of their freedom of movement, and also deny them of their right to be heard or afforded a fair trial. The courts failure to uphold these rights and even recognize the fact that these people were entitled to them in the first place shows the nonchalant attitude of the courts towards human rights at the time.

2. *The Post-First Republican and 1969 Constitutional Period (1966 – 1972)*

On February 24th 1966, the Military with the collaboration of the Police and other security agencies ceased political power in Ghana through a *coup d'état*. The military regime of the National Liberation Council (NLC) thus ruled Ghana between February 1966 and August 1969. The 1960 Constitution was suspended during this period, but the NLC Establishment Proclamation ensured that the courts remained functional and continued to adjudicate disputes. The case of the *Republic v. Director of Prisons; Ex Parte Salifa*⁶⁴² is an early example of the newfound boldness of the courts during this era. In this case, a fifteen-year-old boy was sent to Guinea by his father in 1965 to continue his education. In 1967 he ran away from his guardian who was allegedly maltreating him. He went to Sierra Leone where he asked the Ghana High Commissioner to help him to return to his parents in Ghana. On his arrival in Accra, in June 1967, he was immediately arrested by the police and detained at the Ussher Fort Prison. On 25th June 1968, Salifa's father filed an *ex parte* application for an order of *habeas corpus* on the ground that his son's detention was unlawful.

⁶⁴² [1968] GLR 630.

Upon a notice of motion filed on 29 June 1968, for hearing on 2 July 1968, the Director of Prisons made a return thereto by an affidavit annexing thereto a photostat copy of a document, purporting to be a Decree signed by the Chairman of the National Liberation Council, which authorized the arrest and detention of Salifa. The document was not numbered, and neither was it published in the Gazette as required by the Proclamation establishing the National Liberation Council. Counsel for the Director of Prisons then referred the court to the Proclamation, particularly paragraph 3 (5) thereof and contended that by virtue of that paragraph the National Liberation Council had an unlimited power. The court however held that, the formal requirements of enacting a decree involving gazetting and numbering etc. could not be legally dispensed with in the making and issuing of a Decree that is to have the force of law. Consequently, since what was presented was neither numbered nor published in the Gazette, it could not be classified as a Decree.

In ordering the immediate and unconditional release of Salifa, the court further held that: *'The contention that the National Liberation Council had an unlimited power was pitched too high – it undermined or undefined the purposes for which by the Proclamation the National Liberation Council was established. According to the preamble to the Proclamation, it was established in the interest of the people of Ghana, and for the provision for the proper administration of the country and for the maintenance of law and order. In effect the Proclamation provided for the eradication by the National Liberation Council of illimitability of power in Ghana; for, autocracy in*

*Ghana was given a decent burial on 24 February 1966.*⁶⁴³ It is clear here that even during the military regime, the courts were ready to hold the government to account and protect the rights of the people, contrary to what ensued under the ‘democratic’ and ‘constitutional’ regime between 1957 and 1966.

That notwithstanding, the government immediately re-arrested Salifa and brought him before another High Court on the same facts. The case of *Republic v. Director of Special Branch; Ex Parte Salifa*,⁶⁴⁴ had to do with Salifa, who had been detained under a National Liberation Council Decree and had appeared in *habeas corpus* proceedings before Anterkyi J. who had ordered his release on the grounds, that the Decree, being unnumbered and unpublished, was invalid. Immediately after his release, Salifa was however re-arrested without warrant and detained for suspected subversion under another unnumbered and unpublished National Liberation Council Decree. Salifa's father filed another application for a writ of *habeas corpus* for the immediate release of his son on the grounds, inter alia, that the re-arrest without warrant was unlawful and further that the subsequent unnumbered and unpublished Decree was also invalid. The court however held that, the police had the right to arrest a person without a warrant who had been suspected of having committed or about to commit an offence. The court thus failed to invalidate a warrant that deprives people their right to freedom of movement even though the warrant was not numbered and published and clearly invalid. The action of the court in this instances represents a conflict of the courts at the time whether to enforce human rights or not in a military regime where there was a high prevalence of abuse of rights.

⁶⁴³ *Id.*

⁶⁴⁴ [1968] GLR 646-666.

Fortunately, the military regime handed over power to a constitutionally elected government in August 1969. The 1969 Constitution of Ghana also contained explicit human rights guarantees and provisions that were entrenched in the Constitution and could not be repealed except through a national referendum. This was in reaction to what occurred during the previous era. However, the new government soon faced a challenge in court regarding some action that it had taken upon its assumption of office, which affected the rights of some citizens.

In the case of *Sallah v Attorney General*,⁶⁴⁵ the plaintiff was, on 16 October 1967, appointed a manager of the Ghana National Trading Corporation (G.N.T.C.), a public corporation that had been established in 1961. The plaintiff held that appointment until it was terminated on 21 February 1970 by the Presidential Commission acting in pursuance of section 9(1) of transitional provisions of the 1969 Constitution. He therefore sought a declaration that on a true and proper interpretation of the said section 9(1) the Government was not entitled to terminate his appointment because his office fell outside the category of public offices to which section 9(1) was applicable. Neither party disputed the fact that the G.N.T.C. was originally established in 1961. However, Counsel for the government argued that to determine the offices contemplated by section 9(1) it was necessary to analyze the legal consequences flowing from the 1966 revolution that overthrew the Government of the First Republic and the Proclamation of the National Liberation Council (N.L.C.).

⁶⁴⁵ 2 G & G 739 (2d) 1319, [1970] GLR 55.

After referring to Kelsen's General Theory of Law and State, it was argued on behalf of the government that the 1966 revolution repudiated the 1960 Constitution and the laws thereunder and that the N.L.C. did not derive its authority from the 1960 Constitution but rather established a new legal order. Thus, all offices deriving their sources from laws that historically existed before the N.L.C. were juristically established by the N.L.C. by virtue of the proclamation. He submitted that "established" should be given a technical meaning and '*any offices established*' in section 9(1) should be interpreted to mean '*any office which derives its legal validity from the N.L.C.*'. Counsel for the plaintiff however referred to the use of "*establish*" in local statutes, and contended that the word should be given its ordinary dictionary meaning as defined in the Oxford Dictionary. He submitted that establishing a new legal order was not the same as establishing new offices and further that there was a distinction between "*establish*" and to "*continue in force*". The court however agreed with the plaintiff's submissions, and vindicated his rights i.e. that the government had overstepped in purporting to terminate him from office. Thus, the Supreme Court upheld human rights and this signaled the birth of a new dawn where the courts were willing to assert its authority in terms of the enforcement of constitutional rights.

3. *The Post-Second Republican and 1979 Constitutional Period (1972 – 1981)*

The constitutional government elected under the 1969 Constitution was overthrown in a military *coup d'état* in 1972. The new entity that took over was known as the National Redemption Council (NRC). One of the important cases of this era was the

case of *Shalabi v. The Attorney General*.⁶⁴⁶ The plaintiffs, formerly of British nationality, took out a writ for a declaration that they were Ghanaian citizens and therefore entitled to operate a transport business notwithstanding the provisions of the Ghanaian Business (Promotion) Act, 1970 (Act 334). They had obtained Ghanaian passports in 1968 by virtue of the Ghana Nationality Decree, 1967 (N.L.C.D. 191), para. 1. For the Attorney-General it was submitted *inter alia* that the National Liberation Council, being the sovereign body of the land at the time, could do whatever it liked, including depriving persons of their citizenship; and that by the Ghana Nationality (Amendment) Decree, 1968 (N.L.C.D. 333), paragraph 1 of N.L.C.D. 191 had been obliterated by retrospective substitution and consequently every person who acquired citizenship thereunder ought to be deemed never to have acquired such citizenship.

It was held that, the National Liberation Council through the Proclamation, 1966, established itself as an interim government recognizing the people of Ghana as the repository of sovereignty. The court further held that: ‘*As a constitutional interim government its object was to uphold the suspended Constitution, excepting so far as it had to derogate from it under the doctrine of necessity, thus re-establishing the rule of law and other principles necessary for the proper functioning of democracy. By the Proclamation, 1966, the National Liberation Council was established to provide “for the proper administration of the country” and this did not include depriving Ghanaians of their basic right, citizenship. Citizenship once conferred can only be lost by processes specifically stated in the instrument conferring that citizenship and not by an ambiguity.*’

⁶⁴⁶ [1972] 1 GLR 259.

The NRC was subsequently overthrown on June 4th 1979 by the Armed Forces Revolutionary Council (AFRC), which comprised of junior officers of the Ghana Armed Forces. On 24th September 1979, the AFRC handed over power to a civilian administration under the leadership of President Hilla Limann, who had been elected under the 1979 Constitution. Limann's administration did not last long as it was itself overthrown on 31st December, 1981, however a few human rights related cases were decided by the courts during this period. For instance, in the *Republic v. Director of Prisons; Ex Parte Oduro*,⁶⁴⁷ the plaintiff Emmanuel Oduro brought an application for habeas corpus in the interest of General I. K. Acheampong (leader of the NRC) who was arrested and detained in the interest of national security after he had been overthrown as Head of State. In his application, Oduro claimed to be a friend of Acheampong. However, it was alleged that he did not have the authority of Acheampong to bring the application and neither did he state in his affidavit that access to Acheampong in prison had been denied.

In dismissing the application, the court held that the applicant was not included in the categories of persons who could apply for habeas corpus. According to Act 244,⁶⁴⁸ Section 1(2), the categories of persons who could apply for habeas corpus were persons alleging that they had been unlawfully detained; persons entitled to the custody of a person alleged to be unlawfully detained; and persons acting on behalf of the person alleged to have been detained. It further provided that, in the third category, the authority of the person detained must be shown, unless it could be implied (as on the part of a

⁶⁴⁷ [1979] GLR 354-359.

⁶⁴⁸ Habeas Corpus Act, 1964 (Act 244).

husband applying for the release of his wife). Where authority could not be implied and express authority was lacking, a relation or friend might still apply provided he could show that access to the person alleged to be illegally detained had been denied so that it was impossible to obtain instructions from him. The court thus concluded that the applicant had not shown that he had the authority of Acheampong and his application therefore was dismissed. This decision is interesting in the sense that, subsequent cases uphold the rights of individuals to act as interested persons in such cases even where they are not directly affected.

4. *The Post-1979 Constitutional Period (1982 – 1992)*

This era witnessed arguably the gravest abuse of human rights in the history of Ghana. This is because, the PNDC arrogated all powers of government to themselves, including judicial power – as they established public tribunals, that run parallel to the regular courts. The power of the ordinary courts, although not abolished, was highly diminished as evident in the famous case of *Kwakyie v Attorney General*.⁶⁴⁹ The plaintiff, a former Inspector General of Police, was purported to have been tried in absentia in pursuance of a military decree and was sentenced to 25 years imprisonment. The plaintiff who was outside the country filed for a declaration that he was never tried, convicted or sentenced by any court and that the purported sentence of 25 years' imprisonment imposed on him was void and of no effect whatsoever. The regime however sought to have the suit dismissed on the basis of section 15(2) of the transitional provisions of the 1979 Constitution, which forbade courts to deal with or adjudicate on matters, including executive, legislative and judicial actions that had been taken or were purported to have

⁶⁴⁹ [1981] GLR 944-1071.

been taken by the AFRC regime. The court thus unanimously dismissed the plaintiff's application and held that the trial was lawful, and thus upheld Kwakye's conviction and sentence.

C) HUMAN RIGHTS UNDER THE 1992 CONSTITUTION

The 1992 Constitution was approved on 28 April 1992 through a national referendum, and entered into force on 7th January 1993. The Constitution defines the fundamental political principles establishing the structure, procedures, powers and duties of the government, that of the judiciary and legislature, and spells out the fundamental rights and duties of citizen.⁶⁵⁰ The Fundamental Human Rights and Freedoms of Ghanaians are provided for in Chapter 5 of the Constitution.⁶⁵¹ These rights and freedoms are to be respected and upheld by the all persons, including the government and other organs and agencies, and are enforceable by the Courts.⁶⁵² All persons in Ghana are entitled to these fundamental human rights and freedoms irrespective of one's race, place of origin, colour, religion, creed or gender.⁶⁵³ Some of these rights include the right to life, personal liberty, respect for human dignity, protection from slavery and forced labour, equality and freedom from discrimination, economic rights, educational rights amongst others.⁶⁵⁴

⁶⁵⁰ See the 1992 Constitution of Ghana.

⁶⁵¹ *Id.* Articles 12 to 33.

⁶⁵² *Id.* Article 12.

⁶⁵³ Article 12(2) of the 1992 Constitution.

⁶⁵⁴ Chapter 5 of the 1992 Constitution.

Article 140 of the Constitution however provides that '*the High Court shall have jurisdiction to enforce the Fundamental Human Rights and Freedoms guaranteed by this Constitution.*' Thus, the High Court is the court of first instance when one alleges that human rights have been violated. Thus, article 33(1) provides that:

Where a person who alleges that a provision of this Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to him, then without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress.

Therefore, the Supreme Court's power and jurisdiction in terms of the interpretation and enforcement of the Constitution generally, and the enforcement of the Fundamental Human Rights and Freedoms in particular is however subject to the jurisdiction of the High Court first. Nevertheless, where one is dissatisfied with the decision of the High Court, an appeal can be made to the Court of Appeal and ultimately to the Supreme Court.

This Article provides the admissibility criteria by which the High Court will have jurisdiction over the case. Firstly, the right should be part of Chapter 5 of the Constitution. Secondly, either the violation has occurred, is occurring or likely to occur; and finally the violation should be in relation to the person in question. The protection of these rights by the courts are only in respect of the person who claims his or her rights are being infringed upon or is likely to be contravened in relation to him. However, in *Adjei-*

Ampofo v. Accra Metropolitan Assembly and the Attorney-General,⁶⁵⁵ (on the right to dignity, discussed below) this legal requirement was modified. This case was decided in the Supreme Court although it concerned enforcement of human rights, which as already noted the High Court has original jurisdiction over.

