

**MEMORANDUM ON THE PROPER HUMAN SEXUAL RIGHTS AND GHANAIAN
FAMILY VALUES BILL, 2021**

**COMMENTS FROM THE COMMISSION ON HUMAN RIGHTS AND ADMINISTRATIVE
JUSTICE (CHRAJ)**

INTRODUCTORY REMARKS

The “Proper Human Sexual Rights and Family Values” bill has generated considerable public debate from a cross section of Ghanaians since its content became public. On one hand, proponents of the bill have defended it as timely and expansive with the view to addressing the lacunae in the existing laws against activities of LGBTQ+ persons. Opponents on the other hand, have argued that the bill has far reaching consequences for the human rights of LGBTQ+ persons who are considered one of the vulnerable groups in the country.

The Commission on Human Rights and Administrative Justice (Commission) is a Constitutional Body established pursuant to the 1992 Constitution (the Constitution) by the CHRAJ Act, 1993 (Act 456) to promote and protect the human rights and freedoms of all persons in Ghana. The Commission is thus mandated by article 218(f) of the Constitution *“to educate the public as to human rights and freedoms by such means as the Commissioner may decide including publications, lectures and symposia..”*

It is also important to emphasise that the Commission recognises the constitutional obligation imposed on Parliament by article 93(2) which states as follows:

“subject to the provisions of this Constitution, the legislative power of Ghana shall be vested in Parliament and shall be exercised in accordance with the Constitution.” (Emphasis ours)

However, as the National Human Rights Institution operating in accordance with the Paris Principles, the Commission is additionally enjoined to provide **advisories, recommendations, opinions to government (including Parliament) and public officials** on issues of human rights concern.

It is therefore against this backdrop that the Commission has elected to proffer its opinion/recommendations on the Proper Human Rights and Sexual Values Bill to the Parliament of Ghana for sober reflection and possible consideration.

GENERAL COMMENTS

The Commission has observed that the following themes formed the basis or *raison d’être* of the bill as expressed in the memorandum accompanying it.

a. Culture

Page (i) paragraph (4)states *“...the house wants to state without equivocation that*

throughout history, nowhere does a Ghanaian culture subscribe to LGBTI which is a taboo, inhuman and alien to our Ghanaian society.”

It is not in doubt that every society determines its own cultural values and practices and therefore the argument of culture in the context of rights is not a new phenomenon. It is however worth mentioning that culture is dynamic, evolving, and in fact inclusive. The committee on Economic Social and Cultural Rights (CESCR) defines culture as “*broad, encompassing all manifestations of human existence and also as a living process, historical, dynamic and evolving with a past, a present and a future*”. It is also equally true that in every society while some cultural practices may be dominant, others may not but deserving of equal protection before the law.

Related to the culture argument is the notion that LGBTQ+ is alien to Africa. While the term ‘LGBTQ+’ and human rights for that matter may be regarded as western constructs, the philosophy (values) which undergird them – dignity, equality and non-discrimination– apply to all humans everywhere. Indeed, these values have shaped anti-colonial struggles in Ghana and the rest of the continent, and continue to shape different struggles across the world today.

While the Commission does not seek to engage Parliament on a historical debate around LGBTQ+, it is equally relevant to mention that some anthropological studies have also shown that certain cultural practices and values across the continent proved that same-sex conduct existed on the continent even before colonialization.¹ Murray and Roscoe’s seminal work, “*Boy wives and female husbands: studies of African homosexualities*” empirically demonstrated the prevalence of same sex relations in at least 50 African societies.² In Ghana, terms such as “*Kojo Besia*”, *Obaa Barimas*” points to the recognition of gender fluidity of some members of the society.

b. Religion

Page (iii), paragraph (1) stipulates “*civil society organisations including the national coalition for proper human sexual rights and family values which is the amalgamation of Christian and para-Christian bodies, religious bodies including the Ghana Pentecostal and Charismatic Council, the coalition of Muslim organisations, the advocates for Christ have condemned the advocacy of the activities of persons in support of LGBTQ+ persons.*”

Unquestionably, Christians and Muslims form significant percentage of the Ghanaian population, and as such the values of these Abrahamic religions are most likely to influence any national conversation. While this may be true, the Ghanaian state is largely regarded as secular based on Constitutional ethos than a religious one given that no particular religious group lay claim to the republic being governed based on its doctrine.

¹ SO Murray ‘homosexuality in traditional sub-Saharan Africa and contemporary Africa’ in Murray & Roscoe pp 1-18)

² SO Murray &W Roscoe(ed)1998)Boy-wives and female husbands: Studies of African homosexualities (in) B Anderson ‘Politics of Homosexuality in Africa’(2007)1 Africana 123

The 1992 Constitution for instance states in the preamble as follows:

“... we the people of Ghana, in exercise of our natural and inalienable rights to establish a framework of government which shall secure for ourselves and posterity the blessings of *liberty, equality of opportunity and prosperity*”. Also, article 1(2) stipulates that the Constitution shall be the supreme law of Ghana...”

