

LAW AND SEXUALITY:  
COMPARATIVE ANALYSIS OF LEGAL TREATMENT OF QUEER PEOPLE IN CANADA  
AND GHANA – THE QUEST FOR HUMAN RIGHTS JUSTICE  
FOR QUEER MINORITIES IN GHANA

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## TABLE OF CONTENT

TABLE OF CONTENT .....	ii
LISTS OF ABBREVIATION .....	iii
ABSTRACT .....	iv
OVERVIEW OF CONCEPTS UNDER REVIEW .....	1
1.1 INTRODUCTION .....	1
1.2 DEFINITION OF TERMS .....	3
1.3 RESEARCH QUESTIONS OF PAPER.....	6
1.4 ORGANIZATION OF PAPER .....	6
2. HISTORY OF QUEERNESS AND SAME-SEX RELATIONSHIP .....	6
2.1 INTRODUCTION.....	6
2.2 HISTORY OF QUEERNESS.....	7
2.3 EVOLUTION OF LGBTQ+ RIGHTS IN CANADA AND THE LAW.....	8
2.4 SAME-SEX MARRIAGES IN CANADA.....	<b>Error! Bookmark not defined.</b>
3. HISTORY OF QUEERNESS AND QUEER RIGHTS IN AFRICA .....	17
3.1 THE DEVELOPMENT OF QUEERNESS IN AFRICA .....	18
3.2 EVOLUTION OF LGBTQ+ RIGHTS IN GHANA.....	20
3.3 LEGAL FRAMEWORK OF QUEER LAWS IN GHANA .....	21
3.4 THE PROMOTION OF PROPER HUMAN SEXUAL RIGHTS AND GHANAIAN FAMILY VALUES BILL, 2021 .....	<b>Error! Bookmark not defined.</b>
4. COMPARATIVE ANALYSES: CANADA AND GHANA .....	24
4.1 THE LAW AND QUEERNESS.....	25
4.2 RELIGION AND QUEERNESS.....	29
4.3 CULTURE.....	33
5. THE WAY FORWARD: THE CANADIAN APPROACH .....	34
6. CONCLUSION .....	37
BIBLIOGRAPHY.....	39

## **LIST OF ABBREVIATIONS**

LGBTQ+ - Lesbian Gay Bisexual Transgender and Queer (LGBTQ+)

CCG - Christian Council of Ghana

GPCC - Ghana Pentecostal and Charismatic Council (GPCC)

## ABSTRACT

This paper is a work of scholarship and advocacy. The author's goal is to participate in the movement in Ghana towards the decriminalization of advocating for queer rights in Ghana. The author analyzes and compares the relationship between law and sexuality in Ghana as compared with Canada. In particular, the research identifies a number of fundamental principles, distinctive of Canadian human rights and equality rights jurisprudence, which bear importing into, or emphasizing in, the Ghanaian legal system.

The paper argues that everyone has the right to enjoy basic human rights regardless of their gender, race and/or sexual orientation. This is a proposition deriving from Canadian principles of rights jurisprudence that establish that there is no hierarchy of human rights and that no rights are absolute. These are key approaches to balancing the rights claims of the Lesbian, Gay, Bisexual, Transgender and Queer people (LGBTQ+) with often conflicting rights grounded in religion-based claims. As a result, the study will discuss ways in which the Ghanaian legal system can balance religious-cultural rights, on the one hand, and human rights and equality rights based on sexual orientation, on the other, by adopting queer advocacy strategies, and following principles of Canadian jurisprudence about these often-competing rights claims. In doing so, this work contests the obvious discrimination and violence against LGBTQ+ people in Ghana by promoting greater human rights for queer people in Ghana notwithstanding the long-established social and cultural primacy of religion in Ghana's history.

# 1. OVERVIEW OF CONCEPTS UNDER REVIEW

## 1.1 INTRODUCTION

On 31<sup>st</sup> January 2021, there were reports in the media of opening a Lesbian Gay Bisexual and Queer (LGBTQ+) resource advocacy center in Accra, Ghana<sup>1</sup>. The LGBTQ+ Rights Ghana organization opened a resource center in the country and held an event. Among those who attended the event was the Australian High Commissioner to Ghana, Mr. Gregory Andrews, who openly shared his participation and support for LGBTQ+ advocacy. The event sparked public interest and debates in the country on the rights of LGBTQ+ individuals and advocacy in Ghana. The event was met with unrelenting criticism, dominating the media space of several societies, including the Christian Council, the National House of Chiefs, the National Chief Imam and the Catholic Bishop's Conference in the country. They advocated for the shutdown of the resource center and the arrest of the organizers and anyone who participated in the event claiming that these activities were alien to the Ghanaian culture.<sup>2</sup>

On February 24, 2021, the new LGBTQ+ resource center was raided by the National Security operatives in Ghana, shutting it down permanently – with some people eager to burn the

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<sup>1</sup> The promotion of proper human sexual rights and family values Bill. Memorandum. Retrieved 25<sup>th</sup> October 2021. <https://cdn.modernghana.com/files/722202192224-0h830n4ayt-lgbt-bill.pdf>

<sup>2</sup>Ibid.

whole building down.<sup>3</sup> Mr. Alex Kofi Donkor, Director of the LGBTQ+ Rights Ghana, conceded that “we knew that there would be opposition, but we didn't think it would be of this magnitude”.<sup>4</sup>

Following the Shutdown of the LGBTQ+ resource center, the government of Ghana has moved on to propose a Bill awaiting Parliamentary debate and its subsequent passage. This government-sponsored homophobic Bill is known as “*THE PROMOTION OF PROPER HUMAN SEXUAL RIGHTS AND FAMILY VALUES BILL, 2021*”.<sup>5</sup> Portions of this Bill seek to jail LGBTQ+ people and people who engage in LGBTQ+ advocacy in Ghana for a maximum of 10 years imprisonment and hard labour in the country.<sup>6</sup> The Bill will be discussed in detail in subsequent sections.

The Bill is anti-LGBTQ+ and, as such, seeks to institute punitive measures for the show of same-sex affection and advocacy for the LGBTQ+ community – with a maximum sentencing of 10 years. Some of the targeted offences that fall under this Bill are as follows: the organization of efforts to support non-heterosexual individuals with different sexual orientations, giving support to sexual minorities, making donations to such causes as well as making media posts of messages

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<sup>3</sup> Ghana Security Forces Shut Down LGBTQ+ Office: Rights Group; The LGBTQ+ Rights Ghana Group says its Accra Office was raided and closed by Security Forces. Retrieved 26<sup>th</sup> October 2021.

<https://www.aljazeera.com/news/2021/2/24/ghana-shuts-down-lgbt-office-rights-group>.

<sup>4</sup> How a US Group with links to the far-right may have influenced a crackdown on Ghana’s LGBTQ+ community. Retrieved from <https://www.cnn.com/2021/10/08.africa/ghana-lgbt-crackdown-intl-cmd/index.html>. On 26<sup>th</sup> October 2021.

<sup>5</sup> The promotion of proper human sexual rights and family values bill. Memorandum. Retrieved 25<sup>th</sup> October 2021. <https://cdn.modernghana.com/files/722202192224-0h830n4ayt-lgbt-bill.pdf>.

<sup>6</sup> Ibid

and images that promote these acts.<sup>7</sup> The introduction of this Bill to the Ghanaian Parliament seems to presuppose an impending institutionalization of homophobia in Ghana.

While the government of Ghana argues that queer rights are alien to the African culture and for that matter, a Western concept of Sexuality rights. Queer Rights advocates have on the other hand argued that homophobia is a western colonial concept. It is important to note that, “as of December 2020, 69 States continue to criminalize same-sex consensual activity,” as observed by Mr. Lucas Ramón Mendos, Research Coordinator at ILGA World and the lead author of the report.<sup>8</sup> All of them criminalize men and 43 criminalize women for homosexual activity.<sup>9</sup> Thirty-Five (35) of these countries are Commonwealth jurisdictions that criminalize private, same-sex, consensual sexual activity.<sup>10</sup> Ghana and Canada are both part of the Commonwealth of Nations. However, while Canada has an inclusive and progressive law towards queer rights, the former is increasingly making repressive and homophobic laws against queer people.

## **1.2 DEFINITION OF TERMS**

The term Lesbian Gay Bisexual Transgender and Queer, “LGBTQ+” is often used collectively to refer to individuals who identify as lesbian, gay, bisexual, transgender and queer. Nonetheless, this paper will broaden the term by including individuals who do not identify with any of the above-stated sexual orientations and yet have another sexual preference aside from

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<sup>7</sup> Danielle Paquette (2021). Lawmakers in Ghana seek to outlaw advocacy for gay rights. Retrieved 6th November 2021 <https://www.washingtonpost.com/world/2021/07/28/ghana-lgbtq-bill/>

<sup>8</sup> ILGA WORLD updates state-sponsored homophobia report: “there’s progress in times of uncertainty”. Retrieved December 31, 2021. <https://ilga.org/ilga-world-releases-state-sponsored-homophobia-December-2020-update>.

