Chapter 6

Ghana's Proposed Anti-LGBTQ+ Bill And its Implication on Academic Freedom in Institutions of Higher Learning

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Abstract

Debates concerning the criminalisation of LGBTQ+ activities in Ghana have been at the centre stage of political discussions over the last decade. However, the debates have assumed a different dimension after the LGBTQ+ community officially launched an advocacy centre in Ghana. The launch of the advocacy centre, done at the blind-side of many Ghanaians, drew extensive criticism on social media. Most significantly, the establishment of the LGBTQ+ advocacy centre triggered moral entrepreneurs, primarily the church and other Christian-oriented civil society organisations, to institute stringent measures to quell LGBTQ+ activities in all facets of Ghanaian life. In light of the public uproar against the establishment of the advocacy centre and the massive support of the Ghanaian populace to criminalise LGBTQ+ activities, a private member's bill, entitled the Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill of 2021, is currently undergoing various stages of parliamentary

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appraisals. A survey conducted by Afrobarometer reveals that most Ghanaians have heralded the Bill as a necessary step to curb practices that are "abominable" to Ghanaian culture and values. The Bill criminalises LGBTQ+ activities in Ghana. The overall objective of the Bill is to prohibit advocacy of LGBTQ+ activities. Furthermore, the Bill imposes an obligation on state institutions – including institutions established by the Constitution of the Republic of Ghana of 1992, such as the courts, the Commission for Human Rights and Administrative Justice (CHRAJ), and the National Commission for Civic Education (NCCE) – to strictly adhere to and uphold Ghanaian family values as enshrined in the Bill. Also, teachers and other educational instructors at schools, including higher education institutions (HEIs), are under a legal duty to uphold the Ghanaian family values contained in the Bill. Any person, including teachers and instructors in HEIs, who breaches the duty to uphold the Ghanaian family values and proper sexual human rights commits a criminal offence and is liable on summary conviction to a fine or a term of imprisonment. The extent of restriction and criminal sanctions imposed by the Bill has raised some concerns in the academic space and in HEIs about the political encroachment on the value of academic freedom as protected by the 1992 Constitution of Ghana. This chapter accordingly seeks to explore the implication of the Anti-LGBTQ+ Bill on academic freedom in HEIs in Ghana. The chapter explores the constitutional foundations of freedom of speech, belief, conscience and thought, including academic freedom and the inroads the Bill seeks to achieve. The chapter further discusses the constitutionality of the provisions in the Bill that restrict academic freedom by reflecting on landmark cases by the Supreme Court of Ghana. This chapter suggests that the provisions of the Bill that restrict free speech, freedom of thought, belief, and conscience, including academic freedom, be expunged from the Bill as they are at variance with the core principles and fundamental rights in the 1992 Constitution of Ghana.

> "The university classroom is peculiarly the marketplace of ideas…"[2]

2 *Keyishian v Board of Regents of University of the State of New York* 385 US 589, 603 (1967). Also quoted in the following: Niehoff and

1. Introduction

Debates concerning the criminalisation of Lesbian, Gay, Bisexual, Transgender, Queer, and other related (LGBTQ+) activities in Ghana have been at the centre stage of political discussions over the last decade. However, the debates have assumed a different dimension after the LGBTQ+ community officially launched an advocacy centre in Ghana.[3] The launch of the advocacy centre was on the blind side of many Ghanaians. This drew extensive criticism on social media. Most significantly, the establishment of the LGBTQ+ advocacy centre triggered moral entrepreneurs,

Sullivan *Free Speech: From Core Values to Current Debates* (2022) 50; Rabban "A functional analysis of individual and institutional academic freedom under the First Amendment" in Alstyne (ed) *Freedom and Tenure in the Academy* (1993) 252; Davis "Protecting the marketplace of ideas: The First Amendment and public school teachers" 2005 *First Amendment Law Review* 335-336; Blocher "Institutions in the marketplace of ideas" 2008 *Duke Law Journal* 821 821-825; Labaree "The peculiar problems of preparing educational researchers" 2003 *Educational Researcher* 13 13-22; Scott "What kind of freedom is academic freedom?" 2022 *Critical Times* 1 1-19; Stone "Restrictions of Speech Because of its Content: The peculiar case of subject-matter restrictions" 1978 *University of Chicago Law Review* 81 81-115; Wernicke "Teachers' speech rights in the classroom: Analysis of *Cockrel v Shelby County School District*" 2003 *University of Cincinnati Law Review* 1471-1472; Ingber "The marketplace of ideas: A legitimizing myth" 1984 *Duke Law Journal* 1-85; Strauss "Dangerous thoughts? Academic freedom, freedom of speech, and censorship revisited in a post-September 11th America" 2004 *Washington University Journal of Law and Policy* 343 343-367; Vollenhoven "The right to freedom of expression: The mother of our democracy" 2015 *Potchefstroom Electronic Law Journal* 2299-2327; Welner "Locking up the marketplace of ideas and locking out school reform: Court's imprudent treatment of controversial teaching in America's public schools" 2003 *UCLA Law Review* 959 960-1030; Levin "Educating youth for citizenship: The conflict between authority and individual rights in public schools' 1986 *The Yale Law Journal* 1647 1647-1680; Chemerinsky "Teaching that speech matters: A framework for analyzing speech issues in schools" 2009 *University of California, Davis Law Review* 825 825-241; and Gordon "When the classroom speaks: A public university's first amendment right to a race-conscious admissions policy" 2000 *Washington and Lee Journal of Civil Rights and Social Justice* 57 57-85.

3 Coleman and Kyerematen, "Created in the image of God, criminalised by the laws of Ghana" 2022 https://www.africanlawmatters.com/blog/blog-created-in-gods-image (25-09-2022).

primarily the church and other Christian-oriented civil society organisations, to institute stringent measures to quell LGBTQ+ activities in all facets of Ghanaian life.[4] In light of the public uproar against the establishment of the advocacy centre, a private member's bill, entitled the Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill of 2021,[5] is currently undergoing various stages of parliamentary appraisals. Most Ghanaians have heralded the Bill as a necessary step to curb practices that are "abominable" to Ghanaian culture and values.[6] The Bill imposes an obligation on state institutions – including constitutionally established bodies, such as the Commission for Human Rights and Administrative Justice (CHRAJ) and the National Commission for Civic Education (NCCE) – to strictly adhere to and uphold Ghanaian family values, as enshrined in the ill.[7]

In addition, school teachers and instructors are under a positive legal obligation to uphold the Ghanaian family values contained in the bill.[8] Any person, including teachers and educational instructors, who breaches the duty to uphold the Ghanaian family values and proper sexual human rights commits a criminal offence and they shall be liable on summary conviction to a term of imprisonment or a fine.[9] The extent of restriction and criminal sanctions imposed by the Bill has raised concerns in the academic space and higher education institutions (HEIs) about the political encroachment on the value of academic freedom protected by the 1992 Constitution of Ghana. One of the main

4 *Ibid*.
5 Parliament of Ghana "Bills" 2021 https://www.parliament.gh/docs?type=Bills&OT (25-09-2022) (hereafter "the Bill").
6 Moral entrepreneurs are the driving force pushing for the criminalisation of LGBTQ+ activities in Ghana. According to Tettey, moral entrepreneurs are "individuals or organizations that assume responsibility for promoting, and/or enforcing, views and regulations that reflect their moral beliefs, with the goal of ridding society of perceived ills". See Tettey "Homosexuality, moral panic and politicised homophobia in Ghana: Integrating discourses of moral entrepreneurship in Ghana media" 2016 *Communication, Culture and Critique* 86-94.
7 cl 3(2) of the Bill.
8 cl 3(2)(a) of the Bill.
9 cl 4 of the Bill.

arguments by the sponsors of the Bill is that fundamental rights enshrined in the Constitution of Ghana are not absolute, and thus subject to the law and pursuance of public good and interest. Hence, according to the proponents of the Bill, the restriction of the right to freedom of expression, speech, and academic freedom is legally justified, considering that the rights contained in Ghana's Constitution are not absolute. Against this background, the scope and aim of this chapter are hinged.

This chapter reflects on the impact of the Anti-LGBTQ+ Bill on academic freedom in institutions of higher learning in Ghana. The contribution explores the constitutional foundations of freedom of speech, belief, conscience and thought, including academic freedom and the negative inroads of the restrictions in Ghana's proposed Anti-LGBTQ+ Bill. The contribution also reflects on the main arguments of the sponsors of the Bill regarding the legal justification to limit fundamental rights contained in the 1992 Constitution of Ghana. The chapter further discusses the constitutionality of the provisions in the Bill that restrict academic freedom by reflecting on pronouncements by the Supreme Court of Ghana regarding the protection of fundamental rights in Ghana. This chapter argues that the provisions in the bill restricting academic freedom fall short of the legal threshold required to limit fundamental rights contained in the 1992 Constitution of Ghana.

This chapter is organised into six main sections. The first section discusses the framework and scope of academic freedom. It reflects on the status of academic freedom in HEIs in Ghana. The next section provides an overview of the Anti-LGBTQ+ Bill, particularly the extent to which the Bill restricts freedom of speech and expression and academic freedom. The third section appraises the key arguments advanced by the sponsors/proponents of the Bill as justification to limit fundamental rights and freedom, including academic freedom. The fourth section discusses the international legal framework guaranteeing academic freedom, freedom of expression and opinion. The fifth section explores the parameters of restricting fundamental rights under Ghanaian law by reflecting on the pronouncements of courts in Ghana. The sixth section concludes by suggesting that

the restriction and criminalisation of academic freedom by the Anti-LGBTQ+ Bill falls short of the constitutional justification required to limit fundamental rights. It also argues that the limitations are unjustifiable and erode the parameters of academic freedom. This chapter suggests that the arguments advanced by the sponsors of the Bill do not meet the threshold required to limit academic freedom.

