IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA- A.D. 2024

CORAM: BAFFOE-BONNIE JSC (PRESIDING)
LOVELACE-JOHNSON (MS.) JSC
AMADU JSC
KULENDI JSC
GAEWU JSC
DARKO ASARE JSC
ADJEI-FRIMPONG JSC

WRIT
NO. J1/18/2021
24TH JULY, 2024

DR. PRINCE OBIRI-KORANG ……………….. PLAINTIFF

VRS

ATTORNEY GENERAL ………………….. DEFENDANT

JUDGMENT

AMADU JSC:

INTRODUCTION

My Lords, the preamble to the Constitution of the Republic of Ghana 1992, provides;

IN THE NAME OF THE ALMIGHTY GOD
We the People of Ghana,

IN EXERCISE of our natural and inalienable right to establish a framework of government, which shall secure for ourselves, and posterity the blessings of liberty, equality of opportunity and prosperity;

***IN A SPIRIT** of friendship and peace with all peoples of the world;*

***AND IN SOLEMN** declaration and affirmation of our commitment to:*
Freedom, Justice, Probity and Accountability;

The Principle that all powers of Government spring from the Sovereign Will of the People;

The Principle of Universal Adult Suffrage;

The Rule of Law;
The protection and preservation of Fundamental Human Rights and Freedoms, Unity and Stability for our Nation.

DO HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

(1) **The Constitution of the Republic of Ghana 1992, from it's very preamble amplifies certain core values, pillars and features upon which it is anchored. These values are well intended to regulate the affairs of the people, it's institutions and leaders. In the comity of constitutional democracies, the adherence and respect for the rule of law, the protection and preservation of fundamental human rights and freedoms of every individual, is invariably non-negotiable. However, the operationalization, enforcement and interpretation of any Constitution can stultify the realisation of these principles and portend an anathema to societal growth of nation state and the entire human race.**

(2) **Whereas, the enjoyment and ventilation of human rights have been guaranteed under the 1992 Constitution, just as in all civilized nations across the world, these rights, freedoms and liberties are not at large**

absolute and without limits. In limiting the enjoyment of these rights and freedoms, however, such limitations and consequential sanctions ought to find expression and justification within the constitution, or other statute consistent with the constitution lest the limitations may be potentially or actually unconstitutional.

(3) **Section 104 of the Criminal and Other Offences Act 1960 (Act 29)** ***criminalises the offence of unnatural carnal knowledge*** **with or without consent. The section enacts as follows:**

(1) A person who has unnatural carnal knowledge

(a) of another person of not less than sixteen (16) years of age without the consent of that other person commits a first degree felony and is liable on conviction to a term of imprisonment of not less than five (5) years and not more than twenty-five (25) years; or

(b) of another person of not less than sixteen (16) years of age with the consent of that other person commits a misdemeanor; or

(c) of an animal commits a misdemeanour.

(2) Unnatural carnal knowledge is sexual intercourse with a person in an unnatural manner or, with an animal. *(Emphasis added).*

(4) **In the instant action which invokes the original jurisdiction of this court, we have been urged by the Plaintiff to pronounce as unconstitutional,** ***Section 104(1)(b) of the Criminal and Other Offences Act, 1960 (Act 29)*** **which criminalises** ***unnatural carnal knowledge.*** **The Plaintiff's contention is that, the said section violates the rights of individuals** *(especially homosexuals)* **to liberty, non-discrimination, and privacy as guaranteed under Articles 14(1), 17(2) and 18(2) of the 1992 Constitution. The Defendant** *(the Attorney General)* **contests this assertion**

of the Plaintiff, and argues *contra* **that, the criminalization of unnatural carnal knowledge under Section 104(1)(b) of Act 29 is consistent with the letter and spirit of the 1992 Constitution. For the Defendant, same is in accord with the moral values of the state and consistent with the intendments of the framers of both the Constitution and the said provision under Section 104(1)(b) of Act 29.**

(5) **By the writ filed on the 26th of August 2021, the Plaintiff prays against the Defendant** *(Attorney-General)*, **the following reliefs:**

a) A declaration that Section 104(1)(b) of the Criminal and Other Offences Act (Act 29) 1960 is ultra vires Article 18(2) of the Constitution of Ghana of 1992 in so far as the said section will lead to the unlawful and arbitrary interference of the privacy of all adult persons living in Ghana.

b) A declaration that Section 104(1)(b) of the Criminal and Other offences Act 29 of Ghana is ultra vires Article 17(2) of the Constitution of Ghana of 1992 in so far as the said section arbitrarily and unjustifiably discriminates against persons based on their sexual orientation.

c) A declaration that Section 104(1)(b) of the Criminal and Other Offences Act 20 of Ghana is ultra vires Article 14(1) of the Constitution of Ghana of 1992 in so far as the said section arbitrarily deprives homosexuals of the liberty to select their intimate sexual partners and their right to engage in intimate sexual conduct without state interference.

THE PLAINTIFF'S CASE

(6) **In his statement of case, the Plaintiff contends that, Section 104(1)(b) of Act 29 which criminalise, the act of "*unnatural carnal knowledge*" contradicts Article 18(2) of the Constitution 1992 as the**

statutory provision unlawfully and arbitrarily invades the privacy of not only consenting adults who engage in homosexual acts but also, the privacy of the majority of consenting adults who may engage in heterosexual conducts.

(7) **Plaintiff's premise for this contention is that, *"the term "unnatural carnal knowledge" as it applies or was applied in various jurisdictions including the United Kingdom where the term and offense was inherited from by Ghana may include penetration per anus, the penetration of the female genitalia or male/female rectum with an inanimate object, fellatio and cunnilingus all of which are not exclusive to homosexuals".***

(8) **It is further submitted by the Plaintiff that, any contention by the Defendant that, Section 104(1)(b) was enacted to protect morality is untenable. He reasons that, with the issue of morality, there must be distinguished *"public morality"* from *"private morality"* as urged by such legal philosophers like John Stuart Mills, HLA Hart as well as the Report of the Committee on Homosexual Offences and Prostitution of 1957 (Wolfenden Report).**

(9) **Whereas the Plaintiff concedes that, a law protecting public morality is justified, he however contends that, issues of private morality should not be the concern of the state. The Plaintiff's contention is that, seeking to regulate same will lead to serious and unjustifiable breach of the privacy of the individual.**

(10) **The Plaintiff thus submits that, based on the distinction between *"public morality"* and *"private morality",* when homosexuality and all other vaginal sexual acts are carried out in the private among consenting adults without causing harm to one another, their actions do not fall**

within the purview of the law and same is therefore protected under Article 18(2) of the Constitution, 1992.

(11) **With respect to the second relief, the Plaintiff submits that the entrenched provision in Article 17(2) of the 1992 Constitution seeks to ensure that legislation does not discriminate against any person or group of persons including homosexuals based on their inherent specific characteristics. The Plaintiff argues that, the list of persons protected under Article 17(2) of the Constitution is not exhaustive and thus, having regard to the spirit and principles undergirding the Constitution 1992, same should include homosexuals.**

(12) **The Plaintiff attacks any attempt to foreclose the sexual preferences of such persons based on religious arguments, as homosexuals are also entitled to the freedom of religion. The Plaintiff refers to Article 21(1)(c) of the Constitution 1992, as guaranteeing the right of any person not to believe in any supernatural or other being. According to the Plaintiff, while the constitution guarantees all adult persons the liberty to choose a partner with whom they may engage in consensual private sexual activities, Section 104(1)(b) of Act 29 arbitrarily and unjustifiably discriminates against homosexuals by preventing them alone from participating in their sexual preference.**

(13) **The Plaintiff argues further that, the application of the provisions in Section 104(1)(b) of Act 29 indicates a pattern of historical discrimination against homosexuals. According to the Plaintiff, Section 104(1)(b) of Act 29 criminalises acts like penetration per anus and fellatio among consenting adults as a whole and that, the historical pattern with regard to prosecution and persecution under the said provision seems to have disadvantaged homosexual gays, as there is not yet a reported case relating to the offense of unnatural carnal knowledge in which the accused persons are consenting heterosexual**

adults who engaged in sexual behaviours other than penile to vaginal intercourse.

(14) **The Plaintiff submits that, *"penetration per anus (along with other sexual acts such as fellatio, masturbation, use of sex toys etc.) is gays"* main mode of sexual expression and that denying them of their only mode of sexual expression is discriminatory because heterosexuals are permitted the right to sexual expression** *(at least, penile-vaginal intercourse)* **in a way that they prefer.**

(15) **The Plaintiff further argues in support that, the cirminalisation of acts of *"unnatural carnal knowledge"* perpetuates stigma and hostile discrimination against homosexual persons. Furthermore, same also negatively affects the health of the gay community as it has the tendency to dissuade homosexual persons** *(particularly gays)* **from accessing health facilities. The Plaintiff surmises further that, even when they visit such health facilities they are likely to be ignored or attended to with disdain and contempt.**

(16) **On his final relief, the Plaintiff submits that, Section 104(1)(b) of Act 29 infringes the personal liberty of the individual under Article 14(1) of the Constitution 1992 as same cannot also be justified under any of the exceptions provided under Clauses (a)-(g) of Article 14(1) of the Constitution 1992. The Plaintiff argues that, the right to liberty encompasses the right to sexual autonomy as all adults of consenting age are entitled to complete liberty over the most intimate decisions relating to their personal lives, including the choice of a partner.**

<u>THE DEFENDANT'S CASE</u>

(17) **The Defendant had no objection to the** *locus standi* **of the Plaintiff nor any objection to the jurisdiction of this Court to adjudicate over the**

instant action. In defence to the merits of the action, the Defendant submitted on the first relief that, having regard to the letter and spirit of the 1992 Constitution, it can be argued that, the Constitution did not envisage a society where same sex relations or bestiality would be tolerated. The Defendant argues that, Article 18 of the 1992 Constitution in providing for the right to privacy is mindful of the protection of morals and the prevention of disorder or crime. For the Defendant, by criminalising the act of "*unnatural carnal knowledge*" under Section 104 of Act 29, it is conceivable that, it is consequent upon what the society approves to be morally wrong.