<sup>9</sup> Ibid.

<sup>10</sup> The Human Dignity Trust: The Issue. Retrieved on 15<sup>th</sup> November 2021. <https://www.humandignitytrust.org>

heterosexual sex. Because of this, the usage of the term "queer" denotes a more inclusive term in this paper. The slogan "gay rights are human rights" is very succinct and has subsequently expanded over time to be more inclusive to be rephrased as "gay and lesbian rights are human rights" or to be more encompassing, human rights-based on individual sexual orientation and gender identity<sup>11</sup>. This terms queer, homosexuality, gay, lesbian, and same-sex are used interchangeably in this paper. Where there is the need to single out one gender identity or sexual orientation, such a distinction will be brought to the reader's attention.

This paper will advocate for the rights of queer people in Ghana by taking inspiration from Canadian LGBTQ+ advocacy strategies and jurisprudence. Since Canada is a bi-jural country – which means it has both common and civil law systems, this paper will concentrate only on the common law aspect and its influence on the Canadian legal system. Regardless, context will be provided on the history of LGBTQ+ rights in Canada as well as the existing legal framework affecting and defining LGBTQ+ rights.

When in the course of the study, the description and analysis entails specific expression, identity or practice, the paper employs words in context. Nonetheless, since the study also relies heavily on secondary materials and sources, the author may not know what the sources refer to in all cases and as such, would be compelled to use the LGBTQ+ or queer in most situations.

This paper focuses on comparative analysis between Canada and Ghana because both countries legal systems have been influenced massively by the common law. Both countries have a high rate of religious participation and cultural values which are some of the main grounds on

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<sup>11</sup> George Andreopoulos and Zehra F. Kabasakal Arat (2014). The Uses and Misuses of Human Rights.



which anti-queer people discriminate. Christianity is the most popular faith in Canada; almost two-thirds of Canada's population (67.3%) reported that they were affiliated with the Christian religion while approximately 71% of Ghana's population are Christians respectively.<sup>1213</sup> These will be discussed extensively in the subsequent sections.

In this paper, it is argued that heightened homophobic laws are being enforced in Ghana because of the ghost of old colonial homophobic policies that still hang around the neck of Ghana. However, Ghana cannot hide behind such old colonial laws, religion and culture to discriminate against LGBTQ+ minorities. Canada, also a former colony of England, demonstrates a different path forward. This is owed to the fact that Canada passed through such phases and has now emancipated itself from the shackles of absurd homophobic laws. This paper ends with some ways in which Ghana can learn from Canada to embrace all-inclusive laws. This paper argues for an abrupt end to homophobia in Ghana. This may not be possible, but intended reforms should take place gradually and systemically, like Canada.

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<sup>12</sup> 2019 Report on International Religious Freedom: Ghana. Retrieved on 22 December 2021.

<https://www.state.gov/reports/2019-report-on-international-religious-freedom/ghana>.

<sup>13</sup> 2011 National Household Survey: Immigration, place of birth, citizenship, ethnic origin, visible minorities, language, and religion Retrieved on December 22, 2021. <https://www150.statcan.gc.ca/n1/daily-quotidien/130508/dq130508b-eng.htm?HPA>.

### **1.3 RESEARCH QUESTIONS OF PAPER**

My primary research question is comparative – what can Ghana learn from Canada’s history, LGBTQ+ activism and human rights and equality rights jurisprudence to help end discrimination against LGBTQ+ minorities in Ghana and the criminalization in the country of advocacy work?

By addressing these fundamental research questions, other inquiries are implied:

1. What are the various forms of discrimination that Lesbians Gays Bisexual Transgender and Queer (LGBTQ+) people have experienced in Ghana and Canada?
2. Who are the current (and historical) actors and institutions that have promoted or contributed to discrimination against LGBTQ+ people in these countries?
3. Why do pro-LGBTQ+ rights activities in Ghana inevitably end in failure?

### **1.4 ORGANIZATION OF PAPER**

The paper is divided into four (4) key parts. The first part focuses on the history or origin of queerness in human existence and the legal framework of LGBTQ+ laws in Canada. The second part also deals with queerness and homophobia in Africa and narrows down the issue to Ghana and the legal position of LGBTQ+ rights in Ghana. The third chapter discusses the comparative analysis of LGBTQ+ laws between Canada and Ghana. The final part focused on the way forward for Ghana with inspiration from Canada’s LGBTQ+ activism and jurisprudence.

## **2. HISTORY OF QUEERNESS AND SAME-SEX RELATIONSHIPS**

### **2.1 INTRODUCTION**

This chapter reviews the history of queerness and same-sex relationships from existing literature. In this regard, the chapter specifically looks at the development of LGBTQ+ rights in developed countries like Canada.

## **2.2 HISTORY OF QUEERNESS**

Some scholars have argued that Lesbian Gay Bisexual Transgender and Queer (LGBTQ+) individuals are a creation of modernity and as such, is a recent development as a result of societal change. However, other scholars disagree with this assertion and argue that there is evidence of homosexual activity and same-sex relationships, whether such relationships were accepted or rejected, in every documented culture across the globe.<sup>14</sup> Queerness has been recorded in Western culture as far back as the Ancient Greeks. Scholars have also found evidence of queerness among people from the Middle East, Africa, Asia and Europe.

Queerness existed in ancient Israel since it was mentioned and prohibited in the Bible. It grew in popularity and flourished between both men and women in Ancient Greece.<sup>15</sup> There is also substantial evidence that people lived their lives as a different gender from the ones they were assigned at birth. There is same-sex musical lyrics composed by Sappho in the 7<sup>th</sup> Century BCE, youth who were raised as the opposite sex in various cultures ranging from Albania to Afghanistan, the concept of ‘female husbands’ in Kenya and native American “two spirit” alternatives.<sup>16</sup> The focus of this section will be on the evolution and subsequent development of queer rights in Canada and the current legal status of queer people in Canada.

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<sup>14</sup> History of Lesbian Gay Bisexual and Transgender Special Movements. Retrieved on 15<sup>th</sup> November 2021.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

## 2.3 EVOLUTION OF LGBTQ+ RIGHTS IN CANADA AND THE LAW

Canada has been hailed as the most gay-friendly country in the world and as such, has been ranked first according to the Gay Travel Index Chart in 2018.<sup>17</sup> The Forbes magazine in 2019, also ranked Canada as one of the top 5 safest countries for Queer people in the world.<sup>18</sup> However, such an enviable feat did not come without struggle. Canada has gone through phases and trajectories of homophobic laws in the past before reaching its current all-inclusive and progressive laws on queer rights. Today queer people in Canada enjoy freedom and societal acceptance.

Britain had a massive influence on Canadian laws for many years throughout its colonial period. Starting from the early colonial period, same-sex relationships were officially illegal and the penalty for “the abominable act of buggery” (also known as sodomy) was punishable by death. By 1861, that law had been slightly reduced from death to 10 years imprisonment or in the very worst situation, lifetime imprisonment.<sup>19</sup> Despite all these positive developments, the laws governing “homosexual acts” became very stringent with deadly sentences. These laws usually targeted males who engaged in a same-sex relations and often used ambiguous language that usually aimed at giving a large amount of discretionary power to law enforcement.<sup>20</sup>

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<sup>17</sup> SPARTACUS Gay Travel Index 2019. Retrieved on 15<sup>th</sup> November 2021.

<https://spartacus.gayguide.travel/blog/gay-travel-index-2019/>

<sup>18</sup> 20 Most Dangerous Places for Gay Travelers (And The 5 Safest). Retrieved 15<sup>th</sup> November 2021.

<https://www.forbes.com/sites/laurabegleybloom/2019/11/25/most-dangerous-places-safest-lgbtq-gay-travelers/#a519ced11694>

<sup>19</sup> Krishna Rau (2014). Lesbian, Gay, Bisexual and Transgender Rights in Canada. Retrieved on 21<sup>st</sup> November 2021. <https://www.thecanadianencyclopedia.ca/en/article/lesbian-gay-bisexual-and-transgender-rights-in-canada>.

<sup>20</sup> Ibid.