It is the considered view of the Commission that, Ghana is a constitutional democratic nation and as such, constitutional ethos of liberty and equality must guide every organ of government when performing a function under the Constitution (see article 12(1) of Constitution)

c. Criminal Law

Another justification for the bill is that section 104 of the Criminal offences Act, 1960 (Act 29) is inadequate to appropriately deal with LGBTQ+ as a criminal offence. It is however important to revisit certain fundamental principles underpinning the foundation of criminal law. Scholars have differed in opinion as to what should form the basis for criminalising a particular conduct. John Stuart Mills, one of the leading scholars in the field, contended that the purpose of criminal law is essentially to protect the “public from harm.” Therefore, should sexual activity between two consenting adults pass as “harm to society” and which should warrant criminalisation? Further to this, is the question of *mens rea* and the *actus reus* requirements which must be satisfied for an act to be deemed a “crime.” The resultant question is, whether individuals holding themselves as LGBTQ+ persons enough to warrant an arrest based on their sexual orientation? This has the tendency to occasion unbridled profiling of persons based on their perceived gender/sexual orientation thereby leading to arbitrary arrests and detention of LGBTQ+ persons.

d. Human Rights Law

The Commission has again observed that specific references have been made to international human rights law to support the passage of the bill particularly article 2(4) of the UN Charter. Further, reference is also made to articles 12(2), 17(1) and 21(1) (a) and (d) of the 1992 Constitution, Vigilantism and Related Offences Act, 2019 and the Cybersecurity Act.

Drafters argue that while rights are not absolute, the freedom to associate and advocate for change in law or public opinion towards LGBTQ+ persons do not arise on the premise that the act or their status is criminalised in the first place. These legislations have thus been employed to fortify the argument of any restriction placed on the freedom of persons identifying as LGBTQ+ to express their opinion or sentiments on how the current bill can undermine their human rights generally.

At the heart of human rights discourse are these fundamental questions. What does it mean to be human, and, who decides who is worthy of rights and who is not? Also, whether sexual orientation is a human right? This obviously raises the main question

of what constitutes human rights. Generally, human rights are entitlements and claims individuals make against the state and non-state actors by virtue of their humanity. Human rights and fundamental freedoms seek to protect human beings from **fear** and **want**, particularly threats of violence, assault, harassment and discrimination in any form whatsoever that potentially undermine the civil, political, economic, social and cultural rights as guaranteed under the universally acclaimed standard setting human rights Instrument – the Universal Declaration of Human Rights (UDHR)

Therefore, does sexuality or gender/sexual orientation qualify as human rights worthy of protection? In other words, whether whom a person is attracted to sexually is an entitlement or a claim one can make? Sexual orientation of an individual is an intrinsic aspect of a person and part of the multiple identities an individual embodies. For instance, an individual can embody multiple identities such as gender identity, race, socio-economic status, religion, including sexual orientation. Indeed, it is part of an embodiment of who a person is. As observed by judge Elburu of the High court of Botswana:

“Sexual orientation is not a fashion statement. It is an important attribute of one’s personality.”³

Incontrovertibly, human rights are not absolute. However, any limitations must comply with the limitation test. Thus, a limitation on a right must be absolutely necessary for the advantages which follow; must not render the right illusory, and must be founded on legitimate state interest.⁴By way of illustration, when government declared lockdown during the outbreak of the coronavirus pandemic, the freedom of movement and other related rights were curtailed. Those rights and freedoms derogated were justified because the purpose was to safeguard public health and safety which was under threat. It was also for a legitimate cause (protecting lives), and lawful (passage of various Executive Instruments).

Additionally, Ghana has ratified the African Charter and other human rights instruments which enjoins her to respect, protect and fulfil the human rights of its people. The African Charter which is an African-based human rights treaty enjoins State parties to ensure that *“every individual shall be entitled to the enjoyment of rights and freedoms recognised and guaranteed in the present charter without distinction of any kind such as race, ethnic group....or other status”*⁵.The inclusion of the words “other status” means that the drafters of the Charter recognise the evolving nature of the human identity as a non-exhaustive list to accommodate new identities or status with the passage of time.

It is instructive to mention that article 28 of the African Charter also projects the

³ BBC News. (2019) Botswana decriminalises homosexuality in landmark ruling. Retrieved August 8, 2019, from <https://www.bbc.com/news/world-africa-48594162>

⁴ Constitutional rights project and others v Nigeria (2000) AHLRR 227 paras 41&42, Media rights agenda and others v Nigeria (2000) AHRLR 200 para 67-69.

