CONSTITUTIONAL JUSTICE IN AFRICA:
An Examination of Constitutional Positivism, Fundamental Law and Rights in
Ghana and Nigeria

by

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This work explores the idea of constitutional justice in Africa with a focus on constitutional interpretation in Ghana and Nigeria. The objective is to develop a theory of constitutional interpretation based upon a conception of law that allows the existing constitutions of Ghana and Nigeria to be construed by the courts as law in a manner that best serves the collective wellbeing of the people. The project involves an examination of both legal theory and substantive constitutional law. The theoretical argument will be applied to show how a proper understanding of the ideals of the rule of law and constitutionalism in Ghana and Nigeria necessitate the conclusion that socio-economic rights in those countries are constitutionally protected and judicially enforceable. The thesis argues that this conclusion follows from a general claim that constitutions should represent a ‘fundamental law’ and must be construed as an aspirational moral ideal for the common good of the people. The argument is essentially about the inherent character of ‘legality’ or the ‘rule of law.’ It weaves together ideas developed by Lon Fuller, Ronald Dworkin, T.R.S. Allan and David Dyzenhaus, as well as the strand of common law constitutionalism associated with Sir Edward Coke, to develop a moral sense of ‘law’ that transcends the confines of positive or explicit law while remaining inherently ‘legal’ as opposed to purely moral or political. What emerges is an unwritten fundamental law of reason located between pure morality or natural law on the one hand and strict, explicit, or positive law on the other. It is argued that this fundamental law is, or should be, the basis of constitutional interpretation, especially in transitional democracies like Ghana.
and Nigeria, and that it grounds constitutional protection for socio-economic rights. Equipped with this theory of law, courts in developing African countries like Ghana and Nigeria will be in a better position to contribute towards developing a real sense of constitutional justice for Africa.
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Chapter 1

Introduction

This work explores the idea of constitutional justice in Africa with a focus on constitutional interpretation in Ghana and Nigeria. My objective is to develop a theory of constitutional interpretation based upon a conception of law that allows the existing constitutions of Ghana and Nigeria to be construed by the courts as law in a manner that best serves the collective wellbeing of the people. The task thus involves an examination of both legal theory and substantive constitutional law. The theoretical argument will be applied to show how a proper understanding of the ideals of the rule of law and constitutionalism in Ghana and Nigeria necessitate the conclusion that socio-economic rights in those countries are constitutionally protected and judicially enforceable. I will argue that this conclusion follows from a general claim that constitutions should represent a ‘fundamental law’ and must be construed as an aspirational moral ideal for the common good of the people.

Building the theoretical argument is the task undertaken in the Chapters Two, Three and Four. The argument, simply put, is that constitutions in liberal democratic states, and especially in transitional and developing countries in Africa struggling to develop their own sense of liberal democracy, are more than the laws found in written constitutional texts; they include written texts and an underlying unwritten fundamental law that both makes ordinary constitutional law possible and informs its interpretation.
This ‘fundamental law’ is a ‘law of reason’ according to which state power, to count as ‘law’ for the people it affects, must be justified to them as ‘law’ because it respects their individual dignity as full members of a political community with a shared commitment to normative order and (thus) the common good. This unwritten fundamental law of reason is, in essence, a substantively rich conception of ‘legality’ or the ‘rule of law’ that sees principles of political morality, including at least certain human rights, as inherent within law’s conceptual structure. The list of moral principles and rights implicit within law’s conceptual structure is not fixed or closed; it embraces those principles and rights necessary to make state power ‘law’ for people in the circumstances in which they find themselves.

Chapter Two defines the academic question under investigation. I briefly set out the reasons for selecting Ghana and Nigeria to serve as examples for exploring constitutional justice in Africa. I provide a brief historical and legal overview of human rights protections in these two countries. I begin to lay the foundations for the theoretical argument about law in African states by examining commonalities shared by countries like Ghana and Nigeria, including the challenges of dealing with the legacies of colonialism, past military dictatorships and economic under-development. I suggest that these problems cannot be fully solved by legal theory, but that developing a proper conception of law is one part of the solution because it may support the building of polities based on the rule of law and constitutional order. However, the judicial decisions from these countries suggest that the courts have not developed this conception of law yet. Instead, they seem, at times at least, committed to a theoretical approach that may be
described as ‘constitutional positivism.’ I conclude the chapter by explaining what ‘constitutional positivism’ is.

To ensure that law or the constitution is best interpreted as the aspirational moral ideal of the people, the courts in Ghana and Nigeria must resist the influence of constitutional positivists. Chapter Three thus articulates a theoretical model for constitutional interpretation to achieve this end. I review the rule-based constitutionalism of legal positivists like H.L.A Hart and the value-based constitutionalism of non-positivists, focusing upon Lon Fuller and Ronald Dworkin. Fuller and Dworkin both seek to show law’s necessary connection to morality without resorting to traditional natural law arguments; instead, they look to the conceptual nature of law itself, Fuller focusing upon the formal criteria for the rule of law and Dworkin on the interpretive nature of law. I suggest that Fuller and Dworkin’s work provides important insights, but also their work has limitations. I then turn to the old English common law discourse on ‘fundamental law’ as a way of addressing those limitations. The idea of a background or fundamental law of reason, which is more substantive than Fuller’s formal conception of the rule of law and not trapped by existing legal materials like Dworkin’s interpretive approach to law, leads, I suggest, to a theory or conception of law that provides an appropriate way to understand constitutional interpretation. This reason-based constitutionalism resembles the liberal theory of the rule of law presented by T.R.S. Allan and David Dyzenhaus, but it is more elastic in that it can accommodate the special demands of transitional and developing countries, like Ghana and Nigeria.
However, it is not enough that we have this sense of law and constitution, for the ultimate aim is the protection of rights through an interpretive approach that looks beyond positive law or written constitutions, and this raises serious questions about both the idea of ‘rights’ and the institutional capacity of judges to articulate and enforce them against other branches of the democratic state. This requires an articulation of a theory of rights and of judicial review that can be integrated into the theory of law that Chapter Three develops. This is the task of Chapter Four. I will argue that an interpretive approach that holds law as the aspirational moral good of the people must cohere with a theory of public law rights, which respects and protects such moral aspirations. On that account, rights listed in the Constitutions of Ghana and Nigeria are not exhaustive of the rights intended to be enforced in these legal systems. And it is critical that the theories of legal rights and moral rights are integrated not only for a complete and comprehensive theory of rights, but also to aid judicial incorporation of rights norms that are necessary for the sustenance of values inherent in a constitutional democracy and human dignity. This examination naturally leads to the legitimacy of judicial review. Why should judges enforce rights not expressly found in written constitutions? The answer, I suggest, is that once we see that at least certain rights are inherent in the idea of law, and we accept that the job of judges is to uphold law, it follows that it is legitimate for judges to uphold these rights, whether or not they are found in the written texts the lawmakers make.

With the theoretical approach to constitutional interpretation articulated, in Chapters Five, Six, Seven and Eight I turn to its application in Ghana and Nigeria. Chapter Five addresses concerns about the relevance of a theory of law that seems to rely
so heavily on other theories of law developed in European or Western developed
countries. It might be thought that the multicultural, post-colonial, and democratic
transitional factors in Ghana and Nigeria make such a theory inapplicable. I argue, to the
contrary, that these factors make the theory of law developed in earlier chapters more not
less relevant. I also address in detail the idea of judicial independence in Ghana and
Nigeria, for the theory of law advanced depends upon a very particular style of judicial
reasoning that, in turn, necessitates an independent judiciary.

Chapter Six turns to an analysis of substantive case law in Ghana and Nigeria. It
deals with existing styles of constitutional interpretation. We shall see that judicial
reasoning in these countries betray elements of both constitutional positivism and non-
positivist styles, and that there are even hints of support for the theory of unwritten
fundamental law that I develop in this thesis. This chapter thus highlights and
distinguishes these two dominant styles of constitutional interpretation, where the former
seeks to understand the constitution, and law, for that matter, as an expression of social
fact or formal exercises of political power, and the latter looks at law or the constitution
as having a purpose embedded in an unarticulated spirit. While the first approach is very
common and popular among Nigerian judges, it is also true that there is a thin line of
non-positivist thought there too. The non-positivist approach is more evident in the
Ghanaian courts, but there is also a thin line of constitutional positivism evident.
However, I concede in Chapter Six that the practical difference between adopting
positivist and non-positivist approaches may not be great in many areas of law, and that
whether judges take a positivist approach that allows reference to theory, context and
morality when expounding texts, or whether they take a non-positivist approach that views moral theory and context as underlying sources of law that are supplemented by texts, may not matter, for, either way, similar results may obtain. But this will not always be so, and especially in hard cases it is important to appreciate the substantive implications of these approaches to constitutional interpretation and justice. The question of socio-economic rights is an example, a question that is addressed in Chapters Seven and Eight.

In Chapter Seven, I examine how the theory of an unwritten fundamental law of reason provides a basis for understanding the status of socio-economic rights in Ghana and Nigeria by focusing on domestic constitutional law. The Chapter argues that the fundamental law of reason adopted in the previous chapters embraces certain basic socio-economic rights because government rule for a person suffering from severe poverty, disease and lack of education cannot be justified as ‘law’ rather than mere ‘power’. Given such a situation of deprivation, the sense of political community necessary for legality to exist simply is not present. Based on this argument, I argue that asserted rights under the so-called Directive Principles of State Policy in the Constitutions of Ghana and Nigeria, which encapsulate some socio-economic rights, are justiciable when deeper constitutional values founded on the unwritten fundamental law support such a claim, and to the extent that they constitute the anchoring normative basis for what the two Constitutions call “Fundamental Rights”, i.e., rights that are (for the most part) justiciable political-civil rights. In contrast, the courts in Ghana and Nigeria have adopted a positivist conception
of rights and law when approaching the justiciability of the Directives, and have largely failed the non-positivist interpretive approach test.

The argument developed in Chapter Seven based on the fundamental law of reason in favour of socio-economic rights nevertheless leaves a number of unanswered questions, such as whether political-civil rights can really be seen as linked or as unified with socio-economic rights, and whether judicial intervention on behalf of socio-economic rights will mean judicial interference with socio-economic policy, a field that it is institutionally and democratically unsuited for the judiciary, a problem that does not seem to arise in quite the same way in relation to judicial protection of political-civil rights. Also, if, by virtue of the theory of the rule of law advanced in this thesis, state power cannot count as ‘law’ for people suffering from severe poverty, does this mean they are not bound by rules of property and trespass, and so can appropriate whatever resources they need? If so, there is a paradox: the rule of law argument leads to an undermining of the rule of law.

In Chapter Eight I turn to international and comparative law analyses to address these outstanding questions. Of course, reference to these sources is itself something that is problematic for judges adopting ‘constitutional positivism’ as their guide. The chapter thus suggests that we cannot retain the positivist approach in this increasingly globalised world, as the result will not only obfuscate a holistic understanding of constitutions, but also risk the violation of major international human rights norms that are part of the post-war global human rights landscape. The fundamental law of reason regards legal discourse in a holistic and unified way, with abstract ideals of legality and
constitutionalism manifested in specific ways in different countries and internationally, and judges should see their task as interpreting the laws of their countries as a coherent component of this web of legal rules, principles and underlying political-moral ideals. Taking this approach in Ghana and Nigeria, we will see that there are compelling reasons to regard socio-economic rights as constitutional rights deserving of judicial enforcement.
Chapter 2

The Constitutional Setting for Human Rights in Ghana and Nigeria

2.1 Introduction

This work examines the topic of constitutional justice in Africa by examining three separate aspects of legal discourse: constitutional positivism, fundamental law and human rights. The relationship between these ideas and the goal of constitutional justice in Africa is the fulcrum upon which this work rests. In terms of practical examples, the focus of the work will be on Ghana and Nigeria. It is impossible for a study of this nature to cover the entire African continent as it is vast and has varied legal traditions. Besides, methodological constraints militate against such a project, however desirable its objectives. A narrower study is, however, feasible, and there are good reasons for electing to deal with Ghana and Nigeria, including juridical and colonial commonalities, and transitional democratic concerns. I shall begin with a brief overview of these reasons. I shall then provide a summary of the human rights provisions in the Ghanaian and Nigerian Constitutions; I will discuss briefly the place of this work within the human rights literature relating to Africa; I will provide a few examples from the Ghanaian and Nigerian case law to illustrate the approach to constitutional interpretation that I will argue against; and, finally, I will provide a brief account of that approach, which I will call (following David Dyzenhaus) ‘constitutional positivism’. The construction of an alternative approach to constitutional interpretation will commence in Chapter Three.
2.2 Ghana and Nigeria Compared

Ghana and Nigeria are selected for this study for several important reasons. First, with respect to juridical and colonial commonalities, the two selected countries are former British colonies in West Africa. Though thousands of miles apart, they share some affinities on account of their experiences under British colonial rule. Both jurisdictions were governed and exploited under the British indirect rule system, and even today their laws are largely informed by the common law tradition. Put together, they constitute the largest English-speaking common law nations in the western Sub-Saharan in terms of natural resources, population and landscape.

Far from being culturally homogeneous nations, both countries have come to understand the benefits of multiculturalism. Yet the most important justification for examining them together lies in the juridical circumstances of the two jurisdictions. Both nations are currently grappling with critical issues relating to judicial decision-making and the rule of law, human rights and constitutionalism.¹ There seems to be a growing concern among citizens of these nations for developing a proper conception of law and a better understanding of its value for constitutional democracy and the general welfare of the people.² Courts occupy a strategic place in these jurisdictions, but they have not yet

developed fully an institutional responsibility in sustaining democracy, the rule of law and constitutionalism.\textsuperscript{3}

The common commitment to these constitutional values means that Ghana and Nigeria are naturally unified, allowing us to examine parallels between them and to identify common legal features at a fundamental level. Indeed, we may go so far as to suggest, following T.R.S. Allan, that they share a common constitution, grounded in a broadly liberal conception of law for the common good and legitimate governance.\textsuperscript{4} How this commitment is to be fulfilled remains a pressing challenge for the people of Africa, especially the citizens of these two nations.

We may add to these reasons for examining Ghana and Nigeria together the fact that both countries are young democracies. Since independence, Ghana and Nigeria have alternated between constitutional rule and military dictatorship. They have long been troubled by conflicts and repressive military juntas. Indeed, this has been a general feature of African politics since the 1960s, as many countries have entered what might be called constitutional oblivion, reducing themselves to enclaves of military repression and pockets of devastatingly violent conflict. While some countries were quick to retreat from this constitutional oblivion, others persisted, plunging their people into needless anarchy,

\begin{itemize}
\item B. Ugochukwu & C. Ononiwu, \textit{The Judiciary and Democratic Transition in Nigeria} (Lagos: Legal Defence Center, 2000).
\item T.R.S. Allan, \textit{Constitutional Justice: A Liberal Theory of the Rule of Law} (Oxford: Oxford University Press, 2003) at 5 (Allan argues that liberal democracies share a common constitution, though he focuses on developed rather than developing countries.)
\end{itemize}
barbarity, hopelessness and lawlessness. The general effects of this state of affairs include a marked negation of constitutionalism, human rights, and the rule of law.

Under their military dictatorships, Ghana and Nigeria maintained the kind of political posture that is condemned by the post-war global human rights constituency. The history of the military regimes is pitted by frequent episodes of violations of human rights. Torture, extra-judicial killings, and imprisonments of real and imagined opponents were the norm. Even people who used the civil process to register their discontent were killed. Executions, as in the case of the environmental activist, Ken Siro Wiwa, and eight others in Nigeria in 1995, took place despite pleas from the international community and the African Human Rights Commission.

These abuses of power are condemned by both international and domestic laws, which oblige governments to protect their citizens from human rights violations and other abuses, and to provide redress for those who suffer from such violations and abuses. Governments also have a duty to combat illegality by, among other measures, imposing sanctions against those who infringe the fundamental human rights of others, and eradicating the conditions that enable and produce the violations and abuses.

Throughout the contemporary world, supreme courts and constitutional courts, as well as national human rights institutions, have emerged as a critical part of the response

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7 International Covenant on Civil and Political Rights (ICCPR) and The International Covenant on Economic, Social and Cultural Rights (ICESCR).
by states, especially those undergoing political transition, to serious human rights violations. Ghana and Nigeria are not exceptions in this regard. In both countries, there is a real interest in accepting constitutional democracy as a system of governance. They have not only embraced constitutional democratic rule, but each country has adopted fairly comprehensive human rights guarantees in their written Constitutions, an indication of a commitment to repudiate the dark days of the past and to build and protect a culture of liberty, rule of law, human rights and constitutionalism, all fastened to the ideals of constitutional democracy, for a better future.

Thus Ghana and Nigeria, under their current Fourth Republican Constitutions, adopted in 1992 and 1999 respectively following periods of military suppression, are transitional democracies. However, at present, there are deep cultural cleavages in each country that are sometimes bitterly expressed in politics. Elections are frequently fought on tribal lines rather than the nation-wide visions of parties and candidates.\(^8\) The public interest is undermined by unreflective cultural biases. The political and economic space is dominated by elites who show a distinct lack of concern for corruption in the public sector and the appalling living conditions of the vulnerable and poor who occupy the lower strata of society. These are not just young democracies, they are developing economies; though rich in natural resources, poverty and accompanying social ills afflict very large portions of their populations.

While private and public media remain vibrant and there exists the opportunity for public dialogue about creating an open democracy, the desire of the people to enjoy the sort of life promised during elections is largely unsatisfied, and the promises of the constitutions as fundamental law remain unfulfilled. In fact, for historical reasons, including constraints imposed by frequent coups d’état, there has not yet been a long tradition or experience in the judicial interpretation of these instruments, and hence it is at present critical for a sound theory of constitutional interpretation to be developed for these jurisdictions.

But our task here goes beyond the particular concerns of Ghana and Nigeria to embrace certain basic questions of normative constitutional theory. To begin with, in many jurisdictions across the globe, especially in Africa, the message about protecting human rights and the rule of law has a large audience and profound reach. In particular, there is a great deal of attention given to constitutionalising human rights in transitional constitutional democracies. Part of the rationale for this development is the desire to avert a repetition of egregious violations of rights occasioned by authoritarianism, colonialism, wars, military dictatorships and violent conflicts. One basic goal of this

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12 See Luis Roniger & Mario Sznajder, The Legacy of Human Rights Violations in the Southern Cone: Argentina, Chile, and Uruguay (Oxford: Oxford University Press, 1999); John AWisema&
thesis, then, is to articulate a general jurisprudence of “transformative constitutionalism” appropriate for transitional democracies and developing countries.\textsuperscript{13}

Typically, the concern for human rights in such circumstances leads to the creation of domestic bills or charters of fundamental human rights (or constitutions with detailed rights provisions)\textsuperscript{14} and their enforcement through the judicial review of legislation and executive actions.\textsuperscript{15} These developments establish what may be referred to as the institutional structure of human rights protection and enforcement in such regimes.

However, this structure may mean little for the human rights and rule of law project, especially in Ghana and Nigeria, if it is not supported by other substantive constitutional values. The success of the project is often dependent upon recognizing three distinct but interrelated points: a higher priority of human rights over legislation, entrenching rights against ordinary legislation and enforcing such rights by means of judicial review.\textsuperscript{16} The essence of the project is to ensure rights are respected and to prevent legislative majorities or over-reaching executives from trampling upon them.\textsuperscript{17} This has been the project that has been pursued in Nigeria and Ghana following military

\textsuperscript{17} See in general, for example, Ronald Dworkin, \textit{Taking Rights Seriously} (Cambridge, MA: Harvard University Press, 1978).
dictatorships in both jurisdictions; indeed, it has been a central part of cultural and political change in each country.

These developments represent a conscious break from the legal past, from the colonial legacy of legislative sovereignty to post-colonial constitutional supremacy, with entrenched rights and a judiciary explicitly authorised to police, in accordance with the terms of the constitutions, both the legislative and executive branches of government. Now legislatures only have the power to enact laws subject to the constitution, which only the judiciary has the legal mandate to interpret and enforce. Ghana and Nigeria have embraced the idea that the legislature is legally limited and it is the courts that should enforce these limits.

This development results from a desire for constitutional justice.\(^\text{18}\) People yearn for better constitutions with better values. The quest for constitutional justice has led both countries to the institution of judicial review: judges and courts are given the task of protecting these values by policing the actions of governments. The object generally as stated above is to ensure that fundamental human rights and freedoms are not simply set aside by governments or private actors.\(^\text{19}\)

But constitutional justice, as this work will seek to show, has a much broader and aspirational outlook than the one just stated, an outlook based upon a very particular


conception of law. It answers in a particular way the question: what does ‘law’, in a general sense, represent in a modern constitutional democratic state? The answer to that question will then determine how the constitution should be interpreted, for the constitution is, properly viewed, a form of ‘law’. Our theoretical conception of law should influence the construction or interpretation of the constitution. Yet the business of constitutional justice seeks one kind of conception of law – law, including constitutional law, should be conceived and interpreted as an aspirational moral ideal for the collective wellbeing of the people. It aspires to be the morally best law for the peoples’ common good.

Human rights discourse in Ghana and Nigeria dates back to the “inglorious” days of colonialism\(^\text{20}\) – the imposition of foreign political power over natives, and the Trans-Atlantic Slave trade.\(^\text{21}\) These two events depict the brute aspect of man.\(^\text{22}\) The forces of colonialism required that political authority was never to be questioned. Its aim: to create an atmosphere that was conducive for economic exploitation of the colonies. The slave trade on the other hand commodified human beings.\(^\text{23}\) Today, the “Gates of No Return” in Cape Coast Castle, the first centre of political power in colonial Ghana, provide a crude illustration and invoke bitter memories of the sad exit of many young men and women to the New World. If there is ever an injustice to mankind, colonialism and the


slave trade aptly epitomize its breadth. They represent indignity and injustice, and engender righteous anger in the victims.\textsuperscript{24}

While the slave trade was formally abolished in the late 19\textsuperscript{th} Century, the struggle to end colonialism lingered on until the second half of the 20th Century.\textsuperscript{25} It was the latter that heightened the concerns for human rights in Ghana and Nigeria. Local peoples legitimately agitated for the respect of human dignity and recognition, values that colonialism had failed to hold as sacrosanct. They sought a complete political independence from the colonialists. The contest was not easy. It was partly civil and partly violent, and it produced varied results. Destruction of property and lives seems sadly to have been inevitable. But the result, in the end, was the attainment of independence. It became a source of hope and joy to native Ghanaians and Nigerians.

Ghana and Nigeria achieved independence from British colonial rule on March 6, 1957, and October 1, 1960, respectively. But, this was not a complete political freedom as expected. The Independence Constitutions of these states provided that they remain part of the British Empire.\textsuperscript{26} As a result, the laws and government of Ghana and Nigeria were still formally subject to the British Crown. In fact, Ghana’s final court of appeal until July 1, 1960, remained the Judicial Committee of the Privy Council in Britain, and such was the fate of Nigeria until 1963. Laws could be invalidated if they contradicted

\textsuperscript{24} Ibid.
\textsuperscript{25} Suzanne Miers, \textit{Slavery in the Twentieth Century: The Evolution of a Global Pattern} (Walnut Creek, CA: AltaMira Press, 2003).
British law. Interpretations of law by the Judicial Committee, even of Ghanaian and Nigerian laws, were final and authoritative.\footnote{Nwabueze, ibid.} With the adoption of Republican Constitutions on July 1, 1960, for Ghana, and October 1, 1963, for Nigeria, full independence from Britain was achieved.

However, despite the early political enthusiasm and expectations that their independence generated, political abuse and economic decadence befell Ghana and Nigeria. Apart from the immediate political benefits of self-governance, the citizens did not get the open political space they were promised.\footnote{Issa Shivji observes: “For by definition, the neo-colonial state has tended, for its own reproduction, to usurp and obliterate the autonomy of civil society and therefore the very foundation of democracy.” Issa Shivji, \textit{The Concept of Human Rights in Africa} (London: CODESRIA, 1989) at 5.} Political opponents were thrown into jails.\footnote{In Ghana, prominent opposition politicians like O. Lamptey and Dr. J.B. Danquah died in Nsawam Prison in 1963 and 1965 respectively. Similarly, in Nigeria, Chike Obi, Obafemi Awolowo, Anthony Enahoro suffered the same fate as their Ghanaian counterparts. See Benjamin Nwabueze, \textit{Constitutionalism in the Emergent State} (London: C. Hurst & Co, 1973).} The most draconian laws were enacted to keep political opposition at bay.\footnote{In Ghana, the Preventive Detention Act, 958 (Ghana) gave the President the power to cause to be detained without trial any person within the territory of Ghana whom he has reasonable grounds to believe that such a person is causing or likely to cause public disorder. There are similar laws in Nigeria such as those on sedition and treason. Chike Obi for example was jailed for sedition, under section 51(c) of the Criminal Code which made it an offence for anyone to print, publish, sell, offer for sale, distribute or reproduce any seditious publication. A ‘Seditious intention’ was defined as, inter alia, an intention to bring the government into hatred or contempt or excite disaffection against it: \textit{DPP v Chike Obi} [1961] 1 SSCNLR 197.} Worst of all, by a Parliamentary resolution and backed by a referendum, Ghana went back to a de jure one-party state. Lamentably, the precious chapter of multi-party constitutional democracy was, for a time, closed. General helplessness and unquestioned
misgovernance ensued. Perhaps this partly explains the interventions of the military in civilian governments in both jurisdictions.\textsuperscript{31}

2.3 An Anatomy of Constitutional Human Rights Protections

Yet constitutional protection of human rights has been part of the constitutional histories of Ghana and Nigeria since their independence—at least on paper. The 1957, 1969, 1979 Constitutions of Ghana contained, and the current 1992 Ghanaian Constitution contains, provisions on human rights. The exception was the 1960 Constitution; although Article 13 of that Constitution might have been interpreted as giving some protection for human rights, the Supreme Court concluded that it did not. In contrast, the Nigerian Constitutions have all contained human rights provisions, and very similar provisions are found in the 1979, 1989\textsuperscript{32}, and current 1999 Constitutions.

In the current Ghanaian and Nigerian Constitutions there is a clear commitment to constitutionalising well-known civil and political rights. In Chapter Five of the Ghanaian Constitution, entitled “Fundamental Human Rights and Freedoms”, and in Chapter Four of the Nigerian Constitution, entitled “Fundamental Rights”, provision is made for the right to life, personal liberty, human dignity, equality, procedural due process, administrative justice, criminal justice, and the right to vote. There are also provisions on fundamental freedoms, namely, speech, expression, association, assembly, press and media, information, religion, thought, conscience and belief, and movement. Both the Ghanaian Constitution, in article 1 and 12(1), and the Nigerian Constitution, in section 1,

\textsuperscript{32} Nwabueze, \textit{A Constitutional History of Nigeria}, supra note 26.
expressly recognize the supremacy of the respective Constitutions, and that laws inconsistent with provisions found therein are void.

In addition to protecting traditional individual rights, however, the Ghanaian and Nigerian Constitutions both contain express commitments to certain broad socio-economic goals. In Chapter Six of the Ghanaian Constitution, entitled “The Directive Principles of State Policy”, it is provided that the State “shall take all necessary action to ensure that the national economy is managed in such a manner as to maximize the rate of economic development and to secure the maximum welfare, freedom and happiness of every person in Ghana and to provide adequate means of livelihood and suitable employment and public assistance to the needy...” and the “basic necessities of life”; in the words of Frans Viljeon, it provides “a limited number of socio-economic rights” such as the right to education, property, work under satisfactory, safe and healthy conditions, the right to join a trade union, and a variety of cultural rights. The right to education in Ghana is limited to the terms of “free compulsory primary education and free secondary education”.

Article 34(1) provides that the Directive Principles of State Policy in Ghana “shall guide all citizens, Parliament, the President, the Judiciary, the Council of State, the Cabinet, political parties and other bodies and persons in applying or interpreting this Constitution or any other law and in taking and implementing any policy decisions, for

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the establishment of a just and free society”—and so it may be said that the rights found therein are justiciable.

In Chapter Two of the Nigerian Constitution, which is entitled “Fundamental Objectives and Directive Principles of State Policy”, a similar set of broad social and economic commitments are made. There are, however, some important differences between the Directive Principles of State Policy—or DPSP—between the two countries. For example, whereas the Ghanaian Constitution enjoins the State to “provide adequate means of livelihood and suitable employment and public assistance to the needy” and it provides only for the “progressive introduction” of the right to free secondary education, the Nigerian Constitution achieves a distinction by providing for “suitable and adequate shelter, suitable and adequate food”\textsuperscript{34}, “free secondary education”\textsuperscript{35}, without an internal modifier of “progressive introduction” as in the case of Ghana, and “free university education”\textsuperscript{36}. A remarkable convergence between Ghana and Nigeria with respect to DPSP is in the area of free compulsory primary education though the two systems differ in vocational training, which is free in Ghana, while the Nigerian Constitution is silent on this. Under the Ghanaian Constitution, there is a mandatory reporting system on these DPSP, as the President is obliged to report to Parliament at least once in a year on the state of complying with the DPSP.

But the major difference between the two systems relates to justiciability. As noted above, article 34(1) of the Ghanaian Constitution appears to contemplate the

\textsuperscript{34} Article 16(2)d.
\textsuperscript{35} Article 18(3)b.
\textsuperscript{36} Article 18(3)c.
possibility that the DPSP are justiciable. In contrast, section 6(6)(c) of the Nigerian Constitution states that the judicial powers of the Nigerian Courts “shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution...” The only right of a socio-economic character that is expressly justiciable under the Nigerian Constitution is the right to acquire and own immovable property found in section 43 of Chapter Four.

2.4 Academic Opinions and Gaps

Stating formal constitutional guarantees of human rights is one thing, understanding those rights is another. Indeed, there is a growing literature on the rule of law, constitutionalism and human rights in Africa. This thesis shares with many other authors the view that scholarship is an important part of addressing the legacy of past experiences of misgovernment, oppression and abuse. Of course, I appreciate that prolonged wailings from the bowels of tensed, misruled countries steeped in wars of barbarity, armed conflict, personalisation of state power, authoritarian rule, pervasive corruption and wanton abuse of human rights will do little to salvage the victims. What is required is a multi-dimensional approach to the problems. This work pursues just one of several possible approaches. It hopes to fill a gap in the literature by arguing that part of the solution to the problems faced by transitional democracies in Africa, like Ghana and Nigeria, will be found through the adoption of a particular conception of law by the
courts. I will develop the basic argument for that conception of law in Chapters Three and Four of this thesis.

But this thesis is also about human rights, and it is important to acknowledge where it stands in relation to the broad debates about human rights in Africa. Only a sketch is possible here. There is now a large body of literature documenting the failure of post-independence African states to uphold human rights. There is a body of literature that seeks to justify or explain this apparent failure of governments to respect human rights as one of the legacies of colonialism and foreign exploitation. Against this background of arguments about failure and reasons for failure, there is work that seeks to chart the unique African approach to human rights that preceded colonialism that might now inform solutions. Authors have thus examined traditional forms of social and political organization in Africa with a view to showing that, despite greater emphasis on social solidarity, family and community relationships, and customary bonds and duties, African societies still celebrated individual human dignity and prohibited conduct that violated human dignity.

These authors thus reject a competing view that human rights were uniquely European or Western historically, that this vision of human rights is the one that informs the universal conception of human rights applicable globally today, and that traditional African approaches to human dignity are nebulous and communal and have nothing to do with human rights properly understood. Yet another line of inquiry plies the middle road between the Western conception of human rights which recognises the individual as the nucleus of analysis and the cultural-relativist Afrocentrics who predicate the concept of human rights on the community. For this group, an African conception of human rights recognises, but does not over-emphasis, the community, and strikes a balance between the individual and communal rights. Finally, there is a very pragmatic body of literature that examines specific topics of human rights, good governance, and development from domestic and international legal perspectives with a view to


the literature is how legal theory can be explored as a means to deal with the serious problems encountered relative to enforcing values protected by constitutions in Africa. What role does legal theory play in enforcing the constitutions as the fundamental laws of transitional or young democracies in Africa? This topic has not been wholly ignored. The importance of developing an “African approach to legal theorising” for solving African problems has been acknowledged. But it remains an area in need of more detailed study.

The approach that I will take looks beyond expositions steeped in doctrine and empirical accounts of the successes and failures of courts in Africa. Such studies, though powerful and perceptive, have failed to develop a theory of judicial method by which the difficult questions of constitutional adjudication are to be confronted by the courts. The performances of courts in Ghana and Nigeria since independence and more so in their current transitional political stage, warrant such an approach. A sound theory of constitutional interpretation is at present critical for the courts to hold governments accountable to the promises of human rights and the rule of law in post-independence constitutions.

2.5 Judicial Response

A brief survey of judicial decisions from these two jurisdictions will help make the need for a sound theory of constitutional interpretation much more evident. In *Re* 

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Akoto, one of the famous cases in constitutional law in Ghana, the Supreme Court had
held that there was nothing in the First Republican Constitution, 1960, in the nature of a
human rights protection to prevent the authorities from detaining the applicant and seven
others without trial. In fact, the applicants’ relied on Article 13 of the said Constitution,
which stated that:

Immediately after the assumption of office, the President shall make the following solemn
declaration before the people: “On accepting the call of the people to the high office of the
President of Ghana I ________, solemnly declare my adherence to the following fundamental
principles: ‘That no person shall suffer discrimination on the grounds of sex, race, tribe, religion
or political belief. That subject to such restrictions as may be necessary for preserving public
order, morality or health, no person should be deprived of freedom of religion or speech, of the
right to move and assemble without hindrance, or of the right of access to courts of law.

While this article seemed premised upon the assumption that certain human rights existed
and enjoyed some constitutional protection, the Court held that the provision and the
rights it alluded to were not justiciable; the provision was equated with the coronation
oath of the Queen of England. Similarly, in Fattal v. Minister of Internal Affairs\(^4^5\), Archer
JSC remarked that it is not the business of the court to strike down a law simply because
it is unreasonable. He said: “Although SMDC 172 may be unjust, unreasonable and even
autocratic, yet it is not within the province of this court to strike it down merely because
it is an unjust and unreasonable law. The days when courts of law could embark upon
such exercise are over”\(^4^6\).

These cases demonstrate judicial literalism and an absolute faith in positive law,
an interpretive approach that was again played out in Larden v. A-G\(^4^7\), when the court

\(^{4^5}\)[1981] GLR 104.
\(^{4^6}\)Ibid., at 117.
\(^{4^7}\)[1957] 2 G&G 98
ruled that a parliamentary enactment on deportation could not be declared invalid because it was validly made by the National Assembly and thus the appellants were to be deported without a remedy. In effect, the procedural requirements of the validity of a law trumped its substantive content. Although, as we shall see in Chapter Six when judicial methods are scrutinized in more detail, judges in Nigeria and Ghana are not exclusively positivist, at critical junctures judicial reasoning in these countries has manifested, and on critical issues, for example, socio-economic rights, it continues to manifest, positivist tendencies, i.e., a rigid judicial belief in the supremacy of positive law and, by extension, explicit constitutional provisions.

More recently, the Accra High Court in *Issa Abass v Accra Metropolitan Assembly* appeared dismissive of the argument that Article 33(5) of the Ghanaian Constitution, which is the unenumerated rights provision, embraces justiciable rights to housing and economic livelihood for squatters.\(^48\) Article 33(5) states:

> The rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.

This ruling reflects the general trajectory of the Court’s case law: if a right is not explicitly provided for in the Constitution, then reliance upon Article 33(5) for the right amounts to an attempt to sneak the right into the Constitution in an unacceptable manner. Here, there is a curious insistence on positive law, underlying a judicial belief that rights

are only protected under the Constitution when there is very clear constitutional language that refers to such rights. Thus express textual provision is required to sustain an argument of a purported protected constitutional value. It is worth recalling that in the famous case of *Griswold v. Connecticut*, the United States Supreme Court relied, at least in part, on the Ninth Amendment of the Constitution, which, like Article 33(5) of the Ghanaian Constitution, refers to rights unlisted in the Constitution, to hold that there is a right of privacy. Of course, whether such an approach should be taken in relation to socio-economic rights is controversial, as we shall see in Chapters Seven and Eight of this thesis.

For Ghana and Nigeria, though, socio-economic rights are not exactly unenumerated. As already described, in each of the Constitutions of Ghana and Nigeria provision is made for what are referred to as Directive Principles of State Policy (DPSP). The DPSP include socio-economic rights that are found in the International Covenant on Social, Economic and Cultural Rights. As the stereotype of a human rights dichotomy, where political-civil rights are favoured over socio-economic rights, is fast crumbling at national and international levels, courts in these two jurisdictions are yet to extricate themselves from the troubling jurisprudence that socio-economic rights dressed in the plain clothes of Directive Principles of State Policy are non-justiciable.

For instance, in *Morebishe v Lagos State House of Assembly*, it was ruled that the DPSP in the Nigerian Federal Constitution are not justiciable. However, *Attorney
General of Ondo State v. Attorney General of the Federation\(^{51}\) modified this position, holding that the DPSP are justiciable if they are legislated upon by an Act of Parliament. The binary view of rights was adopted in *Uzuokwu v. Ezeonu II* \(^{52}\) where the Nigeria Court of Appeal held that there are other rights which may pertain to a person which are neither fundamental nor justiciable in the court and these include the DPSP. In Ghana, the Supreme Court has articulated a similar opinion in *New Patriotic Party v. Attorney-General (CIBA Case)*\(^{53}\), and *New Patriotic Party v. Attorney-General (31 December Case)*\(^{54}\), though it seems to suggest in the former that the DPSP are justiciable when they are capable of being read and applied in conjunction with any of the justiciable fundamental rights set out in the Constitution.

The problem with these cases, which will be examined in detail in Chapter Seven, is not so much the conclusions reached, but the questionable character of the judicial reasoning that supports the conclusions. An asserted right under the DPSP is only justiciable if it can read as a fundamental right in Ghana or is legislated upon in Nigeria. The courts’ central assumption, it seems to me, is that provisions like the DPSP typically associated with developing democracies are generally non-justiciable. There appears to be a judicial fear in creating justiciable rights from constitutional provisions that do not prima facie suggest justiciability, even though deeper founding constitutional values support justiciability. This fear is tied to a constitutional-positivist approach, which

\(^{52}\) [1991] 6 NWLR.
\(^{54}\) [1993-94] 2 GLR 3531.
entreats courts to obey the explicit, written provisions of constitutions when questions of justiciability are being settled. Sources outside the positive law must not be relied on by the courts, and unlisted legal principles intrinsic to the integrity of the constitution, as a coherent scheme of just governance, are ignored or undervalued.

The situation is somewhat different in Nigeria, where there is, on the one hand, an ouster clause in the Constitution, section 6(6)(c), that appears to prevent judicial enforcement of the DPSP, and, on the other hand, constitutional provisions which appear to restore the benefits of the ousted provisions, like section 13, which, as we shall see in Chapter Seven, requires the conduct of the three arms of government to be in conformity with the goals of the DPSP. However, the Nigerian courts in *Archbishop Olubunmi Okogie and Seven Others v. Attorney General of Lagos*55 have held that in the event of conflict between the two provisions, section 6(6)(c) trumps section 13. The courts have left it to Parliament to judge whether the state has fulfilled its constitutional responsibility vis-a-vis the DPSP. If this is correct, what would happen in an event of a parliamentary determination of the legality of state action on the DPSP that threatened judicial protection of rights and the rule of law? The theory of law developed in this thesis, if adopted by courts, has answers to just this sort of question.

2.6 Academic Question of Investigation

The gaps in the scholarly literature and the problems in judicial reasoning described above are worth addressing. Collectively, they point to some critical questions:

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What do the Constitutions in Ghana and Nigeria entail? Are they “hollow hopes” in the search for progressive goals, as Rosenberg proposed?\textsuperscript{56} Should we be seeking to take such constitutions away from the courts and letting popular constitutional sentiment determine their meaning, as suggested by Tushnet and Waldron?\textsuperscript{57} Do the constitutions represent an exhaustive account of the values that are necessary for a comprehensive conception of law or must the legal systems and the courts for that matter limit themselves to the written texts of constitutions for all legal norms when seeking to interpret law as an aspirational moral ideal for the common good of the people?

The joint answer to this set of questions is the core of this thesis. Such questions are nowhere as valid, urgent and juridically relevant as in the young constitutional democracies of Ghana and Nigeria where answers to them by the courts would add quality to the rule of law, human rights and constitutionalism. To yield to the doctrinaire juristic theory that socio-economic rights expressed in Directive Principles of State Policy are non-justiciable, that the protection of rights is dependent upon the express written provisions of the Constitution or an Act of Parliament, or that comparative constitutional jurisprudence matters not, approaches all too commonly adopted, as shown by the brief survey of cases above, is to compromise constitutional justice and progress by the sentiments of constitutional positivism.

In formulating a sound theory of constitutional interpretation for courts in these transitional democracies, I intend to argue that explicit law in the form of statutes and written constitutions are not exhaustive of the fundamental values and valid legal norms necessary for the wellbeing of a political system and its citizens. I argue further that such legal documents must not only be interpreted as aspirational moral ideals for the collective wellbeing of the people, but also should be supplemented by the unwritten fundamental principles of common law. Substantive justifications of judicial decisions articulated on values that best morally serve the legal order depend, but not entirely, on the explicit law.

A submission to the view that positive law exhausts the grounds of judicial justification of what the law entails is a submission to the Austinian view on the nature of law – that law is the command of the uncommanded sovereign. Under that approach, judges will have nothing but Acts of Parliament, policies of the executives made within the confines of delegated power, and written constitutions as the legitimate source of legal norms applicable in the legal system.58 While the values of written constitutions or statutes are not to be discounted, a positivist conception that valid legal norms are only derivable from such legal enactments is, I will argue, inappropriate. It presumes that the only relevant point of reference for legitimately valid legal norms is the plain constitutional text or Acts of Parliament.59 David Dyzenhaus correctly conceives this as

the rhetoric of constitutional positivism. For Dyzenhaus, the consistent practice of constitutional positivism works against an aspiration for the fundamental principles of legality. It is a costly mistake for legal systems and their judges to seek refuge in constitutional positivism, for it is an interpretive attitude that is contrary to the conception of law as an aspirational moral virtue that serves society in the best morally justifiable light.

2.7 Constitutional Positivism in Context

Before proceeding to inquire into the practice of constitutional positivism, we need to understand what, in theory, constitutional positivism is about. Constitutional positivism is a version of legal positivism. According to Dyzenhaus, constitutional positivism is a practical rather than conceptual stance closely related to the idea that judges “are committed by their understanding of the doctrine of the legislative supremacy to applying the law enacted by their legislatures in a manner true to the idea that the legislature has a monopoly on making law, so that judges should seek to understand statutes providing rules with determinate content.” In such cases, the explicit law enacted by the legislature constitutes a determinate legal norm applicable at all times unless it is amended or repealed by the legislature.

Dyzenhaus, however, asserts that judges in a common law legal system (like Ghana and Nigeria) must face up to the fact that they have an interpretative role premised on the doctrine of the legislative supremacy.

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60 Ibid.
61 Ibid.
on a duty to give authoritative expositions of the law when deciding cases. A proper appreciation of this role, Dyzenhaus reasons, precludes judges from following a positivist conception of law that sees the legislature as law’s only source. Although the rigid doctrine of separation of powers locates a monopoly of law-making power with the legislature, it does not, according to Dyzenhaus, mean that judges must abandon this interpretative role. Of course, the interpretative role that judges have often generates tension between branches of government, and it is the response to this tension, says Dyzenhaus, that defines constitutional positivism: the judiciary in the constitutional positivist context will always seek to yield to the legislature’s commands.  

Such a submission to legislative command affects the task of the judiciary in determining in a particular case of law what the legislature intended – as judges avoid relying on arguments about what moral ideals they think the legislature ought to be trying to achieve. While this may preclude a positivist judge from imposing his or her moral notions on the law, it may lead to a recognised superiority of and strict adherence to the rigid doctrine of separation of powers as judges lie low in order to avoid blame for usurping the powers of the legislature. This undermines a substantive conception of law as an aspirational moral value.

By analogy, a written constitution drafted by a consultative or constituent assembly, as the case may be, and adopted through a nationwide referendum will impose similar force on a constitutional positivist judge. The express provisions of such a

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63 Ibid.
64 Ibid.
constitution become conclusive of legal values that the state intends to protect. The judge’s role is to enforce strictly the constitution by relying on the framers intentions at all material times. Though statutes and constitutions in this context are by no means the same in terms of either form or content, the constitutional positivist judge understands them both as exhaustive accounts of operative legal norms and principles in the state.

Such an understanding is informed by the fact that both documents have been duly enacted by the competent authorities in the country. Questions of their moral value as law do not excite the positivist judge. He is content to focus on the factual basis for the enactments, and will not venture outside the legal texts to the surrounding terrain of political morality. Thus constitutional positivism would seem to amount to a crude subordination of the judge’s interpretative role to the narrow search for the intent of legislators or drafters of written constitutions. The aspirational moral value of law, as it will be argued for in this work, counsels judges against this engagement and will require of judges that they rely on arguments about what moral ideals the legislature or constitution ought to be trying to achieve. Such values may be explicit in the constitution or derivable from the text or the unwritten constitution of common law.

Part of Dyzenhaus’s understanding of constitutional positivism is its corollary effect of dualism. Dualism in his view is manifested in a tension between domestic law and international human rights norms, and dualism in the context of norms of statutes and fundamental principles of common law. Both senses of dualism, it seems to me, imply a third category of dualism, namely the tension between law as an aspirational moral virtue and law as posited fact. In the particular case of dualism between domestic law and
international human rights norms, judges of constitutional positivist leanings will hold on to the conception that unless international human rights norms are explicitly incorporated into domestic law by the legislature, such norms are inapplicable.

This remains true even if it is proven as a matter of fact that their judicial incorporation would enhance the normative value of domestic law. A similar result will obtain if fundamental principles of common law clash with norms of statutory law. It will be argued in this work that in our increasingly globalised world, a legal system which takes this path looks set to remain insular in understanding its constitution, and may disdain constitutional jurisprudence and major international human rights norms that are part of the post-war global human rights constituency.

A judicial posture that discounts the significance of comparative constitutional jurisprudence is unfortunate. In fact, in the recent past, comparative constitutional jurisprudence has gained increased attention.\(^6\) There is a growing acceptance in constitutional adjudication, particularly in cases involving human rights, of the influence of foreign courts. Depending upon the constitutional character of the polity, national courts may cite foreign decisions either to fill gaps in their domestic law, clarify a legal position, or attempt homogenising constitutional ideals.\(^6\) It is no doubt true that

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comparative constitutionalism exhibits some positive influence on judicial institutions worldwide.

Ruti Teital states that comparative jurisprudence is an ambitious enterprise with a broad aim to canvass enduring answers to common constitutional questions.\(^\text{67}\) It is, particularly in transitional regimes and so should be the case in Ghana and Nigeria, at the centre of serious judicial inquiries.\(^\text{68}\) There is even a claim that it is a vehicle to legal truth.\(^\text{69}\) At best, it nourishes a presumption that “there is a significant degree of congruence between problems and their possible solutions across the spectrum of contemporary constitutional democracies.”\(^\text{70}\) In other words, there are universal constitutional ideals (at least for states committed to liberal-democratic values) that lie beyond the limited legal jurisdiction of a particular country. National courts are thus encouraged to engage constitutional jurisprudence of foreign courts in the course of judicial settlement of constitutional questions.

It is not inconsistent with the objective of establishing an indigenous constitution, including a set of human rights protections\(^\text{71}\), to recognise the value of comparative constitutionalism. Anne-Marie Slaughter argues that its aim is less to borrow than to seek


\(^{70}\) Ibid., at 8.

the benefits of comparative deliberations.\textsuperscript{72} This view has been supported by Justice Claire L’Heureux-Dubé of the Supreme Court of Canada, as she observes, “judges are not into passive reception of foreign decisions, but in active and ongoing dialogue.”\textsuperscript{73} While this highlights the importance of comparative constitutional jurisprudence, it also cautions judges not to abandon domestic constitutional values in the course of “borrowing” from abroad.

In effect, understanding the constitution of a particular country must not only be inward. It can also be outward - referencing foreign decisions in an attempt to understand, interpret, explain and evaluate the values of one’s own constitution. This does not necessarily warrant commonality of textual provisions, history, culture and social values. The constitutional positivist’s dualistic conception of law and of sources of legal norms applicable in a legal system will work against the potential values of comparative constitutional jurisprudence, since there is little reason to look at foreign decisions or international human rights norms that are not incorporated into domestic law. Dualism is therefore one part of a general assault by constitutional positivism on the conception of law as an aspirational moral value.

The theory of constitutional positivism, then, will be taken in this work to represent the view that the proper exercise of the power of judicial review or constitutional adjudication in protecting fundamental rights and freedoms must be limited

to finding and protecting values explicitly provided for or recognised in written legal
texts. From this perspective, legitimate constitutional adjudication is limited to the
application of concrete norms derivable from the written constitution itself.74 Conceived
as a supreme positive law, the constitution is applied in disputed cases as the most direct
legal expression of the people where judicial submission to the text is required. A
reverential view of the written text is to be adopted. Thus judges consider “written
constitutional provisions as canonical expressions of legal principle that exhaust legal
meaning on the points to which they apply.” 75

As a theoretical prelude to this work, I claim that there is very little support in the
constitutional texts for any model of judicial review predicated on constitutional
positivism. Furthermore, I argue that such an interpretative approach undermines our
ability to realise constitutional justice and produces instead an undesirable conception of
law and fundamental rights and freedoms. It introduces a judicial determinism in
constitutional adjudication that seriously discounts any role of the court as the expounder
of human welfare and fair treatment when the content of these ideals is not expressed as a
matter of justiciable positive law.

Besides, it legitimates a problematic structure and hierarchy of human rights that
undercuts any possibility of conceiving rights as comprehensively indivisible and
interrelated human entitlements. This has led to a profound emphasis on Civil and

75 Mark D. Walters, “Written Constitutions and Unwritten Constitutionalism” in Grant Huscroft
(ed.), Expounding the Constitution: Essays in Constitutional Theory (Cambridge: Cambridge
University Press, 2008) at 265.
Political Rights and less stress on Socio-Economic Rights. A unity of constitutional justice which seeks to unite the content of these two categories of rights is thus denied. Finally, such a narrow view of the constitutive function of law presumes that only reference to past choices of the people are sufficient to discover the true import of law and largely precludes present values of the legal system from being considered. Judicial decisions that take such a view only serve as the foundation of a theory of social subordination and to strengthen constitutional hostility to political inclusiveness and good governance.

Relying principally on decisions of the Supreme Courts of Ghana and Nigeria, I will argue that a firmer case for constitutional justice lies in understanding and interpreting the Constitution as a continuing discourse about political order and how citizens should live and about the fundamental values necessary for the collective good, not minimally around words of the text. Accordingly, written constitutional provisions must not be interpreted as providing conclusive legal meaning on points where invoked, but rather as a “manifestation of more abstract principles”76 from which unexpressed legal propositions can be derived. An exclusive focus on bare written constitutional provisions by judges is an illustration of an unqualified primary reasoning in constitutional interpretation that disdains the utility of abstract but compelling legal principles. There must be, in the courts, as suggested by Mark Walters “a discourse of secondary reason in which written law is regarded as but one source of unwritten law”

76 Ibid.
and judges should “seek a unity or equality of reason by oscillating between concrete and abstract propositions of law”.77

This approach echoes Thomas Grey’s argument that when judges interpret abstract constitutional language they effectuate “values not articulated in the constitutional text” thereby giving expression to an “unwritten constitution”.78 In this way, judicial interpretation seeks the “value of having a comprehensive and coherent constitutional order”.79 The text does not provide conceptions of political life that can be applied mechanically to current problems relating to governance. Contemporary political and legal issues cannot be resolved merely through a strict focus, however important and attractive, on the text. Adopting as a definitive code the textual provisions of written constitutions is a dangerous presumption in favour of an unsubstantiated legal proposition that treats the written texts not only as exhaustive but also comprehensive in its values. Any meaningful constitutional discourse or interpretation with the view to achieving a unity of constitutional justice must therefore involve the courts in a three-tiered approach: they must recognise and apply the values of legal history, as fashioned by political experience and the fundamental principles of common law constitutionalism, they must embrace a purposive-progressive interpretative model, and they must adopt a willing inclination to engage in a dialogical comparative interpretative approach. This

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77 Ibid.
79 Walters, “Written Constitutions and Unwritten Constitutionalism”, supra note 75 at 274.
objective cannot be achieved by “mere logical disquisition on the Constitution alone”. The ultimate end of this is to conceive the constitutions in Ghana and Nigeria as morally ideal laws for the collective wellbeing of the people.