2. Academic freedom, opinion, and expression: history and parameters

The modern conception of academic freedom was formulated in Germany and other European HEIs in the 19th century.[10]

10 Fuchs "Academic freedom – Its basic philosophy, function, and history" 1963 *Law and Contemporary Problems* 431 431-466; Ludlum "Academic freedom and tenure" 1950 *The Antioch Review* 3 3-34; Socha "Policed pedagogy controlling and dominating classrooms, curriculum, and courses" in Nocella and Socha (ed) *Policing on Campus: Academic Repression, Surveillance and the Occupy Movement* (2013) 39-53. Some academics trace the history of academic freedom to Socrates after the execution of Galileo. See Ledoux, Marshall and McHenry "The erosion of academic freedom" 2010 *Educational Horizons* 249 249-256. According to Fuller, the classical conception of academic freedom is attributed to the works of Wilhelm von Humboldt. See, Fuller "The genealogy of judgement: Towards a deep history of academic freedom" 2009 *British Journal of Education Studies* 164 164-177. For various historical accounts and perspectives on academic freedom generally, see Livingstone "Finding revelation in anthropology: Alexander Winchell, William Robert Smith and the heretical imperative" 2015 *The British Journal for the History of Science* 435 436-454; Metzger *The Development of Academic Freedom in the United States* (1955); McIver *Academic Freedom in Our Time* (1955); Schrecker *No Ivory Tower: McCarthyism and the Universities* (1986); Nocella, Best and McLaren "Introduction: The rise of the academic-industrial complex and the crisis in free speech" in Nocella, Best and McLaren (eds) *Academic Repression: Reflections from the Academic-Industrial Complex* (2010); Hayes "Academic freedom and the diminished subject" 2009 *British Journal of Educational Studies* 127 127-145; Scott "Knowledge, power, and academic freedom" 2009 *Social Research* 451 452-480; Steward "Taking liberties: Academic freedom and the humanities" 2008 *Profession* 146 146-171; Veit "Academic freedom in Germany before and after 1933 under the Republic of Weimar and under Hitler" 1937 *Peabody Journal of Education* 36 36-44; Becker "Academic freedom in England and Germany: A comparative perspective" 2006 *World Studies in Education* 5 5-24; Karran "Academic freedom:

The concept opposed governmental, political, and religious interference in academic and research activities in HEIs.[11] Prior to the formulation of the concept, the 18th-century HEIs were under the sponsoring authority of political states and religious institutions.[12] At the core of the concept is the idea that HEIs, where scholars were to formulate and transmit knowledge to students and pursue academic and scientific truths, must be without political and religious interference.[13] The foundations of academic freedom are thereby enmeshed in the role of HEIs and the responsibilities of scholars to transmit knowledge and pursue scientific truth. The pursuit of academic freedom opposed religious and political dogmas of religious institutions and the political state. The resultant impact of such religious and political influence was an alteration of the purpose of higher education, which is to pursue objective scientific truth without the influence of political and religious inclinations.

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in justification of a universal ideal" 2009 *Studies in Higher Education* 263 263-283; Beiter "Measuring the erosion of academic freedom as an international human right" 2016 *Vanderbilt Journal of Transnational Law* 597 560-691; and Zeleza "Academic freedom in the neo-liberal order: Governments, globalisation, governance, and gender" 2003 *Journal of Higher Education in Africa* 149 149-194.

11 Fuchs (n 9) 432.

12 Brickman "Academic freedom: Past and present" 1968 *Journal of Thought* 152 152-155; Axelrod "Academic freedom and its constraints: A complex history" 2021 *Canadian Journal of Higher Education* 51-52; McConnell "Academic freedom in religious colleges and universities" 1990 *Law and Contemporary Problems* 303 305-306; and Andreescu "Academic freedom and religiously affiliated universities" 2008 *Journal for the Study of Religions and Ideologies*162 163-183.

13 Dworkin "We need a new interpretation of academic freedom. Academic freedom and the future of the university – Lecture series" 1996 *Academe* 10 10-15; Lynch "Academic freedom and the politics of truth" in Lackey (ed) *Academic Freedom* (2018) 23-35; Badamchi "Academic freedom: How to conceptualize and justify it?" 2022 *Philosophy and Social Criticism* 619-623; Aarrevaara "Academic freedom in a changing world" 2010 *European Review* 55-59; Whittington "Academic freedom and the mission of the university" 2022 *Houston Law Review* 821 823-829; and Suissa and Sullivan "How can universities promote academic freedom? Insights from the front line of the gender wars" 2022 *Impact: Philosophical Perspectives on Education Policy* 2 10-11.

An early formulation of the scope and purpose of academic freedom is said to have been captured in the writings of Paulsen. Paulsen averred that:

> it is no longer, as formerly, the function of the university teacher to hand down a body of truth established by authorities, but to search after scientific knowledge by investigation, and to teach his hearers to do the same ... For the academic teacher and his hearers there can be no prescribed and no proscribed thoughts. There is only one rule for instruction: to justify the truth of one's teaching by reason and the facts.[14]

Prior to that, Immanuel Kant had reflected on the notion of academic freedom in 1794 that:

> only a ruler who is himself enlightened and has no fear of phantoms, yet who likewise has at hand a well-disciplined and numerous army to guarantee public security, may say what no republic would dare say: Argue as much as you would like and about whatever you like, but obey.[15]

Essentially, Kant argued that academics should be granted a degree of civil freedom since a "lesser degree of civil freedom gives intellectual freedom enough room to expand to its fullest extent".[16] Hutcheson argues that the essays of Kant served as a basis for the development of academic freedom in German universities by scholars.[17] Also in Germany, academic freedom as developed by Alexander von Humboldt encapsulated the doctrines of the freedom to teach (*Lehrfreiheit*),[18] and the freedom

14 Paulsen *The German Universities and the University Study* (Translated by Thilly and Elwang 1906) 228-231. Also quoted in Michell *The Coup at Catholic University: The 1968 Revolution in American Catholic Education* (2015) 34.

15 Kant "An answer to the question: What is enlightenment?" in Reiss (ed) *Kant's Political Writings* (Translated by HB Nisbet 1977) 54-60.

16 Kant (n 14) 54-60.

17 Hutcheson "Why tenure needs protection in these troubled times" in DeVitis and Sasso (ed) *Colleges at the Crossroads: Taking Sides on Contested Issues* (2018) 113-126.

18 Altbach "Academic freedom: A realistic appraisal" 2021 *Higher Education* 2 2-3; Lodewyckx "Academic freedom in Germany"

to learn (*Lehrnfreiheit*).[19] The 17th and 18th centuries' Eurocentric conception of academic freedom represented the idea that scholars had the duty to teach research in pursuit of scientific truths in HEIs without political or religious interferences. The German and Eurocentric conception of academic freedom remains relevant and valuable in the 21st-century university environment in many countries.

In America, the German influence and understanding of academic freedom can be seen in the 1915 Declaration of the American Association of University Professors (AAUP). The AAUP Declaration of 1915 (revised in 1940) embodies the principles of academic freedom.[20] Under the declaration, academic freedom

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1941 *The Australian Quarterly* 82 82-89; Rockwell "Academic freedom: German origin and American development" 1950 *Bulletin of the American Association of University Professors (1915-1955)* 225-227; Commager "The University and freedom: Lehrfreiheit and Lehrnfreiheit" 1963 *The Journal of Higher Education* 361-364; Palonen "The politics of academic freedom: Weber, Westminster and contemporary universities" 2016 *Max Weber Studies* 149-161; Zavale and Langa "African diaspora and the search for academic freedom safe havens: Outline of a research agenda" 2018 *Journal of Higher Education in Africa* 1-9; Neumann Jr "Academic freedom, job security and costs" 2017 *Journal of Legal Education* 595 595-596; Jones "TF Tout and the idea of the university" in Barron and Rosenthal (eds) *Thomas Frederick Tout (1855-1929): Refashioning History for the Twentieth Century* (2019) 71-85; Eisenach *The Lost Promise of Progressivism* (2021) 94; and Eastman and Boyles "In defense of academic freedom and faculty governance: John Dewey, the 100th Anniversary of the AAUP, and the threat of corporatization" 2015 *Education and Culture* 17-26.

19 Macfarlane "Re-framing student academic freedom: A capability perspective" 2012 *Higher Education* 719-722; Metzger "Profession and constitution: Two definitions of academic freedom in America" 1988 *Texas Law Review* 1265 1269-1271; Landauer, Cowan, Hillway, and Goldberg "Further comments on institutional neutrality" 1970 *AAUP Bulletin* 123-126; Steinzor "A Techer's reaction to the idea of a university" 1962 *Improving College and University Teaching* 145-147. See generally: Russell *Academic Freedom* (1993); and Josephson "Lehrfreiheit, Lernfreiheit, Wertfreiheit: Max Weber and the University Teachers' Congress in Jena 1908" 2004 *Max Weber Studies* 201 202-219.

20 American Association of University Professors (AAUP) "AAUP's 1915 Declaration of Principles" (hereafter, AAUP Declaration of Principles) 1915 https://aaup-ui.org/Documents/Principles/Gen_Dec_Princ.pdf (01-10-2022). See also Wilson "The AAUP's 1915 declaration of principles: Conservative and radical, visionary and myopic" 2016 *Journal of Academic Freedom* 1-19; Cain *Establishing*

comprises three main elements: freedom of inquiry and research, freedom of teaching within an HEI, and sometimes the freedom of extramural utterance and action.[21] In America, academic freedom extends to students. This protection of students' freedom to learn was not part of the initial AAUP Declaration of 1915. The gap was remedied in 1967 when the AAPU adopted the Joint Statement on Rights and Freedoms of Students (hereafter "the 1967 AAUP Joint Statement"), where the liberty of students to learn was included in the rubrics of academic freedom from an American perspective.[22]

The 1967 AAUP Joint Statement provides that the liberty to teach and the freedom to learn are inseparable aspects of academic freedom.[23] From the student's perspective, therefore, academic freedom entails the liberty the students have to choose or study subjects of interest or concern to them and arrive at conclusions and express their opinions based on the said conclusions.[24] The 1967 AAUP Joint Statement also protects students from improper academic evaluation[25] and permits students to form associations.[26] Students also have the freedom of inquiry and expression,[27]

Academic Freedom (2012) 29-50; Gilbert "Public university professors: Employees or appointees" 2020 *Kentucky Law Journal Online* 1-9; Metzger "The 1940 Statement of Principles on academic freedom and tenure" 1990 *Law and Contemporary Problems* 3 3-77; and Schrecker "One historian's perspective on academic freedom and the AAUP" 2014 *Academe* 30 31-34.

21 AAUP Declaration of Principles of 1915.

22 American Association of University Professors (AAUP) "Joint statement on rights and freedoms of students" (hereafter "AAUP Joint Statement") n.d. https://www.aaup.org/report/joint-statement-rights-and-freedoms-students (01-10-2022); Appiagyei-Atua "Students' academic freedom in African universities and democratic enhancement" 2019 *African Human Rights Law Journal* 151-156; Mullendore "The joint statement on rights and freedoms of students: Twenty-five years later" 1992 *New Directions for Student Services* 5 6-23; Miller "The evolution of the joint statement on the rights and freedoms of students" 1993 *Journal of Student Affairs Research and Practice* 176 176-181; Alstyne (ed) *Freedom and Tenure in the Academy* (1993); and Cooper and Lancaster "Perceived adherence to the joint statement on the rights and freedoms of students on college campuses" 1995 *Journal of Student Affairs Research and Practice* 179 180-188.

23 preamble of AAUP Joint Statement of 1967.

24 art II(A) of AAUP Joint Statement of 1967.

25 art II(B) of AAUP Joint Statement of 1967.

26 art IV(A) of AAUP Joint Statement of 1967.

27 *Ibid.*

among other civil and political rights. The contours of academic freedom, as explained above, seek to serve a long-term goal of advancing knowledge in society without religious, political, or other societal constraints and restrictions.