The Supreme Court however, declared the case as admissible and held that it was in the public interest of the country to do so. On the issue of the plaintiff not being affected by the violation personally, the court held that the affected persons as well as those likely to suffer did not know their rights and also did not have the monetary means to initiate a case in court. Therefore, even though the High Court has original jurisdiction over human rights matters, the Supreme Court in enforcing the Constitution as a whole could adjudicate at first instance on human rights matters under certain circumstances. This decision of the Supreme Court was likely borne out of the public interest nature of the case, showing how our courts have gradually appreciated the importance of fundamental human rights from the post-colonial era till date.

Also, in the case of *Awuni & Others v. West African Examination Council*,⁶⁵⁶ the Supreme Court made provision for “monetary compensation”, a new remedy that is not expressly provided for in the constitution. This case unlike the *Adjei-Ampofo* case was instituted at the High Court, through the Court of Appeal and finally the Supreme Court where the judgment was delivered. The provision of compensation in monetary value is a new development as the court realized that the extent to which the fundamental human

⁶⁵⁵ [2003-2004] 1 SCGLR 411.

⁶⁵⁶ [2004] 1 SCGLR 471.

rights had been violated required further efforts by the courts to bring the affected persons to their *status quo*. Finally, in the consolidated cases of *Ahumah-Ocansey v. E.C; Centre for Human Rights and Civil liberties (CHURCIL) v. A.G and E.C*, the Supreme Court held that prisoners had the right to vote, despite their incarceration.

In terms of sex work, the 1992 Constitution of Ghana does not even expressly state the right to work generally as a fundamental human right. However article 33(5) provides that the rights and freedoms specifically mentioned in the chapter does not exclude other rights and freedoms which are to be considered to be inherent in a democracy and intended to secure the freedom and dignity of man. The Supreme Court in *The Ghana Lotto Operators Association v. National Lottery Authority*⁶⁵⁷ had an opportunity therefore to clarify whether or not the right to work could be imported into Ghanaian law under article 33(5) but failed to do so.

Article 14 of the constitution also speaks to the right to personal liberty and gives the cases under which the right to personal liberty of a person can otherwise be deprived from them. Clause 1(d) of this article is of importance in particular in relation to sex work because it personal liberty may be deprived ‘*in the case of a person suffering from an infectious or contagious disease, a person of unsound mind, a person addicted to drugs or alcohol or vagrant, for the purpose of his care or treatment or the protection of the community*’. A study conducted by the Ghana Aids Commission in 2014 disclosed that 5,720 representing 11% out of 52,000 female sex workers in Ghana were living with

⁶⁵⁷ [2007-2008] SCGLR 1088.

HIV.⁶⁵⁸ Deducing from this statistics, it can be said that, sex workers with sexually transmitted infections and diseases cannot be entitled to the right of personal liberty for the protection of the community. On one hand, it can be argued that, sex workers have the right to personal liberty and can do what they see fit unless that liberty is curtailed under the exceptions provided in the article 14(1)(d).

The constitution in article 15(1) similarly provides that '*The dignity of all persons shall be inviolable*'. The Supreme Court in the *Adjei-Ampofo case*⁶⁵⁹ was confronted with an interpretation of this article of the Constitution, as to whether or not the practice of people carrying pan latrines on their heads as an employment given to them by the Accra Metropolitan Assembly (AMA) amounted to a violation of the dignity of the employees. Although the case was settled, it could be inferred from the consequential orders given by the court and the agreement reached by the parties to the action that, the practice was deemed to be undignifying. The question here is whether sex work and carrying a pan latrine on the head can be put in the same category of jobs that are undignifying. The inability of the court to make a pronouncement on the ambits or the metric of what makes a thing lack dignity makes it open for all to decide.

The Constitution also talks about equality before the law and non-discrimination in article 17. Clause (3) thus states: '*For the purposes of this article, "discriminate" means to give different treatment to different persons attributable only or mainly to their*

⁶⁵⁸ The General Telegraph, Statistics: 5,720 female sex workers in Ghana living with HIV, <http://www.quest.com.gh/statistics-5720-female-sex-workers-in-ghana-living-with-hiv/> - accessed on 4th November, 2017.

⁶⁵⁹ Adjei-Ampofo, *supra*.

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.’ In *Nartey v. Gati*⁶⁶⁰, Dotse JSC, in his reasoned judgment stated that, article 17 should be read alongside article 12(2) which will give a clear indication that, all the rights and freedoms contained in chapter 5 are to be enjoyed subject to the rights of others and the public interest. In relation to sex work, the Constitution states that a person should not be discriminated upon based on their occupation. An occupation can be said to be job a person undertakes to earn a living. Sex work can be said to be an occupation hence; it can be inferred from this that sex workers are not to be discriminated against based mainly on the fact that they are sex workers. This notwithstanding, they can be discriminated upon only when it is in pursuance of a public interest, and the fact that sex work is generally prohibited makes this more likely.

Another right guaranteed under the Constitution, which is of importance to the rights of sex workers in Ghana, is the right to freedom of thought, conscience and belief. The right to freedom of thought, allows an individual to hold any view they deem fit and worthy, independent of those of others. The framing of these set of rights makes it such that, people are allowed to have their own belief systems that they identify with and ascribe to without having to justify these to anyone. The right to freedom of thought, conscience and belief can be interpreted to accommodate a person’s right of choice. This is due to the fact that an individual’s thought, conscience and belief system informs the

⁶⁶⁰ [2010] SCGLR 745.

choices they make. Sex workers, by engaging in the acts they engage in, are exercising their right of choice and rightfully so. This provision of the Constitution gives sex workers like all other persons, the freedom of thought, conscience and belief so however this right manifests in their life is clearly a matter of choice that is constitutionally guaranteed.

The last set of rights which are relevant for the purposes of our discussion are: economic rights;⁶⁶¹ educational rights;⁶⁶² cultural rights and practices;⁶⁶³ women's rights;⁶⁶⁴ and children's rights.⁶⁶⁵ Hence, article 24 of the Constitution is in relation to the right of workers to work under satisfactory, safe and healthy conditions as well as receiving equal pay for equal work without discrimination. This provision of the Constitution makes provision for people who are employed. The article seeks to protect workers from exploitation by their employers, hence demands that workers work under satisfactory conditions, and are paid properly for the jobs they do. This provision of the Constitution is reiterated in the Labour Act, in section 10. Article 24 of the Constitution does not however in any way suggest that all persons are entitled to the right to work, hence by extension, it does not necessarily guarantee the right to sex work. However, what is abundantly clear is that all persons in Ghana are entitled to economic rights like the right to work and to receive equal pay for equal work.

⁶⁶¹ See CONSTITUTION Art. 24 (1992) (Ghana).

⁶⁶² See *id.* art. 25.

⁶⁶³ See *id.* art. 26.

⁶⁶⁴ See *id.* art. 27.

⁶⁶⁵ See *id.* art. 28.

Similarly, Ghanaians have a right to all the various forms of education without any distinction whatsoever. Article 26(1) then provides that: *‘Every person is entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the provisions of this Constitution.’* However, article 26(2) adds that: *‘All customary practices which dehumanize or are injurious to the physical and mental well-being of a person are prohibited.’* The importance of these provisions is of particular relevance to any discussion of sex work in Ghana. This is because, culture has always been one of the factors that have been often cited and relied upon in opposing the recognition of the rights of sex workers by some. It is thus argued that Ghanaian culture abhors such practices, which are expressed to be foreign to the traditional and cultural identity of Ghana. This argument is however counter-intuitive if you consider the numerous documented instances of traditional sex work that existed in the pre-colonial times, which has already been examined in this dissertation.

Furthermore, such arguments are deficient in the sense that culture, which has been universally described as the way of life of a people, is not static, but rather changes over a period of time. Article 26(2) further buttresses this point because the drafters of the Constitution realize that cultural practices, albeit long standing and potentially unchangeable, may be injurious to the physical as well as mental well-being of humans, and may even dehumanize them. Thus, many hitherto unquestionable cultural practices like female genital mutilation⁶⁶⁶ and *trokosi*⁶⁶⁷ have been outlawed by virtue of this

⁶⁶⁶ Sometimes referred to more succinctly as ‘female genital cutting’, it involves the cutting or other obliteration of the female clitoris to stifle sexual pleasure. The justification for this is to prevent women from being promiscuous.

provision. It is also a notorious fact that even same-sex female relations, popularly referred to as “*supi*” has been in existence in Ghana from time immemorial.⁶⁶⁸

Finally, there is the need for a brief examination of the residual human rights clause of the Ghanaian Constitution i.e. Article 33(5). This article provides as follows:

The rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.⁶⁶⁹

This means that, despite the fact that some specific human rights have been set out in Chapter 5 of the Constitution, other rights which are not specifically or expressly stated, but which are recognized as rights in other democratic states, especially where they are intended to secure human dignity and freedom, shall be considered as rights in Ghana as well. The question that then arises is whether or not the rights of sex workers can be considered as one of such residual rights? The matter has not been adjudicated upon

⁶⁶⁷ This is still practiced in some parts of Ghana, and involves the sending of young girls by their families to serve at the pleasure of a traditional fetish priest, ostensibly to atone for some sins that may have been committed by the girl’s family or forebears. These girls usually end up as sex slaves at the behest of these unscrupulous ‘priests’.

⁶⁶⁸ See Serena Owusua Dankwa, “*It’s a Silent Trade*”: *Female Same-Sex Intimacies in Post-Colonial Ghana*, 17 NORDIC J. FEMINIST AND GENDER RES. 192 (2009).

⁶⁶⁹ Article 33(5) of the 1992 Constitution of Ghana.

directly by the Supreme Court, but recent decisions by the court seem to point towards a liberalization of the scope of the residual rights envisioned by article 33(5).⁶⁷⁰

For example in the case of *Adjei-Ampofo v. Attorney-General*,⁶⁷¹ the Supreme Court of Ghana held as follows:

This article clearly speaks of ‘rights, duties, declarations and guarantees relating to fundamental human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding other not specifically mentioned.’ The reference to ‘others’ referred to in article 33(5) can only be those rights and freedoms that have crystallized into widely or greatly accepted rights, duties, declarations and guarantees through treaties, conventions, international or regional accords, norms and usages.⁶⁷²

Similarly, in the case of *Ghana Lotto Operators Association & Others v. National Lottery Authority*,⁶⁷³ the Supreme Court speaking through Justice Date-Bah in evaluating the scope of article 33(5) held that “*evidence of such rights can be obtained either from provisions of international human rights instruments (and practice under them) or from the national human rights legislation and practice of other states.*”⁶⁷⁴

⁶⁷⁰ The Supreme Court of Ghana has pronounced on Article 33(5) in two notable cases. See *Adjei-Ampofo v Attorney-General* [2003-2004] 1 SCGLR 411; *Ghana Lotto Operators Association & Others v National Lottery Authority* [2007-2008] SCGLR 1088.

⁶⁷¹ See *Adjei-Ampofo*, supra.

⁶⁷² *Id.*

⁶⁷³ See *Ghana Lotto Operators Association*, supra.

⁶⁷⁴ *Id.*

In Ghana therefore, although the rights of sex workers are not expressly provided for and protected under the Constitution and other laws, article 33(5) of the Constitution presents the best hope for future recognition. The Supreme Court in the aforementioned cases has also left room for recognition of the rights of sex workers and other vulnerable groups if the opportunity was to arise. It is not surprising therefore that the Constitution Review Commission in its recommendations to the Government regarding the issue of gay rights, stated that: *‘The Commission finally finds that there does not appear to be any compelling reason for the Commission to address, let alone attempt to deal with, this issue in the present context. The more advisable approach would seem to be to leave the matter for settlement by the Supreme Court in due course. If and when there is enough interest in the matter (and there is a sufficiently strong feeling about the issue), those who wish to promote the idea will be able to seek an opinion from the Supreme Court, and the Court will be able, soberly and in its own time, to consider the submissions put before it and issue the interpretation of the Constitution in the light of the strength of the arguments advanced. In doing so, the Court may also seek to take account of the prevailing conditions and views in the country at the time.’*⁶⁷⁵

Even though the Commission avoided taking a position one way or the other on the rights of sexual minorities, but rather deferred to the Supreme Court if there was “*enough interest in the matter*” (a position that was accepted by the Government of

⁶⁷⁵ See CONSTITUTION REVIEW COMMISSION, REPORT OF THE CONSTITUTION REVIEW COMMISSION: FROM A POLITICAL TO A DEVELOPMENTAL CONSTITUTION ¶ 18 (2011) (hereinafter CONSTITUTION REVIEW REPORT).

Ghana without any further comment),⁶⁷⁶ it seems as if the Commission offered some general hope to sexual minorities in Ghana. Thus, in relation to the issue of discrimination generally, under the subtheme of “Equality and Freedom from Discrimination,”⁶⁷⁷ the main dimension of the issue was captured as: ‘*whether to include the grounds of discrimination in the Constitution to include sex, sexual orientation, North-South discrimination, Natural resource discrimination, age and disability.*’ The Commission extensively reviewed the scope of Article 17 of the Ghanaian Constitution and made the following findings:⁶⁷⁸

The Commission finds that the framers of the 1992 Constitution substituted “sex” (which was in the 1979 Constitution) with “gender” for the following purpose: to ensure the recognition of the natural/biological state of a woman and a man. The Commission observes that including “sex” in the anti-discrimination clause of the Constitution, in addition to “gender” would add to the legal arsenal of those who argue that the Constitution abhors discrimination on the grounds of sexual orientation The Commission observed that at the National Constitution Review Conference, it was proposed that Article 17(2) should be amended to read thus: A person shall not be discriminated against *directly or indirectly* on grounds of *sex, gender, race, color, ethnic origin, religion, creed, civil, political, social, cultural, or economic status, disability or age or any other ground.*⁶⁷⁹

⁶⁷⁶ GOVERNMENT OF GHANA WHITE PAPER ON CONSTITUTION REVIEW COMMISSION REPORT. On the issue of Recognition of Lesbian and Gay Rights it was stated that: “*Government has taken note of the recommendation of the Constitution Review Commission that the legality or otherwise of homosexuality be decided by the Supreme Court if the matter comes before the Court.*” *Id.*

⁶⁷⁷ *See id.*, ch. 13.

⁶⁷⁸ *Id.* at 653-654.

