Journal of Law, Policy and Globalization
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.144, 2024

Human Rights, Homosexuality and the Law in Ghana: An Appraisal

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Abstract

On 13th July 2015, the Circuit Court of Ghana in the first case on homosexuality in Ghana; *The Republic v. Dr. Sulley Ali Gabass*, sentenced the accused to 25 years imprisonment. The facts disclosed that the accused had anal sex with a minor. Six years later, the Ghanaian Parliament passed the Proper Human Sexual Rights and Ghanaian Family Values Bill, 2021, and enacted the Human Sexual Rights and Family Values Act, 2024. The Act is awaiting Presidential assent to be passed into law. Two court cases were brought before the Ghana Supreme Court to prevent passage of the Bill into law asserting, among others, human rights and privacy violations.

The President is however hesitant in signing the said Act and has asked parliament to await decision of the country's apex court. Till date of writing this paper, the Supreme Court has not made a final decision on the matter. The impasse has generated much media furore over the necessity or otherwise of the law. Proponents of the law cite cultural norms and family values while opponents focus on human rights principles of privacy and non-discrimination.

Arguing from International Human Rights Law perspective, this doctrinal paper contributes to the debate by analysing the Ghanaian case law and jurisprudence on homosexuality, and provisions of the Bill and proposed Act. The paper finds, among others, that the scope of the proposed law is very wide and sweeping going beyond proscribing LGBTQ+ persons and their activities to prosecuting those associated with them. In criminalising all allies and advocates for gay rights, the proposed law is wider than the existing Criminal Offences Act that criminalises unnatural carnal knowledge. The paper argues that such wide scope could lead to witch- hunting and suppression of freedom of association.

Keywords: Homosexuality, Human rights, Family values, Ghana

DOI: 10.7176/JLPG/144-04
Publication date: December 30th 2024

1. Introduction

LGBTQ+ persons are classified as sexual minorities. The gay, lesbian, bisexual, transgender and those labelled queer in society constitute minorities based on their gender identification and sexual orientation. Sexual minorities have existed since time immemorial (Greenberg & Bystryn 1982). Homosexual behaviour has been recorded in many African communities (Murray & Palgrave 1998; Busangokwakhe 2006). Initially identified sexual minorities were gay men often referred to as homosexuals. When gay men who are sexually attracted to each other engage in sexual acts, such acts are seen as unnatural. Homosexual sex is deemed unnatural because it does not fit in the popular sex within heterosexual relationship. The homosexual terminology has now broadened beyond reference to gay men to include Lesbians, Bisexuals, Transgender, Queer and Plus; hence the acronym LGBTQ+. The plus sign represents other sexual minorities not named or yet to be discovered.

Historically, homosexual sex was criminalized and referred to as sodomy or unnatural carnal knowledge (Atuguba 2019). Homosexuality was criminalised in Europe and much of the Americas until late 20th century. In *R v. Allen* (1848-50), the accused was prosecuted for unnatural carnal knowledge after he induced a twelve-year-old boy to sodomise him. Sodomy seems to be used in several cases as a simile for unnatural carnal knowledge. Criminal prosecution under unnatural carnal knowledge provisions have also included buggery (British Buggery Act 1533). Sodomy is sexual intercourse involving anal or oral copulation and Buggery is anal intercourse (*The Republic v. Dr. Sulley Ali Gabass* 2015). Under old English law therefore, any form of sexual intercourse other than sex *per vaginum* is unnatural carnal knowledge. Old British cases on unnatural carnal knowledge also applied in Ghana.

The British Buggery Act of 1533 penalised homosexuality until 1967 when homosexuality was decriminalised

for consenting adults over 21 years in much of England and Wales and later the entire United Kingdom (United Kingdom Sexual Offences Act 1967). Hence, homosexuality was legalised in England and Wales on condition that the acts were consensual, in private and between two men who had attained the age of 21. Prohibition of unnatural carnal knowledge as a sexual offence under section 104 of Ghana Criminal Offences Act is therefore a common law relic that became part of the laws of Ghana. As a common law country, Ghana's legal system and its court structure is based on the English Common Law which became applicable in Ghana with passage of the Judicature Acts of 1847. Article 1 of the 1992 Ghanaian Constitution lists the laws of Ghana to include common law rules.