(18) **The Defendant submits further that, from the time the Constitution 1992 was promulgated, Ghanaian society has not shown any signs of accepting homosexuality and Section 104 of Act 29 had prevailed since then and has stayed. The Defendant has cited several academic studies and has made references to some statements by senior public functionaries such as the president of the Republic of Ghana and the Speaker of Parliament of Ghana all of which in our view are irrelevant and inconsequential to the determination of the legal issue provoked by the Plaintiff's action.**

(19) **On the first relief sought by the Plaintiff, the Defendant submits that, per the letter and spirit of Article 18(2) of the 1992 Constitution, and in keeping with the values of Ghanaians, the said relief be dismissed. The Defendant contends further that, Section 104(1)(b) of Act 29 does not authorise any person to enter another's bedroom for the purposes of ascertaining whether there has been or there is any unnatural carnal knowledge taking place therein. Therefore, the law does not seek to infringe on the privacies of individuals. On the contrary, the law is intended to protect the moral fiber of society.**

(20) **On the second relief sought by the Plaintiff to the effect that, Section 104(1)(b) of Act 29 is** *ultra vires* **Article 18(2) of the 1992 Constitution,**

the Defendant submits that, Article 17(2) of the Constitution 1992, makes no mention of sexual orientation as one of the grounds of discrimination recongised by Ghanaians. For the Defendant, for any such term of sexual orientation to be imported into the Constitution, same requires a deliberate amendment of the Constitution. Relying on the case of T.T. NARTEY VS GODWIN GATI [2010] SCGLR 74, the Defendant submits that, unnatural sexual acts such as those described by the Plaintiff namely, penetration per the anus and fellatio among others can hardly be said to be justifiable by any stretch of imagination and therefore cannot be said to come under the purview of Article 17(2) of the Constitution 1992.

(21) **Finally, with respect to the third relief, the Defendant submits that, the freedom contemplated under Article 14(1) of the Constitution 1992 cannot be stretched to encompass the kind of freedom the Plaintiff refers to. The Defendant denies Plaintiff's contentions seeking to suggest that, no harm is caused to practitioners of the criminal acts of unnatural carnal knowledge. For the Defendant, studies have shown to the contrary that, homosexual acts like penetration through the anus among other unnatural sexual practices cause serious harm to those who practice it.**

MEMORANDUM OF ISSUES

(22) **On the 24th of August 2022, the parties filed a joint memorandum of issues formulating the following for determination:**

1. ***Whether or not Section 104 (1)(b) of the Criminal and Other Offences Act (Act 29) of 1960 contravenes the provisions on the right to privacy enshrined in Article 18(2) of the 1992 Constitution of Ghana, by criminalizing unnatural carnal knowledge between consenting adults in seclusion.***

2. ***Whether or not Section 104(1)(b) of the Criminal and Other Offences Act (Act 29) of 1960 contravenes the provisions on the***

right to equality and non-discrimination enshrined in Article 17(2) of the Constitution of Ghana, 1992 by criminalizing unnatural carnal knowledge between consenting adults in seclusion.

3. ***Whether or not Section 104(1)(b) of the Criminal and Other Offences Act (Act 29) of 1960 contravenes the provision on the right to personal liberty enshrined in Article 14(1) of the 1992 Constitution of Ghana by criminalising unnatural carnal knowledge between adults in seclusion.***

4. ***Whether or not personal liberty under Article 14(1) of the 1992 Constitution of Ghana can be extended to include the choice of a sexual partner.***

5. ***Whether or not unnatural carnal knowledge is harmful to persons who practice same.***

JURISDICTION OF THE SUPREME COURT

(23) **As observed earlier, there has been no objection to the jurisdiction of this court for the reliefs sought in the action. The absence of any objection to jurisdiction will however, not automatically result in an assumption of jurisdiction by the court, as this court is constitutionally obligated to first determine in any action whether or not it's jurisdiction has been properly invoked. The constitutional yardsticks under Articles 2(1) and 130(1) of the 1992 Constitution on which the Plaintiff relies in invoking the original jurisdiction of this court requires that, there is a real and genuine question for determination before the court can proceed to test the constitutionality of any legislation. In the instant case in particular, the provision of the legislation in question has been on the statute books for over six (6) decades.**

(24) **The Plaintiff has invoked the court's jurisdiction under Articles 2(1) and 130 of the 1992 Constitution to determine the present action. The said articles provide as follows:**

"Article 2(1)

(1) ***A person who alleges that -***

(a) an enactment or anything contained in or done under the authority of that or any other enactment; or

(b) any act or omission of any person;

is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect.

Article 130(1)

(1) ***Subject to the jurisdiction of High Court in the enforcement of the Fundamental Human Rights and Freedoms as provided in Article 33 of this Constitution, the Supreme Court shall have exclusive original jurisdiction in-***

(a) all maters relating to the enforcement or interpretation of this Constitution; and

(b) all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under this Constitution."

(25) **A combined reading of the above constitutional provisions settles the proper forum question. That is, it is only this court which is vested with the power to test the constitutionality of a legislation made by the Parliament of the Republic of Ghana and ascertain whether or not same is consistent with the Constitution. This constitutional power vested in the Supreme Court is grounded in the principle of supremacy of the Constitution, as expressed under Article 1(2) of the 1992 Constitution**

and this court being the only forum in our constitutional arrangement to determine same, is the proper forum. Thus, in accordance with Article 1(2) of the 1992 Constitution and by virtue of the jurisdiction vested thereby, where any law is inconsistent with the constitution, then this court shall have the power to pronounce same as unconstitutional, and to the extent of the inconsistency strike same down.

(26) **In order to avoid the abuse of the original jurisdiction of this court especially on the determination of issues relating to allegations of violations of fundamental rights and enforcement thereof, this court has consistently frowned upon attempts to usurp the jurisdiction of the High Court in matters where the parties and/or their counsel cleverly becloud the issues before the court as if same were constitutional issues. This court also examines situations where there is a settled precedent defining the subject of the dispute; or where some other forum or body is better placed to interrogate and determine any issue. The settled law practices is that, for this court to accede to an invitation to interpret provisions of the constitution, relative to an impugned statute, the court is mindful of the following: whether;**

i. ***The constitutional provisions under consideration are vague, unclear or ambiguous;***

ii. ***Rival meanings have been placed on the true meaning and effect of the provisions of the constitution.***

iii. ***There is an interplay between institutions of the state vested with constitutional authority to ascertaining who has the requisite mandate to deal with the special occasion.***

iv. ***Where there is a conflict between two or more provisions of the constitution and a question arises which of them is to prevail.***

(27) **Where therefore, there is no ambiguity or conflict regarding the interpretation of any provision of the constitution or the scope of the functions of institutions set up under the constitution, then, there is no need for such interpretation. These yardsticks have found constitutional support for several decades in our jurisdiction from a myriad of notable decisions such as REPUBLIC VS. SPECIAL TRIBUNAL, EX-PARTE AKOSAH [1980] GLR 592; YIADOM I VS. AMANIAMPONG [1981] GLR 3, SC; THE REPUBLIC VS. MAIKANKAN [1971] 2 GLR 473.**

(28) **My Lords, whereas the above judicial tests, are applied in situations inviting this court for an interpretation of a provision of the constitution, they may not necssarily be appropriate to be utilised in situations of enforcements particularly, where the court is invited to ascertain the legality or constitutionality of a legislation by the Parliament of the Republic of Ghana which may ordinarily not require interpretation of the constitutional provision, but only an application of the constitutional provision to such legislations which any other court can lawfully determine. In such latter situation, this court in assessing whether its jurisdiction has been properly invoked must ascertain whether, the allegations made by the Plaintiff is not fanciful and that same,** *prima facie* **raises a genuine and real constitutional issue. This will ascertain whether the enactment in question or the provision thereof, is inconsistent or contradictory with a provision of the constitution as provided for under Article 2(1) of the 1992 Constitution.**

(29) **Thus, although Article 2(1) of the 1992 Constitution provides for the right to invoke the jurisdiction of this Court upon an allegation of an enactment having been made in excess of the powers of parliament, or being inconsistent with any provision of the Constitution 1992, such allegations should be real, genuine and live not frivolous, fanciful or merely academic. Therefore, where the court has already decided on any such enactment or a provision of the Constitution, this court will decline**

jurisdiction to re-open any such question already determined unless there is a special consideration to depart from its earlier decision.

(30) **Authorities abound from this court on various situations and circumstances where the court pronounced as unconstitutional, pieces of legislations made by the legislature and even the executive and had struck down same. See cases such as PROF. KWADWO APPIAGYEI-ATUA & 7 ORS. VS. ATTORNEY-GENERAL WRIT NO. J1/14/2022; NEW PATRIOTIC PARTY VS. INSPECTOR GENERAL OF POLICE [1992-93] GLR 586; JUSTICE ABDULAI VS. THE ATTORNEY-GENERAL (UNREPORTED) WRIT NO.J1/07/2022 DATED 9TH MARCH 2022; MARTIN KPEBU VS. ATTORNEY-GENERAL [2015-2016] 1 SCGLR 143 etc. In the instant case however, having reviewed the reliefs sought and the respective statements of case filed, we are convinced that, the court's jurisdiction has been properly invoked to determine the constitutionality of Section 104(1)(b) of the Criminal and Other Offences Act, 1960 (Act 29).**

<u>THE STATUTORY PROVISION IN QUESTION</u>

(31) **The Offence of Unnatural Carnal Knowledge & Section 104(1)(b) of Act 29:**

Under Section 104(1)(b) of Act 29, a person who has unnatural carnal knowledge of another person of not less than sixteen years of age with the consent of that other person commits a misdemeanor. In the case of a person less than the age of sixteen years, a person who has *unnatural carnal knowledge* of such a person, with or without consent commits a first degree felony. Again unnatural carnal knowledge of an animal is also criminalised. (See Sections 104(1)(a) &(c). *The Plaintiff takes no issue with unnatural carnal knowledge* of persons below the age of sixteen years as well as animals but targets only adult persons who are not less than sixteen (16) years of age.