Chapter 3

The Constitution as a Fundamental Law for the Collective Good

3.1 Introduction

A comprehensive constitutional protection of rights and freedoms in a state - as in the case of Ghana and Nigeria - gestures to a minimum pre-commitment to building and protecting a culture of liberty and the rule of law. But beyond this abstract commitment is the practical value of rights and freedoms to the common good of the people. That is and should be the promise of law in a state and such should be the value of the constitutions of these jurisdictions. A contrary view may undermine the moral aspirations of the people. Therefore, a proper exercise of judicial review of legislative and executive power in a constitutional democracy must preserve a higher law that protects such aspirations.

The claim in this work is not that Ghana and Nigeria lack constitutions or democratic credentials. Rather, the goal is to explore how the existing constitutions may be construed by the courts as law in a manner that best serves the collective wellbeing of the people. This task calls into question the actual conception of law in these jurisdictions as means to protecting fundamental rights and freedoms. But how that is done presupposes a particular response to the question: what is the normative value of the constitutions as law in these states? Important as this question is, a simple reactionary response may not help. At the most abstract level, the constitution should represent the
fundamental law and must be construed as an aspirational moral ideal for the collective wellbeing of the people.

In defending a value-based view of the constitution, we must somehow counter the basic stance adopted by so-called ‘constitutional positivists’ as to the meaning of constitutions and constitutional interpretation. This is the chief task of this chapter. Constitutional positivists adopt the general positivist view that judges either (a) apply existing rules in a morally neutral and passive way (when they operate within the settled core of law) or (b) make entirely new rules based on their own moral views, unconstrained by existing law (when they are in the unsettled penumbra). Positivists are thus both formalists and realists. Constitutional positivists, at least as Dyzenhaus describes them, think that constitutions should always provide the sort of rules that ‘settled law’ generally does, as in (a) above, and they are thus very uncomfortable dealing with (b)-type situations, when the constitutional text seems to give no clear guidance. Since constitutional texts rarely give the sort of rule-based guidance that statutes or the common law does, constitutional positivist judges are at sea (so to speak) without an anchor or a paddle when they confront problems of constitutional law. They try to be formalists and thus try to avoid moral argumentation, even where there are no formal rules capable of guiding them, and this leads to confusion and unsatisfactory results.

Here, I will argue that interpretation is not simply a process of drawing out of the statute or constitution what its makers put into it, but also partly a process of adjusting the statute or constitution to the implicit broader demands and values of the society to which
it is to be applied.\textsuperscript{81} As Trevor Allan rightly observes, no enacted law ever comes from the legislator fully “made”.\textsuperscript{82} Thus the simple dichotomy between settled legal rules and open-ended morality, between the settled core and the wild penumbra, is false. Constitutional law and morality, and hence constitutional interpretation and moral reasoning, are deeply and inherently connected phenomena. There are no (or few) ‘rules’ to be passively or neutrally applied in constitutional law, nor are there situations when judges need to engage in wholesale legislation on pure moral grounds uninformed by law or legal principles. In essence, law is everywhere, and so is morality.

I shall pursue this argument in three parts. The first part, termed \textit{Rule-Based Constitutionalism}, reviews the underlying jurisprudential foundation of constitutional positivism, which is, of course, the general school of legal theory known as legal positivism, with the focus on the leading positivist of the twentieth century, H.L.A. Hart. In the second part I will explore what I call \textit{Value-Based Constitutionalism}. The focus will be the responses to Hart made by Lon Fuller and Ronald Dworkin. We shall see that these non-positivists provide important insights into the relationship between law and moral values, but that their views are also problematic in terms of providing a conception of law appropriate for constitutional interpretation in transitional and developing African states. In the third part, entitled \textit{Reason-Based Constitutionalism}, I develop an alternative conception of law that is appropriate to ground constitutional interpretation in transitional and developing African states by combining the insights provided by Fuller and Dworkin.

\textsuperscript{81} Lon L. Fuller, \textit{Anatomy of Law} (1968) at 85-6.
with insights derived from the old English common law discourse on fundamental law. The approach, as we shall, relies heavily upon the approach of the rule of law developed by T.R.S. Allan. But, in certain respects, it lays the foundation for a conception of legality, or the rule of law, that goes beyond Allan’s, and provides the ingredients for arguments about socio-economic rights in developing African countries—a topic that we shall explore in Chapters Seven and Eight of this thesis.

3.2 Rule-Based Constitutionalism

The background to our discussion in this section comes from what we are told as students at law school through the teaching of courses like Jurisprudence and Philosophy of Law, that different theories compete for attention in respect of answering the question what is law or what is the nature of law. These theories can roughly be classified as (but are not limited to) legal positivism and natural law. While the former contends that law as a real social phenomenon is or may be separated from morality and should be defined exclusively with reference to social facts, the latter argues that law is so intimately connected with moral ideas that the concept of law must necessarily include a reference to morality. Each of these theories has had serious followers at the bar, on the bench, and within the legal academy, who have made remarkable arguments in support of their peculiar positions. The contentions generally revolve around the criteria to apply when

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resolving disagreements about what Dworkin terms true propositions of law. That is, what test must law pass so as to be accorded the title ‘law’ in a state?

John Austin, charting a legal positivist path in the nineteenth century, suggested that a law in a particular polity is law if it can be proven to be a command of some person or group with the sovereign power of such a polity. But Austin, it would seem, was by no means the originator of this idea of law being the command of the sovereign. Indeed, John Erskine, a Scottish natural lawyer wrote in his *Principles of the Law of Scotland*, 1759, that “Law is the command of a sovereign, containing a common rule of the life of his subjects.” However, it was Austin who maintained a more expansive version of this command theory of law to include the habit of obedience and threat of sanctions, an aspect which later generated fierce opposition. The enforcement of these commands rests on the threat of sanctions.

The sovereign, in Austin’s view, is some person or group whose commands are habitually obeyed and who is not in the habit of obeying anyone else. Properly conceived, only rules commanded by the sovereign will qualify as law. On this account, law is to be reduced as a matter of historical political decisions made by those who wield political power and the sovereign in that regard is legally unlimited – thus “law is the command of the uncommanded commanders of the society – the creation of the legally

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untrammeled will of the sovereign who is by definition outside the law‖. 87 This naturally leads to a trilogy of commands, sovereign and threats of sanctions as the cardinal pillars of law’s true make up. Once these are present, the question of what is the nature of law is summarily but appropriately answered.

Convincing as this position may appear in its relative historical context, Austin’s views met with criticism, at least from two fronts, namely the deficiency of the command theory and the separation of morals from law. Both of these propositions may have a limited bearing in contemporary constitutional democracies. For instance, locating of the Austinian sovereignty in modern, young constitutional democracies like Ghana and Nigeria may be difficult. The people in these states retain the power, in the Lockean sense, to change the constitutions through amendment, when the legislative authority is so wicked to design laws against their general interest. In that case, the assertion that people habitually obey a legally unlimited sovereign looks feeble. Sovereignty in this case is exercised by the people and obedience in its non-habitual form is rendered to the people themselves. Besides, transitional regimes or regimes set up through coups d’état in Africa and elsewhere would have difficulty with this conception. In such states, new leaders are far from being habitually obeyed by their citizens.

On a different ground, Salmond protests that the Austinian conception of law does not treat seriously the issue of legal rights, as it fails to provide for a place within the

entire analysis of an ethical basis for rights. It “attempted to deprive the idea of law of that ethical significance which is one of its most essential elements”.

Salmond’s rejection of the command theory based on ethical considerations in respect of rights resonates well with a functional conception of public law that protects the rights and well-being of the citizenry. It also speaks to a constitutionally limited government where law is not the exclusive command of the legislator, but an expression of a composite of well-considered values of the people from whom the power of the legislator is derived.

Even among positivists, Austin encountered resistance. H.L.A. Hart rejected the view that law is merely a matter of habitual command and obedience. Hart proposed a “rule of recognition”, a test accepted by officials for determining what normative standards form part of the legal corpus or what factual propositions should be accepted as valid law in a community. This approach includes within ‘law’ only those rules of law that master rule validates. The significance of the rule of recognition is to make law-making subject to the idea that “nothing which the legislators do makes law unless they comply with fundamentally accepted rules specifying the essential law-making

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88 Hagerstrom similarly protest that the command theory cannot account for or contemplate the notion of individual rights. He does not see commands, which we either obey or we do not obey, conferring rights on the individual. Alex Hagerstrom, *Inquiries into the Nature of Law and Morals* (Olivecrona ed. 1953) at 221.
procedures‖. 93 Certainly, the sovereign lawmaker must be subject to the secondary rules, including, most importantly, the rule of recognition; it cannot succeed in making ‘law’ unless its ‘law’ complies with the master rule that defines what ‘law’ is. But since Hart denies that the rule of recognition is itself a valid ‘law’, it may be misleading to say that, in Hart’s view, the sovereign is ‘within the law’. The rule of recognition is ‘law’ only in a special sense; it is a customary rule or social fact that underpins ‘law’.

Nevertheless, if a proposition meets the requirements of this rule of recognition, then such a proposition can correctly be designated as law. It thus follows, as summarised by Dworkin, that “propositions of law are true not just in virtue of the commands of the people who are habitually obeyed, but more fundamentally in virtue of social conventions that represent the community’s acceptance of a scheme of rules empowering such people or groups to create valid law”. 94 Such a view yields the descriptive, rather than prescriptive, posture of positivism and leads to its social and moral theses, which respectively hold that what is law and what is not law is a matter of social fact, and the identification of a law is not contingent upon any moral arguments. Hence, the law’s conformity to moral values or moral ideals is in no way a condition for the validity of law.

It would seem, on this account, that Hart and Austin converge: understanding the concept of law simply lies in what law is and not what law ought to be. Hart makes this

94 Dworkin, Law’s Empire, supra note 84 at 34.
clear by maintaining that there is “the need to distinguish, firmly and with the maximum
of clarity, law as it is from law as it ought to be”. Austin puts it:

The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one inquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we have happen to dislike it, or though it vary from the text, which we regulate our approbation and disapprobation. The distinction may be important because it may “enable men to see steadily the precise issues posed by the existence of morally valid laws and to understand the specific character of the authority of the legal order”. The “purposes men have for living in society are too conflicting and varying to make possible much extension of the argument that some fuller overlap of legal rules and moral standards is ‘necessary’ in this sense”. Undoubtedly, both Hart’s and Austin’s account of law embraces the so-called “Separation Thesis” of legal positivism, which holds that “there is no necessary connection between law and morals or law as it is and law as it ought to be.” There is, according to this thesis, a necessary severability of law from morality. Law, to the legal positivist, is a social fact, “a particular way of structuring social life”. It is thus

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95 Hart, Essays in Jurisprudence and Philosophy, supra note 93 at 50.
96 Ibid., at 184.
97 Ibid., at 53.
99 Ibid., at 602. Andrei Marmor said that the separation thesis “basically maintains that determining what law is, does not necessarily, or conceptually, depend on the moral or other evaluative considerations about what ought to be in the relevant circumstances”. Andrei Marmor, “The Separation Thesis and the Limits of Interpretation” (1999), 12 Canadian Journal of Law and Jurisprudence 135 at 135.
essential to the nature of law that it can be identified without any appeal to controversial moral arguments.\textsuperscript{101}

Consistent with this position is the legal and political philosophy of Joseph Raz. For him, when there is legal system and laws, “the courts are bound to apply [them] regardless of their merit…. [L]egal systems consist of laws which the courts are bound to apply and are not at liberty to disregard wherever they find their application undesirable, all things considered”.\textsuperscript{102} He defends the positivist’s conceptual independence from morality. Morality is necessarily excluded from the concept of law.\textsuperscript{103} Law is to be identified by empirical social facts, namely, the common legal resources, such as legislation, judicial decisions and custom,\textsuperscript{104} and should therefore be defined without reference to moral standards. This resonates well with Hart’s conception that the beliefs of the judges do not count when it comes to the validity of the law. Law is law even if judges accept the rules of their jurisdiction for other reasons, such as “calculations of long-term interest; disinterested interest in orders; an unreflecting inherited or traditional attitude; or mere wish to do as others do”.\textsuperscript{105}

Both Hart and Raz concurred on this and called such considerations “weak acceptance”\textsuperscript{106}, which have no weighty count on the validity of law. However, Raz went beyond the contours of the weak acceptance: he argues for what he terms ‘strong

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\textsuperscript{101} Ibid.  \\
\textsuperscript{102} Joseph Raz, \textit{The Authority of Law} (Oxford: Clarendon Press, 1979) at 113.  \\
\textsuperscript{103} Ibid., at 47.  \\
\textsuperscript{104} Ibid., at 3.  \\
\textsuperscript{105} Hart, \textit{The Concept of Law}, supra note 92 at 198.  \\
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acceptance’. He emphasises that law does serve moral purposes, claim moral authority and depend on the participants’ moral attitudes.\textsuperscript{107} Perhaps this has some moral legitimacy for the law\textsuperscript{108} so accepted by the judge but does not imply anything similar to the argument that the content of the law must be morally correct. This reading of Raz might pose a challenge to Hart as Raz requires that law claims, not possesses, legitimacy as part of the preconditions for accepting law and its authority. Hart does not seem to presuppose such a notion of law claiming legitimacy as an \textit{a priori} value to validate the authority of law.

While this conceptual distinction does little to disturb the unity of legal positivists, it appears that the lingering challenge for legal positivism is the reasonability of the separation thesis as urged by Austin, Hart, and Raz, among others. Leslie Green, a self proclaimed ‘unrepentant anti-conventionalist positivist’\textsuperscript{109}, however, advances a more moderate view. For him, legal positivists like Hart did not intend to recommend any hard separation between law and morals. That is, Hart’s position, if properly conceived, does not amount to an absurd view that law and morality should be \textit{kept separate}. In defence, Green argued that

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Morality sets ideals for law, and law should live up to them. Nor did he [i.e., Hart] mean that law and morality are separated. We see their union everywhere. We prohibit sex discrimination because we judge it immoral; the point of prohibiting it is
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\textsuperscript{107} Raz, \textit{The Authority of Law}, supra note 102 at 37.
\textsuperscript{109} Leslie Green, “Positivism and Conventionalism” (1999), 12 Canadian Journal of Law and Jurisprudence 35 at 36.
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to enforce and clarify that judgment, and we do so by using ordinary moral terms such as “duty” and “equality”.  

It appears from the above quotation that a literal approach to the separation thesis can thus lead to an oversimplified but silly conclusion that law and morality must be kept separate. In fact, Green’s concerns are elsewhere echoed by Joseph Raz. In *The Authority of Law*, Raz suggests: “[T]he claim that what is law and what is not is purely a matter of social fact still leaves it an open question whether or not those social facts by which we identify the law or determine its existence do or do not endow it with moral merit. If they do, it has of necessity a moral character”. So, if it is taken that the positivist conception of law is simply predicated on social facts, it is misleading to suggest that such social facts are bereft of any moral content. Accepting that conclusion entails the presumption that the social facts by which law can be identified or its existence determined cannot have any moral virtue. Such a position John Gardner claims will be “absurd and no legal philosopher of note has ever endorsed it”.  

This point underpins Owen Fiss’s claim that we should jettison any incautious embrace of the separation thesis. He argues that judges try to give meaning and expression to public values, embodied in law, and that their understanding of such values is necessarily shaped by the prevailing morality, and that too rigid an insistence on positivism will inevitably bring into question the ultimate moral authority of the legal text.

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– the justness of the Constitution.\footnote{\textit{Ibid.}, at 753.} But granted that such a difficulty exists as to the true meaning of the separation thesis, it is of no use merely to say that the debate about it is “entirely pointless”.\footnote{F. Klaus, “Farewell to ‘Legal Positivism’: The Separation Thesis Unravelling”, in Robert P. George (ed.), \textit{The Autonomy of Law: Essays on Legal Positivism} (New York: Oxford University Press, 1996) at 120.} We may still have an unresolved question on our hands in an attempt to understand a proper judicial commitment or role in constitutional interpretation in a legal system. A resolution of this is crucial for judges in the young democracies of Ghana and Nigeria, as elsewhere, where a better appreciation of judicial construction and enforcement of fundamental values of a constitution by looking at evaluative considerations that would justify making or sustaining a possible legal rule remains key.

It has been suggested that the correct way to appreciate the separability thesis requires a clarification of three terms: connection, morality and necessary.\footnote{Green, “Positivism and the Inseparability of Laws and Morals” \textit{supra} note 110 at 1041.} These terms seem to constitute the building blocks upon which the entire separability thesis rests. For the first two, Green explains that law is a human institution with both internal and external relations. These relations, such as “social power, social rules and morality”, define law in its relationship with the rest of the social world.\footnote{\textit{Ibid.}} A connection is thus necessary between the concept of law and all these social phenomena that help define it, and to remove law from a misleading conception that it is naturally given. But this rejects morality’s connection with law by denouncing both the natural law view that “there must...
be moral tests for law” and the “consensus sociologists” assertion that “all legal systems necessarily embody the spirit, traditions, or values of their communities”.\textsuperscript{118}

However, in explaining the idea of a \textit{necessary} connection between law and morality, Green distinguishes between \textit{contingent connection} and \textit{necessary connection}. While the latter variable is absolute, the former is not, a choice he prefers. The “separability thesis allows for a contingent connection between law and morals”.\textsuperscript{119} Green justifies this reading of the separability thesis on the view that Hart has given “necessity” a large and liberal interpretation” as he fails to articulate a “firmer commitment about its nature”.\textsuperscript{120} Hart expressly, Green argues, “allows for necessary truths to be contextual – that is, to depend on the stable empirical features such as our embodiment, our mutual vulnerability, and our morality, all of which are reflected in the whole structures of our thought and language”.\textsuperscript{121} Given these features of law, accepting a necessary conceptual connection between law and morals is thus inevitable.

This claim, though persuasive, may be conceptually problematic. It may be difficult to reconcile Green’s explanation on “morality” and “necessary”. If the contingent /necessary connection dichotomy allows for the incorporation into law of “our embodiment, our mutual vulnerability and our morality”, then it is difficult to accept the view that the separability thesis rejects the opinion of the consensus sociologists - that is, “all legal systems necessarily embody the spirit, traditions, or values of their

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\item \textsuperscript{118} \textit{Ibid.}, at 1042.
\item \textsuperscript{119} \textit{Ibid.}
\item \textsuperscript{120} \textit{Ibid.}
\item \textsuperscript{121} \textit{Ibid.}, at 1043.
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communities.” Nor is it uncontroversial in suggesting that natural lawyers, consensus sociologists and legal positivists belong to distinct camps as far as the debate on the nature of law is concerned.

Green would no doubt respond by saying that this view simply distorts the true arguments of Hart. The separation thesis does not hold that there can be no case where morals and law are merged. Positivists merely seek to deny, as far as that argument goes, natural lawyers’ insistence that a law must of necessity pass a moral test. Morality, positivists in this sense argue, is not a precondition for the validity of law. The rule of recognition, as espoused by Hart, becomes the benchmark for the validity of a law and significantly represents a separation between questions of what the law is and what the law ought to be.

There is thus nothing non-positivist in the assertion that morality may be part of law. For instance, a positivist legislating for a state can, in accordance with the rules of recognition, explicitly authorise a particular law to be predicated on morality or openly require that a certain law be made to pass a moral test. “If the rule of recognition asserts that morality is a condition of legality, then morality is a condition of legality in that system. If the rule of recognition incorporates no moral principles, however, then no such principles figure in the criteria of legality”.\(^{122}\) This will not be antithetical to the positivist thesis concerning the separation between morality and law so long as it is done in accordance with the socially accepted rule of recognition. Positivism is not contradicted by clear constitutional provisions incorporating some critical moral rules of a society.

However, positivists may not argue that the moral worth of these constitutional provisions exclusively hold the key (unless dictated by the rule of recognition) to the critical question of their necessary legal validity. On the contrary, the fundamental requirement of their legal validity may lie in their conformity with the officially accepted rules of recognition *simpliciter*, and law must not necessarily connect with morality in every case.

This understanding may have an appeal though it raises a further critical concern, which is that there is a possibility that modern constitutional democracies, such as Ghana and Nigeria, may consistently enact laws with moral content. That is, if the rule of recognition can provide that Acts of Parliament or even a written constitution as laws must have moral content, then, the difference between positivists and the natural lawyers is fuzzy. An enacted law in compliance with this rule of recognition will by necessity pass a moral test, an objective the natural lawyers forcefully argued for. The possible concurrence of the two theories on this point thus lies in the fact that the validity of the laws promulgated in this example depends both on meeting procedural requirements – rules of recognition -- and content prescription – morality.

But this reading of positivism still leaves us with further questions. The fact that morality and law can merge and do merge sometimes does not fully counter the contention that they must *necessarily* and always meet. According to Klaus, as also shown in Green’s analysis, if the law complies with morality, then it does so only *contingently* because of certain factual circumstances, but not for intrinsic moral
reasons. It is thus possible to maintain a distinction between the rationale for the separation thesis and the moral necessity of law’s content. With this, any definition or conception of the nature of law must be morality-free.

The claim that morality may be empirically identified as part of a law or a legal system does not sufficiently answer questions about the motivation for the presence of morality in law. That is, the rationale or reasoned motivation for the inclusion of morality in law is not justified by the mere presence of morality in law or the contingent case of law’s content being fused with morality. What the opponents of positivism insist is that morality is part of law’s content because its intrinsic value is inseparable from the intrinsic value of legality.

Equally vital is the possibility left by positivists for a moral content of law to depend on the idiosyncrasies of the legislator. That is, the connection between law and morality is contingent upon the personal desires of the legislator or the general consensus of persons responsible for law-making. This is due to positivists’ insistence that a law is law once duly posited by the appropriate authority following the officially accepted rules of recognition. It matters not at all if such a law is bereft of any moral virtue. If the rule of recognition is religiously followed in enacting a particular law, then one is precluded from investigating the normative moral content of such a law in the course of determining its validity as law. But of course Hart and other positivists will say that we can still investigate the moral content of the law to decide, not its validity as law, but its moral

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123 Klaus, “Farewell to ‘Legal Positivism’”, supra note 115 at 126.
authority for us; and if we think that a valid law is morally repugnant, we can decide to disobey it (and suffer the legal consequences).

But this qualification pre-empts a counter reflection.124 Where will resistance to a valid but morally repugnant law lead in a legal system deeply engrossed by the ideals of positivism? Resistance may be regarded as pernicious in such a society, and so positivism may serve to protect entrenched interests and to render courts less than responsive to changing social needs and the wellbeing of oppressed groups within society.125 It may conceal from the people the true nature of law and perhaps its influence in social life.126 According to Radbruch, positivism misleads and corrupts people as it weakens resistance to state tyranny or absolutism.127 Mass resistance to the wicked laws of apartheid South Africa was neither sufficient to invalidate such laws nor to prevent violations of individuals’ moral rights. Such laws prevailed, though their injustices could not be fully masked by the positivist rule of recognition.

Nascent democracies like Ghana and Nigeria may thus seek alternative ideas on the nature of law. These states, with their backgrounds of military dictatorship and general neglect of human rights, may not be well served by an exclusive positivist’s conception of law, as it may legally entrench poverty, indignity and increase general

124 Postema sees Hart’s theory in this light; “At bottom, his claim is that the authority of criteria of validity ultimately rests not on the justice, correctness, or truth of the criteria as a matter of critical morality, but rather on convention”. G. Postema, “Coordination and Convention at the Foundations of Law” (1982), 11 Journal of Legal Studies 165 at 171.
127 G. Radbruch, Dei Erneuerung des Rechts, 2 Dei Wandlung (Germany, 1947).
vulnerability amongst the population. This result may arise because such an approach may undermine the courts’ role in guaranteeing and enforcing constitutional justice through the invocation and application of substantive values at the core of the people’s welfare. Supremacy of the constitution, as it stands, when not accompanied with judicial protection of principles beyond those expressed in the written law, may amount to supremacy of a political will that consistently fails to attend to the social problems of substantive inequality, poverty and indignity – problems that threaten the enduring common good. The legality and legitimacy of law must thus be consistent with the common good and substantive moral values of the people.\textsuperscript{128}

3.3 Value-Based Constitutionalism

Lon L. Fuller reacts to positivism this way: “...we assert that under some conditions the same conception of law may become dangerous, since in human affairs what men mistakenly accept as real tends, by the very act of their acceptance, to become unreal.”\textsuperscript{129} That is, the positivist conception of law may, in Fuller’s opinion, lead to a “series of definitional fiat” culminating in seeing law as nothing but “the command of a sovereign, a rule laid by a judge, a prediction of the future incidence of the state force, [or] a pattern of official behaviour”.\textsuperscript{130} The unique contribution of Fuller to legal theory is his argument that an order or command will represent mere power or force unless it can be justified as ‘law’ for the people subject to it, and this means that power must conform

\textsuperscript{129} Lon L. Fuller, “Positivism and Fidelity to Law – A Reply to Professor Hart” (1957-58), 71 Harvard Law Review 630 at 631.
\textsuperscript{130} \textit{Ibid.}
to the implicit ideals of legality or the rule of law which, in turn, require at least minimal respect for the humanity of law’s subjects.

The positivists’ separation thesis, if accepted, enables the evil regime to pass cruelty, intolerance and inhumanity off as ‘law’. Fuller rejects this possibility. “To me,” he writes, “there is nothing shocking in the saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system.”¹³¹ For countries, like Ghana and Nigeria, that have endured prolonged periods of military dictatorship, this style of legal theorizing has profound practical ramifications.

In his book, The Morality of Law, Fuller articulates eight conditions that a law must meet in fulfilling the demands of law’s internal morality. Fuller is careful to insist that these criteria, though aspects of morality, are not derived from some external or substantive source in natural law, but represent rather a procedural conception of natural law, one that articulates a conception of “law as the morality of order, a functioning order”.¹³² For an exercise of power to be ‘law’ it must set forth general rules rather than ad hoc dictates, and these rules must be public, prospective, understandable, consistent, not impossible to obey, stable, and administered according to their own terms.¹³³ A prima facie obligation to obey a law is thus contingent upon law meeting these a priori moral principles. By implication Fuller’s rejection of Hart’s separation thesis is to be

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¹³¹ Ibid., at 660.
understood in this procedural sense fastened to the listed desiderata as grounds for a valid law. But since these principles do not contemplate any appeal to a higher moral law, Fuller is excluded from the traditional natural law camp that advocates that law must concur with a higher law, such as (traditionally at least) a law of God, discoverable by reason.

It may nevertheless be unclear what courts will do with an iniquitous law that meets the requirements of law’s internal morality. Moreover, if the necessary validity of law is dependent upon the procedural force of these principles (and not its higher moral end), what will distinguish Hart’s “rules of recognition” from Fuller’s “internal morality desiderata”? Critiquing Fuller, Ronald Dworkin argues that it is possible that a “perfectly evil statute can be drafted with exquisite precision.”\textsuperscript{134} This complaint may be true of some laws of apartheid South Africa and some of the military decrees made in Ghana and Nigeria or other African states during times of military dictatorship; though substantively unjust, such instruments conform to the formal principles of legality or the rule of law that Fuller identifies. The internal morality of law does not say anything about whether law makers should prohibit or permit activities over which there is little national consensus\textsuperscript{135}, such as military decrees endorsing the incarceration of persons without recourse to the law courts or neglect of the established principles of the rule of law and constitutionalism in Abacha’s Nigeria.

\textsuperscript{134} Ronald Dworkin, “Philosophy, Morality, and Law: Observations Prompted by Professor Fuller’s Novel Claim” (1965), 113 University of Pennsylvania Law Review 672.
\textsuperscript{135} Evan Fox-Decent, “Is the Rule of Law Independent of Human Rights?” (2008), 27 Law and Philosophy 533 at 539-40.
However, even though an evil regime may comply with Fuller’s eight rule-of-law criteria, and still make laws for unjust purposes, there is an insight underlying Fuller’s work that is important for the argument developed in this thesis. To funnel power into the form of ‘law’ is to take up an attitude of legality that implies a reciprocal relationship of respect between lawmaker and subject, one that “regards persons as free, self-determining and responsible agents, and that they possess inherent dignity in virtue of their autonomy”.\(^{136}\) Law’s point is governance, i.e., setting standards for people to govern themselves, and this is impossible unless people are seen as capable of both individual self-government and of appreciating the demands of social life and collective self-government. The internal morality of law, the morality that makes ‘law’ possible, is inherently linked to the individual’s search to “find the good life in a life shared with others.”\(^{137}\)

For Fuller, this relationship between individual and common good is central to the very concept of law: to have a system based on legality, or the rule of law, is to have a political community where individuals and their government have a shared interest in normative order; to have ‘law’ as opposed to arbitrary power is to assume that people are genuine members of a political community as opposed to a random collection of individuals. As T.R.S. Allan observes, this Fullerian insight into the concept of law implies a conception of legality or the rule of law that is morally rich in ways that the simple resort to Fuller’s eight rule-of-law criteria does not make obvious. The very


conceptual structure of law—the “idea” of law—is, as Nigel Simmonds argues, a “moral” one.\textsuperscript{138}

I will argue in this thesis that the conception of law to emerge here—one that sees an inherent link between legality or the rule of law and individual dignity and the common good—is not just a matter of abstract legal theory but it informs, or should inform, the practical or doctrinal interpretation of law by judges and lawyers, and, in particular, the approach taken to constitutional interpretation in Ghana and Nigeria. But its details still require definition. To that end we turn first to Dworkin’s work. Dworkin accepts the two basic points of this thesis; he accepts, implicitly at least, the Fullerian insight that the morality of law is located within not outside the conception of law, and he accepts, explicitly, the idea that abstract legal theory and practical or doctrinal legal interpretation are thoroughly integrated. For Dworkin, law’s morality is integral to conceptions of law because conceptions of law are \textit{interpretive}, and interpretation is inherently normative, or moral, in essence.

But both Fuller and Dworkin deny that there is any sharp distinction between law and morality; they simply differ in their philosophical approach to the issue. It is not correct, Dworkin suggests, to distinguish rigidly what is a legal principle and what is a moral principle. In hard cases, moral principles are legal principles. This is the centrepiece of Dworkin’s conception of “the soundest theory of the law”. The amalgamation of legal and moral principles into a conception of law is key, for, in Dworkin’s view, “a principle is a principle of law if it figures in the soundest theory of

\textsuperscript{138} Nigel Simmonds, \textit{Law as a Moral Idea} (Oxford: Oxford University Press, 2007).
law that can be provided as a justification for the explicit substantive and institutional rules of the jurisdiction in question.” 139 Indeed, Dworkin’s views have continued to evolve, and in his most recent work he argues that law does not just draw upon political morality through an interpretive process, but law is itself a “a branch, a subdivision, of political morality.” 140

It follows that an account of law which dwells merely on legal rules is a mistake. 141 In legal reasoning, especially in hard cases 142 where pre-existing rules run out, judges and lawyers rely on standards that are, strictly speaking, not rules but principles. Such principles work to provide only a pro tanto reason for a particular legal conclusion as opposed to the legal rules that are applied in an all-or-nothing fashion. The principles only operate as a guide in legal reasoning in hard cases towards a certain direction, but do not command or necessitate a particular conclusion. A principle only “states a reason that argues in one direction”. 143 That is so because it is possible for two or more principles to conflict, in which case they must be weighed or balanced to determine which of them has the greatest weight in the circumstances. Dworkin thus denounces the view, commonly associated with positivism, that valid legal rules are exhaustive of law, and that a case

142 The term hard cases “refer to real gaps or lacunae in a legal system, in the sense that legal standards fail to say anything at all about whether challenged conduct is permitted or prohibited”. Philip E. Soper, “Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute” (1976-77), 75 Michigan Law Review 473 at 484-5.
which is not covered by a valid legal rule must be resolved through the exercise of discretion.

Of course this does not render written rules or constitutions irrelevant. Dworkin privileges the written text of the American Constitution in his analysis without necessarily discounting the application of principles not explicitly stated in the text. The first obligation of the judge, especially in a hard case, is to explain how his decision is to be affected by the explicit law, a step which confirms Dworkin’s belief in written laws. Differently put, the judge must explain how his chosen answer to the legal question best explains the explicit law, i.e., the set of settled legal rules usually found in written form in cases, statutes and constitutions that Dworkin describes as “pre-interpretive” data.144

This is not about a rigid adherence to precedents or the framers’ intent as the conventionalist would suggest, but rather it is the first step in an interpretive process whereby possible legal answers to hard legal questions must be shown to pass a threshold test of ‘fit’ within the established pre-interpretive data. But where many constructions of the law pass this threshold test of fit, Dworkin says the judge must give a reasonable justification for preferring one construction of the law to the other. The judge’s trump card is the best moral justification of the overt law. The role of this best moral justification is to make the law reasonably sound, and to show the legal system in its best light, as morally coherent. Indeed, coherence is, for Dworkin, itself a political-moral value, one that he calls “integrity”; in the interpretive search for integrity in law the judge

144 Dworkin, Law’s Empire, supra note 84.
seeks to extend to all the rights extended to some in the past, that is, to treat each person of the political community with equal concern and respect.

This two-step interpretive process is premised upon the view that moral and legal principles are united in a single account of law, and this account is ultimately itself an integral aspect of a single or unified account of morality and ethics.\(^\text{145}\) Here, a judge not only explains but does so with the best moral justification that makes the law sound in the light of the entire legal system\(^\text{146}\), and in light of system of political morality of which the legal system is a part.\(^\text{147}\) Thus the reach of legal duty extends to cases that are not resolved by any socially accepted rule of recognition. A judge deciding difficult cases must as a matter of law undertake (implicitly or explicitly) a complex exercise in interpretation, seeking to develop and apply the soundest theory of law.\(^\text{148}\) This constitutes the principled basis of law and must be central in determining law’s nature.

Although Dworkin does not suppose law to be a mere combination of both “explicit legal materials and the principled basis of the material”\(^\text{149}\), he does think that the explicit legal materials within a system are the legal data (the pre-interpretive data) which have to be accounted for in deciding what law is.\(^\text{150}\) His notion of moral principles such as justice and fairness seem to be firmly implanted in and within the framework of the

\(^{145}\) See Dworkin, Justice for Hedgehogs, supra note 140.
\(^{146}\) Ronald, Law’s Empire, supra note 84.
\(^{147}\) Dworkin, Justice for Hedgehogs, supra note 140 at 405-415.
\(^{150}\) Ibid.
explicit law, and the determination of the question as to what law is, is settled by examining the implications that these principles have in a given case. An adoption of this conception of law should lead to morally superior legal practice and “law will in fact approximate more to the substantive standards of morality already embodied in the law”.

This approach denies the positivist claim that judges exercise unrestrained discretion in the absence of explicit law or concrete legal rules. The Dworkinian approach is premised upon the idea that principles must not only count as legal norms to fill in the gaps when valid legal rules run out, but must also be binding and operative norms that check the open discretion positivists accord judges in such situations. These principles will be legal principles not by virtue of some posited rule of recognition, but because of their moral merit to the legal system. Positivists, in response, argue that this rule-principle distinction is ineffective, and some positivists have argued that it is possible to have the principles suggested by Dworkin as part of the law by virtue of social fact rather than moral argument. For example, Joseph Raz accepts that judges will often rely upon principles, but he concludes that these principles are either identified, like legal rules, by the social sources of law, or, if not, they are properly regarded as extra-legal resources upon which judges can draw to make new law.

In his book the Law’s Empire, Dworkin attempts a counter-response with a more developed theory, arguing that the positivist approach is guilty of using what he calls a

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151 Ibid., at 28.
153 Raz, The Authority of Law, supra note 102 at 45.
semantic sting. He says that the positivist account of law as limited to rules (and principles) identified by a rule of recognition is not theoretically sustainable given that judges and other legal officials disagree on the very criteria as to what counts as law. This suggests, in his view, that law is not a fact defined by verbal or semantic criteria, but rather law is an interpretative concept, which is an expression of the narrow explicit rules slavishly followed by the positivists and more broadly, the scheme of moral principles necessary to justify them.\textsuperscript{154} Under Dworkin’s theory judges are to try to achieve horizontal and vertical consistency with moral principles. He makes very clear in his latest book especially that he believes in the “unity of value”.\textsuperscript{155} This is a very ambitious claim that seeks to show that all values are unified, including ethics and morality; all political values, must cohere within a general theory of morality, including legality. True, he does say that unjust laws are possible. But he says that unjust laws would only be acknowledged as laws by virtue of the need for judicial respect for legal materials that is required by a broader theory of political morality. This requires judges to have a constructive and coherent view of the law that gives it the best moral light to the legal order.

Dworkin’s theory of law as integrity becomes a juridical light to the judge in the determination of valid law. Integrity is expressed in such notions as justice, fairness and procedural due process.\textsuperscript{156} By these values, the moral social order and equality of citizens in the state are preserved. But the trouble with law as integrity is that his notion of justice

\textsuperscript{154} Dworkin, \textit{Law’s Empire}, supra note 84 at 227.
\textsuperscript{155} Dworkin, \textit{Justice for Hedgehogs}, supra note 140 at 1.
\textsuperscript{156} Dworkin, \textit{Law’s Empire}, supra note 84 at 178.
as one immanent in the written law threatens his efforts to distance himself from positivism. The soundest theory of law accepts principles as part of the law in order to make it just, but there are limits to the extent to which such principles by interpretation can qualify written or posited law. After all, the judge’s interpretation of the law must, in the end, ‘fit’ into the existing, established legal materials, and if those materials cannot be made to square with justice then the possibility of unjust law emerges. For example, Dworkin concedes that laws supporting slavery in pre-civil war America, though unjust, might still have been laws.157

Dworkin’s theory of law as integrity seems most compelling where certain conditions are met, namely, that there is a well-advanced legal system with a comprehensive constitutional bill of rights; there is wide-spread agreement on the abstract principles that underlie this constitution; and there is a conscientious judiciary that understands the difference between explicit law and underlying principles immanent within the law and is able and willing to engage in the appropriate form of interpretation necessary for the enforcement of these principles through constitutional adjudication. While these conditions may exist in some jurisdictions at the advanced stage of modern constitutional practice, in Ghana and Nigeria, where there has not been a long history of constitutional adjudication of hard cases and where there has been, in the past, judicial weakness in upholding the rule of law due to self-imposed constraints or political conflict, the Dworkinian approach may be less valuable.

157 Dworkin, Justice for Hedgehogs, supra note 140 at 411.
There is little specific guidance to judges in these jurisdictions but attitudes upon which the construction of justice and fairness may depend, though their decisions may be constrained by the actual political history of the community.\footnote{T.R.S. Allan, “Dworkin and Dicey: The Rule of Law as Integrity” (1988), 8 Oxford Journal of Legal Studies at 266.} In developing a theory of “transformative constitutionalism”\footnote{K. Klare, “Legal Culture and Transformative Constitutionalism” (1998), 14 South African Journal of Human Rights 155.} appropriate for transitional democracies like Ghana and Nigeria, the morality of law cannot be held hostage to the morality implicit in the legal materials that happen to exist at any given point in time. Although Dworkin’s non-positivist legal theory has been rightly held out as a guide for judges in transitional democracies in Africa\footnote{Nsongurua Udombana, “Interpreting Rights Globally: Courts and Constitutional Rights in Emerging Democracies” (2005), 5 African Human Rights Law Journal 47 at 56, 58; Murray Wesson, “Hart, Dworkin and the Nature of (South African) Legal Theory” (2006), 123 South African Law Journal 700.}, its limitations have to be acknowledged too.\footnote{David Dyzenhaus, “Law as Justification: Etienne Mureinik’s Conception of Legal Culture” (1998), 14 South African Journal of Human Rights 11 at 16.} What we can take from Dworkin’s work for the purposes of the argument of this thesis is his understanding of legal reasoning as a form of interpretive or justificatory reasoning that is inherently moral in nature.

### 3.4 Reason-Based Constitutionalism

Let us take stock. We have seen that legal positivists focus upon the rules found in explicit law or positive legal materials, which may be morally sound or just, or may not be. We have also seen two attempts to respond to positivism. These attempts seek to show how law is necessarily connected with morality, but they do so without resorting to
the old natural law claim that human law is subject to an external, higher moral law. To this end, efforts are made to find law’s morality within the conceptual structure of law itself. Fuller looked to the formal requirements of the rule of law, while Dworkin looks to the fact that law is an interpretive concept. Both approaches have their problems, especially for transitional democracies in Africa, for whether one focuses upon the formal requirements of the rule of law, as Fuller did, or the moral principles implicit in existing law, as Dworkin does, one can still be trapped by evils that may be explicit or implicit in positive law. Despite these limitations, however, both thinkers provide insights that may be used to develop a better legal theory.

Underlying Fuller’s approach is a conception of legality or the rule of law according to which power can only count as ‘law’ for people if it can be justified to them as consistent with their status as self-governing individuals who are full members of a self-governing political community. And Dworkin reminds that law is not so much a thing or a fact but a dynamic interpretive process that is inherently normative, and hence moral, in character. Linking these ideas together, a moral sense of ‘law’ that transcends the confines of positive or explicit law emerges, but one that remains inherently ‘legal’ and so does not simply fall into the realm of pure moral or political reasoning—what emerges, we may say, is an unwritten fundamental law located between pure morality or natural law on the one hand and strict, explicit, or positive law on the other. I will argue that this fundamental law is, or should be, the basis of constitutional interpretation, especially in transitional democracies like Ghana and Nigeria. But in developing this
argument I will look to an unlikely source, the legal traditions of the system that once oppressed Ghana and Nigeria: the English common law.

Why would transitional democracies in Africa look to old English law for lessons about constitutional interpretation? Aside from the fact that both Ghana and Nigeria are both common law jurisdictions—that is, jurisdictions with their own common law systems that were, historically at least, founded in part upon English law—there is a good reason in terms of legal theory to do so. The historic common law discourse on fundamental matters of public law is necessarily one of first principles, because the English, and later British, constitution was an unwritten one. It is an example of basic principles of law being worked out through interpretive practice rather than legislative fiat or sovereign will. When the Bill of Rights, 1689 asserted that the King had ‘endeavoured to subvert the constitution’ and had ‘violated the fundamental laws’, Parliament was invoking an entire theory of fundamental law with deep historical and theoretical foundations.¹⁶² That tradition has no normative power in Ghana and Nigeria today as tradition; but it may have normative power today in these countries for reasons of substantive moral and legal principle. I will argue that the common law tradition of fundamental law does have normative power today because it manifests clearly, without the interference of written constitutional texts, two strands of thought that help us to understand constitutional interpretation today—strands of thought that help define the unwritten fundamental law that is behind or prior to constitutional texts.

The first strand of thought relates to what we might now call a substantive theory of the rule of law. The notion of a higher law was a key part of medieval and feudal jurisprudential thought. Charles McIlwain observes that medieval jurists generally assumed that “there is a law fundamental and unalterable, and rights derived from it indefeasible and inalienable”. Such a fundamental law implied protection of liberties and entailed, at least in theory, immunity from arbitrary authority. It was thought to imply a limited government and a check against abuses of power. These general ideas came to be associated with the Magna Carta. Sir Edward Coke gave voice to it in the most illustrative fashion, stating not only that Magna Carta is “the fountaine of all the fundamentall lawes of the realme”, but also that Magna Carta was “but a confirmation or restitution of the common law” and if any statute were made contrary to it, the statute would be “void”. The supremacy of this fundamental law was reflected by Coke’s famous assertion: “Magna Charta is such a Fellow, that he will have no Sovereign”. The celebrated passage of Magna Carta that was usually invoked protected the freedom and property of freemen from invasion except by lawful judgment of their peers or per legem terrae—that is, according to Coke, “by the law of the land (that is, to speak it once for all,) by the due course and process of law.”

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163 Charles McIlwain, The High Court of Parliament and its Supremacy (New Haven: Yale University Press, 1910) at 44.
164 Ibid., at 52.
a set of substantive rights as it was a general idea that substantive rights, that is, basic rights to liberty and property, were protected from arbitrary power by due process of law; in today’s terms, fundamental law was, in essence, a substantive theory of the rule of law.

Perhaps Coke’s most famous and controversial assertion of fundamental law is his *obiter dictum* in *Dr Bonham’s Case*. “And it appears in our books,” Coke wrote, “that in many cases the common law will controul acts of Parliament, and sometimes adjudge them to be utterly void: for when an act of Parliament is against the right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such acts to be void….” 168 Debate has raged about whether Coke meant that statutes might be struck down by judges or simply construed to avoid injustice. 169 And it is now generally accepted that Coke and other seventeenth century common lawyers wildly exaggerated the antiquity of this “ancient constitution” as part of a political struggle against absolutist claims by Stuart monarchs—a struggle that involved civil war and revolution. 170 These historical facts and debates should not distract us here. It is sufficient

168 *Bonham’s Case* (1606), 8 Co.Rep 114, at 118.
to observe that in stating that Parliament itself was bound by a law of reason, Coke was in fact re-stating an idea that was, by then, commonplace for English lawyers.  

While Coke was still on the bench, Sir Henry Finch published a book in which it was asserted: “it is truly said, and ought to be assented to by all, that the Laws which do in reality contradict the Law of Reason, are null and void, as well as those which contradict the Law of Nature.” Perhaps the only novel aspect to Coke’s statement was the assertion, found (as we have seen above) elsewhere in his writings too, that this fundamental law of reason was part of the ordinary common law. Martin Loughlin has argued that the medieval concept of fundamental law was historically regarded as logically prior to, and so separate from, the ordinary laws enforced by ordinary courts. The fact that common lawyers appropriated fundamental law in their political struggle against royal absolutism only underscores the relevance of fundamental law discourse for transitional democracies emerging from similar periods of arbitrary government. Fundamental law is a normative ideal of constitutionalism that is opposed to arbitrary rule in any form. It is a special form of law that is prior to ordinary law, providing the conditions of legality or the rule of law necessary for ordinary law to exist, but it is also integrated within ordinary law, providing normative force to particular doctrinal interpretations of law by ordinary courts.

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The second strand of thought to emerge from the old common law discourse on fundamental law relevant for our purposes is the idea that fundamental law is an *unwritten* law of *reason*. Historically there was a close connection between the law of reason and the law of nature within the discourse on fundamental law. The law of nature, however, implied a complete understanding of morality, and fundamental law was never taken to be just another term for morality; fundamental law was not just natural law. As the sixteenth-century writer Christopher St. German observed, English lawyers tended to prefer the term “law of reason” over “law of nature”, and by reason they often meant something narrower than natural law, something he called the ‘lawe of reason secundarye’ that involved a more legalistic reasoning about the full implications of positive laws rather than the abstract requirements of natural law.\(^{174}\)

As Coke famously stated, the common law may be reason, but it is the “artificial reason” of judges who had undergone long study and training in the law.\(^{175}\) This law of reason was less about substantive rights as it was a particular form of legal discourse. As Sir John Davies asserted, the common law was ‘*Ius non scriptum*’ or ‘*unwritten* lawe’ in the sense that it was not ‘made’ by princes and ‘imposed’ upon subjects, but it emerged over time and grew ‘to perfection’ and thus approximated ‘the lawe of *Nature*’ and so ‘farre excel[led] our *written* lawes, namely our Statutes or Actes of Parliament’; indeed, for Davies, the common law was really a ‘discourse of reason’ in which judges sought

\(^{175}\) *Prohibitions del Roy* (1607), 12 Co. Rep. 63 at 65.
‘coherence’ or ‘harmony of reason’ in our lawe…” It has thus been argued that there is a close connection between the unwritten fundamental law of reason and modern theories of legality that emphasize law’s interpretive character, like Dworkin’s law as integrity.

But this leads us back to the main point: what is the pay-off from invoking the concept of fundamental law in its historic common law sense? How does it fit into our theory of constitutional interpretation? How does it resolve some of the weaknesses that other non-positivist theories have? To these questions I now turn. But first, it is helpful to remind ourselves about the theory of constitutional interpretation being advanced here. Our argument is that judges should approach the task of interpretation on the basis of a non-positivist understanding of legality or the rule of law. Law is not to be regarded simply as the product of law-makers’ decisions and intentions but, in some respects and in relation to some issues at least, as embodying fundamental values that gain normative force independently of what is decided, written or intended by lawmakers. The particular values that will, under this approach, gain this special normative force cannot be listed in a fixed catalogue; they are, rather, the values that, given the practical circumstances that happen to exist in any given time or place, are deemed essential to securing the conditions for legality or the rule of law that are, in turn, necessary for ‘law’ to exist.

The key to understanding this theory is to understand the unique style of reasoning that it demands. The identification of this fundamental law is neither a matter of mere

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political decision-making nor simply a matter of a judge picking one principle over another on grounds of political preference; nor is it pure moral reasoning. It is a conception of law as a rule of reason with “reason” here suggesting a uniquely judicial form of discourse. This makes the reason of the fundamental law key to this work. Court decisions in Ghana and Nigeria should be able to carry conviction with the ordinary person as being based not merely on legal precedent or the law-makers’ intentions but also upon acceptable values as understood from the reason of the fundamental law.

We are now in a position to draw together the various lines of argument that we have explored. Law is, as Dworkin insists, an interpretive concept and interpreting law means giving full effect to principles of political morality implicit within existing legal materials. But law’s existence cannot depend only upon principles that happen to be implicit within existing legal materials, for those materials might be flawed; Dworkin concedes that the morality of which law forms a part, and that forms part of law, may require that judges acknowledge deeply unjust laws, citing American laws on slavery as an example.¹⁷⁸ For African peoples whose ancestors suffered from the slave trade and who themselves suffered from unjust ‘laws’ of military dictators, this approach to legal theory will not, at least at an intuitive level, do. Law’s existence, as Fuller insists, must depend upon general moral principles internal to the very conceptual structure of law itself, principles of the rule of law that transcend the legal materials that happen to exist in particular systems and that reconcile the ideal of individual dignity and autonomy with membership in a political community that strives for a shared sense of normative order

¹⁷⁸ Dworkin, *Justice for Hedgehogs*, supra note 140 at 410-413.
and common good. Under this approach, slavery laws could never be laws for slaves because they did not treat them as equal members of the political community for which the ‘laws’ were made. But Fuller’s formal criteria for the rule of law fail to go far enough to show this ideal in practice. So, we may turn to the insights of the old common law discourse on fundamental law at this point, that is, the unwritten law of reason that both precedes ordinary law, making that sort of law possible, but also infuses ordinary law with normative shape.

Combining these ideas together, we come very close to the liberal theory of the rule of law advanced by T.R.S. Allan. In his book *Constitutional Justice*, Allan argues that an unwritten constitution of reason lies beneath written constitutions in all liberal democracies, one that focuses upon a substantive version of the rule of law according to which state power, to be ‘law’, must be capable of reasoned justification as general measures in pursuit of the common good of the people through a means that accommodates the equal concern that each member of the political community is owed.\(^\text{179}\) State power that fails to fulfil this ideal is not just constitutionally invalid, it does not even count as ‘law’ from a theoretical or jurisprudential or conceptual perspective; indeed, the theoretical non-existence of such acts of power as ‘law’ rather than inconsistency with some written constitutional document is what renders them doctrinally invalid; legal theory shades into constitutional doctrine.

Where there is a written constitutional document, however, it must be interpreted to give effect to the unwritten fundamental law. A written constitution which expressly

\(^{179}\) Allan, *Constitutional Justice*, supra note 128.
settled all questions of enactment, intent, formality and clarity, must be interpreted to respect the conscience of the unwritten fundamental law in order to give or promise justice and fairness, and respect to reason, human dignity, and well-being. Despite the surprising way this point sounds to most lawyers, a reaction that illustrates just how dominant ‘constitutional positivism’ as a mode of legal thought is, a look at judicial decisions in established liberal democracies, like the United States, Australia and Canada, suggests that judicial resort to an unwritten fundamental law of reason is not uncommon, though not always openly acknowledged.  

