

# Domesticating the African Charter on Human and Peoples' Rights in Ghana: threat or promise to sexual minority rights?

Ernest Yaw Ako\*

<https://orcid.org/0000-0001-7214-4992>

**ABSTRACT:** For a long time, the denial in Africa of sexual minority rights on cultural and religious grounds was firmly rooted and unchallenged. This is no longer the case. Recent scholarship has challenged the narrative that homosexuality is un-African. Gradually courts and parliaments in Africa are beginning to decriminalise colonial-era sodomy laws. In addition to progressive global and regional developments on equal legal protection for sexual minorities, it would have been difficult to imagine that the African Charter on Human and Peoples' Rights could be used as a new pretext to deny sexual minority rights in a national constitution. Recently, however, the Constitution Review Commission of Ghana claimed that the African Charter and the Ghanaian Constitution abhor sexual minority rights. This argument ignores the pre-colonial past of many African countries, including Ghana, whose cultures embraced sexual minority rights. A consideration of the Ghanaian philosophical and theoretical thought, 'Sankofa', makes it imperative to turn to the past and learn from our pre-colonial cultures that embraced sexual minorities. Sankofa implores us to combine past functional cultures with current global and regional human rights law, to provide equal legal protection for every individual regardless of their sexual orientation. Therefore, domesticating the African Charter in Ghana should embrace sexual minority rights.

## TITRE ET RÉSUMÉ EN FRANCAIS:

### L'incorporation en droit interne de la Charte africaine des droits de l'homme et des peuples au Ghana: menace ou opportunités pour les droits des minorités sexuelles?

**RÉSUMÉ:** Le déni des droits des minorités sexuelles pour des motifs culturels et religieux a longtemps été enraciné et incontesté en Afrique. Ce n'est plus le cas. Des études récentes ont remis en question l'argument selon lequel l'homosexualité n'est pas africaine. Peu à peu, les tribunaux et les parlements africains commencent à dépénaliser les lois sur la sodomie héritées de la colonisation. En plus des progrès sur le plan mondial et régional en matière d'égalité de protection juridique des minorités sexuelles, il aurait été difficile d'imaginer que la Charte africaine des droits de l'homme et des peuples puisse être utilisée comme un nouveau prétexte pour dénier les droits des minorités sexuelles dans une constitution nationale. Récemment, cependant, la Commission de révision constitutionnelle du Ghana a affirmé que la Charte africaine et la Constitution ghanéenne abhorraient les droits des minorités sexuelles. Cet argument ignore le passé précolonial de nombreux pays africains, dont le Ghana, où les cultures embrassaient les droits des minorités sexuelles. Un examen de la pensée philosophique et théorique ghanéenne, «Sankofa», impose de se tourner vers le passé et d'apprendre de nos cultures précoloniales qui incluaient les minorités

\* LLB (Hons), BA (Hons), LLM (Pretoria); Doctoral candidate, Centre for Human Rights, Faculty of Law, University of Pretoria, Barrister & Solicitor of the Supreme Court of Ghana; [ernestyawako@hotmail.com](mailto:ernestyawako@hotmail.com)

sexuelles. Sankofa appelle à combiner les cultures fonctionnelles du passé avec le droit universel et régional actuel des droits de l'homme, afin de fournir une protection juridique égale à chaque individu quelle que soit son orientation sexuelle. Par conséquent, l'incorporation en droit interne de la Charte africaine au Ghana devrait inclure les droits des minorités sexuelles.

**KEY WORDS:** African Charter on Human and Peoples' Rights, sexual minority rights, sexual orientation, Ghana, sodomy laws

**CONTENT:**

1	Introduction.....	100
2	Constitutional Review Commission of Ghana: background and analysis of its work .....	103
3	Theoretical framework .....	105
4	The African human rights architecture and sexual minority rights.....	109
5	The Bill of Rights and sexual minority rights in Ghana .....	114
6	Conclusion .....	121

## 1 INTRODUCTION

In today's world, where international human rights protection has gained utmost importance, almost every international human rights instrument arguably protects the rights of every person regardless of their sexual orientation.<sup>1</sup> International human rights treaty monitoring bodies have interpreted treaties to give effect to sexual minority rights.<sup>2</sup>

- 1 The term 'sexual orientation' is used in this paper to mean 'how one relates to men or women'. The paper also uses the term as conceived by Waaldjik as 'the main generic term used to cover homosexuality, heterosexuality, and bisexuality' in International and European Law. See K Waaldjik 'The right to relate: a lecture on the importance of orientation in comparative sexual orientation law' (2013) 24 *Duke Journal of Comparative and International Law* 161 at 163. In this regard, every person has a sexual orientation, be it homosexual (relating sexually to persons of the same sex), heterosexual (relating sexually to persons of the opposite sex) or bisexual (relating sexually to persons of the same sex and the opposite sex).
- 2 See for instance Communication 488/1992, *Toonen v Australia*, Merits, UNHR Committee (31 March 1994) UN Doc CCPR/C/50/D/488/1992. The Human Rights Committee held for the first time that the ICCPR prohibited discrimination on grounds of sexual orientation, holding that 'sex' in arts 2(1) and 26 included 'sexual orientation' para 8.7; Communication 338/2008 *Uttam Mondal v Sweden* Committee Against Torture (CAT) (23 November 2011). The CAT held at para 7.8 that Sweden's intention to deport a gay man to Bangladesh would constitute a breach of art 3 of the convention against torture; General Comment No 35 - article 9 (liberty and security of person) Human Rights Committee CCPR/C/GC/35, 16 December 2014, emphasises that every person including LGBT persons are entitled to liberty and security of their person; Resolution 275: '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' The African Commission on Human and Peoples' Rights (the African Commission), meeting at its 55th Ordinary Session held in Luanda, Angola, from 28 April to 12 May 2014 condemned violence against sexual minorities; the African Commission has also stated in passing in at least three cases that did not determine sexual orientation issues that the right to equality in art 2 of the African Charter which prohibits discrimination could include other grounds not mentioned in the Charter such as sexual orientation. See the cases of *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) para 169; *Purohit and Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 49; and *Bissangou v Republic of Congo* (2006) AHRL 80 (ACHPR 2006) para 69.

States or their representatives at global and regional political forums have passed resolutions and issued statements observing the need to protect the rights of sexual minorities<sup>3</sup> and urging other states to decriminalise sodomy laws.<sup>4</sup> Domestic laws<sup>5</sup> and courts<sup>6</sup> have also embraced sexual minority rights and declared sodomy laws as unconstitutional. Given the progressive development of human rights protection at global, regional, and domestic level irrespective of a person's sexual orientation, not many would have thought that a constitutional review commission would contend that a regional human rights treaty abhors sexual minority rights.<sup>7</sup>

Recently, however, the Constitution Review Commission (CRC) of Ghana<sup>8</sup> recommended that the amendment of the 1992 Constitution of Ghana should emulate the African Charter on Human and Peoples' Rights (African Charter), which abhors consensual same-sex relationships, and not include provisions to protect sexual minority rights expressly.

- 3 The term 'sexual minorities' is used in this paper to denote 'people whose preferences, intimate associations, lifestyles or other forms of personal identity or expression actually or imputed derogate from a dominant normative-heterosexual paradigm'. Also, 'rights of sexual orientation and rights of sexual minorities denote (interchangeably) rights against discrimination on the basis of sexual orientation', see E Heinze *Sexual orientation: a human right An essay in international human rights law* (1995) 61. The acronym 'LGBT' is also used in this paper in the sense in which it is used worldwide to mean lesbian, gay, bisexual, and transgender, but not in any cultural context. See F Viljoen *International human rights law in Africa* (2012) 259; See also J Oloka-Onyango 'Debating love, human rights and identity politics in East Africa: the case of Uganda and Kenya' (2015) 15 *African Human Rights Law Journal* 28 at 31, who contends that the term LGBT is 'rooted in culturally-specific norms and values that are not necessarily shared by African people'.
- 4 See for instance Resolution 275 (n 2); Resolution A/HRC/RES/17/19 Human Rights Council Seventeenth session agenda item 8 entitled 'human rights, sexual orientation and gender identity' (14 July 2011) para 1. The resolution was adopted by a 23 to 19 vote appointing the High Commissioner for Human Rights to conduct a study into the prevalence of violence against sexual minorities globally; See also Joint statement on sexual orientation & human rights delivered by New Zealand at the Commission on Human Rights, March 2005 noting the sensitive nature of sexual orientation and human rights yet determined together with other states to ensure protection for sexual minorities, available at <https://arc-international.net/global-advocacy/sogi-statements/2005-joint-statement/> (accessed 23 June 2020).
- 5 Constitution of the Republic of South Africa sec 9(3).
- 6 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); *Letsweletse Motshidiemang v Attorney General & Legabibo (Amicus Curiae)* MAHGB – 000591-16; *Navtej Singh Johar and Others versus Union of India* Thr Secretary Ministry of Law and Justice Writ Petition (Criminal) No 76 of 2016.
- 7 The recommendations of the CRC are yet to be implemented but there is no indication that this position has changed. Homophobic rhetoric is on the increase and politicians have threatened to pass laws with stiffer punishment for same-sex sexual activity.
- 8 The Constitution Review Commission was appointed under Constitutional Review Commission of Inquiry Instrument 2010 (CI 64) with a mandate to collect the submissions of Ghanaians with a view to making proposals for the amendment of the 1992 Constitution of Ghana.