As noted above, the British decriminalised homosexuality and have granted certain civil rights to homosexual couples, but Ghanaian law on the matter remained unchanged and static until the Proper Human Sexual Rights and Ghanaian Family Values Bill, 2021 and the current proposed anti-gay law; the Human Sexual Rights and Family Values Act, 2024. The Bill and the proposed Act seeks to (1) proscribe LGBTQ+ and related activities (2) proscribe propaganda, advocacy or promotion of LGBTQ+ and related activities and (3) provide protection of and support for children and persons who are victims or accused of LGBTQ+ and related activities. The Bill generated much furore within the Ghanaian populace with opponents and human rights activists challenging the proposed law in court (*Dr. Amanda Odoi v. The Speaker of Parliament & the Attorney-General* 2023 & *Richard Dela Sky v The Parliament of Ghana and Another* 2024).

Human rights activists argue, amongst others, that the Bill will undermine fundamental human rights and freedoms like non-discrimination, freedom of association, privacy and dignity, guaranteed under articles 12 (1) and (2), 15 (1), 17 (1) and (2), 18 (2), 21 (1) (a) (b) (d) and (e) in Chapter 5 of the 1992 Ghana constitution. Activists and human rights advocates challenged the constitutionality of the anti- gay Bill and asked the Ghana Supreme Court to declare it null and void and of no effect. An interlocutory injunction was also filed at the Supreme Court to restrain Parliament from transmitting the proposed anti-LGBTQ+ Act to the President for assent. A motion countering the injunction was also brought to the Court by the proponents and supporters of the Bill and its attendant proposed Act. Proponents welcomed the anti-gay law as a necessary law to protect African values (Memorandum to the Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill 2021).

The Supreme Court ruled on July 17, 2024, that it would defer judgment on the interlocutory injunction until the substantive case, on the unconstitutionality of the Bill, has been heard. Hearing on the substantive case has however delayed because of many deficiencies in the court documents filed by the various parties. The President has declined signing the Act citing the pending cases before the Supreme Court.

1.1 Human rights and the reprobation and approbation on LGBTQ+ rights

Human rights principles are set out under many international human rights documents starting with the International Bill of Rights, to wit, the Universal Declaration on Human Rights (UN General Assembly 1948), the International Covenant for Civil and Political Rights (UN General Assembly 1966) and the International Covenant for Economic, Social and Cultural Rights (UN General Assembly 1966). The constitutions of various countries including those of Africa also embody human rights principles. The usual arguments in favour of gay rights are based on the human rights principle of non-discrimination. Embedded in the principle of non-discrimination are demands for equal treatment. Initially the most common grounds for non-discrimination under human rights law were race, sex, language and religion.

The most revolutionary human rights document on non-discrimination is the Charter of the Fundamental Rights of the European Union (European Union Charter of Fundamental Rights 2007). The Charter was preceded by article 13 of 1997 Treaty of Amsterdam establishing the European Community. Article 21 of the EU Charter expanded the grounds for discrimination to include, discrimination based on any grounds such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.

To approbate and reprobate is a legal principle that refers to a person or entity taking inconsistent positions on a matter, especially in legal proceedings or actions. Hence, a person cannot both approve and reject a legal instrument (Benjamin 2023). The reprobation and approbation that characterised acceptance of LGBTQ+ shows that the road to recognition of the human rights of non-discrimination for homosexuals has been a fraught one. Jurisprudence of human rights law reveals that homosexuality was criminalised in many Western countries. Indeed, as already stated, Ghana law on unnatural carnal knowledge was received from the United Kingdom Common Law. Despite the United Kingdom and Wales decriminalising homosexuality in the 1960's, the European Court on Human Rights and its Commission, were hesitant in recognising gay rights as justiciable

human rights. Initially, all cases brought before the European Commission on rights of gay persons or homosexuals were rejected as inadmissible. Further, early attempts, in Handyside v. United Kingdom (EHRR 1976) to place homosexual literary content under freedom of expression were rejected by the European Court of Human Rights as having a pernicious effect on the morals of the likely readers between ages 12 and 18.