(32) **Section 104(2) of Act 29 defines *unnatural carnal knowledge* as "*sexual intercourse with a person in an unnatural manner or, with an animal*." It is to be noted that our laws thus, recognise only heterosexual life as sexual intercourse between a male and female. This is permissible if same is penetration through the vagina. In GLIGAH & ATTISO VS. THE REPUBLIC [2010] SCGLR 870, this court speaking through Dotse JSC defined carnal knowledge as "*the penetration of a woman's vagina by a man's penis. It does not really matter how deep or however little the penis went into the vagina. So long as there was some penetration beyond what is known as brush work, penetration would be deemed to have occurred and carnal knowledge taken to have been completed*." See also RICHARD BANOUSIN VS. THE REPUBLIC CRIMINAL APPEAL NO. J3/2/2014 DATED 18TH MARCH 2014 where this court pronounced that "*it is the female sex organs called the vulva and vagina that are normally penetrated into during any sexual act which can qualify to be carnal knowledge under Sections 98 and 99 of Act 29*." Therefore, any sexual intercourse with a person or animal other than through the means of penetration with a penis into the female vagina is unnatural and criminalised under Section 104 of Act 29. Such situations include sodomy and bestiality which is carnally knowing an animal or where a person allows an animal to carnally know that person.**

The right to privacy; non-discrimination and liberty

(33) **The rights as guaranteed under Chapter five (5) of the 1992 Constitution headed *"Fundamental Human Rights"* are, in the language of Article 33(5) not exhaustive. These rights include such rights and freedoms, which are inherent in a democracy and intended to secure the dignity and freedom of man. Article 12(1) of the 1992 Constitution provides that, the rights and freedoms as guaranteed under the Constitution are to be respected and upheld by all persons including the executive, the legislature and the judiciary. Article 12(2) of the Constitution however, restricts these rights from being absolute. It**

provides as follows: "*Every person in Ghana, whatever his race, place of origin, political opinion, colour, religion, creed or gender shall be entitled to the fundamental human rights and freedoms of the individual contained in this Chapter* ***but subject to respect for the rights and freedoms of others and for the public interest."*** *(Emphasis added).* **From the above provision, the rights guaranteed under Chapter 5 of the constitution are subject to the respect for the rights of others, and secondly, the public interest.**

(34) **In his invaluable book, "A Handbook of the Constitutional Law of Ghana and its History" (Black Mask Publications, 2021) Sir Kofi Kumado rightly posits in our view at pages 217-218 that, apart from clause 2 of Article 12 of the 1992 Constitution, the limitations to individual rights must pass a triadic test being that: the limitations must be shown to be prescribed by law; reasonable and necessary in a free and democratic society.**

The Right to Personal Liberty;

(35) **The right to personal liberty has found guaranteed constitutional expression under Article 14 of the 1992 Constitution. The Article provides as follows:**

(1) "Every person shall be entitled to his personal liberty and no person shall be deprived of his personal liberty except in the following cases and in accordance with procedure permitted by law-

(a) in execution of a sentence or order of a court in respect of a criminal offence of which he has been convicted; or

(b) in execution of an order of a court punishing him for contempt of court; or

(c) for the purpose of an bringing him before a court in execution of an order of a court; or

(d) in the case of a person suffering from an infectious or contagious disease, a person of unsound mind, a person addicted to drugs or alcohol or a vagrant, for the purpose of his care or treatment or the protection of the community ; or

(e) for the purpose of the education or welfare of a person who has not attained the age of eighteen years; or

(f) for the purpose of preventing the unlawful entry of that person into Ghana, or of effecting the expulsion, extradition or other lawful removal of that person from Ghana or for the purpose of restricting that person while he is being lawfully conveyed through Ghana in the course of his extradition or removal from one country to another; or

(g) upon reasonable suspicion of his having committed or being about to commit a criminal offence under the laws of Ghana…"

(36) **This court in the cases of MARTIN KPEBU (NO.1) VS. ATTORNEY-GENERAL (NO.1) [2015] DLSC 3031; MARTIN KPEBU (NO.2) VS. ATTORNEY-GENERAL (NO.2) [2015-2016] 1 SCGLR 143; MARTIN KPEBU (NO.3) VS. ATTORNEY-GENERAL (NO.3) [2020] 152 GMJ 97; GORMAN VS. REPUBLIC [2003-2004] 2 SCGLR; DODZIE SABBAH VS. REPUBLIC [2015] GHASC 133 has expounded on this right, which primarily deal with the constitutional or unconstitutional restrictions on the movement of the individual freely in a democratic state.**

The Right to Privacy

(37) **The enjoyment of the right to *"Privacy"* as a human right covers various facets of the right in respect of a person's home, property, correspondence or communication. Article 18(2) provides that :**

"No person shall be subjected to interference with the privacy of his home, property, correspondence or communication except in

accordance with law and as may be necessary in a free and democratic society for public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others."

(38) **In RAPHAEL CUBAGEE VS. ASARE & ANOTHER [GHASC] 14 DATED 28TH FEBRUARY 2018, this Court opined an exposition of the privacy right of individuals per Pwamang JSC as follows:**

"Privacy is so broad a constitutional right that it defies a concise and simple definition. It comprises a large bundle of rights some of which have been listed in the article as privacy of the home, property, and correspondence or communication. This list is not exhaustive and the full scope of the right of privacy cannot possibly be set out in the text of the Constitution. However, under the right to privacy is covered an individual's right to be left alone to live his life free from unwanted intrusion, scrutiny and publicity. It is the right of a person to be secluded, secretive and anonymous in society and to have control of intrusions into the sphere of his private life. See the Unreported Judgment of Supreme Court dated 20th December, 2017 in Suit No.CA/J4/31/2015; MADAM ABENA POKUA VS. AGRICULTURAL DEVELOPMENT BANK. Privacy is a very important human right that inheres in the individual and ensures that she can be her own person, have self-identity and release her self-worth. It guarantees personal autonomy for the individual and without it public authorities would easily control and manipulate the lives of citizens and undermine their liberty. It is one of the most widely demanded human rights in today's world for the simple reason that advancements in information and communication technology have made it extremely easy to interfere with privacy rights.

(39) **As provided under Article 12(2), the Constitution 1992 recognises that, the right to privacy is not absolute. The constitution dispels the**

thinking of absolutism in the enjoyment of rights by subjecting them to the safety or wellbeing of the public; the protection of health or morals; prevention or disorder of crime as well as the protection of the rights of others.

(40) **Undoubtedly, the constitution recognises that, a person's right to privacy can be compromised to avoid the prevention of a crime. Further, the person's' right to privacy can also be restricted to protect the morals of the public and public health. Clearly, for one to assert and claim an enjoyment of the right to privacy, the person must demonstrate that, he is not caught in the web of exceptions, from prevention of crimes; prevention of the corruption of morals; as well as protection of public health.**

Freedom against discrimination; right to equality

(41) Article 17 of the 1992 Constitution provides the constitutional threshold in asserting equal treatments to all persons. It provides as follows:

(1) ***"All persons shall be equal before the law.***

(2) ***A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status.***

(3) ***For the purposes of this article, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by race, place of origin, political opinions, colour, gender, occupation, religion or creed, whereby persons of one description are subjected to disabilities or restrictions to which persons of another description are not made subject or are granted privileges or advantages which are not granted to persons of another description."***

(4) ***Nothing in this article shall prevent Parliament from enacting laws that are reasonably necessary to provide -***

(a) ***"for the implementation of policies and programmes aimed at redressing social, economic or educational imbalance in the Ghanaian society.***

(b) ***for matters relating to adoption, marriage, divorce, burial, and devolution of property on death or other matters of personal law;***

(c) ***for the imposition of restrictions on the acquisition of land by persons who are not citizens of Ghana or on the political and economic activities of such persons and for other matters relating to such persons; or***

(d) ***for making different provisions for different communities having regard to their special circumstances not being provision which is inconsistent with the spirit of this Constitution.***

(5) ***Nothing shall be taken to be inconsistent with this article which is allowed to be done under any provision of this Chapter."***

(42) **Thus, the constitution frowns upon giving different treatments to different persons only based on their race, place of origin, political opinion, colour, gender, occupation, religion or creed. This court expounded on the scope and import of the Article 17 provisions in the seminal case of NARTEY VS. GATI [2010] SCGLR 745. Regarding the meaning of** *equality,* **His Lordship Prof. Date-Bah JSC speaking for the court expressed himself as follows:**

"[E]quality before the law requires equal treatment of those similarly placed, implying different treatment in respect of

those with different characteristics. In simple terms, equals must be treated equally, while the treatment of unequals must be different. The law must be able to differentiate between unequals and accord them the differentiated treatment which will result in enabling them, as for as practicable, to attain the objective of equality of outcomes or of fairness. If the differentiated legal rights arising from such an approach to the law were to be struck down as not conforming with the constitutional prescription that all person are equal before the law, it would be thoroughly counterproductive."

In the context of the peculiar facts of the instant action, the critical interrogatory provoked is; whether, Section 104(1)(b) of Act 29 in the manner it has been formulated pursues different treatments to *"persons"* who have unnatural carnal knowledge of others?