In America, the principles underlying academic freedom have been upheld by courts. In *Keyishian v Board of Regents of the University State of New York*,[28] the United States Supreme Court considered whether the regents at the State University of New York could require academic staff to sign a loyalty oath as part of their conditions of employment. This condition was based on a state law, the New York State Education Law (Feinberg Law).[29] The law required that educators declare whether they were or had been a member of the Communist Party (considered a subversive organisation). Based on the content of Feinberg's Law, membership in the Communist Party was a precondition to deny or terminate the employment relationship between the educators and the HEI.[30]

The other issue that the Supreme Court considered was whether section 3021 of the Education Law and section 105(3) of the Civil Service Law, which referred to "treasonable or seditious speech or act", threatened the right to freedom of speech (enshrined in the First Amendment). Underlying this is the hallowed concept of academic freedom in HEIs.[31] The US Supreme Court declared the New York State Education Law unconstitutional, as the law was overbroad and vague.[32] The court stated further that membership in a subversive organisation in and of itself –without intention or further action – is not

28 *Keyishian v Board of Regents of the University State of New York* 385 US 589, 603 (1967). See also *Alder v Board of Education of City of New York* 342 US 485 (1952); Hiers "Institutional academic freedom or autonomy grounded upon the first amendment: A jurisprudential mirage" 2007 *Hamline Law Review* 1-58. See generally Huq "Easterbrook on academic freedom" 2010 *The University of Chicago Law Review* 1055 1056-1072; and Golden "Constitutional law: Academic freedom gains full constitutional protection" 1967 *Tulsa Law Review* 270 270-275.

29 the *Keyishian* case paras 5-6.

30 the *Keyishian* case par 6.

31 the *Keyishian* case paras 12-14.

32 the *Keyishian* case par 30.

a justifiable reason to terminate the employment of faculty members.[33] The US Supreme Court re-affirmed the importance of open dialogue in a democratic HEI environment.[34] Based on the findings of the court, it described the university classroom as a marketplace of ideas.[35] In the view of the court:

> Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore of special concern of the First Amendment, which does not tolerate laws that cast palls of orthodoxy over the classroom... The nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of multitude of tongues than through any kind of authoritative selection...[36]

As mentioned, academic freedom includes the liberty of students to choose an interest of study, and to form and express their opinions based on their conclusions. American courts have affirmed this liberty, for instance in *Sweezy v New Hampshire, by Wyman, Attorney General*.[37] In that case, the Attorney-General

33 the *Keyishian* case par 26.
34 the *Keyishian* case par 20.
35 the *Keyishian* case par 19.
36 *Ibid*.
37 *Sweezy v New Hampshire, by Wyman, Attorney General* 354 US 234 (1957). See generally Cooper Jr "Constitutional law – rights of states to investigate subversive activities" 1960 *Louisiana Law Review* 595 596-600; Porter "The Supreme Court and individual liberties since 1952" 1959 *Kentucky Law Journal* 48 49-62; Cramton "The Supreme Court and state power to deal with subversion and loyalty" 1958 *Minnesota Law Review* 1025 1025-1082; Mommer "State loyalty program and the supreme court" 1968 *Indiana Law Journal* 462 463-470; Daughtrey Jr "The legal nature of academic freedom in United States colleges and universities" 1991 *University of Richmond Law Review* 233 234-271; McCarthy and Patterson "Academic freedom in the schools" 1978 *The Journal of General Education* 299 300-310; Park "Sovereignty and First Amendment rights of higher education institutions: An affirmative action and institutional approach" 2020 *First Amendment Studies* 110 110-127; Inazu "The strange origins of the constitutional right of association" 2010 *Tennessee Law Review* 485 485-562; and Byrne "The threat to constitutional freedom" 2004 *Journal of College and University Law* 79 79-142.

of New Hampshire, on behalf of the New Hampshire legislature, investigated the beliefs and associations of Professor PM Sweezy of the University of New Hampshire, who was suspected of being engaged in subversive behaviour. Professor Sweezy also refused to testify about the content of the speech he delivered at the HEI and denied being a member of the Communist Party and having knowledge about the communist infiltration into the Progressive Party of New Hampshire.[38] The US Supreme Court ruled that the Attorney-General of New Hampshire had gone too far in conducting investigations on behalf of the legislature. The court stated that legislative investigations could encroach upon the liberties of individuals, especially in situations where the said investigative powers are broad and ill-defined.

The court highlighted the harm of governmental intrusion into the intellectual life of a university, and struck down or overturned the decision of the New Hampshire Supreme Court.[39] In terms of the application of the concept of academic freedom to students, the US Supreme Court averred that: "teachers and students must always remain free to inquire, to study and to evaluate, and gain maturity and understanding, otherwise our civilisation will stagnate and die".[40] Academic freedom means that, internally, HEIs must respect the opinions expressed by students. The respect for academic freedom also includes the idea that HEIs must respect associational rights, such as freedom of association. This position was upheld by the United States Supreme Court in *Healy v James*,[41] where the court held that the refusal of the Central Connecticut State College to recognise a campus chapter for Students for a Democratic Society (SDS) was unconstitutional and violated the First Amendment

38 the *Sweezy* case 234.
39 the *Sweezy* case 261.
40 the *Sweezy* case 250.
41 *Healy v James* 408 US 169 (1972) (*Healy*). See generally Terbeek "Healy v James: Official campus recognition for student for student groups" 1973 *Cleveland State Law Review* 373 374-387; Bogaty "Beyond 'Tinker' and 'Healy': Applying the First Amendment to student activities" 1978 *Columbia Law Review*1700 1701-1713; and Patton "Trumping the First Amendment: Student-driven calls for speech restriction on public college campuses" 2017 *Case Western Reserve Law Review* 189 190-212.

rights.[42] In Africa, the history of academic freedom is said to have been inextricably intertwined with the concept underlying the establishment of universities in Egypt around 2000 BCE in the Per-ankh.[43] Academic freedom since the establishment of universities in Per-ankh has been a critical component of university life in many African countries.[44] The commitment to academic freedom in Africa is expressed in two key declarations, namely the Dar es Salaam Declaration on Academic Freedom and Social Responsibility of Academics of 1990,[45] and the Kampala Declaration on Intellectual Freedom and Social Responsibility of 1990.[46] These two declarations seek to protect academic and intellectual freedom in Africa.

The contemporary understanding of academic freedom is undergirded by the understanding that HEIs must have the autonomy to produce research and teaching to improve and enhance societal development, and improve human conditions. Academic freedom also mirrors the autonomy of HEIs. Institutional autonomy of HEIs mirrors the idea of self-governance and self-regulation without governmental, political, or religious influences.[47] This mission of HEIs promotes

42 the *Healy* case 185-194.

43 Appiagyei-Atua (n 21) 155.

44 *Ibid.*

45 Shivji "The jurisprudence of the Dar es Salaam Declaration on Academic Freedom" 1991 *Journal of African Law* 128 129-141; Kanywanyi "Academic freedom, the autonomy of institutions of higher education and the social responsibility of academics" 2006 *Journal of Higher Education in Africa* 69 70-81 Chachage *Academic Freedom and Social Responsibilities of Academics in Tanzania* (2008) 1-5; Appiagyei-Atua, Beiter and Karran "The compositive theory: An African contribution to the academic freedom discourse" 2015 *South African Journal on Human Rights* 315 316-329; and Rajaoson "Academic freedom and social responsibility reflections from the African experience" 2002 *Higher Education Policy* 375 376-379.

46 Laakso "Academic mobility in Africa" 2021 *Politikon* 442-445; Agbo and Lenshie "Between the state and intellectuals: Dialectics of the struggles for academic freedom in Africa" 2017 *International Journal of Humanities and Social Science Studies* 361 366-370; and Tierney and Lanford "The question of academic freedom: Universal right or relative term" 2014 *Frontiers of Education in China* 3 18-19.

47 Matei and Iwinska "Diverging paths? Institutional autonomy and academic freedom in the European higher education area" in Curaj, Deca, and Pricopie (eds) *European Higher Education Area: The Impact of Past and Future Policies* (2018) 345-368; and Maassen, Gornitzka

a democratic agenda and socio-economic development in societies.[48] The historical understanding and aspects of academic freedom have influenced essential international instruments, constitutions of countries, and legislation and policy frameworks preventing political, religious, and societal erosion into academic freedom.

3. International legal architecture and standards on academic freedom

Several international instruments protect and set standards regulating academic freedom. In addition to international instruments, some regional instruments imbibe and ascribe to the tenets of academic freedom and institutional autonomy. The International Covenant on Civil and Political Rights (ICCPR) of 1966 protects academic freedom. The ICCPR guarantees the right to hold an opinion without interference.[49] Article 19(2) of the ICCPR provides that: "everyone has the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice".[50] However, the right to hold an opinion is subject to specific responsibilities as provided by law, including the respect for the rights and reputations of others and the protection of national security, public policy or public

and Fumasoli "University reform and institutional autonomy: A framework for analysing the living autonomy" 2017 *Higher Education Quarterly* 239 240-250. Adams argues that although institutional academic autonomy is significant, it is not the same as academic freedom. See Adams "Resolving enmity between academic freedom and institutional autonomy" 2021 *Journal of College and University Law* 1-70.

48 Kratou and Laakso "The impact of academic freedom and democracy in Africa" 2022 *Journal of Development Studies* 809 809-826; Slaughter "Academic freedom and the state: Reflections on the uses of knowledge" 1988 *The Journal of Higher Education* 241 241-262; Adedeji "African renaissance, economic transformation and the role of the university" 1998 *Indicator South Africa* 64 64-67; and Tierney and Lechuga "Social significance of academic freedom" 2010 *Cultural Studies* 118 119-113.

49 art 19 of the International Covenant on Civil and Political Rights (hereafter "ICCPR") of 1966.

50 art 19(2) of ICCPR.

health or morals.[51] Several academics believe that article 19(2) of the ICCPR guarantees academic freedom and protects academic discourses between students and academics.[52] By guaranteeing academic freedom, the ICCPR recognises the institutional autonomy of HEIs. Another international instrument that protects academic freedom is the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966.

Article 13 of the ICESCR provides for the right to education. However, it does not explicitly provide for academic freedom and institutional autonomy to protect the independence of research and opinion in academic environments.[53] Even though article 13 of the ICESCR does not explicitly provide for academic freedom and institutional autonomy, the Committee on Economic Social and Cultural Rights (CESCR) in the General Comment 13 of 1999 on the Right to Education ("General Comment 13 of 1999") provides that the right to education can be fully enjoyed when academic staff and students have academic freedom and autonomy. In the words of the CESCR: "the right to education can be enjoyed if accompanied by academic freedom of staff and students... and that staff and students throughout the education sector are entitled

51 art 19(3)(a) and (b) of ICCPR.