This article argues that the African Charter embraces the rights of all persons regardless of their sexual orientation.<sup>9</sup> Uncritically accepting the view that the African Charter and the 1992 Constitution of Ghana do not protect sexual minority rights legitimises ongoing human rights violations against sexual minorities such as forced anal examinations, harassment, assault, killings and other forms of violence.<sup>10</sup> It will also embolden African states to continue criminalising and re-criminalising consensual same-sex conduct on the basis that it is alien to African cultural values. Failing to correct the impression that the African Charter abhors sexual minority rights will also empower other organs of the African Union (AU) to request other independent bodies of the AU to ‘consider’ their relationship with human rights defenders based on ‘African culture’. Arguably, criminalisation of same-sex sexual acts constitutes ‘dignity taking’,<sup>11</sup> and the only way to restore this dignity of the human person is to decriminalise consensual same-sex acts. Therefore, the statement of the CRC potentially undermines global, regional, and domestic efforts to restore dignity to many who have been denied it by state and non-state actors.

After this introduction, the article proceeds as follows: Part 2 discusses the CRC’s findings, recommendations, and the government White Paper issued to accept its recommendations. Part 3 examines the concept of Sankofa as a theoretical framework to examine the paper. Next, the article argues that the African Charter embraces sexual minority rights.<sup>12</sup> Part 5 argues that given Ghana’s history, bill of rights and commitment to international human rights, it is imperative that it embraces sexual minority rights. Part 6 concludes the paper with some reflections on the critical points canvassed in the paper.

- 9 R Murray & F Viljoen ‘Towards non-discrimination on the basis of sexual orientation: the normative basis and procedural possibilities before the African Commission on Human and Peoples’ Rights and the African Union’ (2007) 29 *Human Rights Quarterly* 86 at 92-97; See also Resolution 275 (n 2).
- 10 Human Rights Watch ‘No choice but to deny who I am’ violence and discrimination against LGBT people in Ghana’ (2018); RA Atuguba ‘Homosexuality in Ghana: morality, law, human rights’ (2019) 12 *Journal of Politics and Law* 113 117-118.
- 11 A Shaw ‘From disgust to dignity: criminalisation of same-sex conduct as a dignity taking and the human rights pathways to achieve dignity restoration’ (2018) 18 *African Human Rights Law Journal* 684.
- 12 The Yogyakarta Principles ‘Principles on the application of international human rights law in relation to sexual orientation and gender identity’ adopted in Yogyakarta Indonesia in March 2007; See also The Yogyakarta Principles plus 10 ‘Additional principles and state obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta principles’ adopted on 10 November 2017 in Geneva. These principles emphasise that sexual minority rights are not a new set of rights. They are existing rights in core international human rights treaties as applied to LGBT persons.

## 2 CONSTITUTIONAL REVIEW COMMISSION OF GHANA: BACKGROUND AND ANALYSIS OF ITS WORK

After calls by civil society organisations, political parties, and ordinary citizens for the 1992 Constitution to be revised, the Ghanaian government established a Constitution Review Commission (CRC) on 11 January 2010.<sup>13</sup> The CRC was mandated to appraise the 1992 Constitution of Ghana and gauge the views of Ghanaians relating to ‘strengths and weaknesses of the [1992] Constitution’.<sup>14</sup> The terms of reference noted further that the CRC should ‘articulate the concerns of the people of Ghana on amendments that may be required for a comprehensive review of the 1992 Constitution’.<sup>15</sup> The terms of reference noted further that the CRC was empowered to ‘make recommendations to the government for consideration and provide a draft bill for possible amendments to the 1992 Constitution of Ghana’.<sup>16</sup> The President swore-in the nine-member CRC which comprised lawyers, academics, traditional rulers, a legal drafting consultant and other members of the private sector on 11 January 2010 to execute their mandate for two years.<sup>17</sup> The CRC had an Executive Secretary and principal researcher who was in charge of the research and its daily affairs, supported by other staff.

Guided by its terms of reference, the CRC sought the views of Ghanaians both home and abroad through town hall meetings and received oral and written submissions on crucial amendments to the Constitution. The CRC also accessed submissions through non-traditional forms of media and interacted with millions of Ghanaians through its face to face meetings and online access to submissions.<sup>18</sup> It received and utilised 83,161 submissions from Ghanaians calling for amendments of specific areas of the Constitution.<sup>19</sup> In all, the CRC grouped the issues to be addressed under 13 chapters and subsequently suggested 41 amendments to the Constitution.

The CRC made various findings and recommendations for the adoption by the government. One of the critical findings and recommendations relates to chapter 5 of the 1992 Constitution of Ghana that contains the bill of rights. The CRC made a general finding that throughout its interactions, Ghanaians did not want to amend the bill of rights unless this was to improve or add to the human rights provisions in the Constitution. Apart from this general

13 Report of the Constitutional Review Commission of Ghana ‘From a political to a developmental constitution’ (Constitution Review Commission report) (2011) 1 8.

14 Constitution Review Commission report (n 13) 10.

15 As above.

16 As above.

17 As above.

18 Constitution Review Commission report (n 13) 34.

19 As above.

recommendation relating to fundamental human rights protections, the CRC also made specific findings and recommendations.

The first was on the right to equality and freedom from discrimination. On this issue, it noted that one of the grounds for which people had made submissions to the CRC to consider was to include 'sex' and 'sexual orientation' into the prohibited grounds of discrimination in the Constitution.<sup>20</sup> Among the submissions received by the CRC, some noted that 'sex' and 'sexual orientation' should be included in the discrimination clause to 'avoid possible discrimination on account of biological differences between men and women'.<sup>21</sup> Those who opposed references to 'sex' and 'sexual orientation' did so 'to ensure that it is not interpreted to recognise homosexuality in Ghana'.<sup>22</sup> Based on these submissions, the CRC made an interesting finding and observation.<sup>23</sup> Without citing any authority to back its claim, it stated that 'the Commission finds that the framers of the 1992 Constitution of Ghana substituted 'sex' (which was in the 1979 Constitution) with 'gender' for the following purpose: to ensure the recognition of the natural/biological state of a woman and a man'.<sup>24</sup> The CRC observed further that yielding to a section of Ghanaians to insert 'sex' to the anti-discrimination clause 'would add to the legal arsenal of those who argue that the Constitution abhors discrimination on the grounds of sexual orientation'.<sup>25</sup> This aspect of the CRC's observation is problematic because it starts from a position that the Constitution should not protect the rights of a segment of society, therefore entrenching the belief that the state endorses discrimination against sexual minorities. Thus, any reference to 'sex' or 'sexual orientation' should be discarded.