The Handyside case involved publication of 'the Little Red Schoolbook' meant as a reference book for school children. The book contained sexual matters including references to homosexuality. The European Court did an about turn however in Dudgeon v. United Kingdom (EHRR 1981), when it held that Northern Ireland's statute criminalising homosexual acts between consenting adult males was an interference with Dudgeon's right to private life contrary to articles 8 of the European Convention on Human Rights and article 12 of the Universal Declaration of Human Rights. In Norris v. Ireland (EHRR 1989) the Court agreed with the decision in Dudgeon that statute criminalising homosexual acts between consenting individuals was an intrusion into the right to private life contrary to article 8 of the European Convention. The courts seemed to be tolerant when homosexual activity was conducted within the private sphere.

Indeed, in Smith & Grady v. United Kingdom (EHRR 1999) and Lustig-Prean & Beckett v. United Kingdom (ECHR 2000), the European Court ruled that discharging homosexuals from the armed forces violated Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 8 prohibits public authorities violating citizens' right to a private and family life unless necessary. Presumably, homosexual activity conducted within privacy between consenting adults is protected under the human right to privacy. Sexual orientation as a human right was eventually recognised in the case of Toonen v. Australia (United Nations Human Rights Committee 1994). Subsequently, as already noted above, discrimination based on sexual orientation was prohibited under the Charter of the Fundamental Rights of the European Union.

The various states in United States of America had similar anti-gay legislation. In Bowers v. Hardwick (US 1986), the state of Georgia criminalised 'any sex act involving the sex organs of one person and the mouth or anus of another'. Bowers, who was arrested in his home and charged with the crime of sodomy under the above legislation, challenged the statute as an infringement of his fundamental rights to privacy established under the United States Constitution. The court, while acknowledging that anti-sodomy laws had ancient roots as a criminal offence at Common Law, held by majority opinion, that the right for gays to engage in sodomy was not protected by the Federal Constitution, and that the Georgia law was legal.

Also, in Boy Scouts of America v. Dale (US 2000), a scout's master who had his position revoked because he was a homosexual and gay rights activist brought the case alleging discrimination based on sexual orientation. Justifying his dismissal, the Boy Scouts argued that his sexual orientation was inconsistent with their value system. The court held by 5-4 majority that the constitutional right to freedom of association allowed the Boy Scouts of America to exclude a homosexual person from membership despite a state law requiring equal treatment of homosexuals in public accommodations. Further, the case of Masterpiece Cakeshop v. Colorado Civil Rights Commission (US 2018), reveals judicial inconsistency in dealing with LGBTQ+ rights. While the United States Supreme Court agreed that refusal of a baker to make cake for homosexual couple constituted discrimination, they ruled that antagonism against the Bakers religious belief demonstrated by the Commission was also a violation of the baker's religious belief. The case reveals that reprobation and approbation in relation to LGBTQ+ rights is also evident in the United States Justice System.

Seemingly, the laws and constitution protect gay persons and gay couples in exercise of their civil rights, while at the same time also protects personal or individual religious and philosophical objections under freedom of expression. Indeed, many states of the United States still have anti-sodomy laws. Some of the states with Sodomy laws are Florida, Georgia, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, North Carolina, Oklahoma, South Carolina and Texas. In the 2020 case of Bostock v. Clayton County (US 2020), the US Supreme Court unequivocally forbid discrimination based merely on sexual orientation. The court in the case held that an employer that fired an individual merely for being gay or transgender had violated the United States Federal Constitution at Title VII. As noted by Cohn and Gallagher (1977), western approval and recognition of LGBTQ+ persons have gone through phases; the first phase of negative and punitive reaction and the second and third phases of positive reaction and acceptance of sexual identification as an individual matter not public matter for judgment, and a moral issue respectively.