However, this may look like a difficult case to make. Why should judges rely on rules that are unwritten to impugn written rules of law? This question is particularly relevant in a certain context when constitutional supremacy represents a certain conception of law which imparts upon legal reasoning. For instance, constitutional positivist judges will normally say that anything that is not supported by the written text is not law, and a norm’s legal validity entirely depends on the written constitution. But these claims would also have to be sustained by meeting a certain challenge: why must we prioritise the “writtenness” of the constitution or its “textual supremacy” over the conception of law that says that unwritten fundamental rules must count in determining the content and validity of legal norms?

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It must be observed that the unwritten fundamental law does acknowledge the importance of the written constitution for purpose of certainty in governance. But as the historical fundamental law discourse has shown above, positive law, in the form of constitutions, will not be exhaustive of the legal norms or the fundamental basis for determining the content and validity of law in a legal system such as Ghana and Nigeria. To the extent that they add quality to law and enrich the moral content of law, judges must consider a conception of law in these legal systems that incorporates the fundamental principles of the unwritten law into the body of the constitutional law that governs.

The distilled reason which is inherent in the fundamental law allows the written text of the constitution to be manifested in a conception of law that ensures that it exemplifies those fundamental values of the people that make sense of their collective wellbeing and that secure for them the conditions of legality or the rule of law that make ‘law’ possible. It does so by avoiding contradictions and morally repugnant laws. It will constitute the basis for filling gaps in the positive law by disciplining the discretion of the judge. Positivists’ rigid focus on the framers’ intentions may displace this vital role in shaping the constitutions as that body of values capable of protecting individual dignity and providing, sustaining and enhancing the collective wellbeing or moral good of the citizens. The ideal theory of law would thus be constitutive of principles of the fundamental principles of the unwritten law and such principles as expressed in the constitution, the enforcement of which enhances the common good.
On this account, it is important to return to the fundamental question about the pay-off from invoking the concept of fundamental law in its historic common law sense. There are two responses to this concern. The first one is general, which is that though history may not be decisive, Coke’s views must not fail because they were historically controversial. We can distil, for purposes of our present context, immensely important lessons from them, and we should accept them as correct, although with some modifications in order to fit modern constitutional circumstances. In short, I am not unaware of the limitations of Coke’s views but only intend to rely on one stream of constitutional discourse – the fundamental law stream – that existed in the distant past.

The suggestion is that this stream of constitutional discourse offers to us lessons that resonate normatively today; and would equally have universal attraction for people at any juncture.

The second response is that the unwritten fundamental law can serve as anchoring foundational principles of the written constitutions of Ghana and Nigeria. It will serve to unite the enduring values of the past and current “practices, expectations and necessities”.\(^{181}\) If this attitude dominates the constitutional imagination of young democracies like Ghana and Nigeria, a more plausible foundation is laid for judges to “speak to the law” without necessarily being seen as its “architects”\(^{182}\). That is, the fundamental law and its immutable principles of liberty, non-repugnancy, reason and justice, shall form part of the constitutions of these countries. Despite its historical


\(^{182}\) Pollock, “Continuity of the Common Law”, *supra* note 169 at 433.
English roots, it is capable of useful and sustainable local expression founded on justice, reason and human welfare.

The political and social anxieties confronting these emerging democracies are not distinct in character and scope from those that occasioned the emergence of the immutable principles of the fundamental law in feudal and medieval Europe. Substantive equality, justice, human dignity and human welfare on one hand, and effective responses to extreme political paternalism and over centralisation of political power on the other hand, are as important in their modern context as they were in their distant past. It is not a coincidence that fundamental law discourse emerged at its strongest in England during the seventeenth century, when England itself was, in today’s terms, in a “transitional” state from absolutism to constitutionalism. History and geography though important, may thus not preclude a firm understanding of the realities of these anxieties faced by the emerging democracies of Ghana and Nigeria. Current interstices of constitutional discourses should therefore focus on attempts to diminish the effects of these apprehensions.\footnote{Tracy Robinson, “Gender, Nation and the Common Law Constitution” (2008), 28 Oxford Journal of Legal Studies 735-76.}

We should therefore be suspicious of those narratives of law that suggest that law is merely what is posited by lawmakers who follow some preordained or officially accepted rules regardless of their moral propriety.\footnote{Ibid.} There is a supreme gift in conceiving of the constitutions in these countries as containing a core of values both explicit in the written text and those external, attainable through the application of the
principles of the fundamental law of reason and justice. This requires a broader liberal methodology for constitutional interpretation than the rigid method associated with constitutional positivism and the idea that law is simply what is acknowledged as law through accepted official criteria. The virtues of unwritten fundamental law must mediate just not in the construction and interpretation of the constitutions in Ghana and Nigeria, but the conception of the valuableness of ordinary laws in expressing norms of human dignity, welfare and justice. The force and persistence of such values must be shown in these legal systems as foundational ideas that protect individuals’ rights and freedoms from the whims of politicians and to distinguish our enduring values from temporary premonitions of leaders controlled by other less compelling considerations.

The method of integrating law and morality through constitutional interpretation advanced here does borrow heavily from Dworkin. But it is worth emphasizing the differences. First, as mentioned, for Dworkin law’s morality remains tied to the morality implicit in existing legal materials. Under the unwritten fundamental law of reason developed here, that is not the case. In his most recent work, Dworkin has, in effect, acknowledged that the theory of unwritten fundamental law could emerge for a legal system. Using the United Kingdom as an example, he observes that, in Coke’s time, parliamentary authority was regarded as limited by natural rights, that this view was rejected during the nineteenth century as the ideas of positivists like Bentham took over, but that a similar idea is once again emerging among judges and lawyers.

\textsuperscript{185} \textit{Ibid.}
The story is simply an illustration, he says, of how “[l]aw is effectively integrated with morality”; it shows how, as approaches to political morality are revised, so too are basic propositions of constitutional law.\(^{186}\) When this passage is read in light of Dworkin’s point, discussed above, that judges may be required to acknowledge unjust laws if that result is dictated by the best reading of existing legal materials in light of prevailing attitudes of political morality, then we are left with the troubling conclusion that the question whether judges are compelled to uphold laws they regard as unjust simply depends upon socially contingent facts about the particular state of political morality at the time. The general idea of a fundamental law of reason, as understood here, is grounded in the conceptual structure of law and is not, as Dworkin seems to say, contingent on the state of law or morality in given places or at given times, though, needless to say, the application of the fundamental law will vary considerably as the understanding of moral values and the common good changes with time.

Second, Dworkin’s approach, at least as applied to the United States Constitution, emphasizes the written constitutional text and the moral principles it presupposes and denies the need for reference to moral principles that are considered external to the text, and so the unenumerated rights provision in the U.S. Constitution (the Ninth Amendment) is given little weight by Dworkin.\(^{187}\) As we shall see in Chapter Seven, Ghana’s unenumerated rights provision is given great weight by the approach to constitutional interpretation adopted here. And, finally, Dworkin’s commitment to a strict

\(^{186}\) *Ibid.*, at 414.

distinction between principle and policy leads him to regard socio-economic rights, like, for example, rights to universal public health care, as political not legal rights—even if they are expressly protected by written constitutional provisions. As we shall see, Ghana and Nigeria both have written constitutional provisions that appear to acknowledge socio-economic rights, and the approach to the rule of law adopted here requires that these provisions be given full legal enforcement, a point to which we shall return in Chapters Seven and Eight.

Indeed, this last issue marks the point at which the theory of constitutional justice for Africa advanced in this thesis may be seen to diverge from, or develop further, the general theory of constitutional justice that Allan asserts. Implicit in the rule of law, according to Allan, are certain classic civil-political rights, like rights to free expression, that form the necessary conditions of legality for ‘law’ to exist. The argument here is that the list of rights implicit in the rule of law cannot be seen as fixed for all liberal democracies. What is needed for the conditions of legality to exist in emerging democracies in less-developed states in Africa will necessarily be different from those needed in developed Western liberal democracies. In Chapters Seven and Eight of this thesis we shall return to this point and develop the argument that, for certain African countries, including Ghana and Nigeria, socio-economic rights are implicit within the rule of law as understood according to the unwritten fundamental law of reason.

This leads us back to the notion of law that must be the centrepiece of our theory of constitutional interpretation. Here, we may say that law must not only rest upon moral

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188 Dworkin, *Justice for Hedgehogs*, supra note 140 at 412-413.
grounds, but also reason and established custom that speak to the “collective good” of society. Legality of law should depend on a defensible view of the common good. Law must thus conform to certain standards of justice as are essential to the common good or collective well-being and individual dignity. These are intrinsic features of the law and they are fundamentally legal values that a law must be attuned to, even if it may for certain purposes be plausibly defined as the content of any rule whose validity is affirmed by reference to some morally neutral and purely empirical test or criteria. On this account, an initial identification of law and its concrete interpretation in seeking justice and the common good as constitutional ideals are to be affected by the moral aspirations of the legal order. There is thus no basis in reason to seek a rigid distinction between the moral aspirations of the legal system and its laws, as constitutional positivists generally seek to do. The moral justification of law must thus be a precondition of its obligatory force, and the citizens’ moral judgment should be inextricably engaged in the identification of law.

We must, however, be careful here not to equate the moral legitimacy of law with the view that every individual in the state should always agree with the content of the law before rendering his/her obedience. That is far from the morally defensible view of the law; otherwise one may reasonably be understood as advocating anarchy where everyone’s conception of the law is correct. The core of the argument lies in the

189 Allan, Constitutional Justice, supra note 128.
190 Ibid., at 5.
191 Ibid., at 6.
192 Ibid., at 71.
193 Ibid., at 75.
normatively defensible collective good, to which the individual is a part and which forms the moral basis in reason for the obedience. This does not preclude occasional individual moral disagreements with the law, but a morally defensible common good ascertained through the application of the fundamental law principles must constitute the foundation for both the identification and concrete interpretation of the law. The moral force of law must thus be coextensive with its grounds and law must be consistent with the shared moral and political assumptions supported by the reason of the fundamental law that underpins the legal system.

Judicial interpretation in the young democracies of Ghana and Nigeria must therefore give law such a significant prominence and value. Like the medieval case of England, judicial duty is an investiture of a constitutional responsibility in the judge to interpret and enforce the constitutional law in a manner conformable to a higher law of reason that respects human dignity and welfare. In Ghana and Nigeria, obeisance to this duty is necessary in order to protect the liberties and freedoms of the people. It will work to constrain the legislative and executive arms of government from derisively trampling upon the fundamental values of the people. Gilbert Burnet is right when he said in 1681 that “he that holds the high office of the Judiciary” was “the Chief Trustee, and Assertor of the liberties of his Countrey”. On such terms, judicial duty in these jurisdictions will embrace an obligation to interpret and enforce the constitutions with a view to justice,

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195 Allan, Constitutional Justice, supra note 128 at 73.
196 Gilbert Burnet, The Life and Death of Sir Matthew Hale (London: 1681) at 91.
human well-being and the protections of liberty and freedoms founded on reason. On this view, the written constitutions of Ghana and Nigeria only give greater, but not exhaustive, prominence and account to these fundamental values of the people, and judges have an obligation to make them all inclusive by donning interpretive spectacles that reveal these values through the prism of the fundamental law.\textsuperscript{197}

Chapter 4

Theories of Rights and the Legitimacy of Judicial Review

4.1 Introduction

Since the interest of law as an aspirational moral ideal for the common good of the people is central to constitutional justice founded on the judicial enforcement of human rights in Ghana and Nigeria, it must be connected and allowed to achieve consistency with a particular conception of public law theory of rights. The relationship between this rights theory and the theory of law developed in the preceding chapter provides a normative basis for courts in these states to understand their constitutions in a way that protects and preserves the well-being of their people. It is critically important to see the relationship between the force, appeal and the reasoned justification of these conceptions, on the one hand, and their scrutinized use, on the other, in the subsequent chapters.

Directly connected to these ideas is the institution of judicial review. That is, the legitimacy of the exercise of interpretation as advocated needs a justification in a constitutional democracy. The fact that these conceptions of law and rights neatly connect does not prima facie entitle the courts in Ghana and Nigeria to apply them. We

must for that reason move beyond the reasonability of these conceptions to the justification of their contextual legal application.

The object of this chapter, therefore, is to make two distinct but interrelated arguments: first, the theory of law and interpretation argued for in the preceding chapter must cohere with a theory of public law rights which respects and protects the wellbeing of the people. Further, I claim that rights listed in the Constitutions of Ghana and Nigeria are not exhaustive of the rights intended to be enforced in these legal systems. And it is critical that the theories of legal rights and moral rights are integrated not only for a complete and comprehensive theory of rights, but also to aid judicial incorporation of rights norms that are necessary for the sustenance of values inherent in a constitutional democracy and human dignity. This requires the courts to be sensitive to questions of appropriate remedies that hold sacrosanct such constitutional values central to preserve human dignity and just democratic governance.

Secondly, since the realisation of the above aim, in part, is dependent on the exercise of judicial review, its legitimacy lies in a conception of democracy that allows the courts a duty to enforce a higher body of law grounded in rights, underpinned by the value of the wellbeing of the people. Accordingly, rights protection as understood by this conception of democracy should serve as the main juridical basis for legitimate judicial review.199 This relates to the objective of law as an aspirational moral ideal to protect

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rights or foster the enjoyment of constitutional entitlements such as rights. It thus entitles the courts to use their judicial power either in the process of declaring or interpreting the law to preserve such a value of public law.

4.2 Schematic Overview: The Range of Rights Theories on Offer

Within nations and on the international scene, the reputation of human rights is high.\textsuperscript{200} In politics, law and morality, the discourse of human rights has been pervasive.\textsuperscript{201} There is rarely any position, claim, criticism or aspiration relating to social and political life that is not expressed in the language of rights.\textsuperscript{202} Their recognition and enforcement has engaged the attention of individuals, groups, corporate entities, states and intergovernmental organisations. Yet there remain burning normative questions, such as what are human rights and what explains their pervasive popularity in recent decades. The former in particular is a contentious question. A satisfactory answer to this question is imperative in order to lay the basis for a legitimate claim by potential rights-holders and for the source of the obligation on others to enforce the rights. Sheer speculation on this will not suffice. Likewise extreme abstraction would likely confuse the issues. At its best, it might engender ignorance among potential rights claimants and blur the nature and scope of obligations in respect of protecting these rights.


\textsuperscript{201} Douzinas convincingly writes, “A new idea has triumphed on the world stage: human rights. It unites left and right, the pulpit and the state, the minister and the rebel, the developed world and the liberals of Hampstead and Manhattan”. Costas Douzinas, \textit{The End of Human Rights: Critical Legal Thought at the Turn of the Century} (Oxford: Hart, 2000) at 1.

A number of theories of rights ranging from natural law, legal positivism, to cultural relativism have tried, in their limited perspectives, to tell us what human rights are. But there is no unanimity in their conclusions. Engaging these theories here is inevitable. But the limited focus for this exercise as it relates to the central question to address here is not, what is the nature of human rights? Rather, the key question is: what conception of human rights is needed for a sound approach to legal interpretation in a constitutional democracy like Ghana or Nigeria? This narrower question permits us to avoid all sorts of philosophical issues about the nature of rights that are ultimately not necessary to solve as there are many hard and invariably un-resolvable problems about the nature of rights.

So, it is possible to offer a “schematic” overview of the range of rights theories on offer, before side-lining the ones that are unhelpful for our purposes. On that account, it is helpful to acknowledge, for example, two extreme views about rights: (a) the idea that what is right and what rights people have is a matter of natural law, a universal set of norms that exists independently of what people say or think, derived either from God or from “nature”; and (b) the idea that what is right and what rights people have depends on human behaviour and agency, and will therefore vary with social and cultural differences, and also human emotions and personal attitudes.

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These are two extreme views, and they are therefore controversial. Many people would reject (b). For example, many people would say slavery is wrong, not just for our society but for all societies. But many people would have trouble accepting (a). That position seems to depend upon either religious belief, which in liberal societies people tend to disagree about, or upon a view of “nature” or “the universe” that is difficult to understand. So, the tendency has been for theorists to develop accounts of rights that fall between these two extreme views.

For example, John Finnis seeks to explain natural rights without God in the background as the author of natural rights (though he personally believes God is in the background), and without “nature” as an alternative, secular, author of rights.\textsuperscript{204} He accepts that liberal societies must adopt a non-theological explanation for natural rights, but he also says that simply putting “nature” in for “God” as the author of rights is not the solution. Finnis accepts the view that we cannot derive an “ought” from an “is”, and so we cannot say what humans ought to do or what rights they ought to recognize on the basis of facts about “nature”, even, “human nature”. Finnis argues instead that the basic “goods” of human life, which are the foundations of natural law and natural rights, should simply be seen as self-evident truths that any rational human person will acknowledge, even if they cannot prove their truth.

Another intermediary position is the one put forward by Rawls. His answer was to imagine people in the ‘original position’ designing a constitution behind a veil of ignorance. This approach recognizes that human agency is relevant to our understanding.

\textsuperscript{204} Finnis, \textit{Natural Law and Natural Rights}, ibid.
of justice and rights, but it tries to eliminate personal and cultural factors from the attempt to define justice and rights.\textsuperscript{205}

Another attempt to avoid the idea that rights are either a matter of abstract metaphysics or local cultural attitudes is that advanced by Dworkin.\textsuperscript{206} Dworkin says that we all think certain specific propositions are true, like slavery is wrong, and he then says that identifying the truth about right and wrong is possible without leaving the ‘first-order’ level of discourse about right and wrong and ascending to a second-order level in which the status of first-order truths is questioned. There is no need to resort to metaphysical arguments about truth. Truth emerges within the first-order dimension when people argue for and against propositions through a particular interpretive method. They take the specific propositions that they accept as true and develop a theory of justice or rights that demonstrates how all of those specific propositions can be seen to be coherent and justified; those that do not fit are rejected as untrue, or the theory adjusted to accommodate them, and this theory can then be the test for new questions about justice or rights. Dworkin calls this oscillation between specific and abstract ideas about truth a search for ‘reflective equilibrium’.\textsuperscript{207}

These intermediary positions are mentioned because, for our purposes, it makes sense to be explicit about the philosophical foundations for rights needed for the thesis I am developing. There may or may not be a theological or metaphysical or natural basis


\textsuperscript{207} See also chapter 6 of Dworkin’s \textit{Taking Rights Seriously}, supra note 139.
for human rights; but, answering that complex question is not necessary for understanding the constitutional interpretation of human rights in a liberal democracy. It is sufficient to take a more modest intermediary stance, like any of the ones just described, for they are all based upon the idea that human rights are universal goods about which we can engage in rational discourse. It follows that this thesis cannot, however, be agnostic about all theories of morality and rights. The arguments that follow only make sense if we reject sceptical theories that deny the existence of morality and rights altogether, or which say that morality and rights are entirely a matter of subjective personal belief or attitude.

If such a sceptical approach were permitted, it would be hard to defend the idea of an unwritten fundamental law enforceable by judges against democratically-elected legislators, since there would be no reason to prefer judicial beliefs about rights over anyone else’s. Instead, the thesis is premised upon the idea that morality and rights do have some degree of objective reality to them, and that judges are well positioned institutionally to figure out what they are. People will of course differ about what the best interpretation of morality and rights is, and what is best for one community may not always be, given differences in social and cultural factors, the best for another community; but the thesis assumes that we can engage in rational debate about the objective truth about what rights people have, and that the best answers to hard questions about moral rights (and thus legal rights) exist independently of what particular people
(even judges) may happen to think. In this respect, at least, the thesis follows the general path marked by Dworkin.\footnote{208 See Dworkin, \textit{Justice for Hedgehogs}, \textit{supra} note 140, and Dworkin, “Truth and Objectivity”, \textit{supra} note 206.}

We begin, then, from a starting point that is common to a variety of different rights theories—by accepting the value for people of rights, and the central importance of the right of equal freedom. If we begin the analysis at this starting point, we may focus our energy on the more pressing issue about the relationship between this innate sense of equal freedom and institutions, laws, and constitutions. At this point, it may be useful to be schematic again and distinguish between two traditions in political theory that address this topic: liberal natural rights theory developed by authors like Hobbes and Locke, and classical republican theory associated with older Roman sources.

Pursuant to the liberal natural rights tradition, rights are pre-political and civil society is created to protect them. In contrast, the republican rights tradition conceives of rights as social and political phenomena. There are no pre-political rights, there is no state of nature; rather, the natural condition of humanity is political or social, and because rights define political and social relations, there can be no pre-political or pre-social rights. Even freedom, under this approach, is understood as a product of civil or social order. But even this contest between rights schools is not necessary to resolve. Whether we accept a liberal or a republican explanation, we still accept that rights depend upon some form of civil or social order. And both traditions concede that some rights will be
protected by law while others will not, and so some way must be developed to distinguish between moral rights that are also legal rights, and moral rights that are not legal rights.

However, a detailed examination of these theories of rights, as I said, is not necessary here. The schematic outline is just to acknowledge their existence, and all may not be relevant to the limited task of this section, which is to attempt to distinguish between what I term rule-based rights schools, which say rights flow only from positive law, and value-based schools of rights, which say that rights have \textit{a priori} existence, and so exist independently of legal enactment; I will then suggest that value-based rights theory may be seen to shade into something slightly different, namely, a reason-based rights theory that views rights as inherent within the concept of law. Such a focus is relevant in terms of thinking through the theoretical possibilities of how to conceive of the relationship between moral/natural law rights on the one hand and legal or positive law rights on the other hand as an answer to the key question: what conception of human rights is needed for a sound approach to legal interpretation in a constitutional democracy like Ghana or Nigeria. My use of labels here tracks, although only roughly, the ideas of rule-based, value-based and reason-based constitutionalism developed in the preceding chapter.

4.2.1 Rule-Based Theories of Rights

If human rights are not chimerical in our current rights conscious-century, then they must as a matter of practical reason and reasons of principle have a foundation. To this end, there are some who claim that rights without a basis in specific legislation or
enacted law are legally dubious. These claims are largely associated with positivism, and are related to the positivist stance on the nature of the true properties of law in a legal system. Rights, if they are to have legal legitimacy, must be rooted in an act of law legislated upon by a sovereign. An extreme version of this approach denies that rights can exist at all without law. Thus, Jeremy Bentham, in his *Anarchical Fallacies*, insisted that “natural rights is simple nonsense: natural and imprescriptible rights (an American phrase), rhetorical nonsense, nonsense upon stilts.”

209 Leading up to this oft-quoted sentence, Bentham had declared that “right is the child of law; from real laws come real rights,” which parallels his explanation that human rights are no more than “bawling upon paper”. Rights, on this account, are principally legal commands and their justification is not contingent upon our humanity, but on an expression of legal fact that entitles citizens of a particular state to entitlements that the courts shall enforce.

The claim that there are no *a priori* rights and that the authority and legitimacy of human rights stem from the prescription of state officials or state laws, may still find some support today. 210 But after the post-war human rights revolution, even positivists generally admit that, even in absence of law, rights may exist as a matter of morality. But consistent with the positivist account of the nature of law, this view sees no necessary connection between moral rights and their potential legal basis. On this account, rights in Ghana and Nigeria will not be valid in law because of any adherence to morality. Legal


rights and moral rights are separate, though there may be a contingent connection between them in some respects. Rights are to be particularised and reduced to law by the specific legal acts of the state.

Amartya Sen has argued that this positivist approach, or what we might call the ‘rule-based’ approach, to rights permits the arbitrary rejection of some rights from legal protection, for it permits states to “accept the general idea of human rights but exclude, from the acceptable list, specific classes of proposed rights”. This point is linked to the broader arguments to follow. It may be true that the rule-based account recognizes the flexibility with which the nature and form of rights can be reformed, but it also allows rigidity, perhaps even wickedness, since rights cannot transcend the empirical reality created for them by the state. Under the competing theory of natural law, rights have long been seen to transcend state realities. In the Hellenistic period which followed the breakdown of the Greek city-states, the Stoic philosophers formulated the doctrine of natural rights as something which belonged to all men at all times. These rights were not the particular privileges of citizens of particular cities, but something which every human being everywhere was entitled, in virtue of the simple fact of being human and rational. The rule-based view of rights seems to be a rejection of this idea of moral or natural rights, or at least its relevance as a legal idea.

The rule-based rights theory is also inconsistent with international human rights protections, like the Universal Declaration of Human Rights, the International Covenant

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on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. Of course, to the extent that these human rights instruments accord authority and legitimacy to human rights by virtue of their ratification by party states it can be said that they affirm the rule-based approach. In theory, however, as we will see in the broader arguments to follow, positivism tends to undermine the international basis of human rights because of the emphasis positivists place on the supremacy of national sovereignty. Actions of states may therefore violate universal norms enunciated in the human rights instruments, thereby negating their fundamental value to the human rights community.

Furthermore, even universal consensus on the legal protection of rights does not necessarily lead to a universal acceptance on the determination of the content of the rights legally protected. As Loren Lomasky has argued, the former may be attainable, but the latter may not be. And, of course, seen from the positivist rule-based rights theory, the gains, benefits, interests and entitlements arising from these instruments will be limited to the particular stated rights. This has its limitations. As Jeremy Waldron asserts: “[T]o secure a constitutional protection [for a right not expressly acknowledged], the proponent of the right will either have to agitate for constitutional reform or, if there is already a Bill of Rights, persuade those entrusted with the task of interpreting it to recognise the new

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right under the heading of some existing provision”.\textsuperscript{216} This task may be easy or difficult to achieve and may depend largely on the temperament of the political forces at the time.\textsuperscript{217}

The rule-based theory of rights must be considered in light of specific constitutional contexts. What are the implications if, consistent with constitutional positivism, in the specific cases of Ghana and Nigeria, no valid claims or entitlements exist in the name of human rights unless the sovereign legislator in the legal system amends the rules on the account of a demonstrated acceptable legal reason? South Africa under apartheid had a similar theory of rights, which led to egregious violations of human rights.\textsuperscript{218} In Abacha’s Nigeria, the property of citizens was confiscated, and people rounded up by the security institutions, tortured and incarcerated without recourse to the law courts, all in the name of and within the limits of the law.\textsuperscript{219} There were laws that denied people their rights to a fair trial and the courts’ jurisdiction over such cases was ousted.\textsuperscript{220}

\begin{itemize}
\item[\textsuperscript{216}] Jeremy Waldron, “A Right-Based Critique of Constitutional Rights” (1993), 13 Oxford Journal of Legal Studies 3 at 11.
\item[\textsuperscript{217}] See Jane Mansbridge, \textit{Why We Lost the ERA} (Chicago: University of Chicago Press, 1986).
\item[\textsuperscript{220}] For instance, Decree 12 of 1984 stipulates that "no act of the federal military Government may henceforth be questioned in a court of law" and "divests all courts of jurisdiction in all matters concerning the authority of the federal Government" and Decree 14 of 1994 effectively suspended the right of habeas corpus by forbidding courts to hear cases demanding the Government to produce in court those detained under Decree Two of 1984.
\end{itemize}
So long as rights are regarded as an artefact of explicit law or legislation, arguments about rights will be arguments about whether there is or is not an established rule in the authoritative system of rules that entitles one person to act in a certain way or possess certain things and or requires others to permit or assist that person in such respects.\textsuperscript{221} No assumptions will be made about pre-existing or anticipated positive rules.\textsuperscript{222}

These concerns are closely connected to the relationship between legal rights and legal remedies as backed by state institutions such as courts, legislatures and the police.\textsuperscript{223} This is typically constructed not only on a rejection of the notion of moral rights, but also on the conceptual distinction between what Maurice Cranston would call a “lawful entitlement” and a “just entitlement”.\textsuperscript{224} The former being a positivist or legal right is necessarily enforceable and we can look for such rights in Ghana and Nigeria by reading the laws that have been enacted. This connects both justification and proof as to be able to obtain an authoritative ruling from a court of law.\textsuperscript{225} This attribute does not necessarily apply to the latter as it lacks precision and institutionalisation, though may contingently apply. Not all just entitlements are lawful entitlements. The justness of an entitlement or interest of a Ghanaian citizen will not necessarily cloth it with the required legality as to justify its enforcement by the state institutions upon its invocation. Carl Wellman eloquently wrote:

\textsuperscript{221} Campbell, Rights, supra note 202 at 15.
\textsuperscript{222} Ibid.
\textsuperscript{223} Ibid., at 87.
\textsuperscript{224} Cranston, What Are Human Rights?, supra note 212 at 19.
\textsuperscript{225} Ibid.
Typically a legal rights is a complex cluster of legal liberties, claims, powers, and immunities involving the first party who possesses the right, second parties against whom the right holds, third parties who might intervene to aid the possessor of the right or the violator, and various officials whose diverse activities make up the legal system under which the first, second and third parties have their respective legal liberties, claims, power and immunities and whose official activities are in turn regulated by the legal system itself.\textsuperscript{226}

On this point, rights are legal rights in Ghana and Nigeria on the account that they are characteristically recognised by positive law, the actual law of actual states and which give power to the right-holders to invoke the coercive power of the state for their fulfilment or recompense in their non-fulfilment. There must be an authoritative remedial mechanism that is called into action to deal with alleged rights violations, so that rights may be said to exist even if they are frequently violated, save that there is an appropriate and available legal response to such violations.\textsuperscript{227}

A major difficulty that would beset such an analysis in the specific contexts of Ghana and Nigerian is less about the connection between the available legal rights with remedies as it is the potential inadequacy or non-exhaustiveness of the legal rights. Courts in these countries will not give any remedy to a just claim if such a claim is not authoritatively expressed as a matter of law. The potential certainty and precision of legal rights do not compensate for their potential narrowness, which may preclude certain “just” but “unlawful” entitlements from the citizens. Legality of rights is implored to circumscribe the nature and form of rights.

Having said this, however, it is important to observe that this rule-based theory of rights, which is focused on positive law, is different from the republican theories I

\textsuperscript{226} Carl Wellman, “Upholding Legal Rights” (1975), 86 Ethics 49 at 50-1.
\textsuperscript{227} Campbell, \textit{Rights}, supra note 202 at 89; Hart, \textit{The Concept of Law}, supra note 92.
described above. There is a difference between saying (as republicans do) that rights only
exist in civil or social orders and saying (as Bentham did) that rights only exist if
explicitly enacted by positive law within a civil or social order. For example, the civic
republican could argue that once there is a social or civil order all sorts of “rights” must
be taken to exist, even if they have not been explicitly enacted into positive law; whereas,
of course, Bentham insisted that enactment was necessary for rights to exist.

4.2.2 Value-Based and Reason-Based Theories of Rights

The rule-based theory of rights is not the only one accepted within the human
rights community. An alternative approach, one that we may call the value-based theory
of rights, focuses the rights discourse on the values that justify the recognition of rights
rather than the positive laws by which they may or may not be affirmed. Under this
conception of rights, the suggestion is that legal rules in a state do not create rights, but
only recognise them. The existence of rights is \( a \ priori \) to their legal source and the
validity and legitimacy of such rights are not solely contingent on acts of parliament or
written constitutions that have given concrete expression to such rights. But what really
distinguishes this approach from the rule-based approach is the idea that the \( a \ priori \)
moral existence of rights has a legal aspect too, so that rights may have a legal quality in
absence of explicit or positive legal recognition. Here, we may say, the value-based
theory of rights shades into what we may call a \textit{reason}-based theory of rights.

One version of the reason-based theory of rights insists that certain moral rights
(to equality, freedom, speech, etc.), while perhaps \( a \ priori \) or independent of legislative
enactment, are nevertheless inherent within the concept of legal order or the rule of law. In other words, once people decide to have a legal system, whatever the nature of that legal system, they must recognize certain basic human rights, since it is impossible to have a system that is “legal” without respecting the “rule of law”, and you cannot respect the rule of law without respecting these basic human rights. This is basically an insight Lon Fuller developed, but one more recently developed by T.R.S. Allan and David Dyzenhaus.

Another variation on this theme is the Dworkinian one (though it may be best seen as a value-based rather than reason-based example). Dworkin does not go so far as saying that all legal orders must respect basic human rights because rights are inherent within the concept of the rule of law upon which legal order rests, though he comes close. Instead, he says that once a legal system expressly commits itself to certain rights, principles or values for certain people, then through legal reasoning based upon the idea of law as integrity we should conclude that these rights, principles or values are implicitly extended to embrace analogous rights, principles or values and are extended to cover other people or other situations, if such an extension is warranted by a general theory of political morality that shows the legal materials of that legal system to be coherent and justified.

The advantage of the Fullerian and Dworkinian theories, as the broader arguments of this work will show, is that they tell us: (a) law and legal rights embrace more than what positive law happens to say at any point; it includes things that are implicit or ‘unwritten’”, and (b) there is a technique of legal reasoning available to show us which
parts of ‘morality’ must be considered implicitly part of the law, and which parts of morality are just non-legal in character. Of course neither approach relies upon any positivistic test or rule of recognition to accomplish this task; both seem to rely upon the fact that, ultimately, law and morality are integrally connected and the relationship between them will be an on-going or dynamic process of interpretation (or reasoning or discourse).

However, the broader argument under the value-based and reason-based accounts of rights is that rights that people possess are not the product of positive law. As Robert Nozick has written, “individuals have rights, and there are things no person or group may do to them (without violating their rights)”.

Similarly, Rawls asserts that each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. Such claims perhaps are based on norms and morality of universal humanity, which parallels the Stoics’ idea of a law common to all imperial subjects, of a *jus gentium*. This is also consistent with the language of inalienable and imprescriptible rights in historic official declarations such as the French Declaration of the Rights of Man and the Citizen or newly minted constitutions of nascent democracies, as in Ghana.

This account of rights might loosely be referred to as the theory of natural rights. Though there are, of course, competing accounts of natural rights, most accounts are

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connected to the notion that moral rights may have a legal status independent of legislation. H.L.A. Hart suggested that this idea is built upon a belief that such rights are natural in three separate senses: rights are not artefacts of human will; they do not depend for their existence on social convention or recognition; and in important ways rights are reflected in or have adapted to features of human nature. These predicates must feature prominently in the determination of individual claims which are to constitute natural rights.

It is worth observing that natural rights and moral rights may imply different things for some people. The ‘natural’ label generally suggests an existence independent of both positive law and other social constructs or conventions, whereas the ‘moral’ label, while often used in that sense too, is sometimes used to describe social or political attitudes within particular communities or traditions.

As mentioned above, I will not take a stand on the philosophical debate about whether the objective reality of rights is independent of or linked to social practices, though I will insist upon their having an objective reality, either way, sufficient to allow us to make rational claims about them. In other words, theories of both natural rights and moral rights could have the same implication, that is, that their existence and enforcement by state institutions in Ghana and Nigeria does not solely lie in their being expressed within positive legal rules. It is this commonality that gives the two phrases a conceptual

232 Rex Martin and James W. Nickel, “Recent Work on the Concept of Rights” (1980), 17 American Philosophical Quarterly 165 at 175.
unity. My concern here is not to determine which of these phrases is theoretically appropriate, but only to underscore an account of rights different from the rule-based version. Thus regardless of the usage or conception of moral or natural rights, the *a priori* value-based account of rights may apply to any rights that are held to exist prior to, or independently of, any legal or institutional rules.\(^{233}\) What I have called the reason-based idea of rights takes this one step further, and asserts that certain of these rights (but not all of them) are inherent within the very idea of law.

So, in Ghana and Nigeria as the argument will show, the existence of such category of rights is anterior to and independent of their enactment by legislators, or their declarations, explicit or implicit, by constitution makers.\(^{234}\) This contention is consistent with Amartya Sen’s suggestion that the notion of human rights is built on our shared humanity. Accordingly, rights are not derived from our citizenship of any country, or membership of any nation, but are presumed to be claims or entitlements of every human being.\(^{235}\) Considerations of safeguarding rights thus need not be contingent on citizenship and nationality, and, in the case of Ghana and Nigeria, may not be institutionally dependent on a nationally derived social contract.\(^{236}\)

If this could be taken as a solution to the critical problem of how to reasonably articulate the nature and source of such rights, it does not seem helpful to worry about

\(^{233}\) *Ibid.*, at 84.
\(^{236}\) *Ibid.*, at 144.
Joel Fienberg’s query that: “how can we recognise them and resolve disagreements about their existence, and what practical consequence, if any, follows from their possession, especially when they are not given legal protection”. Fienberg’s concern is that just because rights can be natural or moral, and just because they exist independently of law and citizenship, it does not follow that we know what they are or what they mean. This is partly rooted in the implication that such rights are not deemed real rights by some dubious constitutional and rights language or that they may be wrongfully withheld by law makers of a particular state.

In Ghana and Nigeria, as in other places, it is possible to understand such rights as a manifestation of general or universal values rather than of mere conventional morality. While we may accept that the specific application of universal values may depend upon local conditions, including cultural differences, what cannot be allowed is a theory of rights where rights are simply determined by the *absolute subjective* moral feelings and beliefs of a particular group of individuals; a local community in an obscured corridor of Northern Ghana or Nigeria, for example, cannot have its own entirely unique conception of rights and values, and so it would not be acceptable for such a group to claim of right, as a reasonable value, the discretion to kill all foreigners in Nigeria or to rob them of their property. Though it is possible for peculiar subjective feelings like this to emerge to support values that are thought to be crucial for the development or survival of that group, such values must also cohere with objective and universal principles of morality.

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which exist independently of legislative enactment\textsuperscript{238} or local custom, and can be evaluated and sustained through an interactive process of critical scrutiny with open impartiality, ideally by the courts.

A claim that a certain moral value in Ghana and Nigeria is important enough to be seen as a right is also a claim that reasoned scrutiny will sustain that judgment. No one, of course, expects that there will be unanimity in what everyone actually wants; but the fact of disagreement simply shows how important it is to invoke arguments that can sustain judgments\textsuperscript{239}, arguments which demand a general appreciation of the reach of reasoning in favour of those rights, if and when others try to scrutinise the claims on an impartial basis\textsuperscript{240} and with recourse to objective and universal moral principles. Of course, the proper identification of rights is never an easy task. It can be complicated by at least three possibilities.

First, there is the possibility for such subjective group values to emerge as a language of \textit{a priori} value-based rights. Secondly, such \textit{a priori} value-based rights as recorded may either be independent of objective and universal principles of morality or overlap with it. Lastly, such rights may overlap with legal rights – that is, they are both recognised as \textit{a priori} valued-based rights and given legal protection by a positive law. This has a further precise complication made possible by the potential distinction within valued-based rights between some of such rights that are exercisable as legal rights.

\textsuperscript{238} \textit{Ibid.}, at 152.  
\textsuperscript{239} Sen, \textit{The Idea of Justice, supra} note 235 at 385.  
\textsuperscript{240} \textit{Ibid.}, at 386.
before positive legal recognition, what I have called reason-based rights, and those which cannot be so exercised unless they are enacted into law.  

The reason for this conceptual plurality lies in the character of the value-based rights. Unlike positive legal rights where the question of justiciability is typically expected to be settled upfront, rights in the reason-based category do not easily yield to that conclusion. While there may not be an easy way out there, it is reasonable to suggest that rights on this account are not only rights by virtue of their subjective moral source. In fact, they are rights regardless of their positive legal recognition, and claims about them should be deeply rooted in objective, critical and universal moral concerns for humanity or the wellbeing of the people. Besides, if claims of such rights are strongly supported by these objective moral principles, and sustained through an interactive process of critical scrutiny with open impartiality, legal or judicial protection should be accorded them as to foster their justiciability. Finally, those moral rights that are found to have an implicit legal character will invariably ‘fit’ (to borrow Dworkin’s phrase) into a coherent interpretation of law; indeed, their legal enforcement will be seen to be not only helpful to but necessary for the completion of the aspirations toward legality and constitutionalism within the relevant jurisdiction.

We can thus ground such reason-based rights in a fundamental law of reason that holds humanity sacrosanct and supports claims that seek to validate human dignity, welfare and livelihood. There would be no point in the boast that we respect individual rights unless that involved some sacrifice, and the sacrifice in question must be that we

give up whatever marginal benefits our country would receive from overriding these rights when they prove inconvenient.\textsuperscript{242} To understand rights in this manner is to postulate that rights may not only be independent of legislation but are also independent grounds for judging legislation or law that purports to recognise such rights.\textsuperscript{243}

In democratic systems, especially in young democracies like Ghana and Nigeria, rights should be taken seriously as a mechanism to engender a system of decision-making and social control that serves the general interest. The content of this general interest should encompass the legitimate interests of all members of society as identified by criteria such as wellbeing, autonomy, justice and equality. Indeed, rights have a vital role here in giving clear and forceful expression to those fundamental interests that are recognised as basic to a decent and truly human existence. They provide check lists against which citizens of these states can measure the reality of their democracy, the justice of their laws, the fairness of their economic and social system and the appropriateness of their conduct towards other people.\textsuperscript{244} Moreover, they serve to identify the priority goals of all legitimate governments. They are, at the very least, an affirmation of universal value of human dignity.\textsuperscript{245} All these rights may not necessarily be the subject of the legal rules that define legal rights in Ghana and Nigeria, yet they may triumph on the account of

\textsuperscript{242} Dworkin, \textit{Taking Rights Seriously}, supra note 139 at 193.
\textsuperscript{243} Michael Freeman, “The Philosophical Foundations of Human Rights” (1994), 16 Human Rights Quarterly 491 at 500.
\textsuperscript{244} Campbell, \textit{Rights}, supra note 202 at 95.
their merit to our shared humanity and objective universal moral principles and represent morally valid and fundamental human interests.²⁴⁶

So in confronting the difficult question of defining the theory of rights that is at the core of this thesis, one need not be too simplistic and conclude that either the rule-based or value-based rights accounts, each in its unique right, be exclusively adopted for Ghana and Nigeria. It is reasonable to accept an overlap of the two accounts. Therefore, consistent with the theory of law and adjudication advocated in Chapter Three, it must be stated that rule-based rights in their narrow construction should not be considered as exhaustive of the rights to be enforced in these states. A complete and sound theory of rights for these states should integrate both rule-based and value-based rights. Inherent in the idea of law are rights which must be protected by courts, and the reason-based rights theory helps us to see just this point.

In response, however, it might be claimed that my approach is too simple and perhaps cheapens the argument on the side of justiciability. This is especially so when, as it would be the case in Ghana and Nigeria, a range of communal and individual moral values vie for the status of justiciable rights. Where do we draw the boundary of law in respect of values that have not been given explicit legal protection? If we reject the view, as this thesis does, that the non-recognition of such values in our acts of parliament or written constitutions signals the end of the road for those who think their protection in law is essential for the quality of their lives, then how should courts sort out which values

are truly legal and which are not? How would the courts in Ghana and Nigeria avoid being inundated by controversial moral claims as legal rights and how could they reasonably determine such claims in a manner that fits with their judicial responsibility not to close their doors to such claims merely on the account that they are not explicitly recognised by any legal rule?

Given these difficulties, we are not to suppose that arguments of integration, as advanced, presume anything that entails that rights are coterminous with subjective individual wish lists. As I have already stated above, claims that must be accepted as rights ought to cohere to some objective and universal principles of morality, which exist independently and are capable of inference from legal materials or evaluation and sustenance through a uniquely judicial interpretive process of critical scrutiny by impartial courts. Rights will be seen as entitlements grounded on values that respect and protect individual humanity, or well-being and shared values of the people. Such a theory of public law rights must be sensitive to questions of appropriate remedies from the courts that hold sacrosanct such constitutional values central to preserve human dignity and just democratic governance.

Since the written constitutions of Ghana and Nigeria have already recognised a set of rights rooted in values of this character, it is not inappropriate, in my view, to seek the comprehensive and adequate enforcement of these values. But the enumeration of some rights in written constitutional form should not, on account of the thesis advanced here, be considered as conclusive of rights that are necessary to sustain the arguments of just democratic governance and human dignity, since that would denigrate the normative
value of *a priori* rights to a complete theory of rights for a comprehensive rights regime. In fact, norms of international human rights interpreted from the perspective of the fundamental law as urged in Chapter Three, should in that context, provide grounds for an objective, critical and universal moral concern for humanity. The list of rights expected to ground just democratic governance, human dignity, wellbeing and substantive equality can thus be supported by the international human rights norms. Courts can therefore have recourse to such norms when interpreting these constitutions.

In the particular cases of Ghana and Nigeria, two reasons help the case for seeing their constitutions as aspirational moral ideals for the peoples’ well-being. First, in Ghana, Article 33(5) of the Constitution appears to refute constitutional positivism, and, as shown in Chapter Two, recognises the difficulty in providing explicitly for all rights. This provision points to a penumbra in the Constitution and suggests that the framers of the constitution believed that there are additional fundamental rights that exist alongside those explicitly provided for, which government must not infringe. It affirms the open texture of values and invites the determination of their content by the courts, agreeable with the values inherent in a democracy, and in the interest of human dignity. It opens the possibility for judicial recognition of socio-economic rights as part of a conception of democracy and the advancement of human dignity and legality. If the range of this set of rights seems too wide for legal rights, there is nothing in the provision that disturbs the
courts’ ability from utilising international human rights norms or comparative human rights and constitutional jurisprudence in this regard, through the lens of the “fundamental law.”

In the constitutions of Ghana and Nigeria, as we have seen, directive state principles are provided for in ways that may suggest that at least some rights and moral values are given weaker protection than others. In uniformity, these provisions protect what may be called socio-economic rights. The difficulty with these provisions, however, stems from two factors. First, there is a strong judicial denial that such provisions are justiciable. Secondly, there is a constitutional declaration, at least in the Nigerian case, that such provisions are not enforceable in any court of law. The second factor, it would seem, works to exonerate the courts, at least in Nigeria, from the potential wrong associated with the first factor.

Two separate comments are apt here. The first comment is that the two jurisdictions seem to have accepted the dubious structure and hierarchy of human rights existing in some Western democracies, according to which so-called civil and political rights are regarded as justiciable but socio-economic rights are not. The preference of civil and political rights over socio-economic rights by such democracies is a function of

247 Both the International Covenant on Civil and Political Rights (ICCPR) and The International Covenant on Economic, Social and Cultural Rights (ICESCR) had been ratified by Ghana and Nigeria.
250 Section 6(6) (c) of the Nigerian Federal Constitution, 1999.
the questionable argument that freedom in a state only entails the removal or prevention
of state constraints on the individual and that it is feasible to enforce the former rights by
virtue of their easy institutionalisation. Maurice Cranston puts the argument thus:

The traditional political and civil rights are not difficult to institute. For the most
part, they require governments, and other people generally, to leave a man
alone... The problems posed by the claims of social and cultural rights, however, are
of another order altogether. How can the governments of those parts of Asia, Africa,
and South America, where industrialization has hardly begun, be reasonably called
upon to provide social security and holidays with pay for millions of people who
inhabit those places and multiply so swiftly?\textsuperscript{251}

This is a startling claim because it presumes that the legal status of rights is contingent on
the ease of their enforcement or institutionalisation, as well as the level of
industrialisation of the state. Cranston seems to have downplayed the difficulties
associated with the realisation of civil and political rights, such as rights to life, fair trial
and freedom of expression. As Amartya Sen observes, to “guarantee that every person is
‘left alone’ has never been particularly easy” as it is difficult to “prevent the occurrence
of murder somewhere or other every day”.\textsuperscript{252} It would thus seem a mistake to ground the
philosophical understanding of rights on the ease of the institutionalisation of such rights.

Difficulties in the realisation of rights do not make the claimed rights non-rights.
Thus the “exclusion of all economic and social rights from the inner sanctum of human
rights, keeping the space reserved only for liberty and other first-generation rights,
attempts to draw a line in the sand that is hard to sustain”.\textsuperscript{253} It must be argued that
subscription to democracy and human rights necessitates a clear value commitment by

\begin{footnotesize}
\begin{enumerate}
\item Cranston, What Are Human Rights?, supra note 212 at 13.
\item Sen, The Idea of Justice, supra note 235 at 385.
\item Ibid.
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the state, a fulfilment of which entails both the removal of constraints on the exercise of freedom and positive duties to facilitate the equal enjoyment of such freedom.\textsuperscript{254} If human rights are to be secured to all, it does not make sense to ignore other constraints on the ability of individuals to exercise their rights. Such constraints can arise as much from poverty, poor health, and lack of education as from tyranny and intolerance.\textsuperscript{255}

On this, Amartya Sen would point to a “removal of major sources of un-freedom: poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or over-activity of repressive states”.\textsuperscript{256} It is thus not reasonable to hold a contest between human rights categorisations founded on justiciability between civil and political rights and socio-economic rights in an attempt to deny their inherent indivisibility and interrelatedness. For instance, it is difficult to argue that poverty is not the creation of law or state intervention through property law. Sen for instance thinks that entitlements to livelihood could be denied by a law that “stands between food availability and food entitlement”. In that case, “starvation deaths can reflect legality with vengeance”.\textsuperscript{257}

Sandra Fredman therefore reasons that both set of rights must interact and interrelate. She observes that free speech or assembly is of little value to a homeless or starving person.\textsuperscript{258} Likewise, the rights not to be detained without fair trial or subjected to torture

\textsuperscript{255} \textit{Ibid.}, at 11.
\textsuperscript{257} \textit{Ibid.}, at 165-7.
\textsuperscript{258} Fredman, \textit{Human Rights Transformed, supra} note 254 at 67.
can mean nothing to the beggar in *Agege Market* in Western Nigeria who cannot access the legal system to redress breaches of these rights by the security apparatuses or fellow citizens. In fact, freedom of the individual within a society directly entails a positive duty on the state to ensure the provision of a range of options, of public goods and the framework within which human relationships can flourish.\(^\text{259}\) This does not necessarily conform to Hegel’s argument that the state embodies objective reason that requires the allegiance of all.\(^\text{260}\) as rights are not the supreme gifts of state nor solely founded on state laws. The value that positive duties “add to traditional doctrines of restraint is the perception that failure by the State to act can limit freedom as much as action by the State.”\(^\text{261}\).

The second comment relates to the argument that there may be some *a priori* rights recognised as legal rights, but legal rights that are non-justiciable\(^\text{262}\) and that may be the character of the directive state policies in both Ghana and Nigeria’s Constitutions. To accept this idea would be to undermine our integrative thesis, and it also controversially supposes that the socio-economic rights as articulated in the directive principles are *a priori* rights that cannot be put to use through any court actions. The result would be that although the enforcement of these provisions would be consistent with norms of international human rights and with some comparative human rights and constitutional

\(^{259}\) *Ibid.*, at 18.


jurisprudence, their enforcement through the courts in Ghana and Nigeria would nevertheless be beyond reach. Accordingly, whatever moral claims or values such provisions may have represented for the advancement of human dignity and just democratic governance, are contingent upon their realisation by the politicians acting through the structures of parliament. Such values may thus be held hostage by the political vicissitudes (of corrupt politics) or untutored and transient whims of politicians in Ghana and Nigeria.

Here, recall what I said about one of Cranston’s points above, that the ease of institutionalisation should not be the test for whether a right is a legal right. But he makes a second point, which is that in developing countries even more than in developed countries it is unreasonable to put governments under a constitutional duty to provide socio-economic rights to the people. Conversely, I think, the reverse is true: that there are reasons to think it is more rather than less appropriate to think of socio-economic rights as legal rights in developing than in developed countries. It seems to me that there are two related responses to Cranston. First, it is of course the case that courts cannot hold governments to impossible standards. The claim that socio-economic rights are legal rights in developing countries does not entail that governments must suddenly and magically transform their countries into wealthy economies where poverty is unknown; it only requires them to take reasonable steps to do what is possible to do.

Second, and perhaps even more importantly, is the following line of reasoning. We can all accept that ideally policies of a socio-economic nature ought to be developed and executed by democratically elected branches of state, not judges. There
are sound reasons of democracy why this is so. There are also sound reasons relating to institutional competence. Judges are good at adjudicating legal disputes on specific points of law; judges lack the institutional competence to make broad “polycentric” decisions on socio-economic development. This is why, by the way, Dworkin in *Justice for Hedgehogs* says that socio-economic rights are not only not justiciable, they cannot even really be seen as legal rights under a constitution that acknowledges them.\(^{263}\); recall from his older work his insistence that law is about principle, and politics is about policy. Although it is reasonable to concede to this point, we also should recognise that the judicial enforcement of socio-economic rights is not thereby rendered impossible in cases where there is a relatively narrow or discrete point of principle at stake, rather than socio-economic policy development generally, and where courts adopt appropriate standards of deference to legislatures and executives.