The second finding and recommendation of the CRC dealt with whether the Constitution should recognise lesbian and gay rights. The CRC noted that it received 'a few submissions from persons wanting the Constitution to recognise the rights of homosexuals in the Constitution. However, the overwhelming majority of the submissions were to the effect that homosexuality should not be recognised by the Constitution'.<sup>26</sup> Commenting on the submissions received, the CRC observed that there was an overwhelming number of people who reckoned that there should be 'non-recognition of the right to sexual orientation for homosexuals',<sup>27</sup> and that 'in recent times gay and lesbian issues have taken centre stage in Ghana'.<sup>28</sup>

20 Constitution Review Commission report (n 13) 652.

21 Constitution Review Commission report (n 13) 653.

22 As above.

23 As above.

24 As above.

25 As above.

26 Constitution Review Commission report (n 13) 654-655.

27 Constitution Review Commission report (n 13) 656.

28 As above.

Perhaps the most significant finding and observation of the CRC is captured in paragraphs 125 and 126 of the report. At paragraph 125 it is noted as follows:<sup>29</sup>

The Commission finds that in any case, it would be neither necessary nor advisable for the Constitution Review Commission to attempt to deal with this complicated issue at this time. It is very probable that a proposal to give some recognition to same-sex relationships in Ghana at this stage will be condemned by a large section of the population in the country - mainly on religious and cultural grounds. On the other hand, a suggestion to introduce a provision in the Constitution expressly excluding same-sex marriages in Ghana would be [clearly] seen by many people in the country and outside of it as a reactionary move not worthy of a progressive state.

The CRC made further observations:<sup>30</sup>

The Commission finds that Ghana's human rights are situated in the African Charter on Human and Peoples' Rights. This Charter provides in the preamble that human rights take 'into consideration the virtues of their (The Africans') historical tradition and the values of African civilisation'. The Charter says further that the individual who seeks his or her human rights to be protected has the responsibility to protect the social and cultural values of the society: 'the individual shall also have the duty to preserve and strengthen positive African values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society. Arguably homosexuality could be an example of a situation where the desire of an individual to have sex with a person of the same sex should not be recognised as long as that practice fails to sit with the socio-cultural values of the society in which the individual finds himself.

After making these findings, the CRC recommended that 'the legality or otherwise of homosexuality be decided by the Supreme Court if the matter comes before the court'.<sup>31</sup> The above findings and recommendations of the CRC implicate the African Charter, the Constitution of Ghana and their compatibility with sexual minority rights. This paper analyses these parts of the CRC's report, but first, I examine the theoretical framework for the paper.

### 3 THEORETICAL FRAMEWORK

This study situates the compatibility of sexual minority rights with the African Charter and the Ghanaian Constitution in the context of Ghanaian and African philosophical thought of 'Sankofa', which means 'go back for it'.<sup>32</sup> Sankofa is a traditional Ghanaian symbol of the Akan speaking people,<sup>33</sup> of a 'mythical bird flying forward with its head

29 Constitution Review Commission report (n 13) 656.

30 Constitution Review Commission report (n 13) 656-657.

31 Constitution Review Commission report (n 13) 657.

32 JET Kuwornu-Adjaottor and others 'The philosophy behind some Adinkra symbols and their communicative values in Akan' (2016) 7 *Philosophical Papers and Review* 22.

33 Akan is a dominant umbrella language group in Ghana with many dialects such as Fante, Asante, Akuapem and many others. It is spoken by over half of the population in Ghana and used as a medium of trade in almost all the regional capitals of Ghana. See Kuwornu-Adjaottor and others (n 32) 24.

turned backwards',<sup>34</sup> with an egg in its mouth which 'represents the "gems," or knowledge, of the past upon which wisdom is based. It also signifies the generation to come that will benefit from that wisdom'.<sup>35</sup> The mythical bird is also a philosophy, a way of life and a form of communicating Akan ideas,<sup>36</sup> 'religious, aesthetic and cultural values',<sup>37</sup> When expressed as an Akan proverb, '*se wo were fi na wosankofa a yenkyi*',<sup>38</sup> it means 'it is not wrong or shameful to go back for something you have previously forgotten'. Thus, the Akans believe that the wisdom of their forebears is critical to understanding their history, navigating the present and carving out a future based on an accurate representation of their culture and who they are as a people. Therefore, 'the Akan people are of the opinion that the past serves as a guide when planning for the future and obtaining wisdom of the past enables planning for a stronger future'.<sup>39</sup>

From the ground-breaking work of Appiagyei-Atua, we learn that the Akans through proverbs, folklore and symbols like Sankofa reflect Akan philosophy and contribution to the concept of human rights.<sup>40</sup> Some of these rights, in Akan philosophy and culture, include the right to life, freedom of speech and expression. Inherent in the right to life, is the right to human dignity and the freedom of the individual in such a cultural setting to claim their 'individuality' and achieve their full potential in a society that also realised communitarian values. Ngwena also observes that embracing sexual diversity that includes same-sex sexual relationships is part of our 'Africanness'.<sup>41</sup> Other scholars confirm that various African cultures accepted and embraced same-sex sexuality during the pre-colonial era.<sup>42</sup> Therefore, while Africans valued heterosexual relationships that produced children that continued the generations of people, it still accepted and valorised consensual same-sex relationships as a significant part of society for purposes of war, abundant farming yield and the expression of the

- 34 KP Quan-Baffour 'The wisdom of our forefathers: Sankofaism and its educational lessons for today' (2008) 7 *Journal of Educational Studies* 22 at 25.
- 35 A K Beale 'Daring to create change agents in physical education: the Sankofa philosophy' (2013) 84 *Journal of Physical Education, Recreation & Dance* 7.
- 36 K Gyekye *African cultural values: an introduction* (2002) 125.
- 37 J Nkansah-Obrempong 'Visual theology – the significance of cultural symbols, metaphors and proverbs for theological creativity in the African context: a case study of the Akan of Ghana' (2002) 5 *Journal of African Christian Thought* 38 at 39.
- 38 Quan-Baffour (n 34) 25.
- 39 J Slater 'Sankofa – the need to turn back to move forward: addressing reconstruction challenges that face Africa and South Africa today' (2019) 45 *Studia Historiae Ecclesiasticae* 1.
- 40 K Appiagyei-Atua 'Contribution of the Akan philosophy to the conceptualisation of African notions of human rights' (2000) 33 *Constitutional and International Law Journal of South Africa* 165.
- 41 C Ngwena *What is Africanness? Contesting nativism in race, culture, and sexualities* (2018).
- 42 M Epprecht 'Bisexuality and the politics of normal in African ethnography' (2006) 48 *Anthropologica* 187 at 190-192; O Ambani 'A triple heritage of sexuality? Regulation of sexual orientation in Africa in historical perspective' in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 14 at 23-24.



diverse nature of humanity.<sup>43</sup> In the Ghanaian context, same-sex relationships existed before, during and even after colonialism had officially ended.<sup>44</sup> Pre-colonial Ghanaian cultures had elaborate laws governing their societies, some of which categorised certain sexual conduct as offences against the community, but did not punish consensual same-sex conduct.<sup>45</sup> Colonialism introduced 'unnatural carnal knowledge' laws to punish consensual same-sex relationships.<sup>46</sup> Thus, the theory or concept of Sankofa implores us to revisit our pre-colonial past and take lessons from our culture 'to serve as a guide for planning the future'.<sup>47</sup> It is also an opportunity to embrace contemporary developments into our Ghanaian and African cultures, taking cognisance of the past that our forebears laboured to build.<sup>48</sup>

Scholars have used Sankofa theory to emphasise the need to return to the functional aspects of African tradition and culture that existed in the past to serve as a guide for a better future. The theory has been used in the context of education<sup>49</sup> to emphasise the need to decolonise the educational curriculum to depart from an education that reflects the ideals of the West to one that encapsulates African values and needs.<sup>50</sup> It emphasises the salient aspects of the Sankofa theory such as 'humaneness, respect for life and human dignity'.<sup>51</sup> The theory has addressed issues in mental health,<sup>52</sup> used as a cultural framework to