Even though homosexuality was criminalized during the colonial period and attracted the death penalty, the justice system was unwilling and reluctant to prosecute accused homosexuals according to the dictates of the law.<sup>21</sup> Michael Lyons in his article “Sodomites and Punishments” claims that “the death sentences, in general, were usually commuted, so before prison reform in the early 19<sup>th</sup> century, convicted sodomites often ended up in ‘gaols’.”<sup>22</sup> In 1842, Patrick Kelly and Samuel Moore became the first men in Canada to be convicted of “homosexual sex between two consenting adults.”<sup>23</sup> The convicted men were sentenced to life imprisonment which at that time carried the death penalty. Until 1969, the death penalty for sodomy was still in effect and was subsequently repealed. The two men were later released despite their sentence.<sup>24</sup>

Sodomy law held sex between men to be illegal in Canada from the earliest days of colonization to 1969. More so, a law enacted in 1892 held “gross indecency” between men to be illegal and carried penal sentences.<sup>25</sup> “Gross indecency” entailed anything that exhibited same-sex

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<sup>21</sup> Michael Lyons. (2016). Sodomites, crime, and punishment: The story of the first men convicted of homosexual sex between two consenting adults in Canada. Retrieved 21<sup>st</sup> November 202, <https://www.dailyxtra.com/sodomites-crime-and-punishment-70094>.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Ron Levy (2016). The 1969 Amendment and the (De)criminalization of Homosexuality. Retrieved 20<sup>th</sup> November 2021. <https://www.thecanadianencyclopedia.ca/en/article/the-1969-amendment-and-the-de-criminalization-of-homosexuality>

attraction, including simple touching, dancing and kissing, with the law being extended to women in 1953.<sup>26</sup>

It is worth noting that 1969 was the turning point in Canada's laws during which LGBTQ+ Rights were legally recognized in the country. Following the trial, conviction and sentencing of Everett George Klippert for homosexuality in 1965, the *Criminal Law Amendment Act, 1968-69* brought an exemption to the *Criminal Code* that made such acts legal under certain circumstances. Everett Klippert who happened to be a resident of the Northwest Territories was a mechanic by profession. He confessed to the law enforcement officers that he was gay and has had sexual relations with men for over 24 years and thus, has no desire to change his sexual orientation. In the year 1967, Everett Klippert was given an indefinite prison term and tagged as a "dangerous sex offender", a sentence that was affirmed by the Supreme Court of Canada the same year. However, Klippert was released on 20<sup>th</sup> July 1971 and had his sentence quashed.

In December 1967, the then Minister of Justice, Pierre Trudeau proposed a new Amendment to the *Criminal Code* that would seek to relax, and possibly decriminalize, homosexuality in Canada. Trudeau argued that:

It's certainly the most extensive revision of the Criminal Code since the 1950s and, in terms of the subject matter it deals with, I feel that it has knocked down a lot of totems and overridden a lot of taboos and I feel that in that sense it is new. It's bringing the laws of the land up to contemporary society, I think. Take this thing on homosexuality, I think the view we take here is that there's no place for the state in the bedrooms of the nation. I think that

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<sup>26</sup> Ibid.

what's done in private between adults doesn't concern the Criminal Code. When it becomes public this is a different matter, or when it relates to minors this is a different matter.<sup>27</sup>

Later in 1969, these Amendments proposed by Trudeau succeeded in being passed in law, helping decriminalize homosexuality in Canada. Under this Amendment, two men or two women who engaged in penetrative anal or oral sex could still be penalized under the gross indecency law even if the sex was with the consent of both parties. The 1969 Amendments did not entirely change social perceptions about queer people. People still considered queerness as a moral wrong that needed to be corrected. Many continued to view homosexuality as immoral and corrupt and, therefore, deserving of punishment.<sup>28</sup>

There were various homophobic attacks on queer people during the 1970s and this led to the law enforcement officials stepping up their efforts to charge gay men and women, sometimes at gunpoint. This action was seen as deliberate with the goal of instilling fear and intimidation into a growing LGBTQ+ community that was advocating aggressively for equal rights and the repeal or amendment of all anti-LGBTQ+ laws in the country.<sup>29</sup> This led to the situation in 1978, where the Pink Triangle Press was charged with "possession of obscene material for distribution" by law enforcement in response to an Article on pederasty titled "Men Loving Boys Loving Men".<sup>30</sup>

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<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Krishna Rau (2014). Lesbian, Gay, Bisexual and Transgender Rights in Canada. Retrieved on 21st November 2021. <https://www.thecanadianencyclopedia.ca/en/article/lesbian-gay-bisexual-and-transgender-rights-in-canada>.

Despite all these negative developments, the Canadian Human Rights Commission recommended in its Annual Report that “Sexual Orientation” be added to the *Canadian Human Rights Act*.<sup>31</sup>

In the 1980s, Parliament considered repealing the gross indecency law from the *Criminal Code*. Although queer rights were advancing and gaining recognition, there was continuing discrimination against queer people. In 1981, there was heated tension in Toronto when issues came to a head in what later became known as Canada’s Stonewall. From an article authored by Krishna Rau titled “Lesbian, Gay, Bisexual and Transgender Rights in Canada”:

[O]n 5<sup>th</sup> February 1981, Toronto Police in Canada arrested some 300 men in surprise raids on four (4) different bathhouses. These arrests led to over 3000 people taking to the streets to march on 52 Division Police Precincts as well as the Queen’s Park, destroying properties, smashing car windows as well as setting fires en route. The arrested men were subsequently charged with being ‘found-ins’ in a bawdyhouse which was defined by the law enforcement as being in any location where “indecent acts” took place. Nonetheless, most of the charges were thrown out although these raids persisted in the country for the next two (2) decades including a 2022 raid on a Calgary bathhouse.<sup>32</sup>

The 1980s saw a major transformation in the fight for inclusiveness and queer recognition in the country with most legal battles being won during this period. During this period, the country did away with its colonial-influenced Constitution and adopted the *Canadian Charter of Rights and Freedoms* that later became the foundation for many future equality decisions. In 1985,

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<sup>31</sup> TIMELINE | Same-sex rights in Canada. Retrieved 24th November 2021.

<https://www.cbc.ca/news/canada/timeline-same-sex-rights-in-canada-1.1147516>

<sup>32</sup> Krishna Rau (2014). Lesbian, Gay, Bisexual and Transgender Rights in Canada. Retrieved on 21st November 2021. <https://www.thecanadianencyclopedia.ca/en/article/lesbian-gay-bisexual-and-transgender-rights-in-canada>.



Section 15 of the Charter came into effect. It guaranteed the “right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability”. This, however, did not include sexual orientation.

The offence of "gross indecency" was finally repealed in 1987. Before that, sodomy continued to be treated as a criminal offence. There was an exemption: (i) when no more than two people are present; (ii) for husbands and wives; and (iii) two consenting parties above the age of 18. The age for consent for same-sex relationships was again reviewed to comply with the universally accepted age of 16.<sup>33</sup>

In 1985, the Canadian Parliamentary Committee on Equality Rights released a report titled "Equality for All". The Committee registered its displeasure with the level of discrimination that was meted out to individuals who engaged in a same-sex relationship. The report touched on the violence, harassment, physical abuse, psychological oppression and hate propaganda that individuals who practised same-sex relationships had to contend with. Based on this, it was recommended by the Committee that the existing *Canadian Human Rights Act* at that time be changed to make it illegal to discriminate based on an individual's sexual orientation.

In March of that year, the Canadian government responded to the Committee's report in a paper entitled "Towards Equality" where the government stated that "the government will take whatever measures are necessary to ensure that sexual orientation is a prohibited ground of

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<sup>33</sup> Ron Levy (2016). The 1969 Amendment and the (De)criminalization of Homosexuality. Retrieved December 11, 2021. <https://www.thecanadianencyclopedia.ca/en/article/the-1969-amendment-and-the-de-criminalization-of-homosexuality>

discrimination concerning all areas of federal jurisdiction."<sup>34</sup> Later in 1988, "Anal Penetration" was substituted for "Gross indecency" while the age of consent was reduced to 16. However, the age of consent for other sexual activity is 16 having been raised from 14 in 2008.<sup>35</sup> It should be understood, that engaging in anal penetration in the public space remains an offence.<sup>36</sup>

The Charter's impact on human rights legislation was affirmed in August 1992 when the Ontario Court of Appeal, in *Haig v Canada*, ruled that the absence of sexual orientation from the list of proscribed grounds of discrimination in Section 3 of the *Canadian Human Rights Act* was in direct violation to Section 15 of the Charter.<sup>37</sup> The Appeals Court determined that Section 3 of the Act must be read and applied with the notion that sexual orientation was listed, that is, sexual orientation should be "read" into the Act. The federal government chose not to appeal the *Haig* decision and stated that it would be applied throughout the country. After this landmark ruling, the Canadian Human Rights Commission has been accepting complaints of sexual discrimination based on sexual orientation since 1992.<sup>38</sup> The federal government, in 1996, passed Bill C-33 which specifically added "sexual orientation" to the *Canadian Human Rights Act*.