52 Taylor "Thinking allowed in the academy: International human rights law and the regulation of free speech and academic freedom under the 'Model Code'" 2020 *University of Queensland Law Journal* 117-118; Blell, Liu and Verma "A one-sided view of the world: women of colour at the intersections of academic freedom" 2022 *The International Journal of Human Rights* 1; Quinn and Levine "Intellectual-human rights defenders and claims for academic freedom under human rights law" 2014 *International Human Rights Law Review* 209 216-217; Beiter, Karran and Appiagyei-Atua "Academic freedom and its protection in the law of European states: Measuring an international human right" 2016 *European Journal of Comparative Law and Governance* 254 261-265; Rajagopal "Defending academic freedom as a human right: An internationalist perspective" 2003 *International Higher Education* 3 3-5; Beiter, Karran and Appiagyei-Atua "Measuring the erosion of academic freedom as an international human right: A report on the legal protection on of academic freedom in Europe" 2016 *Vanderbilt Journal of Transnational Law* 597-602; and Rajagopal "Academic freedom as a human right: An internationalist perspective" 2006 *Academe* 25-28.

53 Nkhata "Academic freedom, institutional autonomy and the University of Malawi: An analysis of some trends and prospects" 2017 *Law, Democracy and Development* 127 127-152.

to academic freedom."[54] Hence the ICESCR recognises academic freedom and institutional autonomy as an entitlement of every academic, intellectual or student. According to the committee:

> Members of the academic community, individually or collectively, are free to pursue, develop and transmit knowledge and ideas, through research, teaching, study, discussion, documentation, production, creation, or writing. Academic freedom includes liberty of individuals to express freely opinions about institution or system in which they work, to fulfil their functions without discrimination or fear of repression by the State or any other actor, to participate in professional or representative academic bodies, and to enjoy all the internationally recognized human rights applicable to other individuals in the same jurisdiction. The enjoyment of academic freedom carries with it obligation, such as the duty to respect academic freedom of others, to ensure fair discussion of contrary views and to treat all without discrimination on any of the prohibited grounds.[55]

For academic staff and students to enjoy their academic freedom, their institutions – notably HEIs – must enjoy a certain degree of autonomy.[56] According to the CESCR, institutional autonomy requires a degree of self-governance regarding decision-making and academic work standards.[57] The fact that HEIs must enjoy autonomy does not mean that their operations must be at variance with the public systems of governance. Hence, the system of self-governance also means that the decision-making, management, and other related affairs must be consistent with principles of public accountability. This principle is significant, primarily when HEIs are funded with state funds. The mere fact that HEIs are funded with state funds does not mean their autonomy can

54 par 38 of the Commission on Economic, Social and Cultural Rights (CESCR) "General Comment No. 13: The Right to Education" (Art. 13) 1999 E/C.12/1999/10 (hereafter "CESCR General Comment No 13").
55 par 38 of CESCR General Comment 13.
56 par 40 of CESCR General Comment 13.
57 *Ibid.*

be eroded. The CESCR accordingly suggests a balance to be struck in ensuring that HEIs are accountable but that their autonomy is not eroded.[58] Also, in furtherance of transparency, institutional arrangements in HEIs must thus be fair, just, and transparent.[59]

Other international instruments commit to academic freedom and institutional autonomy as a propeller for the enjoyment of education rights. In the United Nations Educational, Scientific and Cultural Organization (UNESCO)'s Recommendation Concerning the Status of Higher Education Teaching Personnel of 1997 ("Recommendation Concerning Higher Education") the significance of academic freedom as a springboard for maintaining international and domestic standards in higher education is re-emphasised.[60] The Recommendation Concerning Higher Education provides that, in maintaining the international and domestic standards in higher education, the concept of academic freedom must be upheld religiously.[61] In upholding the principle of academic freedom, teaching personnel are free to teach without interference.[62] HEIs must not be compelled to teach or utilise a curriculum that is at variance with international and national standards.[63] In addition, HEI teaching personnel must have the "freedom to carry out research without interference or suppression in accordance with nationally and internally recognised principles of intellectual rigour, scientific inquiry, and research ethics".[64]

Most importantly, teaching personnel in HEIs in fidelity to academic freedom must have liberty to express their opinion about the system in which they work (their institution) without

58 *Ibid*.
59 *Ibid*.
60 The ILO/UNESCO "The ILO/UNESCO Recommendation Concerning the Status of Teachers" (hereafter "Recommendation Concerning Higher Education") 1997 https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/ILO_UNESCO_Recommendation_Concerning_the_Status_of_Teachers_1966_En.pdf (7-10-2022).
61 preamble of Recommendation Concerning Higher Education.
62 art 28 of Recommendation Concerning Higher Education.
63 *Ibid*.
64 art 29 of Recommendation Concerning Higher Education.

censorship.[65] According to the recommendation, institutional autonomy deals with a degree of self-governance in decision-making that advances the tenets of public accountability, especially in publicly funded institutions.[66] Also, "autonomy is the institutional form of academic freedom and a necessary precondition to guarantee the proper fulfilment of the functions entrusted to higher education teaching personnel and institutions".[67] States are required to protect the autonomy of institutions of higher learning from threats of interference from any source.[68]

From a regional perspective, steps were taken in the 1990s by academics to establish standards for the protection of academic freedom and institutional autonomy.[69] These commitments led to the Dar Es Salaam Declaration and the Kampala Declaration. Under the Dar es Salaam Declaration, members of the academic community have the "right to fulfil their functions of teaching, researching, writing, learning, exchanging and disseminating information and providing services without fear of interference or repression from the state or any other public authority".[70] Subject to certain restrictions, academics must enjoy the freedom of movement without harassment.[71] Also, academics have the freedom to teach without any interference.[72]

In accordance with the highest standard of education principles, members of staff and students have the right to initiate, participate in, and determine academic programmes in

65 art 27 of Recommendation Concerning Higher Education.
66 art 17 of Recommendation Concerning Higher Education.
67 art 18 of Recommendation Concerning Higher Education.
68 art 19 of Recommendation Concerning Higher Education.
69 It is noteworthy that the African Charter on Human and Peoples' Rights of 1981 (the Banjul Charter) does not explicitly provide for academic freedom as a protected right. However, the African Commission on Human and Peoples' Rights in *Kenneth Good v The Republic of Botswana* (Communication No. 313/05) [2010] ACHPR 106 (26 May 2020) recognised academic freedom within the framework of the Banjul Charter.
70 art 14 of the Dar es Salaam Declaration on Academic Freedom and Social Responsibility (hereafter "Dar es Salaam Declaration") of 1990.
71 art 15 of Dar es Salaam Declaration.
72 art 20 of Dar es Salaam Declaration.

their institutions.[73] The Dar es Salaam Declaration recognises the students' dimension of academic freedom. It provides that HEIs must guarantee the participation of student bodies either collectively or individually.[74] A student can challenge their instructor on academic matters without fear of victimisation or reprisal.[75] However, a student wanting to exercise this right must have reasonable grounds to do so.[76] The Dar es Salaam Declaration also guarantees institutional autonomy and other associational rights of academics in an academic community.[77]

The Kampala Declaration provides that every person has the right to education and to participate in intellectual activities.[78] An African intellectual shall not be persecuted, harassed, or intimidated because of his or her intellectual works.[79] An African intellectual has the liberty of movement and this right shall not be restricted by any administrative body or action, whether directly or indirectly.[80] To uphold academic freedom as a guiding standard in Africa, the Kampala Declaration provides that an African intellectual shall have the freedom to pursue intellectual activities – including research, teaching, and dissemination of results – without interference or hinderance and in accordance with universally accepted principles and professional standards.[81] In addition, teaching and research members of the intellectual community shall have security of tenure and shall not be dismissed, except for reasons such as misconduct or proven negligence, among others.[82] The Kampala Declaration also recognises the right of students to initiate, participate in, and determine academic programmes of their institutions.[83]

73 art 18 of Dar es Salaam Declaration.
74 art 23 of Dar es Salaam Declaration.
75 art 25 of Dar es Salaam Declaration.
76 *Ibid.*
77 arts 26-27 of Dar es Salaam Declaration.
78 art 1 of the Kampala Declaration on Intellectual Freedom and Social Responsibility (hereafter "Kampala Declaration") of 1990.
79 art 3 of Kampala Declaration.
80 art 4 of Kampala Declaration.
81 art 6 of Kampala Declaration.
82 art 8 of Kampala Declaration.
83 art 7 of Kampala Declaration.

The Kampala Declaration cloaks intellectual communities with autonomy and other associational rights.[84] In addition, intellectual communities have institutional autonomy to make their decisions and govern themselves.[85] The autonomy and decision-making rights of intellectual communities, according to the Kampala Declaration, must be determined in accordance with democratic means of self-government, involving active participation of all members, irrespective of the academic community.[86] It is noteworthy that, under international law, academic freedom is circumscribed or limited by certain conditions and factors, including the standards and principles determined by national laws and ethical considerations. Nevertheless, international law (to which Ghana subscribes), does not subject academic freedom and the pursuance of intellectual activities to political and religious precepts of society. Academics are free to engage in intellectual activities and must not be subjected to any form of persecution or harassment because of their academic work.

4. Academic freedom in Ghana: history and parameters

Historically, successive post-independent Ghanaian governments have attempted to regulate and control academic and intellectual activities in Ghana. For instance, in the 1960s, under a government informed by the tenets of socialism, the government attempted to control the appointment of professors through the so-called "special professors" appointment framework. Under this regime, the president of Ghana could directly appoint professors, known as "special professors". The special professors were responsible to the president of Ghana.[87] Also, attempts were made by the government to exercise control over the appointment of heads of

84 art 10 of Kampala Declaration.
85 art 11 of Kampala Declaration.
86 art 12 of Kampala Declaration.
87 Owusu-Ansah "Academic freedom: Its relevance and challenges for public universities in Ghana today" 2015 *Journal of Education and Practice* 173-178.

departments in HEIs.[88] The attempt by the government to control academia led to the passage of the University of Ghana Act 79 of 1961, which made the head of state the chancellor of the University of Ghana.[89] Through the University of Ghana Act, the government exercised extensive control over universities in Ghana.

This system of governmental control unleashed some form of governmental supervision and constraints on academic and intellectual activities in Ghana. Arguably, the extent of governmental control over academic activities was to restrict intellectual opposition to the government, especially about the ills and human rights abuses by the government of the day. Governmental control was possible because most post-independent constitutions (before the 1992 Constitution) of Ghana did not explicitly provide academic freedom as a constitutional right.[90] The control of academic activities morphed into state repression of academics. In some instances, the government's ideological inclinations permeated several institutions'

88 See generally Ajayi, Goma and Johnson *The African Experience with Higher Education* (1996).

89 s 4(1) of University of Ghana Act 79 of 1961. See also s 4 of the University of Science and Technology, Kumasi Act 80 of 1961 (later Act 555 of 1998), which made the head of state the chancellor and the head of the university. S 4(2) provided that, in the absence of a head of state, the person acting shall be the chancellor of the university. Similarly, the University of Cape Coast Act 390 of 1971 made the head of state the chancellor and the head of the university. It is noteworthy that these laws have been amended, and the universities have the autonomy to appoint their chancellors, following their internal structures.