- 43 JO Ambani 'A triple heritage of sexuality? Regulation of sexual orientation in African in historical perspective' in S Namwase & A Jjuuko (eds) (2017) *Protecting the human rights of sexual minorities in contemporary Africa* 14.
- 44 N Ajen 'West African homoeroticism: West African men who have sex with men' in SO Murray & W Roscoe (eds) *Boy-wives and female husbands studies in African homosexuality* (1998) 129; I Signorini 'Agonwale Agyale: the marriage between two persons of the same sex among the Nzema of southwestern Ghana' (1973) 2 *Journal de la sociétés des africanistes* 221; SO Dankwa 'The one who first says I love you: same-sex love and female masculinity in postcolonial Ghana' (2011) 14 *Ghana Studies* 223; SO Dankwa (2009) 'It's a silent trade: female same-sex intimacies in post-colonial Ghana' (2009) 17 *Nordic Journal of Feminist and Gender Research* 192; WF Mohammed 'Deconstructing homosexuality in Ghana' in SN Nyeck (ed) *Routledge handbook of queer African studies* (2020) 167 169-170.
- 45 JM Sarbah *Fanti customary laws: a brief introduction to the principles of the native laws and customs of the Fanti and Akan sections of the Gold Coast with a selection of the cases thereon decided in the law courts* (1897); RS Rattray *Ashanti law and constitution* (1929); GBN Ayittey *Indigenous African institutions* (2006).
- 46 See Criminal Offences Act, Act 29, 1960 first enacted as Ordinance no 12 of 1892 which criminalised 'unnatural carnal knowledge'. See JS Read 'Ghana: the Criminal Code, 1960' (1962) 11 *International and Comparative Law Quarterly* 272.
- 47 Appiagyei-Atua (n 40) 168.
- 48 As above.
- 49 Quan-Baffour (n 34). See also MO Ajei 'Educating Africans: perspectives of Ghanaian philosophers' (2018) 19 *Phronimon* 1.
- 50 Quan-Baffour (n 34) 26.
- 51 Quan-Baffour (n 34) 28.
- 52 B Adomako and others 'Sankofa: understandings of culture and its relevance for mental health provision in Ghana' (2016) 6 *Research on Humanities and Social Sciences* 232.

discuss the inevitable changes that occur with currency denomination,<sup>53</sup> and employed in the arts and literature for its relevance to society.<sup>54</sup> It symbolises unity and remembrance for Africans in the diaspora,<sup>55</sup> and a movie has even been made based on Sankofa.<sup>56</sup>

Unlike previous studies, this paper utilises Sankofa as a tool to assess the veracity of claims that the African Charter and the Ghanaian Constitution are incompatible with sexual minority rights. It is a useful theory for this study, especially as a decolonial method of examining claims that same-sex relationships never existed in Ghana and Africa and only a colonial importation. It is also useful and representative of the African and Ghanaian conception of fundamental human rights, emphasising the right to dignity, equality, non-discrimination, and privacy. Alongside historical evidence of the existence of sexual minorities in Ghana, and other African societies, it makes a compelling case for policymakers, constitutional drafters and legal officers to rethink the denial of sexual minority rights in contemporary constitutions under the guise of sweeping statements that same-sex relationships never existed in Ghana and Africa.

Using Sankofa as a framework for critiquing same-sex relationships, therefore places the spotlight on sexual minority rights in the Ghanaian context, in light of the findings and recommendations of the CRC that the African Charter abhors same-sex sexual relationships based on African culture and tradition. Despite its focus on Ghana, however, the study has implications for other African countries. The claim that the African Charter abhors same-sex relationships in Africa, though interrogated in light of Ghanaian folklore and symbolism, has consequences for other African countries that follow a similar approach. Therefore, the context of this analysis, while unique to Ghana, has consequences for other African countries. The sentiments expressed by the CRC of Ghana that the African Charter abhors homosexuality is similar to statements attributed to some heads of

- 53 VAA Dzokoto 'A bird, a crocodile, and the 21<sup>st</sup> century cowrie shell: analysing Ghana's currency change' (2011) 42 *Journal of Black Studies* 715.
- 54 S Kandé & J Karaganis 'Look homeward, angel: maroons and mulattos in Haile Gerima's 'Sankofa'' (1998) 29 *Research in African Literatures* 128. See also P Appiah 'Akan symbolism' (1979) 13 *African Arts* 64; S Benagr & TBK Ofose 'Ghanaian screendance perspectives: the nuance of 'Sankofaism' as emerging aesthetics and rejection of orthodoxy' (2016) 6 *International Journal of Screendance* 78.
- 55 CN Temple 'The emergence of Sankofa practice in the United States: a modern history' (2010) 41 *Journal of Black Studies* 127.
- 56 H Gerima *Sankofa* (1993). The *Sankofa* philosophy permeates the social fabric of the Ghanaian society. For instance, the popularisation of the wearing of locally made garments for official functions by the office of the President, members of Parliament and other government officials reflects the *Sankofa* principle. It is a return to a cultural way of dressing. Hitherto, the wearing of Western clothes for official functions was the norm. Thus, even though the *Sankofa* philosophy cannot be said to expressly dictate official policy or decisions, in many respects, it has an implied influence.

states and politicians in Africa,<sup>57</sup> as well as the Executive Council of the African Union.<sup>58</sup> Courts have also expressed similar sentiments in Kenya,<sup>59</sup> Malawi<sup>60</sup> and even Botswana<sup>61</sup> in the past. Therefore, interrogating the threat or promise that the African Charter holds for sexual minority rights in Ghana if domesticated or used to interpret constitutional rights, resonates with the situation in other African countries. Against the backdrop of Ghanaian and African philosophical thought of Sankofa, it is even more significant.

#### 4 THE AFRICAN HUMAN RIGHTS ARCHITECTURE AND SEXUAL MINORITY RIGHTS

In dismissing submissions received by some Ghanaians that it is plausible to interpret the Constitution of Ghana to include the rights of everyone including sexual minorities, the CRC noted that such a conception is not possible because ‘Ghana’s human rights are situated in the African Charter on Human and Peoples’ Rights’.<sup>62</sup> The CRC argued that the preamble to the African Charter refers to African virtues, historical tradition and African civilisation as a basis to conceptualise an African notion of human and peoples’ rights.<sup>63</sup> It noted further that article 29 of the African Charter imposes on every individual the duty to uphold positive African values and to contribute

57 All former presidents of Ghana since 1992 including the current president have condemned same-sex sexual relationships. There are many examples of African presidents including presidents of Kenya, Uganda, and Namibia condemning homosexuality. The late Robert Mugabe of Zimbabwe spectacularly claimed at the UN General Assembly that Africans are not gays. ‘Robert Mugabe to the UN: We are not gays’ 28 September 2015. Available at <https://edition.cnn.com/videos/world/2015/09/29/mugabe-un-speech-not-gay-succession-nr.cnn> (accessed 8 August 2020).

58 Decisions of the Executive Council African Union Twenty-Seventh Ordinary Session 7-12 June 2015 Johannesburg, South Africa 32.

59 *EG & 7 Others v Attorney General; DKM & 9 Others (interested parties); Katiba Institute and Another (amicus curiae)* consolidated suit of Petition no 150 of 2016 and Petition no 234 of 2016. A Kenyan High Court in Nairobi held that the criminalisation of consensual same-sex sexual adults between adults in private is not unconstitutional. At para 339 the court reasoned that majority of Kenyans were opposed to same-sex sexual rights and it would open the floodgates for gay marriages if it went ahead to decriminalise consensual same-sex relationships.

60 *Republic v Steven Monjeza Soko & Tionge Chimbalanga Kachepa* Chief President Magistrate’s Court Blantyre Criminal case no 359 of 2009. At page 23 of the report Mr Usiwa Usiwa who determined the matter noted with consternation, following the majoritarian morality principle, that ‘I do not believe Malawi is ready to smile at her daughters marrying each other’.

61 *Kanane v The State* 2003 (2) BLR 64 (CA), where the court noted that the majority of the Botswana people were not ready to accept homosexuals in society.

62 Constitution Review Commission report (n 13) 656.

63 As above. See also para 5 Preamble to the African Charter adopted on 27 June 1981 and entered into force on 21 October 1986.

to the moral well-being of society.<sup>64</sup> Based on a combined reading of these two provisions, the CRC concluded that it was not possible for the African Charter, and the Constitution of Ghana to embrace sexual minority rights. The CRC observed that ‘arguably homosexuality could be an example of a situation where the desire of an individual to have sex with a person of the same sex should not be recognised as long as that practice fails to sit with the socio-cultural values of the society in which the individual finds himself’.<sup>65</sup>

The statement of the CRC, referring to African socio-cultural values as a reason to reject consensual same-sex relationships calls for deep reflection and interrogation of what these socio-cultural values are. A critique of this statement is especially relevant because, in 2015, the Executive Council of the African Union used similar sentiments to call on the African Commission on Human and Peoples’ Rights (African Commission) to consider withdrawing the Observer Status it had granted to the Coalition of African Lesbians (CAL). In a protracted application process that saw the Observer Status of CAL denied, granted and subsequently withdrawn, the AU Executive Council called on the African Commission to ‘take into account the fundamental African values, identity and good traditions, and to withdraw the observer status granted to NGOs who may attempt to impose values contrary to the African values’.<sup>66</sup>

The African Charter does not stipulate which socio-cultural values are uniquely African. While it may be difficult to decipher what values are African and whether all African countries share absolute values that make them African, Quan-Baffour<sup>67</sup> indicates what some of these values are. Using the Sankofa theory, he argues that African values include humaneness, respect for the human dignity of a person, non-discrimination and equal treatment.<sup>68</sup> Respect for human dignity is an African cultural value that is the cornerstone of all rights and held in high esteem in many cultures across Africa.<sup>69</sup> Respect for a person’s dignity requires a duty to respect a person’s most intimate, innate and private domains of their life, which includes the right to relate to and choose one’s partner.<sup>70</sup> Therefore, human dignity is not a hollow claim.