Currently homosexuality is generally legal in the Northern and Southern Americas (except for Guyana), Australia and most of Asia. The shifting positions on LGBTQ+ acceptance even in Europe showcases the complexity of the matter (Dalvi 2003). The position is not different in African Countries. Despite the African Commission on Human and Peoples' Rights resolution on equal protection guarantees to be extended to sexual

orientation (ACHPR/Res.275 2014), the African human rights system has not made much input in the anti-gay debate on the continent. Hence, while the African Charter underscores protection of freedoms and individual rights, the Charter also reiterates protection of African values and duties. The Preamble to the Charter takes into consideration the virtues of historical tradition and the values of African civilization which should inspire and characterize reflection on the concept of human and peoples' rights (OAU 1982).

Indeed article 18 of the Charter identified the family as the natural unit and basis of society and deemed it the preserve of the state to take care of its physical and moral health. The provision underscored the duty of every state to assist the family which is the custodian of morals and traditional values recognized by the community. Further, the Charter is the only International human rights document with a separate section on duties expected of individuals. Of much relevance is article 27 (2) which provides that the rights and freedoms of everyone shall be exercised with due regard to the rights of others, collective security, morality and common interest. Article 29 (7) also placed a duty on the individual to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society.

Many anti-gay legislations in the various African countries have touted the protection of African culture and values. Promotion of Ghanaian family values was the basis for drafting Ghana's Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill, 2021 and the proposed Human Sexual Rights and Family Values Act (Memorandum to the Bill, 2021). The rationale for anti-gay laws in African countries like Ghana, Nigeria (Nigeria 2021) and Uganda (Uganda 2023) have been based on culture and the need to protect morality and African values (Sogunro 2014). While the universality of human rights principles has been propounded in the International Bill of Rights, proponents of cultural relativism assert that values, ethics and religions vary, and hence human rights principles must be interpreted within the context of the culture, religion and ethics of the various state parties (Donnelly 1984). It is important to take note of heterogeneous societies and to accommodate differences particularly in relation to cultural norms.

However, while cultural relativism has received some support, the overriding consideration has always been not to interpret culture considerations to the detriment of protection of fundamental human rights. Indeed, the African values, culture, morality and the relativist debate seem weakened with advent of legalisation protecting LGBTQ+ rights in half the countries of Africa like South Africa and Botswana. In 2019 Botswana decriminalised homosexuality and in South Africa, the 1996 South African Constitutional equal protection and non-discrimination section includes a provision that; the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour or sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

The South African Constitutional Court reaffirmed the above non- discrimination principle in National Coalition for Gay and Lesbian Equality v. Ministry of Justice (SA 1999) when the court ruled, amongst others, that the common law offence of Sodomy relating to two consenting male adults was inconsistent with the constitution and breached the rights of equality, dignity and privacy.

1.2 The Clergy and Losing Religious Anti-Gay Narrative

Apart from cultural reasons, refusal to accord gay or homosexual rights are based on religious and moral grounds. Generally, both Islam and Christianity, the two major religions of the world, view homosexuality as sinful (Chadee et al 2013). In Christian dogma, homosexuality is un-Christian (Fuller 2023). Both religions base their anti-gay arguments on the biblical story of creation when God created man and woman and exulted them to multiple (Gedzi et al 2019). Marriage between two genders was seen as an antithesis to this exultation. The biblical story of Lot in Sodom and Gomorrah where God destroys those cities because of the prevalence of homosexual behaviour (Holy Bible Genesis 19), further upholds the religious anti-gay narrative that views homosexuality as an amoral choice. The sinful nature of homosexuality is equated to a criminal offence punishable by the state.

Modern perspectives on gay rights among the religious and clergy however seems to be more tempered. Despite the traditional religious orthodoxy held by many Christian groups, especially the Evangelical and charismatic churches, who seem to be the most ardent opponents of LGBTQ+ rights and causes, Anglo-Catholicism is more sympathetic and attractive to the homosexual cause (Hilliard 1982). The Church of England seems to tolerate gay priests so long as they don't break the vow of celibacy or act out their impulses and avoided scandal (Jones 2011). The Catholic Church has also over the years adopted an attitude of forbearance towards the issue. Gallagher (Gallagher 2006) noted that homosexuality in the priesthood was tolerated but not publicly

acknowledged. Pope Francis has opined that homosexuality is a moral sin but not a crime (PBS 2023). The Pope has labelled laws that criminalize homosexuality or homosexual activity as unjust and urged Catholics to show tenderness as God does with each of his children (Glatz 2023). The Anglican Church has taken a more radical step by celebrating gay marriages. Indeed, in 2003 the US Episcopal Church concentrated Gene Robinson, an openly gay cleric as bishop of the diocese of New Hampshire.