EVALUATION

(43) **It has not been lost on us that, in recent times, there is an increase in the public discourse on the legality of homosexual acts and the extent of their legality or justification under our legal system. The discourse is varied, and ranges from rights of homosexuals to marry; sexual exploitation of homosexuals; freedom of homosexuals to express and propagate their orientations and beliefs in the society without any restrictions. Indeed, in contemporary times, global developments particularly in the Western world have seen some remarkable decisions from constitutional courts including those of the Commonwealth. There is also a pattern of deliberate legislation in some jurisdictions to proscribe homosexual actives:**

THE UNITED STATES

(44) **Arguably, the United States is in the lead role in most states in the proclamation and upholding of certain rights of homosexuals. This is**

reflected in various decisions by the Supreme Court of the United States. In OBERGEFELL VS. HODGES 576 US 644 [2015], the United States Supreme Court per a majority decision 5-4 upheld the rights of same sex couples to marry. In this case, Justice Kennedy in support of the majority decision observed that:

> ***"It is demeaning to lock same-sex couples out of a central institution of the Nation's society, for they too may aspire to the transcendent purposes of marriage."***

(45) **Before this decision, the United States Supreme Court had decided in US VS. WINDSOR 570 US 744 [2013] that, the Federal Estate Tax Exemption for surviving spouses must be available to lawfully married same-sex spouses. The court found as unconstitutional, the Defense of Marriage Act in defining *"marriage"* and *"spouse"* to exclude lawfully married same – sex couples for the purposes of the federal law. The court also pronounced in LAWRENCE VS. TEXAS 539 US 558 [2003], that the liberty protected by the Constitution allows homosexual persons the right to choose to enter upon relationships in the confines of their homes and their own private lives and still retain their dignity as free persons. In 2020, the court found as unlawful an employer dismissing an individual merely for being gay or transgender as violating Title VII in the case of BOSTOCK VS. CLAYTON COUNTY 590 US644 [2020].**

INDIA

(46) **Following the trends in the United States, the Indian Supreme Court has also upheld as discriminatory laws criminalising sex among homosexuals. In NAVTEJ SINGH JOHAR & ORS. VS. UNION OF INDIA [2018] 10 SCC, the Supreme Court of India struck down Section 377 of the Indian Penal Code (IPC) as unconstitutional and thus decriminalised all consensual sex among adults, including homosexual sex. The court in this case emphasised that the Lesbian/Gay/ Bisexual/Transgender/Queer (LGBTQ) community are equal citizens and**

hence they cannot be discriminated against in law, based on their sexual orientation or gender. Similarly in NALSA VS. UNION OF INDIA AIR 2014 SC 1863, the Supreme Court upheld the right of transgender persons to decide on their gender and directed state agencies to recognise gender identities of persons such as male, female or a third gender. Furthermore, in KS PUTTASWAMY VS. UNION OF INDIA [2017] 10 SCC 1, the Supreme Court of India upheld the right to privacy as a fundamental right under the Constitution which cannot be trampled upon by the government intervention. Indeed, in 2018, the Supreme Court again did recgonise the right to choose a person's partner as part of the fundamental right to liberty and dignity in SHAFIN JAHAN VS. UNION OF INDIA AIR [2018] SC 1933.

(47) **The emerging crucial interrogatories are;**

(i) First, should the seeming acceptance of these sexual orientations and practices involving unnatural carnal knowledge in the western world or other countries of the world necessarily sanction a recognition in the Ghanaian legal system and practice of same.

(ii) Second, the law being a tool for social engineering, must our unique traditional and cultural identity cognizant under our constitutional framework be compromised in favour of alien cultural values?

(48) **My Lords, a major challenge with the efficacy of laws in legal systems, particularly those made in African States, is the problem with the transposition and translation of laws from foreign lands into our legal systems without modifications or exceptions. This challenge is manifest per the consequences of such legislations made, as the resultant effect cascades into unexpected and undesirable outcomes. This observation, does not downplay the acceptance of certain rules, principles, and practices into our law making process, if they are consistent with, and**

justified within the context of relevant social factors prevailing at a particular time in our legal system.

(49) **To borrow from sociological legal theory, laws made, must connect and be in tune with the developments in society; such that they can serve meaningful social purposes. The law's utility thus become waste, if it is just a transposition of alien cultural values or ideas which have no foundation at all with the peculiar social factors in our legal system. Indubitably, modernism, western ethnocentric ideas and dependency theories of development in appropriate situations may impact on the legislative process. However, such legislations, as has been historically decided must not take precedence over the supremacy of our 1992 Constitution, which is the bedrock of our existence as a democracy and as a people with a common destiny.**

(50) **While we commend the exposition of the distinction between public and private morality using western ideas in legal philosophy in the Plaintiff's statement of case, we fail to see the proper application of the distinction to the facts of the instant action. We therefore deem it pertinent, to emphasise the specific context of the question this action provoked. In our view, the Plaintiff's action is urging or seeking a** *carte blanche* **prayer for recognition of** ***'every'*** **right of homosexuals. The action simply seeks to question the constitutionality of Section 104(1)(b) of Act 29 in the context of the provisions of Articles 14(1); 17(2) and 18(2) of the 1992 Constitution.**

(51) **It is important to also caution against adjudicating over certain issues which are merely academic but have found place in the statements of case put forth by the parties and the memorandum of issues filed. Thus a causal reading of the reliefs sought by the Plaintiff, and the statements of case filed by the parties will reveal an invitation to the court to pronounce on whether the practices of homosexuals are constitutional.**

Yet, the main question provoked for determination is whether Section 104(1)(b) of Act 29 is unconstitutional within the true meaning and effect of Articles 14(1), 17(2), and 18(2) of the 1992 Constitution. It is difficult therefore, to appreciate the relevance of the 4th and 5th issues as set down in the joint memorandum of issues filed; which are: *"whether or not personal liberty under Article 14(1) of the 1992 Constitution of Ghana can be extended to include the choice of a sexual partner"* and *"whether or not unnatural carnal knowledge is harmful to persons who practice same".* These issues in our view, merely seek an opinion and the resolution of same are intended to answer academic questions. As this court does not answer by hypothetical questions which do not address real, genuine live issues, we decline to determine same.

(52) **The issues we deem relevant to a determination of this action are as follows:-**

(a) "Whether or not Section 104(1)(b) of the Criminal and Other Offences Act (Act 29) of 1960 contravenes the provision on the right to privacy enshrined in Article 18(2) of the 1992 Constitution of Ghana, by criminalising unnatural carnal knowledge between consenting adults in seclusion.

(b) Whether or not Section 104(1) (b) of the Criminal and Other Offences Act (Act 29) of 1960 contravenes the provision on the right to equality and non-discrimination enshrined in Article 17(2) of the Constitution of Ghana 1992, by criminalising unnatural carnal knowledge between consenting adults in seclusion.

(c) Whether or not Section 104(1) (b) of the Criminal and Other Offences Act (Act 29) of 1960 contravenes the provision on the right to personal liberty enshrined in Article 14(1) of the 1992

Constitution of Ghana by criminalising unnatural carnal knowledge between adults in seclusion."

(53) **Before dealing with the above issues, we wish to express our outright rejection of the Plaintiff's proposition that it is not the function of the state to, through law making interfere with the private lives of the individuals. Whereas, the function of the criminal justice system is to assert the state's revulsion against public injury, the determinant of whether a conduct should be criminal or not is not solely contingent on whether it takes place within the public or the private space. That is, any conduct albeit even taking place in private between two consenting adults may be deemed injurious to the society to the extent that the social factors peculiar to that society frown upon such conduct. Hence, once the test of legality is met in terms of Articles 19(5) and 19(11) of the Constitution 1992, criminalising such conduct and to the extent that, same is not adverse to the constitutional consistency, the state's objection and sanctioning regime will not render the offence unconstitutional.**

(54) **Without a doubt, every criminal law regime is hugely augmented and sharpened by morals, especially public morality. However, the test of a crime, is not primarily because same is** *malum in se* **but rather, whether the state, through the instrumentality of law making, designates the conduct as prohibited and expresses a penal consequence for it's occurrence. As opined by Lord Atkin in PROPRIETARY ARTICLES TRADE ASSOCIATION VS. ATTORNEY-GENERAL FOR CANADA [1931] AC 310:**

"…Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The Criminal quality of an act cannot be discerned by intuition: nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part

of a more extensive field covered by morality unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle. It appears to their Lordships to be of little value to seek to confine crimes to a category of facts which by their very nature belong to the domain of 'criminal jurisprudence'; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished."

<u>Issue (1)</u>

Whether or not Section 104(1)(B) Of The Criminal And Other Offences Act (Act 29) Of 1960 Contravenes the provision on the right to privacy enshrined in Article 18(2) of the 1992 Constitution Of Ghana, by criminalising unnatural carnal knowledge between consenting adults in seclusion.

As already pointed out under Article 18(2) of the 1992 Constitution, a person's enjoyment of the right to privacy is not absolute. While a person is free to enjoy his or her privacy, same is subject to the law and if necessary in a free and democratic society for purposes of the constitutional provision which reads: ***"No person shall be subjected to interference with the privacy of his home, property, correspondence or communication except in accordance with law and as may be necessary in a free and democratic society for public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others".*** **Therein lies the Plaintiff's hurdle in the reliefs sought in this action.**

(55) **It is the Plaintiff's case that, the state cannot be concerned with what two consenting adults do in private, including acts of** ***unnatural carnal***

knowledge. **For purposes of arguments, what Plaintiff seeks to pursue, is that the state should not involve itself with conducts in private which are criminal. It is not uncommon that, most crimes are committed in private. To accept the Plaintiff's proposition, is to relegate as unconstitutional all acts legislated as crimes and committed in private. Such a position clearly is incongruous and does not accord even with the definition of a crime.**

(56) **As already observed, to pronounce a crime as unconstitutional is to test it's legality against constitutional tenets and this test in our view has not been satisfied in this matter. Article 18(2) of the 1992 Constitution has made it clear that, a person's privacy can be compromised for the prevention of a crime. Thus, it is circular to urge this court to declare conducts which violates the provisions of a statute though same is not inconsistent with the constitutional provisions. Therefore on the peculiar facts of the matter before us and from our application of the law and other relevant legal principles, we do not find Section 104(1)(b) of Act 29 as a provision which violates the right to privacy of the individual under Article 18(2) of the Constitution, 1992.**

Issue (2)

Whether or not Section 104(1) (b) of the Criminal and Other Offences Act (Act 29) of 1960 contravenes the provision on the right toe equality and non-discrimination enshrined in Article 17(2) of the Constitution of Ghana, 1992 by criminalising unnatural carnal knowledge between consenting adults in seclusion.

(57) **As per the test of discrimination already espoused above, particularly in the NARTEY VS. GATI case, (supra) a person contending to have been discriminated against is under obligation to demonstrate to the court, how the person has been treated unequally from persons within the same similarly placed situation as that person. Within the context of the impugned provision, does it reveal that, the provision has been designed**

to target only homosexuals as the Plaintiff appears to be urging? At the risk of sounding repetitive, Section 104(1)(b) of Act 29 *(as amended)* **provides** that: ***"A person who has unnatural carnal knowledge of another person of not less than sixteen years of age with the consent of that other person commits a midsdeamour"***

(58) **Clearly, the above provision does not appear to limit the word *"person"* to only heterosexual persons or homosexuals but covers all persons. The only limitation is the age factor, being for those not less than sixteen years of age. Thus, acts of *unnatural carnal knowledge*, can be committed between a male and a female; and as conceded by the Plaintiff through the anus. Therefore, the legislature, found as abhorrent sexual intercourse not in the natural way hence criminalising same. If the provision sought to have suggested that, a person within the provision is a homosexual in the person of gay or a lesbian, then, the Plaintiff's case of alleged discrimination would have been conceivably persuasive. Even then, there will be the need to demonstrate whether such proscription is not justified in terms of the exceptions discussed under the enjoyment of rights. We find no such justification. Accordingly, the relief sourght by the Plaintiff to pronounce as unconstitutional Section 104(1)(b) of Act 29, on the basis that, same is discriminatory in terms of Article 17(2) of the Constitution 1992 is totally misconceived.**

Issue (3)

Whether or not Section 104(1) (b) of the Criminal and Other Offences Act (Act 29) of 1960 contravenes the provision on the right to personal liberty enshrined in Article 14(1) of the 1992 Constitution of Ghana by criminalising unnatural carnal knowledge between adults in seclusion.