The Supreme Court of India put it succinctly when it noted that ‘life without dignity is like a sound that is not heard. Dignity speaks; it has its sound; it is natural and human’.<sup>71</sup> If sexual orientation is an innate

64 The Charter, art 29(7).

65 Constitution Review Commission report (n 13) 657.

66 Decisions of the Executive Council African Union Twenty-Seventh Ordinary Session 7-12 June 2015 Johannesburg, South Africa (n 49).

67 Quan-Baffour (n 34).

68 As above.

69 K Gyekye *African cultural values an introduction* (1996). At page 24, the author underscores the dignity and worth of the human being with a Ghanaian proverb that says, ‘all human beings are children of God; no one is a child of the earth’.

70 *Letsueletse Motshidiemang v Attorney General & LEGABIBO (Amicus Curiae)* (n 6) 79-80.

71 *Navtej Singh Johar and Others versus Union of India Thr Secretary Ministry of Law and Justice* (n 6) 84.

human quality that every human being possesses,<sup>72</sup> and criminalisation of this human quality amounts to the deprivation of their dignity,<sup>73</sup> then respect for a person's human dignity entails respect for their heterosexual or homosexual sexual orientation. Moreover, dignity is natural, human and inheres in the human being; thus, without it, a person ceases to be human. The African Charter guarantees respect for human dignity<sup>74</sup> as does the Ghanaian Constitution, which also makes this right inviolable.<sup>75</sup> It cannot, therefore, be correct to say that respect for African cultural values is irreconcilable with respect for the rights of sexual minorities. The two are not mutually exclusive, but the same thing. One does not ask a person their sexual orientation before respecting their dignity but should respect their human dignity because they are human.

In a similar vein, El-Obaid and Appiagyei-Atua argue that the portrayal of traditional African values as a reason not to offer constitutional protection of human rights is utopian and unjustified.<sup>76</sup> The authors contend that the portrayal of African socio-cultural values as 'purely communalistic, homogenous and cooperative' is misconceived.<sup>77</sup> They assert that the African Charter 'is far from a realistic reflection of human rights in Africa'.<sup>78</sup> While El-Obaid and Appiagyei-Atua's arguments do not refer to sexual minority rights, they nevertheless make significant claims regarding socio-cultural values of Africans and the foundation upon which the African human rights architecture rests. In sum, African cultural values promote respect for a person's dignity and equality. Those values acknowledge that there are individual differences in the African communitarian principle, and this may include sexual diversity and the right to relate to a person of the same-sex. Therefore, the right to relate to persons of the same sex must be respected in the same manner as we respect heterosexual relationships.

It is difficult to reconcile the position of the CRC that the duty 'to preserve and strengthen positive African cultural values in his [or her] relations with other members of the society',<sup>79</sup> equals a duty to prevent or abhor same-sex sexual relationships. The African Charter states that in order to preserve and strengthen positive African values, the individual must strive to do this 'in a spirit of tolerance, dialogue and consultation'<sup>80</sup> towards the 'moral well-being of society'.<sup>81</sup> It is difficult

72 *Letsweletse Motshidiemang v Attorney General & Legabibo (Amicus Curiae)* (n 4) 79-80.

73 Shaw (n 11) 691-693.

74 African Charter, art 5.

75 Constitution of the Republic of Ghana art 15.

76 EOA El-Obaid & K Appiagyei-Atua 'Human rights in Africa: a new perspective on linking the past to the present' (1996) 41 *McGill Law Journal* 819.

77 As above.

78 As above.

79 Constitutional Review Commission report (n 13) 656-657. See also the Charter art 29(7).

80 African Charter, art 29(7).

81 As above.

to fathom how tolerating and dialoguing with one's neighbour towards the moral well-being of society, as a duty, metamorphoses into a duty to disrespect the dignity of a person based on their sexual orientation. Moreover, this provision falls under the 'duties' section of the African Charter. The provision is, therefore, a call to duty of all Africans to remember African cultural values such as humaneness, respect for human dignity and freedom of speech in their dealings with their fellow human beings.

As argued by some scholars, at the time of drafting the African Charter, words and phrases like 'sexual orientation' were not in use, and there was no attempt by the drafters of the Charter to deny any person the benefits of the rights in the Charter based on their sexual orientation.<sup>82</sup> Therefore, interpreting the African Charter as forbidding sexual minority rights is unfounded. If there is any provision in the African Charter that attempts to limit the enjoyment of rights, it is the 'general limitation provision',<sup>83</sup> but even this does not limit the rights of sexual minorities.

In a direct analysis of the African Charter and sexual minority rights, Murray and Viljoen contend that the basis for limiting the rights under the African Charter, under the two-phased approach under article 27,<sup>84</sup> could be limited to three possible instances of 'African values, majority morality and HIV prevention'.<sup>85</sup> However, all three bases for limiting rights under the Charter are untenable. Regarding African values and culture, overwhelming evidence suggests that same-sex sexual practices existed in many cultures in Africa before colonial administrators arrived on the shores of Africa and continue to exist until today. As the authors rightly pointed out, criminalising homosexuality does not promote African values<sup>86</sup> of humaneness, respect for human dignity and freedom of expression. Besides, a human rights treaty like the African Charter and a national constitution should not be at the whim and caprice of the majority but rather interpreted to protect the minority who are often vulnerable, as India and Botswana have done recently. Further, criminalisation of same-sex sexual practices does not have any positive effect on HIV control as an overwhelming majority of infections occur 'through unprotected heterosexual sex'.<sup>87</sup> The African Commission recognised this fact when it noted that Africa had to adopt a human rights approach to addressing the issue and pay attention to vulnerable groups such as men having sex

82 Murray & Viljoen (n 9) 88.

83 Murray & Viljoen (n 9) 92; see also art 27(2) which states that 'the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest'.

84 The two-phased approach under 27 of the African require a complainant showing a prima facie violation of the Charter rights and the perpetrator or state showing that such a violation is proportionate and does not aim to render the enjoyment of the said right illusory. See Murray & Viljoen (n 9) 92.

85 Murray & Viljoen (n 9) 93.

86 Murray & Viljoen (n 9) 93-94.

87 Murray & Viljoen (n 9) 96-97.

with men,<sup>88</sup> instead of criminalising and stigmatising these vulnerable groups.

The African Charter does not limit the rights of sexual minorities but instead protects ‘every individual’ regardless of status. There is no justification to exclude any person or group of persons from enjoying the rights under the African Charter. Taking a right to equality, and the right to privacy, derived from a combined reading of the right to life and the right to integrity, the African Charter could be argued to provide human rights protections for every person regardless of their sexual orientation.<sup>89</sup> It is therefore not possible for a person to forfeit their rights such as ‘right to a fair trial, to assemble freely, or to property merely based on sexual orientation’.<sup>90</sup>

Although the African Charter does not have a provision that explicitly provides for the protection of the rights of sexual minorities, it is essential to understand that this drafting omission occurred in the context of the time the Charter was adopted.<sup>91</sup> Just like the core human rights treaties of the UN, the African Charter also does not contain a reference to sexual orientation. That notwithstanding, all core treaties of the global human rights system arguably provide equal legal protection for LGBT persons.<sup>92</sup> There is no reason why the African Commission which interprets the African Charter, using the jurisprudence of these global treaty bodies in other aspects of human rights protections cannot do so in the case of sexual minority rights.<sup>93</sup>

The argument that the African Charter protects LGBT persons is strengthened further by the fact that the African Commission has often relied on the jurisprudence of global and regional treaty bodies. There is no bar for it to continue doing so, even concerning sexual minority rights.<sup>94</sup> Drawing from the jurisprudence of the UN, European and Inter-American human rights systems, it is impossible to hold that a person’s right to integrity, liberty or security has been curtailed simply because of their sexual orientation, as that would amount to an

88 Resolution 163 ‘Resolution on the establishment of a committee on the protection of the rights of people living with HIV (PLHIV) and those at risk, vulnerable to and affected by HIV – ACHPR /Res 163 (XLVII) 10 (May 2010).