The religious tolerance for homosexuals in certain faiths could partly be attributed to acknowledgement of the failings of men and partly to the coming out or exposure of gay priests. The Catholic gay narrative about the sinful nature of homosexuality has been called into question by critics who accuse the church of tolerating gay priests and shielding them from punishment especially in cases of paedophilia (Gallagher 2006). Also, even though homosexuality is penalised in some Islamic countries, contemporary Islamic scholars argue for compassion and inclusiveness of homosexuals (Ahmadi 2012), especially in view of certain cultural contexts within which the practice occurs.

2. Ghanaian Jurisprudence and Case Law on Homosexuality

2.1 The Criminal Offences Act on Unnatural Carnal knowledge

Section 104 of the Criminal Offences Act (Act 29) does not mention the word homosexuality. The Act uses the terms unnatural carnal knowledge.

Under section 104 (1) A person who has unnatural carnal knowledge

(a) of another person of not less than sixteen years of age or over 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.

Further, section 104 (2) explains that unnatural carnal knowledge is sexual intercourse with a person in an unnatural manner or, with an animal.

From the above provisions, consensual unnatural carnal knowledge with another person or unnatural carnal knowledge with an animal is a lesser offence than non-consensual unnatural carnal knowledge with another person who is above sixteen years. It is important to note that any sexual relations with a person, male or female, below sixteen years of age is defilement under the criminal law. The definition of unnatural carnal knowledge under section 104 (2) as 'sexual intercourse in an unnatural manner' was further interpreted by the courts in the case of *Republic v. Dr. Sulley Ali Ghabas* (Ghana 2015).

2.2 The Republic v. Dr. Sulley Ali Gabass

This case was brought before the Circuit Court. The Circuit court has both criminal and civil jurisdiction. Judges who sit at the Circuit Court are referred to as Circuit Court Judges. The Circuit Courts are in the regional and some district capitals of Ghana. Criminal cases at the Circuit court are prosecuted by lawyers from the Attorney-Generals Department on behalf of the Republic of Ghana. In this vein, the case of *Republic v. Dr. Sulley Ali Gabass*, was brought by the state on behalf of the victim, a 16-year-old boy.

In the case, one Dr Gabass was prosecuted on two counts. The first count was for defiling a child under 16 years of age contrary to section 101 (1) of the Ghana Criminal Offences Act 1960, Act 29. Defilement is the natural or unnatural carnal knowledge of a child under sixteen years of age, whether with or without the consent of the child. Under section 101 (2), penalty for defilement is a term of imprisonment of not less than seven years and not more than twenty-five years. The second count was for having unnatural carnal knowledge with the child contrary to section 104 (1) of the Ghana Criminal Offences Act, 1960, Act 29.

The prosecution's case was that Dr. Gabass (hereinafter referred to as the accused) and the child (hereinafter referred to as the victim) met on the internet and became friends. Subsequently they met at various places where they had anal sex. After the second such sexual encounter, the victim fell ill and informed the accused, who prescribed medication. The victim's condition became worse, and he informed the accused who asked him to go to the hospital. The accused contributed towards the hospital expenses. At the hospital, the victim mentioned the accused as the person responsible for his condition. Following media reports on the matter and police

investigations, the accused was arrested and arraigned before court for prosecution.

The accused was arraigned before court on 24th October 2014. Judgment was given on 13th July 2015. Ruling in favour of the prosecution, the Court held that count one had been proven; and that the accused had sex with the victim who at the material time was below 16 years of age. The Court however dismissed count two on unnatural carnal knowledge, because the charge of unnatural carnal knowledge could not be sustained together with the charge of defilement. Defilement demanded that the victim be below 16 years, while to succeed on a count of unnatural carnal knowledge the prosecution must not only establish:

> 1) That the accused did commit either buggery or sodomy with/or
> on the victim, where the victim is a human being (as in this instant case) …

But also,

> 2) That at the time the act took place, the victim was above the age
> of sixteen years …

The Court also noted that;

> Consent is wholly irrelevant as to the status of unnatural carnal
> knowledge being a criminal offence except that where the victim
> consented to the act, the act is a misdemeanour whereas if the victim did
> not consent to the act, it becomes a first-degree felony.