⁶⁷⁹ *Id.*

On this basis, the Commission therefore recommended to the Government of Ghana that an Affirmative Action Act be enacted, which ‘*should deal with all types of discrimination against vulnerable groups and minorities.*’⁶⁸⁰ It can be reasonably deduced from the foregoing that the Commission intended to have the proposed Affirmative Action Act protect the rights of sexual minorities as well as other vulnerable groups like sex workers, in an equal manner. Interestingly, the Government of Ghana also accepted this recommendation of the Commission in its White Paper in the following terms: ‘*The Government accepts that the recommended Affirmative Action Act should deal with all types of discrimination against vulnerable groups and minorities.*’⁶⁸¹ Thus, it appears that the country is slowly but steadily moving towards formal recognition of the rights of sexual minorities, sex workers and other vulnerable groups; or at least the opportunity to present arguments in favor of formal recognition and protection through a public interest case that may be brought before the Supreme Court and/or the possible enactment of the Affirmative Action Act in the near future.

However, a very important fact to be considered in the ascertainment of the rights of sex workers is the essential criminalization of the work they engage in. As previously noted, the Criminal Offences Act, Act 29, in chapter seven gives elaborate provisions on offences against public morals. In section 274 (1) it is stated that ‘*Any person who knowingly lives wholly or in part on the earnings of prostitution; or is proved to have, for the purposes of gain, exercised control, direction or influence over the movements of a prostitute in such manner as to aid, abet or compel the prostitution with*

⁶⁸⁰ *Id.* at 654.

⁶⁸¹ *See id.* at 44.

any person or generally, shall be guilty of a misdemeanour'. The title of this section of the Act, is '*Persons trading in prostitution*'. From the wording of the section, nowhere does it expressly ban sex work, what the section rather does, is to make it an offense for a person to aid a sex worker. The persons who exercise any form of control or influence over sex workers are pimps. So in effect, what the section does is to impute criminal liability on pimps.

The first part of the section also says a person who lives wholly or in part on the earnings of prostitution commits a misdemeanour. Once again, the Act does not expressly ban the act of sex work *per se*. What the Act does is to make a person who lives on the earnings on sex work, criminally liable. Invariably, a sex worker will have to live on their earnings. Sex workers partake in this line of work because they need a means to earn a living, hence they will definitely live on the money they make from the work they do. This section is very wide in its scope. Also, we must consider the fact that sex workers are not the only ones who live on their earnings. Most sex workers have relatives and in some cases children who they take care of; so to the extent that all these people knowingly live on the earnings of a family member who is a sex worker, they commit a criminal offence – as untenable and unenforceable as that is.

The 1992 Constitution affords all persons human rights, which are subject to other provisions of the Constitution and to the public interest. Of all the rights enumerated in the Constitution, some of them seem to accommodate the rights of sex workers; for example – the right to freedom of thought, conscience and belief. This right gives

justification to sex workers for partaking in their chosen occupation. Similarly, the rights to dignity and equality & non-discrimination seem applicable to all persons without distinction, sex workers inclusive, deducing from the recommendations of the Constitutional Review Commission. The rest of the rights discussed above may accommodate the rights of sex workers but not without a lot of complications. An important detail that need not be glossed over in the determination of whether or not sex workers in Ghana have a right to engage in sex work is the fact that their activities are indirectly barred by statute, which makes it difficult advocating for their rights in the first place. This is a theme that is further explored in Chapter Six.

D) REGIONAL & INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

1. *The Banjul Charter*

The African Charter on Human and Peoples Right, otherwise known as the Banjul Charter was adopted in Nairobi in June 1981. Ghana has signed and ratified this Charter. The Banjul Charter, which is a treaty that is unique in the sense that it does not only deal exclusively with rights per se, but it also emphasizes responsibilities. It is also the only regional human rights instrument that places a premium on communal rights or ‘peoples’ rights. Article 2 states:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind

such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Article 3 deals with equality before the law, and equal protection of the law. Specifically, article 3(2) states that, '*Every individual shall be entitled to equal protection of the law.*' This provision of the Charter was clarified in the case of *Modise v. Botswana*,⁶⁸² where the court held that, the protection of the law here should not be limited to citizens only, regardless of the content of their respective Constitutions.

Article 4 provides that: '*Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.*'⁶⁸³ In relation to the rights of sex workers, the Charter permits sex workers like all other persons to be protected by the law. Article 5 also prohibits exploitation and degradation of man '*particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment or treatment.*' This provision of the Banjul Charter speaks to the right to dignity of all persons in the following terms: '*Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.*'⁶⁸⁴

⁶⁸² (2000) AHRLR 30.

⁶⁸³ Article 4 of the African Charter on Human and Peoples' Rights, 1981.

⁶⁸⁴ Article 5 of the African Charter on Human and Peoples' Rights, 1981.

The jurisprudence of the court in respect of this article, points to the fact that, the court primarily looks at dignity from the standpoint of slavery, torture and other acts that people do not consent to. This notwithstanding, the court had to determine in the case of *Thebus and Another v. The State*,⁶⁸⁵ whether the conviction of a person amounted to an abuse of their right to dignity. The court held in the negative that, the conviction and subsequent incarceration of a person did not amount to the abuse of their right to dignity. Under this provision, one cannot rightfully infer the rights of sex workers under the Charter. The intention of the framers of the Charter and the jurisprudence of the court and African Commission on Human Rights point to the fact that, the article was intended to protect people from exploitation and abuse. Sex work, where the parties consent to, which is the case in most situations does not involve the exploitation and or abuse of the parties. Judging from this, it may be difficult to infer the right to sex work from this article of the Charter.

Article 6 of the African Charter on Human and Peoples Rights states that, '*Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.*' The wording of this article points to the fact that, the Charter wants to protect individuals from being unduly arrested and detained by the State. It will not be unreasonable to deduce a right to sex work from this provision of the charter. Article 8 also provides that freedom of conscience, profession and the free practice of religion shall be guaranteed. It states that no one may, subject to law and order, be submitted to measures restricting the exercise of these

⁶⁸⁵ (2003) AHRLR 230.

freedoms. The African court in *Prince v South Africa*,⁶⁸⁶ noted that, the right to religion like all other rights, are limited to the laws of the State under the doctrine of margins of appreciation. Also, the right to a profession has been stated in the Charter, but is yet to be interpreted by the court. Although sex work can be argued to be a profession, it is doubtful whether the court will accept such a postulation.

Article 15 of the African Charter is in relation to the right to work under equitable and satisfactory conditions. The African Court of Human Rights has held in the case of *Malawi African Association and Others v. Mauritania*,⁶⁸⁷ that, the applicants were entitled to be paid for the work they did as well as the work they did under favorable conditions. The failure of the State to provide this was tantamount to slavery in the opinion of the court. Also, in *Prince v. South Africa*,⁶⁸⁸ the court in arriving at the decision that South Africa was not in breach of the provision of the Charter, indicated that, ‘*One purpose of this Charter provision is to ensure that States respect and protect the right of everyone to have access to the labour market without discrimination. The protection should be construed to allow certain restrictions depending on the type of employment and the requirements thereof. Given the legitimate interest the state has in restricting the use and possession of cannabis as shown above, it is held that the complainant's occupational challenge can be done away with should he chose to accommodate these restrictions. Although he has the right to choose his occupational call, the Commission should not give him or any one a leeway to bypass restrictions legitimately laid down for the interest of the whole society. There is no violation, thus, of*

⁶⁸⁶ (2004) AHRLR 105.

⁶⁸⁷ (2000) AHRLR 149.

⁶⁸⁸ (2004) AHRLR 105.

his right to choose his occupation as he himself chose instead to disqualify himself from inclusion by choosing to confront the legitimate restrictions.’⁶⁸⁹

In relation to the right of sex workers in Ghana, it can be inferred from the decisions of the court that, no such right to work as a sex worker will be acknowledged. Act 29, prohibits sex work and to the extent that it has been barred under Ghanaian law, for the purposes of protecting public morality, the court will not guarantee such a right. To sum it up, the provisions of the African Charter coupled with the jurisprudence of the African Court on Human Rights, seems to suggest that the right to sex work or prostitution may not necessarily be generally guaranteed or accommodated just yet.

2. Protocol to the Banjul Charter on the Rights of Women in Africa

The Women’s Protocol in article 3 states, ‘*Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights. Every woman shall have the right to respect as a person and to the free development of her personality*’. The effect of this article reinforces the right to dignity already provided for under the African Charter but adds an additional leg to this right i.e. the free development of her personality. This additional provision to the right to dignity can be construed to accommodate the rights of sex workers. This is due to the fact that, in allowing a person to develop a personality of their own, their choices are very essential. The decision to be a sex worker will invariably impact a person’s personality. The protocol demands that, every woman’s personality development be respected and protected.

⁶⁸⁹ *Id.*

Article 4(2)(a) of the protocol states that, '*States Parties shall take appropriate and effective measures to enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public*'. This article of the protocol relates to violence, including sexual violence. The violence here however, could be extended to the sex workers who are abused. The ambit of this article cannot be interpreted to mean or guarantee a right to sex work nonetheless. The Protocol in article 13 is however dedicated to the protection of the economic and social welfare of women. For the purposes of the right to sex work in Ghana, the relevant clauses are, clause (d), which states, '*State parties shall adopt and enforce legislative and other measures to guarantee women the freedom to choose their occupation, and protect them from exploitation by their employers violating and exploiting their fundamental rights as recognized and guaranteed by conventions, laws and regulations in force.*' Clause (e) also provides that, '*States Parties shall adopt and enforce legislative and other measures to guarantee and create conditions to promote and support the occupations and economic activities of women, in particular, within the informal sector.*'

These two provisions seek to address the issue of exploitation of female workers and the promotion of women in the informal sector. Generally, women in the informal sector are women who are into agriculture, trading and other vocational jobs. Sex work, cannot form part of the informal sector within the meaning of this provision of the protocol because, from the wording of the article, the drafters envisaged women who undertake generally accepted businesses of which sex work is not part. Also, it can be argued that categorizing sex work as a type of work in the informal sector will more or

less open the floodgates for the inclusion of other generally unacceptable “trades” as part of the informal sector – for example armed robbery, fraud and other vices. The protocol therefore demands of State parties to make sure women who already have jobs are not discriminated against, and also to protect them from exploitation.

3. *International Human Rights Obligations: CEDAW, ICCPR & ICESCR*

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted by the United Nations in 1979 in resolution 340/180 and entered into force in September 1981 as one of the UN international human right treaties. In 1980, Ghana acceded to the CEDAW and subsequently in 1986, ratified this accession without reservation. Article 1 of the Convention defines discrimination against women as *‘any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.’* This definition of discrimination is very wide in its application and scope. It covers specifically, discrimination targeted at women in the favour of men. Sex work is an occupation that is primarily undertaken by women and there is virtually no discrimination in terms of sex work against men in any form. The type of discrimination that can be argued that may exist is in terms of society’s perception of sex workers. It cannot however be reasonably deduced from this provision that, a right to sex work exists for women and should be protected from discrimination.

Similarly, Article 11 of CEDAW states that, *‘States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: (a) The right to work as an inalienable right of all human beings; (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment; (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training.’* This provision expressly guarantees women the right to work and enjoins State parties to the convention to ensure that women are not discriminated against when it comes to issues of employment, be it in the formal or informal sector.

Ghana signed and ratified both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) on 7th September 2000.⁶⁹⁰ The ICCPR⁶⁹¹ contains several provisions that prohibit discrimination on stated grounds, and also guarantee equal protection of the law. However, in terms of the protection and recognition of the rights of sex workers, the most salient provisions of this treaty are Articles 2(1); 17; and 26. Article 2(1) states:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized

⁶⁹⁰ See http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx

⁶⁹¹ This treaty was adopted in 1966, and entered into force in 1976.

in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁶⁹²

Also, article 17(1) provides that: *‘No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.’* Article 17(2) then states: *‘Everyone has the right to the protection of the law against such interference or attacks.’*

Finally, article 26 provides that: *‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’* The ICCPR therefore provides for the right to inherent dignity of all persons, the right to liberty and autonomy and the right to equality, equal protection of the law and non-discrimination. On the other hand, Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) states that *‘States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.’* This provision of the treaty is clear and unambiguous. It gives all persons the right to work and goes ahead to provide that people are entitled to choose any work they want to do, and the State must take steps to

⁶⁹² Article 2(1) of the International Covenant on Civil and Political Rights, 1966.

safeguard this right. This article of the treaty can be said to give all sex workers a right to work and goes the extra mile to require of States to protect and safeguard the rights of sex workers.

Thus, under article 6 of the International Covenant on Economic, Social and Cultural Rights, sex workers have a right to engage in sex work and also demand their States to safeguard this right. The only problem is that sex work is generally criminalized, and as a result, such an interpretation may be difficult to advance, especially in Africa. On the other hand, the Convention on the Elimination of All Forms of Discrimination against Women does not necessarily guarantee the right to engage in sex work. What the convention does however is to require State parties to eliminate all forms of discrimination against women.

E) CONCLUDING OBSERVATIONS

All in all, the major lesson to be learned from the brief exposition of Ghana's human rights history and track record is that, the courts have gradually come to accept human rights as part and parcel of the national identity. However, when it comes to sexuality and sexual offences with a human rights nexus, the courts are yet to make a definitive pronouncement. The conservative attitude of Ghanaians in general regarding sexuality will probably be a determining factor in whether or not the rights of sex workers and the right to sex work will be vindicated if such a matter were to present itself for adjudication.

What is important however is that, Ghana's constitutional prescription of fundamental human rights leaves room for the future incorporation of rights that have not been expressly provided for in the Constitution, or those yet to be developed. Ghana's regional and international human rights obligations may also play a critical role if sex worker rights are to be recognized, and the right to sex work guaranteed. However, it is my considered opinion that for this to be achieved, we will have to critically examine the law prohibiting sex work from a constitutional standpoint so as to provide legal justification for the right to sex work, and the rights of sex workers. This is what Chapter Six of this dissertation seeks to do.