89 Murray & Viljoen (n 9) 96-97.

90 Murray & Viljoen (n 9) 92.

91 Murray & Viljoen (n 9) 88.

92 Yogyakarta principles (n 12) 7; and Yogyakarta principles + 10 (n 12) 5, both affirm ‘existing international legal standards as they apply to all persons on grounds of their sexual orientation, gender identity, gender expression and sex characteristics’.

93 A Rudman ‘The protection against discrimination based on sexual orientation under the African human rights system’ (2015) 15 *African Human Rights Law Journal* 1 16. F Viljoen *International human rights law in Africa* (2012) 9-10, observes that human rights protection has evolved beyond the domestic sphere. There is therefore a relationship between the sub-regional, regional, and global level which make up the international level. For a discussion of the interaction between regional and global human rights systems see C Heyns & M Killander ‘Universality and the growth of regional systems’ in D Shelton (ed) *The Oxford handbook of international human rights law* (2013) 670.

94 Rudman (n 93) 13.

arbitrary deprivation of rights.<sup>95</sup> By the same logic, if a law causes someone to ‘denounce that person’s most intimate and private acts and thoughts, solely based on that person’s sexual orientation, that would be an arbitrary infringement on that person’s integrity’.<sup>96</sup>

Resolution 275 strengthens the claim that the African Charter embraces sexual minority rights by condemning violence and violations of the rights of sexual minorities.<sup>97</sup> The resolution affirms the equality, non-discrimination and respect for human dignity provisions enshrined in the African Charter.<sup>98</sup> It gives meaning to the argument that the African Charter protects everyone, including sexual minorities. Most importantly, the resolution calls on African countries to create an enabling environment for every person, including sexual minorities, to realise their full potential as human beings. An enabling environment entails repealing laws that criminalise the intimate relationships of persons be they homosexuals or heterosexuals to preserve their right to dignity<sup>99</sup> and privacy,<sup>100</sup> under the African Charter. Such an argument coincides with the philosophy of the Sankofa. While guaranteeing African values such as respect for human dignity and equality, Sankofa also implores us to go back to our past, pick aspects of our socio-cultural values such as humaneness and respect for human dignity and combine that with international human rights protections that forbid discrimination against persons based on their sexual orientation. In this regard, the Sankofa philosophy may be useful in resolving majority and minority differences. For instance, if the majority dislike same-sex sexual relationships, they are still bound by authentic cultural values such as respect for human dignity and equality of all human beings not to criminalise or violate the rights of the minority based on their sexual orientation.

## 5 THE BILL OF RIGHTS AND SEXUAL MINORITY RIGHTS IN GHANA

Apart from human rights being a core value of the Ghanaian Constitution,<sup>101</sup> chapter 5 also contains a bill of rights,<sup>102</sup> which are the

95 As above 19.

96 As above.

97 Resolution 275 (n 2).

98 African Charter arts 2, 3 and 5, respectively.

99 African Charter, art 5.

100 Even though there is no right to privacy under the Banjul Charter, a right to privacy can be derived from a combined reading of art 4 (right to life and integrity of the human person), art 5 (right to dignity) and art 6 (right to liberty and security of the person). For a solid argument in defence of this proposition see Murray & Viljoen (n 9) 90, and the guidelines for reporting under the African Charter (1989), which includes reporting on rights and duties such as the ‘right to privacy’.

101 *Asare v Attorney-General* [2003-2004] SCGLR 823 829. The Supreme Court observed that the core values of the 1992 Constitution could be distilled from the bill of rights in chapter 5 and the Directive Principles of State Policy in chapter 6.

102 Constitution of the Republic of Ghana chapter 5 arts 12 to 33.



entitlement of every person in Ghana.<sup>103</sup> These rights and freedoms include the right to human dignity,<sup>104</sup> equality and freedom from discrimination on many grounds, including gender.<sup>105</sup> The Constitution states further that the arms of government, other government organs and agencies, as well as natural and legal persons must respect and uphold these rights, which are enforceable by the courts.<sup>106</sup> Chapter 6, though christened as the Directive Principles of State Policy (DPSP), also contains specific fundamental human rights provisions such as the protection of the vulnerable in society<sup>107</sup> and has been declared justiciable by the Supreme Court of Ghana.<sup>108</sup> Even though the Constitution does not mention sexual minority protections by name, it protects 'every person', which arguably includes sexual minorities. Therefore, a combined reading of chapters 5 and 6 of the Constitution provides a framework that protects the rights of every person in Ghana, including the vulnerable, mainly persons with disabilities, older persons, women, children and LGBT persons.<sup>109</sup> It is therefore inconceivable to curtail a person's freedom of speech, of association, dignity and freedom from discrimination because of their sexual orientation.

Nevertheless, the CRC report proceeds from the angle that sexual minority rights are not protected by the 1992 Constitution of Ghana, just like the African Charter. The evidence does not back this (mis)understanding of the Constitution of Ghana. The 1992 Constitution of Ghana mimics some of the rights in the African Charter. One reason which explains this is that Professor EVO Dankwa, who was a one-time Commissioner of the African Commission, was a member of the committee of experts that drafted the 1992 Constitution of Ghana.<sup>110</sup> Unsurprisingly, therefore, just like the African Charter and other international instruments that the African Charter borrows from, the Ghanaian Constitution does not mention sexual orientation. However, the global and regional instruments that the African Charter borrows from have interpreted the rights in these treaties to include

103 Constitution of the Republic of Ghana chapter 5 art 12(2).

104 art 15.

105 art 17.

106 As above art 12(1). The enforceability of fundamental human rights in Ghana has a chequered history. The apex court in Ghana in the famous *Re Akoto* case [1961] GLR 523 held that the provisions in the 1960 Constitution that offered human rights protections were not enforceable because they did not constitute a bill of rights properly so called, but merely a coronation oath sworn by the President on assuming the reins of government.

107 As above art 37(2)(b).

108 *Ghana Lotto Operators Association & others v National Lottery Authority* [2007-2008] SCGLR 1088; *New Patriotic Party v Attorney-General* (31 December case) [1993-94] 2 GLR 35, SC; *New Patriotic Party v Attorney-General* (CIBA Case) [1996-97] SCGLR 729.

109 Constitution of the Republic of Ghana art 37(2)(b) mentions 'the disabled, the aged, children, and other vulnerable groups'.

110 MG Nyarko 'The impact of the African Charter and Maputo Protocol in Ghana' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 95.

equal legal protection of sexual minorities.<sup>111</sup> *Prima facie*, the African Charter and the 1992 Constitution do not contain provisions that refer to sexual orientation by name, but their interpretation cannot possibly leave out a person or group simply because of their sexual orientation or gender identity. The operative word in the African Charter is 'every individual'<sup>112</sup> while the 1992 Constitution of Ghana uses every person,<sup>113</sup> as criteria to enjoy the human rights provisions in the African Charter and 1992 Constitution of Ghana, respectively.