⁵ African Charter on Human and People’s Rights(1986) article 2

enviable African value of tolerance as a tool for human rights protection by stating that “*every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safe-guarding and reinforcing mutual respect and tolerance.*” It is the position of the Commission that while the “majority” may regard LGBTQ+ as unwelcome, it does not detract from LGBTQ+ persons their humanity but rather tolerance coupled with dialogue for an effective engagement holds more promising future for better human rights protection as opposed to criminalisation.

Significantly, the African Commission on Human and People’s Rights – an organ of the African Union adopted ***Resolution on Protection against Violence and Other Human Rights Violations Against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity (Resolution 275)*** in 2014 which is derived from articles 2, 3, 4 and 5 of the African Charter on the right to freedom from discrimination, equality, life and dignity respectively and called on state parties to the African Charter “*to ensure that human rights defenders work in an enabling environment that is free from stigma, reprisals or **criminal prosecution** as a result of their human rights protection activities, including the rights of sexual minorities.*”⁶The Commission is of the view that as a state party to the African Charter and its corresponding resolutions, Ghana is expected by the long standing legal principle of *pacta sunt servanda*⁷ to comply with obligations imposed on her by treaties ratified voluntarily in good faith.

e. Freedom of Expression, Assembly and Association

Following from point (d) above, it is therefore quite problematic for drafters of the bill to attempt to criminalise freedom of association, assembly and expression of LGBT persons. Freedom of expression is one of the fundamental tools available to individuals and civil society in particular to effect social change. Consequently, article 21(1) (a) of the 1992 Constitution safeguards freedom of expression. As established earlier on, the freedom of LGBTQ+ persons to associate, assemble and raise concerns of the impact of a public law on their lives cannot be derogated as far as human rights law is concerned. At the risk of sounding repetitive, it is not in dispute that human rights are not absolute. However, the concerns have been the degree to which, and the grounds upon which those rights may be restricted.⁸ While, there may be marked cultural differences across societies, the restriction of this right must satisfy the limitation test. Being part of a gamut of rights under the ICCPR, the Human Rights Committee contends that the grounds provided to restrict such rights already vest states with sufficient powers during emergencies. Which means that emergency situations will be taken into account when assessing the proportionality of limiting those rights but may not have to be invoked to derogate

⁶ Resolution On Protection Against Violence And Other Human Rights Violations Against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity(2014)para 3

⁷ Article 26 of Vienna Convention on the Law of Treaties(

⁸ I Bantekas & L Oette International Human Rights Law and Practice, Cambridge University Press,(2020) Third Edition. P. 404

from that right.⁹ At this stage, the question to address is, what is the existing “state of emergency” to warrant the imposition of restrictions on the freedom of expression by LGBTI persons as justified in the bill?

While recognising local and national differences, often times, grounds such as public morality used for the restriction of freedom of expression “carries the risk of privileging majoritarian or state centric interpretation of rights”¹⁰ and therefore imposition of such restrictions require a careful assessment of the circumstances of persons who will be affected by them. Same-sex sexual orientation even if contrary to prevailing social norms, it is impossible to divorce from other multiple identities an individual embodies. Thus, can it be justified that persons identifying as LGBTQ+ cannot freely express themselves against the consequences of state laws and public attitudes on their lives? It is the considered view of the Commission that holding such views may be pronounced unconstitutional if challenged.

f. Sustainable Development Goals (SDGs)

Ghana has subscribed to the SDGs as the successor to the MDGs. Indeed, the President of the Republic, Nana Addo Dankwa Akufo-Addo is the co-chair of the eminent group of advocates for the SDGs.

The SDGs critically analysed are human rights commitments expressed in a different form. Put differently, human rights and the SDGs are two sides of the same coin. The overarching theme of the SDGs is “leaving no one behind” similar to the principles undergirding human rights – non-discrimination, and equality– which means that any action by an arm of government must be seen to advance these values and not to water them down. Therefore, a bill which has the tendency of criminalising the status of LGBQ+ based on their sexual orientation will definitely push them to the fringes hence undermining the SDGs agenda of “leaving no one behind”

SPECIFICS COMMENTS ON SELECTED CLAUSES OF THE BILL

- i. **Clause 1:** The Commission observes that persons holding themselves as intersex are included in the bill for criminalisation and possible incarceration. The Commission would like to emphasise that intersex persons as defined by the bill as “*an individual whose sexual anatomy or chromosomes does not fit the traditional makers of female or male assigned at birth.*” Clearly, a biological condition or sex characteristics and not a question of sexual orientation. An individual who does not fit into the binary categorisation of male and female due to biological “anomaly” cannot be considered to have committed a crime over something the person did not determine.