While I shall return to this concern later in the thesis, it is appropriate just to make one further observation in response to Cranston’s second point about industrialization. And that is that in developed countries with long histories of stable politics, in which governments have generally developed socio-economic policy in a responsible fashion, the concern about relative institutional competence and democracy, which suggests that politicians not judges should address socio-economic rights, is very strong. It is right to think in these countries that socio-economic rights should primarily be worked out in the ‘forum of politics’ (the legislature).

\(^{263}\) Dworkin, *Justice for Hedgehogs*, supra note 140.
But, in contrast, in developing countries in transition from a time of military dictatorship and political corruption, where there is not a long history of politicians addressing socio-economic issues in a responsible way, the concerns about justiciability, democracy and relative institutional competence, which we can accept as very real, nevertheless become weaker, and competing concerns about the relationship between socio-economic rights and civil and political rights become stronger. It thus makes more sense to think that at least some socio-economic rights could be appropriately located within the ‘forum of principle’, i.e., the courts, where they will be safe from the vicissitudes of politics that may be, in these young democracies, still rather unpredictable. Indeed, my argument in Chapters Seven and Eight will be that these rights are necessarily legal once the fundamental law of reason is applied to the specific circumstances of Ghana and Nigeria.

4.3 Legitimacy of Judicial Review Determined

How does the theory of rights adopted above affect the defence of judicial review that we should adopt? This is important because, I think, the theory of rights one adopts could help shape the argument one adopts about the legitimacy of judicial review. On that account, the general argument here is that (a) there are rights inherent in the idea of law; (b) judges uphold law, and so (c) it is legitimate for judges to uphold these rights whether or not they are found in the written texts the lawmakers make. Having said this, I think some preliminary comments on judicial review are appropriate.
The wide-spread practice and incisive use of judicial review in the enforcement of rights and the rule of law poses serious challenges to democratic governance. The most remarkable problem in jurisprudence is its alleged inconsistency with the spirit of modern majoritarian democracy. Also, widespread disagreements among scholars of public law exist over its true nature and scope. Some doubts have been raised about its enduring propriety. But before we look into these disputations, it is important to set out the understanding of judicial review that is at the core of this work.

Judicial review may be understood in two overlapping but to some extent distinguishable models: reviewing administrative or executive action in light of primary legislation, and determining the compatibility and validity of administrative, executive and legislative acts, including primary legislation, in light of a written constitution. The first brand is traditionally associated with the *ultra vires* rule. It is mostly, but not exclusively, observed in countries with the political tradition of parliamentary supremacy, which accords primacy to laws enacted by the elected legislature. The second model, in principle, recognises the supremacy of a written constitution by virtue of which the courts may review primary legislation (and other state acts) in order to test its

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compatibility with that constitution. It is also an avenue for the courts to say what the supreme law is. Its value partly rests on the desire to ensure that the constitution is respected in all governmental actions.

However, it may be helpful here to note that there might not be a sharp distinction between administrative law and constitutional law as far as the theoretical foundations of judicial review are concerned. For instance, it is true that in common law jurisdictions there is a big difference between (x) the judicial review of administrative and executive acts in light of administrative law principles, and (y) the judicial review of administrative, executive and legislative acts in light of constitutional law principles. But theoretical foundations for both types of review may be seen to blend together. So, with regard to (x), it is true, as I said above, that one explanation for this type of review is parliamentary sovereignty, that is, keeping administrative and executive decisionmakers within the scope of the powers conferred by Parliament (this is the “ultra vires” doctrine as that term is used in England). We may conveniently term that type of judicial review \((x_i)\). But there is a second theoretical justification, which is that judicial review is designed to keep administrative and executive decision makers within the confines of basic legal values or principles that exist independently of parliamentary intention or will, like natural justice or the rule of law, etc. This ground is often referred to as the common law constitutional ground of judicial review in England, and we may as well term that \((x_{ii})\).

Then turning to constitutional judicial review, where judges review primary legislation (and administrative and executive acts) in light of constitutional law, there are also two theoretical justifications. There is one, as noted above, which holds that the
judges keep the legislature (and other branches of state) within the confines of the written constitution. For our purpose, let’s call that \((yi)\). This parallels the *ultra vires* rule found in \((xi)\): the goal is to uphold written laws and therefore the sovereignty of lawmakers who write and enact written laws. But there is a second theoretical foundation for constitutional judicial review that parallels \((xii)\), or the common law constitutionalist explanation of administrative law. It says that in constitutional law review, judges also uphold basic values of legality when reviewing legislative acts, values that exist independently of the will of constitution writers and therefore independently of written constitutions. We can call this type of review \((yii)\).

In the opinion of some public law scholars, for example Trevor Allan, there is really no theoretical distinction between \((xi)\) and \((yi)\), and no theoretical distinction between \((xii)\) and \((yii)\), at least at a deep or basic level.\(^{270}\) One result of this theoretical continuity is that the expanding literature on common law constitutionalism in the UK, which I concede is mainly about administrative law review, is theoretically relevant to the arguments about unwritten constitutionalism in those places that do have written constitutions, and where the concern is the use of common law or unwritten concepts in constitutional law review.

So, the focus here does not only collapse any sharp distinction between the two types of review but overlap their theoretical grounds. The rationale for this is in three parts. First, the questions to be considered extend beyond *ultra vires* rule. An open construction of that rule is taken. Although the so-called “ultra vires” doctrine in England

\(^{270}\) See in general Allan, *Constitutional Justice*, supra note 128.
has become associated with upholding parliamentary sovereignty in judicial review of administrative actions, the term itself simply means ‘outside power’, and it is often used in other places in the constitutional context. For instance, in Canada, a provincial law that violates federal powers conferred by the Constitution is often called ‘ultra vires’; that is, beyond the power conferred upon the legislature by the Constitution. This would not be different in Nigeria and so, not much turns on the use of this expression.

The second reason is in the constitutional nature of the Ghanaian and Nigerian States: the absence of the principle of Parliamentary sovereignty, and the presence of written constitutional supremacy. The third rationale principally relates to the synthesis of the first two reasons which rests on the idea of constitutional justice through a particular conception of law and rights, which challenges judicial interpretation of the written constitution within the context of a review of the validity of all legislative and executive acts in Ghana and Nigeria. But this is situated within legal theory with reasonable proximity to arguments that do not necessarily discriminate between the theoretical grounds of review offered above.

4.3.1 Judicial Review in a Written Constitutional Context

In Ghana and Nigeria, like in the United States and South Africa, all forms of state action, including administrative and executive acts but also acts of primary legislation, or Acts of Parliament, are scrutinised for their conformity to the rights and freedoms set out in the Constitution. This rights-oriented judicial review is part and parcel of general constitutional review, and the courts are required to strike down any
statutes or executive instruments for violations of rights.\textsuperscript{271} Under this model of review, the Constitution, not Parliament, is in principle the supreme source of law. The Constitution is, in other words, entrenched. As a general rule, it is the Constitution that sets the limits for the validity of all legislative and executive acts. Thus, any Act of Parliament or executive action which does not fall within the purview of the letter and spirit of the Constitution will be declared invalid, unconstitutional or inoperative, unless the said action is justified within the provisions of the Constitution.\textsuperscript{272} As this form of review seeks to create a hierarchy of norms or laws, with the Constitution and its norms at the apex, it in effect installs the operative presumption that basic legal values such as the rule of law, human rights and constitutionalism cannot be impugned by primary legislation or an executive act without reasoned constitutional justification—or at least this is the theory of judicial review that I will develop.

Constitutional judicial review is usually justified on three separate but logically related propositions: the will of the people is sovereign, the written Constitution, which represents the sovereign will, is the supreme source of law of the state, and it is the duty of the judiciary to say what the law is.\textsuperscript{273} This line of reasoning is often traced to the famous case of \textit{Marbury v. Madison},\textsuperscript{274} where the Supreme Court of the United States

\begin{footnotesize}
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\item \textsuperscript{271} See Forsyth, \textit{Judicial Review and the Constitution}, supra note 264.
\item \textsuperscript{274} (1803) 1 Cranch 137, 177; 5 US 87, 111 (Marshall CJ) at 176-78.
\end{itemize}
\end{footnotesize}
claimed that it was “the province and duty of the judicial” branch to declare and uphold the law, including the law of the Constitution.²⁷⁵

Central to this approach to judicial review is the idea that the written Constitution is the founding legal text made morally legitimate by virtue of an original act of consent by the people’s sovereign will.²⁷⁶ Accordingly, all legitimate governmental powers in the State owe their existence, scope and normative force to the sovereign will of the people as expressed in the written Constitution.²⁷⁷ In that case, the written Constitution becomes the supreme law of the state, which the courts, as the final arbiters of what law is in the state, must uphold against all inconsistent governmental actions.²⁷⁸

Implicit within these assertions, however, lies another justificatory principle for judicial review on constitutional grounds, one that is theoretically distinct from the sovereignty of the people as expressed in the written Constitution, and that is the idea of constitutionally limited government.²⁷⁹ This idea is grounded in the objective of creating and nurturing the culture of liberty and equality by assuming that government is (aside from any decisions of the people expressed in their written Constitution) limited by the requirement that it always respect human rights, the rule of law and the values of constitutionalism—or, using the language I have adopted in this thesis, by the

²⁷⁸ Ibid.
requirements of reason embraced by the theory of fundamental law. Central to this justification for judicial review is the conception of government as agent or trustee of the people, that all governmental powers are held in trust for the people. It shows the *locus* of power in a modern democratic constitution and how it should be exercised. It also concerns itself with values and principles that are *a priori* commitments upon which the whole edifice of democratic government is premised.\(^{280}\)

Fundamental law, in this sense, is the ultimate means by virtue of which the courts may verify whether an alleged piece of legislation is legal and legitimate, so as to be entitled to judicial enforcement.\(^ {281}\) Where it is not, the court shall declare it unconstitutional or inoperative. The underlying goal is to protect human rights and fundamental freedoms. Rights and freedoms are accepted values of modern society which must be protected. They articulate the fundamental ideals that must generally animate all government actions and particularly constitute the defining limits of legislative freedom.\(^ {282}\) Such institutional protection is necessary in order to keep governments to their constitutional objectives and limits. It is my argument in this thesis that this is what the constitutions of Ghana and Nigeria promise.

### 4.3.2 Objections to Judicial Review

There are, of courses, objections to the idea of constitutional judicial review. Most of these objections are premised upon the idea that it is an affront to the central principle


\(^{282}\) *Ibid.*
of democracy – majority rule. The enduring propriety of judicial review in promoting and protecting the ideals of the rule of law, constitutionalism and human rights does not foreclose all questions on its democratic legitimacy. A chief proponent of arguments against judicial review as understood in this work is Alexander Bickel, who characterises the nucleus of his claim as “the counter-majoritarian difficulty”. Another sceptic of judicial review is Jeremy Waldron, who contends that judicial review privileges “majority voting among a small number of unelected and unaccountable judges, [and so] it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights.” The politics of accountability will require that power is exercised by those directly elected by the electorate to whom they are periodically accountable.

Even Dworkin, a proponent of judicial review, accepts, like Bickel and Waldron, that the “majoritarian premise” which is “about fair outcomes of the political process” presents a problem for judicial review. In fact, whether one subscribes to Bickel, Waldron or Dworkin’s characterisation of this problem, it is fair to suggest that they all

286 Thomas Jefferson held judicial review as “a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy”-Letter to William Jarvis, in P.L. Ford (ed.), The Writings of Thomas Jefferson, vol.10, 160-61.
287 Bickel, The Least Dangerous Branch, supra note 265 at 16.
share a common predicate, though with different conclusions: they have grounded the problem in a democratic theory. This theory requires that for judicial review to be legitimate in a particular State its practice must be reconcilable with the underlying assumptions of democratic majority rule, and for most people this means that it must be shown to have been authorised by some positive democratically legitimating fact.\(^{290}\)

This claim goes to the heart of this thesis. As Bickel contended, “when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it”.\(^{291}\) This fits in very well with Dworkin’s *majoritarian premise* (though Dworkin rejected it) which “insists that political procedures should be designed so that, at least on the important matters, the decision that is reached is the decision that a majority or plurality of citizens favors, or would favor if it had adequate information and enough time for reflection”\(^{292}\).

We may accept that these observations do reflect a unified and coherent viewpoint. That is, a representative democracy principally requires the elected body of the people to take the responsibility of lawmaking for the general welfare of the citizenry. The process by which laws are made in this context has a better and higher pedigree by virtue of its deliberative character. This does not necessarily amount to a belief that decisions achieved in a democracy are neither to be subjected to constant reconsideration

\(^{290}\) Luc Tremblay terms this as specific legitimacy argument which must be positively authorised by the existing legal rules in the state. See “General Legitimacy of Judicial Review and the Fundamental Basis of Constitutional Law”, *supra* note 281.

\(^{291}\) Bickel, *The Least Dangerous Branch*, *supra* note 265 at 16-17.

\(^{292}\) Dworkin, *Freedom’s Law*, *supra* note 289 at 15-16.
nor meant to be static, for democracy "does mean that a representative majority has the power to accomplish a reversal".\textsuperscript{293}

Furthermore, such a view "does not deny that individuals have important moral rights the majority should respect", and on this ground, in many countries, with the exception of some legal systems (e.g., the United Kingdom), where it is thought that "the community should defer to the majority’s view about what these individual rights are, and how they are best respected and enforced\textsuperscript{294}. at least a narrow brand of judicial review is generally accepted. But the exception allowed here for the respect of vital individual rights by the majority through the exercise of judicial review is still seen as a formidable problem for democratic theory. In fact, though the exception is not denied by the majoritarian premise, its defenders tend to think that when judicial review limits a legislative initiative, something morally regrettable had happened.\textsuperscript{295} Part of the rationale for this response is the sense that judges lack the consent of and are not accountable to the governed. As Bickel wrote, a "coherent, stable – and morally supportable – government is possible only on the basis of consent, and the secret of consent is the sense of common venture fostered by institutions that reflect and represent us and that we can call to account".\textsuperscript{296}

Bickel concedes that checks on legislative power may be valuable, but insists that the need for coordinated action by both legislature and executive to make law goes a long

\begin{footnotesize}
\begin{enumerate}
\item Bickel, \textit{The Least Dangerous Branch, supra} note 265 at 17.
\item Dworkin, \textit{Freedom’s Law, supra} note 289 at 16.
\item \textit{Ibid.}
\item Bickel, \textit{The Least Dangerous Branch, supra} note 265 at 20.
\end{enumerate}
\end{footnotesize}
way to achieving this end. As Bickel claims, “statutes are the product of the legislature and the executive acting in concert, and that the executive represents a very different constituency and thus tends to cure inequities of over- and underrepresentation”.\textsuperscript{297} This may tend to serve as an institutional insurance against uncritical decisions. From this perspective, the idea of judicial review not only fails to understand that judges may not be as politically responsible as members of the other arms of government, but also depreciates the “central function assigned in democratic theory and practice to the electoral process”.\textsuperscript{298}

Moreover, judicial review, under this approach, has the tendency over time to weaken the democratic practice on the account that it “expresses, of course, a form of distrust of the legislature”\textsuperscript{299} founded on a possible “lowering of the level of legislative performance”.\textsuperscript{300} It does not even help matters if, in a quick riposte, the claim is made that judges are not the only officers of the state that tend not to be politically accountable and responsible. The exercise of delegated power by some state officials does nothing to dislodge the force of the argument that judges, by the exercise of the power of judicial review, are guilty of political non-accountability. For instance, Bickel denies that the exercise of delegated power by civil and public servants is coterminous with what judges do with the power of judicial review, with no or little sense of accountability. He asserts: “so long as there has been a meaningful delegation by the legislature to administrators,\textsuperscript{297, 298, 299, 300}

\begin{itemize}
\item \textsuperscript{297} \textit{Ibid.}, at 18.
\item \textsuperscript{298} \textit{Ibid.}, at 19.
\item \textsuperscript{299} \textit{Ibid.}, at 21.
\item \textsuperscript{300} \textit{Ibid.}, at 22.
\end{itemize}
which is kept within proper bounds, the essential majority power is there, and it is felt to be there – a fact of great consequence”.

There are more dilemmas for judicial review in modern constitutional democracies than the counter-majoritarian difficulty. For example, Jeremy Waldron accepts that rights must be respected, but he insists that interpreting rights is a contested value-based activity, and so legislators, who have democratic legitimacy, are just as good as judges at doing it.

Waldron thinks that the legislatures are best suited for such exercises as the questions raised by bills of rights “are not issues of interpretation in a narrow legalistic sense.” On the contrary, they are “watershed issues” better resolved through legislative debate, mediated by societal needs and commitments, some of which are expressed in legislation. Unlike judicial reasoning, the legislature is not distracted by the strings of “legalism” and decisions made have a higher claim to legitimacy as a multiplicity of opinions from elected representatives are likely to have been considered. Besides, contrary to the ideals of self-governance, judicial review insidiously precludes an honest and good faith disagreement among citizens on the topic of rights, which is an affront to their participatory aspirations in a democratic process. The judicial interpretation of rights invariably leads to a form of constitutional reform over time, which is a form of disrespect levelled at the people in constitutional orders.

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301 Ibid., at 20.
303 Ibid., at 44-45.
Waldron’s argument emphasizes the process-based value of the peoples’ direct participation in a democracy which, as he says, “depends solely on the point that, whatever you say about your favourite democratic procedures, decision-making on matters of high importance by a small elite that disempowers the people or their elected and accountable representatives is going to score lower than decision-making by the people or their elected representatives”.\textsuperscript{304} Recognising the participatory rights of the ordinary men and women in a democratic system in the determination of major questions of principle is, under this view, the best way to honour and respect human rights.

It is important to distinguish between questions of “who gets to participate” as opposed to “how do they decide” when we disagree on major issues in a democracy. For instance, John Hart Ely is famous for the argument that judicial review, if allowed in a democracy under the constitution’s open-ended provisions, can appropriately concern itself only with questions of democratic process or participation, and not with the substantive merits of the political choices under attack.\textsuperscript{305} In effect, judicial review’s sole justification is to support the democratic processes of the legislature that, as Waldron has argued more recently, is the right place to define rights. This is very different from theories of judicial review that focus on judicial mistrust of other branches of state, or the view that, aside from issues of trust, at a certain level the proper articulation of legal and constitutional rights should be seen as a uniquely judicial function that legislatures and

\textsuperscript{304} Ibid., at 45.
executives are, despite (or indeed perhaps because) of their democratic qualities, ill-suited to perform.\footnote{Ibid.} On the accounts of judicial review just summarized, it is morally wrong and politically illegitimate, or at least problematic, to allow unelected judges to decide as ultimate arbiters what the supreme law of the land means by either affirming or setting aside legislation enacted through the majoritarian democratic process.\footnote{John Hart Ely puts it this way: “[T]he central problem of judicial review is: a body that is not elected or otherwise politically responsible in any significant way is telling the people’s elected representatives that they cannot govern as they’d like.” Ibid., at 4-5.} The wisdom of the majority of elected representatives may well, from time to time, be doubted, but, on this view, it is less likely that a few unelected judges will have it right.

4.3.3 In Defence of Judicial Review

If we believe in the theory of democracy supposed by the arguments advanced above, then we must also be prepared to answer some serious questions. How do we balance or accommodate this conception of democracy with the theory of law and rights advocated here, premised, in part, on the idea that a proper legal system must establish and protect rights that the dominant legislature does not have the power to override or compromise, even if the makers of the written constitution have not expressly recognized those rights? Is the supposed conflict between democracy and judicial review a real one? It seems true to say that one’s response to these questions will depend on one’s conception of rights, law and democracy and their role and value for the entire legal order.
To respond to these issues, it may be useful to return to the basic premise of this section that links it with our theory law and rights: it is that (a) there are rights inherent in the idea of law; (b) judges uphold law, and so (c) it is legitimate for judges to uphold these rights whether or not they are found in the written texts the lawmakers make. Three specific arguments will be made here. The first refutes the democracy-based objections raised above; the second attempts a rights-based justification of judicial review; and the third argument synthesizes the first two with the contention that if we accept the fundamental law claims about the place of law in a legal system, then judges can and are fit to impose standards that are unwritten to discipline legislation in order to protect rights that are unwritten or implicit in the written sources of law.

First, with respect to the tension between democracy and judicial review: there is, it seems to me, a considerable difficulty with those presumptions which treat democracy as exhaustible in procedural terms. Absent any demonstrated evidence to sustain these presumptions as the absolute truth, the democratic deficit argument that is levelled at judges and judicial review is weak. Besides, it is a mistake to suppose that democracy can purely be understood in terms of the processes by which decisions are made in a state. Thus majority decisions on the account of this objection are not justified in terms of the ends they promote, but the procedures by which they are made. It is an unhelpful myth

that there is a reliable formula or theory in majority rule that produces right answers to all questions or ensures that decisions are always consistent with the people’s interest.\textsuperscript{309}

In drawing a distinction between democracy and majority rule, Dworkin observes that democracy “means legitimate majority rule, which means that mere majoritarianism does not constitute democracy unless further conditions are met”.\textsuperscript{310} Accordingly, democracy is best understood to have both enabling rules and disabling rules that jointly safeguard the important values of the people. While the enabling rules feature in the construction of majority government by stipulating who may vote, when elections are held, and issues of representation, the disabling rules appropriately restrict the powers of the representative officials created through the operation of the enabling rules.\textsuperscript{311}

If so, judicial review is just one of these disabling rules and its exercise would not contradict the needs of democracy in Ghana and Nigeria when geared towards safeguarding important constitutional values from what Dworkin described as the possibility of “monolithic tyranny” by the majority.\textsuperscript{312} It is possible to assert that political participation in Ghana’s democracy, for example, seeks to avail to the people equal opportunity to the legal resources of their state. This is not limited to legislative deliberations or periodic electoral politics as the democratic deficit proponents would like us to belief. Legal challenges of these processes and the substances of the decisions

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\textsuperscript{309} Kent Roach, \textit{The Supreme Court on Trial: Judicial Activism or Democratic Dialogue} (Toronto: Irwin Law, 2001) at 12.
\textsuperscript{311} Ibid., at 2-3.
\textsuperscript{312} Ibid., at 10.
\end{flushright}
achieved through such processes, in courts may actually enhance the quality of democracy.\textsuperscript{313}

Such actions will test the democratic standards allowed in the participatory process \textit{vis-à-vis} the substantive quality of the decisions taken.\textsuperscript{314} Judicial review of legislation or executive action is an additional opportunity for the political community to participate in the legislative process.\textsuperscript{315} In the event of a successful challenge to the validity of a law, legislators are told of their failures in meeting democratic standards, and failed challenges may, in contrast, fuel public discourse and generate the general consciousness about public policy that is needed in a successful democracy.\textsuperscript{316} John Rawls’ concept of public reason, when applied to the discourse of judges in their decisions, relates well with this account, as courts may serve as public fora for discussions about fundamental justice. The criterion of reciprocity which is central to this conception of public reason implies that courts must interrogate and discipline the decisions taken both by public officials and citizens with a view to ensuring that such decisions meet the requirements of reasonableness in the course of achieving their policy objectives.\textsuperscript{317}

\textsuperscript{313} Barry Friedman, “Dialogue and Judicial Review” (1993), 91 Michigan Law Review 577. The author engages the debate on the legitimacy of judicial review and the counter-majoritarian claims raised. In defending the judiciary, he argues that a dialogue occurs between the courts and public opinion when issues of constitutional interpretation arise.


\textsuperscript{315} \textit{Ibid}.

\textsuperscript{316} \textit{Ibid}.

A proper conception of democracy in Ghana and Nigeria must therefore extend beyond matters of process and the direct participation of ordinary citizens in fundamental decision-making to include some disabling rules, such as the power of judicial review, to help protect minorities and fundamental values from the majority’s momentary judgements that can be pushed through such processes. The goal is to seek unity between process and substance in democratic decision-making. It is thus problematic to characterise majoritarian rule as the source of legitimacy for all state decisions. Such characterisation simply amounts to a misapprehension of the value of the judiciary in a democratic state. It seeks to pit the judicial branch against other arms of government and it discounts the former in matters of governance.

Discounting the role of the judiciary in governance may not only serve as a sort of code for judicial conservatism, but it may also obscure from view the ways in which judicial review may provide a legitimate avenue of political activity for those seeking to rectify historic injustice.\textsuperscript{318} In addition, it is seems oblivious of the possibility of majoritarian tyranny, which can be as repressive as one can imagine for minority and individual rights, and all that responsive and responsible governance stands for. There is no assurance that majority rule will not be used, as it so often has, to subvert the public interest in justice and deprive classes of individuals of the true values of democracy.\textsuperscript{319} Crediting the democratic majority with a good intent represents one side of the equation,

\textsuperscript{318} This in part is connected to its ability to promote political equality and participation even in democracies with a just and hardworking legislature. See Annabelle Lever, “Is Judicial Review Undemocratic” [2007] Public Law 280 at 281. See also E.V. Rostow, “The Democratic Character of Judicial Review” (1952), 66 Harvard Law Review 193.

and holding it to this presumption is another. On this account, judicial review provides a
positive counter-force to the possibility of majoritarian tyranny by policing the other arms
of government and preventing them from treating with contempt the fundamental
interests that a proper democratic legal system should protect.

We should therefore reject Ely’s argument that the proper role of courts is only to
police the processes of democracy, not to review the substantive decisions made through
those processes. Indeed, in many states, it is hardly obvious that these processes are
sufficiently democratic, even in the sense of securing accurately majoritarian will, to
warrant the respect that writers like Ely and Waldron give them.320 Laws approved of by
the processed-based account of democracy may offend certain substantive interests of
people within the same body of polity. Dworkin is therefore right to say that if we give up
the idea that there is a canonical form of democracy, then we must also surrender the idea
that judicial review is wrong because it inevitably compromises democracy.321 Judicial
review insures that the most fundamental issues of political morality will finally be set
out and debated as issues of principle and not political power alone, a utility which the
legislature alone cannot achieve.322

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321 Ibid., at 70.  
322 Ibid.

The attractiveness of this broader conception of democracy, in part, serves as a
tranquiliser to the assertion that democracy necessarily requires that all officials who hold
and exercise state political power be elected. There are a good number of individuals,
including judges, in the state with significant amounts of political power, who do not submit to regular (or any) electoral accountability. It is enough that the power so held is particularly derivative of the electoral system or generally a part of the institutional arrangement as established by a good constitution. Jeremy Waldron objects by stating that it is not enough to show, as this argument does, a scintilla of democratic respectability in the constitution of judicial power. For that does not show that the courts should have prerogatives that the people and their directly elected representatives lack, nor does it establish that when judicial authority clashes with parliamentary authority, the former ought to prevail.  

There are at least two responses. First, there is a problem if Waldron’s point is conceived as an argument of general application. For instance, in Ghana as in Nigeria, the Constitution gives the judiciary the priority over the legislature in the determination of law within the context of the Constitution. Moreover, Waldron’s point looks self-defeating as it discounts the character of a democratic process instituting the power of judicial review as a check to the legislature and thus any sudden and unreasonable inclinations of the majority. That is simply the case in Ghana and Nigeria. The rationale for this is that judicial review is understood as part of a democratic institutional arrangement with the view to foster the culture of responsible and just governance.

This sort of institutional arrangement is consistent with the general conception of constitutional democracy. The Constitution represents an act of explicit consent by the people of the fundamental law and thus authorises the distribution of all state power. It

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323 Waldron, “A Right-Based Critique of Constitutional Rights”, supra note 216 at 44.
also sanctions various systemic checks and balances. One of these checks (or, as Dworkin would call them, disabling rules) is the power of judicial review invested in the judicial branch to police the actions of the legislature and executive. This is an institutional arrangement specifically, as in the Ghanaian and Nigerian cases, authorised by the Constitutions to regulate the use of political power in the general interest of the people. Otherwise the risk is too great that the legislature or the executive will overstep their legal boundaries and tyrannise the people.\(^{324}\)

But Waldron may still object by saying that preauthorisation by the constitution of judicial review only settles the question of the legality, not the legitimacy, of judicial review. There is nothing in the pre-authorisation argument to show that the quality of the judicial reasoning should be preferred over the reasoning of the legislature. As noted, Waldron says interpreting rights is a contested value-based activity, and so legislators, who have democratic legitimacy, are just as good as, or better than, judges at doing it. Mere constitutional authorisation does not necessarily discount the force of these claims, and judges remain unelected yet they control an essential power to set aside legislation considered by the elected representatives. The response to this argument constitutes the head of my second argument here.

It may be difficult in the context of democracy to separate legitimacy from legality, though the reverse is possible. If the constitution as a legal document is accepted as legitimate, it makes no sense to declare as illegitimate the *proper exercise* of a power

granted by it. Unless the grounds for which the constitution was made are successfully impeached, the reasonable exercise of the power of judicial review is thus defensible. Besides, judges are accountable to the people or their elected representatives, especially in the appointment and disciplinary procedures.\textsuperscript{325} This accountability is perhaps most effectively manifested through the practice of courts publicly justifying their decisions by issuing reasoned opinions. This requires that courts publicly demonstrate that their decisions about the validity of laws are justified by the Constitution.\textsuperscript{326} In this way, judicial review can be seen as an attempt to establish a public reading of the constitution and its moral foundations.\textsuperscript{327}

It may also be said that Waldron’s objection misconceives the quality of the institutional context within which such decisions are taken. In fact, the issue is not just about whether the legislatures do better than the judges in moral reasoning on rights. Rather, the issue may also be about the congeniality of the institutional context in which the decisions are taken. “Are there,” Dworkin asks, “institutional reasons why the legislative decision about rights is likely to be more accurate than a judicial decision?”\textsuperscript{328} The answer to this argument, I think, lies in the distinctiveness of legal reasoning, and in the fact that legislators tend to reason through hard problems differently than judges.

Getting at and appreciating this difference is one important part of understanding the necessity of judicial review. Indeed, I agree with and adopt Dworkin’s view that the

\textsuperscript{325} Samuel Freeman, “Constitutional Democracy and the Legitimacy of Judicial Review” (1990), 9 Law and Philosophy 327 at 365.
\textsuperscript{326} Ibid.
\textsuperscript{327} Ibid.
\textsuperscript{328} Dworkin, A Matter of Principle, supra note 320 at 24.
judiciary, particularly the higher courts, are the appropriate fora of principle to deal with issues of rights protection.\footnote{Ibid., at 33, 69-71.} The reason being that, courts can avoid harmful prejudice and short-sightedness to which the elected majority sometimes succumb.\footnote{Gerald N. Rosenberg, “Judicial Independence and the Reality of Political Power” (1992), 53 The Review of Politics 370..} They are as well not paralysed by the vicissitudes of democratic politics by virtue of their independence.\footnote{See Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (Harvard: Harvard University Press, 2004).} In effect, courts can deliberate on issues of principle undistracted by popular pressures and the possibility of public anger.\footnote{Waldron, “The Core of the Case Against Judicial Review”, supra note 288 at 1363.} Yet judicial moral reasoning is not unqualified moral reasoning, rather, it is the reasoning about the best moral interpretation of law, in service of values embedded in a constitution and in the general idea of legality, in the name of the whole legal system. In this respect, judges are under intense constraints of interpretive coherence that legislators seem hardly aware of. Adding to a political system a process that is institutionally structured as a debate over principle rather than a contest over power is desirable, and that counts as a strong reason for allowing judicial interpretation of a fundamental constitution.\footnote{Ibid.}

At this point, we may shift to look at the rights-based justification of the institution of judicial review. In fact, it is probably best to concede the point that the judiciary is not democratically accountable in the way that legislatures are, for judicial
culture is not permeated with the ethos of elections, representation and electoral accountability in the way that the legislative culture is. But such an admission does not undermine the argument in favour of judicial review. Judicial review remains a useful mechanism at the disposal of the courts to protect and insulate from possible hostile political decisions the fundamental rights and values guaranteed in the constitution.

As I argued in the first section of this chapter, at least certain rights are inherent in the idea of law, which judges have an obligation to uphold. We may not separate the obligation to uphold this idea of law from the rights that flow from it. A valid judicial protection of the constitution of a state as the fundamental law would thus include the protection of those rights inherent in the idea of fundamental law applied to the specific circumstances of the state. Judicial review provides an institutional framework by which the courts are able to scrutinise legislative and executive actions with the view to giving meaning to the constitutional commitment to fundamental human rights and freedoms. A review of their acts potentially brings them within the ‘four corners’ of the general values and rights as guaranteed or contemplated by the constitution. Rights as understood in this work become a “metaphorical trump card held by the people that can prevent the legislative and executive from doing a certain thing” that offends the rationale or value

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for which such a right exist. Indeed, they are characteristically seen as a “higher order of law” that trumps unhealthy acts of other democratic institutions.

The limits of respect for the judgements of any official body, however representative of the general community, “must always depend, as a matter of reason, on their content and on the arguments offered in their defence”.

338 If the accommodation of constitutionalism with the needs of democracy is defended on the account of protecting rights from the power of elected officials, then “asking judges to interpret and enforce those rights provides the best available forum for viewing the question of their interpretation as moral rather than a political one”.

339 Accordingly, the relationship among rights, law and democracy must take seriously the idea that certain fundamental values such as rights are shared by the people and this requires the maintenance of such values “through constraints on the majority decision”.

340 An attractive political community, as Ghana and Nigeria aspire to be, would wish its citizens to engage in politics out of a shared and intense concern for the justice and rightness of the results, an objective that is not fulfilled only by a process-based account of democracy.

341 In that case, democracy and such constraints as are appropriately fostered by the institution of judicial review are not antagonists but partners in principle in aid of the protection of rights.

338 Allan, Constitutional Justice, supra note 128 at 163.
341 Ibid., at 334.
342 Ibid., at 346.
As correctly argued by Lorraine Weinrib, judicial review welcomes judicial protection of individual rights and their value structure to continuously correct for the perceived inadequacies of majoritarian politics. Underlying this model is respect for the dignity, equality and autonomy of each member of the community. Whatever the sources and trajectories of these commitments, the aim of collective political life is to create and preserve a structure in which each of us, to an equal extent, may pursue and act upon these commitments, either alone or within a chosen community.\(^343\) Thus judicial review may plausibly be interpreted as a scheme for protecting the rights of the citizens in public law.\(^344\) It provides “both a legal standard against which the decisions of public bodies may be judged and also a normative basis from which the exercise of judicial power can be justified.”\(^345\) It preserves the quintessence of constitutionalised rights and freedoms. Rights may thus be seen as the central juridical values for the legitimacy of judicial review in constitutional democracy.

This makes our last argument simple. As our theory of the fundamental law of reason contends, the moral and hence legal foundations of the constitution are not only articulated in positive law, and so there is no good reason to limit the legitimacy of judicial review of legislation to the written text of the constitution. Courts or judges can impose relevant standards that are based on unwritten or implicit rights, rather than rights


expressly guaranteed in a written document. The existence of the written text does not preclude such rights and standards. Once properly conceived as legal rights, their validity and legitimacy are not solely contingent on acts of parliament or written constitutions that may give them concrete expression. Law and legal rights are more than what positive law happens to say at any point; they include values that are implicit or “unwritten”. The defence of judicial review need not be based on any positivistic test or rule of recognition to accomplish this task. Therefore, it is legitimate for judges to uphold the rights that are inherent in the idea of the fundamental law of reason, whether or not such rights are found in the written texts the lawmakers make.
Chapter 5

Independent Courts and Juridical Application of Fundamental Law

Theories in Ghana and Nigeria

5.1 Introduction

In the previous chapters I have developed a theory of constitutional interpretation according to which judges approach the task of interpretation on the basis of a non-positivist understanding of legality, one in which ‘law’ is regarded not simply as the product of lawmakers’ decisions and intentions, but, in some respects and in relation to some issues at least, as embodying fundamental values that gain normative force independently of what is decided, written or intended by lawmakers. I have emphasized that the key to understanding this theory is to understand the unique style of reasoning that it demands. As we saw in Chapter Three, one value of looking to the old common law discourse on fundamental law is the emphasis placed on law as a form of discourse or reasoning that is uniquely juridical and (thus) appropriately judicial.

It follows that the institutional setting within which this style of reasoning is made possible— an independent judiciary—must be a central aspect of the fundamental law itself. On that account, the proper reception and application of a theory may be contingent upon the political and social conditions of the jurisdiction, and the fact that the basic notion of judicial independence is logically built into the very notion of adjudication itself –
therefore a fair outcome, is rendered both more likely and more visibly likely by the fact that the decision maker possesses the appropriate degree of autonomy.\(^\text{346}\)

It is important however, to expand this introduction in an attempt to establish a link between the unique style of reasoning inherent within the theory of a fundamental law of reason on the one hand and the principle of judicial independence on the other by means of a brief discussion of the classic ‘case’ of \textit{Prohibitions del Roy}.\(^\text{347}\) In this note, Sir Edward Coke, then Chief Justice of the Common Pleas, described his reaction to the suggestion that the King, as the fountain of justice, could personally sit and decide matters in any court. In the presence of the King James I, Coke said the following:

\[ \text{… it was answered by me, in the presence, and with the clear consent of all the Judges of England, and Barons of the Exchequer, that the King in his own person cannot adjudge any case, either criminal … or betwixt party and party … but this ought to be determined and adjudged in some Court of Justice, according to the law and custom of England; and always judgments are given, \textit{ideo consideratum est per Curiam}, so that the Court gives the judgment … [I]t is commonly said in our books, that the King is always present in Court in the judgment of law; and upon this he cannot be nonsuit: but the judgments are always given \textit{per Curiam}; and the Judges are sworn to execute justice according to law and the custom of England. … [T]he King cannot take any cause out of any of his Courts, and give judgment upon it himself …} \]

The King was not pleased with this answer, stating that “he thought the law was founded upon reason, and that he and others had reason, as well as the Judges …” In short, if the law was reason and if the King could reason just as well as the judges, then the King could judge cases. Implicit in the King’s answer is the further idea, that as the King is sovereign his view of reason should necessarily prevail over that of his judges. Coke’s response to the King is a classic statement of judicial independence and the rule of law—


\(^{347}\) (1607) 12 Co. Rep. 63.
one that links judicial independence to the character of judicial reasoning and thus to the conception of law as a form of unwritten reason. Coke stated:

...to which it was answered by me, that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it: that the law was the golden metwand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, quod Rex non debet esse sub homine, sed sub Deo et lege [the King is under no man, but is under God and law].

The King thought he was above the law, and he eventually removed Coke from the bench in 1616. The protection of judges from this sort of political interference in England was not confirmed until the Act of Settlement, 1701\(^\text{348}\), after which superior court judges have held their offices not at the Crown’s pleasure (durante bene placito) but during good behaviour (quamdiu se bene gesserint). After the Act of Settlement judges could only be fired for just cause, and after an address to both Houses of Parliament.\(^\text{349}\)

So, in Coke’s note, we have a very forceful assertion of the inherent link between the independence of the judiciary and the conception of law as a special or “artificial” brand of reason. The King—and by implication the executive generally—cannot interfere with the adjudication of cases because the King cannot engage in this special form of reasoning. But what if the King happened to be a trained lawyer who had engaged in a “long study” of the

\(^{348}\) 12 &13 William III, c. 2.
\(^{349}\) See Act of Settlement, 1701, section 3, para. 7: “judges commissions [shall] be made quamdiu se bene gesserint, and their salaries ascertained and established; but upon the address of both houses of parliament it may be lawful to remove them.”
law? Could that King judge cases? Coke’s statement may be unclear on this point. However, implicit in his statement is something that we, today, would wish to bring out and make explicit, which is the idea that the sort of legal reason required for the rule of law to flourish can only emerge through a discourse that is separate from the normal political debates of the day, and members of the executive are unlikely to be in a position to carry on this special form of discourse very well for very long, even if they are trained lawyers.

The principal rationale for using Coke to make this point in this chapter is that Coke’s name is, as we saw in Chapter Three, linked to the historical version of the “fundamental law” idea that I am developing in this thesis. The independence of the judiciary, we may say, was an integral part of common law constitutionalism as developed by Coke in the early seventeenth century. However, having made this point, we should return to and confront the series of questions that form the subject matter of this chapter, namely, could this “common law” conception of fundamental law, as it has since been developed by more modern theorists (which I have discussed in earlier chapters), flourish as the basis of a theory of constitutional interpretation in places like Nigeria and Ghana? In particular:

- Does it work in a multicultural state?
- Is it appropriate in a post-colonial state?
- Is it possible in a transitional democracy?
- Do Nigeria and Ghana have the right judicial culture—i.e., a sufficiently independent judiciary—for it to operate?
5.2 Multicultural Strings in Constitutional Interpretation

Ghana and Nigeria are multicultural societies.\textsuperscript{350} There are not only numerous ethnic groups with varied cultural practices and norms,\textsuperscript{351} but also in both states more than two hundred distinct local languages thriving on thousands of dialects. In both colonial and post-colonial constitutional arrangements, the different cultures in these states were recognised and conceptualised around their traditional political institutions (chieftaincy)\textsuperscript{352} and customary laws.\textsuperscript{353} These customary laws are still at play and relevant today. But in thinking through the status of local law and custom in Ghana and Nigeria, I think it is important to take a step backward into colonial history in order to be as clear as possible on the legal foundations and limitations of these laws and customs from the British perspective.

In the colonial context, the key historical instrument for the identity of law in Ghana was the Supreme Court Ordinance, 1876, which introduced English law and affirmed the continuity of local customary laws in the Gold Coast Colony. Section 14 introduced the common law and equity as well as English statutes of general application. Section 17 provided that these English laws were to be applied subject to local conditions and

\textsuperscript{350} Here, “multiculturalism” is to be referred not only to reflect demographic realities, but also to reflect the distinct normative cultural values.


\textsuperscript{352} See Martin Klein, “Traditional Political Institutions and Colonial Domination” (1971), 4 African Historical Studies 659.

circumstances, and such laws could be altered by local legislation. And section 19 provided that, where appropriate, courts were to apply local laws and customs so long as they were not “repugnant to justice, equity and good conscience.” This basic legal duality—an English-based common law system plus local customary law—continued after independence with each successive constitution.\textsuperscript{354}

It should be noted that Ghana’s Supreme Court Ordinance 1876 was adopted and made applicable in Nigeria as the \textit{Supreme Court Ordinance 1914}, when Nigeria was united into one state. Therefore the provisions, as just cited, on the reception of English law into Ghana and the continuity of customary law are also applicable to Nigeria. Even so, the application of customary law in Nigeria was also governed by special provisions in the various high court laws, such as section 6(a) of the Native Courts (Amendment) Law, 1960\textsuperscript{355}, and section 26 of the High Court Laws of Lagos State, 1973.\textsuperscript{356} In the colonial period, both countries had extensive systems of so-called Native Courts for the application of local customary laws, which were integrated into a regional system of appeals, with a common West African Court of Appeal, and, ultimately, an appeal to the Judicial Committee of the Privy Council in London.\textsuperscript{357}

But aside from this major reception ordinance, it was the \textit{Colonial Laws Validity Act} of 1865 which provided the colonial systems a proper fit into their larger imperial

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{355} N.R. No. 10 of 1960.
\item \textsuperscript{356} 1973 Lagos Laws Chapter 52.
\end{itemize}
\end{footnotesize}
The basic point of the Colonial Laws Validity Act was to confirm that a law made in the colonies that was repugnant to an Act of the imperial (or U.K.) Parliament, or an order made under such an Act, that extended to the colony, was of no force or effect (section 2). But it also confirmed that colonial laws that were repugnant to the “Law of England” were not void, unless, in violating the Law of England, they also violated an Act of Parliament or order made thereunder extending to the colony (section 3). In fact, the 1865 Act was intended to dispel the notion that colonial legislative authority was in some sense bound by vague notions of humanity or equity associated with the Laws of England. The Act confirmed that the only legal limitation on colonial legislative authority was the express terms of Acts of the imperial Parliament, or orders made thereunder, that extended to the colony in question.358

The crucial point here is that it was not the Colonial Laws Validity Act, 1865, as such, that made local customary laws void if repugnant to principles of equity. Rather, it was the terms of the colonial ordinance that confirmed the continuity of native or local customary law, which, in the case of Ghana and Nigeria, said (as noted above) that these local laws and customs were in force so long as they were not “repugnant to justice, equity and good conscience.”359 Indeed, this proposition merely affirmed a principle of common law (see below). The rationale for this, that is, that customary laws repugnant to justice or equity were void, is rooted in the claim that the colonial legal systems in Ghana and

Nigeria were appendages (or really components) of the British Empire, and subject to the sovereign and supreme will of the British Parliament. Indeed, the Colonial Laws Validity Act affirmed this principle.

But the caveat here is that the supremacy of the “laws of England” was not as firm a principle as one might think. First of all, colonial laws could alter, amend, repeal or override the “law of England” as it applied within a colony, unless expressly prevented from doing so by an Act of Parliament or order made thereunder extending to the colony. This point is made explicit in section 3 of the Colonial Laws Validity Act. The history of this Act confirms that the legislative intent behind section 3 was to affirm that colonial laws could even trump fundamental principles (e.g., of equity or good conscience) that formed part of the Law of England (unless, of course, to do so violated an Act of Parliament or order made thereunder extending to the colony). This is not to suggest that the assertion, that customary laws in Ghana and Nigeria repugnant to equity were void, is wrong. In fact, it is right. But the source of that limitation on customary law was not the “laws of England” as such, but the local colonial ordinance that affirmed the continuity of local customs so long as they were not “repugnant to justice, equity and good conscience.” Or at least this was the orthodox way that English lawyers saw the matter.

The core aim of this brief survey of legal history is to convey the idea that legal pluralism, reflecting cultural and ethnic diversity, is a deeply rooted aspect of the legal traditions in Ghana and Nigeria. But legal pluralism was not something that was wholly

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contingent upon some local colonial ordinance. It was, rather, itself a fundamental principle of common law—though not the common law of England but rather the common law of the British Empire, of which Ghana and Nigeria were a part. The continuity of local laws and customs after the assertion of Crown sovereignty over a colonial territory was a principle of imperial common law: judges would presume that local laws and customs, not English law, were in force, at least among native peoples, so long as these laws and customs were not inhumane or repugnant to good conscience or morality, or inconsistent with British sovereignty, at least until legislation provided otherwise. In other words, the local colonial ordinances that confirmed the continuity of customary laws subject to good conscience and equity in Ghana and Nigeria merely affirmed a basic or fundamental principle of continuity embraced by British imperial common law.

In the colonial context, and as far as the legal pluralism in its modern sense is concerned, there is a rich line of cases in which British judges tried to recognize and apply customary laws. For example, in actions for a declaration of title to chieftaincy, family ownership of land, and rights of a “white cap chief” to certain family property. By the early twentieth century, the Judicial Committee of the Privy Council had developed a fairly robust approach to protecting the continuity of local customary laws. In *Amodu Tijani v. The Secretary, Southern Nigeria*, an appeal involving “one of the Idejo White Cap Chiefs of Lagos”, it was held by Viscount Haldane that judges were to be careful when applying

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361 The classic case on these points is *Campbell v. Hall* (1774), Loft. 655 (per Lord Mansfield).
365 [1921] 2 A.C. 399 (P.C.).
“the various systems of native jurisprudence throughout the Empire” to avoid the tendency of unconsciously equating legal concepts with those with which they were familiar under English law. 366 This is not to say that British judges were never culturally insensitive or never displayed Eurocentric cultural superiority. Of course, they did. *In re Southern Rhodesia*367 is a sad example of this. But it is perhaps worthwhile noting that the common law sought to reconcile the unity of imperial authority with the diversity and plurality of local customary legal systems within Africa, in part out of respect for ethnic and cultural difference, and these leading cases are an important part of that story.

In the post-independence period, this duality of legal norms did not fade off.368 There has been a sustained attempt to recognize the customary laws of the various ethnic groups as part of the corpus of constitutional law in Ghana and Nigeria. Article 11(2) and 11(3) of the Ghanaian Constitution provide that the “common law of Ghana” includes not only the rules of law generally known as the common law, but also “rules of customary law” or “rules of law which by custom are applicable to particular communities….” That is, the common law in Ghana embraces both general common law and particular local customary norms. The Nigerian Constitution suggests that provision is made for a Sharia Court of Appeal and a Customary Court of Appeal for the Federal Capital Territory, Abuja (Sections 260-269), and a Sharia Court of Appeal and a Customary Court of Appeal for each State.

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367 [1919] A.C. 211 (P.C.)

needing one (Sections 275-284) in service of the values and practices of her varied cultures.\textsuperscript{369} It is inescapable that the multiplicity of customary codes is a legal reality in both states.

Without proper reflection, we may have concerns about these various customary laws, for they represent a web of conflicting cultural norms—strings of multiculturalism as it were—that may tie down and restrict the judicial interpretation of the Ghanaian and Nigerian Constitutions. How do the theorists relied upon in this work—who, as seen, advance a non-positivist liberal conception of law premised upon the idea of a fundamental law of reason—get us out of this problem? The question is not whether the legitimate multicultural values in each country are given recognition by their constitutions, but rather whether the constitutional recognition of these legitimate multicultural values is consistent with the theory of constitutional interpretation developed in this work. This question is problematic if it is presumed either that the constitutions of these states and their authoritative traditions of interpretation have been developed to the exclusion of, or without reference to, the cultures that constitute these states\textsuperscript{370} or that the claims of cultural recognition within the constitutional institutions of these jurisdictions and their authoritative traditions of interpretation are blind to the principles of fundamental law urged here. Certainly, both of these presumptions are either wrong or capable of being conversely sustained. In fact, both constitutions, as I said, have


made customary law and by implication the values of the various cultures in Ghana and Nigeria part of the legal norms within the respective countries, and yet have also recognized human rights on a universal basis.

There appear to be good reasons to think, then, that the theory of fundamental law and public law rights is not restricted to monocultural jurisdictions. It may be the case, for example, that such a theory of law may work in a multicultural jurisdiction with the appropriate qualification on the reach of cultural diversity claims. It is this latter supposition that interests me, as the former claim may be rebutted on the account that the legal systems of the United States and the United Kingdom, where the works of most of the non-positivists relied upon here are focused, are not monocultural states. There is some sense of cultural pluralism in both states supported by the existence of different cultural values and tensions among Hispanics, African-Americans, Indians, and Asians in the United States, and Irish, Scottish, Welsh, English and even citizens of the larger Commonwealth in Britain.

What then is the nature of the qualification on the cultural diversity claim that makes reliance on the non-positivists and the common law notion of fundamental law possible in Ghana and Nigeria? In answering this question, it must be said that the argument that multiculturalism implies the application of restrictive interpretive strings in the application of the theory of constitutional interpretation considered in the preceding chapters is, on the appearance, seductive, but it is a fallacious one. As noted by a famous Ghanaian philosopher, Gyekye Kwame, “cultural pluralism…does not necessarily
eliminate the possibility of horizontal relationships between individual cultures”.\footnote{Gyekye Kwame, \textit{An Essay on African Philosophical Thought: The Akan Conceptual Scheme} (Cambridge: Cambridge University Press, 1987) at 191.} It is justifiable to recognize and accommodate a fair degree of cultural diversity within Ghana and Nigeria without necessarily suggesting that such cultures cannot be disciplined by the central values of the fundamental law.

Note, however, that I am not suggesting the revival of what might resemble the colonial assertion of limitations on customary law derived from “justice, equity and good conscience” during the colonial era. The problem for us today with this limitation, as it was applied by British judges in the colonial context, is that it was motivated by attitudes of Eurocentric cultural superiority and paternalism, and judicial opinions often contained passages, for example, references to the contest between barbarism versus civilization, offensive to us now. So, it would be potentially controversial to invoke this old colonial rule in support of the argument here. But I want to take away the Eurocentric rhetoric, and assume that the judges adopting this approach are now Ghanaian and Nigerian, not British. Seen in this light, their approach suggests the basic gist of the argument I am making in this thesis. For example, Lord Atkin, in \textit{Eshugbayi Eleko v. Government of Nigeria},\footnote{[1931] A.C. 662 (P.C.) at 673.} said the following:

\begin{quote}
An interesting question arose at the hearing as to the modification of an original custom to kill [a deposed chief] into a milder custom to banish. Their Lordships entertain no doubt that the more barbarous customs of earlier days may under the influences of civilization become milder without losing their essential character of custom. It would however appear to be necessary to show that in their milder form they are still recognized in the native community as custom, so as in that form to regulate the relations of the native community \textit{inter se}. In other words, the Court cannot itself transform a barbarous custom into a milder one. If it still stands in its barbarous
\end{quote}
character it must be rejected as repugnant to “natural justice, equity and good conscience.” It is the assent of the native community that gives a custom its validity, and therefore barbarous or mild, it must be shown to be recognized by the native community whose conduct it is supposed to regulate.