In 1995, the Supreme Court of Canada made a landmark ruling in the case of *Egan v Canada*.<sup>39</sup> In *Egan*, the Supreme Court ruled that sexual orientation constituted a prohibited basis

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<sup>34</sup> TIMELINE | Same-sex rights in Canada. Retrieved December 12, 2021.

<https://www.cbc.ca/news/canada/timeline-same-sex-rights-in-canada-1.1147516>.

<sup>35</sup> Karen Busby (2020). A short History on Queer rights in Canada. (1969-2018).

[file:///C:/Users/busby/Desktop/lgbtq2-01-\(1\).pdf](file:///C:/Users/busby/Desktop/lgbtq2-01-(1).pdf). Retrieved December 12, 2021

<sup>36</sup> Ibid.

<sup>37</sup> *Haig v Canada* (1992), 16 C.H.R.R. D/226 (Ont. C.A.) [Eng. 7 pp.]

<sup>38</sup> Ibid.

<sup>39</sup> *Egan v Canada* [1995] 2 SCR 513

of discrimination under Section 15 of the *Canadian Charter of Rights and Freedoms*. Sexual orientation is, therefore, an analogous ground of discrimination under the equality rights provision of the *Canadian Charter of Rights and Freedoms* and “read in[to]” the Charter.<sup>40</sup>

The decision in *Egan* was reiterated with a much more comprehensive interpretation when the Supreme Court held in the case of *Vriend v Alberta*.<sup>41</sup> The Court ordered that “sexual orientation” be read into Alberta’s human rights legislation.<sup>42</sup> As a result, the government could no longer deny protection to lesbians, gays and bisexuals through inaction – the Court explicitly stated that the Charter applies to legal actions and omissions alike.<sup>43</sup>

This decision came to a head in the case of *M v H*, where the Supreme Court ruled that same-sex couples should be given the same rights and benefits as heterosexual couples and equal access to benefits from social programs to which they are participants and contribute to its development.<sup>44</sup>

## 2.4 SAME-SEX MARRIAGES IN CANADA

The Provinces of British Columbia and Ontario became the first two Provinces known to accept and legalize same-sex marriages in Canada in 2003. The Ontario Court of Appeal upheld

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<sup>40</sup> Ibid.

<sup>41</sup> *Vriend v Alberta* [1998] 1 SCR 493

<sup>42</sup> Ibid.

<sup>43</sup> Through the Looking Glass: the Vriend Decision and Beyond – The “Mirror” arguments and underinclusive human rights. Retrieved January 30, 2022. <https://egale.ca/wp-content/uploads/2013/01/Through-the-Looking-Glass-the-Vriend-Decision-and-Beyond.pdf>.

<sup>44</sup> *M v H* [1999] 2 S.C.R. 3.

the ruling and Michael Leshner and Michael Stark became the first same-sex couple to marry in the country.<sup>45</sup> Other Canadian provinces – but not all – issued similar decisions.

For example, in Manitoba, same-sex marriage became legal and was recognized in September 2004. Manitoba, therefore, became the fifth province or territory in Canada to expand and broaden the definition of marriage to allow same-sex couples to marry.<sup>46</sup> Interestingly, the fight for same-sex marital legislation began years earlier in Manitoba, with a landmark case involving Chris Vogel and Rich North in 1975. Vogel and North launched an early but unsuccessful challenge for same-sex marriage in 1975.<sup>47</sup> The claim was based on the use of the word "persons" rather than gendered-limiting terms like bride or groom.<sup>48</sup> In dismissing their case, the Court ruled that marriage was known in Christendom as between a man and a woman and that no semantic argument could help set that aside.<sup>49</sup>

In 2004, Vogel and North, along with two other same-sex couples, initiated a lawsuit, *Vogel v Canada*,<sup>50</sup> seeking the right to marry in Manitoba. The court ruled that the Province's ban on issuing marriage licenses violated the *Canadian Charter of Rights and Freedoms* on the rights of

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<sup>45</sup> Krishna Rau. (2014). Lesbian, Gay, Bisexual and Transgender Rights in Canada. Retrieved on December 19, 2021. <https://www.thecanadianencyclopedia.ca/en/article/lesbian-gay-bisexual-and-transgender-rights-in-canada>.

<sup>46</sup> HOMOSEXUAL (SAME-SEX) MARRIAGES IN CANADA, Province of Manitoba. Retrieved on December 28, 2021. [http://www.religioustolerance.org/hom\\_marb29.htm](http://www.religioustolerance.org/hom_marb29.htm).

<sup>47</sup> Karen Busby (2020). A short History on Queer rights in Canada. (1969-2018). Retrieved December 28, 2021. [file:///C:/Users/busby/Desktop/lgbtq2-01-\(1\).pdf](file:///C:/Users/busby/Desktop/lgbtq2-01-(1).pdf).

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> *Reference re Same-Sex Marriage*, 2004 SCC 79 (CanLII), [2004] 3 SCR 698

gays and lesbians. The Province was then ordered to issue a marriage certificate to the couple. In late 2004, the government adopted an inclusive marriage law.<sup>51</sup> *The Civil Marriage Act* came into effect in 2005. The federal *Civil Marriage Act* became law in July 2005; “queer couples from coast to coast had the choice to marry.”<sup>52</sup>

To legalize same-sex marriage in all Canadian provinces and territories, the *Civil Marriage Act* was introduced as Bill C-38 in the First Session of the 38<sup>th</sup> Parliament of Canada on February 1<sup>st</sup>, 2005. The Bill passed in the House of Commons on the 28<sup>th</sup> of June 2005 and also passed in the Senate on July 19, 2005.<sup>53</sup> The Bill was given Royal Assent and came into force on 20<sup>th</sup> July 2005 making Canada the fourth country to permit same-sex relationships and marriages after the Netherlands (2000), Belgium (2003) and Spain (2005).<sup>54</sup> Canada became the first country outside of Europe to legalize and recognize same-sex marriage by changing the “common law” definition of marriage, as a union between male and a female, to marriage for civil purposes, which is the lawful union of two persons to the exclusion of others.<sup>55</sup>

### **3. HISTORY OF QUEERNESS AND QUEER RIGHTS IN AFRICA**

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<sup>51</sup> Ibid.

<sup>52</sup> Karen Busby (2020). A short History on Queer rights in Canada. (1969-2018). Retrieved December 28, 2021. [file:///C:/Users/busby/Desktop/lgbtq2-01-\(1\).pdf](file:///C:/Users/busby/Desktop/lgbtq2-01-(1).pdf).

<sup>53</sup> Simon Fraser University, center for education, law and society law connection. Retrieved December 28, 2021. <https://www.sfu.ca/education/cels/resources/law-connection/same-sex-marriage/backgrounder.html>.

<sup>54</sup> *Civil Marriage Act* [S.C. 2005, c.33]

<sup>55</sup> Ibid.

### 3.1 THE DEVELOPMENT OF QUEERNESS IN AFRICA

Africa is regarded as one of the most homophobic continents in the world. While some argue that queerness is a 'Western concept' that has no place in African society, queer activists argue that African culture has historically embraced queerness for most of its history. Many countries in Africa have hidden behind the notion that LGBTQ+ expressions are alien to African culture to discriminate against LGBTQ+ minorities on the African continent. This argument seems to forget that some African countries never observed same-sex relationships as a crime prior to colonial settlement. For instance, Burkina Faso, Benin, Ivory Coast, the Democratic Republic of Congo, Equatorial Guinea, Mali, Niger, Madagascar and Rwanda never saw queerness as a criminal offence prior to the advent of colonialism and Christianity.

Culture and religion have been the two main grounds on which people discriminate against LGBTQ+ people in most African countries. Despite the uncertainty regarding stories about sexuality in pre-colonial Africa and how it was influenced by the culture at the time, it is widely known that homosexuality existed in Africa before the advent of foreign influence through colonization. However, some Africans still believe that same-sex relationships are un-African.<sup>56</sup> It is worthy to note that in the Nigerian local Yoruba language, the word that is used for "homosexuals" is 'adofuro', which is a colloquialism for a person who has anal sex. While it may sound derogatory, the fact that there is a word for the behavior in indigenous African language shows that the behaviour is as old as the Yoruba culture itself.<sup>57</sup>

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<sup>56</sup> Quist-Adade, C, Bates, F, Wathanafa, N. Homosexuality in the Ghanaian Media: A Preliminary Survey(2014). *International Journal of Linguistics, Literature and Culture*, 1(2).