(59) **On this issue, the Plaintiff tried painstakingly to assert that, the deprivation of homosexuals from engaging in acts of *unnatural carnal knowledge* is an infringement of the personal liberty of the individual. We find it difficult to appreciate such submission within the meaning of**

the phrase *personal liberty* as provided for under Article 14(1) of the 1992 Constitution. The arguments under this issue by the Plaintiff are far-fetched, speculative and remote and we shall not burden ourselves with any detailed evaluation of same.

(60) **Suffice it however to say that, under Article 14(1)(a)-(g) of the 1992 Constitution, the individual's liberty if contextually construed, pertain to the free physical movement of the person, subject to such restrictions against any liberties as sanctioned by law or the constitution itself. Granted for the sake of argument that, the personal liberty of the individual can be construed to encompass the situation the Plaintiff has urged on us, the Plaintiff has failed to demonstrate that, the criminalisation of *unnatural carnal knowledge* does not fall within the exceptions under Article 14(1) of the Constitution, 1992.**

CONCLUSION

(61) **Upon our consideration of the submissions of both parties in their respective statements of case, we find that, Section 104(1)(b) of Act 29 is not discriminatory against homosexuals; neither does it infringe on the privacy of individuals, be they homosexuals or practitioners of other forms of sexual orientation which involve *unnatural carnal knowledge* however described. Accordingly, the criminalization of acts of *unnatural carnal knowledge*, under Section 104(1)(b) of the Criminal and Other Offences Act, 1960 (Act 29) is in our view, not inconsistent with the letter and spirit of the 1992 Constitution. It is therefore, not unconstitutional.**

(62) **In the premises, the Plaintiff's action wholly fails, and we dismiss same.**

(SGD) I. O. TANKO AMADU
(JUSTICE OF THE SUPREME COURT)

(SGD) P. BAFFOE-BONNIE
(JUSTICE OF THE SUPREME COURT)

(SGD) A. LOVELACE-JOHNSON (MS.)
(JUSTICE OF THE SUPREME COURT)

(SGD) E. Y. GAEWU
(JUSTICE OF THE SUPREME COURT)

(SGD) Y. DARKO ASARE
(JUSTICE OF THE SUPREME COURT)

(SGD) R. ADJEI-FRIMPONG
(JUSTICE OF THE SUPREME COURT)

<u>CONCURRING OPINION</u>
<u>KULENDI JSC:</u>

INTRODUCTION:

1. I have carefully perused the erudite opinion of my venerable and respected brother Amadu JSC, and while I fully agree with his reasoning and resultant conclusions, I wish to submit this concurring opinion, which in my considered view, offers additional insight to the conclusions reached by this Court and addresses certain nuances implicated by the instant suit. In order to contextualize this concurring opinion it is necessary to reiterate the reliefs sought by the Plaintiff and offer a synopsis of the respective arguments canvassed by the parties to this dispute.
2. The Plaintiff, a citizen of the Republic, has invited this Court to exercise its original jurisdiction pursuant to articles 2(1) and 130 of the Constitution and to declare section 104 (1)(b) of the Criminal Offences Act, 1960 (Act 29) which criminalizes all forms of unnatural carnal knowledge, and in his opinion, homosexuality for that matter, as unconstitutional and consequently null, void and of no effect.

3. In considering this writ, I could not help but reminisce on the statement of an eminent jurist, Oliver Wendell Holmes, Jr. in *The Path of the Law* (Harvard Law Review, vol. 10, no. 8, 1897, pp. 457,-478) where he wrote:

> "The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of popular jests, tends to make good citizens and good men. …"

In his treatise, *The Common Law (1881),* he is noted to have stated;

> "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in

determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics"

4. Whereas the invocation of our original jurisdiction is not unusual, the subject matter of this present case is novel, and borders on the moral fabric, values, rights and functionalism of law and society.

RELIEFS:

5. The reliefs specifically sought by the Plaintiff, per his writ, filed on the 26th of August 2021, are as follows:

    a. A declaration that section 104 (1) (b) of the Criminal Offences Act (Act 29) 1960 is ultra vires Article 18 (2) of the Constitution of Ghana in so far as the said section will lead to the unlawful and arbitrary interference of the privacy of all adult persons living in Ghana.

    b. A declaration that, section 104 (1) (b) of the Criminal Offences Act of Ghana is ultra vires Article 17(2) of the Constitution of Ghana, in so far as the said section arbitrarily and unjustifiably discriminates against persons based on their sexual orientation.

    c. A declaration that, section 104 (1)(b) of the Criminal Offences Act of Ghana is ultra vires Article 14(1) of the Constitution of Ghana, in so far as the said section arbitrarily deprives homosexuals of their liberty to select their intimate sexual partners and their right to engage in intimate sexual conduct without state interference.

PLAINTIFF'S CASE:

6. The Plaintiff anchors the above reliefs on the contention that section 104 (1) (b) of the Criminal Offences Act of Ghana contravenes the letter and spirit of Article 18(2) of the Constitution. It is argued that privacy is essential to all

persons and that Article 18(2) of the Constitution seeks to protect the privacy of persons resident within Ghana.

7. According to the Plaintiff, the nature, nuance and peculiarities of an individual's sexual dispositions, executed in the privacy of his bedroom ought not be the preoccupation of our criminal law and as such the criminalization of "unnatural carnal knowledge" is an affront to the spirit and purpose of Article 18(2) of the Constitution. The Plaintiff contends that the purpose of the said section is the determination of a sense of private morality, which in his opinion is wholly misplaced. This, he argues, is neither the essence nor purpose of criminal law.

8. The Plaintiff, in aid of his case, cites the works of distinguished legal philosophers; such as John Stuart Mill and H.L.A Hart in his bid to distinguish the realms of private and public morality. Further, extensive reference is made to the '*Report of the Departmental Committee of Homosexual Offences and Prostitution in Great Britain*', which was published on 4th September, 1957 and has been famously dubbed as '*The Wolfenden Report*'. Purporting to rely on the strength of these authorities, the Plaintiff contends that section 104 (1) (b) of Act 29, which seeks to legislate into matters within the realm of private morality, in contradistinction with public morality, is an unjustifiable breach of a person's right to privacy.

9. Particularly, the Plaintiff urges this Court to adopt the counsel of the Wolfenden Report and reproduces the following portion of the report for our consideration:

   > "*that unless a deliberate attempt is to be made by society, acting through the agency of the law to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms,* ***not the law's business***"

10. On this foundation, the Plaintiff argues that the personal and private nature of moral and immoral conduct places a corresponding personal and private responsibility on the individual for his or her own actions and ought not incite

the threat of punishment from the law. In preemptive rebuttal to the State's justification of the adverse social repercussions of such actions, the Plaintiff argues that actions such as fornication and adultery evoke equal moral opprobrium and cause even greater harm to the society, and yet such acts are not proscribed by threat of criminal sanction. In consequence of the foregoing, the Plaintiff argues that it is in the domain of the church and not the state, to be guardians of private morality, and to deal with sin.

11. Significantly, the Plaintiff concedes that it is justifiable to criminalize acts that border on public morality such as, the offence of gross public indecency, engaging in sexual intercourse in public or the distribution of pornographic content, (see sections 278, 280 and 281 respectively of the Criminal Offences Act, 1960 (Act 29). However, he argues that this justification for the legal incursion into the sphere of morality cannot be similarly deployed in relation to personal and private intimate sexual preferences such as same sex relations or homosexuality, masturbation, and oral sex. The Plaintiff submits that generally, the law should not be concerned with private consensual sexual activities undertaken between adults unless and until some harm, or threat of harm is occasioned by reason of such conduct.

12. On this score, the Plaintiff posits that in enacting legislation to create offences, Parliament ought to be guided by the harm principle and that legislation that seeks to create offences or crimes must, by jurisprudential reasoning, be limited to enactments that prevent persons from causing harm to themselves or others. He cites "*The Declaration of the Rights of Man and of the Citizen*", set by France's National Constituent Assembly in 1789, amongst others, to justify this harm principle. He relies on John Stuart Mill's work "*On Liberty*" wherein the distinguished author posits that "*the only purpose for which power can be rightly exercised over any member of a civilized community against his will, is to prevent harm to others*."

13. The Plaintiff contends that the right to privacy, as enshrined in Article 18(2) of the Constitution embodies in it a recognition that adults have a right to a sphere of private intimacy and autonomy which can be pursued without needless interference from the society, government or State. Within this domain of private autonomy, according to the Plaintiff, is situated the sexual orientation and activities of the individual. Therefore, where consenting adults, in expression of this right to privacy, opt to participate in a preferred sexual activity and no threat of harm is posed to any of the participants of the said act, any societal invasion of that personal precinct, by the threat of punishment, will be a breach of their privacy.

14. The Plaintiff makes reference to a judgment of the High Court of Botswana dated 11th of June, 2019 entitled **Letsweletse Motshidiemang vrs. Attorney General & Lesbians, Gays and Bisexuals of Botswana (Legabibo)**, where the court found as unconstitutional, sections of the Penal Code which criminalized same sex relations or the attempt of same. On the strength of this authority he has contended that like heterosexuality, homosexuality is equally natural and reflective of expression of choice and that homosexuality is not a physical or mental illness but natural variations of expression and free thinking. In support of this position, he refers us to page 2 of the Report of the American Psychological Association Taskforce on Appropriate Therapeutic Responses to Sexual Orientation (2009).