There is, once we eliminate the culturally and historically loaded language of barbarism and civilization from this statement, something very compelling about what is said. The judges are saying, in effect, that the normative force of customary law must emanate from the community itself, not from the judges, and so long as the customary law is consistent with justice and humanity it can receive judicial recognition; but the judges will not impose their view of justice and humanity to make a customary norm something that it is not. This seems to be an attempt to reconcile local cultural and legal diversity with a fundamental common law notion of reason—which is what I am arguing for. It is thus possible on these qualified terms to ground the varied cultural values or rights in the fundamental law of reason that holds humanity sacrosanct and support claims that seek to validate human dignity, welfare and livelihood. Besides, this will engender the evolution of a comprehensive human rights regime for the people.

It is the very paradox at the heart of the human condition that underlies the argument that the legal recognition and protection of multicultural values within the constitutional orders must be subject to their being consistent with justice and humanity, principles central to the fundamental law of reason. While all cultures seem committed in principle to valuing human livelihood and wellbeing fastened to a fundamental conception of human rights and dignity (a point underscored in Chapter Two of this work), there may exist disturbing cultural practices that deviate from that commitment.
and offend these values. For instance, human sacrifice as it may happen in some communities either as part of religious or cultural rituals to accompany dead chiefs are a marked negation of the value of life and livelihood. Or, to take another example, the practice of *Trokosi* in Ghana not only poses a challenge to the theory of rights argued for in Chapter Four of this work, but also constitutes a blatant travesty of justice to hundreds of children who are victims to this practice.  

This cultural practice allows children, especially girls, to be sent into “cultural slavery” in service of a priest of a community shrine in order to atone for sins committed by a family member. Not only this, but a good number of girls in Ghana and Nigeria are victims of the cultural practice of female genital mutilation (FGM), a practice that kills many and facilitates among them the spread of sexually transmitted diseases – including HIV/AIDS - and forced marriage. Moreover, women, more often than not, are subjected to dehumanizing widowhood rights, and several forcibly taken to camps, generally referred to as witches’ camps, on the basis of certain conceived “cultural crimes”. Such cultural practices need a rigorous judicial discipline within the constitutional arrangements of Ghana from the perspective of law as an aspirational moral ideal. The existence of multicultural values therefore does not represent a legal

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license to the various cultures to treat with contempt norms of international human rights or the principles of the fundamental law.

5.3 Colonial and Post-Colonial Dualism

However, the problem here may be greater than the multicultural strings considered above. As a matter of fact, having been colonised by Britain, Ghana and Nigeria may be prone to an aspect of constitutional culture of their (former) colonial master.377 This may be a source of a problem for the application of the theorists relied upon in this work. The conception of this problem, it seems to me, lies in two probable dualities. The first of these two being an internal duality, which suggests that the judiciary in the jurisdictions under study may, to a large extent, be influenced by the colonial legal culture where the defined role of the judge, essentially, was to administer justice under law.378 Such a role does not entail questioning the legality of law itself, as in the nature of constitutional review urged in this work. But closely connected to this is the second dualism, which is that the post-independence period in these states was either one of imposed constitutions, drafted largely with a modern European (in this case, British) constitutional orientation, or a product of modern constitution-making, an act whereby a

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people frees itself from custom and imposes a new form of association on itself by an act of will, reason and agreement.\footnote{Tully, Strange Multiplicity, supra note 370 at 60.} Thus the historical formation of constitutions in these states may constitute a challenge to the recognition of the current peculiar political arrangements of the states and the authoritative interpretative traditions that the courts should embrace. Judges who must work under the constitutional framework of the latter model of constitution-making may sometimes find themselves not only wearing the imperial garbs of the first model, but also operating within the mind-set of the British constitutional system: where judges are largely constrained in reviewing the constitutionality of laws due to the legal strings of the traditional notion of parliamentary sovereignty. According to orthodox constitutional theory in Britain, courts will not entertain any legal questions pertaining to the constitutionality of a Parliamentary Act.\footnote{See A.V. Dicey Introduction to the Study of the Law of the Constitution 8th ed. (London: Macmillan & Co., 1915). Even with the enactment of the Human Rights Act of 1998, courts in the United Kingdom are only under an interpretative legal duty to read domestic laws consistent with the European Convention of Human Rights (ECHR), and, if this is not possible, judges are limited to making (so-called) declarations of incompatibility, which signal a defect in the statute but do not affect the statute’s legal status.}

If these dualities persist in the current constitutional context in Ghana and Nigeria, we may have some worries as to their effect on the judicial approach to constitutional adjudication. While the exercise of the power of judicial review (as explained in Chapter Four) would require courts in Ghana and Nigeria to interrogate the constitutionality of legislative and executive acts, the continuing influence of the colonial legal culture as well as British constitutional ideas may hinder the judicial role in this
respect. As a result, reliance on the theories of Dworkin and other non-positivists in this thesis may, it seems to me, prove difficult in light of this potential dualism between colonial and post-colonial judicial interpretative cultures and expectations. But it is important to observe that if these dualities are problems that may arise, perhaps it is because of one presupposition: that judges are unable to distinguish the current constitutional arrangements from the colonial legal culture and the British constitutional system. This is tied to two distinct responses.

First of all, it seems to me that one simple answer to the “colonialist” claim against using “colonial”-based legal systems and their theorists is this: the common law was initially imposed on Nigeria and Ghana in the nineteenth century, but when they became independent countries, the people embraced the common law tradition as their own, or as part of their own, legal tradition. There is a common law of Ghana, and a common law of Nigeria, and although these systems of law draw upon the British tradition, they are now, really, Ghanaian and Nigerian traditions. Indeed, as noted, the common law of Ghana embraces both the “common law” narrowly defined and local customary laws within distinctive communities.

Secondly, it is obvious that in both Ghana and Nigeria, there are written Constitutions with explicit provisions authorising the courts to review Acts of Parliament or actions of the executive in order to safeguard guaranteed rights, and in both of these states the value of parliamentary sovereignty has thus been diminished (or eliminated) on the account that the Constitutions have been declared as the supreme law. Such a constitutional structure seems to encapsulate the concern for correcting, through judicial
review, in appropriate cases, both the form and content of a law or valid rules and regulations in light of constitutional standards to which the two countries in question have committed themselves. In other words, both legal systems have consciously departed from the orthodox understandings of constitutionalism associated with the colonial legal culture and the related British constitutional tradition.

This departure opens interpretive possibilities that were before obscured, including the possibility of a justiciable fundamental law erected upon unwritten rules of the common law and the application of non-positivist conceptions of law and rights, as developed in this work, with the concomitant need to realign the conception and function of law towards securing justice, human well-being, and fairness in administrative decision-making, and to advance the ideals of the rule of law, constitutionalism and human rights in a democratic state. Of course, this does not preclude our drawing upon other strands of common law constitutionalism that have emerged within the British tradition that are, as a matter of normative theory today, compelling within the Ghanaian and Nigerian contexts—as I have already done by invoking the legacy of Coke. Finally, it should be clear from the discussions in Chapters Three and Four that I am not taking the work of non-African theorists without modification in light of African demands; on the contrary, I am arguing that the fundamental law of reason has very particular aspects in transitional and developing countries in Africa that it may not have in developed Western countries. To this point we can now turn.

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381 Forsyth, “Of Fig Leaves and Fairy Tales”, supra note 269.
5.4 Transitional Democratic Premise

It might be said that Ghana and Nigeria, being young democracies emerging from periods of military dictatorship and military suppression, might have a difficulty with the applicability of the considered theorists, who come from stable and developed democracies, in the construction of an appropriate analytical framework for the examination of constitutional law in these countries in two ways. The first is a negative influence: the judiciaries in both countries may be timid and may therefore resist the adoption of new theories of constitutional interpretation. The concern is that judges will still be influenced by the culture of oppression and silence that characterized the military governments preceding the adoption of current constitutional arrangements. In Ghana, for instance, three High Court judges were abducted and gruesomely murdered in the 1980s by the operatives of the then military government, perhaps as a means of coercing the judiciary into submission.382 However, the second possible influence, which is positive, contemplates a courageous court which will not hesitate to adopt new approaches to constitutional adjudication as a means of consolidating substantive constitutional change in these states—so that the egregious violations of human rights experienced under military dictatorship would never be judicially tolerated again.

Since the arguments of constitutional justice in this work frown upon judicial timidity, the transitional democratic premise in both Ghana and Nigeria shall be used as a spring-board to enforce such constitutional values that are at the core of the people’s wellbeing. This does not preclude the judges from applying theorists whose legal orders

382 Jacob Yidana, Who Killed the Judges (New Town, Accra: Bismi Enterprise, 2002).
are different, but whose aims are congruent with those supported by the current constitutional arrangements in Ghana and Nigeria. Such an exercise is both important and necessary to fill gaps (created partly by military governance) in the domestic laws, clarify certain legal positions, or attempt homogenizing, where applicable, constitutional ideals.\footnote{383} This is not only a probable means, as the claim goes, to legal truth\footnote{384}, but also nourishes a presumption that “there is a significant degree of congruence between problems and their possible solutions across the spectrum of contemporary constitutional democracies.”\footnote{385} The courts in Ghana and Nigeria are thus encouraged to engage in comparative constitutional jurisprudence, as suggested in Chapter Two, in the course of the judicial settlement of constitutional questions.

In the relevant literature, especially on post-conflict/post-dictatorship problems of political violence in Ghana and Nigeria, it is acknowledged that there is a certain common dynamic within these states.\footnote{386} The initial move to independence in the 1950s and 1960s unleashed democratic forces after a long period of imposed order under colonialism. With this increased openness came expressions of identity and ambitions for political power from within many diverse ethnic and religious communities, and the resulting jockeying for power led to conflict and political violence. Next came military dictatorships, which were justified on the grounds that national-state identities had to be consolidated and built before

\footnote{385}{Ibid., at 8.}
\footnote{386}{Ukoha Ukiwo, “Politics, Ethno-religious Conflicts and Democratic Consolidation in Nigeria” (2003), 41 Journal of Modern African Studies 115.}
democracy could be introduced, because democracy only led to clashes between local ethnic groups unless preceded by the forging of unified national identities. Finally, and most recently, democracy has been restored in countries like Nigeria and Ghana, and yet, once again, political conflict, instability and in some cases violence (especially in Nigeria) have resulted between ethnic groups. From this story, what lessons emerge?

First, it is clear that the three distinct themes that I have addressed above, namely, multiculturalism, post-colonialism, and challenges of democracies emerging from periods of military dictatorship, are all, in Nigeria and Ghana, closely intertwined. They are not separate but closely related issues. They represent different aspects of a common phenomenon, and our legal-theoretical responses should (it may be argued) be global in nature. The achievement of constitutional justice in these states will ultimately involve judicial appreciation of principles of fundamental law that transcend jurisdictional boundaries. This approach affords to judicial institutions the opportunity to understand and appreciate constitutional provisions through inter-court or inter-jurisdictional dialogue and through their own participation within the larger discourse of universal norms of human wellbeing and international human rights. Perhaps this approach will allow courts in these young democracies to jettison the stance of constitutional positivism that was, in part at least, fostered by military dictatorship and to negative the thinking that only the intentions of the legislators or the intentions of the drafters in a legal system matter in discovering the legal values inherent within enacted laws.

However, beyond this general premise, Ukooha Ukiwo has good counsel for us as to the way forward. He argues through an analytical framework that holds that the interface
between ethnicity and democratization is found in absence of effective citizenship and good governance in post-transition societies. In the circumstance that democracy does not go beyond the conduct of multiparty elections to include improvement in the quality of life of the people, there is frustration, and people who already feel alienated from the state are vulnerable and likely to be mobilized around counter-elites who exploit extant popular alienation from the state by whipping up sectarian sentiments.\textsuperscript{387}

In other words, the tension between democracy and ethnic violence is exacerbated, if not caused by, failure by states to provide a just socio-economic context for peoples’ lives. The solution to multicultural tension is not military dictatorship, but “effective citizenship and good governance”. The problem in Nigeria, Ukoha Ukiwo argues, is that the state is still seen as a partisan participant within the political struggle for resources, not as a “neutral ground to mediate conflict” between different classes or groups.\textsuperscript{388} He quotes a 2001 survey in which more than half of Nigerians stated that they did not view the 1999 Constitution as reflecting the nation’s values and aspirations.\textsuperscript{389} Having no trust in central or state political institutions, people turn to local ethnic groups for support and to further their ambitions, and political violence becomes more likely.

Two interesting conclusions could be drawn from this analysis. First, one could argue that there is a legal side to the author’s political argument (which he does not address directly). If we accept his basic premise, that good governance, effective citizenship and neutral state institutions are necessary to address post-colonial and post-military regimes in

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{387} Ibid., at 120.
  \item \textsuperscript{388} Ibid., at 129.
  \item \textsuperscript{389} Ibid., at 131.
\end{itemize}
\end{footnotesize}
Africa, then, surely, central to this project is the establishment of the rule of law and a very robust conception of constitutionalism, an approach to law that embraces the value of equal citizenship as inherent within the very idea of legality. Second, if it is true that citizens in post-military regimes like Nigeria do not accept the written Constitution as reflecting their values, then, aside from a process of re-writing the Constitution, which could simply breed more tension and hostility, the main way forward is to bridge the gap between values and supreme law through the adoption of the sort of interpretive approach to constitutional law that this thesis offers. In short, the three problems I have addressed in this section of the thesis, multiculturalism, post-colonialism, and democratic transitionalism, are all reasons for, not against, the adoption of the sort of theory of constitutional interpretation I argue for in this thesis.

5.5 Judicial Independence

But the major question of this chapter remains: Do Nigeria and Ghana have the right judicial culture—i.e., a sufficiently independent judiciary—for a fundamental “law of reason” to operate? Here, it is helpful to return to the general idea that the very conception of law as an unwritten or fundamental law of reason hinges on there being a very particular style of legal or judicial discourse, which in turn depends upon the independence of the judiciary from the effects of partisan political debate and partisan political forces. The key questions are: What is needed to achieve this? And do Nigeria and Ghana have whatever that is? But before looking into the specific cases of Ghana and Nigeria, it is vital first of all to perform two tasks: (a) state a rationale for an independent judiciary for this work
and (b) briefly explain the sort of judicial culture or independence necessary for the fundamental rule of reason to flourish as a mode of constitutionalism and constitutional interpretation.

5.5.1 Rationale for an Independent Judiciary

The judicial submission to a properly understood “conscience” of the constitution or law in young constitutional democracies like Ghana and Nigeria requires a particularly independent judiciary. This is important for at least three reasons: (a) it puts the courts on a proper pedestal to achieve constitutional justice by understanding law or the constitution as an aspirational moral ideal for the wellbeing of the people without bowing to undue political interference; (b) as a necessary connection to (a) above, it fosters judicial protection of rights and other constitutional values necessary to preserve human dignity and the welfare of the people in the legal system; and (c) it helps the courts in these legal systems to break with their authoritarian and politically negligent past and reconstruct a constitutional culture that supports the protection of constitutionalism, rule of law and human rights, values that frown upon impunity which allows actors within the state to transgress the legal system for mere partisan political gain.\footnote{Erik S. Herron and Kirk A. Randazzo, “The Relationship between Independence and Judicial Review in Post-Communist Courts” (2003), 65 The Journal of Politics 422 at 422.}

The main premise is that courts with greater guarantees of independence should be freer to exercise their own will and consequently should have more opportunities to engage in a kind of judicial review\footnote{Ibid., at 425.} that identifies and protects constitutional values at
the core of which is the well-being of the people. Beyond doubt, the synthesized ideal of these rationalizations of judicial independence is that it is a central value to the court system, which in part fosters objectivity and impartiality of the judicial process. Its functional viability assures litigants a high quality of justice and the development of coherent and sound rules of law in the legal system. It guarantees, in our contemporary political settings, the protection and efficient enforcement of constitutional norms, fundamental human rights and freedoms and insures the citizens against general misrule.

5.5.2 Meaning and Standards of Judicial Independence

Scholarship on the concept of judicial independence abounds. Yet, these writings are less than clear on its nature and scope. One traditional conception of judicial independence, as posited by J.E.S. Fawcett, states that “independence is primarily freedom from control by, or subordination to, the executive power in the state.” Such a view correctly supposes that an independent court in a legal system must not be controlled by the whims of the executive. But this may be too simplistic, for the

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394 Ibid.
legislative branch, or even the judiciary itself, may occasionally threaten judicial independence. In many jurisdictions, the proposed budget for the judiciary, drafted with or without consultation of the judiciary, must receive the blessing of the legislature.\textsuperscript{398} This may be true where, for example, the legislature (rather than the constitution) is the source of rules regulating judicial tenure.\textsuperscript{399}

Thus the substantive and procedural reach of the concept of judicial independence makes it a complex concept,\textsuperscript{400} it defies a single definition accepted by all scholars\textsuperscript{401} and may thus point to the need for a broader outlook. A fundamental rationale for this state of complexity is: what, in reality, constitutes independence of the judiciary is largely a function of a country’s history, constitutional structure, traditions, conventions and experience\textsuperscript{402} even though, judicial independence in many polities around the world share a number of commonly held standards. These standards include security of tenure,\textsuperscript{403} financial freedom\textsuperscript{404} and decisional and institutional independence.

\begin{footnotesize}
\begin{enumerate}
\item Germany is one of such cases. Donald P. Kommers, “Autonomy Versus Accountability: the German Judiciary” in Peter Russell & David O’Brien (eds.), Judicial Independence in the Age of Democracy: Critical Perspectives from around the World (Charlottesville: University Press of Virginia, 2001) at 139.
\item See Shetreet, Shimon & Deschênes, eds. Judicial Independence, supra note 393.
\item Ibid.
\item Reference re Remuneration of judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3, per Lamer C.J. at paras. 82-109.
\end{enumerate}
\end{footnotesize}
The concept is explained in the relevant literature from two distinct perspectives. Peter Russell stated these as the institutional autonomy of judges, and the actual behaviour of judges.\footnote{Henry J. Abraham, “The Pillars and Politics of Judicial Independence in the United States,” in Judicial Independence in the Age of Democracy, supra note 399 at 25.} While the former facet entails (though not exclusively) the collective as well as the individual autonomy of judges, the latter represents a standard of behaviour for individual judges in their relation to other political institutions within the political system. Thus, Russell’s double-principled conception of independence is broader than Fawcett’s view, which limits the focus to only threats from the executive branch. Indeed it is possible to go further and develop a more liberal and malleable construction of Russell’s assertion to include interferences from the legislature and even the judiciary itself.\footnote{Peter Russell, “Toward a General Theory of Judicial Independence” in Judicial Independence in the Age of Democracy, supra note 399 at 6.}

The difficulty with both Russell’s and Fawcett’s claims, though, is that they are constructed on Baron de Montesquieu’s theory of the separation of powers, according to which the three arms of government are to be wholly independent of each other in terms of personnel and functions.\footnote{See Irving R. Kaufman, “The Essence of Judicial Independence” (1980), 80 Canadian Law Review 671.} The immediate relevance of this to the institutional
autonomy of the judiciary may be limited.\textsuperscript{408} In fact, Shetreet\textsuperscript{409} counsels against the rigidity of this institutional separation thesis; he goes beyond freedom from the executive and legislative branches of government to direct our attention to the importance of judicial freedom from powerful non-governmental interests as part of the scope of the necessary status of independence. He observes,

\begin{quote}
  in modern times, with steady growth of corporate giants, it is of utmost importance that the independence of the judiciary from business or corporate interests should also be secured…independence of the judiciary implies not only that a judge should be free from governmental and political pressure and political entanglements but also that he should be removed from financial or business entanglement likely to affect, or rather to be seen to affect him in the exercise of his judicial functions.\textsuperscript{410}
\end{quote}

This opinion has received judicial support. In the Supreme Court of Canada, Justice Gonthier observed that “the pressure or interference with independence could come from any quarter or any person… for example, private parties or corporate giants”.\textsuperscript{411} But Justice Le Dain in \textit{Valente} said that this is more an issue of impartiality, and the focus should be on the relationship with the state when referring to independence. Nonetheless, as foreign corporate bodies have trooped into Africa at an increasing rate, Shetreet’s observation is crucial for the independence of courts; that is, to guard against financial inducements from such bodies or threats of legal suits, which would compromise the decisional and institutional independence of judges.\textsuperscript{412} This is of utmost importance for


\textsuperscript{410} Ibid.


\textsuperscript{412} See for example \textit{Social and economic rights action centre (SERAC) and another v. Nigeria} (2001) AHRLR 60.
the realisation of independence relating to adjudication.⁴¹³ Judges ought to be neutral third parties, with no interest in the issues and no partiality toward either party; their only allegiance can be to the law, and to protecting the rights of people against intrusion by others.⁴¹⁴ If the institution of the judiciary is in the deep pockets of well-endowed corporate bodies whose chief aim is profit through business regardless of ethical propriety, the impartiality of judges required to uphold the rule of law and human rights is in danger.

However, this amplified reading of the meaning of institutional independence as one face of Russell’s double-principled conception of judicial independence does not say anything about that aspect which deals with the assertive behaviour of individual judges in their relation to other political institutions within the legal system. This possibility introduces the concept of impartiality into the discussion of independence. There is, however, some disagreement about whether there is a meaningful distinction between judicial independence and judicial impartiality. Russell suggests that they are inseparable aspects of the same idea. Still, there is support for thinking about the judicial role in both senses. Justice Gerald Le Dain of the Supreme Court of Canada stated that “impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in particular”, and independence “connotes not merely a state of mind or attitude in actual exercise of judicial functions, but a status or relationship to others, particularly to the

⁴¹⁴ Ibid.
executive branch of government, that rests on objective conditions or guarantees”. In the end, however, there is no reason to adopt an artificial separation between the two ideas. It is fair to say that the two elements are closely connected: judicial independence is the institutional precondition for impartiality. Simply put, independence refers to institutional protections, impartiality refers to a state of mind; the former helps guarantee the latter.

On that account, the sort of judicial culture or independence necessary for the fundamental rule of reason to flourish as a mode of constitutionalism and constitutional interpretation is one in which the following general principles are respected:

- that there is a rough separation of powers, such that, in general, executive and legislative functions of state are institutionally separate from judicial functions; the core elements of the judicial function must be performed by judges and not members of the other branches of state;
- that where judicial or quasi-judicial functions are performed within the executive branch of state, individuals affected by decisions should have recourse to judicial review before independent judges to ensure decisions are rational, procedurally fair, and within the ambit of powers conferred by general laws enacted by the legislature;
- that judicial independence includes independence from both executive and legislative branches of state;
- that judicial independence is both institutional and personal in dimension, so that it

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includes both the idea that judges are institutionally autonomous from the executive and legislative branches of state and generally impartial towards particular classes or interests in society (including, for example, powerful business interests); in other words, judicial independence and judicial impartiality are integrally connected, and the relationship between judges and both public and private actors is important;

- that we are concerned to prevent both actual violations of judicial independence and the appearance that the principle is violated; in short, a “reasonable apprehension” of bias or interference should prevail rather than a test of subjective or actual bias or interference;

- that judicial independence implies financial independence, both of judicial institutions and of individual judges, so that, for example, judicial salaries and pensions should be appropriate and should not be susceptible to arbitrary or political interference, and courts should be given sufficient resources to operate effectively;

- that judicial independence implies administrative independence, so that judges themselves control the day-to-day operations of courts (when and where they sit; internal rules of procedure, etc.);

- that judicial independence implies an appointments process that ensures, to the extent possible, that the decision on who becomes a judge is open, transparent, and non-partisan, whether by means of requiring parliamentary committee questioning of nominees, or vetting by a non-partisan, arms-length judicial appointments commission, or some other technique;
that judicial independence implies security of judicial tenure in office, such that judges may not be removed or threatened with removal from the bench except in cases of obvious wrongdoing or improper conduct, ideally as established through some form of apolitical or non-partisan judicial or quasi-judicial process, or at very least upon address to the legislature;

that judicial independence implies that judges should not just be protected from removal for making unpopular decisions, but protected in other ways from retaliatory acts by either public or private persons, for example, by protecting judges from civil suits and perhaps criminal prosecutions for things done in the course of their judicial duties.

This list may not be exhaustive. Other principles or standards could be mentioned and those which have been mentioned need further elucidation and justification. My principal aim however, in listing them is merely to illustrate the structural content and formal conception of the idea of judicial independence. It should be remembered, nevertheless, that in the final analysis the fruitfulness of the principle of judicial independence rests on its idea that the courts should be free, able and willing to exercise judicial power in interpreting and enforcing the law. These various institutional rules are all designed to ensure the essence of judicial independence, which usually goes unarticulated and unstated in positive legal instruments, namely the special quality of mind—what Dicey called “the legal turn of mind”\textsuperscript{416}—which permits a person confronted by a legal problem to say to

themselves, in effect, ‘what does “the law” require that I do here?’, on the assumption that this “law” has some rational and autonomous existence separate from that person’s personal political or moral preferences, and separate from the personal, political, or moral opinions of other public or private actors.

5.5.3 Judicial Independence in Ghana and Nigeria

We now turn our attention to the specific cases of Ghana and Nigeria. As a prelude to the discussion here, the experience of Coke, as earlier on alluded to, in England is again instructive. There was a strong tradition of judicial independence in England which nourished the conception of law as a form of reason. Where those sorts of conditions exist, the style of constitutional interpretation that I am advancing in this thesis may flourish. What is needed, then, is the right sort of “judicial culture”. Ideally, it should be a “culture” in the sense that it is socially and deeply entrenched in the practices and traditions and attitudes of officials. But Coke’s example is instructive in another way. The King in his day did not respect this judicial culture and attempted to undermine it, and Coke, after resisting, was eventually removed from the bench. This was just one episode in the long and violent constitutional struggle between Crown and Parliament/Common Law in the seventeenth century, a struggle that broke out into civil war in the 1650s and revolution in 1688/89.

The judicial culture Coke represented was, in fact, a vulnerable one. And when the struggle was over, and Parliament/Common Law won over the Crown, England was, in effect, in a post-conflict situation not unlike that of Nigeria and Ghana; and in this context it was seen to be important that certain constitutional principles, including the principle of
judicial independence, be given an explicit foundation in written law, and hence we have the
Act of Settlement 1701. Judicial independence may be an integral part of the unwritten
fundamental law, but in post-conflict situations it may be necessary to give it explicit
support in positive law. Of course, just because the principle is embraced in written
constitutional law, it does not follow that the unwritten principle ceases to be relevant; for
the written provisions may not be comprehensive. Canada’s experience is instructive in this
respect. There, the courts have supplemented weak written protections for judicial
independence in the constitution with an “unwritten” constitutional principle of judicial
independence.417

So, the key question to ask here is: is there a judicial culture in Nigeria and Ghana
that could support the non-positivist approach to constitutional interpretation at the core of
this work? Here, I shall first be more explicit about the situations in both countries, in terms
of whether people generally regard the courts as impartial and independent. Reliance is
placed on some incidents, past and present, placed in a broader context in order to determine
what the “judicial culture” is like. This will provide a context for the discussion of the
specific provisions in the Ghanaian and Nigerian constitutions that address the judiciary
explicitly. But we should begin with a caution. The judicial culture in Ghana and Nigeria
can show signs of both vulnerability and independence. But the upshot of this is not
sufficient to deny the existence of the right kind of strong tradition of judicial independence
which will nourish the conception of law as a form of reason. Nor will it necessarily claim
that courts in these states have not in the past or present been made vulnerable.

It is important to begin with the experience of the judiciary under the military regimes that preceded the current constitutional arrangements in both countries. During this time, the culture of respect for the institutional independence of the judiciaries was relatively weak.\textsuperscript{418} Judicial independence was eroded by government decrees either to pre-empt the judicial resolution of certain disputes or to take judicial power from the courts in respect of certain legal questions. In Ghana, for example, the \textit{Protective Custody Law} (PNDCL 4) gave officers of the regime wide discretionary powers to detain people without cause and the \textit{Habeas Corpus (Amendment) Law} (PNDCL 91) ousted the courts’ jurisdiction from enquiring into the legality of such detentions. Besides, while the death penalty was imposed by the \textit{Public Tribunal Law} (PNDCL 78) for political offences, it ousted the Superior Courts’ supervisory jurisdiction over the tribunals.\textsuperscript{419} These acts may not be a direct affront to the independence of the courts, but they were indirect encroachments on judicial power.\textsuperscript{420} In Nigeria, the \textit{Civil Service and Other Statutory Bodies (Removal of Certain Persons from Office) Decree (No. 16) of 1984}, and the \textit{Public Officers (Special Provisions) Decree (No. 17) of 1984}, were both passed to pre-empt decisions in suits challenging the validity of, or claiming damages for, the dismissal of certain public officers by the military government in 1984. A classic illustration of similar decrees in

\textsuperscript{419} Mike Oquaye, “Human rights and the Transition to Democracy under the PNDC in Ghana” (1995), 15 Human Rights Quarterly 556 at 563-4.
Ghana came in section 4(8) of the Subversion Decree 1972 (NRCD 90) as amended by the Subversion (Amendment) (No.2) Decree, 1973 (NRCD 191):

No Court shall entertain any action or proceedings whatsoever for the purpose of questioning any decision, judgment, findings, order or proceedings of the Military Tribunal convened under this section; and for the removal of doubts, no Court shall entertain any application for an order or writ in the nature of habeas corpus, certiorari, mandamus, prohibition, or quo warranto in respect of any decision, judgement, findings, order or proceedings of any such Tribunal.

With these kinds of decrees in place, the power and jurisdictional capacity of the courts to offer redress to those whose rights had been affected adversely by the conduct of the military governments was grievously hampered. Yet in Ghana, there was judicial resilience in the face of these deliberate acts of interference. Decisions taken by functionaries of the military government that adversely affected the rights of individuals were reversed by the courts. But unlike the reaction of the King in England, who removed Coke from the bench after his resistance to the King’s interference, the operatives of PNDC regime in Ghana shamefully resorted to a despicable form of coercion of the judiciary by the brutal murder of three High Court Judges and a retired military officer during the night of 30 June 1982. These Judges were perceived as enemies of progress in the days of the military dictatorship.

The PNDC regime was implicated by the report of a Special Investigations Board (SIB) set up to inquire into the incident. It was reported that the victims (Justices K.A. Agyepong, F.P. Sarkodee, Cecilia Koranteng-Addow and Major Acquah) were removed by car during curfew hours and the perpetuators had used passwords normally controlled by
people at the top hierarchy of the regime.\textsuperscript{421} The cruelty of the killing was unimaginable as one of the victims (Mrs. Justice Koranteng-Addow) was nursing a four-month old baby. Even though the principal architect - Amartey Kwei - was arrested, tried and executed, the incident remained an obvious case of the regime’s interference with the judiciary. However, these murdered judges, now known as the \textit{Martyrs of the Rule of Law}, represented a kind of judicial culture needed for the sustenance of the fundamental law at the core of this work. This judicial culture is of a kind that judges would engage in their work, as these murdered judges and Coke did, to enforce and to uphold the integrity of the rule of law even in the face of unscrupulous executive interference. Like Edward Coke, and unlike many of the judges under apartheid South Africa, these murdered judges made the correct moral choice to adhere to the rule of law and to ensure that the reasonable justification of law is contingent upon its legitimacy and justice, though they paid the highest price.

Such independence and rectitude in the application of the law was shown, for instance, in \textit{Lakanmi and Another v. Attorney-General (West) and Another}\textsuperscript{422} when the Supreme Court of Nigeria, in the heat of military dictatorship, declared \textit{ultra vires} and void a decree of the then military government. Regrettably but true to the tenets of an intolerable and tyrannical military regime, the decision was swiftly reversed by the government through a decree - The \textit{Federal Military Government (Supremacy and Enforcement of Powers) Decree (No. 28)} of 1970. Yet the Lagos High Court was not enthused with military officers who were vested with or arrogated to themselves

\textsuperscript{421} M. Ocquaye, “Human rights and the Transition to Democracy under the PNDC in Ghana” (1995), 15 Human Rights Quarterly 556.
\textsuperscript{422} (1971) 1 University of Ife L.R. 201.
unquestioned power in Nigeria. In maintaining the integrity of the rule of law and independence of the judiciary, the Court had by a *habeas corpus* order nullified a detention order signed by the Nigerian Chief of Staff, Supreme Headquarters in 1986.\(^\text{423}\) The Court ordered the immediate release of the detained applicants. This decision is consistent with the unwritten or common law constitution, which requires that such a detention scheme respect the victim’s right to a hearing at which he can effectively contest the allegation before he is deprived of his liberty. It is apparent that the conduct of the military regimes was a perversion, and a deliberate deflection of, the rule of law, but the most important lesson for our case, is the character of fearlessness shown by at least some of the judges in the application of the law.

This observation is true of certain judges not only during the military regimes but also under the immediate post-independence governments. For instance, in *State v Otchere*\(^\text{424}\), the political stakes were very high. The President of Ghana’s First Republic (Dr. Kwame Nkrumah) was nearly assassinated by acts allegedly masterminded and committed by the accused. However, the Supreme Court of Ghana, after a careful consideration of the evidence, acquitted and discharged the third, fourth and fifth accused persons\(^\text{425}\) of the offences of conspiracy to commit treason and treason. This decision was reached notwithstanding a clear expectation by the President that all the accused would be convicted in light of the fact that his attempted assassination was an attack on the very

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\(^{424}\) [1963] 2 GLR 463.

\(^{425}\) Tawiah Adamafio and Ako Adjei, and Cofie Crabbe.
foundation of the Republic. These sentiments, though valid, could not, according to the Court, interfere with its application of the rules of evidence, and, by extension, the established principles of the rule of law.

The reaction of the government was expected but regrettable. It promptly issued the *Special Criminal Division Instrument, 1963 (E I 161)* to declare the decision null and void. Besides, similar to the treatment of Coke by King James I, President Nkrumah, in exercise of his powers under article 44 (3) of the Constitution, 1960, summarily dismissed Sir Arku Korsah, then Chief Justice, from office. While this is not the place to celebrate or impugn the quality of judicial reasoning in *Otchere*, it is important to note that the decision and its aftermath points to a culture of judicial independence, although the reaction of the government may show judicial vulnerability. In particular, Chief Justice Sir Arku Korsah’s decision not to convict the accused was an act of judicial bravery in respect of the rule of law. It was clear to him that article 44 (3) - which provided that the appointment of a Judge as Chief Justice may at any time be revoked by the President – might be exercised against him by President Nkrumah. A judge partial to the whims of the President or under the influence of other personal considerations might have been tempted to decide the case differently. The decision therefore stands as a testament to the independence of the judiciary from the partial desires of the appointing authority.

In our recent post-military context, the courts have remained loyal to the culture of independence, though the executive has occasionally attempted to dilute this tradition with acts of interference with the work of the judiciary. The *Tsatsu Tsikata’s Cases*
illustrate this. In February, 2002, Mr. Tsatsu Tsikata was served with a
summons to appear before the Fast Track High Court in response to a charge of causing
financial loss to the State contrary to section 179A of the Criminal Code, 1960 (Act 29).
Instead of appearing before the named court, Mr. Tsikata challenged its constitutional
validity at the Supreme Court. The result was Tsatsu Tsikata (No.1) Case. In this case, he
argued that there was no such Fast Track High Court with jurisdiction to try criminal
cases established under the Constitution. However, such a claim was resisted by the
Attorney General, who argued that the said court was properly created by the Chief
Justice under Article 139(3) of the Constitution which stated that: “[T]here shall be in the
High Court such divisions consisting of such number of Justices respectively as the Chief
Justice may determine”.

In a 5-4 majority decision, the Supreme Court agreed with Mr. Tsikata. The
majority argued, in part, that the creation of the Fast Track High Court was not
contemplated by the Constitution, nor was its establishment authorized by an Act of
Parliament. Accordingly, the creation of the Fast Track High Court by the Chief Justice
(Edward Wiredu) was unconstitutional. Not satisfied with the ruling, the Attorney
General launched an appeal in the same Court for a review of the decision rendered. Note
that my primary aim here is not to question the quality per se of the decision in the Tsatsu
Tsikata (No.1 & 2) Cases, but to explore the factual circumstances surrounding them to
determine whether a judicial culture necessary for our project exists or not.

\(^{426}\) Tsatsu Tsikata (No.1) v Attorney General(No.1) [2001-2002] SCGLR 189 and Tsatsu Tsikata
(No.2) v Attorney General(No.2) [2001-2002] SCGLR 620.
The appeal for the review of the decision in *Tsatsu Tsikata (No.1)* resulted in *Tsatsu Tsikata (No.2)*. But while deliberations were ongoing in that review, the President nominated an additional new Justice, who was quickly confirmed by Parliament, which was controlled by the President’s party, to the Supreme Court. Following this development, the decision was reversed by an 11-member panel of the Supreme Court, which included the newly appointed justice, on 26 June 2002. The outcome of this case generated a strong reaction from the public, especially members of the then main opposition party – National Democratic Congress (NDC) - to the effect that the integrity of the court had been compromised by the President’s late appointment.

Perhaps the key question for us here is: does the decision of the Court to reverse itself following a new appointment to that same body suggest a serious threat to the independence of the judiciary through the technique of “court packing”? While the answer to this question may not be a simple yes or no, there was a public perception that the appointment amounted to an attempt by the executive to influence the judiciary.\(^\text{427}\) In the circumstances, Justice Afrehs’s promotion from the Court of Appeal to the Supreme Court certainly raises concerns about executive interference with the judiciary. But it is important to place these concerns in their constitutional context. Article 128(1) of the Constitution only stipulates that the Supreme Court shall consist of the Chief Justice and not less than nine other Justices of that Court. The language of this text does not suggest anything beyond the minimum number of Justices of the Court. In contrast, Section 230

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(b) of the Nigerian Federal Constitution plainly puts the maximum number of Justices on the Supreme Court at twenty-one.

It seems from the text, then, that the President was not precluded by any superior positive law from making the appointment. He could increase the number of the Justices at any time on the advice of the Judicial Council. But the case still raises some problems. It may not have been necessary for a larger panel to review the first decision. Although Article 133 expressly authorizes the Supreme Court to review its decisions, it simply states that the reviewing panel be constituted by “not less than seven Justices....”

A review generally is to rethink through the decision as to whether a grievous legal error was not made in the interpretation and application of the law. This does not prevent the same nine judges from sitting. For a new judge to be elevated to the Supreme Court when a controversial review is pending, and then assigned to sit on the review panel, may seem an implicit attack on the abilities of the first nine justices who decided the case (unless we can establish that the first set of judges had entrenched views on the matter and would be faithful servants to such views), and/or it suggests an attempt by the appointing authority to influence the outcome of the review. The impressions left in the circumstances are damaging to the administration of justice. A solution would be to provide (as in Nigeria) for an upper limit on the number of justices to the Supreme Court. The incident does suggest, then, that despite the very explicit wording in the Ghanaian Constitution prohibiting anyone from interfering with the judiciary, the risk of political interference is real and its apparent manifestation here may suggest that the “culture” of judicial independence is still weak.
Nevertheless, the general context surveyed above provides us a number of lessons. First, the culture of judicial independence has been part and parcel of the body politic of Ghana and Nigeria. As we shall see in Chapter Six, this does not mean that judges in these countries have been immune from the attractions of ‘constitutional positivism’ that were arguably encouraged during times of strong and oppressive government. But it does mean that judges did their best to fulfil the judicial function. This is illustrated by the judges’ determination to resist unlawful acts, and the public response to occasional governmental interference with the work of the courts. For instance, the public debate about the murder of the three High Court Judges does suggest some level of awareness of the principle of judicial independence and how it should be defended. Though this culture may be vulnerable, especially under the military regimes, it clearly exists. This bodes well for a strong judicial role in constitutional matters in the post-military constitutional democratic era.

It is my considered opinion that constitutionally entrenched protections are an excellent point to begin with.\footnote{See John O. McGinnis & Michael B. Rappaport, “Symmetric Entrenchment: A Constitutional and Normative Theory” (2003), 89 Virginia Law Review 385.} First, constitutional provisions provide a clear legal point of reference in case of disagreement. Also, the adoption of such provisions underscores the commitment by most political actors to play by the rules and to recognize the relevance of judicial independence in consolidating the rule of law, democracy and human rights.\footnote{See Charles R. Epp, The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective (Chicago: University of Chicago Press, 1999).} As well, constitutional protection gives the judiciary formal protection\footnote{See John O. McGinnis & Michael B. Rappaport, “Symmetric Entrenchment: A Constitutional and Normative Theory” (2003), 89 Virginia Law Review 385.}
and as such prevents arbitrary variation of their powers by the executive, since any such variation would require formal constitutional or statutory amendment. For these reasons, constitutional protections for judicial independence encourage judges to demonstrate strong will in deciding cases. For instance, demonstrably sufficient procedural laws for the dismissal or retirement process could embolden individual judges’ independence and prevent the frustration of institutional independence.431

It must however be stated here that my use of the phrase “constitutional protection” does not take the usual narrow definition of a constitution. It encompasses the broader view, which encapsulates conventions and established traditions, as in the case of Britain, although formal constitutional protections may be important for reasons advanced above. It is therefore possible to measure independence by reference to manifestation in both formal constitutional law and practical experience. In other words, the understanding of judicial independence does not end only with an examination of formal protections through positive law. It also has to do with the way in which the moral discourse of law unfolds, a substantive rather than merely formal aspect of the rule of law that is particularly important in transitional democracies.432

5.5.4 Constitutional Protection of the Judiciary in Ghana and Nigeria

The Constitutions of Ghana and Nigeria both contain provisions relating to the general principle of judicial independence as well as provisions that address many of the specific features of this principle that were identified in the previous section. At the level of general principle, Article 125(1) of the Constitution of Ghana provides the following: “Justice emanates from the people and shall be administered in the name of the Republic by the judiciary which shall be independent and subject only to this constitution.” The Constitution of Nigeria also contains a general statement of judicial independence, though it is important to note that this statement is found in a chapter of the Constitution that is stated to be non-justiciable. Section 17(1) states that the Nigerian “State social order” is “founded on ideals of Freedom, Equality and Justice.” Section 17(2) states that in “furtherance” of the “social order” (inter alia): “(e) the independence, impartiality and integrity of courts of law, and easy accessibility thereto shall be secured and maintained.” In both Constitutions, the principle of the separation of powers is recognized. Executive, legislative and judicial institutions are defined and vested with powers, and some effort is made to provide express restrictions on executive and legislative incursions into the judicial function.

The Ghanaian Constitution is particularly detailed in this respect. Article 125(3) of the Ghanaian Constitution provides that “[t]he judicial power of Ghana shall be vested in the Judiciary”, and “neither the President nor Parliament nor any organ or agency of the President or Parliament shall have or be given final judicial power”. Article 127(1) protects judges from external influence, providing that the judiciary, in the exercise of
any of its judicial or administrative functions, including financial administration, “is subject only to this Constitution and shall not be subject to the control or direction of any person or authority.” Finally, Article 127(2) provides that “neither the President nor Parliament nor any person acting under the authority of the President or Parliament nor any other person whatsoever shall interfere with judges... in the exercise of their judicial functions” and all state organs and agencies “shall accord to the courts such assistance as the courts may reasonably require to protect the independence, dignity and effectiveness of the courts, subject to this Constitution.”

The Nigerian Constitution is far less explicit in terms of restricting other branches of state from interfering with the judicial function. Section 6(1) and (2) provide that the “judicial powers of the Federation” and the “judicial powers of a State” “shall be vested in the courts” therein described, and section 235 provides that, without prejudice to the powers of the President or of a State Governor with respect to the prerogative of mercy, “no appeal shall lie to any other body or person from any determination of the Supreme Court.” We may say, then, that in terms of express constitutional provisions, and leaving aside for the moment possible arguments by way of implication on a structural interpretative value of the general constitutional provisions, the foundation for the institutional independence of the Ghanaian judiciary is better laid out constitutionally than it is for the Nigerian judiciary.

However, both constitutions have made a good case for judicial independence by vesting in the judiciary an exclusive jurisdiction over “judicial” matters. According to Lovemore Madhuku, “the independence of the judiciary would be rendered meaningless
if it were possible to vest some judicial functions in other bodies…. as the executive and/or legislature would simply avoid the judiciary by entrusting crucial matters to sympathetic or manipulable bodies.\textsuperscript{433} The essence is to give the courts the exclusive authority and power over judicial decisions or to invest in the courts jurisdiction over all issues of judicial nature, thereby preventing the other branches of government from evading the judiciary to address controversies of judicial nature.

But the need to fend off external forces is only one part of securing judicial independence. The constitutional provisions examined do not expressly address the possibility that threats to individual judges’ autonomy may emanate from both internal as well as external sources. It is a mistake, as David O’Brien and Yashu Ohkoshi argue, to maintain, as the provisions referred to above appear to, an exclusive focus on external forces and neglect the internal dynamics of the judiciary.\textsuperscript{434}

There is thus the need in Ghana and Nigeria for a conceptual revision of the traditional understanding that independence is only affected by external constraints, since the judiciary can also be influenced or stifled from within. This happens when judges on the bench exert influence on others regarding decision-making in legally disputed cases.\textsuperscript{435} This is particularly the case when judges are unable to express their own views by filing separate opinions, or when Chief Judges exercise significant influence over discipline or administration (such as case, courtroom, or committee assignments).

\begin{footnotesize}
\begin{enumerate}
\item \textit{Ibid.}
\end{enumerate}
\end{footnotesize}
Typically, conformity becomes a necessary ingredient for promotion, and appointment may be skewed in favour of agents and favourites of the Chief Justice.\textsuperscript{436}

In both Ghana and Nigerian the procedures for appointing justices have some level of constitutional protection, albeit variations in the processes and substance of the rules exist. For instance, in Ghana, Article 144(1) makes the President the appointing authority of the Chief Justice, in consultation with the Council of State and with Parliamentary approval, while the other Justices of the Supreme Court are appointed by the President on the advice of the Judicial Council, in consultation with the Council of State and with Parliamentary approval (art.144 (2). Justices of the Court of Appeal, High Court and Chairmen of Regional Tribunals are appointed by the President on the advice of the Judicial Council.\textsuperscript{437}

In contrast, all Justices of the Nigerian Supreme Court,\textsuperscript{438} including the Chief Justice,\textsuperscript{439} the President of the Court of Appeal,\textsuperscript{440} the Chief Judge of the Federal High Court\textsuperscript{441} and the Chief Judge of the High Court of the Federal Capital Territory, Abuja\textsuperscript{442} are appointed by the President on the recommendation of the National Judicial Council subject to Senate confirmation. But, like Ghana, other Justices of the Court of Appeal,\textsuperscript{443} Federal High Court\textsuperscript{444} and High Court of the Federal Capital Territory\textsuperscript{445} are appointed by

\textsuperscript{436} Ibid.
\textsuperscript{437} Article 144(3).
\textsuperscript{438} Sec. 231(1).
\textsuperscript{439} Sec. 231(2).
\textsuperscript{440} Sec.238(1).
\textsuperscript{441} Sec. 250(1).
\textsuperscript{442} Sec. 256(1).
\textsuperscript{443} Sec. 238(2).
\textsuperscript{444} Sec. 250(2).
\textsuperscript{445} Sec. 250(2).
the President on the recommendation of the National Judicial Council without the benefit of Senate confirmation. It is apparent, then, that in each jurisdiction there are multiple stages in the appointment process, at least in the case of superior court judges, that may prevent political patronage in the appointment of judges.

However, there exist some disturbing commonalities as well as important distinctions embedded in the quality of the structural stages involved in the appointment processes of the two states. First, there is no formal structural difference in the two jurisdictions as to how Justices of the Court of Appeal and High Courts are appointed. It is a straight two-tier affair where, in the case of Ghana, the President appoints on the advice of Judicial Council, and, in Nigeria, such appointments are done on the recommendation of the National Judicial Council. On such appointments, both jurisdictions preclude confirmation by either Parliament (in the Ghanaian case) or Senate (in Nigerian case).

But, the two legal systems differ in the appointment of the Chief Justice; in Ghana, the Judicial Council does not play any role in the process, whereas in Nigeria the National Judicial Council recommends a candidate to the President for appointment with Senate confirmation. Besides, the legal quality of appointments done “on advice” or “in consultation with” and “on recommendation” of a body are not the same. While there is an open discretion for the appointing authority in the former, the discretion is limited in the latter. Thus the functional constitutional value of the Judicial Councils in Ghana and Nigeria differs.

445 Sec.256(2).
By way of illustration, the Ghanaian Council of State\textsuperscript{446} and the Judicial Council,\textsuperscript{447} have no or little weight beyond the formal procedural validations in the appointment of judges. Thus, in reality, the advice of the Council of State does not have any legally binding effect on the President, nor does the consultation of the Judicial Council. These structural weaknesses in the appointment process are exacerbated by the case law, as exemplified by the \textit{Justice Abban Case}.\textsuperscript{448} In this case, the Ghana Bar Association (GBA) challenged Justice Isaac Kobina Abban’s appointment as Chief Justice in court, arguing that he was not a person of “high moral character and proven integrity” as required by Article 128(4) of the Constitution. However, the Supreme Court declined jurisdiction, and argued that the Constitution specifically reserved questions relative to the appointment of the Chief Justice to the President, the Council of State and Parliament. It is therefore not the province of the Supreme Court to determine the moral character of the appointee. Such a position may be problematic.

Characterizing the determination of the moral character of a judge as a wholly political question seals the President’s dominance in the appointment process.\textsuperscript{449} It aggravates the problem of the peculiarly weak position of the Council of State in the

\textsuperscript{446} The Council of State is an advisory body to the President and has a membership of 25 elderly statesmen and women. The President appoints majority of the members.

\textsuperscript{447} Article 153 of the Constitution established the Judicial Council. It is composed of 19 members, including the Chief Justice (CJ), the Attorney-General (A-G), one justice each from the Supreme Court, Court of Appeal and High Court, two representatives of the Ghana Bar Association, and other members of the legal profession, as well as four non-lawyers appointed by the President. Its role in the judicial appointments is nothing but give an unspecified ‘advice’ to the president; and in relation to the appointment of the CJ it has no role at all.