Research by Norbert Brockman on the history of homosexuality in Africa found that there is 'explicit' bushman artistic work that shows men engaging in same-sex sexual activity. There have also been various indicators in pre-colonial African society that the transition from boyhood to adulthood involved same-sex sexual activities between older males and younger females through various initiation rites.<sup>58</sup>

In Buganda Kingdom, part of modern-day Uganda, the ruler of the Kingdom, King Mwanga II who ruled from 1884-1897, was gay and openly practiced his sexuality without opposition and judgment from his subjects. It was only after Christian ideas were spread by white missionaries that the people of Uganda started condemning homosexual acts. While King Mwanga II is the most prominent African recorded as being gay, he is not alone in this regard.<sup>59</sup> In East Africa during the earliest century, some male traditional priests were usually observed to dress in female clothing and hairstyles which was suggestive of homosexuality in those societies. These traditional priests most often married men and the religious roles they performed in society were highly regarded in the Ugandan community.<sup>60</sup> In the northern part of Africa today, same-sex

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<sup>57</sup> Bisi Alimi. 'If you say being gay is not African, you don't know your history'(2016). Retrieved September 15, 2021. <https://www.theguardian.com/commentisfree/2015/sep/09/being-gay-african-history-homosexuality-christianity>.

<sup>58</sup> Brockman, Norbert. Review of *Boy-Wives and Female Husbands*. *Studies of African Homosexuality*. Africa Today 47, no. 1 (2000): 153-155. doi:10.1353/at.2000.0005.

<sup>59</sup> Rahul Rao. *Re-Membering Mwanga: Same-Sex Intimacy, Memory and Belonging in Postcolonial Uganda* (2015). Retrieved September 15, 2021. <https://doi.org/10.1080/17531055.2014.970600>

<sup>60</sup> Eskridge, William N. "A History of Same-Sex Marriage." *Virginia Law Review* 79, no. 7 (1993): 1419-513. Retrieved September 15, 2021. doi:10.2307/1073379.

relationships are punishable by death but according to historians, the northern part of Africa had existing traditional and historical documents of homosexuality throughout the world, especially, during the reign of Mamluk. Moreover, it is a well-known historical fact that the Siwa-Oasis in Egypt were well noted for homosexuality activities on the African continent.<sup>61</sup>

In the same vein, in the western part of Africa, Ghanaian society is historically known to have accepted and tolerated same-sex relationships during the pre-colonial era. During the pre-colonial era, the Ashanti court (which is the largest kingdom in the country) had male servants who served as concubines to the prominent leaders of the society and were killed after the death of their masters to continue to serve them in the after-life. The records of early civilization enlighten us about how individuals conceptualized same-sex relationships.<sup>62</sup> This evidence suggests that the African culture is not a stranger to LGBTQ+ expressions. Hence the notion that LGBTQ+ expressions are alien to the African culture is flawed. Perhaps such a concept gained notoriety during the proliferation of Christianity and Islam on the African continent.<sup>63</sup>

### **3.2 EVOLUTION OF LGBTQ+ RIGHTS IN GHANA**

There is no shred of doubt that Ghanaians, as people of African descent, are one of the most religious and culturally-sensitive individuals on the African continent. Anything that they view as being in contravention to their religious and cultural beliefs is usually frowned upon and

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<sup>61</sup> Ibid.

<sup>62</sup> Peter Mwaura 'Homosexuality Un-African? It's a big lie'.(2006). Retrieved September 15, 2021.

<https://allafrica.com/stories/200606050216.html>

<sup>63</sup> Ibid.



has very strict punitive measures for individuals who engage in those behaviours.<sup>64</sup> As already stated above, same-sex activities have received much attention in recent times and the opponents of same-sex activities argue that it is in direct contravention with the laws, customs, religious beliefs, and culture of the Ghanaian people. The proponents argue otherwise.<sup>65</sup>

Despite all of Ghana's budding democratic developments, the country continues to grapple with the issue of same-sex relationships.<sup>66</sup> Same-sex relationships in the country are viewed as a form of 'sexual colonialism' or Western-imposed sexual orientation on the people in the country, which needs to be confronted with all the available resources at the country's disposal.<sup>67</sup> This has led to opponents of same-sex relationships in the country employing all the cultural, ethical, moral and religious arguments to support their disdain and resentment for same-sex relationships. These arguments resonate with the country's political, religious and traditional leadership views.

### 3.3 LEGAL FRAMEWORK OF QUEER LAWS IN GHANA

The law that speaks against same-sex relationships in the country is a colonial legacy and is found in the country's *Criminal Code of 1960* which makes same-sex relationships a criminal offence. Sub-section (1)(b) of Section 104 of the country's Criminal Code criminalizes consensual "unnatural carnal knowledge". The use of the term "unnatural carnal knowledge" refers to same-

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<sup>64</sup> Owusu, A.Y., Anarfi, J.K & Tenkorang, E.Y. (2013). Attitudes and views on same-sex sexual behaviour in Ghana. *Global Advanced Research Journal of Social Science (GARJSS)*, 2(8), 176-186.

<sup>65</sup> Ankomah, A. (2001). *The International Encyclopedia of Sexuality: Ghana*. In R. T. Francoeur (Ed.), New York: Continuum

<sup>66</sup>Dankwa, S.O. (2009). It's a Silent Trade: Female Same-Sex Intimacies in Post-Colonial Ghana. *NORA – Nordic Journal of Feminist and Gender Research*, 17(3), 192-205.

<sup>67</sup> *Ibid.*

sex sexual conduct. The criminalization of such conduct is a direct attack on the LGBTQ+ population in the country where this Criminal Code is used to threaten, arrest, and punish them for identifying their sexual orientation. The phrase "unnatural carnal knowledge" which is a colonial term, is the usual term used whenever issues of legality of same-sex relationships come up in discussion by both laypeople and legal professionals alike.<sup>68</sup> The lack of a specific modern law to deal with the issue of same-sex relationships in the country is what has led some dogmatic legislators to support the enactment and promulgation of the recent homophobic bill. The bill explicitly makes same-sex relationships a criminal offence and punishable by lengthy prison terms in the 21<sup>st</sup> century when the country claims to adhere to all international obligations and conventions.

### **3.4 THE PROMOTION OF PROPER HUMAN SEXUAL RIGHTS AND GHANAIAN FAMILY VALUES BILL, 2021**

The *PROMOTION OF PROPER HUMAN SEXUAL RIGHTS AND GHANAIAN FAMILY VALUES BILL 202*, was introduced in the Ghanaian Parliament as a direct consequence of a crusade by the government of Ghana against Lesbian, Gay, Bisexual Transgender and Queer (LGBTQ+) rights and advocacy. Named "The Promotion of Proper Human Sexual Rights and Ghanaian Family Values", the Bill was mooted months after Ghana's first LGBTQ+ advocacy community center was opened in the country in January 2020.<sup>69</sup> The objective of the bill seeks "to provide for proper human sexual rights and Ghanaian family values; proscribe LGBTQ+ and

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<sup>68</sup> Adriaan van Klinken (2018). Beyond African religious homophobia: How Christianity is a source of African LGBT activism. <https://blogs.lse.ac.uk/religionglobalsociety/2018/07/beyond-african-religious-homophobia-how-christianity-is-a-source-of-african-lgbt-activism/>

<sup>69</sup> Archbishop of Canterbury criticizes Ghana's anti-LGBT bill. Retrieved December 31, 2021.

<https://www.bbc.com/news/world-africa-59062483>

related activities; proscribe propaganda of advocacy for or promotion of LGBTTTQIAAPP+ and related activities; provide for the protection of and support for children, persons who are victims or accused of LGBTTTQIAAP+ and related activities and other persons; and related matter”.<sup>70</sup>

The crusaders of the Bill have premised their key arguments on the belief that LGBTQ+ activities are alien to cultural values, norms and dictates of the Ghanaian society and as such, are frowned upon by the various major religious groups in the country.<sup>71</sup> Section 20 of the Bill provides that when a person is arrested on grounds of engaging in same-sex relations, the person must either voluntarily opt for ‘a medical treatment’ which includes conversion therapies with the cost been borne by the arrested person.<sup>72</sup> The Bill also seeks to increase jail terms up to a decade.<sup>73</sup> This Bill has been criticized by queer activists and renowned world leaders, including the Archbishop of Canterbury. The revered Archbishop of Canterbury, Justin Welby, who is the symbolic head of Anglicans worldwide wrote to the government of Ghana, making known his ‘grave concern’ about the homophobic Bill and singled his interest to meet with the Anglican Archbishop of Ghana in the near future.<sup>74</sup> The international community and rights activists have

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<sup>70</sup> The promotion of proper human sexual rights and family values bill. Memorandum. Retrieved December 30, 2021. <https://cdn.modernghana.com/files/722202192224-0h830n4ayt-lgbt-bill.pdf>.