90 See The Ghana (Constitution) Order in Council of 1957; Constitution of the Republic of Ghana of 1960 (First Republican Constitution); The Constitution of the Republic of Ghana of 1969 (Second Republican Constitution – Art 12(6) makes provision for freedom of expression and conscience but does not explicitly refer to academic freedom). Unfortunately, the Second Republican Constitution in art 49(b) vested the appointment of the chairman of the university council with the president. Art 49(b) of the Second Republican Constitution was remedied by art 55(1) of the Third Republic of Ghana (Promulgation) Decree of 1979. Art 27(1) of the Third Republican Constitution of Ghana of 1979. conferred autonomy on universities to appoint their own chancellors. It further provided that an individual's freedom of conscience shall not be hindered. In addition, art 55(1)(b) prohibited the president from holding office as a chancellor or head of any university in Ghana.

educational curricula.[91] In 1966, the extent of intrusion and restriction of academic freedom had become apparent, and the vice-chancellor of the University of Ghana commented on it. At a congregation of the university, Alexander Kwapong stated:

> As you all know, this institution [University of Ghana] has been subjected to the most merciless and persistent attacks by the regime of Kwame Nkrumah. When it seemed that all the several institutions of this country had fallen before the resistless advance of his totalitarian power, this institution appeared to be one of the few but most important bastions of freedom still left in the country. Academic freedom was held up to be a shibboleth behind which imperialist, colonialist and neo-colonialist agents and their stooges sheltered, and in the rapid march towards the new socialist paradise and African unity, there was no place for this outworn bourgeois concept.[92]

Ghanaian students have also had their share of academic freedoms limited.[93] Over time and with the coming into force of the Fourth Republican Constitution of Ghana, governmental interference – with the appointment of professors and heads of department – has diminished. The apogee of academic freedom and institutional autonomy is cemented with the constitutional guarantee of independent research and intellectual activities in Ghana. Academic freedom is protected in the Fourth Republican Constitution of Ghana of 1992 (hereafter "the 1992 Constitution"). Article 21(1)(b) provides that all persons shall have the freedom of thought, conscience, and belief, including academic freedom. Academic freedom under the 1992 Constitution is a general freedom everyone in Ghana can enjoy. Ghanaian courts still need to provide an explanation of the parameters of academic

91 Serra and Gerits "The politics of socialist education in Ghana: The Kwame Nkrumah Ideology Institute, 1961-66" 2019 *The Journal of African History* 407 407-428.

92 Kwapong "Address by the Vice-Chancellor, Dr Alexander Kwapong, to the congregation of the University of Ghana" 1966 *Minerva* 542-545.

93 Gyampo "Student activism and democratic quality in Ghana's Fourth Republic" 2013 *Journal of Student Affairs in Africa* 49 49-66.

freedom under the 1992 Constitution. Save that, the Supreme Court (in *Frank Bo Amissah v The Attorney-General*)[94] mentioned that courts have a duty to enforce the content of article 21(1)(b).[95] The constitutional guarantee of the autonomy and freedom of academics in Ghana is further consolidated with an elaborate legislative framework that establishes the structures for the governance of HEIs.

Currently, all universities in Ghana are governed by an act of parliament that establishes the structure, administration, and internal processes or organisation of HEIs, awards of degrees, membership of the university council, and functions of the academic board, among other elaborate legislative directions.[96] The Act of Parliament establishing HEIs confers on those institutions a high degree of institutional autonomy, at least in theory. All the acts establishing the public institutions of higher learning prescribe that the activities of universities must be circumscribed within the rubrics of public accountability. Even though the university structures are considered to have a certain degree of institutional autonomy, the government of the day seems to exercise some political control over the appointment processes in the university. For instance, the chairperson of the University Council of the University of Cape Coast is appointed by the president.[97] In addition, the statutes of all public universities require a certain number of government representatives on the council of the university.

In a recent move by the Government of Ghana to indirectly control public universities, the Parliament of Ghana is considering the Public Universities Bill of 2020. The Bill circumvents the constitutional guarantee of academic freedom to a regime where the government exercises a certain degree of control over

94 *Frank Bo Amissah v The Attorney-General* Writ 7/2000 (Supreme Court, 2003).
95 *Ibid*.
96 See, for instance, the University of Ghana Act 806 of 2010; the University of Cape Coast Act (PNDCL 278) of 1992; the University for Development Studies Act (PNDCL 279) of 1992; the University of Science and Technology Act 80 of 1961 (as amended); the University of Professional Studies Act 850 of 2012; and the University of Education Act 672 of 2004.
97 s 6 of PNDCL 279 of 1992.

the affairs of universities in Ghana. The Bill was received with immense criticism from the academic community in Ghana.[98] The response of the Ghana Academy of Arts and Science to Parliament, in opposition to the Bill, noted with concern the possibility of governmental control over academic institutions and public universities and a limitation on innovation and creativity in academic environments, and accordingly advised that the Bill should not be passed by Parliament. The memorandum to the Bill provides that the purpose of the Bill is to limit grave improprieties in utilising resources in public universities. This objective is problematic, especially considering that Ghana has comprehensive legislation to ensure public-sector accountability and compliance, with which universities must comply.[99]

The Bill confers power on the president to appoint the chancellors and chairperson of university councils of all public universities in Ghana.[100] This shifts the power of appointment from the university council to the president. Also, depending on the university, the Bill reduces the composition of university council members from 21 to 13.[101] The president appoints 8 out of the 13 members of the university council under the proposed Bill. The university council has the power to appoint the vice-chancellor, who runs the day-to-day affairs of the university.[102] Considering that the president appoints most of the council members, the appointment of the vice-chancellor is practically a presidential appointee. The president can dissolve the university council, especially if there is an emergency on a public university

98 The Ghana Academy of Arts and Science "Ghana Academy of Arts and Science kick against Public Universities Bill" 2020 https://www.modernghana.com/news/1002883/ghana-academy-of-arts-and-sciences-kick-against.html (11-10-2022). See also, Awotwe, Acquah and Agyapong "A review of the implications of the Public Universities Bill, 2020 on the University Financing in Ghana" 2021 *IOSR Journal of Economics and Finance* 1-5; Appiagyei-Atua "A Critical review of the relationship between academic freedom and Ghana's public universities: From pre-independence to the Fourth Republic" 2021 *Global Campus Human Rights Journal* 129 129-148.

99 cl 5(1)(a) of the Public Universities Bill of 2020.

100 cl 5(1)(a)-(f) of the Public Universities Bill of 2020.

101 cl 16(2) of the Public Universities Bill of 2020.

102 cl 7(a)-(i) of the Public Universities Bill of 2020.

campus.[103] There is a litany of provisions in the Bill that seeks to achieve one main objective – to exercise governmental control over the activities of universities in Ghana.

Contemporary constraints on academic freedom deserve to be mentioned. With the advent of social media, academics who share unpopular views are vilified, ridiculed, and – in some cases – harassed online.[104] These new trends of social media vilification of academics go to the core of limiting contrary academic opinions and views in Ghana. Another disturbing trend is that academics in Ghana who hold contrary political opinions are subjected to unwarranted social media attacks and vilification by political party communicators. The digital and social media or online persecution of academics for expressing their views is at variance with the standards of academic freedom (as explained above). One of the main challenges to academic freedom in Ghana is that HEIs, especially public universities, rely on public funding.

With the penchant of the Ghanaian government to assume control over academic and intellectual freedom, one of the issues often neglected in academic freedom discourse is the infiltration of political, religious, and other societal ideologies in the academic environment, intellectual discourse, and research. With the proposed Public Universities Bill, a government can circumvent academic freedom and pursue a political, religious, and social agenda. This contribution argues that, considering the political and religious nature of discussions on LGBTQ+ activities in Ghana, a political- and religious-oriented government who are against LGBTQ+ activities can pursue a religious and moral agenda through the majority of government representatives on the university councils. Since 2005, discussions on the criminalisation of LGBTQ+ activities in Ghana have always

103 cl 5(5) of the Public Universities Bill of 2020.

104 For a general discussion of the impact of social media on academic freedom, see Kwestel "Protecting academic freedom or managing reputation? An evaluation of university social media policies" 2020 *Journal of Information Policy* 151 151-183; Wilson "The changing media and academic freedom" (2016) *Academe* 8 8-12; and Cox "Dear professor, be careful with those tweets, okay? Academic freedom and social media" 2020 *Political Science and Politics* 521 521-526.

assumed political and religious twists, with politicians at the mercy of moral entrepreneurs.[105] More recently, with the debates on the criminalisation of LGBTQ+ activities reaching its crescendo, some churches threatened political actors that if they vote against the Anti-LGBTQ+ Bill, they would be voted out of power by their church members.[106]

5. The Anti-LGBTQ+ Bill

5.1 General overview

Under Ghanaian law, a section of members of parliament can present a bill to Parliament to be passed into law – this is known as a private member bill. A bill typically emanates from the executive based on which public funding is allocated from the Consolidated Fund to enforce such a bill. With private member bills, funding must be privately secured and not charged to the Consolidated Fund.[107] Following article 108 of the 1992 Constitution, the Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill of 2021 was presented to Parliament. The Bill is currently undergoing various stages of constitutional appraisal. Even though a section of members of parliament sponsored the Bill, the provisions of the Bill are informed by ideologies of right-wing Christian groups or Churches in Ghana. The primary objective of the Bill, therefore, is to uphold the moral tenets of Ghanaian society and advance the cultural objectives provided under the Directive Principles of State Policy (Chapter Six) of the Constitution of Ghana.[108] After the content of the Bill was published, it struck several nerves and ignited chilling

105 Ako "Towards the Decriminalisation of Consensual Same-Sex Conduct in Ghana: A Decolonization and Transformative Constitutionalism Approach" 2021 LLD thesis, University of Pretoria 119-134; Baisley "Framing the Ghanaian LGBT rights debates: Competing decolonisation and human rights frames" 2015 *Canadian Journal of African Studies* 383-390.

106 Darko "We will vote out any government that opposes the anti-LGBTQ+ bill – Church of Pentecost' 2021 https://www.myjoyonline.com/we-will-vote-out-any-government-that-opposes-anti-lgbtq-bill-church-of-pentecost/ (27-09-2022).

107 art 108 of the Constitution of the Republic of Ghana of 1992.

108 art 39 of the Constitution of the Republic of Ghana of 1992.

debates in Ghana. Fundamental to those debates is Ghana's stringent restriction on freedom of speech, opinion, expression, and academic freedom.