\textsuperscript{449} This is exacerbated by the fact that the Judicial Council and the Council of State are powerless in the appointment process.
appointment process. Worst of all, it sterilizes a legitimate institutional check in the appointment procedures. Accordingly, the Nigerian provision is to be preferred. However, it should be pointed out that the non-constitutional protection of Parliamentary or Senate involvement in the appointment of other Justices at the Court of Appeal and High Courts levels in both jurisdictions can be remedied by active civil society engagement in the appointment process, which can enhance the credibility and the independence of the judges in these Courts. This is founded on the thought that the quality of Parliament or Senate’s involvement in the appointment process is not in and of itself absolute. The value of their involvement, it seems to me, could be contingent on the fact that the President’s Party does not command a majority in Parliament or Senate, as approval of appointments only requires simple majority.\footnote{The shameless practice of party discipline in Ghana and Nigeria makes approval of the President’s nominees a mere formality.}

A loose process exclusively controlled by those whose actions are to be reviewed by the courts looks problematic. In this regard, a politically pluralistic appointment process may be required.\footnote{See Kommers, “Autonomy Versus Accountability”, supra note 399. In Germany, “a vacant judgeship on the Federal Supreme Court would be filled by a committee made up of the sixteen state justice ministers and an equal number of parliamentary representatives, whose partisan coloring would be proportionate to the numerical strength of each political party in the Bundestag.”} Countries with troubled political pasts, such as South Africa, usually embrace the value of this pluralistic process as a way of soliciting the participation of all major political actors in the appointment process. Commenting on South Africa’s situation, Hugh Corder avers that the creation of an independent, pluralistic Judicial Service Commission (JSC) in the post-apartheid political setting
serves as a means to facilitate “a fair degree of openness to the judicial appointment process” and to disallow “political parties to manipulate judicial appointments to further their ends”.\footnote{Hugh Corder, “Seeking Social Justice? Judicial Independence and Responsiveness in a Changing South Africa” in Judicial Independence in the Age of Democracy, supra note 399 at 198.} In South Africa’s case, appointment of judges is done by the President in consultation with the JSC and leaders of political parties, a practice which is conducive to producing a less partial and more accountable process of judicial appointments as a way of establishing a responsive judiciary.\footnote{Ibid., at 199}

This guarantees the ideals of sufficient checks and balances in the appointment process as to avert biased consideration of nominees.\footnote{The nine members of the French Constitutional Council are appointed in the same proportions by the President of the Republic, the Head of the Senate and the President of the National Assembly.} In the words of Shapiro, these are “roadblocks” necessary to prevent unfairness.\footnote{See Martin Shapiro, Courts: A Comparative and Political Analysis (Chicago: University of Chicago Press, 1981) at 32.} This has the immediate advantage of preventing “court packing”, a potential problem in Ghana and Nigeria, where tribalism, ethnicity and political negligence may still compromise the ideals of legality and legitimacy. Less scrutinized appointments on the account of these factors may affect an objective consideration of cases that involve sensitive political questions. However, despite its advantage as illustrated above, the appointment process does not command universal acceptance as a necessary component of independence. It may be seen instead by some as the one way to ensure that judges share the wider political culture – a reasonable expectation in a democracy.
As reasonable as these caveats may appear, it is nevertheless crucial that there are regulatory mechanisms in the appointment process to guarantee the independence of a court. The process of appointment requires some degree of check or limit on the executive’s discretion, and, ideally, some degree of transparency. These mechanisms are necessary to help to ensure the independence of the individual appointees as well as the independence of the institution as a whole. Furthermore, an appointment mechanism that includes an element of transparency may serve as “a confidence-building exercise for the government, citizens, and organs of civil society in the integrity, independence and competence of the Judiciary as an institution.” This underscores the need for minimal executive influence over the process, especially given the appalling history of hand-picking judges associated with military juntas in Africa.

The appointment process in Ghana and Nigeria needs to be conducted with the involvement of the legislature, an independent Judicial Commission and civil society. An open consultation with these parties will give institutional legitimacy to the process and help guarantee that qualified people are appointed. Independence can be enhanced if there is a public open hearing on judicial nominees. Hearings, at least if conducted in a non-partisan spirit, lessen the need for judges to become partisan advocates for particular positions.

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456 See Kate Malleson and Peter H. Russell (eds.), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (Toronto: University of Toronto Press, 2006).


458 Leaders of successful coup d’états, usually either coerce people to take up appointments or appoint their friends or relatives to positions in which they have no qualification.
political ideologies, and they encourage the selection of judges capable of both defending human rights and in engaging in the objective analysis of complex legal problems. If this process is shrouded in secrecy, it could lead to awkward political compromises in Parliament between the major parties in Ghana and Nigeria, which have the potential to discount the relevance of experience and principle as imperative considerations for appointments.\textsuperscript{459}

Once appointed, judges in Ghana and Nigeria enjoy constitutionally protected security of tenure. In Ghana, for instance, article 146(1) provides that unless judges attain a mandatory retirement age, they cannot be suspended nor removed from office except for “stated misbehaviour or incompetence, or on grounds of inability to perform the functions of their office, arising from infirmity of body or mind.” The mandatory retirement age for Justices of the Supreme Court or Court of Appeal, is 70,\textsuperscript{460} and 65 for a High Court Justice or Chair of a Regional Tribunal.\textsuperscript{461}

The Nigerian position is similar. Section 291(1) provides that the compulsory retirement ages for Justices of the Supreme Court and Court of Appeal are 70 and 65 respectively. Other judicial officers, including High Court Justices, must retire at the age of 65, as stipulated by section 291(2). Judges in Nigeria can only be removed from office before the expiration of their tenure on proven grounds of inability to discharge their


\textsuperscript{460} Article 145(2) (a).

\textsuperscript{461} Article 145(2) (b).
duties (arising from infirmity of mind or of body) or misconduct or contravention of the Code of Conduct.\textsuperscript{462}

A recognized part of judicial independence in Ghana and Nigeria is therefore the idea of “job security that exists during a judge’s time in office.”\textsuperscript{463} The objective of security of tenure is, of course, to insulate judges from removal or threat of removal from office, or forced transfers or retirements, by other political actors, for any reason having to do with the proper discharge of their legitimate constitutional obligations. The dismissal of Sir Arku Korsah as Chief Justice by the first President of Ghana following the decision in \textit{State v Otchere} in the 1960s, as shown above, like Winston Churchill’s dismissal of Chief Justice Sir Gordon Hewart by way of a telephone call from 10 Downing Street in 1940\textsuperscript{464}, are apt illustrations of the problem to be avoided. The formal constitutional protections as shown above constitute a firm promise of security of tenure for judges in both states.

Security of tenure is anchored, in both legal systems, by fair dismissal and removal procedures for judges. For example, in Ghana, article 146 stipulates that the President, upon receipt of a petition for the removal of a justice of a Superior Court other than the Chief Justice, or for the removal of the chair of a Regional Tribunal, shall refer the petition to the Chief Justice, who shall determine whether there is a \textit{prima facie} case

\textsuperscript{462} Sec. 292(1) (a).
for dismissal.\textsuperscript{465} Where a \textit{prima facie} case has been established a committee shall be formed by the Chief Justice and the Judicial Council and empanelled to inquire into the matter and make recommendations to the President.\textsuperscript{466}

In contrast, where the petition is for the removal of the Chief Justice, the President, in consultation with the Council of State, shall appoint a committee of five persons\textsuperscript{467} to inquire into the petition and make recommendations to the President. However, it has been held by the Supreme Court in \textit{Agyei Twum v. A-G & Akwetey} \textsuperscript{468} that a petition submitted to the President which seeks the removal of the Chief Justice shall establish as a precondition to setting up a committee to inquire into an allegation of misconduct, a \textit{prima facie} case against the Chief Justice. But, in any event, the President is obliged to follow the recommendations of the committee in each case.\textsuperscript{469} Indeed, all proceedings in relation to the removal of judges in this way must be held \textit{in camera}, and the respondent is entitled to be heard in his defence by himself or by a lawyer of his choice.\textsuperscript{470}

The Nigerian procedure for removal under the Nigerian Constitution is not as elaborate as the one that pertains in Ghana. While Federal Courts judges are removable by the President acting on an address supported by two-thirds majority of the Senate,\textsuperscript{471} at

\begin{itemize}
  \item Article 146(3).
  \item Article 146 (5).
  \item Article 146 (6) [the committee consists of two Justices of the Supreme Court, one of whom shall be appointed chairman by the President, and three other persons who are neither members of the Council of State nor members of Parliament nor lawyers].
  \item [2005-2006] 732.
  \item Article 146(9).
  \item Article 146(8).
  \item Sec.292(1) (a)(i).
\end{itemize}
the State level they are removed by the Governor acting on an address supported by two-thirds majority of the House of Assembly of the State.472

But regardless of this structural difference in the removal procedures of judges in the two jurisdictions, it is reasonable to suggest that a crucial element of independence is met. Both Constitutions guarantee the judges certainty and predictability regarding security of tenure. They cannot be removed from office because of an unfounded allegation. The investigative process tied to the permissive grounds for dismissal established by the Constitutions ensures the application of due process of law in removing a judge from office.

It is important that the dismissal of judges in Ghana and Nigeria be done on reasonable grounds prescribed by law.473 Ideally, such grounds must be duly established through some form of apolitical or non-partisan judicial or quasi-judicial process, or at very least upon address to the legislature. Such an exercise must be meticulous and executed in good faith in order to give meaning to the terms of tenure, clearly spelled out in the Constitutions, and to preclude the procurement of retirements or resignations by any person or authority without regard to due process and application of the appropriate law.

Closely connected to security of tenure and non-arbitrary dismissals is judges’ immunity against prosecution or civil suits on matters relating to their legal duties.474

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472 Sec.292(1) (a)(ii).
473 Jerome B. Meites et. al., “Justice James D. Heiple: Impeachment and the Assault on Judicial Independence” (1998), 29 Loyola University of Chicago Law Journal 741 [the authors discuss the appropriate standards for impeachment under the Illinois Constitution, and find that the Constitution fails to provide explicit guidance as to what is an impeachable offense]
While in Ghana, article 127(3) grants judges immunity from prosecution or legal suit for any act or omission in the exercise of their judicial power, there is no explicit constitutional provision in the current Nigerian Constitution which gives immunity to judges from civil suits or criminal prosecutions. However, it was held in *Adebayo v Konlawole* that “it will rock the very basis of judicial independence if a judicial officer is to be exposed to future litigation and possible sanction under…the Constitution for making an order or passing sentence in good faith while discharging his judicial duty.”

As part of the recognition of judicial independence as an imperative element in a free and democratic society, constitutional protection of judicial fiscal freedom is a necessity. In Ghana, for instance, article 127(4) provides for all salaries, allowances, gratuities and pensions payable to judges or persons serving in the judiciary, to be charged to the Consolidated Fund. Clause 5 of the same provision consolidates this position with the assertion that “salary, allowances, privileges and rights in respect of leave of absence, gratuity, pension and other conditions of service of a Justice of the superior court or any judicial officer or other person exercising judicial power, shall not be varied to his disadvantage”. These provisions are also replicated in the *Courts Act, 1993 (Act 459)*.

Conversely, the Nigerian Constitution has no explicit provision guaranteeing the salaries and allowances of judges while in office. The only exception to this claim is section 292 (3) which guarantees pensions for life and all allowances at a rate equivalent to the last salary of the Supreme Court and Court of Appeal judges. Even with this, there

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475 (1985) 6 NCLR 709 at 709.
is an internal qualification on age. While judges in the above mentioned Courts would have such benefits when they retire at or after the age of sixty-five years, in any other case the person is only entitled to such a benefit if he retires at or after the age of sixty years.

Nevertheless, the non-existence of explicit constitutional protection of judges’ salaries and allowances in Nigeria while in office has been remedied by the statutory law. Section 5 of the *Supreme Court Act*, 1960 makes the salaries and allowances of the Justices of the Supreme Court subject to the prescription by the National Assembly, chargeable on the Consolidated Revenue Fund. The *Court of Appeal Act*, 1976 also provides, in section 2, for salaries and expenses of Justices of that Court. While the salary of the President of the Court of Appeal shall be the same as a Justice of the Supreme Court, making such a person amenable to the operative value of the *Supreme Court Act*, the other Justices of the Court shall have such salaries as equivalent to the Chief Judge of a State.\(^{476}\) Such salaries payable under the *Court of Appeal Act* are to be charged on the Consolidated Revenue Fund.\(^{477}\) Meanwhile, section 5 of the *Federal High Court Act*, 1973 tied the determination of the salaries of the Federal High Court Chief Judge and each of the other Judges of the Court, respectively, to the Chief Judge of the States of the Federation and of the Federal Capital Territory, Abuja and the Judges of the High Courts of the States and of the Federal Capital Territory, Abuja.

\(^{476}\) Sec. 2(1) and (2), *Court of Appeal Act*, 1976.
\(^{477}\) Sec. 2(3), *Court of Appeal Act*, 1976.
Adequate and nondiminishing compensation and remuneration for judges are key virtues in meeting the requirements of an independent judiciary.\footnote{478} Judges salaries, allowances, and pensions as well as administrative expenses must not be insufficient, or varied to their detriment.\footnote{479} Insufficient salaries and allowances for individual judges would threaten the financial independence of both the judges and the judiciary as an institution.\footnote{480} The most dependable means by which financial security can be achieved is by express legislation and constitutional protection, as shown above, and carried out in good faith by the political institutions. In Canada, for example, Justice Le Dain in Valente stated that the essence of financial security is for the right to salary and pensions to be \textit{established by law} and not subject to arbitrary interference by the executive in a manner that could threaten independence.\footnote{481} Such a defence of individual judges’ financial autonomy is central to Martin Shapiro’s claim that “in the most basic and usually the least important sense, independence would mean that the judge had not been bribed or was not in some other way a dependent of one of the parties.”\footnote{482} One fear is that judges who are not well paid may resort to unethical conduct such as taking bribes from parties to disputes; but perhaps the more serious concern is that an impression may develop that

\footnote{479} Robert A. Sprecher, “The Threat to Judicial Independence” (1976), 51 Indiana Law Journal [argues that the quality and independence of the courts is contingent on adequate compensation and salaries of federal judges].  
\footnote{480} Keith S. Rosenn, “The Constitutional Guaranty against Diminution of Judicial Compensation” (1976), 24 University of California Law Review 308 [argues that declines in the real income of federal judges is a threat to the integrity of the judiciary].  
judges will favour, even just subconsciously, the government when deciding cases if government has arbitrary control over judicial salaries.\textsuperscript{483}

A weakness in the reliance upon mere statutory as opposed to constitutional protections in Nigeria is the exclusive control that the National Assembly has in determining salaries of judges, a problem that, given the judicial obligation to review the decisions of that body, may affect public impressions about judicial independence. However, this potential is perhaps minimized through the normal checks and balance that operate in a constitutional democracy, and it may be assumed that the National Assembly can execute its duty in good faith within the context of a multi-party democracy. It should nonetheless be noted that the Ghanaian position, on the specific account of individual judges’ fiscal independence, is a stronger one, as it is subject to both constitutional and statutory protections and requires the cooperation of the three branches of government.

A similar conclusion may be drawn with respect to the protection of the institutional financial autonomy of the judiciary. In Ghana, unlike Nigeria, article 127(1) provides, subject only to the Constitution, for an independent financial administration of the judiciary. In furtherance of this objective, the administrative expenses of the judiciary are to be charged on the Consolidated Fund.\textsuperscript{484} In addition, article 127(4) extends the ambit of this financial freedom to include the operation of banking facilities by the judiciary without the interference of any person or authority, other than for

\textsuperscript{483} Valente v. The Queen [1985] 2 S.C.R. 673.
\textsuperscript{484} Article 127(4).
purposes of an audit by the Auditor-General, of the funds and defraying the expenses of the judiciary. These provisions are a positive constitutional promise for financial independence of the judiciary as they guarantee budgetary allocations and by extension the institutional fiscal independence of the judiciary.

From this account, it is acceptable, if not entirely accurate, to say that fiscal independence has both institutional and individual dimensions. While the latter focuses on financial freedom and satisfaction for individual judges in a modern democratic legal system, the former envisages a well resourced judiciary and in furtherance of this objective, it is not only vital the judiciary participate in the drawing up of its budget but also that the source of funds must be guaranteed and adequate. Insufficient budgets would threaten the judiciary as an institution. Thus a reasoned argument for sufficient funding is to enable the judiciary access to the required resources to be able to carry out its duties effectively. Without this, its priorities, such as the protection of human rights and the rule of law, are likely to be unattainable.

It is regrettable that the fiscal institutional independence component is deficient in Nigeria. The Constitution is not only silent on institutional financial independence, but it opens its budget, like in Ghana, to a reasonable determination by the executive. Nevertheless, as a practical matter, the issue is likely to be addressed, for the most part, in the same way in both jurisdictions; the major concern in both countries is the fragile

nature of their economies and general insufficiency of resources for all public expenses, a concern that the constitutional protection of fiscal independence cannot address.

To summarize, then, we may say that, on the whole, judicial independence in Ghana and Nigeria enjoys a minimum level of formal constitutional protection. Under such constitutional guarantees, it is possible, at least in theory, for judges to perform their constitutional functions free from inappropriate interference. This conclusion is reached against the background reality that it is not possible, at least in practice, to achieve absolute independence. The three branches of government may interrelate in the interest of responsive and responsible governance. Indeed, meaningful independence does not require the hermetic sealing off of one institution from the other. To a significant extent, it does require that their decisions be unaffected by the strength of partisan positions taken by political actors within the other branches and this sort of political isolation is desirable given the important role of courts in building a culture of rights and democracy.

487 Ibid.
488 Ibid.
Strong and independent courts are protectors of constitutional entitlements, and true institutional bulwarks for the citizenry against serious invasions of fundamental rights and freedoms. Independence offers the courts the capacity to insert themselves in a meaningful but legally appropriate way between citizens and the government and to stand up against intimidations of all “outsiders”.\footnote{See \textit{Beauregard v. Canada} [1986] 2 S.C.R. 56, para. 21 (per Dickson C.J.).} In fact, independence is fundamental not only to do justice in a particular case, but also to individual and public confidence in the administration of justice.\footnote{See \textit{Valente v. The Queen}, [1985] 2 S.C.R. 673.} Without such confidence the system cannot command the public respect and acceptance that are essential to its effective operation. Judicial independence allows the courts to avoid the harmful prejudice and short-sightedness to which elected officials sometimes succumb.\footnote{Gerald N. Rosenberg, “Judicial Independence and the Reality of Political Power” (1992), 54 The Review of Politics 370.} It emboldens judges to uphold rights where democratic majorities are paralyzed by prejudice or other more compelling political considerations.
Chapter 6

General Styles of Constitutional Interpretation in Ghana and Nigeria

6.1 Introduction

In the previous chapters, the need for a theory of constitutional interpretation in Ghana and Nigeria has been shown, the core elements of that theory have been developed, and the general suitability of that theory for the two countries has been established. The theory of law that I have developed coheres with a very particular view of public law rights. The preceding chapter concluded this task by introducing some key contextual factors relevant to Ghana and Nigeria, with particular emphasis on the importance of judicial independence. The burden of this chapter will be different: the chapter will examine different styles of constitutional interpretation in Ghana and Nigeria, in particular, judgments illustrating constitutional positivism and judgments illustrating non-positivist styles. It would take a chapter longer than this to work through the cases in Ghana and Nigeria that deal explicitly with approaches to constitutional interpretation. My aim here is much more modest. It is just to highlight and distinguish
these two dominant styles of constitutional interpretation indulged in by the courts of Ghana and Nigeria; and to underscore their manifestations in certain areas of law. With this background, I will then turn in Chapters Seven and Eight to show how the adoption of the non-positivist style of legal reasoning advanced in this thesis assists in understanding the legal status of socio-economic rights.

6.2 The Conscience of the Constitution and the Courts’ Interpretive Approaches

If the central and general assumption underlying our main argument in this thesis is that the written constitutional texts of Ghana and Nigeria are neither “hollow hopes” in the search for progressive goals, nor do they represent an exhaustive account of the legal values that are necessary for a comprehensive conception of law as a moral ideal, we must begin our analysis with some specific answers to some preliminary but very vital questions. What do judges in Ghana and Nigeria think “the Constitution” in their respective countries is? How do they go about interpreting their “Constitution”? These are of course related questions. In answering them, it is important to recall that each country has a written Constitution that purports to define itself—both in terms of its origins and its status as supreme law. Thus, the Preamble to the Ghanaian Constitution provides:

We the People of Ghana,
IN EXERCISE of our natural and inalienable right to establish a framework of government which shall secure for ourselves and posterity the blessings of liberty, equality of opportunity and prosperity;
IN A SPIRIT of friendship and peace with all peoples of the world;
AND IN SOLEMN declaration and affirmation of our commitment to;
Freedom, Justice, Probity and Accountability;
The Principle that all powers of Government spring from the Sovereign Will of the People;
The Principle of Universal Adult Suffrage;
The Rule of Law;
The protection and preservation of Fundamental Human Rights and Freedoms, Unity and Stability for our Nation;
DO HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

Section 1 of the Ghanaian Constitution then states:

(1) The Sovereignty of Ghana resides in the people of Ghana in whose name and for whose welfare the powers of government are to be exercised in the manner and within the limits laid down in this Constitution.
(2) The Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void.

The preamble to the Nigerian Constitution provides:

We the people of the Federal Republic of Nigeria, having firmly and solemnly resolve, to live in unity and harmony as one indivisible and indissoluble sovereign nation under God, dedicated to the promotion of inter-African solidarity, world peace, international co-operation and understanding, and to provide for a Constitution for the purpose of promoting the good government and welfare of all persons in our country, on the principles of freedom, equality and justice, and for the purpose of consolidating the unity of our people;
Do hereby make, enact and give to ourselves the following Constitution:-

Section 1 of the Nigerian Constitution then provides:

(1) This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria.
(2) The Federal Republic of Nigeria shall not be governed, nor shall any persons or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution.
(3) If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.

From these provisions, we may make two important observations that relate to two general approaches to constitutional interpretation. First, the documents locate
sovereignty in the people and assume that the sovereign will of the people is the source of the Constitution. The written documents that follow the preambular statements in this respect are the products of law-making and law-writing by the sovereign. Furthermore, the sovereign (in both cases) declares the written Constitution to be the supreme law from which all governmental authority is derived, and against which all other laws may be measured and judged. It is easy to assume, then, as the constitutional positivist does, that in each country the written Constitution is the Constitution; there is no other source of constitutional law outside the four corners of the written text.

Second, we may note that in each case the sovereign people, in making their Constitution, commits itself to a series of basic principles of political morality, including freedom, equality, democracy, justice, good government and the rule of law, and it is clear that the provisions of the written Constitutions that follow are made to fulfill these political-moral commitments. For at least certain non-positivist theories of constitutionalism, including the theory of unwritten fundamental law developed in the earlier chapters of this thesis, these political-moral principles are inherent within the very idea of legality, and thus provide a reservoir of unwritten legal principle that, as it were, keeps the written Constitutions afloat. From this perspective, it is misleading to say that the written documents somehow supply all the constitutional law there is for these countries; the written “Constitution” is not the full “Constitution” but is only a manifestation in written form of a more abstract, underlying fundamental law that supports it, and may, in the right case, supplement it.
Which of these two general approaches is the one judges follow? Which one should they follow? As Niki Tobi. J.S.C. has stated: “I am, a Nigerian Judge. … As a Nigerian Judge, the condition of my hire is to interpret and apply the Nigerian Constitution to Nigerians and others governed by the Nigerian Legal System and Nigerian jurisprudence …”\textsuperscript{493} The same, of course, can be said of the job of the Ghanaian Judge, as Francis Y. Kpegah J.S.C. has opined that “the framers of the Constitution have given us the unique opportunity to fashion our own jurisprudence which will serve our peculiar needs and aspirations as Ghanaians.”\textsuperscript{494} But if we remain attached to our original thesis that the written constitutions of these states must, through the proper exercise of judicial review of legislative and executive power in a democratic context, be seen to embrace a certain value—we might even say to have a certain “conscience”—that, in the end, secures the welfare of the people, we still have to answer some unique questions: what is the “Nigerian Constitution”? What is the “Ghanaian Constitution”? 

The brief look at the introductory parts of the written texts of the two Constitutions above provides no clear answer to these basic questions. It must be conceded, however, that the first approach—the constitutional-positivist one—is easier to grasp. It seems to treat seriously the idea that the will of people should prevail, something that democrats everywhere are supposed to espouse. Even if we set aside the actual events that led to the two Constitutions (it would seem that the referendum that led to Ghana’s Constitution really was an act of popular democracy whereas Nigeria’s

\textsuperscript{493} Inakoju v. Adeleke (2007), 4 NWLR (Pt. 1025) 423 (S.C.). 
\textsuperscript{494} Republic v. Tommy Thompson Books Ltd. and Others [1999] 2 LRC 503 at 538.
Constitution was imposed by military decree thus making, as one observer says, the ‘we the people’ clause in the preamble a “fraud”\textsuperscript{495}, in both cases a strong claim in political morality can be made that judges should conceptualize constitutional law as the will of those who framed the written Constitutions. Indeed, this seems to be the dominant judicial approach in both countries, though a brief review of a sample of cases suggests that a strand of non-positivism runs through the judgments too.

The experience of judging during times of military dictatorship seems to have shaped, or at least brought to the surface, attitudes about interpretation in both countries.\textsuperscript{496} Before the return to democracy in Nigeria in 1999, the military government operated under a decree that suspended the human rights provisions in Chapter IV of the Constitution then in force (which dated from 1979) and ousted the jurisdiction of the ordinary courts over all claims against the government. In 1992, the Supreme Court held that such military decrees were legally superior to the Constitution.\textsuperscript{497} Different judges seem to have reacted differently to the obvious conflict between might and right produced under these extreme conditions, and these reactions track the competing approaches to constitutional interpretation outlined above.

\textsuperscript{497} \textit{Labiyi v. Anretiola}, [1992] 8 NWLR (Pt. 258) 139 (S.C.) at 162.
6.2.1 Nigeria

The case of Abacha v. Fawehinmi is illustrative. Here, a barrister and prominent human rights advocate who was arrested by the security service in 1996 and held without charge and without reasons claimed human rights violations under the 1979 Constitution and under the 1981 African Charter on Human and Peoples’ Rights, an international human rights treaty that Nigeria had incorporated into its domestic law by statute in 1983. Although the military government had suspended the human rights chapter of the Constitution, it had not taken any explicit steps to suspend the law that implemented the African Charter, though it had, as noted, enacted an ouster clause that purported to preclude all judicial supervision of government action.

In a remarkable judgment at the Court of Appeal, Mustapher J.C.A. held that the military government was not “legally permitted” to interfere with the legislation implementing the African Charter, for although its decrees were superior to all other Nigerian laws, including the Constitution itself, they were not superior to the law on the African Charter because of its “international flavour”; the ouster clause was therefore inapplicable. The decision has been described as a “laudable attempt by the court to curb human rights abuses during the then military regime”, though, given the express terms of the Constitution that enshrine the dualist approach to domestic and international law (section 12(1) in both the 1979 and 1999 Constitutions), its reasoning was difficult to

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sustain. Here, then, is a sample of judicial reasoning that seems to place more weight on constitutional values than sovereign power.

On appeal to the Supreme Court, the judges split, four to three, on the central question of whether the ouster clause prevented judges from considering claims under the African Charter. Constitutional positivism is clearly evident in the reasons of the three judges who ruled that the ouster clause barred the claim. Salihu Modibbo Alfa Belgore J.S.C. stated: “The only way to stop these Military overwhelming curtailment of freedoms is to make their coup fail, but once they are in control it was a futile effort to adjudicate where jurisdiction is clearly ousted by Decree.” Uthman Mohammed J.S.C. reasoned that his job was simply to uphold the intentions of the lawmaker, and it was obvious that “the Military Administration by enacting [the] Decree … had intended to curtail any right of access to courts against any breach of the Fundamental Human rights of Nigerians by Military Government…”

In his judgment, Okay Achike J.S.C. addressed the claim that the detention order, to be valid, had to be based on reasons—that, in other words, although the decree said authorities “may” detain anyone for security reasons, those reasons had to be shown to be well-founded. The significance of this argument is that it parallels the argument made, and rejected, by the famous House of Lords decision on war-time security legislation in *Liversidge v. Anderson*, the case that David Dyzenhaus has used to illustrate the difference between constitutional positivism, which he says animates the majority

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opinion in that case, and a rule of law approach, that, in his view, informs Lord Atkin’s
dissent. Achike J.S.C. followed the majority approach in *Liversidge* and his reasoning
provides a nice summary of the implications that, according to Dyzanhaus, follow from
constitutional positivism in times of constitutional crisis. After reviewing the military
decree, he observed:

No doubt, the power donated herein is wide and startling. … I am unable to discover
from close reading of …[the] Decree … any obligation in the authority issuing
detention orders to disclose reasons in the way and manner he exercises his
subjective discretion. … Clearly, learned counsel is reading implied conditions into
the lucid and unambiguous provisions of … [the] Decree. This cannot be right in the
absence of any authority to do so.

…[The] provisions of [the] Decree … give the Inspector General of Police a free and
unfettered power … Put tersely but frankly, it is manifest that the power vested in
the detaining authority can be wielded arbitrarily and capriciously without any
remedy or right to seek a review of the decisions of the detaining authority….the
inbuilt ouster clause … shields the arbitrariness in which the power of the detaining
authority is shrouded. It is pertinent to remember that the relevant time of the
operation of these Decrees was during the military regime, a time that the provisions
of the 1979 Constitution had been substantially suspended and when judicial powers
of the state had been radically eroded and inclusion of ouster of the jurisdiction of
courts of law in statues became the rule rather than the exception. It is against this
background that the plentitude of subjective discretionary power conferred on the
detaining authority could be better appreciated.

The majority of the judges took a rather different tack. In the lead judgment, Michael
Ekundayo Ogundare J.S.C. held that the Nigerian legislation implementing the African
Charter was *not* superior to either the Constitution or military decree (and so he overruled
the Court of Appeal on this point); but, he also concluded that because the military
government had not suspended or repealed the law on the African Charter, it remained in
force, and, as legislation implementing an international treaty, all domestic legislation,
including military decrees, must be, if possible, read consistently with it. As a result, it
could be assumed that the general ouster clause did not apply to prevent the courts from exercising their jurisdiction over human rights claims under the African Charter. The rationale does have a positivist ring to it: the ouster clause could not apply because “it is presumed that the legislature does not intend to breach an international obligation” unless it expressly declares its intention to do so.

But in fact the judges in the minority were probably right: the military government probably did intend to preclude judicial review under the African Charter. In other words, the majority reasoning here only makes sense if it is considered, like another famous House of Lords decision, the decision on ouster clauses in *Anisminic v. Foreign Compensation Commission*\(^{502}\), to represent a judicial reading-down of such clauses out of judicial respect for the value of legality as opposed to judicial respect for upholding legislative will. If Ogundare J.S.C. was reluctant to acknowledge this point openly, Samson Odemwingie Uwaifo J.S.C., in his concurring opinion, was less so. When it comes to international human rights commitments, he said, “we must be prepared to stand on the side of civilized societies the world over in the way we consider and apply them…[and] [t]his will necessarily extract from the judiciary, so much so in a military regime, its will and resourcefulness to play its role in the defence of liberty and justice.” The “spirit” of the human rights instrument demands that its interpretation “meet international and civilized legal concepts.” We may say, then, that sometimes creative interpretive manoeuvres are needed to reconcile written laws and unwritten legal values.

The *Abacha* case thus illustrates nicely both the constitutional-positivist approach, where law is regarded as a product of social fact, political power or sovereign will, such that once the (written) Constitution is suspended and the jurisdiction of the courts ousted arbitrary power fills the vacuum, and a non-positivist or rule of law approach, where judges read expressions of positive law against principles of political morality that, despite the intentions of lawmakers, prevent gaps or vacuums in legality. True, the judges in the majority were not very explicit about their adherence to this latter approach. Furthermore, by the time they decided the appeal, democracy had been restored and the military regime was over. A quick look at more recent cases suggests that perhaps Nigerian judges have edged back toward constitutional-positivism—a stance that is much easier to defend on moral grounds when the sovereign lawmaker is not a military dictator but the people themselves.

One sign of this is that it seems that for some judges the legacy of military governments of the past, when it was common for the Constitution, or at least its human rights provisions, to be suspended, still informs the approach of some judges even today. Accordingly, in *Alhaji Mujahid Dokubo-Asari v Federal Republic of Nigeria*, Ibrahim Tanko Muhammad. J.S.C. accepted the proposition that where “National Security is threatened”, human rights must “take second place” and so “must be suspended”, for “[t]he corporate existence of Nigeria as a united, harmonious, indivisible and indissoluble sovereign nation is certainly greater than any citizen’s liberty or right.”

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Another indication of this constitutional-positivist tendency is simply the emphasis that judges put on the idea that the 1999 Constitution is a fact or thing made by its framers that has the qualities it has only because the framers decided to make it as they did, and the judge’s job is to find and follow their intentions. For example, in *Inakoju v Adeleke* (as cited above), Niki Tobi. J.S.C., asserted that although “the Judiciary is the custodian of the construction or interpretation of the Constitution”, judges “cannot in the interpretation of specific provisions of the Constitution, gallivant about or around what the makers of the Constitution do not say or intend.”

Similarly in *Attorney-General of Qndo State v. Attorney-General, of the Federation*,\(^{504}\) Ejiwunni, JSC, said: “We as Nigerians have to live and abide with all the provisions of the Constitution which have been fashioned for us by those whose fate was ordained to fashion the Constitution for the governance of the people of Nigeria.” The need to respect the past decisions of constitutional framers, even if they are problematic, is informed by the concept of separation of powers, and thus by a sense of what the appropriate function of the judge is. This point is made in *Obi v Independent National Electoral Commission*,\(^{505}\) by Pius Olayiwola Aderemi J.S.C. using language that could have been taken right out of a handbook for the positivist judge:

> Let me point out that no constitution fashioned out by the people, through their elected representatives for themselves, is ever perfect in the sense that it provides a clear-cut and/or permanent or everlasting solution to all societal problems that may rear their heads from time to time. … Our problems as judges should not and must not be to consider what social or political problems of today require; that is to confuse the task of a judge with that of a legislator. … Let … defective law be put right by new legislations …[for] we must not expect the *judex*, in addition to all his

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505 (2007), 7 NILR 1311.
other problems to decide what the law ought to be. In my humble view, he (judex) is far better employed if he puts himself to the much simpler task of deciding what the law IS.

On the same lines, in *Engineer Charles Ugwu & Anr v Senator Ifeanyi Ararume & Anr*, Niki Tobi, J.S.C. stated that judges must “surrender” to provisions that oust the jurisdiction of the courts even if they are “antithetical to the rule of law”, thus suggesting that the Constitution as it was made by the framers may prevail over deeper constitutional principles where there is a conflict. He also concluded that where the Constitution appears to provide no provision on a topic—where there is a constitutional gap—the judge must leave that gap unfilled. As he explained:

> This is because the only constitutional function of the Judge is, put in the conservative latinism, *judicium est quasi juris dictum*, meaning judgment, as it were, is a declaration of law. In other words, a law must be in existence before a Judge interprets it. If there is no law on an issue, a Judge has nothing to interpret and if he goes to interpret where there is no law, he will be deemed to have made effort to hold the air in his hands, which is physically impossible.

For one who accepts the idea of fundamental unwritten law, this comment makes no sense, for “in the air” there is always law on a topic. The various statements just quoted thus have all the markings of constitutional-positivism, the view that law is a fact to be found by examining pieces of paper or other manifestations of sovereign power. Yet they should be considered alongside other statements that suggest a less rigid judicial attitude. Nigerian judges consistently state, for example, that constitutional interpretation is

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different from statutory interpretation in that broad and liberal readings of the text are needed to give effect to underlying principles and purposes.\textsuperscript{507}

The case of \textit{Attorney-General of the Federation v Alhaji Atiku Abubakar}\textsuperscript{508}, illustrates nicely what judges think they are doing when they interpret the Constitution, and how they go about doing it. The Nigerian Constitution provides that Presidential candidates must run for election with a Vice Presidential candidate from the same political party, but it says nothing about what happens if, after elected, one of them leaves or is removed from the party. It was argued in this case that the Vice President, having left the President’s party, lost the right to continue in office. Finding no mention of the issue of party membership among the grounds set forth in the Constitution for the removal of the President or Vice President, the judges in the court below concluded that for judges to draw the inference that change in party membership was a ground for loss of

\textsuperscript{507} See for example: \textit{Attorney General of Ondo State v. Attorney General of the Federation} (2002) 6 S.C. (Pt. 1) 1, per Uwais J.S.C. at 28 (“…it must be remembered that we are here concerned not with the interpretation of a statute but the Constitution which is our organic law or grundnorm. Any narrow interpretation of its provisions will do violence to it and will fail to achieve the goal set by the Constitution.”); per Ogwuegbu J.S.C. at 62 (“A Constitution is an instrument of government under which laws are made and are not mere Acts or law and the construction which the court will give to a constitutional provision must be such that will serve the interest of the Constitution and best carry out the subject and purpose and give effect to the intention of the framers.”); per Uwaifo J.S.C. at 104-105 (“What should be the proper approach to the interpretation of the relevant provisions of the Constitution with which we are confronted in this case? It must be remembered that they are tersely worded and invariably in declaratory form as most constitutional provisions usually are….There is no doubt the item bears a measure of ambiguity. In a situation like that the approach which has been accepted by this court is that in order not to defeat the principles behind such provisions, technical rules of interpretation should be avoided; and that where the Constitution has used an expression in the broader or narrower sense, this court should lean to the broader interpretation, unless there is something in the text or in the rest of the Constitution to indicate that the narrower interpretation will best carry out the objects and purposes of the constitution…”).

\textsuperscript{508} (2007), 4 NILR 202.
office would involve judicial regard for “matters extraneous or outside of the Constitution”, in particular “political or moral issues upon which courts have no jurisdiction.” Here, then, is another expression of the constitutional-positivist sentiment that constitutional law and political morality occupy two separate realms.

On appeal, counsel argued for a more flexible reading of the Constitution, submitting “that the absence of express provisions on a matter does not mean that the intention/intendment of the Constitution cannot be construed from the totality of the Constitution…” It was argued that judges should “lean to broader interpretation in response to the demand of justice”, and that technical rules of interpretation should not be used “to defeat the principles of government in the Constitution” or its “objects or purposes.” At least one judge agreed with the judges below. Sylvester Umaru Onu, J.S.C. stated that if there was a “lacuna” in the Constitution, it would be wrong for a court “to enact or write into the Constitution what its makers failed to insert” through the “thin disguise of interpretation”, for “[i]f a gap is disclosed, the remedy lies in an amending Act.”\footnote{Quoting here \textit{Magor & St Melions Rural District Council v. Newsport Corp.} [1951] 2 All E.R 839, at 841).}

But the majority of the judges accepted that a broad or purposive reading of the Constitution was appropriate. Giving the lead judgment, Sunday Akinola Akintan J.S.C. affirmed that the goal of constitutional interpretation was to give effect to the framers’ intentions, where possible through a literal reading of the text, an approach that he
observed was generally regarded “as the positivist approach.” But he also accepted the argument that inferences could be drawn from an interpretation of the totality of the Constitution, a task assisted by reference to history, comparative jurisprudence, and underlying theories of government. This examination showed, in his view, that the Constitution “assumes” that the President and Vice President must remain members of the same party (though removal of the Vice President if this rule was violated was a matter for impeachment in the National Assembly rather than the courts).

Several other judges seemed to weave interpretive approaches together. For example, Walter Samuel Nkanu Onnoghen, J.S.C. stated that a Constitution for any country is its “organic law” from which the legitimacy of state institutions is derived, a “composite document” that should attract a style of interpretation that “enhance[s] and sustain[s] the reverence in which Constitutions are held the world over.” Broader rather than narrower interpretations are therefore to be favoured in response to the demands of justice. He quoted, with approval, Sir Udo Udoma J.S.C., who had written in 1980:

... [T]he function of the Constitution is to establish a framework, and principles of government, broad and general in terms, intended to apply to the varying conditions which the development of our several communities must involve, ours being a plural, dynamic society and therefore, mere technical rules of interpretation of statutes are to some extent inadmissible in a way so as to defeat the principles of government enshrined in the Constitution.

He then invoked a series of “principles of interpretation of our Constitution” articulated by Obaseki J.S.C. in *A-G of Bendel State v. A-G of the Federation and ors*\(^5\), which included: giving clear language its plain meaning; acknowledging that the Constitution is

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\(^5\) (1981), 10 S.C 1, at 77 – 79.
“an organic scheme of government to be dealt with as an entirety”; recognizing that “while the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller import to its meaning”; ensuring language is not construed “so as to defeat its evident purpose”; and, finally, recognizing that “[t]he principle upon which the Constitution was established rather than the direct operation or literal meaning of the words used, measure the purpose and scope of its provisions.”

Still, he gave the following caution: “Courts … cannot amend the Constitution. They cannot change the words. They must accept the words, and so far as they introduce change, it can come only through their interpretation of the meaning of the words which change with the passage of time and age.” “It should always be borne in mind,” he continued, “that in constructing the provisions of the Constitution the court is not allowed to read into any provision or section thereof anything not expressly contained therein or to fashion out another Constitution or provision for the people other than to bring out the true intention of the makers of the Constitution.” For this reason, he concluded that no constitutional rule required the Vice President to resign upon leaving the President’s party.

In his reasons, Pius Olayiwola Aderemi, J.S.C. emphasized the traditional separation of powers, that the “fashioning or making” of the Constitution is the “exclusive preserve” of lawmakers, while “interpreting its provisions” is the exclusive job of judges. But what if a constitutional problem is, like this one, “novel”? In other words, what if no constitutional provision expressly answers the legal question before the
court? In these cases, he said, judges must still find an answer, for “no legal problem or issue must defy legal solution”, otherwise society will continue to develop and law will be “stagnant and consequently … useless …”. There can be no legal gaps or vacuums. But while judges in novel constitutional cases must exercise “ingenuity” in articulating what the law is, no judge should regard himself “as making law or even changing law.” The task of the judge is to declare law by considering “the new situation, on principle …”. It is in this sense, then, that it may be said that “the law lies in the breast of the judge.”

Looking to the relevant provisions here, however, he concluded that they plainly list some reasons for removing a Vice President, and changing parties is not one of them, and so the Vice President did nothing unconstitutional by refusing to resign. “I repeat, it has now come to stay like the Rock of Gibraltar that judges, in the exercise of their interpretative jurisdiction, must only interpret the words of a statute or even constitutional provision according to their literal meaning and the sentences therein according to their grammatical meaning ….” Judges must not “invent fancied notions” in the course of interpreting constitutional language just because he or she concludes that giving effect to the plain meaning of words “would be inexpedient or unjust or even immoral.” For judges to place concerns about justice or morality over fidelity to written texts would undermine public confidence in the “political impartiality of the judiciary” depriving the judiciary of “its authority and its legitimacy.” Continuing along this (what we may call constitutional-positivist) vein, he observed:

Let me point out that no Constitution is perfect in the sense that it provides a clear-cut and/or permanent or everlasting solution to all societal problems that may rear their heads from time to time. … But let judges be properly advised that if divinely
endowed to see some shortcomings in any provision of the Constitution which the people have voluntarily fashioned out for themselves through their elected representatives, beyond making a subtle point of the lacuna in their judgments, no slightest attempt must be made by them to effect any correction or an amendment of the law as it presently stands, by either removing or adding some words to the law as it stands now.

Yet there are occasions where the Nigerian courts produce results that parallel non-positivist expectations, but with seemingly restrictive approach to interpretation. One case that properly illustrated this is *Amaechi v INEC (2008).*\(^{512}\) Here, the Supreme Court of Nigerian ruled that in order to safeguard the enduring principles of internal party democracy in Nigeria, the name of a nominated candidate cannot be substituted without a reasonably justifiable cause.

Mr. Amaechi, the appellant in this case, contested (alongside eight others) the primaries of the Peoples Democratic Party (PDP) for the governorship of Rivers State in the 2007 Nigerian general elections. Being victorious at the said primaries, his name was duly sent to the INEC as required by law. However, his name was later deleted and substituted by the PDP with one Mr. Celestine Omehia on the account that it was submitted in error. But it was also established as a fact that Mr. Omehia did not contest as a candidate in the PDP primaries. One question for the court as framed by Justice George Adesola Oguntade was: “what ‘error’ made it possible for a non-candidate at the PDP primaries to be named the PDP candidate in place of eight candidates who contested and of whom Amaechi came first?”\(^{513}\)

\(^{512}\) (2008) 1 S.C. (Pt.1) 36 [hereafter referred to as the *Amaechi Case*].

\(^{513}\) Ibid., at 75.
Such a question was necessary because it was contended for the appellant that the act of substitution was only lawful if the reasons assigned are cogent and verifiable as required under section 34(2) of the Electoral Act, 2006. But this was met by the respondent’s argument that the sponsorship of a member of a political party for the purpose of contesting election into a public office is not a guaranteed right of that member and so the appellant had no statutory or constitutional right to be sponsored by PDP as its gubernatorial candidate.

This contention of lawful substitution was rejected by a unanimous court. To enforce a predictable principle of the rule of law on the electoral process, the Supreme Court held that the substitution was illegal as the infamous “error” reason assigned by the PDP was woefully below the mark of “cogent and verifiable reason”. Oguntade J.S.C. in the leading judgement observed that the reason for the substitution “was patently untrue and certainly unverifiable.” According to Justice Pius Olayiwola Aderemi, the acts of substitution cannot be done by any “decent and polished characters” and they are at best “vicious acts”, a view that in part entails the application of reason and justice and common universal moral values. By implication, the court reasonably supposed that a candidate whose name was deleted in favour of another candidate contrary to the terms of

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514 The relevant portions of Section 34 of the Electoral Act, 2006 reads: (1) A political party intending to change any of its candidates for any election shall inform the Commission of such change in writing not later than 60 days to the election. (2) Any application made pursuant to subsection of (1) of this section shall give cogent and verifiable reasons.
515 *Amaechi Case*, supra note 512 at 75.
the conscience of the Constitution would be and in the case of Mr. Amaechi was, deemed the rightful winner of the election and must be sworn in as such.

Even though the decision was unanimous and the results probably good for democracy and the rule of law in Nigeria, it is less clear if the court intended a break with its restrictive constitutional-positivist approach to interpretation highlighted in the considered cases above. While some judges were simply mute or ambivalent on the issue, others erected sufficient signposts of constitutional-positivist interpretive attitudes. For instance, Aderemi J.S.C. stated that:

The fundamental duty of the judge is to expound the law and not to expand it. He must decide what the law is and not what it might be. Where the words used in couching the provisions are clear and unambiguous as the provisions of Section 32 aforesaid, they must be given their ordinary grammatical meanings, no more.\textsuperscript{517}

On his part, Justice Walter Samuel Nkanu Onnoghen, stated that “It is settled law that in the construction of a statute, the primary concern of the judge is the attainment and ascertainment of the intention of the legislature....Where the language used in the legislation or statute or Constitution is clear, explicit and unambiguous, as found in the instant case, the judge must give effect to it as the words used speak the intentions of the legislature.”\textsuperscript{518} But Onnoghen J.S.C., would later add that a “literal interpretation” may only be adopted if it “will not lead to absurdity or some repugnancy or inconsistency with the rest of the legislation.”\textsuperscript{519} However, this qualification may not have attracted Justice

\textsuperscript{517} Ibid., at 277-8.  
\textsuperscript{518} Ibid., at 204.  
\textsuperscript{519} Ibid., at 204.
Mahmoud Mohammed when he referred to the opinion of Tobi J.S.C. in *Ugwu v Araraume*:

The underlying principle in the interpretation of a statute is that the meaning of the statute or legislation must be collected from the plain and unambiguous expressions or words used therein rather than from any notions which may be entertained as to what is just and expedient...In the construction of a statute, the primary concern of a Judge is the attainment of the intention of the legislature ...  

Of all these interspersed markings of constitutional-positivism, Oguntade J.S.C. achieved a distinction by striking a different interpretive chord, with a less restrictive interpretive bearing. He began by stating that a “court must shy away from submitting itself to the constraining bind of technicalities” and judges “must do justice even if the heavens fall.” According to him, that must be part of the core functions of the judiciary, which, Oguntade J.S.C. said “cannot be a passive on-looker when any person attempts to subvert the administration of justice” and should not “hesitate to use the powers available to it to do justice in the cases before it.” His general proposition therefore was that “in interpreting the provisions of a statute or Constitution” the court “must read together related provisions of the Constitution in order to discover the meaning of the provisions”. The “court ought not to interpret the related provisions of a statute or Constitution in isolation and then destroy in the process the true meaning and effect of particular provisions.”

This style of reasoning may not overtly be non-positivist, but its implications are.

Underlying this argument was Oguntade J.S.C. rationalisation. Since political parties are

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created by the Constitution, he contended, they “have an important stake in flying high and loftily the banner of the rule of law.” It is this banner of the rule of law and, we may add, therefore the fundamental rules of reason and justice, that make the issue of substituting a nominated candidate’s name with another very crucial. The law requires cogent and verifiable reasons, which Ibrahim Tanko Muhammad J.S.C. thought “must be genuine, convincing, compelling and persuading” and “should not be flimsy or dubious.” According to Onnoghen J.S.C., the legal effectiveness of a substitution and its proper interpretation depends on the core of the word “verify” which means “to prove to be true, confirm, to establish the truth of, to examine or test the correctness or authenticity of something.” Such an interpretation will help ensure that politics are conducted in accordance with the conscience of the rule of law, for which Aderemi J.S.C. thought that “in all countries of the world which operate under the rule of law, politics are always adapted to the laws of the land and not the laws to politics.”

But as I said, it may be open to challenge to state that all these rationalisations and conclusions really flow from an approach to constitutional interpretation that is not constitutional positivism. After all, the specific provisions of the Electoral Act being interpreted did in fact require “cogent and verifiable reasons” and if one follows the law, as laid down, the fact therein is that such reasons must be given. It was therefore easy for the court to conclude that the “error” reason given by PDP for the substitution did not

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524 Ibid., at 116.
525 Ibid., at 253.
526 Ibid., at 209.
527 Ibid., at 301.
meet the demands of these words. But the denial of immunity to Mr. Omehia does, it may be argued, show a less text-centred approach by the court.

The situation here was a bit complex, as at the time of the final decision on this case by the Supreme Court in 2008, the said election had already been conducted, won by the PDP, and Mr. Omehia had been sworn-in as the Governor of Rivers State. In light of these events, the respondents argued that the Supreme Court lacked jurisdiction on the question for two principal reasons: first, that it was an election issue which should be resolved by an Election Tribunal, and secondly, even if it is not an election issue, the court should decline to hear the matter because Mr. Omehia had already been sworn-in and as a Governor now enjoyed a constitutional immunity from such legal wrangles pursuant to section 308 of the 1999 Constitution. Section 308 stated that:

(1) Notwithstanding anything to the contrary in this Constitution, but subject to subsection (2) of this section - (a) no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office; (3) This section applies to a person holding the office of President or Vice-President, Governor or Deputy Governor; and the reference in this section to "period of office" is a reference to the period during which the person holding such office is required to perform the functions of the office

Here, we may say, that adherence to the literalism associated with constitutional positivism would have led the judges to hold the Governor immune from the suit. Instead, the Supreme Court inquired into whether the mere act of swearing-in a person as Governor entitled that person to constitutional immunity under section 308 of the Constitution if the election of that person is alleged to have breached the fundamental

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528 As provided for in the Sixth Schedule of the 1999 Constitution.
principles of the rule of law or the law of reason at the core of the conscience of the Nigerian Constitution.

Oguntade J.S.C. concluded that in an election related matter where the status of a person as governor is being challenged or contested, the immunity conferred on him by the Constitution is equally in question.\textsuperscript{529} He expressed derision at the idea of the immunity, for to “ask Amaechi to wait till the end of Mr. Omehia’s tenure of office as Governor before pursuing his suit is to destroy forever his right of action.”\textsuperscript{530} According to Mohammed J.S.C. to accept the arguments of the claims of immunity is to destroy the “acquired rights” of the appellant and close the doors on him “in search for justice”.\textsuperscript{531} Here, the general theory of fundamental unwritten law would require that the validity of one’s election is antecedent to a valid claim of immunity.

To summarize, then, it is clear that Nigerian judges generally adopt a text-centred approach to constitutional interpretation. They seem very reluctant to engage in moral reasoning that might be seen as outside the text, or that might be seen as correcting problems in the text or filling gaps in the text. Yet, at the same time, there is an appreciation that the best reading of the text may demand examining words in light of their underlying principles or purposes, and that occasionally inferences may be drawn from provisions that do not expressly answer the point at issue. The dominant theory of interpretation is one of constitutional positivism, but there is perhaps a strand of non-positivist thought there too.