Nonetheless, the CRC surmised that the inclusion of sex or sexual orientation in a new constitution would potentially strengthen the case of those who want to argue that the Constitution protects the rights of LGBT persons.<sup>114</sup> The *Toonen* case<sup>115</sup> held that 'sex' includes 'sexual orientation'. Therefore, including 'sex' in the Constitution will allow a court to read the term as also including sexual orientation, the CRC presumed. The Ghanaian Constitution does not include 'sex' in the list of prohibited grounds. It also does not have the omnibus clause, 'other status',<sup>116</sup> that is usually found in most global, regional, and domestic laws that allow courts to include other categories of persons. However, the Constitution prohibits discrimination based on 'gender'. Indeed, gender is even more encompassing because while 'sex' only takes account of the condition of being male or female, gender goes beyond biological ascription of sex, and includes social constructions of maleness and femaleness.<sup>117</sup> This broadens the scope of protection because while some may identify as male or female at birth, the social construction of their gender may differ. Therefore, prohibiting discrimination on the grounds of gender gives a broader room for interpreting and including sexual orientation and gender identity as a deeply felt innate feeling of a person, either male or female, which may not necessarily correspond to their sex given to them at birth or even based on the person they love.<sup>118</sup>

Therefore, every person in Ghana is entitled to the fundamental human rights protections in the 1992 Constitution of Ghana. 'Every person' includes sexual minorities. A constitutional interpretation that denies protections purely based on the person's sexual orientation or

111 See for instance the Human Rights Committee decision in *Toonen v Australia* (n 2) which held that arts 2(1) and 26 of the ICCPR which prohibited discrimination on the basis of sex included sexual orientation.

112 African Charter art 2.

113 Constitution of the Republic of Ghana art 12(1).

114 Constitution Review Commission report (n 8) 653.

115 *Toonen v Australia* (n 2).

116 See for instance art 2 of the Banjul Charter that states in part that every individual is entitled to the rights in Charter without distinction including 'national and social origin, fortune, birth or other status'. Other status therefore becomes an avenue to include other groups in the Charter such as 'indigenous people'.

117 Oxford Advanced Learner's dictionary International students 9 ed defines gender as 'the fact of being male or female, especially when considered with reference to social or cultural differences, not differences in biology'.

118 Oloka-Onyango (n 3) 29, observes that 'while the right to love does not appear in any known legal document-national, regional or global- there is no doubt that it is a universal human sentiment'.

whom they have sex with is problematic. That is not what the framers of the Constitution had in mind when they designed the Constitution. The attempt of the CRC to include in its 'findings and observations', claims that the African Charter and the Ghanaian Constitution abhor sexual minority rights is, therefore, inconsistent with a purposive interpretation of the Bill of Rights and an attempt to procure an interpretation by the courts in future in agreement with this position.

In Kenya, the High Court accepted arguments that because the majority of Kenyans had rejected the protection of sexual minority rights in the 2010 Kenyan Constitution, sodomy laws were constitutional.<sup>119</sup> The statement of the CRC of Ghana appears to be another instance where a constitutional review body inserts a clause, that may be pounced upon by an opposing party, to claim that majority of the population have rejected same-sex rights protections in the constitution; therefore the Court should uphold the wishes of the majority.

Apart from making it clear that constitutional rights are the entitlement of every person, the 1992 Constitution also contains a relevant clause that ensures that apart from constitutional rights, other rights that exist in other democracies intended to uphold the dignity of the human person are also applicable.<sup>120</sup> This provision states that in addition to the rights in the Constitution, 'others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of [hu]man[kind]',<sup>121</sup> are not excluded. This provision means that in interpreting the fundamental human rights provisions in the 1992 Constitution of Ghana, the Supreme Court, which is the only Court empowered to do so must take cognisance of international human rights law and foreign law.<sup>122</sup> The Court has affirmed this position and clarified the import of article 33(5) of the Constitution concerning the application of international human rights law.<sup>123</sup>

119 *EG & 7 Others v Attorney General; DKM & 9 Others (interested parties); Katiba Institute and Another* (amicus curiae) consolidated suit of Petition no 150 of 2016 and Petition no 234 of 2016 para 339. A Kenyan High Court in Nairobi held that the criminalisation of consensual same-sex sexual adults between adults in private is not unconstitutional.

120 Constitution of the Republic of Ghana, art 33(5).

121 As above.

122 *Ghana Lotto Operators Association & Others v National Lottery Authority* [2007-2008] SCGLR 1088.

123 *NPP v Attorney-General* [1996-97] (CIBA case) SCGLR 729. The court speaking through Justice Atuguba observed at page 788: 'As to the enforceability of international instruments relating to fundamental human rights, I think that the matter can easily be resolved by recourse to article 33(5) ... It cannot be contended that the principles of those instruments do not fit into this provision, and they are therefore to that extent enforceable'.

There is an ongoing debate about the dualist nature of Ghana, its application of international law, and how this impedes the recognition and application of treaties as part of domestic law in the courts of Ghana.<sup>124</sup> However, this is not the focus of the argument here. The claim I make here is for the use of international law as an interpretative tool to give effect to constitutional rights. Once Ghana has ratified a treaty, it is bound by the principle of *pacta sunt servanda*<sup>125</sup> not to do anything to jeopardise the aims and objectives of the treaty. Thus, the courts are bound to give effect to treaties that Ghana has ratified but failed to domesticate, by interpreting the bill of rights in light of these international treaties and the jurisprudence of these treaties developed by experts and expert bodies. That way, the Court will fulfil its duty of living up to its purposive interpretation of the Constitution of Ghana, paying active service to the underlying core values of the Constitution and enforcing constitutional rights.

The approach of the Supreme Court to use international treaties to interpret constitutional rights is admirable.<sup>126</sup> However, the Court must endeavour to boldly use the jurisprudence of the core human rights treaty bodies, including their decisions, General Comments and Concluding Observations to give full effect to the Bill of Rights.

Often, even though the rights in the Constitution resemble those of international treaties, they do not express or capture the meaning of

124 GEK Dzah ‘Transcending dualism: Deconstructing colonial vestiges in Ghana’s treaty law and practice’ in M Addaney and others (eds) *Governance, human rights, and political transformation in Africa* (2020) 117. Dzah rightly argues that the dualist conception of international law impedes the realisation of treaties that confer fundamental human rights (118) and is a ‘colonial inheritance that has become a pliable device in the state’s toolkit’ (138); EY Ako ‘Rethinking the domestication of international treaties in Ghana’ in RF Oppong & WK Agyebeng (eds) *A commitment to law: essays in honour of Nana Dr. Samuel Kwadwo Boaten Asante* (2016) 665 argues that with over 300 ratified treaties and no attempt to domesticate them, the courts must give effect to these treaties to protect fundamental human rights in Ghana; RF Oppong ‘The High Court of Ghana declines to enforce an ECOWAS Court judgment’ (2017) 25 *African Journal of International & Comparative Law* 127 critiques an Accra High Court’s decision not to enforce an ECOWAS judgment based on the dualist principle; CY Nyinevi ‘The making of treaties under the municipal law of Ghana: a review of the Guantanamo detainees case’ (2019) 5 *Lancaster University Ghana Law Journal* 99 analyses the dualist approach of courts in Ghana and its implications for foreign relations, particularly the conclusion of treaties; EY Ako & RF Oppong ‘Foreign relations law in the constitutions and courts of Commonwealth African countries’ in C Bradley (ed) *The Oxford handbook of foreign relations law* (2019) 583, particularly pages 595-597 discuss the recent application of the dualist doctrine by the Supreme Court of Ghana.

125 Vienna Convention on the Law of Treaties (VCLT); adopted on 23 May 1969 and entered into force on 27 January 1980, art 18.

126 *Mensah v Mensah* (2012) 1 SCGLR 391 relied on the Convention on the Elimination of Discrimination against Women (CEDAW) to declare that property acquired in the course of marriage must be shared equally; *The Republic v Eugene Baffoe-Bonnie & 4 others* Supreme Court Accra case J1/06/2018 (7 June 2018) relied on the UDHR and the ICCPR to hold that accused persons in a criminal trial are entitled to all the evidence to be relied upon by the prosecution; *Dodzie Sabbah v The Republic* Supreme Court Accra case J3/3/2012 (11 June 2015) awarded compensation to the appellant for wrongful conviction and imprisonment, citing art 14(6) of the ICCPR.

those international treaties fully. Also, the provisions in international treaties are continually going through the crucible of expert judicial interpretation through the work of experts, expert bodies, and other mechanisms, and therefore have acquired a deeper meaning. It is therefore vital to look beyond treaty provisions and adopt the jurisprudence of treaty bodies to interpret constitutional rights. The courts in Ghana must act boldly as former Chief Justice Archer did when he noted that the fact that Ghana has ratified the African Charter but not domesticated it does not mean that the Court could not apply it.<sup>127</sup>

Apart from employing international law to interpret the Constitution, there is also an invitation to the Supreme Court, by the Constitution, to use foreign law to decide matters that affect the fundamental human rights of persons in Ghana.<sup>128</sup> In this regard, as a dualist common law country, Ghana has a similar colonial history as Botswana and India, retaining colonial sodomy laws at independence.<sup>129</sup> Ghana can therefore resort to the jurisprudence of Botswana<sup>130</sup> and India,<sup>131</sup> in determining equal legal protection of the law for sexual minorities.