CHAPTER SIX

CONSTITUTIONALITY OF REGULATING INTIMACY AND SEXUAL MORALITY: APPLYING THE

D.I.E. FRAMEWORK

The question whether law should concern itself with the regulation of private morality in general, and intimate human conduct and sexual morality in particular is not easy to answer. Throughout the dissertation, I have however tried to establish that the public policy underpinnings of laws that seek to regulate and/or curtail the individual's "moral" choices must remain neutral; hence, my proposal for the adoption of the D.I.E. framework of public policy making, where the criminal law is concerned, especially in relation to intimate human conduct and sexuality. It must be noted at this point that contemporary debates regarding sex work and its propriety or otherwise in the modern nation State have revolved around four key strategies for tackling the phenomenon.

These are: prohibition (criminalizing the buying and selling of sex); abolition (providing penal sanctions for the buying of sex – for if there is no demand, supply will necessarily be affected); regulation (sanitizing the trade by situating sex work within the context of labour, healthcare and safety, urban planning etc.); and full legalization. This part of the dissertation therefore examines the nexus between private and public morality with particular emphasis on sex work, and whether or not we can deduce a constitutional guarantee, prohibition, abolition or regulation of sex work under the 1992 Constitution of Ghana, using the D.I.E. framework; and which of these four strategies for tackling the phenomenon will be the most appropriate within the context of Ghana.

Fortunately, the Supreme Court of Ghana has over the years laid down some general guiding principles of constitutional interpretation. The constitutionality of the criminalization of sex work generally under Act 29 is therefore examined in light of the possible interpretations that may be ascribed to specific human rights provisions of the Constitution (i.e. the right to dignity, individual autonomy and equality), based on the principles of constitutional interpretation generally accepted in Ghana. These guiding principles, which will be subsequently explored in some detail, are as follows:⁶⁹³

- 1) A national Constitution must be given a benevolent, broad, liberal and purposive construction so as to promote the apparent policy of its framers i.e. the court must avoid a strict, narrow, technical and legalistic approach;
- 2) A Constitution must be construed as a political document capable of growth;
- 3) A national Constitution is a document *sui generis* and must therefore be interpreted according to the principles suitable to its character and necessarily according to the ordinary rules and presumptions of statutory interpretation;
- 4) The Court must avoid importing into the Constitution what does not appear therein;
- 5) The Court may have to take into account the spirit of the Constitution as a tool for constitutional interpretation;
- 6) The provisions of the Interpretation Act may be relevant in construing provisions of Ghana's Constitution;

⁶⁹³ S.Y. BIMPONG-BUTA, *THE ROLE OF THE SUPREME COURT IN THE DEVELOPMENT OF CONSTITUTIONAL LAW IN GHANA* (2010).

- 7) The Court may resort to the Directive Principles of State Policy in Chapter 6 of the Constitution as a tool of constitutional interpretation;
- 8) The Court must ascertain the intention of the framers of the Constitution as collected or gleaned from the provisions of the Constitution, and once ascertained, it is the duty of the Court to give effect to that intention;
- 9) In construing a Constitution, the court must look at all the provisions thereof as a whole;
- 10) In testing any law for unconstitutionality, the Court should not concern itself with the propriety or expediency of that impugned law, but what the law itself provides i.e. that the highest motives and best intentions are not enough to displace constitutional obstacles; and
- 11) Public policy considerations should not be used as a tool for constitutional interpretation just as public policy cannot be relied upon in statutory interpretation. This is because public policy is usually vague and unsatisfactory, and may lead to uncertainty and error i.e. public policy 'is a very unruly horse'.

A) CONSTITUTIONALITY OF REGULATING PRIVATE AND SEXUAL MORALITY

1. *The Right to Human Dignity*

As already noted in Chapter Three of the dissertation, respect for human dignity is the fundamental basis of a rights-based regime. Human dignity is at the core of human rights, and is to a large extent the catalyst for the respect, promotion and protection of all

other rights in a democratic society.⁶⁹⁴ In Ghana, article 15 of the 1992 Constitution provides for the respect of human dignity in the following terms:

- (1) The dignity of all persons shall be inviolable.
- (2) No person shall, whether or not he is arrested, restricted or detained, be subject to—
 - (a) torture or other cruel, inhuman or degrading treatment or punishment;
 - (b) any other condition that detracts or is likely to detract from his dignity and worth as a human being.
- (3) A person who has not been convicted of a criminal offence shall not be treated as a convicted person and shall be kept separately from convicted persons.
- (4) A juvenile offender who is kept in lawful custody or detention shall be kept separately from an adult offender.

The concept of human dignity from a constitutional perspective is therefore linked one way or the other to the criminal justice system, as can be ascertained from article 15. How then do we measure the inviolability of the dignity of individuals within that context?

I have already proposed that for the sake of sound public policy, all laws that seek to regulate intimate human conduct must have at its core the preservation and promotion of the inherent dignity of the individual.⁶⁹⁵ Hence, criminal offences that hinge on some

⁶⁹⁴ See J. Tasioulas, *Human Dignity and the Foundations of Human Rights* (2013).

⁶⁹⁵ See Chapter 3 of the dissertation.

conception of societal moral precepts must fundamentally seek to safeguard the inviolability of human dignity. The questions that remain to be resolved are as follows: does the law prohibiting sex work respect, promote or safeguard the dignity of sex workers? Better still, is there anything undignified about offering sex for money? What is inherently offensive to society about such transactions? Finally, are the laws prohibiting sex work constitutional? To answer these questions, it must be reiterated that Ghanaian law prohibits the solicitation of sex in public places, procurement for sex, the exchange of sex for money in brothels, the keeping of brothels, or living off the earnings of sex workers.⁶⁹⁶

Sex work in its classical forms and manifestations cannot therefore be legally engaged in save for limited circumstances.⁶⁹⁷ The law in Ghana all but classifies sex workers as criminals as a result of their line of work. They are humiliated, looked down upon and publicly shamed when their identities are exposed. But beyond the ‘false consciousness’ ideology that the Catherine MacKinnon wing of feminism will have us believe, is it not possible that people engaged in sex work are making rational economic choices and decisions? Basic economic principles reveal that whenever there is a demand for a commodity or service, a supply chain is created that increases sometimes exponentially i.e. demand fuels supply. Is it therefore fair to degrade people and essentially violate their ‘inviolable’ human dignity by criminalizing them, and their rational economic choices simply because society is not comfortable?

⁶⁹⁶ See sections 273 to 277 of Act 29.

⁶⁹⁷ As already noted earlier, the only conceivable exception is situations where a sex worker receives clients at his or her personal residence, since soliciting and importuning in public places are prohibited.

Some may however suggest that the same argument can be marshaled in defense of armed robbers, whose activities are criminalized because it offends the public good. The difference however between armed robbery and sex work is that, exchanging sex for money is *prima facie* purely a consensual, often private and voluntary affair, whilst the same cannot be said for the former. Armed robbers deprive people of their property, usually in a violent manner that goes beyond the specific victim(s) in question. Sex work however is purely transactional, and except for situations where it involves a minor (who is not capable of consenting to sex anyway), or is linked with the forced trafficking of persons and forced prostitution, genuine sex work should not offend the sensibilities of society.

Then again, critics will postulate that engaging in sex work or soliciting for sex in public places like street corners or brothels etc. offends the moral fiber of the society. That it sends the wrong message to the youth about the society's acceptance of an inherently immoral act. But, what led society to come to this conclusion in the first place? Is it the case that sex is generally bad and as such should not be openly alluded to in the form of street or public solicitation? Surely that is not the case, for sex cannot be deemed bad by any human society. If so, then it is because some other factors must have led to this conclusion that in turn influenced the public policy direction that the law prohibiting sex work epitomizes. These factors are conceptions of morality, mostly from religious and cultural perspectives, as already noted in the previous chapters.

The law does mirror the religious and cultural conception of moral uprightness that sex work clearly runs counter to. It prioritizes the collective sense of morality deduced from religion and notions of cultural heritage, over the individual's private sense of what is moral – a general acceptance of which has entrenched the belief in the ideals of such laws. That notwithstanding, persons who freely choose to engage in activities like sex work for a living are violated in the sense that no dignity is attached to this line of work in Ghana. The law has made sure of this. In fact, degrading and insulting terms like “*ashawo*” which translates to mean “prostitute” are reserved for sex workers, and indeed any female who is deemed promiscuous – whereas no such equivalent terms exists for their male counterparts. As a matter of fact, promiscuity in males in Ghana is celebrated, encouraged and accepted as a socio-cultural norm.

It seems the law does not seek to promote the dignity of the sex worker because it considers her/him *prima facie* as a criminal. What is however interesting is that the law only focuses on the supply side of the equilibrium, to the total neglect of the demand side. Presently, the law in Ghana does not sanction or concern itself with persons who pay for sex. Is it the case that we consider it bad and immoral to sell one's body for monetary compensation, but we cannot really be bothered if you decide to pay money in exchange for sex? Or is it that the policy of the law has been to degrade sex workers, mainly female, from time immemorial, since such conduct is considered immoral? Such mixed and contradictory signals that the law seemingly sends out is problematic because it provides no focused and rational public policy basis for the law in the first place.

Does the law therefore pass the constitutional test of upholding the inviolability of human dignity? It is my considered view that for so long as there are laws that prohibit sex work in Ghana, these laws will continue to inherently infringe on the inviolability of the dignity of sex workers because it considers them criminals. Article 15(1) of the Constitution makes no distinction as to the persons entitled to enjoy this basic human right to dignity. Thus, unless some compelling reason(s) exists for prohibiting voluntary and consensual sexual transactions between adults, the criminalization of such transactions will not be rational and necessary in our contemporary world.

The religious and cultural arguments of maintaining the moral fiber of society can no longer be justification for such repressive laws due to the fact that we live in a secular State, where religion and the State are separate and must remain so, and the multi-cultural world we live in has also become very dynamic. Religious and/or cultural conceptions of morality can therefore no longer be the underpinnings of public policy where intimate human conduct/behavior is concerned. The law prohibiting sex work in Ghana, in my view, does not pass the constitutional test of inviolability of human dignity.

This is because, the main provision of the Criminal Offences Act that seek to prohibit sex work, only does so in terms of street solicitation or importuning. Section 276(1) of Act 29 for example, provides that '*A person who persistently solicits or importunes in a public place or in sight of a public place for the purposes of prostitution commits a criminal offence ..*' Thus, merely standing on the street corner in the middle of the night in a manner that suggests that one is a sex worker can be deemed as solicitation;

whilst approaching passers-by in vehicles for example would amount to importuning. These acts are deemed criminal according to section 276(1) of Act 29. The issue therefore is whether this provision is consistent with the admonishing for the respect of human dignity under article 15 of the Constitution of Ghana, in particular, article 15(1) and 15(2)(b).

The test of constitutionality and principles of constitutional interpretation as outlined above involves eleven (11) important considerations. The first of these has to do with the fact that constitutional provisions must be given a benevolent, broad, liberal and purposive construction so as to promote the apparent policy of its framers i.e. the court must avoid a strict, narrow, technical and legalistic approach. Thus, article 15(1) which suggests that the dignity of all persons in Ghana are inviolable can clearly be given ‘*a benevolent, broad, liberal and purposive construction*’ to apply without distinction to all persons including sex workers. Thus, sex workers are also entitled to respect of their inherent dignity.

Similarly, article 15(2)(b) which provides that no person regardless of circumstances should be subjected to conditions that detract or is likely to detract from their dignity and worth as human beings is also applicable to sex workers. Giving this provision a liberal, benevolent, broad and purposive construction will probably negate laws that criminalize the free and rational economic choice that sex workers make to engage in that trade. The fact that the conduct of sex workers are criminalized by the law clearly detracts from their dignity and worth, because as earlier suggested, absent

religious and cultural conceptions of acceptable moral conduct, there is nothing undignifying about offering sex for monetary reward. In fact as already noted, many of the sexual relationships in Ghana are sometimes premised on pecuniary rewards. If no dignity is involved in sex in exchange for reward (monetary or otherwise) and it is inherently immoral, we might as well criminalize the conduct of persons who enter into marriages with the sole purpose of achieving financial stability or benefiting from the finances of the other spouse! Similarly, we should criminalize persons who maintain multiple sexual partners simply because they are addicted to sex!

Also, if sex workers (*roamers*) cause such a nuisance in public places to the extent that their activities ought to be criminalized, what about street hawkers and beggars who are a constant nuisance in all the major cities of the country, but yet are allowed to operate largely unhindered.⁶⁹⁸ At least, the most popular form of sex work in Ghana only involves solicitation or importuning late at night when the general public and majority of the people are asleep and not in public anyway. Thus, is it the case of selective public policy making? Or is it that society does not consider begging and street hawking as moral issues, grave enough as that of sex work? The bottom line is, by criminalizing sex work in general, the dignity of the sex worker is violated as he or she is deemed a criminal for rational and legitimate economic choices they have made.

We must also note that the Constitution is a political document capable of growth and must be interpreted according to its own principles. Article 15 is clear and admits of

⁶⁹⁸ It must be noted that there are laws that prohibit street hawking and general public nuisance in Ghana; yet a distinctive feature of the urban areas in Ghana is the excessive street hawking menace.

no ambiguity as it applies to all persons in Ghana regardless of their status. There is thus no need to import words into article 15 to make it clearer, as the spirit of the constitution itself will abhor violations of the dignity of the sex worker, because at the end of the day, we are all human beings, deserving of respect of our dignity, regardless of our life circumstances. In a similar manner, the directive principles of state policy contained in Chapter 6 of the Constitution provides in part that *‘The State shall endeavor to secure and protect a social order founded on the ideals and principles of freedom, equality, justice, probity and accountability as enshrined in Chapter 5 of this Constitution; and in particular, the State shall direct its policy towards ensuring that every citizen has equality of rights, obligations and opportunities before the law’*.⁶⁹⁹

Also, article 37(2)(b) provides that *‘The State shall enact appropriate laws to assure– the protection and promotion of all basic human rights and freedoms, including the rights of the disabled, the aged, children and other vulnerable groups in development processes’*. Sex workers are clearly a vulnerable group within the meaning of article 37(2)(b), due to the marginalization and social stigma they face; and as a result, the law must protect them and promote their rights, including respect for the inviolability of their dignity. The intention of the framers of the Constitution as can be gleaned from a reading of the entire Constitution cannot therefore be compatible with disregard for the dignity of sex workers. Indeed, the fact that a whole Chapter of the Constitution is devoted to the promotion and protection of the rights of all persons in Ghana must be construed as a direct intent on the part of the framers to protect all persons in Ghana from unjust laws that criminalize conduct solely on the basis of religion or culture.