15. In conclusion, the Plaintiff submits that the criminalization of homosexuality perpetuates stigma, vilification and hostile discrimination against homosexuals and is **therefore a disincentive to homosexuals from accessing health facilities**. Thus, section 104 (1) (b) of Act 29 by which Parliament sought to criminalize unnatural carnal knowledge between consenting homosexuals is ultra vires the Constitution.

DEFENDANTS CASE

16. The Attorney General, the Defendant herein, is opposed to the present action and has filed a Statement of Case pursuant to the orders of this Court dated 10th February, 2022. It is argued by the Defendant that Article 18 of the 1992 Constitution, which guarantees the right to privacy is mindful of the protection of morals and the prevention of disorder or crime. The Defendant submits that Article 18 provides for a justified curtailment of the right to privacy when it comes to the prevention and the protection of morals amongst others. It is contended that the Constitution must be interpreted to reflect the popular consciousness of the people of Ghana, the peculiarities of our national identity, our historical antecedents, socio-cultural dispositions and moral convictions.

17. On this premise, the Defendant further argues that the Ghanaian society frowns upon homosexuality in all forms, shapes and expressions. In proof of this, the Defendant cites various research papers including Anarf & Gyasi-Gyamerah, 2014; Essien & Aderinto, 2009; Gyasi-Gyamerah & Akotia, 2016; Oti-Boadi, Agbakpe, & Dziwornu, 2014 and urges that all these papers are unanimous in the position that, notwithstanding Western activism for the recognition and acceptance of same sex relations in Africa, prevailing sentiments toward lesbian, gay, bisexual, and transgender (LGBT) persons in Ghana remain overwhelmingly negative. In consequence of the near unanimous public condemnation and disapproval of these acts, the Defendant argues that the law, being a function of the society, ought to reflect the values of the society.

18. Reference has been made to the judgment of the Kenyan High Court dated 24th May, 2019 in the consolidated cases of **EG & 7 ors v. Attorney General, DKM & 9 ors (Interested Parties)[Suit No.: 150 of 2016; Katiba Institute & Anor (Amicus Curia)[Suit No. 234 of2016]** where a three-member panel unanimously held that sections of the Kenyan Penal code which criminalized private consensual sex between adult persons of the same sex did not violate the rights of LGBTQ Kenyans to non-discrimination, health, freedom of conscience, belief, human dignity, privacy etc.

19. Defendant further cites a statement from the Office of the President wherein, the Director of Communications is said to have issued an official communique from the President denouncing same-sex relations and emphatically stating:

> '*It will not be under his presidency that same sex marriage will be legalized in Ghana.'*

Further reference has been made to some other members of the political class in Ghana denouncing homosexuality.

20. The Defendant contends that the values, principles and culture of the Ghanaian public is subsumed under the concept of "public interest" and thereby serves as an overarching fetter on the exercise of the rights enunciated in Chapter 5 of our Constitution. In consequence, the Defendant argues that, the specific scope of the individual rights enumerated under Chapter 5 of the Constitution must be balanced by the necessity to preserve prevailing national values, principles and culture. In this regard, the Defendant argues that given the social deprecation of homosexuality and its associated conduct, the criminalization of unnatural carnal knowledge, in a bid to preserve the social, moral and cultural identity of the Ghanaian people, cannot be branded as unconstitutional.

21. The Defendant asserts that section 104(1)(b) of Act 29 does not authorize any person to enter another's bedroom to ascertain whether acts of unnatural carnal knowledge are being performed and therefore the argument that the said section infringes a person's privacy is misplaced.

22. On the issue of discrimination, the Defendant strenuously contends that the language of Article 17(2) does not factor in homosexuality or sexual orientation as one of the various heads under which a person may not be discriminated against. Consequently, the Defendant submits that discrimination, on the basis of sexual orientation, in the context of our Constitutional framework, is not illegal per se. Further and in the alternative the Defendant contends that assuming without admitting that the said section is discriminatory of

homosexuals, there is legal justification for such discrimination. To buttress this point, the Defendant cites Date Bah JSC. in the case of **T.T. Nartey v. Godwin Gati 2010 SCGLR 74** as follows:

> " *the concept of equality embodied in article 17 is by no means self-evident. To our mind, it is clear what article 17 does not mean. It certainly does not mean that every person within the Ghanaian jurisdiction has, or must have, cxactly the same rights as all other persons in the jurisdiction. Such a position is simply not practicable. Soldiers, policemen, students and judges, for instance, have certain rights that other persons do not have. The fact that they have such rights does not mean that they are in breach of article 17. The crucial issue is whether the differentiation in their rights is justifiable, by reference to an object that is sought to be served by a particular statute, constitutional provision or some other rule of law.*"

23. Defendant also contends that same sex activity of homosexuals have serious health implications and are often an efficient mode of sexually transmitted diseases, thus the Plaintiff's assertion that no harm is caused to persons engaged in acts of homosexuality or other forms of unnatural carnal knowledge is untrue and unfounded.

ISSUES FOR DETERMINATION:

24. The following issues were set down for our determination by the parties per their joint memorandum of agreed issues pursuant to Rule 50 of the Supreme Court Rules, 1996 (C.I. 16):

    1. Whether or not Section 104 (1) (b) of the Criminal Offences Act (Act 29) of 1960 contravenes the provision on the right to privacy enshrined in Article 18(2) of the 1992 Constitution of Ghana, by criminalizing unnatural carnal knowledge between consenting adults in seclusion?

2. Whether or not Section 104 (1) (b) of the Criminal Offences Act (Act 29) of 1960 contravenes the provision on the right to equality and non-discrimination enshrined in Article 17(2) of the Constitution of Ghana, 1992 by criminalizing unnatural carnal knowledge between consenting adults in seclusion?

3. Whether or not section 104 (1) (b) of the Criminal Offences Act (Act 29) of 1960 contravenes the provision on the right to personal liberty enshrined in Article 14 (1) of the 1992 Constitution of Ghana by criminalizing unnatural carnal knowledge between adults in seclusion?

4. Whether or not personal liberty under Article 14 (1) of the 1992 Constitution of Ghana can be extended to include the choice of a sexual partner?

5. Whether or not unnatural carnal knowledge is harmful to persons who practice same.

25. Although the parties have jointly filed the above memorandum of agreed issues for determination by this Court, I note that a memorandum of agreed issues does not bind the Court. Further, this Court will not be swayed into a rote determination of issues set by parties where the determination of same will not, in the opinion of the Court, resolve the substantial matters in controversy. Otherwise, we will be engaging valuable judicial resources in fruitless and pointless academic exercises.

26. Consequently, after a careful consideration of the contentions by the parties in this suit, I am of the considered opinion that this suit can be completely and effectively determined by the resolution of only one issue:

> "*Whether or not section 104(1)(b) of 29 which criminalizes sexual intercourse between members of the same sex, within the context of unnatural carnal knowledge, is unconstitutional?"*

27. On this note, I deem all other issues jointly filed by the parties as superfluous for the purposes of the resolution of the dispute.

SCOPE OF THE IMPUGNED LEGISLATION

28. Section 104 (1) of the Criminal Act, 1960 (Act 29), which the Plaintiff brands as unconstitutional, provides as follows:

"*Unnatural carnal knowledge*

(1) A person who has unnatural carnal knowledge

(a) of another person of not less than sixteen years of age without the consent of that other person commits a first-degree felony and is liable on conviction to a term of imprisonment of not less than five years and not more than twenty-five years; or

(b) of another person of not less than sixteen years of age with the consent of that other person commits a misdemeanour; or

(c) of an animal commits a misdemeanour."

29. Section 104(2) of Act 29 defines unnatural carnal knowledge to be sexual intercourse with a person in an unnatural manner or with an animal. Section 99 of Act 29 lends more insight into the above definition by providing that proof of the "least degree of penetration" shall be sufficient to establish the offence of unnatural carnal knowledge.

30. The Plaintiff takes issue with these provisions on grounds that the effect of these sections is to deny homosexuals the right to engage in sexual intercourse with individuals of the same sex, as same would constitute unnatural carnal knowledge. To that extent, the Plaintiff alleges that the said section is unconstitutional as it infringes on the liberty and privacy of homosexuals and perpetuates discrimination against them.

DETERMINATION

31. With the emergence of the gay rights movement and advocacy in many jurisdictions, it is unsurprising that a case of this nature has come before this Court for determination. It appears there is a global clamour for or against such rights and the instant case, though limited in scope, is an attempt to underscore our position within our fundamental legal values.

32. Notwithstanding the broad scope and variants of sexual conducts that are proscribed under the umbrella term "unnatural carnal knowledge", the parties have by their arguments canvassed in support of their respective positions, confined their discussions, and by extension ours, to a determination of the constitutionality of the said crime, within the specific context of its criminalization of sexual intercourse between members of the same sex.

33. I understand the case of the Plaintiff in many respects to mean that the criminal law on the matters pleaded does not only sin against the Constitution, but also creates moral ambiguity for the Republic. It is this ambiguity that needs to be resolved by this Court. By this understanding there is a presumption in the case of the Plaintiff that the philosophical justification for enacting section 104 of Act 29 is on a wrong footing, as it seeks to classify the private moral space of individuals as public. This presumption concludes that matters of "carnal knowledge", whether natural or unnatural, do not belong to the public moral space as to be justified by the public morality compass. They are private and must remain so without interference from public moral prescriptions.

34. The ambiguity we are therefore faced with in the instant case is whether we could, as a free Republic, accept or contemplate matters of unnatural carnal knowledge, as forcefully urged by the Plaintiff, as private or public moral matters. To the Plaintiff, these are private matters and must be put beyond the reach of public scrutiny. To the Attorney General, this classification is erroneous and that these matters are of a public moral concern and that by our very

nature as an independent legal system with constitutional values, we should frown upon them by explicit positive law.

35. In an attempt by the Plaintiff to conceive and canvass a certain notion of the right to privacy, I understand Plaintiff's claims to entail at least the following three important structural propositions, but which propositions in themselves, when critically evaluated, have significant weaknesses:

(a) Place-focused: On this score, the Plaintiff asserts that because the act of "unnatural carnal knowledge" happens in a private context or place and is beyond the view of the public it ought not be criminal. *A fortiori*, the constitutional protection of privacy under Article 18(2) should be extended to the act because the space in which it happens is not within the public domain. In consequence, the Plaintiff contends that the public is not in any danger by acts that are beyond the view of members of the public.
However, the simple and obvious rebuttal to this proposition is that if the "private context" or "place" of the performance of an act automatically insulates the said act from legal scrutiny, through the invocation of the right to privacy, we might by this same logic constitutionalize all unlawful acts committed in private places.