The court further noted that implicit in the definition of defilement was the concept unnatural carnal knowledge. Dr. Ali Gabass was acquitted and discharged on the offence of unnatural carnal knowledge but found guilty of defilement for having anal sex with a minor. He was sentenced to the maximum sentence of twenty-five years imprisonment.

2.3 Impact of the Criminal Offences Act and Prosecution of Dr. Sulley Ali Gabass

There was no change in Ghanaian legislation following the case of *Republic v. Dr. Sulley Ali Gabass.* Section 104 of the Criminal Offences Act continues to be the law on homosexuality in Ghana. The impact of the case can therefore not be measured per legislative action or reform. Further, following the case, there was no reported increase in physical attack against homosexuals in the country.

Whereas the *Republic v. Dr. Sulley Ali Gabass* did not cause much backlash against perceived homosexuals in Ghanaian society, the case elicited much concern for the plight of young boys who could fall victim to older gay man and sex tourists. In 2016, Ghana hosted the 7th Africa Conference on Sexual Health and Rights (ACSHR) under the distinguished patronage of the first Lady of the Republic of Ghana and President of the African First Ladies Against HIV & AIDS (OAFLA). The need for creation of a safe space for young homosexuals to seek sexual and reproductive health services and advice and physiological help led to establishment of an LGBTQ+ advocacy resource centre in Accra, the capital city of Ghana on 31st January 2021. Framers of the Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill, 2021, referred to news media reports of opening of the LGBTQ+ advocacy resource center which was supported by many foreign agencies and governments.

The Bill noted that the European Union and the Australian High Commissioner to Ghana offered support to all civil society organizations supporting LGBTQ+ groups of the center. This increased LGBTQ+ advocacy, coupled with non-governmental organisations' provision of support and protection for their sexual health programmes, seemed to have had an unintended consequence - alarm and backlash from the public (The Guardian 2021) and some members of Parliament. The backlash culminated in the passage of the Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill, 2021 and the proposed Human Sexual Rights and Family Values Act, 2024. According to the Memorandum to the Bill, the government received many objections to the existence of the advocacy centre from notable Ghanaian organizations and personalities like the National House of Chiefs, the National Chief Imam, the Christian Council and Catholic Bishops Conference.

3. The Proposed Anti- LGBTQ+ Law: The 2021 Bill and the 2024 Human Sexual Rights and Family Values Act.

The Ghana 2021 anti-gay Bill and the proposed Act use the acronym LGBTTQAP+ to mean lesbians, gay, bisexual, transgender, transsexual, queer or their allies, pan-sexual or persons of any other sexual orientation or

in a sexual relationship that is contrary to the sociocultural notion of male and female or the relationship between a males and female (Bill 2021 & Act 2024). However, for the purpose of this paper, the short acronym LGBTQ+ is used.

The defence of Ghanaian values was a central reason for drafting of the Bill and the Human Sexual Rights and Family Values Act, 2024. The Bill reiterated that LGBTQ+ activities threaten the concept of the family and the associated value systems that are central to the social structure of all ethnic groups in Ghana. The framers of the Bill emphasised the sovereign right of the country to prevent infiltration of foreign cultures. The Bill also mentioned the country's right of self-determination to preserve Ghanaian socio-cultural values by enacting legislation to minimise negative effects of globalization particularly the effect of unacceptable foreign influence. LGBTQ+ activities was characterised in the Bill as the antitheses of the concept of Ghanaian family which is a unit of society initiated by marriage between a man and a woman, each of whose gender is assigned at birth.