As noted by Killander and Adjolahoun, courts with dualist traditions in Africa, more than monist systems, use international law to vindicate the rights of citizens.<sup>132</sup> Even though the courts in Ghana have sometimes relied on dualist arguments to deny the enforcement of fundamental human rights,<sup>133</sup> the predominant approach is to use international law to interpret and protect the rights of citizens.<sup>134</sup>

127 *NPP v Inspector General of Police* [1993-94] 2 GLR 459.

128 *Ghana Lotto Operators Association & Others v National Lottery Authority* (n 108).

129 Human Rights Watch 'This alien legacy, the origins of sodomy laws in British colonialism' (2008).

130 *Letsweletse Motshidiemang v Attorney General and LeGaBibo* (amicus curiae) High Court Gaborone (11 June 2019). For the jurisprudential contribution of this case in the purposive interpretation of a national constitution, limiting the role of public opinion in judicial decisions and the claim of homosexuality as 'un-African'; see T Esterhuizen 'Decriminalisation of consensual same-sex sexual acts and the Botswana Constitution: *Letsweletse Motshidiemang v The Attorney-General (LEGABIBO as amicus curiae)*' (2019) 19 *African Human Rights Law Journal* 843.

131 *Navtej Singh Johar and Others v Union of India the Secretary Ministry of Law and Justice* (n 6).

132 M Killander & H Adjolahoun 'International law and domestic human rights litigation in Africa: an introduction' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 4.

133 *In the Matter of Mr Chude Mba v The Republic of Ghana* Suit No HRCM/376/15 High Court Accra (2 February 2016); RF Oppong 'The High Court of Ghana declines to enforce an ECOWAS Court judgment' (2017) 25 *African Journal of International and Comparative Law* 127.

134 EK Quansah 'An examination of the use of international law as an interpretative tool in human rights litigation in Ghana and Botswana' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 37; K Appiagyei-Atua 'Ghana at 50: the place of international human rights norms in the courts' in H Bonsu and others (eds) *Ghana law since independence: history, development and prospects* (2007) 179.

Quite recently, the Supreme Court has interpreted the bill of rights in the Constitution, using the ICCPR to emphasise the right to compensation for unlawful conviction and imprisonment,<sup>135</sup> right to a fair trial<sup>136</sup> and the right to an equal portion of property acquired in the course of marriage whether the spouse, in this case, the woman, contributed financially or not.<sup>137</sup>

The arguments above do not suggest that the legislature should be avoided in the quest to decriminalise sodomy laws in Ghana and Africa. As Ebobrah has convincingly argued,<sup>138</sup> this is a viable route to pursue to decriminalise consensual same-sex acts, and countries like Mozambique<sup>139</sup> Seychelles,<sup>140</sup> and most recently Gabon,<sup>141</sup> have used this route. However, in Ghana, such an option is not possible. Parliamentarians often condemn same-sex relationships, denying that it existed in any culture in Ghana and called for stricter laws to punish the act.<sup>142</sup> The current speaker of Parliament has even threatened to

- 135 *Dodzie Sabbah v The Republic* [2015] Supreme Court, Accra criminal appeal no J3/3/2012.
- 136 *The Republic v Eugene Baffoe-Bonnie and 4 others* Supreme Court Accra case no J1/06/2018 (7 June 2018). Speaking about the bill of rights in the Constitution of Ghana the court noted at page 3 of the judgment 'Our Chapter 5 on Fundamental Human Rights and Freedoms is a direct incorporation of the international bill of rights based on universal human rights and freedoms contained in the UDHR. Our article 19 which reflects article 10 of the UDHR is in pari materia with article 14 of CCPR'.
- 137 *Mensah v Mensah* [2012] 1 SCGLR 391 where the Supreme Court relied on the provisions of Convention on the Elimination of Discrimination Against Women (CEDAW) to determine for the first time in Ghanaian family law jurisprudence that a woman is entitled to an equal share of property acquired in the course of marriage
- 138 ST Ebobrah 'Africanising human rights in the 21st century: gay rights, African values and the dilemma of the African legislator' (2012) 1 *International Human Rights Law Review* 110. Ebobrah argues further at page 132 that in view of the dilemma that the African Parliament faces, the courts provide the best option for decriminalisation of consensual same-sex acts in Africa.
- 139 In June 2014, the Parliament of Mozambique decriminalised law arts 70 & 71 of the penal code of 1886 that criminalised the act of persons who 'habitually practised vices against nature' through law 35/2014, which came into effect in June 2015.
- 140 In July 2016 Seychelles decriminalised section 151(a) & (c) of its 1955 penal code that criminalised 'carnal knowledge of any person against the order of nature'. See ILGA World: LR Mendos, 'State-Sponsored Homophobia 2019: Global Legislation Overview Update' (2019) 32.
- 141 'Gabon senate votes to decriminalise homosexuality' GhanaWeb African news of Monday 29 June 2020, available at <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Gabon-senate-votes-to-decriminalise-homosexuality-993622> (accessed 6 August 2020).
- 142 'Homosexuals could soon be lynched in Ghana-MP warns' <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/Homosexuals-could-soon-be-lynched-in-Ghana-MP-warns-211415> (accessed 30 June 2017); 'I will resign over amendments to accept gayism – Speaker of Parliament' Edmund Smith-Asante Graphic online 10 May 2018 available at <https://www.graphic.com.gh/news/politics/i-d-resign-than-preside-over-gay-debate-speaker-of-parliament.html> (accessed 24 October 2019); 'Parliament has spoken the gay question is settled' Dr A Osei GhanaWeb 20 June 2018, available at <https://www.ghanaweb.com/GhanaHomePage/features/Parliament-has-spoken-the-gay-question-is-settled-661629> (accessed 6 August 2020).

resign his position than preside over any attempt to enact a law in Parliament to protect sexual minority rights.<sup>143</sup> The courts, therefore, represent the most viable option to decriminalise the offence of ‘unnatural carnal knowledge’ in Ghana.

## 6 CONCLUSION

The domestication of the African Charter in Ghana should bring hope and joy to every person or group of persons because it is a human rights treaty that is supposed to protect the rights of every individual regardless of their sexual orientation. Sankofa, as a philosophy and framework situated in Akan symbolism and philosophical thought, implores Ghanaians to embrace their history, culture and traditions of humaneness, respect for human dignity and freedom of expression that accepted same-sex sexual relationships. The rights to human dignity, non-discrimination and respect for individual autonomy are virtues embedded in the Akan and Ghanaian conception of fundamental human rights. Therefore, just like the Sankofa bird, there is the need to borrow from the past, to inform the present. The conception of rights in the pre-colonial past should embrace current and future constitutional rights, international law and foreign laws that protect the right to dignity of every person in the Ghanaian society.

In this regard, the African Charter is a genuinely relevant guide. Though it does not expressly mention sexual orientation and gender identity, it indeed protects the rights of everyone regardless of their sexuality and gender. Resolution 275 of the African Commission gives credence to this view which urges African countries to condemn violence against sexual minorities, investigate instances of such violations, and create an enabling environment for the realisation of the rights of everyone including sexual minorities. The rights to equality, non-discrimination and dignity of the human person brings everyone within the meaning and cover of fundamental human rights within the treaty. The Ghanaian Constitution follows a similar path. International human rights law and foreign law complement the rights in the Constitution to protect the rights of every person regardless of their sexual orientation. The courts in Ghana have to interpret the African Charter and the Constitution of Ghana, using the jurisprudence of treaty bodies that define and clarify these rights to cover the rights of sexual minorities. If followed, such an approach represents hope and fulfilment of the human rights promise for all persons, including sexual minorities in Ghana and elsewhere in Africa.

143 ‘I will resign over amendments to accept gayism- Speaker of Parliament’ Edmund Smith-Asante Graphic online 10 May 2018, available at <https://www.graphic.com.gh/news/politics/i-d-resign-than-preside-over-gay-debate-speaker-of-parliament.html> (accessed 24 October 2019).