<sup>71</sup> Ghana's proposed anti-gay bill presents a tough call for the Akufo-Addo government. Retrieved December 30, 2021. <https://www.theafricareport.com/119670/ghanas-proposed-anti-gay-bill-presents-a-tough-call-for-akufo-addo-government/>.

<sup>72</sup> Ibid.

<sup>73</sup> Archbishop of Canterbury criticizes Ghana’s anti-LGBT bill. Retrieved December 31, 2021. <https://www.bbc.com/news/world-africa-59062483>.

<sup>74</sup> Ibid.

widely condemned the Bill, which was submitted to Parliament by seven MPs and one member of the Presidential Party. A United Nations panel of experts said in a state that “passing this law in its current or even partial form would violate a significant number of human rights, including the absolute prohibition of torture”.<sup>75</sup>

The First Reading of this homophobic Bill was in August 2021. The President of the Republic of Ghana, in an interview with an Accra based radio station, commented on the bill by saying “what I would hope for is that the debate itself be civil, that we will recognize the need for us to be tolerant of each other even when there are opposing views”<sup>76</sup>. This means that there is still light at the end of the tunnel and a healthy debate on how to balance cultural-religious rights and sexual rights would help abate discrimination against queer people in Ghana.

#### **4. COMPARATIVE ANALYSES: CANADA AND GHANA**

Readers need to understand the differences between Ghana and Canada in a comparative way to be able to appreciate how the facets that led to the decriminalization of queer rights in Canada can be adopted or appropriated in Ghana.

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<sup>75</sup> UN Human Rights Council opposes Ghana's anti-gay bill. Retrieved February 6, 2022.

<https://www.africanews.com/2021/08/13/un-human-rights-council-opposes-ghana-s-anti-gay-bill/>.

<sup>76</sup> Ghana's president calls for tolerance as parliament considers anti-LGBTQ+ law. Retrieved December 31, 2021.

<https://www.nbcnews.com/nbc-out/out-news/ghana-s-president-calls-tolerance-parliament-considers-anti-lgbtq-law-n1282154>.

The earlier part of this paper, which concentrated on the history and law of same-sex relationships in Canada, elaborated on the discrimination that queer people used to face in Canada. This means that Canada also used to be in the position that Ghana finds itself in now.

#### 4.1 THE LAW AND QUEERNESS

It is worth noting that Canadian laws were greatly influenced by British laws and their legal system during colonization. Just like many countries that were once ruled by Britain, the British introduced the *Buggery Act* in Canada. In 1841, the *Criminal Code* imposed the death penalty for this crime, which was later changed from the death penalty to life imprisonment up until 1954.<sup>77</sup> Canada's laws on homosexuality were influenced by British legislation. Canada's *Criminal Code* prohibited acts of "gross indecency" between male individuals (it was not until 1953 that the same prohibition was extended to lesbians).<sup>78</sup>

The 1969 Amendment changed some provisions in the *Criminal Code* by decriminalizing certain same-sex sexual acts (gross indecency and sodomy) between consenting adults who were 21 years or older, but only in private. Before this date, homosexual relations contravened the *Criminal Code* and were punishable by imprisonment. With a new law known as the Omnibus Bill, the State confirmed that it has "no business in the bedrooms of the nation".<sup>79</sup>

Five decades after the *Statute of Westminster*, which essentially gave its dominions full legal freedoms and equal standing with England and one another, Canada made its final step

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<sup>77</sup>Historical Background of Homosexuality. Retrieved January 1, 2022.

[https://www.familleslgbt.org/documents/pdf/A\\_Secondaire\\_ENG.pdf](https://www.familleslgbt.org/documents/pdf/A_Secondaire_ENG.pdf).

<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

towards full sovereignty.<sup>80</sup> In 1982, Canada adopted the Charter and, in this sense, became a completely independent country.<sup>81</sup> The Canadian House of Commons added a Charter, or statement of constitutional-level rights, to the Canadian Constitution. However, Canadian members of Parliament refused to include sexual orientation as a ground of protection from discrimination.<sup>82</sup>

By 1998, almost all the provinces had amended their respective human rights codes to prohibit discrimination on the basis of sexual orientation: Ontario (1986), Manitoba and the Yukon (1987), Nova Scotia (1991), New Brunswick (1992), Saskatchewan (1993), and Newfoundland (1995). However, only after a ruling by the Supreme Court, did Alberta and Prince Edward Island (1998), follow.<sup>83</sup> In particular, only after sexual orientation was ‘read in[to]’ Section 15<sup>84</sup> of the *Canadian Charter of Rights and Freedoms*, in *Vriend v Canada*, following *Egan v Canada* did those two provinces act.<sup>85</sup>

Towards the end of 2004, eight provinces had ruled that the traditional definition of marriage was unconstitutional and legalized same-sex civil marriages: Ontario, British Columbia, Quebec, Manitoba, the Yukon, Nova Scotia, Newfoundland, Saskatchewan and Labrador. The

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<sup>80</sup> Canada's Long, Gradual Road to Independence. Retrieved January 1, 2022.

<https://www.history.com/news/canada-independence-from-britain-france-war-of-1812>.

<sup>81</sup> Ibid.

<sup>82</sup> Historical Background of Homosexuality. Retrieved January 1, 2022.

[https://www.familleslgbt.org/documents/pdf/A\\_Secondaire\\_ENG.pdf](https://www.familleslgbt.org/documents/pdf/A_Secondaire_ENG.pdf).

<sup>83</sup> Ibid.

<sup>84</sup> Ibid

<sup>85</sup> Ibid.

federal *Civil Marriage Act* became law in July 2005, giving credence to all same-sex marriages in Canada. It is obvious that Canada's progress, with respect to queer rights was steady and long and did not happen overnight. The country did not become a world leader on LGBTQ+ issues overnight; the process has been slow, painful and intergenerational.<sup>86</sup> It is evident that Canada had a conscious effort to improve its laws and embrace positive and more inclusive laws rather than sticking to old colonial homophobic laws.

On the other hand, Ghana was introduced to the *Buggery Act* by the British just like many British colonies. Although codifications of the act differed slightly in different colonies, every one of them introduced a clause against "sodomy" which was seen as a uniform feature of British imperial rule.<sup>87</sup> The current *Criminal Code of Ghana* was adopted in 1960 right after Ghana gained its independence from the British in 1957. In the 1960 *Criminal Code*, which remains the same today, same-sex sexual conduct is viewed as a criminal offence. As already stated above subsection (1)(b) of Section 104 of the Country's Criminal Code criminalizes consensual "unnatural carnal knowledge". Specifically, Chapter 6 Section 104 of the Criminalizes Code states:

(1) Whoever has unnatural carnal knowledge –

(a) of any person of the age of sixteen years or over without his consent shall be guilty of a first-degree felony and shall be liable on conviction to imprisonment for a term not less than five (5) years and not more than twenty-five (25) years; or

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<sup>86</sup> Canadian LGBTQ+\* History: An Introduction. Retrieved January 2, 2022. <https://canlitguides.ca/canlit-guides-editorial-team/queer-theory-and-canada/canadian-lgbtq-history-an-introduction/>.

<sup>87</sup> Hepple, J. (2012) Will Sexual Minorities Ever be Equal? The Repercussions of British Colonial "Sodomy" Laws. *The Equal Rights Review*, 8, 50-6.

(b) of any person (c) of any animal is guilty of a misdemeanour.

(2) Unnatural carnal knowledge is sexual intercourse with a person in an unnatural manner or with an animal<sup>88</sup>.

The ambiguity with the law on “unnatural carnal knowledge” is worsened by what the law says about natural carnal knowledge. Section 99 of the *Criminal Offences Act, 1960 (Act 29)* provides that, “where, on the trial of a person for a criminal offence punishable under this Act, it is necessary to prove carnal knowledge or unnatural carnal knowledge, the carnal knowledge or unnatural carnal knowledge is complete on proof of the least degree of penetration.”<sup>89</sup>. From the foregoing, it is fair to conclude that, to be able to prove both carnal and unnatural carnal knowledge there must be proof of penetration (even in the least degree).

Dr. Raymond Atuguba in his article “Homosexuality in Ghana: Morality, Law, Human Rights” (2019) has advanced the following analysis of Ghana’s Criminal Code:

1. *“Gay sexual intercourse is a criminal act under the laws of Ghana, only if it involves unnatural carnal knowledge.*
2. *Lesbianism is not criminalized under the laws of Ghana”.*<sup>90</sup>

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<sup>88</sup> The Criminal Offences Act, 1960 (Act 29).