According to the Bill which heralded the Act, the Ghana Pentecostal and Charismatic Council, the Coalition of Muslim Organizations in Ghana, the National Imam's office, the Catholic Bishops' Conference, the Advocates for Christ, the National House of Chiefs and opinion leaders in Ghana, all formed the National Coalition for Proper Human Sexual Rights and Family Values. The Coalition rejected the practices of and advocacy for the LGBTQ+ group in conformity with Customary Law and tenets of faith and respect for public morality. The said Coalition called on the government to strengthen the laws of the country and to resist attempts to disregard cherished Ghanaian culture and social values.

3.1 Overreaching Scope of the Bill and attendant Human Sexual Rights and Family Values Act, 2024

The 2021 Bill noted that the anti-gay law is to provide proper human sexual rights and Ghanaian family values. In particular (1) proscribe LBGTQ+ and related activities, (2) proscribe propaganda of and advocacy for or promotion of LGBTQ + and related activities and (3) provide for the protection of and support for children and persons who are victims or accused of LGBTQ+ and related activities and related matters. Section 1 of the Act also targets advocates of LGBTQ+ rights and persons who provide or participate in surgical procedures or sex or gender reassignment intended to create a sexual category other than the category at birth. The only exception made is for procedures that are solely to correct biological anomaly including inter-sex.

As already mentioned, the Ghana Criminal Offences Act criminalises unnatural carnal knowledge which means criminalisation of homosexuality. The novelty of the current proposed anti-gay law is that it widens the scope of perpetrators to include lesbians and the other prohibited groups. The proposed law also prohibits homosexual marriage and adoption by homosexual couples. The law also criminalises sexual identity without sexual relationships. Further, sections 13-15 of the proposed law criminalise acts that amount to supporting gay rights including dissemination of materials on the subject matter. Indeed, the law imposes a duty on all to report LGBTQ+ practices. Sympathisers of LGBTQ+ people and their activities are also targets of the law.

Prohibitions of advocacy or support for LGBTQ+ persons is criminalization of speech (Commission on Human Rights and Administrative Justice 2021). Indeed, the proposed law seems to go against the Papal teachings of empathy. Empathising with homosexuals is a criminal offence under the proposed law. A further difficulty with the proposed law is that, on one hand the law seeks to punish those accused of LGBTQ+ activities and seeks to protect victims of LGBTQ+ activities. On the other hand, it bans assistance of any kind including sponsorship and funding of educational programmes for LGBTQ+ persons. The existence of the anti-gay law is itself premised on the existence of homosexuals within Ghanaian communities. One wonders how the state would protect victims of LGBTQ+ activities or even protect children who identify as LGBTQ+ if a centre for support is proscribed and banned. Such draconian anti-gay laws can drive the practice underground.

Draconian laws can promote a culture of silence. A culture of silence surrounding behaviour or sexual assault of any kind has often proven to make the plight of victims worse (Gitonga 2021). An anti-gay law in Ghana would make it more difficult for minors like the victim in the case of *Republic v. Dr. Sulley Ali Gabass,* who was HIV positive, to seek sexual health support from advocates who would be more sympathetic to his situation. In addition, in an African country like Ghana, with limited resources where healthcare is below optimum, philanthropic centres that provide sexual health information could have prevented the minor from becoming a victim in the first place. Worthy of note is section 20 (1) and (2) of the Bill that proposed medical aid and welfare provisions for the accused or convicted gay person conditional upon open recantation.

3.2 Criminalization by Association

Section 2 of the Bill and section 1 of the proposed Act also apply to allies, who are non-queer persons, who support or advocate for the queer community. In essence therefore, parents, siblings and friends of LGBTQ+ persons could be prosecuted should they show sympathy or support for such persons. Indeed, section 3 of the Bill and section 2 of the Act place a duty for promoting and protecting proper human sexual rights and Ghanaian family values on individuals especially parents, guardians, teachers or religious instructors, churches and mosques, the executive, judiciary and legislature, the media and the Commission on Human Rights and Administrative Justice (CHRAJ).

This duty to promote family values is an echo of the duty placed on individuals and communities under the African Charter. However, while the duty under the African Charter is inspirational, the Ghana anti-gay law criminalises failure to promote Ghanaian values and associations with homosexuals. Indeed section 2 of the Act and section 5 of the Bill also place a duty on individuals to report homosexual activity to either police officers, community opinion leaders, customary authorities or political leaders. It goes without saying that such practice could lead to witch- hunting and embolden extra judicial attacks on suspected homosexuals. Targeting allies of gay persons is criminalisation by association.