Ostensibly acts committed in private spaces, such as the possession and/or use of illegal drugs, do not escape the law merely by virtue of the fact that they are committed in private and are on face value, victimless. I hasten to observe that only the most crude of offenders attempt engaging in their criminal activities within the open glare of the public or in public spaces and to decriminalize such activities on the basis of the place is to empty the potency and purpose of our criminal laws. It would therefore occasion an inconsistency for the law to intrude private spaces for legal scrutiny save for persons committing unnatural carnal knowledge.

Simply put, I am of the opinion that the "private context" or "place-focused" argument lacks merit, is misleading and is an insufficient justification for

the extension of the constrained constitutional protection of privacy to outlawed sexual activity. Judicial blessing or protection for any activity simply because it occurs in a private space is a retrogressive rationalization for constitutional protection of the right to privacy.

(b) Person-focused: Under this argument, the Plaintiff urges that because the act is undertaken between consenting adults in a particular association or relationship, it should be unacceptable for the law to interfere. Accordingly, the Plaintiff argues that the consent of the persons involved in the act sufficiently operates to legitimize the conduct. In this instance, priority is on the person and not the place.

This Court is however of the considered opinion that this argument is insufficient. I note that in our Republic, consent has not been a magical automatic legitimizing tool for all acts, relationships or associations. In other words, there is no freedom to engage in any act proscribed by law simply because the said act involves two or more consenting adults.

A look at criminal conspiracy sets the legal foundation to contradict such propositions. Limiting the argument to voluntary sexual conduct between consenting adults in order to craft a right or expand the right to privacy to protect homosexual conduct begs the question. It is noteworthy that consenting adults are prosecuted for engaging in incest, bigamy and other sexual crimes because the law does not recognize consent as an exculpating defence to such crimes.

Consent is not always a justification or defense to crime. Thus, our Courts have repeatedly held that one cannot, in the estimation of the law, give his/her consent to suffer unlawful harm. Similarly, the consent of an adult to engage in unnatural carnal knowledge cannot justify the legalization or decriminalization of that offence.

(c) Choice-focused: The Plaintiff in advancing this argument, contends that on the account of enforcing individual autonomy a person should be free to choose how to conduct his/her life. This argument is built on "choice", which must carry such a weight to aid the determination of individual autonomy in a state. This choice is particularly important when it aids with personal definition of self. It is the person's choice and that must be accorded a legal protection in furtherance of the values of individual autonomy.

The weakness of this argument is simply that the significance of "choice" does not necessarily warrant protection of the choice by law. Individual choice is not the sole determinant of constitutional protection of individual autonomy. If it were so, we would constitutionalize the right to suicide and the right to consent to grievous bodily harm, the right to commit incest, abortion etc. We think that in conceptualizing rights, choice simpliciter lacks the credit and value to be elevated to the status of a constitutional right.

36. Further, I note that these structural propositions entailed in the Plaintiff's arguments were constructed on the Wolfenden Report of Britain which, in part, extensively influenced the intellectual basis of the Plaintiff's claims. It is instructive to note that this Report resulted from a public engagement in 1957. In fact, it was an amalgam of public opinion and witness testimonies by the British and not Ghanaians. That being the case, it was not without a social and cultural context. The social data which was gathered and used by the Committee to ground its arguments and findings came from a particular jurisdiction with cultural peculiarities which jurisdiction, despite certain similarities proffers values extremely at variance with our Ghanaian culture and society.

37. I am not, by this statement, suggesting that because the material context and circumstances of the Report was foreign, it is in and of itself inapplicable to Ghana. I am clear in my mind that comparative studies informs and aids an

understanding of one's position. That notwithstanding, I must sound an important cautionary rule on any attempt at a wholesale adoption of foreign cultural context and peculiar social data which might not, I think, speak to our national context, culture and tradition.

38. The hopes, collective aspirations, traditions, and values that our Constitution mirrors represents the overall justiciable purpose that any interpretation by this Court must find, uphold and enforce. Our judicial duty is better understood and appreciated when we take constitutional interpretation not as an exercise of uncovering global norms of interests but of ascertaining the true values, traditions and aspirations at the core of our legal system. It is true that our state, as an actor in global geopolitics, might be influenced by the claims and cultures of other nations; but more importantly we also belong to a distinct boat called; Ghana with a peculiar context and culture which must provide the primary illumination to seeing what our Constitution entails.

39. Be that as it may, it would be unreasonable, I think, to operationalize and interpret a constitutional value in this modern context by merely relying on historical social data gathered several decades ago in a land foreign to ours. Even in today's illusion of universalization of values in the cargo of globalization, state parochiality is not completely abandoned. Whilst we must never disregard our interconnectedness, we cannot, under any circumstances, discount, jettison, and alienate our individual identity. On that account, we must engage the ideas in this "Wolfenden Report" with the reservations that can help maintain this distinctness. It is profoundly wrong, I think, to suggest that because there is some level of similarity in the words of a positive law from different states, the interpretation of such words must be rationalized on the same moral classification without regard to the legal, factual, cultural and social circumstances of the state.

40. I note that even at the material time of publication of this report, European nations were not unanimous in their approval or otherwise on the suggested

scope and content of what the Plaintiff describes as a private sphere of morality. It is still the case today. So the impression should not be created that things, controversies and moral discourses surrounding same sex relations and for that matter unnatural carnal knowledge commands a certain universal voice of acceptance. The world is still engaged in an on-going debate as to what level of uniformity it could reach in respect of the legality and morality of this matter. The controversy is not settled and therefore it cannot lightly be proposed that Ghana must determine such a fundamental matter without recourse to our peculiar circumstances molded by our culture, morality, values, traditions and customs as a people.

41. Contrary to the claims of the Plaintiff, this Report did not have immediate global effect. Nearly 30 years after the Report was launched, the Supreme Court of the United States in the case of ***Bowers vrs Hardwick, 1986*** upheld a Georgia law that criminalized certain homosexual acts. Before arriving at this decision, the US Supreme Court pointedly disagreed with the Respondent in that case that the Court's prior cases have construed the US Constitution to confer a right of privacy that extends to sexual intercourse between members of the same sex. Clearly, the history of this case and the primacy of the conclusion reached by the Court deludes the global efficacy of the findings of the Wolfenden Report.

42. Though ***Hardwick's case*** has been subsequently overruled by the same Court in ***Lawrence vrs Texas in 2003***, the discourse is far from being settled as a divided Court handed down the judgment to a deeply divided nation on the subject matter. As a matter of fact, the majority in *Hardwick* categorically stated that any claim to the effect that the Court's previous cases stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable. The Court's opinion, as contended by the majority was that:

"*in Carey twice asserted that the privacy right, which the Griswold line of cases found to be one of the protections provided by the Due Process Clause, did not reach so far*".

43. Again, around the same period when the ideas as contained in the Wolfenden Report were being evangelized across the globe, the experience in Canada pointed to a different judicial radar and policy position. In 1967, the Supreme Court of Canada in ***Klippert v The Queen [1967] SCR 822*** refused to grant a constitutional license to a consensual homosexual act. In this case, Everett George Klippert was arrested and convicted for gross indecency after admitting to engaging in consensual homosexual acts with other men. The Supreme Court of Canada upheld his conviction, leading to a life sentence as a "dangerous sexual offender." By upholding the conviction, it is evident that the distinction between public and private morality, as urged by the Plaintiff in the instant case, at least in this historical time in Canada, seemed blur. The policy premonitions of the Wolfenden Report did not feature in the Canadian social data that was considered by the Court.

44. I am aware that the same courts have changed their positions to state the opposite. This fact illustrates to all concerned the fluidity and the continuous flipping of the western stance on homosexual rights. It is important to state these examples to show that one nation's experience and history on homosexual rights and conducts cannot be the yardstick for a Ghanaian position on that subject matter. As their positions are moulded from prevailing values and aspirations among their citizenry, this Court ought to project the sentiments on this issue from the values and aspirations of the contemporary Ghanaian citizenry.

45. I cannot overemphasize the cautionary remark of this Court, speaking per the respected jurist, His Lordship Francois JSC, in the case of ***Kuenyehia v Archer*** [1993-4] 2 GLR 525 at 561 where he said that:

"Any attempt to construe the provisions of the Constitution 1992...must perforce start with an awareness that a constitutional instrument is a document sui generis to be interpreted according to principles suitable to its peculiar character and not necessarily according to the ordinary rules and presumptions of statutory interpretation."

46. Thus, after more than three decades of experience under the current 1992 Constitution, this case presents a rare opportunity to this court to re-state in much more firm and certain terms, the culture and principle of constitutional interpretation in this country. Barring all challenges, we have been progressive enough and would not backslide to the terrains of naked literalism in service of the law. The Constitution, I believe, is an amalgam of the nation's hopes, aspirations, values, customs and traditions [see Sowah JSC in Tuffuor v. Attorney General GLR [1980] 637 @ 647-648]. By experience and through history, our Constitution ushered in a new set of national values and principles that must always be properly decoded, understood and enforced.

47. Where necessary, as a Court, we would draw on some benefits from or rely on persuasive foreign jurisprudence in understanding our law and Constitution. Nonetheless, we are mindful of our own experiences and aspirations at the core of our constitutional values which must be upheld. Our aspirations are not nurtured by foreign jurisprudence, neither are the veracity of our values contingent upon such precedents. Regardless of the normative force of foreign persuasive jurisprudence, we are the authors of our collective values and aspirations as entailed in the Constitution. Therefore, the suitability of persuasive foreign jurisprudence to our immediate needs depends on the compatibility of their underlying principles, values and aspirations with ours as a country. They must sit in well with our context. It is our peculiar values and context that determine the application of such cases and not the other way round.

48. This Court would be vulnerable and risk illegitimacy if it resorts to judge-made constitutional law with little or no cognizable roots in the architecture of our values, customs and traditions. Our collective conscience as defined by our traditions, culture and customs is imperative in understanding and upholding our constitutional values. Our task therefore is not to permit the application of bare precedents, without more. Our charge in constitutional interpretation and/or enforcement is to give meaning to our Constitution that mirrors the nation's soul and consciousness. The discovery of the purpose of our Constitution therefore is to have an intercourse with this popular consciousness.