⁶⁹⁹ See article 37 of the 1992 Constitution.

In this regard, it is my considered view that the propriety and expediency of the law prohibiting sex work on the basis of religious and cultural conceptions of morality cannot outweigh the constitutional precept of the inviolability of the human being. The public policy dimension (safeguarding public morals) of criminalization of sex work is also not a suitable justification for the state of the law because public policy has been said to be an “unruly horse”. It can run in directions that may misrepresent the true state of affairs regarding societal conceptions of morality or right and wrong. Thus, both these two tests of constitutionality of the law prohibiting sex work, seem to reinforce the fact that the inviolability of the dignity of all persons including sex workers cannot be overridden by propriety and expediency of the law, or its public policy underpinnings of maintaining the moral fiber of the Ghanaian society.

2. The Right to Individual Autonomy/Liberty

Individual autonomy or liberty is another important variable or principle, which all laws seeking to regulate intimate human conduct must measure up to. Thus, I have suggested that the individual’s ability to act in an autonomous manner free from social coercion must be reflected in laws that seek to regulate intimate human conduct. The 1992 Constitution of Ghana provides in Article 14(1) that ‘*Every person shall be entitled to his personal liberty and no person shall be deprived of his personal liberty ...*’ There are however seven (7) exceptions to this general guarantee of individual autonomy and liberty. These are: restrictions of liberty for the purposes of carrying out the sentence of a court; in execution of an order of a court; for the purpose of bringing a person before a court in execution of an order of the court; for the purpose of treatment or care of persons

of unsound mind etc.; for the purposes of educating or providing the welfare of children below 18 years; for preventing unlawful entry into Ghana or for expelling and extraditing or removing persons from Ghana; and upon reasonable suspicion of the commission of a criminal offence.⁷⁰⁰

Section 276(1) which criminalizes sex work clearly falls within the context of the exceptions to the non-restriction of autonomy and liberty of the individual provision of the Constitution. This is because, the law clearly makes it possible for a person's liberty to be restricted upon suspicion of the commission of an offence or upon suspicion that a person is about to commit a criminal offence. However, the law prohibiting sex work in itself is an affront to individual liberty and autonomy because it seeks to restrict such autonomy on the basis that society finds it morally unacceptable. By categorizing all sex workers as criminals, the law mandates and constitutionally sanctions the curtailment of the liberty and autonomy of sex workers. However, this should not be the case as the individual in a modern democratic society must be free to make rational economic decisions and engage in occupations that are legitimate, and should not offend the law simply because a section of society find it morally unacceptable on religious and cultural grounds.⁷⁰¹

3. The Right to Equality, Equal Protection of the Law and Non-discrimination

⁷⁰⁰ See Article 14(1) of the 1992 Constitution.

⁷⁰¹ The individual's right to occupation is further explored from the perspective of sex work and non-discrimination principles in the next section.

The Constitution of Ghana abhors discrimination. Article 17(1) of the Constitution, which provides that ‘All persons shall be equal before the law’, is the clearest indication of the constitutional guarantee of equality for all Ghanaians. Article 17(2) goes on further to prohibit discrimination on stated grounds.⁷⁰² Article 17(3) explains what “discrimination” means for the purposes of the Constitution: *‘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.’*

Even though discrimination on the basis of sex work is not explicitly stated in article 17 or any other provision of the Constitution for that matter, the fact that article 17 prohibits discrimination on the basis of occupation, can encompass sex work. The goal here is to examine the rights to equality, equal protection of the law and non-discrimination having regard to the aforementioned guiding principles of constitutional interpretation. This will enable us to determine whether or not article 17 protects sex workers from discrimination on the basis of their occupation.

⁷⁰² The grounds for non-discrimination under Ghana’s Constitution are: gender, race, color, ethnic origin, religion, creed or social or economic status.

The first question we need to resolve is what will be a ‘*benevolent, broad, liberal and purposive construction*’ of article 17? In the case of *Tuffuor v. Attorney-General*,⁷⁰³ the Court of Appeal sitting as the Supreme Court of Ghana when called upon to construe certain provisions of the 1979 Third Republican Constitution of Ghana held as follows:⁷⁰⁴

A written Constitution such as ours ... embodies the will of a people. It also mirrors their history. Account, therefore, needs to be taken of it as a landmark in a people’s search for progress. It contains within it their aspirations and their hopes for a better and fuller life ... A broad and liberal spirit is required for its interpretation. It does not admit of a narrow interpretation. A doctrinaire approach to interpretation would not do. We must take account of its principles and bring that consideration to bear, in bringing it into conformity with the needs of the time.

Similarly, in *New Patriotic Party v. Attorney-General (31st December Case)*,⁷⁰⁵ Hayfron-Benjamin JSC writing for the majority, held as follows: ‘*My duty was to discover the ‘intent and meaning’ of ... our Constitution and apply ‘a broad and liberal spirit’ in its interpretation. There is no benefit in these modern times in applying a strict interpretation to modern democratic Constitutions. So to do would mean that we forget that Constitutions are made by men for the governance of men.*’⁷⁰⁶

⁷⁰³ [1980] GLR 637.

⁷⁰⁴ *Id.* at 647-648.

⁷⁰⁵ [1993-94] 2 GLR 35.

⁷⁰⁶ *Id.*

Beginning with the premise that article 17(1) of the Constitution is intended to apply to all persons in Ghana, and that articles 17(2) and (3) set out the grounds for non-discrimination, a ‘*benevolent, broad, liberal and purposive*’ construction of the latter two provisions will not admit of a conclusive and exhaustive non-discrimination criteria. To argue that the omission of sexual orientation and sex work in these provisions and/or that sex work cannot legitimately be an occupation within the meaning of these provisions is conclusive of the intent of the framers not to protect that class of citizens, will be too narrow a construction. This construction fails to bring the Constitution into conformity with the needs of contemporary times – where admittedly sex workers do exist in Ghana, and are in need of the protection of the laws of the country, just like every one else.

Similarly, since ‘*a Constitution must be considered as a political document capable of growth*’, any construction of article 17 must be reflective of this principle. In the *Tuffuor case*, it was held as follows:⁷⁰⁷

The Constitution has its letter of the law. Equally, the Constitution has its spirit. It is the fountain-head for the authority which each of the three arms of government possesses and exercises. It is a source of strength. It is a source of power ... Its language, therefore, must be considered as if it were a living organism capable of growth and development. Indeed, it is a living organism capable of growth and development, as the body politic of Ghana itself is capable of growth and development.⁷⁰⁸

⁷⁰⁷ Tuffuor *supra*.

⁷⁰⁸ *Id.*

If the provisions of the Constitution are akin to living organisms capable of growth and development, article 17 must have room to grow and develop since it is now over twenty-five (25) years old. Assuming that it was not the intent of the framers to protect or legislate against discrimination on the basis of sex work as an occupation initially, article 17 is old enough now to recognize that, in a diverse society, equality before the law and non-discrimination requires the protection of vulnerable groups, regardless of whether or not a majority of the people agree.

The right to equality and non-discrimination as constitutional guarantees must also be construed according to its peculiar character, since the Constitution itself is *sui generis* and must be examined as a whole. So in *Kuenyehia v. Archer*,⁷⁰⁹ the Supreme Court held that: ‘*Any attempt to construe the various provisions of the Constitution 1992, ... must perforce start with an awareness that a constitutional instrument is a document sui generis to be interpreted according to principles suitable to its peculiar character and not necessarily according to the ordinary rules and presumptions of statutory interpretation.*’⁷¹⁰ The right to equality and non-discrimination therefore must be jealously guarded in light of this, and as a result sex workers should not be easily discounted as falling outside the purview of persons entitled to this constitutional protections.

The next principle of constitutional interpretation against which we must examine article 17 is that ‘*Courts must avoid importing into the Constitution what does not appear*

⁷⁰⁹ [1993-94] 2 GLR 525.

⁷¹⁰ *Id.*

therein.' This has been explained by Bimpong-Buta in the following words: '*In other words, the constitution must be interpreted in the light of its own wording and not on the basis of words found in other constitutions. The court must therefore generally recognize that judicial pronouncements in other common law jurisdictions founded on the wording of their constitutions are not likely to be of assistance.*'⁷¹¹ It may therefore be argued that sex work may not necessarily be considered an occupation within the meaning of article 17(2) & (3), and that sex work as an occupation was not intended to be protected by the Constitution, since we are admonished not to read into the Constitution words that are not originally in there.

However, as has been shown, such a construction is not only archaic, but is also inimical to the principle of the Constitution being a living organism capable of growth. Thus, the fact that words must not necessarily be imported into the Constitution does not however mean that, the guiding principles of constitutional interpretation are mutually exclusive and cannot therefore co-exist. It is therefore my considered opinion that, as and when the Supreme Court of Ghana is called upon to interpret the ambit of article 17 and whether or not discrimination on the basis of sex work as an occupation is covered by that provision, the Court will consider all the principles of constitutional interpretation it has itself laid out, as a whole, and be guided by the need to construe the provision in a manner that accords with common sense as well.

In this regard, the spirit of the Constitution as well as the intention of the framers must be considered in interpreting the provisions of the Constitution. So in the case of

⁷¹¹ THE ROLE OF THE SUPREME COURT IN THE DEVELOPMENT OF CONSTITUTIONAL LAW IN GHANA, *supra*.

Sallah v. Attorney-General,⁷¹² the Court of Appeal sitting as the Supreme Court of Ghana held, per Justice Sowah as follows:⁷¹³

I consider that the best guide to interpretation is the letter and spirit of the intention of the Constitution; if the intention of the Assembly ... can be collected from the words used and if that intention, when so collected, is in consonance with the spirit of the Constitution, then there is no need for further aids.⁷¹⁴

Sowah JSC once again in the celebrated case of *Tuffour case*,⁷¹⁵ noted that ‘*The Constitution has its letter of the law. Equally, the Constitution has its spirit. It is the fountain-head for the authority which each of the three arms of government possesses and exercises. It is a source of strength. It is a source of power ... A broad and liberal spirit is required for its interpretation.*’⁷¹⁶

Also, in the case of *New Patriotic Party v. Attorney-General (31st December Case)*,⁷¹⁷ the Supreme Court was called upon to determine whether or not it was unconstitutional for the government to proclaim and celebrate 31st December each year as a national holiday, with State resources.⁷¹⁸ In declaring the celebrations as

⁷¹² (1970) CC 5; (1970) 2 G & G 493.

⁷¹³ *Id.* at 506.

⁷¹⁴ *Id.*

⁷¹⁵ *Tuffuor supra.*

⁷¹⁶ *Id.*

⁷¹⁷ [1993-94] 2 GLR 35.

⁷¹⁸ 31st December was celebrated a national and public holiday in Ghana during the 1980’s and early 1990’s. The significance of the date was that it was the day (31st December 1980) that the Provisional National Defence Council (P.N.D.C.) led by Jerry John Rawlings, overthrew (through a *coup d’état*) the constitutionally elected government of President Hilla Limann and abrogated the 1979 Constitution. Other infamous days that were celebrated as national holidays included June 4th – which marked the overthrow of

unconstitutional by a 5-4 majority, the Supreme Court was of the opinion that, even if there was no contradiction with the letter of the Constitution, the celebrations infringed upon the spirit of the Constitution, since the Constitution made it clear that it abhorred *coup d'états*. Thus, the State should not engage in celebrations that essentially glorified the overthrow of a past Constitution, an occurrence that the present Constitution kicks against and admonishes all citizens to prevent its overthrow.⁷¹⁹

Francois JSC commenting on the essence and importance of the spirit of the constitution as a guide to constitutional interpretation stated: *'My own contribution to the evaluation of a Constitution is that, a Constitution is the out-pouring of the soul of the nation and its precious life-blood is its spirit. Accordingly, in interpreting the Constitution, we fail in our duty if we ignore its spirit. Both the letter and the spirit of the Constitution are essential fulcra which provide the leverage in the task of interpretation ... In every case, a true cognition of the Constitution can only proceed from the breadth of understanding of its spirit ... The necessary conclusion is that the written word and its underlying spirit are inseparable bedfellows in the true interpretation of the Constitution ... For if the Constitution, 1992 frowns on violent overthrows of duly constituted governments, and rejects acts that put a premium on unconstitutionality to the extent of even proscribing the promotion of one party state, it is naivety of the highest order, to expect the Constitution, and in the same breadth, to sing Hallelujah's in a paean of praise to unconstitutional deviations, past or present. If the past is being buried, the spirit of the Constitution, 1992 would frown on the resurrection of any of its limbs. That is the*

the Supreme Military Council in 1979, and brought into power Jerry John Rawlings as Head of State for the first time, until he handed over power to the democratically elected Hilla Limann in 1979.

⁷¹⁹ See CONSTITUTION Art. 3 (1992) (Ghana).

*whole point of the cloak of indemnity conferred in section 34 of the transitional provisions of the Constitution, 1992 ... The admission that a violent overthrow of government occurred on 31 December, forecloses any sanctioning of public celebration in a constitutional era.'*⁷²⁰

How then does the spirit of the Constitution apply towards the interpretation of article 17 of the 1992 Constitution? It is submitted that the spirit underpinning article 17 is the fundamental principle that discrimination on the basis of differential characteristics is not to be countenanced in Ghana. While there is no express mention of sex work as a form of occupation as a ground for non-discrimination, the letter and spirit of the Constitution are inseparable bedfellows, and the overarching purpose of the spirit of the constitution is to reveal the true essence of a constitutional dictate or provision. Article 17 must therefore be interpreted to cover discrimination on the basis of occupation, including sex work. I do not believe that it was the intention of the framers of the Constitution to positively endorse discriminatory practices against sex workers with their omission.

Furthermore, despite the generality of the word 'occupation' as used in article 17, is it not discrimination where ordinary workers in other occupations are given different treatment as opposed to sex workers, attributable only to their chosen occupation? If the framers of the Constitution intended to exclude sex workers from the class of persons who are to be equal before the law, they could have done so. To suggest therefore that occupation as a ground for non-discrimination excludes sex work and that indicates the

⁷²⁰ *NPP v. Attorney-General*, *supra* at pp. 79-80, 81 and 83-84.

framers' intent is too simplistic an argument, because it fails to consider the underlying theme of the provision in question i.e. its spirit.