<sup>89</sup> Section 99 of the Criminal Offences Act of Ghana (1960) Act 29

<sup>90</sup> Raymond Atuguba (2019). “Homosexuality in Ghana: Morality, Law, Human Rights”. *Journal of Politics and Law* 12(4):113. Retrieved February 6, 2022  
[https://www.researchgate.net/publication/337628819\\_Homosexuality\\_in\\_Ghana\\_Morality\\_Law\\_Human\\_Rights](https://www.researchgate.net/publication/337628819_Homosexuality_in_Ghana_Morality_Law_Human_Rights). This is because there will be no penile penetration as mentioned under Section 99 of the *Criminal Offences Act*. (*Emphasis added*).



Therefore, it can be seen that Ghana's incessant use of legal tools to discriminate against queer people results from old colonial laws. While Canada has been progressive and moved from these old colonial homophobic laws, Ghana, is still mired in the shackles of these homophobic laws.

## 4.2 RELIGION AND QUEERNESS

Religion has been used as a justification to deny the rights of queer people. The conflict between religion and queerness varies across the world and from denomination to denomination. Much evidence exists in the African context that clearly shows that religion is a major factor in promoting homophobic tendencies and behaviour on the continent and that it is a great obstacle in the acceptance of LGBTQ+ communities on the continent.<sup>91</sup>

Canada can be said to be a very religious country with the majority of Canadians being Christians. More than two-thirds of Canada's population (67.3%) are professed Christians.<sup>92</sup> Current immigration patterns have led to a situation where more people are also reporting different religious affiliations other than Christianity which includes Hinduism, Islam and Buddhism. In 2011, over 2,373,700 residents of Canada reported affiliation with a religion other than Christianity; this represented 7.2% of the Canadian population. This was a monumental increase

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<sup>91</sup> Adriaan van Klinken (2018). Beyond African religious homophobia: How Christianity is a source of African LGBT activism <https://blogs.lse.ac.uk/religionglobalsociety/2018/07/beyond-african-religious-homophobia-how-christianity-is-a-source-of-african-lgbt-activism/>.

<sup>92</sup> 2011 National Household Survey: Immigration, place of birth, citizenship, ethnic origin, visible minorities, language, and religion Retrieved January 2, 2022. <https://www150.statcan.gc.ca/n1/daily-quotidien/130508/dq130508b-eng.htm?HPA>

from the 4.9% that was recorded more than a decade earlier during the 2001 National Census.<sup>93</sup> This clearly shows that religion also plays a key role in the social and religious lives of Canadians.

Queer people in Canada are shielded by human rights legislation as well as the equality rights provisions of section 15 of the Charter. Both provide protection against discrimination. However, protection of rights is a balancing act in Canada. In the Supreme Court of Canada's Reference *Re Same-Sex Marriage*, [2004] 3 S.C.R 698, the Court ruled that religious officials cannot be compelled to perform same-sex marriages contrary to their religious beliefs. This shows that Canadian law attempts to accommodate competing rights claims and respect individual rights and choices are in Canada – even when they sometimes conflict. The Court made clear that the mere recognition of the equality rights of one group (e.g. based upon sexual orientation) cannot in itself constitute a violation of the rights of another group (e.g. claims based upon freedom of religion). This fundamental proposition of Canadian jurisprudence can serve as a beacon for how the courts and legislators in Ghana can balance sexual identity with religious interests.

The conflict between queer rights and religion was further tested in Canada in the case of *Law Society of British Columbia v Trinity Western University*.<sup>94</sup> Trinity Western University is a private post-secondary institution in Langley, B.C., which was founded on evangelical Christian principles requiring students to adhere strictly to a covenant allowing sexual intimacy only between married heterosexual couples.<sup>95</sup> The Court's held that the covenant would deter LGBT

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<sup>93</sup> Ibid.

<sup>94</sup> *Law Society of British Columbia v Trinity Western University* [SCC 32, 2018] 2 S.C.R. 293.

<sup>95</sup> B.C Christian University loses Supreme Court battle over LGBTQ+. Retrieved January 2, 2022.

<https://globalnews.ca/news/4276321/427632trinity-western-university-supreme-court-loses-lgbtq/>.

students from attending the proposed law school, and that those who did not attend would be at risk of significant harm.<sup>96</sup> The ruling established that the public interest of the law profession gives it the opportunity to promote equality by ensuring equal access, supporting diversity within the profession and preventing harm to LGBT students.<sup>97</sup> This shows immense progress and support for inclusive laws in Canada and a continuous bridging of the gap between queer rights and religion.

In contrast, it is worth noting that religion has played and continues to play an important role in Ghana's development, which to a very large extent influences the daily life of the Ghanaian people.<sup>98</sup> Data from the 2010 government census shows that approximately 71 percent of the 30 million Ghanaian's profess Christianity, 18 percent profess Islam, 5 percent profess various indigenous or animistic religious beliefs and 6 percent belong to other religious groups. The other smaller religious beliefs that are practised in the country include Buddhism, Eckankar, Shintoism, Rastafarianism, Judaism, Hinduism and Baha'i Faith.<sup>99</sup>

It is again worth noting that religious institutions in the country are usually agents of advocacy, community empowerment, innovation and social justice movements.<sup>100</sup> Sadly, these

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<sup>96</sup> Trinity Western loses fight for Christian law school as court rules limits on religious freedom 'reasonable'.

Retrieved January 2, 2022. <https://www.cbc.ca/news/politics/trinity-western-supreme-court-decision-1.4707240>.

<sup>97</sup> Ibid.

<sup>98</sup> Siewobr, Ch. L. (2015) Is Ghana A Religious Nation? Modern Ghana [Online], Retrieved January 2, 2022.

<https://www.modernghana.com/news/608361/1/is-ghana-a-religiousnation.htm>.

<sup>99</sup> 2020 Report on International Religious Freedom: Ghana. Retrieved on January 2, 2022.

<https://www.state.gov/reports/2020-report-on-international-religious-freedom/ghana/>.

<sup>100</sup> Fredua-Kwarteng, Y. (2006) The Potent Force of Religion in Ghana's Economic

religious groups and institutions are the ones championing the discrimination against queer people in the country. An editorial story written by *The Informer* (a Ghanaian newspaper) stated that 82 percent of Ghanaian citizens “abhor homosexuality” due to religious affiliations.<sup>101</sup>

When Ghanaian MP’s introduced the *PROMOTION OF PROPER HUMAN SEXUAL RIGHTS AND GHANAIAN FAMILY VALUES BILL, 2021*, to Parliament for an anti-LGBTQ+ law to be enacted, the Christian Council of Ghana, which includes Methodist Missions, the Anglican Church of Ghana, the Presbyterian Church of Ghana and the the Ghana Pentecostal and Charismatic Council (GPCC), which is an umbrella group that have over 200 churches and religious ministries, issued a joint statement stating their unflinching support for the Bill. These religious establishments urged Parliament to expedite the passage of the Bill into law and asked the Ghanaian President, H.E Nana Akufo-Addo Dankwa to sign it, stating that homosexuality and same-sex relationships are “unacceptable behaviour that our God frowns upon” and “alien to the Ghanaian culture and family value system.”<sup>102</sup>

The above shows that religion in Canada and Ghana may have some similarities because of their diversity and evident religious pluralism. However, while Canada has made progress in

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Development [Online]. Ghana Web. Retrieved January 2, 2022.

<https://www.ghanaweb.com/GhanaHomePage/features/The-Potent-Force-of-Religion-in-Ghana-s-Economic-Development-102402>.

<sup>101</sup> Gray, S. (2012) Ghana: Newspaper says 82 percent 'abhor gays' due to religious affiliation [Online]. Retrieved January 2, 2022. <https://www.pinknews.co.uk/2012/07/27/ghana-newspaper-says-82-percent-abhor-gays-due-to-religious-affiliation/>.

<sup>102</sup> Ryan Truscott (2021) Ghana Churches Push Law to Combat Promotion of Homosexuality. Retrieved January 2, 2022. <https://www.christianitytoday.com/news/2021/october/ghana-lgbt-bill-family-values-same-sex-advocates.html>.

bridging the conflict between sexuality and religion, Ghana has used religion as a tool of discrimination against queer people.

### 4.3 CULTURE

Like many African countries, Ghana has anti-LGBTQ+ activists who argue that queerness is ‘un-African’ and has no place in African culture. The discussions about queerness in Africa have been on the issue of whether queerness was brought by the Europeans to Africa during the colonization of the continent. Some European colonists believed that African men were the most primitive of men and as such, had to be heterosexual, believing that the “primitive man” was expected to be close to and ruled by nature.<sup>103</sup>

Today, the notion that queerness is a western import is widely embraced by many Ghanaians.<sup>104</sup> Although there is a lack of conclusive evidence to end this debate, there are several pieces of evidence (as discussed earlier on the evolution of queerness in Ghana) to support the claim that queerness existed before the European colonization of Africa.