Although criminal laws of many jurisdictions including Ghana proscribe abetting of crime and receiving stolen goods, criminalisation merely by association is an archaic legal practice that must have no place in our jurisprudence. One cannot be punished just because he or she associates with an alleged criminal. Guilty by association or criminalising mere relationships with alleged homosexuals could lead to unjust outcomes and undermine the principle of individual responsibility for crimes

3.3 Punishment

Under the anti-gay Bill and the proposed Act, any person who is guilty of homosexual activities listed under the act commits a misdemeanour and is liable on summary conviction to a fine or to a term of imprisonment of not less than two months and not more than three years or to both fine and imprisonment. To wit, the Act imposes prison sentences for the following: engaging in same-sex intimacy, providing or undergoing gender affirmation surgery or identifying as lesbian, gay, transsexual, queer, transgender, pan-sexual, non-binary person or an ally of such persons. Section 12 of the Act also makes it unlawful for any entity, whether body corporate or not, to provide support like funding for LGBTQ+ persons or persons engaged in any activity proscribed by the Act.

Punishment for such support is a summary conviction to a term of imprisonment of not less than three years and not more than five years. In addition, under section 10 of the Act those found liable for propagating LGBTQ activities or advocating and promoting the rights of LGBTQ+ persons in which ever form including through media or other publication commit an offence and are liable on summary conviction to a term of imprisonment of not less than five years and not more than ten years. Persons who offer their premises for such propagation of LBGTQ+ rights are also liable on conviction to a term of imprisonment of not less than five years and not more than 10 years.

Further, section 11 of the Act prohibits any form of propaganda or promotion of and advocacy for LGBTQ+ activities directed at children. Punishment for such propaganda is a term of imprisonment of not less than six years and not more than ten years. The law is silent on punishment when the perpetrator is a minor. The Act, under section 18, does expect the Minister responsible for health to provide support for victims of sexual activities prohibited under the law. In addition, under section 19(2) of Bill, persons convicted for homosexual activity are also to pay compensation to victims for any physical or psychological harm caused to victims. Section 17 of the Act while placing a duty to report homosexual behaviour also prohibits extra judicial treatment against homosexuals like verbal abuse, assault or harassment.

From the above, punishment for allies and advocates seems harsher by comparison to the misdemeanour for the actual offence. Within the parameters of Ghanaian legal reform where non-custodial sentencing is becoming more popular, it is submitted that custodial sentencing for consensual sex and its support thereof is very draconian. As religious anti-gay sentiments begin to weaken worldwide, many countries have taken the lead towards decriminalization of homosexuality. India decriminalised gay relationships in 2018 when it repealed section 377 of its penal code and South Africa and Botswana have decriminalised homosexuality. Indeed, custodial sentencing for consensual homosexual activity has been ruled as a violation of privacy in many jurisdictions. As already noted, privacy and non-discrimination are grounds that have been successful in human rights challenges to penalisation and discrimination based on homosexuality

4. Conclusion

Global reprobation and approbation on LGBTQ+ rights show the complexity of the issue. Human rights make room for cultural relativism, but criminalisation of conduct based on culture must not override core human rights principles like non-discrimination, privacy and the freedom of association granted by the Ghanaian Constitution. This paper has established that Ghana's Proper Human Sexual Rights and Ghanaian Family Values Bill, 2021 and the proposed anti-gay law, the Human Sexual Rights and Family Values Act, 2024 have very overreaching effect that could lead to witch-hunting and criminalisation by association and promote a culture of silence that could affect the human rights of not only gay persons but also their families and friends.

Though the paper conceded that African countries are enacting stricter legislation to ban gay rights, the paper also noted that many other African countries have decriminalised homosexuality. It is therefore recommended that Parliament takes a second look at this law since there already exists a law on unnatural carnal knowledge. Any proposed legislation or amendment to our criminal law must respect the human rights of Ghanaians as established under the 1992 Constitution.

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