The Bill seeks to provide proper human sexual rights and Ghanaian family values.[109] The meaning of Ghanaian family values includes the "respect for the sanctity of marriage as a lifelong relationship between a man and a woman, each of whose gender is assigned at birth".[110] It also includes the:

> recognition of the nuclear and extended family as the basic unit for all Ghanaian ethnic communities as well as the recognition that the purpose of Government is to protect and advance the family as the basic unit of society and to safeguard the best interest of children.[111]

Further, under the Bill, Ghanaian family values encapsulate the duty of parents, guardians, and teachers to "ensure that children and young people receive equal protection against exposure to physical, emotional, and moral hazards".[112]

The Bill contentiously notes that Ghanaian family values encompass the idea that gender is a social construct assigned to males and females at birth.[113] Also, to uphold Ghanaian family values is to recognise that the chieftaincy institution is the ultimate source of political and traditional authority in Ghanaian ethnic communities.[114] Most importantly, Ghanaian family values, per the Bill, include the duty to cherish values such as selflessness and communalism, among others.[115] According to the sponsors, the Bill is necessary as it seeks to protect public morals in Ghana and most Ghanaians do not subscribe to homosexual activities

109 preamble of the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021.
110 cl 2 of the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021.
111 *Ibid.*
112 *Ibid.*
113 *Ibid.*
114 *Ibid.*
115 *Ibid.*

and thus these activities must be criminalised.[116] They also argue that homosexual activities are an imposition of morally depraved western countries and an act alien to Ghanaian culture. The sponsors support the Bill because LGBTQ+ activities threaten the public health of Ghana.[117]

5.2 Contextualising the negative and positive obligations to promote Ghanaian family values and proper sexual human rights

Under the Bill, every Ghanaian has a legal duty to promote and protect Ghanaian family values and proper sexual human rights.[118] The scope of application of this duty extends to constitutionally mandated bodies and the arms of government, such as the executive, judiciary, and legislature, the Commission for Human Rights and Administrative Justice (CHRAJ) and the National Commission for Civic Education (NCCE), as well as the media and creative arts industry. In addition, teachers or educational instructors, religious instructors, parents, guardians, churches, mosques, or any other religious or traditional institution or organisation must protect the proper sexual human rights and Ghanaian family values contained in the Bill.[119] The Bill requires that the abovementioned persons or institutions collectively ensure that the proper sexual human rights and Ghanaian family values are integrated into the fabric of national life.[120] They are also enjoined to make conscious efforts to introduce the proper human sexual rights and Ghanaian family values into relevant aspects of national planning.[121]

116 Memorandum to the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021 at 1-3.
117 Memorandum to the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021 at 5.
118 cl 3(1) of the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021.
119 cl 3(2) of the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021.
120 cl 3(3)(a) of the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021.
121 cl 3(2)(b) and (c) of the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021.

The Bill imposes a positive duty on the state, organs of the government, constitutional bodies, and the courts in terms of promoting and putting in place measures that ensure the realisation of the objects outlined in the Bill. The negative obligation arises from the duty imposed on the state, arms of government, teachers, educational instructors, parents, churches, mosques, and other religious bodies to refrain from undermining the Ghanaian family values and proper sexual human rights. Also, individuals are prohibited from soliciting, procuring, counselling, facilitating, or promoting any act undermining Ghanaian family values and proper sexual human rights.[122] Through the positive and negative obligations imposed by the Bill, a specific duty is prescribed to academics (teachers and educational instructors) in the context of LGBTQ+ matters – protect and promote Ghanaian family values and proper sexual human rights. Hence, in LGBTQ+ debates and intellectual discourse engaged in by academics, teachers and educational instructors must have the primary objective of promoting the object and purport of the Bill.[123]

The memorandum to the Bill explains that the negative and positive duties imposed on individuals and state institutions ensure that persons refrain from facilitating and encouraging, whether by a personal act or otherwise, directly or indirectly, any activity that undermines the values contained in the Bill.[124] The Bill does not provide the scope and content of the obligation prescribed in clause 3. However, the duty in clause 3 of the Bill can arise in instances where those persons or institutions perform their legal duties – this duty may be prescribed by the Constitution (in case of constitutionally mandated bodies) or by a contract (such as a contract of employment – in the case of a teacher, educational instructor, or academic). From the perspective of academia, an academic, a teacher, or an educational instructor has several obligations. These obligations include research, teaching, facilitating students' academic works, publishing research

122 cl 4(1) of the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021.
123 cl 3(2)(b) and (c) of the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021.
124 Memorandum to the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021 at 5.

results, and developing curricula and programmes, among others. For academics, teachers, or educational instructors to effectively discharge this obligation, they must have the freedom and autonomy without external interference or fear of being held criminally liable for performing their duties. The obligation in clause 3 of the Anti-LGBTQ+ Bill effectually means that an academic, teacher, or educational instructor must perform their duties regarding the positive and negative obligations imposed by the Bill.

Hence, any intellectual and academic discourse, academic activities, and research output that challenge the object and purport of the Bill logically contravenes and undermines the values in the Bill. Similarly, a student who engages in research activity on LGBTQ+ matters and forms an opinion that is at variance with the object and purpose of the Bill contravenes and undermines the negative and positive duties imposed by the Bill. Undermining the positive and negative duties imposed by the Bill to promote and protect Ghanaian family values and proper sexual human rights attracts penal sanctions.[125] According to the Bill, a person may be convicted and face a fine or a prison term of not less than two months and not more than four months for undermining Ghanaian family values.[126]

Engaging in academic activities in an academic environment that can challenge the arguments and the values underlying the Bill attracts penal sanctions and breaches the hallowed principle of academic freedom protected by the 1992 Constitution. Conversely, a research contribution or academic activity that supports and gives meaning to the values outlined in the Bill will not undermine the values outlined in the Bill and therefore not attract penal sanction. The specific obligation on academics, teachers, and educational instructors to – in the performance of their work-related functions – mandatorily give effect to Ghanaian family values and promote proper sexual rights in Ghana unnecessarily

125 cl 3(2)(b) and (c) of the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021.

126 cl 4(2) of the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021.

intrudes into almost all aspects and domains of freedom of speech and expression and academic freedom.

6. Anti-LGBTQ+ Bill and the limitation of academic freedom

One of the arguments touted by the sponsors of the Bill is that fundamental rights are not absolute and can be limited within the framework of the 1992 Constitution. The centre of gravity of the arguments that the sponsors of the Bill rely on to restrict the litany of rights – such as freedom of speech, freedom of expression, opinion, belief or thought, among others – is the advancement of Ghanaian cultural values. The sponsors of the Bill aver that: "we believe it is ripe for Parliament to actualise the intentions of the framers of the Constitution by providing a legal framework for the promotion of values that define our nationhood".[127] The traditional and cultural values in question relate to the values outlined in article 39 of the 1992 Constitution. Article 39 imposes a positive duty on the state to "encourage the integration of appropriate customary values into the fabric of national life through formal and informal education and the conscious introduction of cultural dimensions to relevant aspects of national planning".[128] According to the sponsors of the Bill, limiting freedom of speech, expression, opinion, thought and belief, as well as academic freedom, is to pave the way for the actualisation and integration of social and cultural values into the national fabric of life.

The critical question that arises is whether the restriction of the rights mentioned above is justified within the framework of the 1992 Constitution. As mentioned, rights are not absolute. Fundamental rights can be limited under certain restricted and defined circumstances. However, the basis of the limitation must meet a legal threshold. Unfortunately, unlike in other countries, the 1992 Constitution does not provide an extensive framework

127 Memorandum of the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021 at 15.
128 art 39 of the Constitution of the Republic of Ghana of 1992.

and parameters for limiting rights.[129] Suffice it to say there are some limitation clauses in the 1992 Constitution. These limitation clauses deal primarily with the right against non-discrimination. For instance, article 17(4) of the 1992 Constitution provides:

> (a) for the implementation of policies and programmes aimed at redressing the social, economic or educational imbalance in the Ghanaian society; (b) for matters relating to adoption, marriage, divorce, burial, devolution of property, on death or other matters of personal law; (c) for the imposition of restrictions on the acquisition of land by persons who are not citizens of Ghana or on the political and economic activities of such persons and for other matters relating to such persons or (d) for making different provision for different communities having regards to their special circumstances, not being provision which is inconsistent with the spirit of this Constitution.[130]

Also, article 41 of the 1992 Constitution provides that the "enjoyment of rights and freedom are inseparable from the performance of duties and obligations".[131] Under the 1992 Constitution, every citizen must respect the freedom and legitimate interests of others and refrain from acting in a manner detrimental to other persons' welfare.[132] Article 12 of the Constitution also provides that the fundamental rights in the Constitution are subject to the respect of the right and freedoms of others and the public interest. The High Court restated this in *Charles Ayuune Akurugu v The Attorney-General*:[133]

> Indeed all persons have the right to freedom of speech and expression, which includes freedom of thought, conscience, and belief. But article 12(2) of the Constitution,

129 See, for instance, s 36 of the Constitution of the Republic of South Africa of 1996 and art 24 of the Constitution of the Republic of Kenya of 2010.
130 art 17(4) of the Constitution of the Republic of Ghana of 1992.
131 art 41 of the Constitution of the Republic of Ghana of 1992.
132 art 17(4) of the Constitution of the Republic of Ghana of 1992.
133 *Charles Ayuune Akurugu v The Attorney-General* Suit No. HR/00039/2015 (29 March 2017).

> 1992 makes these rights subject to the respect for the rights and freedoms of others and the public interest. And it ought to be remembered that by the very nature of human rights, they are considered inherent in a democracy and intended to secure the freedom and dignity of man.[134]

The court also stated that for any measure restricting a fundamental right, particularly those rights contained in article 21 of the 1992 Constitution, one must ascertain whether the said restriction is proportionate or justified.

From the above, certain factors must be considered when limiting fundamental rights. First, the enjoyment of fundamental rights is subject to respect for the rights of others. Secondly, human rights are subject to the public interest. Thirdly, the law or conduct limiting a fundamental right must be proportionate or justifiable (one of the most critical factors). Ghana's apex court explained the proportionality and justifiability test in the consolidated case of *Ahumah Ocansey v The Electoral Commission and the Centre for Human Rights & Civil Liberties v The Attorney-General*.[135] In that case, the Supreme Court of Ghana adopted the Canadian proportionality test (referred to as the Oakes test)[136] to ascertain whether a law or measure justifies the objective it seeks to achieve, whether it interferes with a protected right although that interference is justified, or whether the means are proportionate to the end.[137] The parameters of the proportionality test under Ghanaian law were pontificated by Acquah JSC in the case *Republic v Thompson Books Limited (No. 2)*.[138] The learned judge, in that case, explained the proportionality test in the following manner:

> Now from the language of article 164 and similar provisions like 21(4)(c), the law in question must be reasonably necessary or required; in the public interest, national

134 the *Ayuune* case.
135 *Ahumah Ocansey v The Electoral Commission and the Centre for Human Rights & Civil Liberties v The Attorney-General* [2010] SCGLR 575.
136 *R v Oakes* [1986 1 SCR 103.
137 the *Ahumah* case.
138 *Republic v Thompson Books Limited (No. 2)* [1996-1997] SCGLR 484.