⁹ As above p. 406

¹⁰ As above p.405

- ii. **Clause 2:** this provision seeks to provide an interpretation for what constitutes “Ghanaian Family Values” and states that these include the recognition in **Clause 2 (f)** that “Ghanaian Family Values” hold the ideals of compassion towards the weak and vulnerable as well as the customary ideal to establish a **free** and **just** Ghanaian society. Definitely, this Clause is consistent with human rights principles and values of **protecting** the weak and vulnerable from the tyranny of the majority based on the “majoritarian values”. In other words, the so-called Ghanaian Human Values are consistent with human rights values and also recognise the need to show sympathy and empathy to all human beings regardless of heinous crimes that they might have committed if at all.
- iii. **Clause 3(2) (e) (f) (g):** this provision is inconsistent with the Constitution, particularly Article 33 (1), 34 (1). In fact, no law however well-intentioned can take away the mandates of the institutions referred to in this Clause of the Bill especially when the Judiciary is vested with the exclusive constitutional mandate to adjudicate cases, including interpretation of the law in a democratic dispensation. In respect of the Legislature, it is duty bound not to entertain Bills or enact laws that are potentially inconsistent with the ethos of freedom, justice, and the protection of fundamental human rights underpinning the Constitution. Regarding the Independent Constitutional Bodies like CHRAJ and NCCE, **Clause 3(2) (h)** of the Bill is void *ab initio* in that it runs counter to the constitutionally guaranteed mandates of these institutions to **protect** the human rights and freedoms of all human beings, as well as **educate** the citizenry on their rights and responsibilities, including homophobic/hate speech, policy and bills that can incite hatred, fear and violence against LGBTI persons, who are human beings.
- iv. **Clause 4** appears too broad and vague in terms of what constitutes the parameters or scope of the term “undermining” PSHR. This can lead to abuse of power by public officials empowered to arrest and prosecute offenders under the Bill. Additionally, this Clause can adversely affect the right to personal liberty of any person perceived or suspected to be LGBTI person.
- v. **Clause 6 (1) (a) (i) (ii) (iii):** this provision violates the right to privacy of home

and unjustified interference with personal liberty. It is trite knowledge that usually human beings do not engage in sexual acts in open places other than in the privacy of their homes. Therefore, any attempt to promote a situation whereby people's homes can become the subject of invasions merely in search of persons deemed to be engaging in same- sex activities cannot be countenanced.

- vi. **Clause 12(2):** this provision seeks to gag any form of advocacy aimed at protecting LGBTI persons from acts of intimidation, assault, harassment, violence, homophobia etc. which undermines their rights to live as human beings devoid of their right to live without fear.
- vii. **Clauses 15 and 16:** these Clauses violate the rights to freedom of expression and opinion; freedom of association; freedom of assembly and movement, which are critical for protecting the right of LGBT persons to mount advocacy campaigns to protect themselves from imminent danger or threat to their lives occasioned by homophobic propaganda.
- viii. **Clause 17 and 18:** these Clauses fly in the face of the rights to equality and non-discrimination as well as freedom of association. It is too broad regarding who and how to determine a person's status as an LGBTI person that may result in denial of services. Inherently, this clause also has the tendency to lead to proof of a person's status through potential introduction of LGBTI-free Passport (like COVID 19 Vaccine Passport).
- ix. **Clauses 20 & 21:** this provision is inimical to human rights in that it seeks to provide access to medical care (right to health) under certain conditions. In other words, it provides for consent to be sought under duress. Furthermore, it seeks to give directives to a judicial officer in the exercise of his duties, which includes upholding the human rights and fundamental freedom of all persons.

4. CONCLUDING REMARKS

The Commission acknowledges that LGBT+ issue is a contentious one. Nonetheless, the Commission believes that the bill has the tendency to worsen the already precarious human rights conditions of LGBTQ+ persons as a minority group including stifling freedom of expression of human rights defenders guaranteed under the Constitution. The unintended consequence of criminalisation further exposes LGBTI persons to marginalisation, vulnerabilities, and gross human rights violations such as “mob justice” which is already a sub-culture in the Ghanaian society where for instance suspected thieves and women tagged as “witches” have sadly become victims.

The Commission concludes by stating that while Parliament is vested with legislative power of the state, passing a bill with far reaching implications for vulnerable Ghanaians demands a lot of introspection so as not to dent the image of Ghana as an oasis of peace, tolerance and democracy on the continent and in the comity of nations internationally.

5. RECOMMENDATION

The Commission therefore recommends that an extensive national debate as well as constructive engagement with the LGBTQ+ community and all relevant stake holders will provide a better national response on this matter as opposed to current attempt of state criminalisation through this Bill.

DATED THIS 29th SEPTEMBER 2021 AT THE OLD PARLIAMENT HOUSE, HIGH STREET, ACCRA