\textsuperscript{529} Amaechi Case, supra note 512 at 98.
\textsuperscript{530} Ibid., at 100.
\textsuperscript{531} Ibid., at 182.
6.2.2 Ghana

What about the courts in Ghana? As a general observation, it may be said that Ghanaian judges seem slightly more open to the sort of broad and flexible reading of the Constitution that non-positivists endorse. In general, Ghanaian judges seem more willing than their Nigerian counterparts to acknowledge openly the need to interpret the Constitution in light of its underlying “spirit”. It is acknowledged, for example, that “a national Constitution is a reflection of that nation’s history and the embodiment of the noble aspirations of its framers”\(^{532}\); that “in the interpretation of our national Constitution one must apply a broad and liberal spirit…”\(^{533}\); that interpretation must be “in tune with the spirit and letter of the Constitution”\(^{534}\); that “a national Constitution like ours, being a living document expected to meet the needs and challenges of the present and future generations, ought to be interpreted broadly and liberally” according to its “letter and spirit.”\(^{535}\) Ghanaian judges are fond of quoting the words of Sowah J.C.A. from *Tuffour v. Attorney-General*\(^{536}\):

> A written Constitution such as ours is not an ordinary Act of Parliament. It embodies the will of a people. It also mirrors their history. Account, therefore, needs to be taken of it as a landmark in a people’s search for progress. It contains within it their aspirations and their hopes for a better and fuller life. The Constitution has its letter of the law. Equally, the Constitution has its spirit … Its language … must be considered as if it were a living organism capable of growth and development … A broad and liberal spirit is require for its interpretation. It does not admit of a narrow interpretation. A doctrinaire approach to interpretation would

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534 Republic v. Tommy Thompson Books Ltd. (No. 2), supra note 532 per Sophia Akuffo J.S.C. at 513.
not do. We must take into account of its principles and bring that consideration to 
bear, in bringing it into conformity with the needs of the time.”

Sowah C.J. would later state: “Our interpretation should therefore match the hopes and 
aspirations of our society and our predominant consideration is to make the 
administration of justice work.”

There is a strong case to be made that, for at least certain Ghanaian judges, it was 
the constitutional positivism of judges in the early days of Ghana’s independence that 
permitted military tyranny to flourish, and that consequently the transition to democracy 
requires the rejection by judges of constitutional positivism—and hence the importance 
of looking to the Constitution’s “spirit”. Of course, these judges do not invoke the term 
“constitutional positivism” in making this point; but it is fair to say that that term 
describes well the theory of law that they blame for Ghana’s past descent into military 
tyranny. The key moment, for these judges, was the decision of the Supreme Court in In 
*re Akoto* which, as noted in Chapter Two, held that statements in the 1960 Constitution 
concerning human rights could not limit legislative sovereignty.

The connection between constitutional theory, tyranny, and *Akoto* was explained 
by Amua-Sekyi J.S.C. in *New Patriotic Party v. Inspector-General of Police*. Amua-
Sekyi J.S.C. began by observing that it was assumed upon independence that “our former 
rulers left us the kind of democratic government that they knew”, which was, of course,

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537 Republic v. High Court, Accra; *Ex parte Adjei*, [1984-86] GLR 511, at 518-519.
based upon the doctrine of parliamentary sovereignty.\textsuperscript{540} Under this British doctrine of parliamentary sovereignty “faith is placed in the good sense of those who, for the time being, wield power”; it is, in other words, a system that works best “in a society where tolerance of divergent views is regarded as necessary for the well-being of the community.”\textsuperscript{541} The difficulty, however, is that in a society where those who hold different views are looked upon as subversive “it breaks down completely and becomes tyrannical.”\textsuperscript{542} But, adhering to a rigid view of legislative sovereignty, the judges in early post-independent Ghana upheld draconian laws and unwittingly laid the groundwork for tyranny.

According to Amua-Sekyi J.S.C., with the \textit{Akoto} decision “all resistance to oppression came to an end” and “[w]e had rammed down our throats, a constitutional tyranny” which led to a “one-party state”.\textsuperscript{543} Although subsequent Ghanaian Constitutions have entrenched human rights as a way to “rescue us from such an abyss of despair”, judges are, he says, still uneasy about how to approach the task of constitutional interpretation.\textsuperscript{544} “Unfortunately, we have had too little experience of true democracy since independence. Like a bird kept in a cage for years, we have come to think of the cage as home rather than a prison. The door has been flung wide open, yet we huddle in a corner and refuse to leave.”\textsuperscript{545}

\textsuperscript{540} Ibid., 467.
\textsuperscript{541} Ibid.
\textsuperscript{542} Ibid.
\textsuperscript{543} Ibid., at 469
\textsuperscript{544} Ibid., at 470
\textsuperscript{545} Ibid.
Similar views have been expressed by other Ghanaian judges. Charles Hayfron-Benjamin J.S.C. has stated that in adopting parliamentary sovereignty in *Akoto* the judges “undermined the very fabric of th[e] [1960] Constitution and literally pushed aside certain principles and fundamental human and civil rights which have become the bulwark of the Constitution, 1992”; “our countrymen and women learnt a bitter lesson from that judgment”, and now the “‘spirit or conscience’ of the Constitution, 1992… must .. be our guide…”546

But not all judges seem to have seen the lesson of *Akoto* in the same way. The case of *Amidu v. President Kufour & Ors*547, is illustrative. Here, a declaration was sought that the appointment by the President of Ghana of certain officials without consulting the Council of State violated provisions of the Constitution. One issue facing the Court was whether the President was the appropriate defendant, given that article 57(4) of the Constitution gives the President immunity from suit for the performance of his presidential functions. In the course of concluding that the President could not be sued in this case, Atuguba J.S.C. stated:

The proper construction of this provision [i.e., article 57(4)] is quite a vexed. I must confess that if it were open to me so to hold, I would have eagerly held that the President could be sued in the performance or purported performance of his functions under the Constitution, since that would advance constitutionalism, the rule of law and the negation of the bemoaned days of *In re Akoto* [1961] 2 GLR 523, SC. But as was aptly put by Smith J in *Balogun v. Edusei* (1958) 3 WALR 547 at 553: “The Courts of Justice exist to fulfil, not to destroy the law…” (The emphasis is mine. *[Amidu v. President Kufuor]*, supra, at 109)

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In fact, article 57(4) is open to a different interpretation, for on its own terms it is to operate “without prejudice” to article 2 of the Constitution, which provides for declaratory actions of constitutional inconsistency. So it is hard to see why it was not open to this judge to read the immunity provision narrowly so that a declaratory action could be brought against the President under article 2 and the ideals of constitutionalism and the rule of law thereby advanced. Moreover, it is unclear why this judge thought that advancing the rule of law, which is arguably a precondition for law itself, might somehow be inconsistent with law, that it might “destroy the law”—unless of course he accepted the constitutional-positivist view implicit in *Akoto*. In fact, Atuguba J.S.C. may not have held such an extreme view after all, for he went on to say that the Constitution embodies not just “our sovereign will” but also “embodies our soul”, and its various parts must be read together coherently to achieve its underlying purposes; and it followed that although the President might be immune from suit his conduct could be challenged in actions brought against the Attorney General.548

This resolution of the matter did not, however, go far enough for the judges in the minority. The views of Kpegah J.S.C. are worth examining. Underlying his reasons is a clear concern for the responsibility that judges have in upholding the rule of law in a transitional democracy. He was of the view that the history of Ghana should weigh heavily on its judges. He began by observing that every student of constitutional law in Ghana might rightly feel that had the “celebrated” case of *Akoto* gone the other way, “the political and constitutional development of Ghana would have been different” in the

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sense that “respect for individual rights and the rule of law might have been well entrenched in our land…”\textsuperscript{549}.

It followed that judges must now avoid the “calamity which befell the nation after the \textit{Re Akoto} case\textsuperscript{550}. Kpegah J.S.C. concluded that it was not sufficient to say, as the majority had done, that a presidential act may be open to challenge in an action against the Attorney General; for the rule of law to prevail, the President himself had to account for his actions before the Supreme Court. For him, the function of the Supreme Court is not just to “adjudicate[e] constitutional matters”, but it is to “promot[e] and safeguard[…] constitutional values”—it is, in short, nothing short of “the maintenance of the \textit{culture of constitutionalism}.”\textsuperscript{551}

Perhaps the reasons most consistent with the general theory of fundamental unwritten law are those of Francois J.S.C. in \textit{New Patriotic Party v Attorney-General} (the 31\textsuperscript{st} December Case)\textsuperscript{552}. He stated that it was important to recall that the 1992 Constitution in Ghana “was born of a consensus, which was formally approved in a national referendum”, that it “embodies and represents the people’s will.” But so too it is important to recall that it cannot be interpreted like ordinary laws; a “broad and liberal interpretation” is needed “to allow the written word and the spirit that animates it, to exist in perfect harmony.” “My own contribution to the evaluation of a Constitution”, he continued, “is that, a Constitution is the out-pouring of the soul of the nation and its

\begin{footnotes}
\item \textsuperscript{549} Ibid., 139.
\item \textsuperscript{550} Ibid., at 152.
\item \textsuperscript{551} Ibid. (emphasis added).
\item \textsuperscript{552} [1993-94] 2 GLR 3531.
\end{footnotes}
precious life-blood is its spirit. Accordingly, in interpreting the Constitution, we fail in
our duty if we ignore its spirit. Both the letter and spirit of the Constitution are essential
fulcra which provide the leverage in the task of interpretation.”

Significantly, Francois J.S.C. invoked article 33(5), the unenumerated rights
 provision we discussed briefly in Chapter Two, and concluded that judges are “enjoined
to go beyond the written provisions enshrining human rights, and to extend the concept to
areas not specifically or directly mentioned but which are ‘inherent in a democracy and
intended to secure the freedom and dignity of man.” In other words, the written
provisions do not only cover constitutional law; the law extends also to the “underlying
spirit and Philosophy.” Indeed, he quotes an American judge, who stated that “perhaps
even more than by interpretation of its written word, this Court has advanced the
solidarity and prosperity of this nation by the meaning it has given to these great silences
of the Constitution.” Francois J.S.C. agreed, adding: “Indeed it is the proper
ascertainment of these silences that provide the measure of understanding of the basic
constitutional concepts of the fundamental law.” He quickly added, however, that this
does not mean judges may enter “the forum of conscience” when deciding constitutional
cases; it simply means that “law and conscience … are interwoven.”

Charles Hayfron-Benjamin J.S.C. agreed with the general tenor of this
interpretive style and said that his “duty was to discover the ‘intent and meaning’ of...our
Constitution...”, but this, for him, must be done by applying “‘a broad and liberal spirit”

553 Ibid., at 79-80.
554 Ibid., at 80.
555 Ibid., at 84.
in its interpretation.” He understood this perhaps within the context of non-positivist interpreтив approach to law as “there is no benefit in these modern times in applying a strict interpretation to modern democratic Constitutions”. He added that to do so “would mean that we forget that Constitutions are made by men for the governance of men” and in the context of the 1992 Constitution of Ghana, we should understand or interpret it as “the sum total of our hopes, disappointments, experiences and expectations as a nation.” A decision to ignore this background context would be a fatal failure to recognise the Constitution as “a living organism capable of growth.”

The influence of this general line of reasoning on constitutional interpretation partly built on the judiciary’s determination to purge Ghana’s legal system of the ghost of Re Akoto, and to embrace the views of Sowah C.J. as expressed in Tuffour v. Attorney-General above, survived into our current century. In Asare v Attorney-General, Samuel Kofi Date-Bah J.S.C, stated that:

[T]he “spirit” to which Sowah JSC refers is another way of describing the unspoken core underlying values and principles of the Constitution. Justice Sowah enjoins us to have recourse to this “spirit” or underlying values in sustaining the Constitution as a living organism.

According Date-Bah J.S.C., an interpretation of a constitutional provision with a focus on the discovery of its true purpose has two objectives; the subjective and objective purposes. The former which looks for the framers intent, a view similar to the constitutional positivist claims, and the latter, which he prefers, is on what the provision

556 Ibid., at 168.
558 Ibid., at 835-836.
ought to achieve as in the conscience of the constitution or the core values of the legal system. On this he stated that:

...the objective purpose is not what the author actually intended but rather what a hypothetical reasonable author would have intended, given the context of the underlying legal system, history and values, etc of the society for which he is making law. This objective purpose will thus usually be interpreted to include the realisation, through the given legal text, of the fundamental or core values of the legal system.\(^{559}\)

A similar approach has recently been taken in *Agyei Twum v Attorney-General and Akwetey*\(^{560}\), where the Supreme Court held that inadvertent “gaps” in the Constitution could be filled on the account of the “underlying philosophy and core values” of the country’s legal system. The Ghanaian Constitution provides that any person seeking the removal of the Chief Justice shall submit a petition to the President who shall appoint a committee to inquire into the petition. But the Constitution says nothing about the need for the President to convince himself that the petition does establish a *prima facie* case against the Chief Justice before he appoints a committee. However, this gap does not obtain when the petition is about the removal of other Justices of the Superior Courts. There, a precondition to setting up the committee is the establishment of a *prima facie* case against the person.

In this case, a petition was submitted to the President seeking the removal of the Chief Justice of the Republic, on grounds of judicial misconduct and abuse of power. Following this, the President’s Press Secretary made a public declaration that in compliance with the Constitution, the President was setting up a committee to inquire

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\(^{559}\) *Ibid.*, at 834.

into the petition. Invoking the original jurisdiction of the Supreme Court, the plaintiff complained that such a decision to appoint a committee to inquire into the petition is unconstitutional. To understand the arguments and the interpretive approach of the court, it is important to spell out the provisions in contention.

Article 146(3)-6 of the Constitution stated as follows:

(3) If the President receives a petition for the removal of a Justice of a Superior Court other than the Chief Justice or for the removal of the Chairman of a Regional Tribunal, he shall refer the petition to the Chief Justice, who shall determine whether there is a *prima facie* case.

(4) Where the Chief Justice decides that there is a prima facie case, he shall set up a committee consisting of three Justices of the Superior Courts or Chairmen of the Regional Tribunals or both, appointed by the Judicial council and two other persons who are not members of the Council of State, nor members of Parliament, nor lawyers, and who shall be appointed by the Chief Justice on the advice of the Council of State.

(5) The committee appointed under clause (4) of this article shall investigate the complaint and shall make its recommendations to the Chief Justice who shall forward it to the President.

(6) Where the petition is for the removal of the Chief Justice, the President shall, acting in consultation with the Council of State, appoint a committee consisting of two Justices of the Supreme Court, one of whom shall be appointed chairman by the President, and three other persons who are not members of the Council of State, nor members of Parliament, nor lawyers.

It is evident that the requirement of a *prima facie* case in article 146(3) does not exist in article 146(6). A literal reading of article 146(6) would enjoin the President to accept all sorts of petitions against the Chief Justice. It was this possibility that underpinned the plaintiff’s argument that a liberal interpretation be adopted by reading the two provisions together as to require the President in instant case, to convince himself that there was a *prima facie* case before proceeding to set up a committee. The seven member panel unanimously agreed with this contention. But how did they get to this conclusion? The
views contained in the leading judgment authored by Samuel Kofi Date-Bah J.S.C. are worth examining.

In a thoughtful and stimulating exposition, Date-Bah J.S.C., began by acknowledging that the contest is between “a literalist interpretation of article 146(6)” and “a purposive interpretation of that provision”.\textsuperscript{561} But according to him, the former approach “leads to absurd consequences” and more specifically and directly to the case at bar, “could lead to the floodgates being opened for frivolous and vexatious petitions being continuously filed against a serving Chief Justice...”\textsuperscript{562} Were the President to have automatic duty to set up a committee and suspend the Chief Justice from his functions on the account of such potentially frivolous petitions, that would be, Date-Bate J.S.C. continued, “deeply subversive of the balance of powers underlying the 1992 Constitution and the separation of powers that it entrenches. It is, of course, also inimical to the independence of the Judiciary.”\textsuperscript{563} For him, we can “avert the said absurd consequences”\textsuperscript{564} through “the purposive” interpretive approach.

In a forceful judgment and what could clearly be seen as the best illustration of the general theory of fundamental unwritten law, Dr Date-Bah J.S.C. stated that:

It has to be remembered that there is room for the unwritten in the written constitution. The fact that a country has a written constitution does not mean that only its letter may be interpreted. The courts have the responsibility for distilling the spirit of the Constitution, from its underlying philosophy, core values, basic structure, the history and nature of the country’s legal and political system etc, in

\textsuperscript{561} Ibid., at 754.
\textsuperscript{562} Ibid., at 754, 756.
\textsuperscript{563} Ibid., at 756.
\textsuperscript{564} Ibid., at 754.
order to determine what implicit provisions in the written constitution flow inexorably from this spirit.  

From this, if the Constitution does not explicitly authorise it, its “spirit” embedded in its “unwritten” architecture requires that the Chief Justice “be given the benefit of a prior determination as to whether there is a prima facie case established against him or her, before the President may establish a committee to consider a petition for his or her removal.” The court thus has the power to avert a “manifest absurdity” which is likely to result from the “omission to provide for a prior determination of a prima facie case”.  

Given that article 146 does not on the “plain words” constitutional-positivist approach recommend any reading-in, this exposition looks very non-positivist and at best an explicit endorsement of the proposition that understanding and interpreting a constitution extends to a certain unwritten legal value or reason.

This is significantly in congruence with Francois J.S.C. remarks in *Kuenyehia v Archer* that “any attempt to construe the various provisions of the Constitution,... must perforce start with an awareness that a constitutional instrument is a document sui generis to be interpreted according to principles suitable to its peculiar character and not necessarily according to the ordinary rules and presumptions of statutory interpretation.”

And that:

It appears that the overwhelming imperatives are the spirit and objectives of the Constitution itself, keeping in an eye always on the aspirations of the future and not overlooking the receding footsteps of the past. It allows for a liberal and generous interpretation rather than a narrow legalistic one. It gives room for a broader attempt

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565 Ibid., at 766 [emphasis added].  
566 Ibid., at 762.  
568 Ibid., at 561.
to achieve enlightened objectives and tear apart the stifling straight jacket of legalistic constraints that grammar, punctuation and the like may impose.\textsuperscript{569}

However, there may be some concerns that the Ghanaian court may not be consistent with its largely acknowledged non-positivist approach to interpretation, at least in some areas of constitutional law. That is, there are also signs of the restrictive constitutional-positivist approach and a case in point that illustrates this is \textit{Zakaria v Nyimakan}\textsuperscript{570} (Nyimakan Case). Following the 2000 December general elections in Ghana, Mr Nyimakan was declared winner of the Wulensi Constituency Parliamentary seat (in the Northern Region). The appellant, a registered voter in the same area, successfully obtained a declaration in the Tamale High Court under article 99 of the Constitution and the Representation of the People Law, 1992 (PNDCL 284) that the election of Mr. Nyimakan was null and void as he was not qualified (at the time of the election) to be so elected to represent the Constituency. An appeal against this ruling to the Court of Appeal was unsuccessful, and Mr. Nyimakan then further appealed to the Supreme Court. However, the respondent who in this case is the appellant, brought a motion before the Supreme Court arguing that Mr. Nyimakan’s appeal be dismissed as the Supreme Court does not have the jurisdiction to deal with such matters.

To be able to fully appreciate the legal logic deployed in this case, it is important to set out clearly what the relevant portions of article 99 said. It stated:

\begin{quote}
(1) The High Court shall have jurisdiction to hear and determine any question whether –(a) a person has been validly elected as a member of Parliament or the seat of a member has become vacant; or (2) A person aggrieved by the determination of the High Court under this article may appeal to the Court of Appeal.
\end{quote}

\textsuperscript{569} \textit{Ibid.}, at 562.

\textsuperscript{570} \textit{[2003-2004]} 1 SCLR 1.
Following the plain words of article 99 as evident above, the majority in *Nyimakan* dismissed Mr. Nyimakan’s appeal on account that the highest court to deal with such electoral disputes is the Court of Appeal. Justice Seth Twum stated: “[I]t is the framers of the Constitution, 1992 who, knowing they were creating a new right chose an appeal procedure which ended at the Court of Appeal.”\(^{571}\) The presumption here is that the general appellate jurisdiction of the Supreme Court does not extend to article 99 in such matters. Twum J.S.C. gave meaning to this in a clear expression: “It cannot be said that when they [the framers] wrote article 99 in the form we find it in the Constitution, they were oblivious of the general appellate jurisdiction of the Supreme Court.”\(^{572}\) Thus if the framers were not unaware, as Twum J.S.C. claims, of the general appellate jurisdiction of the Supreme Court, a proper understanding of article 99 supposes that it is the Court of Appeal that shall serve as the last legal forum of litigation on electoral disputes arising from parliamentary elections. For him, there should not be a dispute about this as it is “quite clear that the framers of the Constitution, 1992 intentionally did that.”\(^{573}\) Simply put, the words of the provision in question speak to its meaning and the intention of constitution makers.

But the minority led by Justice Sophia Akuffo refused to adopt the “plain words” or the “framers intent” approach as indulged in by the majority. She rejected the proposition that article 99 contemplates the Court of Appeal as the final forum of

\(^{571}\) Ibid., at 13.
\(^{572}\) Ibid., at 15.
\(^{573}\) Ibid.
litigation in Parliamentary electoral disputes, though she recognised as the majority did that “article 99(2) makes no mention of further appeal to the Supreme Court” and as an interdiction of the majority opinion, Sophia J.S.C., continued, “given the language of article 131(1)and (2) [as set out above]and the structure of the Constitution, 1992 there was not need to do so; and the mere fact that no such mention is specifically made in article 99, cannot justify a conclusion that an appeal cannot lie from a decision of the Court of Appeal in such matters.”\textsuperscript{574} On this point, Sophia J.S.C. did not think that it was necessary to exclude the Supreme Court merely for the fact that the said court is not mentioned by article 99. For her “[A]n election petition raises a question of the proper and lawful representation of the people, a crucial and fundamental factor in constitutionalism and democratic governance.”\textsuperscript{575}

Here, the bigger question is not only on the proper construction of article 99, but which judicial interpretive attitude should be adopted regarding the jurisdiction of the Supreme Court in parliamentary electoral disputes? It may be easy enough to respond to this set of questions from the constitutional positivist perspective, and the majority may have been right, because the most natural reading of article 99 precludes the Supreme Court - it has neither been mentioned in the said article nor will it, on that restrictive account, be contemplated by the “framers of the Constitution”. But note that such an answer supposes, in effect, that our account of the fundamental law of reason and justice is a sheer illusion. Besides, the majority approach and reasoning, if accepted, constitute a

\textsuperscript{574} Ibid., at 19.  
\textsuperscript{575} Ibid.
denial to the non-positivist style of constitutional interpretation according to which judges approach the task of interpretation on the basis of a liberal understanding of legality, one in which ‘law’ is regarded not simply as the product of law-makers’ decisions and intentions, but, in some respects and in relation to some issues at least, as embodying fundamental values that gain normative force independently of what is decided, written or intended by lawmakers.

The non-positivist account of the minority opinion is a direct response to the constitutional-positivist tack of the majority. That is, if the express words of article 99 are conclusive of the legal values that the state intends to protect, as the majority conceives of it, then, the opinion of the majority committed three interrelated blunders: first, it is rooted on the factual basis of the provision in question; second, it refrained from looking outside the legal text to the surrounding terrain of political morality; and third, it subordinated the judge’s interpretative role to the narrow efforts of identifying facts about the intentions of the drafters on the provision in question. Each of these blunders offends against the general tenor of the fundamental unwritten law which views law or the constitution with a deeper conscience and requires judges to relate words to arguments about moral ideals the legislature or constitution is committed to honouring.

The majority may have been less explicit on the fact that constitutional adjudication, as in the instant case, is about the discovery and protection of values, not necessarily by mere logical reference to the words of the constitution or restrictive principles of interpretation. It is not just enough that the bare words of the provision in question failed to include the Supreme Court as a possible forum of litigation in parliamentary electoral
disputes. Otherwise, the value of the courts’ constitutional jurisdiction to entertain questions on interpretation and enforcement of the Constitution would be severely diminished. It is in response to this that the non-positivist approach urges a conception of law as a “rule of reason” which entails a uniquely judicial form of discourse that moves beyond mere logical disquisition of explicit expressions of constitutional or statutory provisions.

Legal values may be explicit in the constitution or derivable from the text or unwritten constitution of common law. By our fundamental law of reason and justice, a proper approach to constitutional adjudication, as manifested in the determination of this case, may not be limited to the application of concrete norms derivable from the written constitution itself.\textsuperscript{576} As we have seen in the minority opinion, and as the fundamental principle of reason would agree, mere judicial submission to or a reverential view of the written text is not a satisfactory way of interpreting a constitution. Interpretation of a text is contingent upon ‘a discourse of secondary reason in which written law is regarded as but one source of unwritten law and judges’ should ‘seek a unity or equality of reason by oscillating between concrete and abstract propositions of law’.\textsuperscript{577} It would seem an interpretive mistake for majority to consider ‘written constitutional provisions as canonical expressions of legal principle that exhaust legal meaning on the points to which they apply’.\textsuperscript{578}

If the judges in the \textit{Nyimakan’s Case} failed the non-positivist approach, it is partly because they had overlooked the broader exhortations of the court’s earlier jurisprudence,

\textsuperscript{576} Grey, “Origins of Unwritten Constitution”, \textit{supra} note 66 at 846.
\textsuperscript{577} \textit{Ibid}.
\textsuperscript{578} Walters, “Written Constitutions and Unwritten Constitutionalism”, \textit{supra} note 75 at 265.
which makes reference to political morality acceptable in interpretation. In *New Patriotic Party v. Ghana Broadcasting Corporation* (*GBC Case*)\textsuperscript{579} the Supreme Court demonstrated that judicial reference to moral theories of rights in constitutional adjudication cannot be avoided (a point similar to the unified rights theory strongly urged in Chapter Four above), and suggests as well that this sort of theorizing will be entirely defensible when impartial judges focus on a minimum core of universal moral values. Human rights, especially freedom of expression, in a legal system are not just valid because of a necessary adherence to positive law, it is possible to fuse political moral basis of rights with their legal basis.

This case was brought about by public controversy generated by the government’s 1993 budget. The budget attracted criticism from several quarters, including the plaintiff, a registered political party in Ghana. While the government party was given two hours of air-time to defend the budget, a request by the plaintiff for a similar opportunity to express its views on the budget was refused by the defendant. Consequently, relying on article 55(11) of the Constitution, which provides that “[t]he state shall provide fair opportunity to all political parties to present their programmes to the public by ensuring equal access to the state-owned media”, and article 163 of the Constitution, which provides that “[a]ll state-owned media shall afford fair opportunities and facilities for the presentation of divergent views and dissenting opinions,” the plaintiff sued the defendant (part of the state-owned media) in the Supreme Court for a declaration that the defendant’s action violated its constitutional rights.

\textsuperscript{579} [1993-94] 2 GLR 354.
The plaintiff argued that an amplified vision of articles 55(11) and 163 is one that provides for a constitutional protection of expressive freedom and that the defendant had a constitutional duty to afford the plaintiff fair and equal opportunities and facilities to present its views on the budget, especially as those views diverged from those of the government. However, the defendant resisted the plaintiff’s claims of constitutional entitlement to equal air-time for the dissemination of its divergent views. The defendant argued that a proper construction of its national role invests it with a sole discretion to prioritise all engagements with it and that the plaintiff’s request was not an exception. The constitutional question for the court was whether the plaintiff was entitled under the Constitution, to demand that the defendant provide air-time for the dissemination of its views on controversial national matters similar in extent and scope as was accorded the government spokesman in respect of the 1993 budget; and as a corollary, for the court to declare whether a failure to grant those facilities constituted a violation of the Constitution.\textsuperscript{580}

This was unanimously affirmed by the court. Various reasons of political morality were assigned by the court. For example, Amua-Sekyi J.S.C. stated that “the temptation to ride roughshod over the opinions of others must be resisted; for it is only the free flow of ideas and discussion that error is exposed, truth vindicated and liberty preserved.”\textsuperscript{581} He further observed that “democracy would be no more than a sham” if “such national assets [GBC] were to become the mouthpiece of any one or combination of the parties

\textsuperscript{580} Ibid., at 363.
\textsuperscript{581} Ibid., at 373.
vying for power‖. In a similar direction, Francois J.S.C thought that protecting expressive freedom is necessary in order to prevent a situation where ―falsehood‖ is being ―dressed in plausible garb‖ and that ―in the comity of nations where the democratic order secures the highest place of honour in the social fabric, the freedom of exchanging information and ideas appears to occupy the noblest point in the social scheme and serves as an essential pivot.‖

But what does the case tell us about the relationship between written constitutional texts and judicially constructed/interpreted constitutional meanings? A critical scrutiny of the Court’s reasoning will assist us in answering this question. First, it is vital to note that five (François J.S.C. and Archer, Amua-Sekyi, Wiredu, and Aikins JJ.) of the seven judges made little or no mention of the written provisions of the Constitution on freedom of expression, but appeared to go straight to the moral/political rationales for the rights in question. That is, they reached their respective conclusions without any explicit mention of the specific constitutional provision that guarantees freedom of expression - article 21(1)(a) - which provides, “[a]ll persons shall have the right to … freedom of speech and expression, which shall include freedom of the press and other media”.

The attitude adopted here by these judges was ambivalent. Some judges simply assumed that everyone knew that they were interpreting a textual provision, and so did not emphasize the text, and others actually thought the text was in some sense immaterial

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582 Ibid., per Justice Amua-Sekyi.
583 Ibid., at 365.
584 Ibid., at 364.
or of only incidental importance as compared to the substantive moral arguments at stake in the case. For instance, article 55—the provision of the Constitution that guarantees to political parties equal access to the state-owned media— which was relied on by the plaintiff, was seen by both Justices François and Archer as lacking any relevancy to the claims of the plaintiff. According to Justice Archer, this provision “is restricted to political parties with special requirements for general and presidential elections”\textsuperscript{585} and since this was not about an electoral contest, the text did not apply.

Only two Justices, Hayfron-Benjamin and Bamford-Addo, made reference to the specific constitutional provision on freedom of expression in their judgement. They took the view -- which was implicit in the opinions of the other Justices -- that though article 55 deals mainly with the constitutional right to form political parties in Ghana (article 55(1) provides: “The right to form political parties is hereby guaranteed”), its corollary effect is to protect freedom of expression. The approach here was that the reason to constitutionalise a right to form or join political parties encapsulated in the provision must extend past its literal sense as far as its implicit promise of justice and fairness, and respect for reason, require. However, all seven judges agreed that the trump card of the plaintiff in this case was article 163. It was perceived as broad and as serving “all manner of persons, namely individuals, group or body of persons, incorporated, and unincorporated”\textsuperscript{586} While the failure of the five Justices to refer to the direct free speech

\textsuperscript{585} \textit{Ibid.}, at.360
\textsuperscript{586} \textit{Ibid.}
provision in the Constitution is of interest, it is of greater interest that they came to the same basic conclusion as the two Justices who did refer to that provision.

However, the sketch of this analytical context leads us back to the question about the style of constitutional interpretation that the case represented. It may be said that the reasoning deployed by the judges in this case leaves traces of both constitutional-positivist and non-positivist approaches of interpretation. While the former claim is derivative, the latter would be shown by examining the leading judgement of Francois J.S.C. But first, it is obvious from a literal reading of articles 55(11) and 163 that the decision of the broadcaster to favour the government over opposition parties when allocating air time was at least a *prima facie* violation of an express, written constitutional provision.

Through the constitutional-positivist approach, we could say that the judges in this case, although they refer to political theory or morality, are in fact engaged in the expounding of a right that owes its constitutional existence exclusively and totally to the written text. So, although judges refer to theory, they do so only to the extent permitted by the written text, and only to give effect to the proper meaning of the text. That is, it is open to certain challenges to claim that the judicial reference in this case to moral/political theory, betrays a non-positivist interpretive attitude. A constitutional positivist, who is someone who (according to the definition given in Chapter Two) believes that the judge’s role in constitutional interpretation is to give effect to the rights established by the adoption of particular legal texts, and no more, could, on the basis of
much of the analysis of this case, respond simply by saying that the judges set out to, and in fact did, merely interpret the written texts at issue.

While all this is analytically implicit, it was the remarkable judgement of Francois J.S.C. that explicitly brought forth the non-positivist markings of the case. He began by stating that in “construing the provisions of the Constitution, 1992 the primary duty of the Supreme Court is to interpret the fundamental law.”\footnote{Ibid., at 361.} But how would this task be achieved? For Francois J.S.C., a “constitutional document must be interpreted sui generis to allow the written word and the spirit that animates it to exist in perfect harmony.”\footnote{Ibid., at 366.} The “spirit” of the Constitution “demands that a broad and liberal spirit of democratic pluralism should prevail in this country.”\footnote{Ibid., at 367.} The effects of our “previous failures in the constitutional experiment,” Francois J.S.C. contended, must lead to “an all embracing liberal framework that would include all possible shades of freedom not specifically or expressly mentioned, but which are essential cogs to enhance the driving capacity of a truly free-wheeling democracy.”\footnote{Ibid.}

Significantly, Francois J.S.C. thought that freedom of expression has a value in “the spirit” of the Constitution. This forms part of the democratic objectives of the Constitution, which “must be made so that the emphatic pointers to its spirit, are not missed.”\footnote{Ibid., at 366.} He would later add that “any acts which are not in accord with these aspirations, would constitute steps in the violation of the Constitution, 1992. A denial of
opportunity for the expression of opposing views, inherent in a democracy, would amount to moves which may culminate in the creation of a monolithic government which is only one step removed from a one-party government.”

This reading of the case is the direct opposite of the one highlighted above. Here, Francois J.S.C. was in fact engaged in a very different sort of task: he was, in fact, expounding a constitutional right that has a legal existence in sources that are independent of, and not contingent upon, the written constitutional provision in which it happens to be expressed. So, under this approach, which is broadly speaking the non-constitutional-positivist approach, written texts are just one manifestation, though obviously an important one, of an underlying set of legal and constitutional rights that ultimately owe their normative force in law to a form of unwritten constitutionalism grounded in a particular moral/political theory.

But to be fair and respectful to the judges involved, especially Francois J.S.C., we may concede that the judges may not have been fully aware of this second interpretation. It is reasonable to accept that they may actually have thought they were engaged in the first rather than the second sort of interpretation; or that they may unconsciously have switched back and forth between these forms of interpretation without fully realizing it; or that they may never have thought about which interpretive approach they were following. The substantive justification of freedom of expression in this case which appears to de-emphasize the written text, came close to the non-positivist approach. Perhaps the judges there were, but not consciously. Perhaps they offered what is best

592 Ibid., at 368.
understood as a non-positivist judgment without even intending to do so; or in the alternative, perhaps they really wanted to give full expression to the written text and no more, as constitutional positivists do.

However, the seemingly non-positivist interpretive approach adopted at least by Francois J.S.C. would suggest that in a proper legal system, rights can transcend the empirical realities of the state or the literal expression of a positive law. Arguments of reason or interpretative moral value are crucial to understanding the meaning or limits of written provisions concerning rights. But the relationship between legal text and moral context does not end there. Adopting democratic constitutions implies a commitment to ideals of constitutionalism that transcends the particular wordings adopted by constitutional texts. A desirable value of law, as in the constitutional provision guaranteeing the protection of the right to freedom of expression, will not be a mere assertion of political will expressed through some officially accepted criteria or rules.

6.3 Conclusion
To summarize, there are two dominant styles of constitutional interpretation in Ghana and Nigeria. The first seeks to understand the constitution, and law, for that matter, as an expression of social fact or formal political power. The letter is enough to know what the constitution means and it means what it says. This is the constitutional-positivist interpretive approach to legality. The second one is the non-positivist interpretive attitude which looks at law or the constitution as having a purpose embedded in an unarticulated spirit. This requires weaving together what is explicit and implicit and
a submission to a broader justificatory reason in interpretation. While the first approach is very common and popular among Nigerian judges, it is also true that there is a thin line of non-positivist thoughts there to. The non-positivist approach is quite dominant in the Ghanaian courts, but we have also seen that the Ghanaian judges have failed that test in the one election case that we have considered.

Here, and in the arguments to follow, I will insist that we understand constitutional law better if we read cases in a non-positivist light, and judges and lawyers themselves will perform their jobs better if they understand (consciously) interpretation in this way too. Of course, the difference between adopting positivist and non-positivist approaches may not be great in some areas of law examined in this chapter. One may also concede that whether judges take a positivist approach that allows reference to theory and context when expounding texts, or whether they take a non-positivist approach that views theory and context as underlying sources of law that are supplemented by texts, does not really matter since, either way, we will probably end up with more or less the same conclusions about the rights involved.

However, this will not always be so. In particularly hard cases, as some of the cases examined above show, it may make a difference, and in the next two chapters I will explore examples of other areas of law in which the choice of interpretive theory clearly makes a significant difference. To appreciate the substantive implications of these approaches to constitutional interpretation and justice, we thus turn to the cases on socio-economic rights. The legal answers in these cases, as I will show, turn on the courts’ interpretive approach to constitutional interpretation. Whether or not each of these
approaches is ideal for understanding the Constitutions of Ghana and Nigeria largely depends on the extent to which they accommodate the notion of law and rights advanced in this thesis.
Chapter 7

Fundamental Law, Human Rights, and the Directive Principles

Jurisprudence in Ghana and Nigeria

7.1 Introduction

On the outskirts of Ghana’s capital is a slum city called Sodom and Gomorrah where almost 40,000 people, many migrants from Ghana’s impoverished north, live in appalling conditions on the banks of a dead lagoon, finding shelter in makeshift shacks and earning what income they can from small-scale trade and odd jobs. They are squatters trespassing on land owned by the city and slated for an ecological restoration project, and they face an eviction order and loss of what shelters and livelihoods they have. Their situation is sadly not uncommon in the developing countries of Africa. Indeed, it was a similar situation that led to the famous decision of the South African Constitutional Court in the 2000 case of Grootboom, in which Justice Zakeria Yacoob stated:

This case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the state to act positively to ameliorate these conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The state must also foster conditions to enable citizens to gain access to

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land on an equitable basis. Those in need have a corresponding right to demand that this be done.\textsuperscript{595}

The Court thus ordered the South African government “to devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing…”\textsuperscript{596}

Inspired by this case, counsel for the squatters of Sodom and Gomorrah in Ghana challenged the constitutionality of the eviction order they faced before the Accra High Court. They argued that the Ghanaian Constitution protects their rights to shelter and work, and, because of the “[i]nternational dimensions” of these claims, they cited the South African case of \textit{Grootboom} in support of their request for an injunction to stop the eviction until the government provided them with an alternative place to live and work.\textsuperscript{597} But they lost.

The loss of the squatters in the \textit{Abass} case provides a helpful context within which to consider the question of socio-economic rights in Ghana and Nigeria, and how the argument presented in this thesis on the fundamental law of reason provides an effective way of re-conceptualizing those rights. This task will take up the next two chapters. In this chapter, the focus is on socio-economic rights from the domestic legal perspective. The analysis will suggest that, by approaching the Ghanaian and Nigerian Constitutions through the fundamental law of reason, it can be seen that socio-economic rights are

\textsuperscript{595} Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46, at para. 93.

\textsuperscript{596} Ibid. at para. 99.

\textsuperscript{597} Issah Iddi Abass & 10 Others v. Accra Metro. Assembly & Anor [herein referred to as the \textit{Abass Case}] (Misc. 1203/2002), unreported decision of the Accra High Court, 24 July 2002 [judgment available at \url{http://www.cepil.org.gh/ruling_31.pdf}].
justiciable constitutional rights. But the analysis will also raise certain troubling questions about this suggestion. In the next chapter, the international and comparative law context of the argument will be addressed, and these sources—including *Grootboom* as well as more recent South African cases—will assist us in answering those troubling questions.

The Preambles of the Constitutions of Ghana and Nigeria epitomise the moral aspirations of the people by providing for, among others, the values of justice, freedom and equality. These preambular pledges find expression in separate chapters of the respective Constitutions dealing with what are described as “Fundamental Human Rights and Freedoms” (Ghana) or “Fundamental Rights” (Nigeria) on the one hand and “Directive Principles of State policy” (Ghana) or “Fundamental Objectives and Directive Principles of State Policy” (Nigeria) on the other. Part of the constitutional scheme of these jurisdictions, it would seem, is to have Fundamental Rights and Directive Principles interrelate in a comprehensive search for constitutional justice for the people. Yet it is not always without dispute what the essence of these values is. In fact, there is a basic difficulty within the legal community regarding the realisation of this ideal of constitutional justice.

The rights identified by the Constitutions as Fundamental rights are for the most part rights that are commonly known as civil and political rights, or first-generation rights, like the rights to liberty, equality and freedom of expression, though they also include rights that have a social, economic or cultural aspect to them, like the rights

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598 In Ghana, the Directive Principles are in Chapter 6 and the Fundamental Rights and Freedoms are in Chapter 5 of the Constitution, 1992; whereas in Nigeria, the Directive Principles are in Chapter II and the Fundamental Rights and Freedoms are in Chapter IV of the Constitution, 1999
relating to property, education and languages (Ghana) or property (Nigeria). The Directive Principles of State Policy, or DPSP, in contrast, identify a variety of general economic and political aims including the objective of fulfilling what may be called socio-economic rights, or second-generation rights, like “public assistance to the needy” or “basic necessities of life” (Ghana) and “suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled…” (Nigeria). As noted in Chapter Two, the two Constitutions appear to take different approaches on the question of the Directive Principles and judicial enforcement.

In the Ghanaian Constitution, article 34(1) provides that the Directive Principles “shall guide all citizens, Parliament, the President, the Judiciary, the Council of State, the Cabinet, political parties and other bodies and persons in applying or interpreting this Constitution or any other law…” In other words, the Directive Principles are to “guide” Ghanaian judges when they are “applying or interpreting” the Constitution. In the Nigerian Constitution, section 13 states that it is “the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply” the Directive Principles. But it also contains a provision that has no parallel in the Ghanaian Constitution. Section 6(6)(c) of the Nigerian Constitution states that judicial power “shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State
Policy…” There is, in other words, an explicit denial of the justiciability of the Directive Principles in Nigeria, but not Ghana.

It has been said that that although “Ghana comes in a poor second” to South Africa on this point, “justiciability of socio-economic rights is more certain in Ghana” than in other African countries. In fact, as the Abass case noted above suggests, and as further analysis below will confirm, direct judicial enforcement of the socio-economic rights contained in the Directive Principles is not allowed by the courts in either Ghana or Nigeria. My concern in this chapter is to examine how the socio-economic rights recognized by the supposedly non-justiciable Directive Principles interrelate through the fundamental law of reason that I have developed in this thesis with the non-socio-economic Fundamental Rights that are recognized as justiciable in order to secure some level of socio-economic and thus constitutional justice in both Ghana and Nigeria.

Jurisprudence suggesting that socio-economic rights dressed in the plain clothes of Directive Principles are absolutely non-justiciable must be jettisoned. Yet, as observed in Chapter Two above, the jurisprudence of Ghana and Nigeria, which shall shortly be examined, supposes otherwise. The cases confirm that the Directives are not, as a first-order principle, of themselves justiciable.

Courts in Ghana and Nigeria do not ignore the Directive Principles completely. If an asserted right under the DPSP is or can be linked to one of the justiciable fundamental

rights in the case of Ghana, or is the subject of legislation in the case of Nigeria, there is a strong presumption that any infringing law or executive action is unconstitutional. But in both countries, there seems to be a judicial fear in creating justiciable rights from constitutional provisions that do not prima facie suggest justiciability, even if a deeper understanding of the founding constitutional values would support justiciability. This judicial hesitancy is tied to the semantics of constitutional positivism—the idea, that is, that courts must obey written constitutional provisions, including, in this case, those that appear to settle questions as to what rights are justiciable and what rights are not.

But it is difficult to ignore the potential defects of this jurisprudence. For instance, it represents, as I shall show in the analysis in this and the next chapter, a constraint on the courts from relying on foreign constitutional and human rights jurisprudence, on common law notions of fundamental law, or on unincorporated international human rights norms to deal with cases involving the Directives. Also, it presents problems of textual coherence within each Constitution, especially Nigeria where courts are instructed both to conform to Directive Principles (section 13) but not to enforce them (section 6(6)(c)). In any case, it is left only to Parliament to judge whether the state has fulfilled its constitutional responsibility vis-à-vis the DPSP. One of several normative questions

602 This in part is a function of a central assumption by the courts that provisions like the DSPS typically associated with developing democracies are generally non-justiciable.
begged here is what would happen if a Parliamentary determination of the legality of state action on the DPSP threatened judicial protection of rights and the rule of law?

The core argument of this chapter is that asserted rights under the Directives are justiciable when deeper constitutional values founded on the unwritten fundamental law defended in this work support such a claim. The courts can do this by relying on relevant comparative constitutional and human rights jurisprudence, common law notions of fundamental law, or international human rights norms. This is fastened to the contention that where a law or executive conduct patently infringes any of the values contained in the Directives, the courts should declare such a law or act void. Finally, the Directives are justiciable to the extent that they constitute the anchoring normative basis for what the two Constitutions call “Fundamental Rights”, i.e., rights that are (for the most part) political-civil rights. In my view, to conduct the analysis of constitutional rights in these legal systems around a hierarchical structure that subordinates the Directive Principles to the Fundamental Rights is inappropriate. To attain the balance required for a comprehensive sense of constitutional justice, the Directives must be allowed to interrelate sufficiently and directly with the Fundamental Rights. The squatters of Sodom and Gomorrah argued in the *Abass* case that, as a matter of Ghanaian constitutional law, a denial of rights to shelter and to work is a denial of rights to life and human dignity—a line of reasoning that shall be defended in this and the next chapter.
7.2 The Nature and Legal Significance of the Directive Principles

It has to be noted at the outset that the current Constitutions of Ghana and Nigeria came into existence through different roots and drafting processes. But the differences in the constitution-making methods followed are not important for our purposes. It is, however, worth examining the recorded intentions of the persons mandated to carry out the exercise of drafting the constitutions, especially with respect to the Directive Principles. It is important to go through this exercise in this section in order to be able to appreciate the kind of vision that was attached to these Directives from the outset. In both cases, the issue of the justiciability of the Directives was carefully considered. The core concern about the issue of justiciability was not so much whether or not courts would have jurisdiction to apply or make pronouncements by reference to the Directives. Rather, the concern was whether or not an action might be founded solely on the Directives, in and of themselves. An answer to this question in large part determines the legal value of these Directives. Such a determination is crucial because the courts in both countries seek to distinguish principles of the rules of law from principles of policy, the former being justiciable and the latter not justiciable. If the Directives are considered by judges to be mere declarations of public policy, it would follow that they are arguably non-justiciable.

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603 In Ghana, the recommendations of the Committee of Statutory Experts were considered by a Consultative Assembly convened by the then military government. The final draft was approved of through a nationwide referendum. However, in Nigeria, a Constitutional Conference was convened also by the then military government whose work was finally approved of by the military leaders.
In Nigeria, the Constitutional Conference which was convened by the then military government to draft what is now the 1999 Constitution gave Directive Principles a very brief review. The chapter on Directive Principles of State Policy had first been added to the 1979 Constitution, and the work of the 1979 Constitution Drafting Committee was accepted as a reasonable basis for the deliberations of this Conference in 1999. Although there had been some discussion in the 1980s about making the Directive Principles justiciable, like the 1979 Committee, the Constitutional Conference of 1999 was dismissive of the suggestion that the Directives be made enforceable in courts of law and thus should have some biting legal effect. But neither did it accept that the Directives be expunged from the Constitution altogether.

The general position adopted was that the Directives should form part of the Constitution and to serve as guidelines in matters of governance. The Constitutional Conference did recommend that the right to education be elevated to justiciable status, a recommendation that found its way into section 45 of the 1995 Draft Constitution as a justiciable provision. But this provision did not make it into the current justiciable provisions of the 1999 Constitution. The Nigerian approach to Directive Principles of State Policy therefore remains like that followed in India, which has a similar chapter in

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604 See Kaniye A. Ebeku, “Nigeria’s New Constitution for the Third Republic: An Overview” (1993), 5 African Journal of International and Comparative Law 581 (the Political Bureau report of 27 March 1987 recommended that social and economic rights be made justiciable, but this was rejected by government).


606 This does not only call into question the Government commitments to provide education to all by the year 2000, but diminishes the value of basic education in national life. *Ibid* [the Report highlights these aims at p.106].
its Constitution, and unlike that adopted in the 1996 South African Constitution, which includes socio-economic rights together with political-civil rights within a single justiciable Bill of Rights.

The Ghanaian Consultative Assembly on the Constitution in 1992 accepted the conclusion of the Committee of Statutory Experts appointed in 1991 by the PNDC government to make proposals for a draft Constitution that the Directives should not be justiciable. But this approach, unlike in Nigeria where there was a clear case of past rejection of justiciability of the Directives, seems to have been contrary to Ghana’s constitutional tradition established by the 1979 Constitution. The Constituent Assembly that debated the justiciability of similar Directives in the 1979 Constitution resolved that the Directives were justiciable. At its 20th sitting, on Friday, 2 February 1979, the justiciability question was resolved in this manner: “MR. CHAIRMAN [Justice VCRAC Crabbe]: Now I am going to put the question. And the question is the amendment as proposed by Mr. Zwennes that we should make chapter four [on Directive Principles of State Policy] non-justiciable be accepted by the house.” When the question was put before the house, the recorded result was: “Question put and negatived.”

The Assembly accordingly rejected the idea that the Directives in the 1979 Constitution be made non-justiciable. Even though it was acknowledged by the Committee of Statutory Experts in 1991 that chapter 4 of 1979 Constitution was the basis

of its deliberations, it misleadingly stated at paragraph 95 of its final report that “by tradition Directive Principles are not justiciable”. Given the above-noted proceedings of the Constituent Assembly indicating a general assumption that the Directives were justiciable, it was not clear which tradition that the Committee of Experts had in mind.

But the Committee of Experts of Ghana, like the Nigerian Constitutional Conference, was too quick to define the nature of the Directives aside the issue of non-justiciability. At paragraph 94 of its final report the Committee suggested that the Directives may be regarded as spelling out in broad strokes the spirit or conscience of the Constitution. Accordingly, their legal relevance as articulated in paragraph 96 of the same report was for the “guidance” of all actors in the state “in making and applying public policy for the establishment of a just and free society.” They “should not of and by themselves be legally enforceable by any court”, though the courts should have regard to the said Directives in interpreting any laws based on them.

Unlike the Nigerian drafters, the Ghanaian Committee of Experts suggested two distinct reasons for the inclusion of the Directives in the 1992 Constitution. First, Directive Principles represent an enunciation of a set of fundamental objectives of expectation, and, secondly, the Directives in the long run constitute a barometer by which the people could measure the performance of their government. It might be tempting to conclude, in light of these reasons, that the Committee was of the view that the

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609 Ibid., para.96 at 49.
610 Ibid., para. 95 at 49.
Directives were designed merely to identify broad socio-economic policy goals as opposed to specific socio-economic rights. It is clear from reading the Directives that one purpose is to set forth broad policy goals. But the Committee did not think that was the only purpose. Its report stated: “The Committee also elaborated the social and economic aspect of human rights—aspects which are of particular relevance to the conditions of Africa and the developing world generally. Some of these rights are included in the proposed Directive Principles of State Policy, except that here they are more precisely elaborated as rights.”611

Notwithstanding the expressed intentions of constitution-makers in both jurisdictions concerning the justiciability of Directives, only Nigeria confirmed those intentions by an explicit constitutional provision. Section 6(6)(c), as noted above, stipulates that the Directive Principles under Chapter II of the 1999 Constitution are not directly enforceable in any court of law. The 1992 Constitution of Ghana does not have a provision declaring the Directives non-justiciable. As we shall see below, however, there remains a question whether constitutional silence on the justiciability of the Directives in the Ghanaian Constitution provokes similar conclusions anyway.

7.3 The Courts and the Directive Principles

Cases on the Directive Principles from the courts of Ghana and Nigeria have not been as common as other provisions in their constitutions. In Ghana two cases - The 31st December Case and The CIBA Case - considered by the Supreme Court relate to

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611 Ibid. para. 139 at 65
Directives. In contrast, under the current 1999 Constitution of Nigeria only one substantive case - Attorney–General of Ondo State v. Attorney General of the Federation (the Corruption Act Case)\(^ {612} \) has made it to the Supreme Court where the issue of the justiciability of these principles was considered. There are a couple of other cases decided on similar provisions under the previous 1979 Constitution of Nigeria which may be referred to for illustrative purposes.