In addition, there are non-Indo European and non-Semitic terms describing homosexual practices, that indicate the existence of same-sex relationships and homosexuality in the country even before they had contact with foreign cultures. In view of these claims, scholars and researchers have made significant arguments that the colonists did not bring homosexuality with

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<sup>103</sup> Murray, S.O. & Roscoe, W. (1998) Boy-wives and female-husbands: Studies in African homosexualities [Online]. Retrieved January 28, 2022. Available from: <https://soar.suny.edu/bitstream/handle/20.500.12648/1714/9781438484099.pdf?sequence=1&isAllowed=y>

<sup>104</sup> Forms of discrimination of LGBT people in Uganda, Ghana, Russia and Norway: A report by ISFiT Research group (2017). Retrieved January 28<sup>th</sup>, 2022. [https://www.researchgate.net/publication/315706640\\_Forms\\_of\\_discrimination\\_of\\_LGBT\\_people\\_in\\_Uganda\\_Ghana\\_Russia\\_and\\_Norway](https://www.researchgate.net/publication/315706640_Forms_of_discrimination_of_LGBT_people_in_Uganda_Ghana_Russia_and_Norway).

them into the country but existed prior to their coming into the country. Nonetheless, Christianity brought anti-queerness sentiments.

Canada on the other hand has not had any dispute on whether queerness is a colonial imposition. An article by Niko Block reiterates that “throughout the early 20th century, the homoerotic subject matter was conveyed in the works of a handful of painters, sculptors and photographers — some of whom engaged in same-sex partnerships, and some of whom did not.”<sup>105</sup>

## **5. THE WAY FORWARD: THE CANADIAN APPROACH**

This paper analyzes specific approaches and principles of Canadian human rights jurisprudence and equality law and proposes that they be adopted in Ghana to yield greater rights for LGBTQ+ Ghanaian citizens, including the decriminalization of homosexuality and the advocacy of equal rights for LGBTQ+ people.

After surveying both Canada and Ghana's legal and cultural landscapes, I argue that this can occur despite deeply enshrined cultural and religious beliefs, attitudes and prejudices against homosexuality in Ghana. This paper argues that Ghana does not need a new law to protect the rights of queer people. This is because the law in Ghana already protects the human rights of all citizens (as enshrined in Article 17 (2) of Ghana's 1992 constitution)<sup>106</sup> and just as the Canadian courts extended legal protections to LGBTQ+ persons in *Vriend v Canada and Egan v Canada*, by recognizing that all were entitled to equality, a similar broadening should occur in Ghana.

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<sup>105</sup> Niko Block (2015). Queer Culture. Retrieved January 29, 2022. .

<https://www.thecanadianencyclopedia.ca/en/article/queer-culture>.

<sup>106</sup> Article 17(2) of the 1992 Constitution provides that “A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status.”

Sexual orientation is not captured in the rights listed under Article 17(2) of Ghana's Constitution. However, a 'read in' approach and a broad interpretation to the Constitution, similar to how the Supreme Court of Canada 'read in' sexual orientation into the Charter, could be adopted by the Supreme Court of Ghana to give effect to the protection of queer people in Ghana.

This paper argues that an apparent conflict between competing rights (sexual orientation equality rights versus religion-based rights) has led to increased discrimination against queer people in Ghana.

Although there has not been a clear analytical approach by the Canadian courts in dealing with competing rights, there has been some guidance.<sup>107</sup> This paper argues that, when these principles are adopted by the courts of Ghana in dealing with competing rights it will be easier in solving the conflict between religion, culture and sexuality rights in Ghana.

Firstly, it must be understood that one of the fundamental principles of Canadian jurisprudence is that rights are not absolute. Justice Iacobucci emphasizes this in an Article entitled "Reconciling Rights: The Supreme Court of Canada's Approach to Competing Charter Rights," when he states: "A particular Charter right must be defined about other rights and with a view to the underlying context in which the apparent conflict arises."<sup>108</sup>

This Canadian approach is captured in Article 12(2) of the *1992 Constitution of Ghana* which also provides that no single human right is absolute and capable of trumping the others; all must be defined in light of competing claims and the public interest.<sup>109</sup>

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<sup>107</sup> Key legal principles [20]. Retrieved January 30, 2022. <https://www.ohrc.on.ca/en/book/export/html/6585>

<sup>108</sup> Frank Iacobucci, "Reconciling Rights" the Supreme Court of Canada's Approach To Competing Charter Rights. Vol. 20. Retrieved January 31, 2022. <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1038&context=sclr>.

<sup>109</sup> Article 12(2) provides 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 the public interest."

In the context of freedom of beliefs or religion, the Courts have found that the “freedom to hold beliefs is broader than the freedom to act upon them” where to do so would interfere with the rights of others.<sup>110</sup> In addition, “it is well established, however, that religious freedoms are subject to limitations necessary for protecting the safety and/or fundamental rights and freedom of others.”<sup>111</sup>

One principle that is the pillar of Canadian jurisprudence is the proposition that there is no hierarchy of rights. For instance, in the case of *Dagenais v Canadian Broadcasting Corporation*, the Supreme Court of Canada, through Chief Justice Lamer stated that “[a] hierarchical approach to rights, which places some rights over others, must be avoided, both when interpreting the Charter and when developing the common law. When the protected rights of two individuals come into conflict ... Charter principles require a balance to be achieved that fully respects the importance of both sets of rights”.<sup>112</sup>

The importance of these two fundamental Canadian principles cannot be overstated. The fact that no rights are absolute when viewed against a legal landscape that also proclaims that there is no hierarchy of rights can have enormous significance and a transformative impact in Ghana. Religious rights and cultural rights cannot be argued to be above sexual rights. Therefore, such religious and cultural rights cannot be grounds to discriminate against queer people or undermine sexual rights. Therefore, there should be a balance that fully respects the importance of all rights.

Donn Short has written that “human rights laws reflect society’s beliefs as to how we should treat one another. This is particularly true when it comes to people from minority groups

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<sup>110</sup> Key Legal Principles (20). Retrieved January 31, 2022. <https://www.ohrc.on.ca/en/book/export/html/6585>.

<sup>111</sup> Donn Short, Bruce MacDougall, and Paul T. Clarke. “Making the Case” 2SLGBTQ+ Rights and Religion in Schools, pp 32.

<sup>112</sup> *Dagenais v Canadian Broadcasting Corp.* 1994] 3 SCR 835.



and those who are vulnerable.”<sup>113</sup> Safeguarding religious and cultural rights over sexual rights will indeed lead to torture, abuse and death of queer people in Ghana. This goes against the spirit of Ghana’s constitution and all international obligations that Ghana has ratified, including Article 2 of the International Convention for Civil and Political Rights.<sup>114</sup>

## 6. CONCLUSION

Queer advocates in Ghana have been desperately clambering for inclusive laws and legalization so that queerness will not only improve Ghana’s relationship with the queer community but will also attract global investment. The concept of strategic modernization argues that countries hoping to present themselves as more visibly “modern” and successful to potential economic partners might use LGBTQ+ rights to strategically promote and expand economic opportunities.<sup>115</sup>

As already argued, Ghana does not need new legislation by elected legislators. However, the adoption of guidelines from an advanced legal system and jurisprudence like Canada can help pedal the rights of queer people to greater heights in Ghana.

Canada has developed a distinctly Canadian approach in its jurisprudence in dealing with competing rights. In particular, there are three principles of Canadian jurisprudence, which bear importing into, or emphasizing in, the Ghanaian legal system.

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<sup>113</sup> Donn Short, Bruce MacDougall, and Paul T. Clarke: Making the Case 2SLGBTQ+ Rights and Religion in Schools, 41.

<sup>114</sup> Article 2 of the ICCPR provides that “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or another opinion, national or social origin, property, birth or another status.”

<sup>115</sup>The Relationship Between LGBT Inclusion and Economic Development: Emerging Economies. Retrieved February 17, 2022. <https://williamsinstitute.law.ucla.edu/publications/lgbt-inclusion-economic-dev/>.

First, Canadian human rights decisions make clear that the mere recognition of one right cannot constitute an infringement of the rights of others.

Second, Canadian courts and human rights tribunals have repeatedly emphasized that no right is absolute. This is particularly true when an asserted right might lead to harming others.

Third, in Canadian law, there is no hierarchy of rights. It cannot be argued, for example, that religious rights are more important or deserving of protection than equality rights based on sexual orientation.

The legalization of queerness will not significantly affect religious and cultural rights in any way. However, doing so would be a bold step by Ghana towards the realization of the universality of human rights and embracing the Universal Declaration of Human Rights (UDHR) in all of its fullness and a recognition of the inherent dignity, equal and inalienable rights of the citizens of the country.

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