It has also been suggested that the Interpretation Act, 2009 (Act 792) may be relevant in construing the provisions of Ghana's Constitution. Section 10 of this Act, which is captioned 'Aids to Interpretation or Construction' provides in Section 10(4) that: *'Without prejudice to any other provision of this section, a Court shall construe or interpret a provision of the Constitution or any other law in a manner (a) that promotes the rule of law and the values of good governance, (b) that advances human rights and fundamental freedoms, (c) that permits the creative development of the provisions of the Constitution and the laws of Ghana, and (d) that avoids technicalities and recourse to niceties of form and language which defeat the purpose and spirit of the Constitution and of the laws of Ghana.'* Emphasis added.

Clearly therefore, the Supreme Court is under a legal obligation to advance human rights and fundamental freedoms. They are also to creatively develop the provisions of the Constitution. In respect of article 17, the only way of advancing the frontiers of human rights is to creatively construe the provision as protecting all persons including sex workers from discrimination on the basis of their occupation. Such a construction accords with common sense, and is essential in a democratic society such as Ghana if we are to give true meaning to the principle of equality before the law. As already indicated, the spirit of the law and the fact that the Constitution itself is to be

treated like a living organism capable of growth, is justification enough for protecting sex workers from discrimination.

Also, the Directive Principles of State Policy⁷²¹ further reinforce the need to protect sex workers from discrimination in accordance with article 17. This is because article 34(1) of the Constitution provides that: *‘The Directive Principles of State Policy contained in this Chapter shall guide all citizens, parliament, the President, the Judiciary, the Council of State, the Cabinet, political parties and other bodies and persons in applying or interpreting this Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just and free society.’* Emphasis added. Therefore, the Supreme Court can resort to Chapter Six of the Constitution as a guide when called upon to interpret provisions of the Constitution.

One of such important provision that is worth reproducing here is article 37, which is captioned ‘Social Objectives’. It provides as follows:

(1) The State shall endeavor to secure and protect a social order founded on the ideals and principles of freedom, equality, justice, probity and accountability as enshrined in Chapter 5 of this Constitution; and in particular, the State shall direct its policy towards ensuring that every citizen has equality of rights, obligations and opportunities before the law.

(2) The State shall enact appropriate laws to assure—

⁷²¹ See CONSTITUTION Ch. 6 (1992) (Ghana).

(a) the enjoyment of rights of effective participation in development processes including rights to form their own associations free from state interference

(b) the protection and promotion of all other basic human rights and freedoms, including rights of the disabled, the aged, children and other vulnerable groups in development processes.

(3) In the discharge of the obligations stated in clause (2) of this article, the State shall be guided by international human rights instruments which recognize and apply particular categories of basic human rights to development processes.

What this means therefore is that every citizen of Ghana is entitled to equality of rights which is to be guaranteed by the State. Furthermore, the State is obligated to pass laws that ensure the enjoyment of basic fundamental rights by all persons, including *vulnerable groups* – a phrase that is not defined in the Constitution, but must definitely include groups such as sex workers due to the marginalization and stigma they face. Finally, the State is to be guided by international human rights norms and standards.

The conclusion that can be drawn here is that, using the Directive Principles of State Policy as a guide, the Supreme Court can reasonably interpret article 17 of the Constitution in a manner that will ensure greater equality for all vulnerable groups. In terms of vulnerability, the socio-cultural context of Ghana means that sex workers are one of the most vulnerable groups that exist. The marginalization and social stigma they face reinforces this. Therefore, the State (including the Court) has a duty to ensure that

the rights of such vulnerable groups are protected, and that they are not discriminated against simply because of their chosen occupation/profession. Since public policy has also been described as a “very unruly horse” it cannot aid in construing article 17. In any case, any public policy concerns (protection of public morals, for example) regarding the protection of sex workers from discrimination on the basis of their occupation, is outweighed by the overarching need to protect such vulnerable groups, which the spirit of article 17 demands.

As has been painstakingly demonstrated, article 17 of the Constitution which provides for non-discrimination on the basis of occupation, must be interpreted to include sex work as an occupation protected by the law. The question that remains is whether or not in light of this, section 276(1) of Act 29 is constitutional. The Supreme Court in the case of *New Patriotic Party v. Attorney-General (Ciba Case)*,⁷²² held that in testing the constitutionality of any law, the Court must not concern itself with the appropriateness or convenience of the impugned law, but rather the contents of the law. Bamford-Addo JSC citing with approval, the dictum of Lord Diplock in the case of *Hinds v. R*,⁷²³ therefore held that ‘*the highest motives and the best intentions are not enough to displace constitutional obstacles.*’⁷²⁴

Section 276(1) of Act 29 however criminalizes private consensual adult sexual intercourse involving the exchange of money. Since the court must not concern itself with the propriety or convenience of the law, (standards that the entrenched Ghanaian socio-

⁷²² [1996-97] SCGLR 729.

⁷²³ [1976] 1 All ER 353 at 356.

⁷²⁴ *NPP v. Attorney-General (Ciba Case)*, supra.

cultural context obviously endorses), the actual essence of the law must nonetheless be examined, devoid of any biases and gender stereotypes. Such an examination only leads to the conclusion that the law regulates sexual intercourse, plain and simple. It seeks to categorize sex workers *prima facie* as criminals, and imposes a total ban or restriction on their sexual life, the expression of their sexuality and the exercise of their occupation. As we have concluded that article 17 protects sex workers from discrimination on the basis of occupation, it follows that section 276(1) which seeks to curtail aspects of the expression of the sexuality and free exercise of occupation of sex workers, cannot be constitutional.

B) THE CONSTITUTIONAL RIGHT TO SEX WORK: APPLYING THE D.I.E. FRAMEWORK

From the foregoing discussion, it can be concluded that the legal regime in Ghana regarding sex work is one of partial prohibition, as it only criminalizes the supply side of the trade. Following from this discovery, it can also be further concluded that the provisions of Act 29 that partially prohibits sex work are at variance with certain fundamental constitutional dictates i.e. the right to dignity, individual autonomy and equality and non-discrimination. Thus, it is my position that the Constitution guarantees the rights of sex workers in Ghana; and consequently there is a right to sex work in contemporary Ghana. The strategy that must be adopted to make this right meaningful and officially acknowledged, in my opinion, is structured regulation as opposed to full legalization; and this will be discussed in the concluding chapter of the dissertation.

1. *Guiding Principles on the Right to Sex Work*

The legal and regulatory framework that exists in Ghana today for the protection of sex workers is more receptive than it seems at first sight. Thus, the guiding principles in any formulation of the rights of sex workers generally, and the right to sex work in Ghana in particular, must be premised on the constitutional guarantees of human dignity, individual autonomy, liberty and freedom, and the equality, equal protection and non-discrimination clauses of the 1992 Constitution. Collectively, they point to an inherent recognition and protection of the rights of all Ghanaians, regardless of their status or occupation.

Hence, all laws that seek to control intimate human conduct and sexual morality for that matter must ensure human dignity, preserve the individual's autonomy and liberty, and must not be discriminatory. Public policy demands of a multi-cultural and religious society like Ghana must not outweigh these three fundamental principles of human rights enshrined in the Ghanaian Constitution. In terms of construing the phenomenon of sex work, the D.I.E. framework can therefore be looked to as a rational means of making public policy, rather than the sole reliance on the religious and cultural conceptions of morality of the majority of the society, as has been the case since independence in Ghana.

To reiterate, the Dignity, Individual Autonomy and Equality (D.I.E.) framework for public policy making, which I have proposed in this dissertation are as follows:

- 1) All laws that seek to regulate intimate human conduct must have at its core the objective of preserving and promoting the inherent dignity of the individual;
- 2) The individual's ability to act in an autonomous manner free from social coercion must be reflected in laws that seek to regulate intimate human conduct; and
- 3) All laws that seek to regulate intimate human conduct must have the quality of equality about it i.e. it should not criminalize particular groups of people because of personal choices that do not conform with societal standards.

It is within the context of this framework that I believe the right of sex workers and the right to sex work can be guaranteed.

2. Legal Formulation and Justification

The inescapable conclusion that can be drawn from all the analysis of the law thus far is that, the continuous criminalization of consensual sex work under the Criminal Offences Act of Ghana, is an affront to the freedoms and liberties inherent in Ghana's Constitution. Therefore, to the extent that section 276(1) of the Criminal Offences Act of Ghana prohibits sex work involving consenting adults, it is unconstitutional as it offends basic freedoms under Ghana's Constitution. In particular, the provisions of Act 29 regarding sex work does not preserve or promote the inherent dignity of sex workers; neither does it guarantee sex workers their autonomy and liberty; and finally, it does not ensure equality between all persons, as sex workers are treated in an unequal manner and discriminated against, as though they were a lower class of human beings. Enforced sex

work however, including control of sex workers by pimps, sex trafficking etc. fall outside the scope of the constitutional protections and guarantees, and as such must remain illegal.

CHAPTER SEVEN

RECOMMENDATIONS AND CONCLUSION

Throughout this dissertation I have tried to advance the position that laws that criminalize or seek to regulate intimate human conduct must have at its core certain fundamental values. These values, I argue, must be considered along side the usual public policy determinants of religion and culture in making laws that seek to restrict or prohibit specific human conduct usually through the prescription of penal consequences. The major recommendation that I propose as a result is not total decriminalization or full legalization of sex work, as this may not be achievable in the foreseeable future; but rather I propose the eventual regulation of sex work and the sex trade holistically through multi-faceted means. The reason for regulation is simple. I have already intimated that section 276(1) of Act 29 partially prohibits sex work and thus infringes on specific freedoms and liberties contained under Ghana's Constitution. Thus, there must be a way of remedying this blatant unconstitutionality in a manner that does not necessarily offend the sensibilities of a majority of the Ghanaian population, since cultural and religious conceptions of morality will continue to dictate public policy. The only way to do this is by developing a regulatory regime or framework that takes into consideration the mood of the country, the rights of sex workers as well as public health, zoning demands, and other concerns.

My proposal for the eventual regulation of sex work in Ghana, which is discussed in detail in this chapter, is what I term *the gradual systematic approach to influencing*

public policy. This approach is three-fold. Step One is *the preparatory stage*, which essentially provides the foundation for regulation by setting the agenda and creating public awareness. More specifically, it includes (1) the organization of stakeholders' forums on law and morality; (2) the organization of nationwide/public forum(s) on morality, its various manifestations and its proper role in maintaining law and order; and (3) the provision of a platform for sex worker activism. Step Two is *the formal proposals stage*. This stage is a follow up to the preparatory stage, and as such will include the doing of one or all of the following: (1) drafting and presenting a formal proposal on the need for a Sexual Offences Act to the Law Reform Commission; (2) petitioning Parliament to amend specific provisions of the Criminal Offences Act; (3) advocating for the establishment of a Commission of Inquiry into sexuality and sexual offences in Ghana; and (4) advocating for a sex workers' regulatory body and regime. Finally, Step Three involves *litigation* as a last resort.

I conclude the dissertation by discussing where and how theory can meet practice, in particular whether my D.I.E. framework for public policy making and the gradual systematic approach to influencing public policy I propose in this chapter can actually work. It is my belief however that, although my recommendations and approach may seem overly ambitious given the conservative nature of Ghana, if implemented in the right way and in the gradual and systematic manner I propose, it will help move public policy away from the era of sole reliance on religious and cultural conceptions of morality to a new phase of human rights appreciation and enforcement. Indeed, the aim of these recommendations is to lay the groundwork for dignity, autonomy and equality to

be at the heart of public policy and reflect in laws that seek to curtail intimate human conduct and behavior.

A) RECOMMENDATIONS

Before I begin to elaborate on my proposals, it is instructive that I make reference to and briefly summarize some activities that have been undertaken in the past, which led to several recommendations in relation to sex work in Ghana. It has been documented, for instance, that since the 1970s, several attempts have been made towards addressing the issue of sex work in Ghana.⁷²⁵ As a matter of fact, it is on record that the Department of Social Welfare in Ghana undertook a series of studies regarding sex work in Ghana in the 1970s, which led to the establishment of Women's Vocational Centres in all the ten administrative regions of Ghana.⁷²⁶ As Pappoe puts it, *'prostitutes were rounded up and sent to the Centres for training, but the programme was soon abandoned.'*⁷²⁷ This was likely as a result of the fact that the allure of sex work, in particular the monetary reward therein far outweighed any money that such "rehabilitated" sex workers would make after learning a trade in these vocational centres.

Another attempt at tackling sex work in the 1970's was when religious organizations decided to take a stance. Thus, the Christian Council of Ghana's women's committee sent a resolution to the government of Ghana that demanded that firm and

⁷²⁵ Pappoe, The Status of Prostitution in Ghana *supra*.

⁷²⁶ *Id.*

⁷²⁷ *Id.*

concrete action be taken in relation to sex work in the country.⁷²⁸ Similarly, in the 1980s, the National Council on Women and Development (NCWD), an entity whose sole purpose was the elimination of sex work, which it identified as an affront to the integration of women in the developmental process, organized a three-day consultative meeting that led to various recommendations and proposals sent to the government.⁷²⁹ In all, eighteen proposals were recommended to the government of Ghana, for it to consider in curbing sex work in Ghana.

Prominent among these recommendations were as follows: (1) that job opportunities should be made available to girls and women in general; (2) that women who engage in prostitution on any level should be penalized; (3) that the government should implement proposals of the Law Reform Commission on the law of intestate succession to alleviate the plight of widows and children; (4) that as a matter of urgency, the attention of churches and traditional institutions should be drawn to the high cost of marriage with a view to reducing such cost; (5) that the Ministry of Education should ensure that hobbies like basket weaving, smithing, backyard gardening and fish farming are introduced into school syllabuses so that young people can learn to spend their leisure time usefully in the future; and (6) that since social evils emanate from poor economic situations, it was necessary that the economy be strengthened and job opportunities created for young people especially.⁷³⁰

⁷²⁸ *Id.*

⁷²⁹ National Council of Women and Development, *Recommendations to Government on the Consultation on Prostitution*, June 1980.