> security etc. This really implies that, for any law to qualify as being reasonably necessary or required, the objective of that law must be of such sufficient importance as to override a constitutionally protected right or freedom. In other words, the objective of the law must not be trivial or frivolous, otherwise that law will not be reasonably necessary or required. The objective must be sufficiently important in the sense that it must relate to concerns which are pressing and substantial. After this, it is important to show that the law itself is a fairly proper means of achieving this important objective. This will involve an examination of the provisions of the law to determine if they infringe fundamental principles of law such as natural justice and whether they unduly impair a constitutional right. The second stage depends on the nature of the law and the issues at stake.[139]

The above abstract limitation analysis can be simplified in chronological order – considering the limitation of rights by the Anti-LGBTQ+ Bill. The first point of consideration in the limitation analysis is to ascertain whether the limitation of a right in the 1992 Constitution (in this case, academic freedom, freedom of thought, belief and conscience, and freedom of speech) is proportionate or justifiable. In determining whether a law is proportional or justifiable, the analysis must first commence with

139 the *Thompson Books* case 500-501. The Oakes test also prescribes that the basis for the limitation of a right must be demonstrably justified. This means that the justification must be informed by strong evidence. Scientific or social science evidence will be required to ascertain whether the measure or the reason for the limitation is demonstrably justified. See *Egan v Canada* 1995 2 SCR 513; *Canada Attorney-General v Hislop* 2007 1 SCR 429. Where such evidence does not exist, the cases of *Libman v Quebec Attorney General* 1997 3 SCR 569; *R v Sharpe* 2001 1 SCR 45; *Harper v Canada (AG)* 2004 1 SCR 827; *R v Bryan* 2007 1 SCR 527; and *Thompson Newspapers Co. v Canada AG* 1998 1 SCR 877 provide that evidence can be developed by using logic. However, where the limitation is minimal, the case of *British Columbia Freedom of Information and Privacy Association v British Columbia Attorney General* 2017 1 SCR 93 provides that scientific or social science evidence may not be needed. The decision in the *Freedom of Information and Privacy Association* case does not apply to the Anti-LGBTQ+ Bill since the erosion of the rights is grave and not minimal.

ascertaining the objective of the measure or law that denies an academic. In this case, what is the objective of the Anti-LGBTQ+ Bill for limiting academics' intellectual or academic freedom,[140] freedom of speech,[141] or freedom of thought, belief, and conscience?[142] The next issue is to determine whether the measure to prevent academics from enjoying their academic freedom is prescribed by legislation. If the said measure is prescribed by legislation, then the analysis must explore whether the objective of the measure is sufficiently important. If the answer is not affirmative, the limitation analysis ends, and the measure will be struck down. If the answer is affirmative, the limitation analysis continues.

The next stage in the limitation analysis is determining whether the measure is proportional to the objective. At this stage, the following questions must be asked:

1. Does the measure infringe on a protected right? If no, the limitation analysis ends, and if yes, the test continues.
2. Is the measure reasonably connected to the objective? If no, the test ends, and the measure is struck down; if yes, the test continues.
3. Does the measure least impair the affected right? In other words, is the measure the best alternative? If no, the test ends and the measure is struck down. If yes, the test continues.
4. In terms of the cost-benefit analysis, do the benefits of the objective outweigh the adverse effects of the measures, considering all the circumstances? If the adverse effect of the measure outweighs the benefits of the objective, the measure fails. If the benefit of the measure outweighs the adverse effects, the measure passes the test.

140 art 21(1)(b) of the Constitution of the Republic of Ghana of 1992.
141 art 21(1)(a) of the Constitution of the Republic of Ghana of 1992.
142 art 21(1)(b) of the Constitution of the Republic of Ghana of 1992.

7. Proportionality or justifiability in the limitation analysis

7.1 The objective of the measure or the law

Generally, determining the objective of the law is straightforward. The Bill, and the memorandum itself, point to the objective of the law. Also, determining the objective of a law or measure is a matter of interpretation.[143] In addressing the objective of the Anti-LGBTQ+ Bill, it is vital to refer to the provisions of the Bill and the memorandum. The Bill seeks to criminalise LGBTQ+ activities in Ghana by ascribing a penal sanction on all persons belonging to the LGBTQ+ community. It also applies to a person who expresses themselves on social media or any technological platform with the intent to support or change opinion regarding acts prohibited by the Bill. The memorandum of the Bill further explains that restricting the fundamental rights of all persons is to give effect to the cultural and traditional aspirations of the framers of Constitution under article 39 of the 1992 Constitution.

In seeking to actualise the cultural aspirations of Ghanaians, the sponsors suggest that LGBTQ+ activities are alien to Ghanaian culture and therefore an imposition of foreign norms by morally depraved western countries. This contribution suggests that even though in the limitation analysis, the Supreme Court of Ghana provided reasons for the limiting rights, the measure must be based on accurate sets of facts. This is because the threshold of limiting fundamental rights is high in that not every reason can be relied upon to limit such freedoms or rights. It even becomes problematic where the reasons advanced are factually inaccurate and a complete mischaracterisation of the law. To buttress this, it is essential to highlight some factual inaccuracies touted in the memorandum of the Bill.

143 In *Tehn Addy v Electoral Commission* 1996-1997 SCGLR 216, the Supreme Court of Ghana, on the one hand, laid down a very discernible and critical principle in Ghanaian human rights law jurisprudence that whenever the need arises for rights to be interpreted broadly, the said right must be interpreted broadly. The court, on the other hand, averred that, when a right is being interpreted *vis a vis* the exercise of power, the power must be interpreted strictly.

The focal point of the reasons advanced by the sponsors of the Bill is that Ghanaian and African culture abhors same-sex relationships. Hence, such acts are alien to Ghanaian and African cultures. To begin with, some academics have suggested that the consistent reliance of African countries on African culture and values to disregard the respect for fundamental rights is unjustified.[144] Suffice it to say that the sponsors of the Bill rely on pronouncements by the National House of Chiefs that homosexuality is unknown in African culture.[145] This contribution argues that the reasons advanced by the sponsors of the Bill do not consider anthropological and historical facts on the issue. This is because available academic and anthropological studies reveal that the claim of homosexuality being alien to African and Ghanaian culture is inaccurate.

To provide some context, Ako, a Ghanaian scholar, has asserted that homosexuality was part of pre-colonial African culture.[146] He explains that, even though pre-colonial African societies valued heterosexual relationships for purposes of childbirth and continuation of the family system, they also valourised same-sex relationships as an important part of some African societies.[147] Epprecht also provides that pre-colonial African societies embraced same-sex relationships.[148] According to Ngwena, same-sex relationships are part of our Africanness.[149] Ambani opines that some parts of African societies accepted same-sex relationships.[150]

144 El-Obaid and Appiagyei-Tuah "Human rights in Africa: A new perspective on linking the past to the present" 1996 *McGill Law Journal* 819-819.

145 Memorandum to the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021 at 1-2.

146 Ako "Domesticating the African Charter on Human and Peoples' Rights in Ghana: Threat or promise to sexual minority rights?" 2020 *African Human Rights Yearbook* 99-106.

147 Ako (n 145) 106.

148 Epprecht "Bisexuality and the politics of normal African ethnography" 2006 *Anthropologica* 187 190-192.

149 See Ngwena *What is Africanness? Contesting Nativism in Race, Culture, and Sexualities* (2018).

150 Ambani "A triple heritage of sexuality? Regulation of sexual orientation in Africa in historical perspective" in Namwase and Jjuuko (eds) *Protecting the Human Rights of Sexual Minorities in Contemporary Africa* (2017) 23-24.

In addition to the academic and anthropological observations, there are incontestable accounts of the existence of homosexual relationships in some parts of Africa. The *Yan Daudu* system among the Hausa people in Northern Nigeria was described as "men who are more or less exclusively homosexual (not always, but often transvestite or at least effeminate males)".[151] In Uganda, the record shows that Kabaka Mwanga II had a sexual relationship with men and executed them afterwards.[152] Thoonen reveals that the sexual orientation of Kabaka Mwanga II was a common reflection of sexualities in pre-colonial African societies.[153] In Ghana, Signorini discovered a unique type of marriage between persons of the same sex among the Nzema people, also known as *agonwole agyale*. While Signorini was speculative about the sexual relations in this type of marriage,

151 Salamone "Hausa concept of masculinity and the Yan Daudu" in Ouzgane and Morrell (eds) *African Masculinities: Men in Africa from the Late Nineteenth Century to the Present* (2005) 80. See generally Gaudio *Allah Made Us: Sexual Outlaws in an Islamic African City* (2009); Murray "Review: Allah made us: Sexual outlaws in an Islamic African city by Rudolf Pell Gaudio" 2010 *Language in Society* 696; Murray and Roscoe (eds) *Boy-Wives and Female Husbands* (1998); Zilmman, Davis and Raclaw (eds) *Queer Excursions: Retheorizing Binaries in Language, Gender, and Sexuality* (2014); Wilcox *Queer Religiosities: An Introduction to Queer and Transgender Studies in Religion* (2021); Pittin *Women and Work in Northern Nigeria: Transcending Boundaries* (2002); Ayeni "Human rights and the criminalisation of same sex relationships in Nigeria: A critique of the Same Sex Marriage (Prohibition) Act" in Namwase and Jjuuko (eds) *Protecting the Human Rights of Sexual Minorities in Contemporary Africa* (2017); Murray "Gender-defined homosexual roles in Sub-Saharan Islamic cultures" in Murray and Roscoe (eds) *Islamic Homosexualities: Culture, History and Literature* (1997); Bolich *Transgender, History and Geography* (2007); and Gaudio "Men Who Talk Like Women: Language, Gender and Sexuality in Hausa Muslim Society" 1996 PhD thesis, Stanford University.

152 Blevins "When sodomy leads to martyrdom: Sex, religion, and politics in historical and contemporary contexts in Uganda and East Africa" 2011 *Theology & Sexuality* 51-54; Hoad "Arrested development or the queerness of savages: Revisiting evolutionary narratives of difference" 2000 *Postcolonial Studies* 133 155-156; Rao "Re-membering Mwanga: Same sex intimacy, memory and belonging in post-colonial Uganda" 2015 *Journal of Eastern African Studies* 1 1-19; and Nabutanyi "(Un)complicating Mwanga's sexuality in NaKisanze Segawa's the triangle" 2020 *A Journal of Lesbian and Gay Studies* 439.

153 Thoonen *Black martyrs* (1941) 168.

the *agonwole agyale* was a system that represented a "sublimation of deep feeling which is of considerable value as a social cohesion in Nzema culture and which is recognised by that society".[154] It is noteworthy that most ethnic groups in Ghana had elaborate laws that characterised the type of sex. However, those laws did not criminalise homosexual relationships.[155] Same sex relationships were criminalised after the promulgation of the Criminal Ordinance 12 of 1892 by the British Colonial Government, and this was brought into the current Criminal Offence Act 29 of 1960. Hence, by logical reasoning, the criminalisation of consensual same-sex relationships was an introduction of the British colonial government and not because African and Ghanaian culture abhorred consensual same-sex relationships.