49. Thus, any interpretation and/or enforcement of this Constitution must be done in the context of the broader policy underpinnings, fundamental principles of state policy enshrined in Chapter 6 of the Constitution and the objectives, aspirations and goals as summarized in the preamble of the Constitution and which find expression throughout the Constitution.

50. The standards inherent in the Plaintiff's argument merely conduces to the conclusion that since unnatural carnal knowledge, and for that matter homosexuality, is between two consenting adults, in privacy and occasioning no injury to a third party, the State has no business in regulating, let alone criminalizing such a conduct. The State, by this position, would simply be disabled from even investigating, considering and weighing the consequences of such a conduct on the whole society. Undoubtedly, this is a strange and retrogressive viewpoint in human rights and constitutional litigation. We should observe that no State around the globe provides any glory to her citizens by constitutionalizing rights without limitations.

51. In the interest of the society and progressive view of human rights protection and enforcement, the rights of others or public interest are always considered as disabling legal rules to mediate all rights discourses. These are protected values sufficient to be considered by the Courts, state organs and rights bearers in all their conduct. On the contrary, the Plaintiff has in this case thrown an invitation to this Court, not only to shelve this long held limiting principle and

practice within the human rights framework, but also to completely obliterate it from our legal system.

52. The Supreme Court of Singapore in the case of ***Ong Ming Johnson v Attorney-General and other matters [2020] SGHC 63*** while declining to declare section 377A of the Penal Code, which criminalizes acts of "gross indecency" – sex between consenting adult men – unconstitutional stated that:

> *"[i]n any case, I accept the defendant's contention that, following the Attorney-General's position on s 377A, it would "naturally follow" that any prosecution under other provisions which would contradict the non-prosecution position for consenting male homosexual adults for their sexual acts in private would likewise not be in the public interest*."

53. The rationalization in this regard rests on the need to balance individual consensual acts and the public interest. Eschewing any notion of absolute individual interest premised on consent, the Court readily granted protection to public interest in a society even where same would amount to a curtailment of an individual's rights or freedom.

54. It is thus palpably inadequate for the Plaintiff to contend that the impugned acts are basically "between consenting adults" and not done in the public, but in private rooms. The sufficiency of such reasoning is on the premise that it is not the business of the law to interfere with an adult life, especially where there is consent. Hence , the definition of privacy, by the Plaintiff, rests on the pillars of consenting adults acting in places beyond the reach of the public eye. By this deduction, it is unreasonable to invoke religious taboos to regulate such a private space. This is more problematic where there is religious pluralism as a right in the country. The legitimacy of secular legislation, like Act 29, would

depend on whether Ghana as a state proffers some justification for its law beyond its conformity to religious creed.

55. The Plaintiff, in his Statement of Case, at no time contemplated the probability of an infant's welfare being threatened by the conduct of an adult. That is to say, the legality of an adult's conduct is not sufficient to say that such a conduct is full proof of all negative consequences on society. In criminology and criminal law, indices of human conduct are crucial for legislation. In this regard, it would not be prudent for the state to promote an adult behavior that has the current to endanger the welfare of an infant.

56. The general implication of Plaintiff's contention is to the effect that there is a needless moral panic when the impugned criminal law provision seeks to lump private morality into the same box with public morality. This implication, I should observe, is a concealed effort to have this Court declare on homosexual rights by seeking a broad construction of a constitutional right to privacy. It is not a case, in our view, merely on the right to privacy, simpliciter.

57. The right to privacy would therefore not be construed by this Court on personal simplified cords. As a matter of principle, I am minded to take into account the constitutional injunction contained in Article 12 (2) to the effect that:

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

58. This provision, in part, makes it difficult to imagine a free-standing right in our society or conceive of a discourse of human rights independent of the rights and freedoms of others and the public interest. Similarly, Article 18(2) provides a balancing test for the said right to privacy as follows:

"*No person shall be subjected to interference with the privacy of his home, property, correspondence or communication except in accordance with law and as may be necessary in a free and democratic society for public safety or the economic well-being of the country,* ***for the protection of health or morals****, for the prevention of disorder or crime or for the protection of the rights or freedoms of others."*

59. Consistent with our constitutional values, the legislature necessarily intended to treat unnatural modes of sexual intercourse as equally serious invasions of public interest. The interest of the public must form part of the conceptual context and scope for the right to privacy. This mediating value discounts the Plaintiff's proposed absolute nature of the right to privacy in our society.

60. Again, the 1992 Constitution in Article 28(1) (e), points to a certain notion and character of our society that makes it difficult to conceive of a right to privacy in a narrow sense. It states that:

"28(1) Parliament shall enact such laws as are necessary to ensure that— … (e) the protection and advancement of the family as the unit of society are safeguarded in promotion of the interest of children."

61. It is without a doubt that the nation state of Ghana values the family as the unit of society and compels Parliament to enact such laws as are necessary to ensure its protection. Similarly, indeed the state is mandated to ensure the integration, protection, development and adaptation of appropriate customary and cultural values of the people of Ghana. It is apparent that the Plaintiff has not anchored his justification for judicial endorsement of homosexuality on cultural values but merely on comparative authorities of other nations.

62. It is difficult to see how the family could be created through a mode of sexual connection that threatens the most naturally ordained routes of conception. It

is equally uncertain as to how the family may exist with such engagements of unnatural carnal knowledge in the name of upholding rights to privacy.

63. It appears that Ghana is not alone in upholding the moral fabric of society through the family unit. Article 18 of the African Charter on Human Rights to which Ghana is a signatory enjoins the protection of morals and traditional values as follows:

> *"1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and morals.*
> *2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community."*

64. Emphasis is placed here on the morals and traditional values recognized by the community. It is without a doubt that the question of homosexuality borders on morals and traditional values. The society's denunciation is expressed in the criminalization of not only homosexuality but all forms of unnatural carnal knowledge stated in section 104 of Act 29. This denunciation finds further expressions in other constitutional articles that promote family values. Thus, in the terms explained by the Plaintiff in this case, it is without doubt that the practice of homosexuality is unconstitutional. The criminalization of same cannot therefore be said to be an affront to the Constitution of the Republic.

65. The Plaintiff has also contended that section 104 (1)(b) of Act 29 also contravenes Article 17(2) of the constitution which said article provides for the right to equality and non-discrimination. Article 17 (2) & (3) provides as follows:

> *"17(2) A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status."*
>
> *(3) For the purposes of this article, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by race, place of origin, political opinions, colour,*

gender, occupation, religion or creed, whereby persons of one description are subjected to disabilities or restrictions to which persons of another description are not made subject or are granted privileges or advantages which are not granted to persons of another description."

66. The Plaintiff's arguments in support of this contention reveals a fundamental flaw in his deduction; he assumes as a foregone conclusion that the Constitution recognizes homosexuals as a distinct group at law deserving of some peculiar rights and protections by reason of their sexual preferences.
67. As I have found above, the historical, cultural and social context of our Ghanaian society condemns same sex relations and it is this sense of overwhelming disapproval which is manifested in the criminalization of the said conduct. On that score, it is absurd for the Plaintiff to argue that individuals who hold themselves out as being practitioners of an act proscribed by law, are being discriminated against by reason of such proscription.

68. Further, the Plaintiff argues that section 104(1)(b) of Act 29 contravenes Article 14(1) of the constitution. The said article states as follows:

(1) Every person shall be entitled to his personal liberty and no person shall be deprived of his personal liberty except in the following cases and in accordance with procedure permitted by law -...

(a) in execution of a sentence or order of a court in respect of a criminal offence of which he has been convicted; or

(g) upon reasonable suspicion of his having committed or being about to commit a criminal offence under the laws of Ghana.

69. The right to personal liberty is no license to endorse all forms of indecency. Just as acts such as coitus in public, distribution of pornography and the like

cannot be endorsed on the basis of personal liberty, so also, can we not endorse acts of unnatural carnal knowledge on the basis of personal liberty.

70. Before our ink dries on the discussion of the matters implicated by the instant suit, it is important to point out a few matters that are peculiar to our constitutional dispensation as a nation.

71. I wish to state in emphatic terms that our Constitution is supreme and **NOT** subservient to the constitutions, and laws of other nations and jurisdictions. Whilst the constitutions and laws of other nations may have expressly legalized homosexuality, glorified gay marriages and by way of affirmative actions, promulgated legislation to propagate, outdoor, evangelize, preach and sell the notions of homosexuality to every fabric of those societies, Ghana as a nation, and for that matter this Court, cannot by "peer pressure" be cajoled into adopting similar stance. Our Constitution is sui generis and the only one of its kind. Thus, citizens who ply this Court must do more than merely citing and referring to Constitutions of other states as well as their case law into persuading us on what the law is or ought to be in Ghana.

72. Our duty as judges and the oath that we swore before assuming office was not to uphold the laws of other nations or their case law. Our oath is to uphold the Constitution and laws of the Republic of Ghana. Thus, we shall neither engage in legislative drafting nor usurp the lawmaking powers of Parliament in order to substitute our wisdom for that of the lawmakers by superimposing foreign perceptions of propriety and/or normalcy on our laws and established social structures. We must therefore, as judges, avoid any extent of judicial activism that will mislead us into assuming the role of Parliament. [See Republic v Fast Track High Court, Accra; Ex parte Daniels [2003-2004] SCGLR 364 at p.370].

CONCLUSION:

In conclusion, I wish to reiterate, in respect of the issue that was set down for determination in this suit, that section 104 (1) of Act 29 which criminalizes unnatural carnal knowledge does not contravene the Constitution of the Republic of Ghana. The Plaintiff's conception of private morality as a ground to limit or expand the constitutional right to privacy lacks sufficient context in the nation's constitutional architecture. Indeed, it is fundamentally poles apart from Ghanaian family values. Our constitutional provisions derive their purpose and values from our traditions, customs and culture. Consequently, the Plaintiff's action fails in its entirety.

(SGD) E. YONNY KULENDI
(JUSTICE OF THE SUPREME COURT)

<u>COUNSEL</u>

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