⁷³⁰ *Id.*

It is doubtful that many of these recommendations saw the light of day, although the Intestate Succession Law was passed in 1985.⁷³¹ The fact however remains that, many of the socio-economic conditions that were identified as factors that lead to young women engaging in sex work still exist today. Women still remain marginalized in terms of job opportunities, the economy has not improved dramatically, and vocational training and other alternative livelihood and rehabilitation programs have not achieved any meaningful results. Thus, the *status quo* of harsh economic realities remain, and as such sex work is a potent area of opportunity that many young girls and women consider so as to make ends meet to take care of themselves and sometimes their families as well. As a result, any discussion of sex work in Ghana must take into consideration the socio-economic situation as well as the cultural context of the country. It is for these reasons that my recommendations for the eventual recognition of the rights of sex workers and the regulation of the industry as a whole, albeit ambitious and radical, are structured in various phases, with a view to gradually and systematically achieving progress. Below, I discuss the three stages in a chronological order.

1. *The Preparatory Stage*

As already noted, this first step/stage towards the eventual regulation of sex work in Ghana involves three separate but interrelated activities i.e. (1) the organization of stakeholders' forums on law and morality; (2) the organization of nationwide/public forum(s) on morality, its various manifestations and its proper role in maintaining law

⁷³¹ See Intestate Succession Law, 1985 (PNDCL 111).

and order; and (3) the provision of a platform for sex worker activism. I will briefly provide an overview of all three activities, and their confluence points.

i. Stakeholders Forum on law and morality

The preparatory stage begins with a proposal for the organization of stakeholders' forums. The idea behind this proposal is to bring to the policy/decision-making table a wide range of stakeholders within the criminal justice system like policy makers, law enforcement agents and legislators as well as from academia, civil society, traditional rulers, the clergy and religious organizations. The aim of this stakeholders' forum is to discuss ways in which the State can effectively regulate intimate human conduct or behavior through the criminal law. Through these forums, dialogue on international best practices and the ways of dealing with issues like sex work can be discussed and deliberated upon in a congenial and a mutually respectful manner.

Aside the regular stakeholders' consultative sessions that will be core to this proposal, I also propose the organization of academic conferences on the theme of sexuality, morality and the law generally. This is one way of getting leading academics and advocates operating within the field of criminal law and justice to engage in rigorous academic discourse on the subject matter. As a matter of fact, my home institution, the School of Law at the Ghana Institute of Management & Public Administration (GIMPA) is a recognized leader in pushing the frontiers of the law with annual conferences, as well as monthly symposia on the law in Ghana generally. As such, I will propose and

spearhead the organization of a conference on law, morality and sexuality in Ghana to be held in the 2018/2019 academic year.

The major aim of these forums will be to provide a platform for recommending public policy reforms to the appropriate authorities, in particular the Law Reform Commission of Ghana. Such a move is important and will be beneficial in the long term for the country as a whole. Having different stakeholder groups put forward their views and consolidating these will definitely influence the ultimate decisions that are taken by the decision makers, be it the Legislature and/or the Executive, in enacting legislation or taking decisions that are rational and reflect contemporary legal thought, philosophy and international best practice.

It is envisaged that the conferences/seminars and stakeholders' consultative sessions will therefore thoroughly discuss the role of religion and culture in public policy making. With specific reference to sex work, the economic situation of the country will be a key theme for discussion, as socio-economic factors are arguably the most important consideration for those who enter into the sex trade. Also, it is important that the discussions within these fora, tackle the issue of human trafficking, in particular sex trafficking and child trafficking. This will ensure that all the various facets of sex work in our contemporary world are considered, and distinguished for the purposes of effective regulation eventually.

ii. Consultative public assembly's on law and morality

Following on the heels of the stakeholders' forums, it will be important and prudent to organize a nationwide public forum(s) on the role of morality in the law making process. I therefore propose that these forums be held throughout the country, in the form of town hall meetings, for example, where ordinary people will have a platform for voicing out their opinions. The importance of these forums will be to thoroughly discuss the nature, scope and application of various conceptions of morality, and its influence on the laws we have, in particular the criminal law.

More specifically, offences like engaging in sex work can be de-stigmatized through such forums where the core issues pushing some people into sex work can be dispassionately discussed on a wider scale. The fact that some people are making rational economic choices to engage in sex work and out of their own free will should not necessarily attract penal consequences. Rather, we as a society must find a way of addressing the core issues that leads to such decisions (like poverty), and also critically assess the role of religion and culture, especially their prescriptions of moral conduct and their effect on our criminal laws.

If such public forums are held throughout the country, it is my belief that people will start appreciating the proper role of the State in terms of regulating 'moral' conduct. Human rights freedoms and guarantees can be discussed from many different perspectives, and be balanced against the legitimate interest of the State in regulating some aspects of intimate human conduct. Once there is this appreciation, public policy can be made not solely based on cultural and religious conceptions of morality, but also on rational principles, which all persons can relate to regardless of their opposition. I

believe that a nationwide forum(s) on law and morality is long overdue, and can be done if the right stakeholders are involved. Town hall style meetings can be organized in the various universities as well as on a nationwide basis in the regional capitals, for example.

In addition, social media can be effectively used as a means of supplementing the nationwide forums. In contemporary times, a lot more people receive their news and other information through the various social media outlets like Facebook, twitter, instagram etc. Thus, it is imperative that we use social media platforms to sensitize Ghanaians about sexuality and the law generally, and the underlying factors that lead to engagement in sex work. Regular media engagements, through the use of the traditional media outlets, can also be an avenue of stimulating and generating public debate and discourse as well.

iii. Creating a platform for sex worker activism

Human Rights Non-Governmental Organizations (NGO's) as well as other Civil Society Organizations (CSO's) and other groups must also be encouraged to provide a platform for sex worker activism in Ghana. Given the conservative nature of Ghanaian society, and our proclivity to 'judging' people who come out as being engaged in what the broader society considers as morally questionable conduct, it is difficult to see a situation where sex workers themselves can actively organize to push for and fight for their rights. In actual fact, any attempt to register a non-profit entity for the sole purpose of advocating for sex worker rights may prove futile. However, already existing CSO's

and NGO's within the field of human rights and social protection can easily provide this platform, which can be done in so many ways.

For example, activism in the form of sex workers' health can ensure that the authorities take issues of that nature much more seriously. Education for sex workers in the form of outreach programs, can provide a safe space for some of these sex workers who can then be provided with the necessary knowledge regarding issues of healthcare like HIV Aids, as that is critical for their continued engagement in the trade. Sex workers can then be empowered to organize themselves so as to gradually make demands on the government, in terms of the recognition of their rights. Such grassroots organizing together with the stakeholders' and nationwide public forums will put the plight of sex workers on the national agenda, and the government will be forced into action one way or the other.

Such a platform, I believe is necessary in Ghana because the sex workers' movement is taking seed in most parts of the continent, where active organizing is reaping dividends for the movement.⁷³² Even though issues pertaining to sex are usually not publicly discussed in Ghana because of the discomfort it brings, the time is ripe for there to be an honest and open discussion about the plight and future of sex workers. The truth is that, regardless of the laws that exist, and even if the government decides to tighten these laws, sex workers will continue to exist as long as demand for their services exist. Since there is no way of cutting the demand chain of the equilibrium, concrete steps

⁷³² See Chi Mgbako, *To Live Freely in the world*, supra.

need to be taken to ensure that the industry is not driven further underground, as that will have various consequences not just for the sex workers, but for the State as well.

As a result, I propose the production of a television documentary on the plight of sex workers; similar to how documentaries have been produced in recent times that have highlighted the plight of remand prisoners in Ghanaian prisons, and pregnant women in the hospitals of Ghana. This is one of the surest ways of grabbing national attention, as such documentaries tend to shock society into action. Thus, sex workers can be interviewed to tell their story, in particular the underlying factors that got them into the sex trade. Experts, including academics and practitioners' within the fields of criminal law and justice, as well as social scientists can also be interviewed to gain their perspectives on the issue. At the end of the day, the general viewing public will be left to decide on the way forward once such a documentary is produced and aired; as public interest in the matter will be generated.

Ghanaian feminists should also be encouraged to take a stance in relation to sex workers and sex work as a whole. For example, the nexus between legitimate sex work (where women make rational economic choices) and domestic human/sex trafficking and child trafficking for the purposes of sex work must be debated and resolved. It is also proposed that empirical research be undertaken to appreciate the extent and proliferation of sex work and sex workers in Ghana. All of the aforementioned strategies (stakeholders' forums & conferences, nationwide public forums and sex worker activism) if executed well, I believe, can lead to the creation of a social movement, that will be

armed with the arsenal needed to mount an assault on the status quo regarding sex work in Ghana and the rights of sex workers.

2. The Formal Proposals Stage

The second step/stage towards the eventual regulation of sex work in Ghana involves four separate, mutually exclusive or interconnected activities i.e. (1) the proposal for a Sexual Offences Act to be submitted to the Law Reform Commission of Ghana; (2) petition to Parliament to consider amending portions of Act 29; (3) petition to Parliament, the President and the Council of State to consider establishing a Commission of Inquiry into Sexuality and Sexual offences in Ghana; and (4) proposal for a sex workers' regulatory body. I will also briefly provide an overview of all four activities, and their confluence points.

i. Proposal for a Sexual Offences Act

Here, the recommendations, outcomes and reports produced in the preparatory stage will now be formally organized into a concrete proposal to be submitted to the Law Reform Commission of Ghana. The Law Reform Commission is established by virtue of the Law Reform Commission Act, 2011 (Act 822). The main object of this Commission is to promote law reform in Ghana.⁷³³ For the purposes of this proposal, it is imperative that I set out the functions of this Commission in detail, to provide guidance on how my proposal falls within the mandate of the commission. Section 3 of Act 822, captioned 'Functions of the Commission', provides as follows:

⁷³³ Section 2 of Act 822.

To achieve the object, the Commission shall

- (a) receive, consider and make proposals for the initiation and reform of any law in the country;
- (b) prepare and submit through the Minister proposals for the examination of different aspects of the law including recommendations for the codification of legislation;
- (c) make practical proposals for the development, simplification and modernization of the law;
- (d) advise the Minister on policies for law reform;
- (e) undertake the examination of particular areas of the law and formulate proposals for reform after appropriate research;
- (f) provide advice and information to Ministries, Departments, Agencies and the private sector for the reform or amendment of a law;
- (g) obtain information on the legal systems of other countries that may facilitate the performance of its functions; and
- (h) perform any other functions that are ancillary to the object of the Commission.⁷³⁴

It is evident from its functions that the Commission is mandated to receive proposals for reform on any aspect of the law in Ghana. Thus, a report containing proposals for reform of sexual offences should be produced taking into consideration the outcomes of the stakeholders' consultative sessions, nationwide forums and the sex workers' activism strategy.

⁷³⁴ Section 3 of Act 822.

In this regard, I propose in addition to the report a draft Sexual Offences Act, which will consolidate the existing sexual offences in Act 29 into one separate Act. Thus, a thorough review of all the sexual offences must be undertaken to ensure that the proposal is sound, is backed by research and empirical data, and incorporates contemporary human rights norms into the conceptualization of sexual offences to guarantee its conformity with the 1992 Constitution of Ghana. The lessons from the UDHR drafting process must guide this phase, simply because the UDHR and its subsequent popularity and general acceptance as customarily international law shows that it is possible to enact legislation that takes into account different conceptions of rights, regardless of conflict of moral values. At the worse, the Law Reform Commission will be forced to examine this proposal and make its recommendations to the Attorney General on whether or not to proceed with such reforms.

ii. Proposal for the amendment of Act 29

The Criminal Offences Act, 1960 (Act 29) has undergone some changes since its enactment when Ghana attained Republican status in 1960. However, to ensure that the provisions regarding public morality, in particular that which has to do with sex work accords with contemporary human rights norms, it is imperative for a review of those infringing provisions. To this effect, I propose maintaining the prohibition of enforced sex work controlled by pimps and sex trafficking generally; however, the main provision of Act 29 that I believe must be amended or repealed is section 276(1). This provision makes it an offence to persistently solicit or importune in a public place or in sight of a public place for the purposes of sex work.

The difficulties associated with any rational implementation of section 276(1), including but not limited to the constant reports of police abuse of sex workers, makes it imperative for amendment. A weak law enforcement culture, and the lack of interest in enforcing such laws, coupled with the resources needed for implementation means that an amendment will be in order. For example, the law can be amended by the removal of its classification as a misdemeanour, which carries jail time. Such a move will accord with contemporary criminal justice thinking, where increasingly petty offences are not punished with incarceration – and sex work shouldn't even be an offence in the first place.

In addition to the de-classification of sex work as a misdemeanour, the law can also be amended to specify the exact types of public places or spaces and times where persistent solicitation or importuning may be regarded as a public nuisance. It has already been pointed out that the night sex trade mainly takes place very late at night, outside the normal scope of public awareness, although the areas of operation remain public places. Thus, with the exception of law enforcement officials like the police that may be on patrol late at night, and those persons enjoying nightlife or engaged in other legitimate activities, as well as those making up the demand side of the sex trade equation, an overwhelming majority of the public is technically oblivious to the solicitations and importuning that occurs on specific streets (public places) at night.

Hence, even though areas like Cantonments and some parts of East Legon (Lagos Avenue) for example, which are notorious for the sex trade at night, are all public places, the law can be amended to reflect the reality and fact that these *prima facie* public places

change character at night. Thus, sex workers may be prohibited from these same spaces during daytime (which is the *de facto* case anyway), but it makes no sense to restrict them from plying their trade there at night. The flip side to this argument is the idea that all forms of solicitation in public places regardless of the time of day should be prohibited i.e. the status quo must be maintained. I believe however that section 276(1) ought to be amended to reflect present day realities; and at the least, the misdemeanour tag should be removed as it serves no useful purpose to subject sex workers to incarceration as a punishment. Public zoning laws must however be considered in any case, as the local authorities in certain prime areas may want to avoid the tag of their areas being sex hubs.