Besides, the constitutional provision that the sponsors of the Bill claim to give effect prescribes a procedure to actualise the cultural aspirations of the framers of the Constitution. Article 39 of the 1992 Constitution prescribes that the state must strive to integrate cultural values into national life and planning through formal and informal education. Article 39 of the 1992 Constitution does not prescribe that in achieving the cultural objectives, a penal code should be utilised, or fundamental rights contained in other sections of the Constitution should be restricted. Accordingly, the claims by the sponsors of the Bill to criminalise and restrict fundamental freedoms are a mischaracterisation of article 39. As such, they cannot be a valid reason to restrict the freedom of speech, thought, belief, and conscience, including academic freedom.

Another reason advanced by the sponsors of the Bill to criminalise freedom of speech and academic freedom concerning LGBTQ+ matters is the containment of the spread of HIV infection

154 Signorini "Agonwole agyale: The marriage between two persons of the same sex among the Nzema of Southwestern Ghana" 1973 *Journal Des Africanistes* 221-222. See also Dankwa "The one who says I love you: Same-sex love and female masculinity in postcolonial Ghana" 2011 *Ghana Studies* 223 223-224.

155 See Sarbah *Fanti Customary Laws: A Brief Introduction to the Principles of the Native Laws and Customs of the Fanti and Akan Sections of the Gold Coast with a Selection of the Cases Thereon Decided in the Law Courts* (1897); Rattray *Ashanti law and Constitution* (1929).

in Ghana. According to the sponsors of the Bill, same-sex relationship is a super-spreader of HIV/AIDS in Ghana.[156] They further argue that about 18.1% of persons living with HIV are men sleeping with men. Hence, restriction and criminalisation of LGBTQ+ activities are significant in reducing the spread of HIV.[157] Again, this reason to restrict and criminalise the enjoyment of fundamental rights poses some concerns. While it may fall within the scope of the constitutional directive of dealing with public health concerns,[158] the issue remains regarding the existence of a causal link between the criminalisation and restriction of fundamental rights and the limitation of the spread of HIV. This causal link in the public health analysis cannot be neglected. The sponsors of the Bill failed to provide a causal link between criminalisation and restriction of fundamental rights and HIV reduction in Ghana. Neither did they reference another country that had established such a causal link. Murray and Viljoen argue that most HIV infection is spread through unprotected heterosexual sexual intercourse.[159]

Finally, one central argument relied upon by the sponsors of the Bill is that most Ghanaians abhor such rights primarily because of their religious inclination. Thus, the restriction of the rights in the Bill is justified. This objective of the Bill is problematic because the current constitutional dispensation in Ghana prescribes that the object of the law must be to protect all persons, including the vulnerable and minority groups. Failure to do so exposes persons in minority groups to abuse and other discriminatory treatments by the public. Regarding religious foundation as a basis to restrict fundamental rights, the sponsors of the Bill, which include Christian, Charismatic Council, and Coalition of Muslim Organisations of Ghana, seek to create an overarching moral and religious foundation for the advancement

156 Memorandum to the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021 at 5.
157 *Ibid.*
158 art 21(4) of the Constitution of the Republic of Ghana of 1992.
159 Murray and Viljoen "Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union" 2007 *Human Rights Quarterly* 86 96-97.

and restriction of fundamental rights.[160] Fortunately, the Constitution does not give room for the utilisation of majority religious beliefs and dogmas as a basis to restrict fundamental rights. As was explained by Archer J in *Osam-Pinanko v Lartey and Another*,[161] "there is no established religion in Ghana recognised as the religion of the State. The courts of Ghana apply the laws of the country and not what the Christian Bible teaches".[162] This pronouncement by Archer J (as he then was) is profound in the sense that the dogmas and teachings of a particular religion cannot be the basis upon which to organise the activities and enjoyment of the fundamental right of individuals.

7.2 Is the limitation measure prescribed by legislation?

This stage requires an inquiry into whether the restriction on academic freedom, freedom of speech, thought, and belief is prescribed by legislation (assuming the Bill is passed into law).[163] An affirmative response means that the limitation analysis continues. With an affirmative limitation, the next question is to assess whether the objective of the limitation measure is sufficiently important. Is the case of the criminalisation and restriction of free speech and academic freedom, among others, sufficiently important? The reason advanced by the sponsors of the Bill to restrict and criminalise freedom of thought, conscience, academic freedom, and free speech is to actualise the cultural values contained in article 39 of the 1992 Constitution. In addition, the sponsors of the Bill argue that because of the spread of HIV/AIDS in Ghana, same-sex relationships should be criminalised. They also suggest that because of the religious beliefs of most Ghanaians, the restriction and criminalisation of academic freedom, freedom of thought, belief and conscience is justified. According to this test, the reasons advanced by the sponsors of the

160 Memorandum to the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021 at 2-3.

161 *Osam-Pinanko v Lartey and Another* [1967] GLR 330.

162 *Osam-Pinanko v Lartey* [1967] GLR 330 382-385.

163 See *R v Urbanski*; *R v Elias* 2005 2 SCR 3; *R v Thomsen* 1998 1 SCR 640; *R v Therens* 1985 1 SCR 613. According to *Irwin Tot Limited v Quebec (Attorney General)* 1998 1 SCR 927, a prescribed law must be ascertainable in accordance with prescribed and objective standards and not vague.

Bill must not be frivolous. For instance, if the sponsors of the Bill could substantiate with scientific evidence that criminalisation and restriction of fundamental rights have a causal link to the reduction of HIV/AIDS, such measures and objectives of the Bill could have constituted sufficient grounds to proscribe LGBTQ+ activities in Ghana.

Since the dogmas of religious organisations do not constitute the basis for the enjoyment of constitutional rights, the objective of the Bill is insufficient to restrict the rights of individuals. Also, article 39 of the Constitution cannot be a sufficient ground to limit the fundamental rights of individuals. In addition, the sponsors of the Bill have failed to establish that the restriction of fundamental rights has a causal link to the reduction of HIV/AIDS. Since the Bill's sponsors could not provide such a causal link, the objective of the Bill becomes a mere extrapolation or inference, if not frivolous and without basis. Such frivolity cannot be a basis for restricting a right. Also, the requirement that the legislation limiting the right must be sufficiently important means that the objective of the law must be consistent with principles underlying freedom and democratic society. The foregoing principle was established in the Canadian case of *Figueroa v Canada Attorney General*.[164] Hence, the object of the Anti-LGBTQ+ Bill must be to advance the democratic gains of Ghana and not to derail them. Advancing equality, protecting the vulnerable and minority groups in society, and promoting and ensuring that the interest of all persons are critical principles informing Ghanaian democracy, which the Bill fails to promote. With the objectives of the measures being insufficiently important, the limitation analysis must end at this point. However, for academic reflection, it is necessary to explore the implications of the Bill on other factors in the limitation analysis.

7.3 Is the measure proportional to the objective?

Determining whether the measure is proportional to the objective is contingent on several other factors. The first is whether the limiting measure or law infringes on a protected right. The

164 *Figueroa v Canada Attorney General* 2003 1 SCR 192.

extent and scope of infringing the right to free speech, freedom of thought, belief and conscience have been explained in the previous section. The extent of restriction proposed by the Bill is further compounded by the reality that a teacher, educational instructor, or an academic who fails to uphold Ghanaian family values and proper sexual human rights will be criminally liable. Since it is established that the Bill infringes on academic freedom, freedom of thought and conscience, and freedom of speech, the next step is to determine whether the measure or law is rationally connected to the objective. The rational connection test means that the limitation measure or law must not be arbitrary, unfair, or based on irrational considerations.[165]

The rational connection test requires a causal link or relationship between the limit (restriction of a right) and the objective. Scientific observation and evidence are essential in establishing a rational connection, showing that the limit affects the objective.[166] The rational connection test is vital and must be applied stringently, especially in the case of the Anti-LGBTQ+ Bill because it concurrently restricts several rights. The practical application of this test means that the sponsors of the Bill must provide scientific evidence and observation proving that there is a causal link between the limitation of academic freedom, for instance, and the spread of HIV/AIDS in Ghana. The sponsors of the Bill again failed to adduce scientific evidence to substantiate the basis of their limitations.

The proportionality test also requires that the limiting measure or law must impair the affected right as little as possible.[167] This test requires that the sponsors of the Bill prove whether, among a host of alternatives available, there is no measure that is less right-impairing or less restrictive in achieving the objective. The sponsors argue that the objective of the Bill is to actualise the cultural aspirations outlined in article 39 of the 1992 Constitution. The reason for effectuating this cultural objective is that LGBTQ+ activities are at variance with

165 *R v Butler* 1992 1 SCR 452; *Thomson Newspapers Co. v Canada Attorney General* 1998 1 SCR 887; *R v Sharpe* 2001 1 SCR 45.
166 *R v Butler* 1992 1 SCR 452.
167 *R v Edward Books and Art Limited* 1986 2 SCR 713.

the cultural values of Ghana. When giving effect to article 39 of the 1992 Constitution, the sponsors of the Bill were required by article 39 itself to adopt formal and informal education as tools or mechanisms to actualise cultural objectives, not to impose right restrictions and penal sanctions to achieve the said objective.[168]

Article 39 does not confer the authority on the sponsors of the Bill to employ penal sanctions or right-restrictive measures to give effect to the cultural objectives of Ghana. The content of article 39, therefore, provides a less restrictive alternative for the sponsors of the Bill and not the penal sanction or right-restrictive measures adopted in the Bill. In sum, the reasons advanced by the sponsors of the Bill to limit fundamental rights – such as freedom of speech, freedom of thought, belief and conscience, academic freedom, and freedom of expression – do not meet the threshold required to justify the limitation of fundamental rights. This is because the basis of the restriction does not meet the proportionality or justifiability analysis touted by the Supreme Court of Ghana.

8. Concluding reflections and observations

This chapter explored the implication of the Anti-LGBTQ+ Bill on academic freedom in HEIs in Ghana. It discussed the constitutional and historical foundations of academic freedom in Ghana. It reflected on the key arguments in the Bill and provided incontrovertible counter-narratives to those arguments, which the sponsors of the Bill failed to acknowledge. This chapter also discussed the constitutionality of the provisions in the Bill that restrict academic freedom, freedom of speech, expression, opinion, thought, belief, and conscience. It reflected on the pronouncements by the Supreme Court of Ghana regarding the protection of rights and the parameters of limiting fundamental rights contained in the 1992 Constitution of Ghana. It argued that the provisions in the Bill restricting academic freedom, freedom of speech and expression falls short of the legal threshold required to limit individual rights contained in the 1992 Constitution. The chapter suggested that the limitation of rights is legally

168 art 39 of the Constitution of the Republic of Ghana of 1992.

unjustifiable, especially considering the reasons advanced by the sponsors in the memorandum of the Bill.