The proposal for amendment of Act 29 to be sent to Parliament and the individual Parliamentarians must therefore stress on the constitutional infringement on the rights to dignity, autonomy/liberty and equality, that continuous criminalization of sex work and other sexual offences portend. To ensure that our criminal laws do not advocate a particular religious or cultural dictate or prescription, the sexual offences in Act 29 must be thoroughly reviewed, and amended so as to bring our law in line with international best practice.

iii. Proposal for the establishment of a Commission of Enquiry

Under Ghana's Constitution, specifically Article 278(1), the President can appoint a Commission of Enquiry into any matter of public interest if he is so satisfied, or if the Council of State advises him that it is in the public interest so to do, or if Parliament by a resolution requests that he appoints such a Commission into a matter of public

importance.⁷³⁵ In recent times, Commissions of Inquiries have been appointed into all kinds of public interest matters in Ghana including: allegations of corruption regarding the planning and execution of Ghana's fiftieth independence celebrations;⁷³⁶ a commission to inquire into the state of judgment debts granted by the courts;⁷³⁷ a commission on allegations of corruption surrounding Ghana's participation in the 2014 FIFA World Cup tournament in Brazil;⁷³⁸ a commission to inquire into the causes of a stadium stampede;⁷³⁹ a Reconciliation Commission mandated to inquire into past atrocities committed by successive regimes in Ghana with a view to ensuring reconciliation;⁷⁴⁰ and a Commission of Inquiry into the Creation of New Regions.⁷⁴¹

It is therefore clear that once a matter garners enough attention to be deemed one of public interest, there is the likelihood that a Commission of Inquiry may be appointed to look into the issues at stake and make appropriate recommendations. It is for this reason that this particular proposal must be advocated for in the second stage of reform efforts, after the preparatory stage has been completed. Thus, by the time of submitting this petition, a social movement will have been formed in respect of the reformation of sexual offences generally, through the various social media campaigns as well as nationwide forums and stakeholders' meetings. There will therefore be sufficient public interest in the matter to put pressure on the government to act. To ensure this, a petition

⁷³⁵ Article 278(1) of the 1992 Constitution.

⁷³⁶ The Ghana @ 50 Commission.

⁷³⁷ The Judgment Debt Commission.

⁷³⁸ The Brazil 2014 Commission.

⁷³⁹ The May 9th Stadium Disaster Commission.

⁷⁴⁰ The National Reconciliation Commission.

⁷⁴¹ The Commission of Inquiry for the Creation of New Regions.

can be sent to the President, the Council of State and Parliament in accordance with article 278(1) of Ghana's Constitution.

iv. Proposal for a Sex Workers' regulatory body

The final recommendation in this stage, which is in line with my position of regulating the sex trade, is a proposal for the establishment of a sex workers' regulatory body and regime to be submitted to the Ministry of Women's Affairs, Gender & Social Protection. This is because, most sex workers in Ghana are female, and their plight in terms of the continuous criminalization of their trade and abuse of their rights is an indictment on the country's human rights credentials. The proposed regulatory body, can therefore be established, either through an Act of Parliament, or through some other means to essentially attempt to control sex work in Ghana. As difficult and far-fetched as this may sound to many, that may be the best way of checking and bringing the sex trade into the realms of the law.

As it stands now, despite the essential (partial) prohibition of sex work, it is a notorious fact that the trade is well and alive with little to no regulation whatsoever, and as such, pimps and other sex traffickers continue their nefarious activities. Hardly has any sex worker been fined or prosecuted for engaging in the trade; except the regular police extortion schemes already noted. Yet, a drive through some of the major areas of urban Accra after 10pm will reveal to the curious mind, a somewhat well organized, and active sex market. The only law that applies is that which is dispensed by police officers on

patrol, who are famously known for extracting sexual favours from sex workers to leave them alone, and/or extorting and sometimes abusing them.

Thus, a proper legal and regulatory regime is needed to sanitize the sex trade one way or the other. Although many countries in the world continue to prohibit and/or restrict sex work by adopting various means, the sex trade hasn't been curbed in any part of the world. If anything, it has been driven further underground. Yet, examples exist in parts of the world where effective regulation has ensured a fairly sanitized trade – Amsterdam's famous Red Light District being a prime example. As morally opprobrious as it may sound to many Ghanaian readers, regulating the sex trade in a manner like it pertains in the Netherlands, will lead to huge benefits for the country.

First, there will be protection for the sex workers, as their trade will no longer be necessarily considered as illegal. Thus, access to healthcare and health facilities may be easier. The spread of venereal diseases like HIV Aids may be checked through intense safe sex education and easy access to healthcare. Similarly, sex workers who want to exit the trade can be guided to do so by the introduction of alternative livelihood programs, which admittedly have failed in the past. That notwithstanding, where there are formal structures in place with clear economic opportunities, it is possible that those desirous of leaving the sex trade for lack of any employable skills may finally be able to do so in their own time and at their own pace.

Also, transforming this informal trade to a semi-formal one may reap some pecuniary benefits for the State, through licensing, fees and taxes. This will however be a

difficult task because of the largely informal structure of the Ghanaian economy generally, where even most small business owners pay no taxes whatsoever. Thus, it will be difficult for the central government to spread its tentacles to cover individuals who engage in the sex trade, no matter how organized it is. There will be a need to streamline the industry as far as it is possible, for this proposal to have a chance of working.

Tourism may even be boosted as a result of regulation; but once again, this proposal will definitely be condemned as preposterous and highly immoral due to Ghana's reputation as being a religious country. Thus, official sanction of what some view as an inherently immoral profession or trade, may face severe backlash. However, as I have advocated throughout this dissertation, I believe that it is about time that we take the religious dimension of morality out of the equation when deciding or making public policy. This will however be hard to do for obvious reasons; but at least it is a conversation that must be had, and will be had at some point in time now or in the near future.

The regulatory regime that can be established for the purposes of regulating the sex trade can play a pivotal role in the overall development of the country. But this may be impossible to achieve in the short term. However, beginning the conversation through the stakeholders' and nationwide public forums can be a start in this process. The important factor of which sight must not be lost is the interest and well being of sex workers. At the end of the day they are human beings, most of whom have made rational economic choices, and must be protected just like all other people, instead of criminalizing their conduct and line of work.

All the aforementioned proposals discussed in this stage can either be pursued separately, or alongside one another. The problem is that, it is possible that the Law Reform Commission will not take any proposals on the reformation of sexual offences serious enough to warrant a report being sent to the Attorney General for further action. Similarly, Parliament may not be amenable to amending the sexual offences contained in Act 29 since it may not be wise politically so to do for many of the Parliamentarians who have one eye on re-election, and whose constituents are religious persons who regard religious conceptions of morality as the overall determinant of public policy and law for that matter.

Again, the petitions to the President, Parliament and the Council of State for the establishment of a Commission of Inquiry may also prove futile; although I believe that is probably the most promising of all the proposals in this stage, due to the public support and interest that would have been garnered at this point. However, the recommendation for a sex workers' regulatory body may also not be successful. Thus, it is imperative that we carefully consider which of these strategies or combinations thereof have the highest likelihood of success and vigorously pursue it.

3. Litigation as a Last Resort

The final stage in the push for legal reform is the litigation stage. However, it is my proposal that litigation must only be pursued as a last resort. Thus, if the first two stages, as outlined above, fail to yield any positive outcomes, it may become necessary to bring an action in the Supreme Court. The Constitution provides that anyone can bring an

action in the Supreme Court if he or she is of the opinion that an enactment or anything contained therein is inconsistent with or in contravention of the Constitution.⁷⁴² The only foreseeable problem with this strategy is navigating around the seemingly overlapping jurisdictional prescriptions of the Supreme Court and High Court of Ghana. This is because, even though the Supreme Court has original jurisdiction in matters relating to the interpretation and enforcement of the provisions of the Constitution generally,⁷⁴³ the High Court has original jurisdiction, even to the exclusion of the Supreme Court, in matters relating to actual infringements or potential infringements on the fundamental human rights and freedoms contained in Chapter 5 of the Constitution.⁷⁴⁴

It is my opinion that, if litigation becomes necessary, it may be wise to begin from the High Court, where it can be argued that provisions of the Criminal Offences Act relating to sexual offences in general, and sex work in particular, infringe on the fundamental human rights to dignity, autonomy/liberty and equality & non-discrimination as enshrined in the Constitution. Thus, if the suit is unsuccessful at the High Court level, there will still be the possibility of appealing the decision to the Court of Appeal and subsequently to the Supreme Court.

Litigation as a strategy of last resort has varying levels of success. Some advocates in equally conservative countries in Africa have been able to use this to bring about legal change in terms of sexuality generally. For example, recently in Botswana, the High Court for the first time held that by refusing to change the gender identity of a

⁷⁴² Article 2(1)(a) of the 1992 Constitution.

⁷⁴³ Article 130(1)(a) of the 1992 Constitution.

⁷⁴⁴ Article 33 of the 1992 Constitution.

man, who was born as a female but self identifies as a man, on his identity document, the National Registration Registrar of Botswana had violated several of his basic human rights.⁷⁴⁵ This was done even though the country is very religious, culturally conservative and still maintains strict laws prohibiting homosexuality. Therefore, legal change is possible through litigation, but probably as a last resort when public interest in such matters has been sufficiently garnered.

B) CONCLUSION

The D.I.E. framework for public policy making, which I have advocated for in this dissertation, is a theoretical framework that is not likely to be adopted in Ghana without much debate. The underlying objective of this framework is the advancement of the rights of vulnerable groups and persons like sex workers and sexual minorities. It focuses on protection and promotion of fundamental human rights in contemporary Africa. However, there is a new wave of human rights scholarship that suggests that too much focus on substantive human rights in our world today has systematically increased economic inequality.

In his book entitled *Not Enough: Human Rights in an Unequal World*,⁷⁴⁶ Samuel Moyn, for instance, explores why the rise and acceptance of human rights as our highest ideals has led to grave economic inequalities.⁷⁴⁷ He suggests that the twentieth century

⁷⁴⁵ Graeme Reid, *Victory for Gender Identity in Botswana: Country's High Court Rules in Favor of Transgender Man*, <https://www.hrw.org/news/2017/10/03/victory-gender-identity-botswana>

⁷⁴⁶ Samuel Moyn, *Human Rights in an Unequal World* (2018).

⁷⁴⁷ *Id.*

wave of human rights that prevails today has led to an over-concentration on substantive human rights, especially civil and political rights, to the neglect of broader social and economic justice ideals.⁷⁴⁸ This criticism relates to my D.I.E. framework for public policy making because, focusing on ensuring the protection of the rights of sex workers *per se*, will not necessarily lead to the elimination of the major underlying factor that drives people into the trade in the first place i.e. economic hardship.

Also, the human rights approach of my framework is likely to be criticized as being foreign to the cultural ideals of traditional Ghanaian society. Thus, the theory for reform is unlikely to receive much support on the ground initially because of the skepticism that human rights scholarship is greeted with in Africa generally, where certain sexual offences are concerned. Despite these criticisms and skepticism that is to be expected, we still need to find a middle ground from which to proceed in ensuring law reform because it is the right thing to do. How then do we achieve this?

As already suggested, getting broad based support for reform through a new wave of social movement might be one of the surest ways of kick-starting the reform agenda. The reason is simple, social change and law reforms have a common denominator – the will of the people. So in addressing the issue of homosexuality and the rights of sexual minorities in Ghana, the President of Ghana, Nana Akufo-Addo recently stated as follows:

⁷⁴⁸ *Id.*

This is a social, cultural issue, I don't believe that in Ghana so far, a sufficiently strong coalition has emerged which is having that impact on public opinion that will say "change it, let's now have a new paradigm in Ghana." At the moment, I don't feel, I don't see that in Ghana there is that strong current of opinion that is saying this is something we need to deal with. It is not so far a matter that is on the agenda ... I grew up in England at the time that homosexuality was banned there. It was illegal and I lived in a period where British politicians thought it was an item not to even think about. But suddenly the activities of individuals and groups, a certain awareness, a certain development grew and grew stronger and it forced a change in law. I believe that those are the same processes that will bring about changes in our situation.⁷⁴⁹

How then do we achieve a strong coalition that can impact public opinion and force a change in the law? I believe increased public awareness and sensitization regarding the irrationality of criminalizing sexual behaviour that does not conform to entrenched societal standards can be a start.

It is for this reason that my proposals for change is structured in a gradual, systematic manner, so as not to appear overly radical from the onset. To reiterate, the first stage prepares the ground through public awareness drives, sensitization campaigns etc. Once the matter has garnered substantial public interest over a period of time, then formal proposals can be submitted to the authorities for law reform. If this second step is

⁷⁴⁹ Naa Sakwaba Akwa, *Legalizing homosexuality not on the agenda but....* – Akufo-Addo, <https://www.myjoyonline.com/news/2017/November-26th/legalizing-homosexuality-not-on-the-agenda-akufo-addo.php>.

unsuccessful, litigation can then be resorted to as a last resort. It is my considered opinion that such a strategy is the most appropriate in bringing about change in the law generally, but especially in respect of sexual offences involving the curtailment of the individual's right to the legitimate expression of his or her sexuality, in particular.

In conclusion, the proscription of legitimate sex work has no place in a contemporary democratic society where human rights and fundamental freedoms should underpin public policy and law. Criminalizing such intimate human conduct does not further any legitimate State interest, but rather perpetuates the religious and cultural morality prescriptions that have long dictated public policy and law. It also drives such activities further underground, and outside the remit and scope of any meaningful law enforcement measures. I strongly believe however that the time has come to hold such laws that seek to regulate intimate human behavior to higher standards. Thus, such laws must measure up to fundamental human rights including dignity, liberty & autonomy and equality. It is only when such a balancing act is done, that proper regulation can be achieved.

The example of the Universal Declaration of Human Rights (UDHR), which has generally achieved universal acceptance as the standard of human rights the world over should provide motivation for a rational public policy framework in regulating certain intimate human conduct. The fact that diverse groups of people were able to generally agree on fundamental rights and freedoms that should govern all persons the world over, despite their differences, proves that it is possible to achieve compromise on moral

standards. Thus, we must look to the example of the UDHR when coming up with public policy prescriptions that underpin laws, in particular the criminal law – where intimate human conduct involving sexuality is concerned. That is not to advocate a neglect of core moral principles that are sound for public policy making, but in addition we must emphasize on the respect for basic human rights as complementary and equally important principles in the decision making process.

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