In The 31\(^{st} \) December Case, the plaintiff sought a declaration in the Supreme Court of Ghana that a public celebration of the overthrow of a legally constituted Government of Ghana on 31 December 1981 with public funds was inconsistent with or in contravention of the letter and spirit of the Constitution. The constitutional provisions relied upon for such a claim included:

35(1) Ghana shall be a democratic state dedicated to the realization of freedom and justice; and accordingly, sovereignty resides in the people of Ghana from whom Government derives all its powers and authority through this Constitution; …

41(b) The exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations, and accordingly, it shall be the duty of every citizen - (b) to uphold and defend this Constitution and the law

These provisions fall under chapter 6 of the Constitution, the chapter which contains the Directive Principles of State Policy, and together they suppose, as was the contention of the plaintiff, that Ghana is a constitutional democracy in which citizens have the right as well as the duty to resist any unlawful change of the values established by the Constitution. It was argued that the celebration of the 31\(^{st} \) of December amounts to a glorification of coups d'état in the country, and it was thus inappropriate to finance such

\(^{612} \) (2002) 6 S.C. (Pt. 1) 1
events with public funds. But this was resisted by the defendant on the grounds that the values of the 31 December celebration were ineluctably connected to the manifesto of the party in power and, most importantly, the reliance of the plaintiff on articles 35(1) and 41(b) was problematic as the said provisions were non-justiciable.

In a five to four majority decision, the Court ruled in favour of the plaintiff’s argument and accordingly held that the celebration of 31 December in Ghana with public funds was inconsistent with the letter and spirit of the Constitution. But it is important to note that the decision on the justiciability of the Directive Principles was somewhat less forceful. Two members of the majority who divide rarely, Justices Amua-Sekyi and G.E.K. Aikins, made no explicit allusion to the Directives, thus making it difficult to suggest that their reasoning collectively supported the non-justiciability jurisprudence.

Two other Justices of the majority side – Justices Charles Hayfron-Benjamin and R.H. Francois -- came to their conclusion by relying mainly on the concept of the spirit of the Constitution. Only Justice N.Y.B. Adade on the majority side was direct about the Directives, stating that: “I am aware that this idea of the alleged non-justiciability of the directive principles is peddled very widely, but I have not found it convincingly substantiated anywhere. I have the uncomfortable feeling that this may be one of those cases where a falsehood, given sufficient currency, manages to pass for the truth.”613 Adade J.S.C. examined the debates of the 1979 Constituent Assembly and the 1991 report of the Committee of Experts—the materials summarized in the section above—and concluded that the earlier body had indeed accepted the justiciability of Directives; but,

613 The 31st December Case, supra note 54 at 66.
he added, even if the framers of the 1992 Constitution (despite being misled on this point) really intended to make them non-justiciable, “that intention was not carried into the Constitution, 1992.” Evidence of framers’ intention cannot contradict the language of the Constitution, and in his view the language clearly made the Directives justiciable. In a declaration which addresses directly what Hayfron-Benjamin and Francois JJ.S.C. avoided, Adade J.S.C. asserted that “the Constitution, 1992 as a whole is a justiciable document.”\(^6\)

Before engaging the jurisprudential value of this case, it makes sense to point out the structural difficulty that the case presented. While two members of the minority – Justice A.K. Ampiah and Chief Justice P.E. Archer (as he then was) -- failed to consider the Directives in their judgements, one of the members of the minority, Justice Isaac Kobina Abban, thought that the plaintiff’s reliance on the Directive Principles was misconceived and of no relevance.\(^7\) It was only Justice Joyce Bamford-Addo on the minority side who boldly stated that the Directives were not justiciable. Given the way that different judges addressed (or failed to address) the issue of Directives and their justiciability, no clear majority or minority view on this point emerges. It is neither clear whether members of the majority subscribed to the open declarations of Adade J.S.C. that the Directives are justiciable, nor is it conclusive that Bamford-Addo J.S.C.’s rebuttal of that claim was supported by the other members of the minority. It is fair to suggest that both Adade and Bamford-Addo JJ.S.C. were on their own with their respective views on

\(^6\) *Ibid.*

\(^7\) *Ibid.*, at 102.
the matter, and thus the case cannot be said to have conclusively decided on the proposition that the Directive Principles are justiciable, though I shall shortly return to their reasoning in the analysis below.

However, the confusion produced by the 31st December Case with respect to the justiciability of the Directives in the Ghanaian Constitution was diminished, but not thoroughly rectified, in a later case – the CIBA Case. In this case, the plaintiff challenged the constitutionality of the Council of Indigenous Business Association Law, 1993 (PNDCL 312) which required certain associations specified in its Schedule to be compulsorily registered with the Council. It was also observed that the said law permitted direct and substantial monitoring and regulation of the registered associations by a Minister of State. The plaintiff argued that the law infringed rights to freedom of association, and relied upon provisions from both chapter 5, on Fundamental Rights, and chapter 6, on Directive Principles of State Policy, of the Constitution. From chapter 5, the plaintiff invoked article 21(1)(e), which reads:

21(1) All persons shall have the right to –
(e) freedom of association, which shall include freedom to form or join trade unions or other associations, national and international, for the protection of their interest.

From chapter 6, the plaintiff invoked article 35(1), which is set out above, and also article 37(2) (a) and (3), which provide:

37 (2) The State shall enact appropriate laws to ensure - (a) the enjoyment of rights of effective participation in development processes including rights of people to form their own associations free from state interference and to use them to promote and protect their interests in relation to development processes …

37(3) In the discharge of the obligations stated in clause (2) of this article, the State shall be guided by international human rights instruments which recognize and apply particular categories of basic human rights to development processes…
The Attorney-General’s argument in response, or at least the part of the argument of interest to us here, was that the provisions relied upon by the plaintiff which fall within chapter 6 of the Constitution, i.e. the Directive Principles of State Policy, are not justiciable. A declaration in favour of the plaintiff’s claim would thus amount to a declaration that such Directives are justiciable.

In fact, the majority in this case did rule in favour of the plaintiff, but once again the judgments in the case were hardly decisive about the status of Directives. Two members of the majority, Justices Sophia Akuffo and A.K. Ampiah, thought that the Directives are not justiciable. One member of the majority, Justice William Atuguba, saw them as merely “rules of construction”, but, in a very interesting argument, he asserted that, by way of article 33(5) of the Constitution, (the unenumerated rights provision,) they may “pass as supplementary rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms”. This argument will be examined in greater detail below.

Bamford-Addo J.S.C. authored the lead judgment, and in her reasons she sought to explain how Directives, though generally not justiciable, might be protected as enforceable rights when linked, in some way, with other parts of the Constitution that are justiciable. After reviewing the Committee of Experts report, she accepted that Directives provide “principles of state policy” and “goals for legislative programmes” and “are not

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616 Justice Kpegah dissenting solely on the ground that plaintiff in this case did not have standing.
617 *The CIBA Case, supra* note 53 at 787.
of and by themselves legally enforceable by any court.” She then immediately qualified this statement, stating that “there are exceptions to this general principle.” She then observed that because the courts “are mandated to apply them in their interpretative duty, when they are read together or in conjunction with other enforceable parts of the Constitution, they then, in that sense, become enforceable.” After again affirming that the Directives are not independently justiciable, she continued: “Apart from the above stated requirement for enforceability … there are particular instances where some provisions of the Directive Principles form an integral part of some of the enforceable rights because either they qualify them or can be held to be rights in themselves. In those instances, they are of themselves justiciable also.”

Applying these ideas to the case at bar, Bamford-Addo J.S.C. concluded that this case “provides a good example of the special case where a provision under chapter 6 can be said to be an enforceable right.” Why? Because “Article 37(2) and (3) [found in the Directive Principles chapter] regarding associations read together with article 21(1)(e) [a Fundamental Right affirming freedom of association] undoubtedly mean that every person in Ghana has “the freedom of association free from state interference.” In an apparent effort to counter the claim that, as a Directive Principle, article 37 only identifies general policy objectives, Bamford-Addo J.S.C. emphasized that the article identifies

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619 Ibid., at 745.
620 Ibid.
621 Ibid.
622 Ibid.
623 Ibid.
“rights” and the words “can only mean what they clearly say.” ⁶²⁴ And although these words are found in chapter 6 rather than chapter 5, “they create a ‘right’ and can be held as a qualification” on the right of freedom of expression found in chapter 5. ⁶²⁵ To “buttress” this conclusion, she then cited article 37(3), which makes “international human rights instruments” relevant to the state duties set out in article 37(2), and article 33(5), which refers to unenumerated rights. ⁶²⁶ The invocation of international law will be considered in the next chapter, and the unenumerated rights argument will be considered later in this chapter.

Having articulated and applied to the relevant provisions the “criteria or test” for the justiciability of Directive Principles, Bamford-Addo J.S.C. then sought to summarize the criteria or test again, though arguably in a different way. ⁶²⁷ She stated: “[W]here those principles are read in conjunction with other enforceable provisions of the Constitution, by reason of the fact that the courts are mandated to apply them, they are justiciable. Further where any provision under chapter 6 dealing with the Directive Principles can be interpreted to mean the creation of a legal right, ie a guaranteed fundamental human right as was done in article 37(2)(a) regarding the freedom to form associations, they become justiciable and protected by the Constitution.” ⁶²⁸ In her first account of the criteria, some connection between the Directives and an enforceable part of the Constitution seemed to be necessary; but in this second account of the criteria, she

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⁶²⁴ Ibid., at 746.
⁶²⁵ Ibid.
⁶²⁶ Ibid.
⁶²⁷ Ibid., at 747.
⁶²⁸ Ibid.
was very ambiguous on this point, perhaps suggesting that if a Directive creates a fundamental human right that would be enough for it to be justiciable.

Whatever the precise nature of the relationship that Bamford-Addo J.S.C. thought had to exist between provisions in chapter 6 on Directive Principles and those in chapter 5 on Fundamental Rights before the former could be justiciable, it is clear that at the heart of her analysis is not the concern about technical form but a concern about substantive principle. In the end, what really matters is this: does the provision at issue identify a fundamental human right or not? If it does, the fact that it is found in chapter 6 on Directive Principles rather than chapter 5 on Fundamental Rights does not affect the fact that it must be regarded as justiciable under the Ghanaian Constitution. 629 With this normative principle driving constitutional interpretation, one would think that finding a formal link between chapters 5 and 6 should not present any real barrier to the judicial protection of human rights.

Turning now to Nigeria, as we have seen, under the Nigeria Constitution section 6(6)(c) explicitly prohibits judicial enforcement of the DPSP while section 13 plainly requires the conduct of the three arms of government, including the judiciary, to be in conformity with the DPSP. In the Archbishop Olubunmi Okogie Case, however, it was held that, in effect, section 6(6) (c) trumps section 13. But while the DPSP may not be directly justiciable in Nigeria, they can have some legal effects, as illustrated by the case

629 Ibid., at 746.
of Attorney-General of Qndo State v. Attorney-General, of the Federation or the Corruption Act Case.630

Following the inauguration of a democratically elected constitutional government in 1999, it became obvious that the pervasive nature of corruption631 in Nigeria would be strongly confronted by the government. General Olusegun Obasanjo, who was then sworn in as the President, indicated a desire to tackle corruption when he described it as “the greatest single bane”632 of the Nigerian society. Consistent with this objective, a bill on anti-corruption was submitted to the National Assembly. After a long period of rancorous debate within the legislature and the media over the bill, the Corrupt Practices and Other Related Offences Act No.5 of 2000 was finally passed into law.633 While this Act makes any corrupt practice a punishable criminal offence, it also establishes an Independent Corrupt Practices Commission (hereafter referred to as the Commission) with the power to investigate and prosecute offenders. The powers of the Commission were extensive and covered all persons in Nigeria (both private and public). However, in the Corruption Act Case, the Supreme Court of Nigeria was invited to decide on the constitutionality of this Act, and by extension the legality of the jurisdictional powers of

631 Nigeria at the time was first in rank as the most perceived corrupt country in the world as established by Transparency International index (http://www.transparency.org).
632 Nigeria World “Inaugural Speech by His Excellency, President Olusegun Obasanjo following his swearing-in as President of the Federal Republic of Nigeria on May 29, 1999” (available at: http://nigeriaworld.com/feature/speech/inaugural.htm).
the Commission. This case was triggered when the Commission attempted to prosecute an Ondo State official.

Although the case dealt with what Ben Nwabueze, one of the amici curiae, called “the cardinal principles of Nigeria’s federal system”634, the specific question of law that it addressed that concerns us was whether the National Assembly was competent to create offences on corruption and abuse of power in Nigeria by virtue of the obligation to implement the Directive Principles in the 1999 Constitution. The case of the plaintiff was that no explicit or implied provision of the Constitution confers power on the National Assembly to create a body with all-inclusive power to prosecute corruption for the whole of Nigeria; this was a matter reserved for State legislatures. It was further argued that the Directive Principles are not justiciable but are only meant as guidelines for the authorities that exercise executive, legislative and judicial powers. Thus any enactment to enforce their observance can only apply to such persons in public authority and not private persons.635

The Court agreed in part with the plaintiff and held that the Directives are not justiciable. But it qualified this position by accepting the defendant’s contention that the Directives can be made justiciable by law. Accordingly, in the specific context of this

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634 Corruption Act Case, supra note 630 at 17.
635 In defence, reliance was in part placed on Section 15(5) and Item 60(a) of the Constitution. While Item 60(a) provides that the National Assembly has the power to establish and regulate authorities “for the observance of the Fundamental Objectives and Directive Principles” contained in Chapter II of the Constitution, Section 15(5) stipulates that “[T]he State shall abolish all corrupt practices and abuse of power”. 293
case, through a combined reading of sections 4(2)\textsuperscript{636}, 15(5)\textsuperscript{637} and item 60(a)\textsuperscript{638}, the impugned Act was upheld, at least in part, on the ground that it was enacted by the National Assembly for peace, order and good government of the Federation, which explicitly or by necessary implication contemplates the enforcement of the Directive Principles. Rejecting the contention that the Directives may serve as the basis for legal obligations only for those with public authority, Chief Justice Owais stated that such a conception “will do violence to” and will “fail to achieve the goal set by the Constitution.”\textsuperscript{639}

The simple conclusion to draw from this case is that the Directives are not justiciable except insofar as they have been enacted by law in furtherance of the fundamental values and objectives embedded in them.\textsuperscript{640} As noted, the Constitution of India also contains Directive Principles of State Policy, and the Nigerian Court turned to Indian case law for assistance in this respect. Chief Justice Uwais quoted with approval the Indian Supreme Court in \textit{Mangru v. Commissioner of Budge Budge Municipality}\textsuperscript{641} that “the Directives Principles require to be implemented by legislation, and so long as there is no law carrying out the policy laid down in a Directive neither the State nor an individual can violate any existing law or legal right under colour of following a

\textsuperscript{636} Section 4(2) The National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution.

\textsuperscript{637} Section 15(5) The State shall abolish all corrupt practices and abuse of power.

\textsuperscript{638} Item 60: The establishment and regulation of authorities for the Federation or any part thereof - (a) To promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in this Constitution.

\textsuperscript{639} \textit{The Corruption Act Case, supra} note 630 at 28.

\textsuperscript{640} \textit{Ibid.}, per Justice Uwais at 104.

\textsuperscript{641} (1951) 87 C.L.J. 369.
Directive.” Justice Ogwuegbu followed this reasoning with the declaration that “courts cannot enforce any of the provisions of Chapter II of the Constitution until the National Assembly has enacted specific laws for their enforcement”. In effect, justiciability and enforcement of the Directives in the Nigerian context is contingent upon an enactment by the legislature.

7.4 Analysis: The Justiciability, Fundamentalness and Bindingness of the Directive Principles

What is the place of the central propositions of these cases reviewed above from the particular perspective of the core claims of this thesis? Two closely related conclusions are discernable from the considered cases: (a) the Directive Principles are not justiciable as free-standing rights or provisions, and (b) they may be justiciable if they are linked to other rights or laws that are justiciable. In the case of Ghana, justiciability may be achieved if the Directives can be read as part of or linked to a fundamental right that is acknowledged to be justiciable by the Constitution, and in Nigeria justiciability is dependent on an explicit legislative act to that effect. A common point accepted in both jurisdictions, then, is that justiciability of the Directives is not automatic. The general spirit of the argument that I will make in this section is that although the Ghanaian court is comparatively less conservative than the Nigerian court with regard to the non-justiciability thesis, it would seem that in both jurisdictions judges adhere to the interpretive method of constitutional positivism in their consideration of the Directives.

642 The Corruption Act Case, supra note 630 at 27.
643 Ibid., at 65.
7.4.1 Law and Directive Principles: The Non-Justiciability Thesis

It is important to recall that both Constitutions do have provisions that make the observance of the Directives a mandatory legal duty on all governments and persons, and that the courts are enjoined to have recourse to the Directives in interpreting the Constitutions. It would thus seem that the relationship of the constitutional feature (explicit or implicit) of non-justiciability with the injunction to observe the Directives give rise to some difficult legal questions. One obvious question is, as Adade J.S.C. put it in the December 31st Case: “How do the [directive] principles guide the judiciary ‘in applying or interpreting the Constitution’ if not in the process of enforcing them?”

In other words, what role can the Directives play unless they have some legal force? As Obinna Okere put it: in “the absence of justiciability, does it mean that the Directives are no more than moral precepts, fond hopes and pious wishes?”644 Are they, in the words of Obiajula Nnamuchi, mere “aspirational or hortatory goals”?645 This set of questions represents one level of concern for us and requires a direct and comprehensive response if the idea of a general scheme for constitutional justice is to be established and maintained in these legal systems.646

At the most basic level, it can be asserted that a mere provision that Directive Principles of State Policy are not justiciable does not necessarily divest them of all legal

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value. To hold otherwise, as the Nigerian courts have done, is to suppose that the core values of the Directives in the Constitution do not form a meaningful part of the constitutional law for the country. It is to accept the proposition that the Directive Principles are indeed nothing but “idle dreams or pious wishes …” Clearly this notion must be rejected, since the Constitutions themselves contemplate that, as Obinna has written, the Directives “may be used as an aid to the interpretation and construction of a law when impugned for being in contravention of the Constitution.”

At very least, then, it may be said that the Directives, though not judicially enforceable, are judicially cognizable. This compromise sounds attractive. It would allow courts, when confronted by a justiciable constitutional provision that is ambiguous, to resort to the Directives for interpretive assistance in resolving the ambiguity. It is, in the end, not controversial to assert that the courts should take cognizance of the Directives when interpreting law. In contrast, to suggest that a person can go to court seeking, for example, an order that a law be made in furtherance of the objectives embedded in the Directives, or that a particular enacted law be declared void for violating the Directives, seems, at first glance, to be altogether different. The assumption

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648 Writing about similar provisions in the Indian Constitution, H.M. Seevai stated that the fact that these provisions are a part of the constitution does not make them a “law” at all, and, a fortiori, not part of the Supreme Law of India [Constitutional Law of India vol. 2 at Preface V and 1680 3rd ed. (1984)].
underlying these sorts of claims is that legislative inaction may be a violation of the core legal values of the Directives, or that one may rely on the Directives to have legislative action judicially voided. By implication, the Directives are not just fundamental objectives of the government, or just interpretive aids for judges, but they are also principles or rules of law enforceable in a law court by virtue of their own normative legal force.

The idea that at least some of the rights and principles embraced by the Directives are themselves free-standing justiciable constitutional rights is one that I shall defend in this chapter and the next. I shall argue that some of the values identified in the Directives are rooted in the fundamental law of reason, and, as such, are essential for creating and maintaining legal institutions and such socio-economic practices that will protect and promote crucial aspects of human wellbeing and thus provide the conditions necessary for a state of legality to exist. To serve this critical purpose, it is important that certain parts of the Directives themselves should have the force and value of justiciable rules of law. It is also important that the Directives be seen to have special normative force in the legal system the invocation of which is necessary to judge the failures or successes of government in respect of the objectives contained in them. The argument may be easier to make in relation to Ghana, since its Constitution does not expressly deny the justiciability of the Directives whereas Nigeria’s does; but the argument can also be seen to apply to Nigeria as well.

Before looking at this argument in greater detail, it is important to observe that it is not in any way inconsistent with the (superficially) less extreme idea that Directives are
merely cognizable as interpretive aids. Not only should we concede that the legislature may give effect to or implement the Directives by legislation.\textsuperscript{650} We should insist that, in most cases, the socio-economic rights embedded in the Directives cannot be fully honoured without legislation. Providing the financial and institutional infrastructure and the detailed regulations necessary for securing socio-economic justice for people in poverty, for example, is clearly not a task for the judiciary.

Furthermore, it makes sense to say that courts, in deciding cases relating to the subject matter of these principles, should, by virtue of the fundamental character of the Constitution, take cognizance of their general tendencies, even when no legislative effect has been given to them.\textsuperscript{651} In other words, courts should not refrain from having recourse to the Directives in their interpretive duties merely on the account that the legislature has not acted in that regard, nor should the legislature be justified in not acting to implement the Directives just because the courts have frequently considered them in fulfilling their judicial obligations. What is needed, in other words, are complementary efforts by all branches of government to secure the ends of socio-economic justice.

But, even if we accept that the Directives are important policy guides for legislatures and interpretive guides for courts, it does not follow that the Directives, or at least certain of the principles they embrace, are not also directly justiciable as constitutional rights. Like other provisions in the Constitution, they may not be self-


\textsuperscript{651} G.N. Joshi, \textit{Aspects of Indian Constitutional Law} (1965) at 27.
executing and so may require some form of positive institutional action to be fully implemented. But that action can be examined from the perspective of the conscience of the Constitution as a whole, and it can be argued that where decisions have been made by other branches of the state in respect of the Directives, even decisions to do nothing, and where those decisions fail to meet the relevant constitutional standards that are implicit within the Directive Principles, then the judiciary, after a proper and impartial examination of the decision in light of the fundamental law of reason, may intervene and order a remedy. Indeed, it is the fundamental law of reason that makes certain socio-economic values in the Directives justiciable as constitutional rights.

But before going on to look at the way the argument works in Nigeria and then Ghana, it would be a good idea to explain the argument in more detail, which revolves around the question: why are socio-economic rights part of the fundamental law of reason? A full answer to this question stretches over the rest of Chapter Seven and Chapter Eight. But I think it would be wise to sketch it here by returning to the general theory of law that I articulated in Chapters Three and Four above. As stated in those chapters, my general argument is that the fundamental law of reason is essentially a substantive conception of the rule of law, i.e., one that sees the proper conception of legality as embracing certain basic human rights in light of the law’s aspiration as a moral ideal for the wellbeing of the people, such that failure to honour these rights means failure to create ‘law’ at all. It is an argument of legal theory or legal philosophy that has legal doctrinal implications.
But, as we saw, the fundamental law of reason is not so much a catalogue or code of substantive rights as it is a way of thinking through legal problems. It is a form of reasoning or interpretive discourse that seeks justificatory reasons for law. For law to be ‘law’ rather than mere power it must be capable of rational explication to its subjects (thus the argument relies heavily on Fuller), on the assumption that for them to be in a position to treat it as law rather than as mere force or power then it must respect their status as humans capable of following laws. Although based on Fuller’s insights, the idea is filled out more substantively than Fuller did; it is very similar, I think, to the idea of law as a “culture of justification”, which David Dyzenhaus, following the South African scholar Etienne Mureinik, develops, and which T.R.S. Allan employs in developing his theory of constitutional justice.652

Rather than a set list of rights, the law of reason is a form of interpretive discourse that forces us to ask the following sorts of questions. What does it take for law to exist within a particular context? What does it take for power or force to be seen by its subjects, in a particular time or place, as ‘law’? What does law need to be in order to justify itself as ‘law’? Or, another way of putting it, what does it take for law’s subjects to be law’s citizens? On the account of this set of questions, my argument is, that sometimes law must embrace socio-economic rights in order to count as ‘law’ at a theoretical level, and thus at a constitutional doctrinal level too.

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But in doing so, it may be helpful to note that almost thirty-five years ago, Joseph Raz effectively demolished the idea that the rule of law is linked to social justice. His argument has obscured the debate ever since. He was partly right. The rule of law cannot be just the same thing as social justice. But he was wrong to think that therefore it had no necessary connection to social justice. Once legality is seen as reason rather than just order, in other words, once we accept that the rule of law means being able to show law to be rules to be respected by its subjects as citizens, rather than as rules to be imposed upon and feared by its subjects as mere subjects; once it is seen that governments cannot make and impose ‘law’ unless its subjects are citizens (using that term very broadly to mean members of a political community); then it follows that the rule of law embraces aspects of a more general theory of social justice, at least those elements of social justice that are necessary to exist before it can be said that a group of people is more than a random group of people but rather is a political community consisting of people sharing a common sense of equal citizenship, or an identity with each other as equal members of the same polity.

Where people are incapable of developing a minimal sense of political community because they are gripped by poverty, disease and lack of education and information, such that their only concern can be the daily struggle to survive, the conditions for legality do not exist. For them, government rule, even if it is well-intentioned and beneficial for them, is power only, not law. Indeed, the government may

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654 Mark Walters has made a distinction between “legality as reason” and “legality as order”: “Legality as Reason: Dicey, Rand and the Rule of Law” (2010), 55 McGill Law Journal 563.
even have extended formal political and civil rights to them, and so key elements of the
rule of law may be in place. But these aspects of the rule of law cannot exhaust the
demands of the rule of law, for, on their own, they fail to fulfil a necessary condition for
legality to exist, namely a political community based on shared citizenship. In these
circumstances, socio-economic rights may well be seen as an implicit aspect of the rule
of law, and hence of the fundamental rule of reason that defines constitutionalism in a
democratic state. Socio-economic rights may need to form part of enforceable
constitutional law, not because the Constitution says so, but because, in the
circumstances, the very possibility of ‘law’ fails without them.

In earlier chapters we addressed the question of whether following Eurocentric or
Western legal theories is appropriate. We concluded that it is, but that the theories should
not be seen as exclusively Eurocentric or Western. Here, it makes sense to reinforce that
point. First of all, it is worth noting that the idea of law as a “culture of justification” was
developed by Etienne Mureinik, who although a white South African (and a controversial
figure) was addressing the situation of a transitional democracy in Africa. He wrote: “If
the new [South African] Constitution is a bridge away from a culture of authority, it is
clear what it must be a bridge to. It must lead to a culture of justification—a culture in
which every exercise of power is expected to be justified. The new order must be a
community built on persuasion, not coercion.”655 The idea of a fundamental law of
reason, based upon a theory of justificatory reason, will have more normative power for
transitional democracies than established ones. But we can go further and make the link

655 Mureinik, “A Bridge to Where?”, supra note 652 at 32.
between law as justification and socio-economic rights. Again, it’s all about the importance of political community for this theory of law, and this has special implications for state-building and nation-building in Africa.

The theoretical connections between socio-economic justice, political community, transitional democracy, constitutionalism, and legality are explicitly acknowledged and asserted by at least two authors. One can thus begin to build a unique African perspective on legal theory and the rule of law, one that puts socio-economic rights at the heart of the very idea of what ‘law’ must be to count as ‘law’. The argument that socio-economic rights form an inherent part of the rule of law may sound suspect for people living in stable, prosperous and developed countries; but the argument is very compelling in the African context, for transitional democracies and developing economies.

To re-cap, the argument is that the fundamental law of reason embraces certain basic socio-economic rights because government rule for a person suffering from severe poverty, disease and lack of education cannot be justified as ‘law’ rather than mere ‘power’ for them because, given their situation of deprivation, the sense of political community necessary for legality to exist simply is not present. There are no doubt many objections to this argument, including the obvious one that it accepts that, for hungry people, the law of theft is not a ‘law’ and so they may ‘steal’ food, or for homeless people the law of trespass is not a ‘law’ for them and so they may live on other people’s land.

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This is a good point, and answering it helps shed important light on the argument. Here, the famous *Grootboom* line of cases helps. The short answer to the objection, then, is, yes, a law stopping people from obtaining what they need to survive may not be, for them, a valid law. But this answer needs to be explained in greater detail, and reference to more recent South African cases, in particular, *President of the Republic of South Africa v. Modderklip Boerdery*\(^\text{657}\), which relies expressly on the rule of law in dealing with socio-economic rights, will be helpful. But this issue can be put off until Chapter Eight, when we deal with the South African case law.

With this rough sketch of the argument why the fundamental law of reason embraces basic socio-economic rights, we may return to the question of whether this argument fits within the constitutional structures established for Nigeria and Ghana. First, we may say that the cases on Directives may be inconsistent with our account of law. Looking first to Nigeria, given that section 6(6)(c) explicitly provides that the Directives are not justiciable, it is hard to see how the argument for socio-economic rights based on a fundamental law of reason could work. The Supreme Court of Nigeria therefore seems to be on firm ground in asserting that its “no justiciability thesis” is a direct function of this specific provision. Even the non-positivists considered in this work may not dispute that conclusion, since the question does not seem to rise to the level of a ‘hard case’.

But here I think we should pause to consider the matter carefully, for serious problems will arise if the content or the necessary implication of a provision like section

like section 6(6)(c) is repugnant and unreasonable, such that its enforcement by the courts would negate the values of the fundamental law of reason and justice, or (to put the same point differently) the ‘conscience’ of the Nigerian Constitution. The interpretive problems are increased once we recall that section 13, read on its own, directly or indirectly contemplates the justiciability of the Directives. Finally, section 1 of the Nigerian Constitution declares the Constitution as the supreme law, and section 3 enunciates a power of judicial review to control all inconsistent acts with the Constitution. One may therefore say the underlying assumption of these provisions is that the Constitution, holistically conceived, is a supreme law and that it is, as a whole, made justiciable by the power of judicial review.

This is, of course, a hard argument to make. Constitutional positivists will tell us that the Constitution that is said to be, as a whole, supreme, is the same Constitution that declares some of its provisions non-justiciable. So if the Constitution indeed is supreme law, as declared in section 1, it necessarily follows that the non-justiciability thesis, found in section 6(6)(c), is firmly and legally grounded. As Nigerian judges have ruled when addressing the relationship between sections 13 and 6(6)(c) as they were found under the 1979 Constitution: “It is clear that section 13 has not made chapter II [on the Directive Principles] justiciable”. 658 As one commentator has observed: “Judicial attitude to socio-economic rights litigation in Nigeria is characterised by great caution and subtle passivity. Following a strict interpretation of section 6(6)(c) of the 1999 Constitution has

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meant that Nigerian courts are almost always incapable of or unwilling to entertain socio-economic rights claims.”

Of course, as Hart’s rule of recognition would suggest, the question of what normative standards form part of the legal corpus is not necessarily determined by looking to the moral content of the law. The significance of the rule of recognition is to make law-making subject to it, as “nothing which the legislators do makes law unless they comply with fundamentally accepted rules specifying the essential law-making procedures”. Therefore, since the non-justiciability thesis of Directive Principles in the Nigerian Constitution is a valid proposition that meets the requirements of this rule of recognition, then such a proposition can correctly be designated as the correct position of the law as held by the court.

If this is the correct way to understand the Nigerian judicial position, if, in other words, what is law and what is not law is a matter of social fact, and the identification of a law is not contingent upon any moral arguments, then the only way out from section 6(6)(c), if a litigant, say in central Kano, disagrees with the way that it shields legislative action or inaction on socio-economic matters from judicial review, is to have it repealed in accordance with the rule of recognition in the Nigerian Constitution. Otherwise, it is the law of the land. The trouble with this conclusion is that it is premised upon a conception of law that appears to disregard other, deeper founding constitutional values.

And, again, section 13 of the same Constitution, loosely phrased here, makes the

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observance of the Directives a legal duty in Nigeria. Thus even if a literal reading of section 6(6)(c) would support the positivist claim that the Directives are not justiciable, there may be a deeper problem for such a proposition once courts try to reconcile the said provision with the positive constitutional injunction contained in section 13.

Turning from constitutional positivism to the idea of law as a moral ideal for the people’s wellbeing, the goal of interpretation changes from strict or literal readings of textual provisions to one of developing a holistic reading of these provisions with the view to giving the whole Constitution a ‘conscience’ that entitles citizens to a real sense of justice. Such a reading will not discount, as the courts in Nigeria have discounted, the necessary inclusion of moral principles into the conception of the Directives as justiciable law. A decision from the outset that the Directives are not justiciable is, in effect, a declaration that they have a very limited effect in the construction of the conscience or spirit of the Constitution. This entails the claim that the directives are not principles of the rule of law contemplated by section 3 of the Constitution.

But once a non-positivist approach is taken, the Directives can be said to figure as principles of law in the soundest theory of law so as to provide a justification for the explicit substantive and institutional rules of Nigeria.\(^\text{661}\) It could be said that the judicial segregation of the Directives as mere public policy statements on the basis of a conception of law which dwells merely on legal rules is a mistake.\(^\text{662}\) An application of the Directives through the reason of the unwritten fundamental law will yield a better


\(^{662}\) Dworkin, ―The Model of Rules‖ at 35 and ―Is Law a System of Rules?‖, *supra* note 133.
constitutional ‘conscience’. This is particularly attractive if injustice will be avoided. If, as St. German asserts, ‘to folowe the words of the lawe’ would negate ‘Iustyce’, it is ‘necessary to leue the wordis of the lawe’ and follow ‘reason and Justyce’. 663

Of course, the suggestion here is not that the written rules or constitutions should go out the window. The judge must show by way of explanation how his chosen answer to the legal question best explains the Directives, which in this situation are part of the explicit law. The answer must be an interpretation of the explicit law, but not in the sense of rigidly following precedents or the framers’ intent, as suggested here by the courts. The answer must fit a threshold test, it must fit within the explicit materials that together form the legal system, but it must also meet a justification test, one that shows those materials in their best light, that is, as coherent and unified in light of the underlying principles of political morality that they are supposed to instantiate. 664

In that sense, the judges in Nigeria, for example, must provide a reasoned justification for their conclusions predicated on the objective of seeing the law in its best moral light for the legal order. The point of this interpretive process of justification is to make the law reasonably sound. It has been argued that a Dworkinian interpretive approach—which this approach resembles in some key respects—is particularly suited to transformative constitutions in Africa. 665

663 Doctor and Student, supra note 174 at 97.
664 See Walters, “Written Constitutions and Unwritten Constitutionalism”, supra note 75; and Dworkin, Law’s Empire, supra note 84.
Following this approach, it may well be true that in an ‘easy case’ section 6(6)(c) will make the Directive Principles non-justiciable. But in a ‘hard case’, where it seems that the rule in section 6(6)(c) stopping courts from enforcing the Directive Principles really does represent a serious problem for basic ideals of constitutionalism and the rule of law, then respect for the written text and its underlying principles may yield a different answer. To begin with, consider the following observation by Niki Tobi J.S.C. in a recent case: “…the non-justiciability of section 6(6)(c) of the Constitution is neither total nor sacrosanct as the subsection provides a leeway by the use of the words ‘except as otherwise provided by this Constitution.’ This means that if the Constitution otherwise provides in another section, which makes a section or sections of chapter II justiciable, it will be so interpreted by the courts.”

Of course, it may well be that no other explicit “section” of the Constitution makes socio-economic rights justiciable. But perhaps finding another “section” is not necessary to take advantage of the “leeway” provided. Section 6(6)(c) does not say that the non-justiciability rule is subject to other sections of the Constitution; it simply says it is subject to “this Constitution”. This expression forces us back to the general question of what “this Constitution” really is. If a non-positivist view of “this Constitution” is accepted and it is seen to embrace the text and its underlying spirit, i.e., the unwritten or fundamental law of reason, then, in the right case, the best reading of section 6(6)(c) will

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be that exception is triggered and the socio-economic principles found in the Directives will be justiciable.

If the courts in Nigeria have erred on the account of law urged in this work, it may be said that their sin is less serious than the sins of the Ghanaian courts. Although we may dislike their approach, at least they acted directly in response to a written constitutional provision. In contrast, there is no such provision stating that the directives in the Ghanaian Constitution are not justiciable. This makes Justice Adade’s comment in the 31st December Case, that the whole Constitution is justiciable, and his further assertion that, if that is not so, then the Constitution must declare it as such, very compelling. As with the Nigerian Constitution, the judicial review provisions found in articles 1(2) and 2(1) (as considered in Chapter Four above) of the Constitution of Ghana do not express any exception in favour of the Directive Principles.

Accordingly, any law or act or omission within the contemplation of these articles but which contravenes or is inconsistent with the Directives must be held as such. It was thus unconvincing when in the CIBA Case certain justices of the Supreme Court claimed that the Directives were not justiciable. Even though this conclusion was quickly qualified, the claim itself was footed on a faulty allusion to tradition by the Consultative

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667 The 31st December Case, supra note 54 at 66 (per Justice Adade “I have not seen anything in chapter 6 or in the Constitution, 1992 generally, which tells me that chapter 6 is not justiciable.”).
668 Justice Adade acknowledged this in the 31st December Case, ibid. at 66.
669 The Supreme Court of India has held in Central Inland Water Transport Corp. v Brojo Nath A.I.R 1986 S.C. 1571 at 1587 that if a law is passed by the legislature which violates the directives principles in the Constitution, the Court can declare that law as unconstitutional.
Assembly uncritically relied upon by the Court. As shown above, the tradition as established by the Constituent Assembly of the 1979 Constitution makes no such claim.

It may nevertheless be suggested that the Ghanaian Court, like its Nigerian counterpart, relied on for the decision a positive legal source. The only difference was that the Nigerian Court relied on an explicit constitutional provision whereas the Court in Ghana premised its decision on historical records – the report of the Consultative Assembly. But, as just mentioned, the report was factually inaccurate. Still, we can accept that the judges were engaged in an honest attempt to apply historical records to determine the ‘conscience’ of a constitutional provision. Nothing in the argument developed in this thesis makes reference to historical records in order to discern the true meaning of constitutional provisions inappropriate.

However, reliance upon historical records to the exclusion of other compelling considerations would be inappropriate, especially if the result was an interpretation of the provision that negated the conception of the Constitution as law for the wellbeing of the people. There must be a willing inclination in the courts to engage such historical records in a form of interpretive dialogue, with the view to interpreting the Constitution as a receptacle of better values for the people’s common good. Law or the constitution should be conceived and interpreted as an aspirational moral ideal, which in essence aspires for the morally best law for the peoples’ common good.

We may conclude, then, that the non-justiciability thesis from the jurisprudence of Ghana and Nigeria represents, implicitly at least, the adoption of a conception of public law very different from the one that I argue for in this thesis, namely, the conception of
constitutions as an exemplification of those fundamental values of the people that make sense of their collective wellbeing. The rigid focus on the constitutional provisions or framers’ intentions by the courts displaces the proper judicial role, which is to make sense of the unwritten fundamental law in shaping the Constitution as a body of values capable of protecting individual dignity and providing, sustaining and enhancing the collective wellbeing or moral good of the citizens.

A focus on judicial enforceability as a definition for law and justiciability, as these cases have done, is simplistic and it ignores the idea that law is a distinctive form of interpretive discourse, the most authoritative manifestation of which is judicial judgement. It represents a direct challenge to the ideal theory of law at the core of this work which is constitutive of principles of the fundamental principles of the unwritten law and such principles as expressed in the constitution, the enforcement of which enhances the common good. But these are virtues which must serve as anchoring foundational principles of these Constitutions in order to unite the enduring values of the past and current “practices, expectation and necessities”.  

The application of the fundamental law of reason leads to the view that the conception of the Directives as justiciable rules of law does not only rest on positive law. The conclusion of the Nigerian Court that justiciability of the Directives is dependent on legislation fails this test. Here the test of justiciability is exclusively a matter of investigating the bare facts of legislative intent. From the perspective of law as a moral

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ideal, while justiciability is not wholly a matter of judicial discretion, it is not also an exclusive matter for the framers’ intent. It is an issue that must feed into our sound justification of law which requires the mediation of the law of reason achieved through a disciplined judicial discourse. Therefore, a judicial understanding of the Directives that supposes that law is merely what is posited by lawmakers who follow some preordained or officially accepted rules regardless of their moral propriety, must be resisted.  

The virtues of unwritten fundamental law must mediate just not in the construction and interpretation of the Constitutions in Ghana and Nigeria, but also in our understanding of the value of ordinary laws like the directives in expressing norms of human dignity and welfare and justice. The force and persistence of the values of the directives must be shown in these legal systems as foundational ideas that protect individuals’ rights and freedoms from the mundane whims of politicians and to distinguish our enduring values from temporary premonitions of leaders controlled by other less compelling considerations.

7.4.2 Rights and the Directive Principles: Justiciability Qualification Thesis

But let us suppose that this theory concerning the relationship between our account of law and the justiciability of the Directives is not accepted. What if, for example, judicial respect for written constitutional law overwhelms the argument for the free-standing justiciability of Directive Principles? Even so, certain important questions

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671 Ibid.
672 Ibid.
What is the relationship between the Directives that are not justiciable and Fundamental Human Rights that are? Could the fundamental law of reason, having failed in its bid to establish Directives as free-standing rights, nevertheless help us to see how Directives might be indirectly enforceable? From our discussion above, it should be apparent that even if Directives are not considered to be directly justiciable, their status as interpretive guides may mean that they are indirectly justiciable. This will be the case if what counts as a violation of a justiciable Fundamental Right is affected by judicial reference to non-justiciable Directive Principles.

The argument for the indirect effect of Directive Principles through Fundamental Rights is, on one level, very simple. It may be easily appreciated that if fundamental human rights do not impose on the state any positive duty to create socio-economic conditions necessary for the realisation and enjoyment of these rights, most of these rights will be capable of realisation and enjoyment only by persons who are free from want, disease, ignorance and illiteracy. For political-civil rights to be meaningful for people, certain general socio-economic conditions must prevail. The Directives direct the state to cultivate those conditions and so they are integrally linked to Fundamental Rights. The right to liberty will have greater meaning for people who live within a

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674 In Minerva Mills Ltd. v. Union of India A.I.R. 1980 S.C. 1789, Justice P.N. Bhagwati held in his dissenting judgement that non-compliance with the directive principles in the Indian Constitution by the State would be unconstitutional [at 1849].
prosperous nation. But this general argument may be refined and restated in other ways. Instead of saying that human rights will be meaningful only under certain general socio-economic conditions, we might say that certain human rights, the ones found in the Fundamental Rights chapters within Constitutions, which are mostly political-civil rights, are only meaningful if other human rights, the socio-economic rights found in the Directive Principles chapters, are also protected.

Under this approach, the protection of political-civil rights is dependent upon the protection of a separate but closely related set of socio-economic rights. The right to vote, for example, may be meaningless for someone unless they have a right to some basic level of education. To the extent that the Directives direct states to provide access to education, these Directives must be enforced as an aspect of protecting voting rights. But a third possible understanding of the relationship between Directives and Fundamental Rights exists. We might resist the idea that the political-civil rights found in the constitutional chapters on Fundamental Rights are separate from the socio-economic rights found in constitutional chapters on Directive Principles. We may prefer to view them not as separate and related rights, but rather as different manifestations of the same rights. The rights to food and shelter, for example, are just specific manifestations of one or more of the more abstract human rights generally recognized, like the rights to life or liberty or equality.

Under this approach enforcing a specific socio-economic right set out in the Directive is really just the enforcement of the more abstract right set out in the chapter on Fundamental Rights. Looking to the Directive Principles helps us to understand, or
guides our interpretation of, what Fundamental Rights really are. Each of these three ways of thinking about the relationship between socio-economic principles in the Directives and political-civil rights in the Fundamental Rights chapters seem to be captured by Bamford-Addo J.S.C.’s analysis from the CIBA case examined above: the Directives may identify general socio-economic policy goals that may inform or shape the interpretation of a justiciable human right; the Directives may identify a socio-economic right that supplements or qualifies or supports a justiciable human right; and the Directives may identify a socio-economic right that is simply a more concrete manifestation of, and so an integral part of, a justiciable human right.

In India, where similar Directive Principles of State Policy are also regarded as non-justiciable, arguments like this have gained acceptance, and so Directives may be indirectly protected through the protection of other human rights provisions. According to Paramjit Jaswal, “fundamental rights would be meaningless and remain only as paper tigers if the people who are to enjoy these rights are not free socially and economically.”677 The provisions of the Constitution should not be erected as barriers to progress nor permit any kind of slavery, social, economic or political, and the hopes and aspirations aroused by the Constitution will be belied if the minimum needs of the people are not met.678 In other words, to accept that the Directives are non-justiciable may mean, practically speaking at least, that the positive injunction in favour of a judicial enforcement of fundamental rights is both weak and tentative. The enjoyment of

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677 Ibid., at 126.
678 Chandra Bhavan v. State Mysore A.I.R. 1970 S.C. 2042 [per Hedge J of Indian Supreme Court at 2050].
justiciable constitutional rights is, in part, contingent upon the realisation of the goals contained in the Directives – which is to create and maintain the necessary institutional as well as socio-economic conditions for legality to exist, if not flourish.\footnote{B. Errabi, “The Constitutional Scheme of Harmony between Fundamental Rights and Directive Principles of State Policy in India: judicial Perception” in Ram Avtar Sharma (ed.), \textit{Justice and Social Order in India} (New Delhi: Intellectual Publishing House, 1984) at 175-2-3.}

An absolute claim of non-justiciability of Directive Principles will potentially undermine the constitutional obligation that the state has to implement them, and the obligation that the state has to respect rights that are justiciable. The prominence of the Directives in matters of governance, we may say, supposes a critical legal duty which must be performed for the realisation of rights.\footnote{Without the directives, Paramjit S. Jaswal asserted, “most of the rights appear valueless.” [\textit{supra} p.143].} It follows that a declaration by the courts that a particular government action unreasonably derogates from the Directive Principles may be appropriate.\footnote{This will include the failure to act. In \textit{Mohd Ahmed Khan v Shah Bano Begum} (1985) 2 S.C.C. 556, the Supreme Court of India has held that the silence on the part of the legislature to implement the directive principles in article 44 of the Constitution dealing with a uniform civil code violated the Constitution.} Such a declaration of derogation and unreasonableness is crucial if the impugned government action constitutes a direct and substantial affront to a fundamental human right.\footnote{Jagat Narain, who stated that “[W]ithout them [the directive principles] most of the rights appear valueless. One is, therefore led to doubt the value of the right to free expression…to a person who is so poor that he does not know when and where he will have next meal and has no property worth speaking about, i.e., who does not have adequate means of livelihood….” [at 220 in Jagat Narain, “Judicial Law Making and Place of Directive Principles in the Indian Constitution” (1985), 27 \textit{J.I.L.I.} 198].}

Differently put, if a violation of the Directives in itself would constitute a serious infringement of fundamental rights, it does not make sense to suggest that a declaration
by the courts to that effect is inappropriate merely because Directives are not justiciable. In such a case, it would be unnecessary to engage in the debate as to whether the Directives have equal legal force and substance with the Fundamental Rights or not. But, in effect, one important implication of this line of reasoning is the theoretical and practical unity and indivisibility of human rights, whether they are described as political, civil, social, economic or cultural in character.

There is, I will acknowledge, resistance to this claim in the relevant literature. Upendra Baxi, writing on similar provisions in the Indian Constitution, argues that it is nonsensical to assert equality between Fundamental Rights and Directive Principles. For him, “the directive principles are subordinate to the fundamental rights.”683 H.M. Seevai agrees684 but adds that the mere fact that these provisions are a part of the Constitution does not make them “law”, and, a fortiori, not part of the Supreme Law of India.685 In his view, the litmus test for determining if a provision of the Constitution is part of the supreme law is whether a law violating that provision is pro tanto void. By his arbitrary classification, the Directives are not part of the supreme law or do not possess the character of law and any law violating them is not void.686 The assumption underlying Seevai’s argument, then, is that the framers of the Constitution included superfluous or

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686 Ibid.
redundant provisions in the Constitution.\textsuperscript{687} Baxi’s view, in contrast, does not necessarily entail that Directives are bereft of all legal value. Even though Baxi resists the claim that the character of such legal values is of a nature that makes the Directives directly enforceable in a court of law, he does accept that “advertence to the directives in governance” of a country may be “termed a duty” as is the case of India.\textsuperscript{688}

The difficulty with this subordinate-superior analysis is the presumption that there is necessarily a hierarchical human rights structure. Following this approach, it would be impossible to advance in theory the equality of values of rights protected in such a legal system. It would also follow that there may be a possible clash between Fundamental Rights and Directive Principles.\textsuperscript{689} If that were so, then it would be impossible to suggest the interrelatedness and indivisibility of legal values protected by the Directives and Fundamental Rights in a legal system. But let us suppose that the rhetoric of the subordinate-superior human rights structure is rejected in favour of a theory of constitutionalism that regards Fundamental Rights and Directives as complementary and integral parts of a comprehensive legal value for the collective wellbeing of the people.\textsuperscript{690} In that case, it would not be right for courts to decline to interfere on the basis of the supposed distinction between subordinate and superior constitutional norms when a law

\textsuperscript{687} This impression was rejected by Jagat Narain, in his article “Judicial Law Making and Place of Directive Principles in the Indian Constitution” (1985), 27 J.I.L.I. 198 at 201.

\textsuperscript{688} Upendra Baxi, “Directive Principles and Sociology of Indian Law” supra note 683 at 245.


contravenes Directives in a way that makes the realisation of Fundamental Rights impossible.

One response to this argument, which may be implicit in Baxi’s position, is that the subordinate-superior claim is predicated on the assumption that in an event of a conflict between Fundamental Rights and Directives, the former shall prevail.\textsuperscript{691} Note, however, that even if we accept this view of the matter, it does not follow that Directives are not justiciable; it just means that they are subordinate to Fundamental Rights, and that, in the event of conflict, there will be a need for some sort of “balancing test” in a fit case, to enforce Fundamental Rights against the Directives. But my purpose in this thesis is neither to test the sustainability of such a balancing test nor completely deny the probability of a “fit case” scenario. After all, there is a presumption in such an analysis that the Directives in some cases are justiciable.

In considering Baxi’s claim, it is very important to be precise about which Directive Principles we are talking about, and which of the above-mentioned ways of understanding the relationship between Directive Principles and Fundamental Rights we accept. For example, in Nigeria it is a Directive Principle that the state should “harness the resources of the nation and promote national prosperity” (section 16(1)(a)), and in Ghana it is a Directive Principle that the state “maximise the rate of economic development” (article 36(1)). In this sense, then, Directives promote the general socio-

\textsuperscript{691} This is consistent with the decision in \textit{State of Madras v Champakam Dorairajan} A.I.R. 1951 S.C. 226 where the Supreme Court of Indian held that the directives cannot override the fundamental rights provisions in the Indian Constitution.
economic conditions that make human rights meaningful. But in a constitutional democracy that respects human rights, general or collective economic goals like these can only be pursued in ways that respect human rights. Although some balancing between economic goals and human rights may be appropriate, this balancing exercise takes place against the background assumption that human rights are superior. To this extent, then, we can of course accept Baxi’s claim that human rights protected by justiciable parts of the Constitution will be superior to Directive Principles.

But if we are talking about those parts of the Directives that address socio-economic matters not at the level of general or collective policy but at the level of individual *rights*, like a person’s right to the “basic necessities of life” (Ghana) or to “suitable and adequate shelter” (Nigeria), then we are in a different analytical dimension entirely, one in which the competition (if there is one) is not between human rights and economic policy, but between one kind of human right, usually a political-civil right, and another kind of human right, a socio-economic one. Leaving aside the fact that Ghana and Nigeria appear to have given socio-economic human rights a lower status in law than political-civil human rights, is there any good reason to think that one sort of human right is superior to the other in the event of conflict? Indeed, is there any reason to conclude that one sort of right is even separate from the other?

If it turns out that the right to food is just one aspect of the right to life, then the whole idea of a competition between political-civil human rights and socio-economic human rights collapses, as does the objection to enforcing socio-economic rights by way of enforcing political-civil rights. Under this approach, enforcing the right to food just is
enforcing a right to life. Of course, there may still be conflict between rights, but in the interpretive balancing that occurs to reconcile rights no \textit{a priori} claims of a rights-hierarchy will exist. Once specific socio-economic rights like the right to food are seen to be implicit or inherent within more abstract human rights like the right to life or liberty, then constitutional provisions that oust the judiciary from reviewing laws under Directive Principles, like Nigeria’s section 6(6)(c), may be seen as like red herrings. As Tom Allen has argued, Nigerian courts could protect social and economic rights “in a form which we might still describe as civil or political rights”, that is, “indirectly, by associating them with rights already protected by the bill of rights…”\textsuperscript{692}

How do these observations relate to the idea of a fundamental law of reason, as developed in this thesis? The idea that human rights may be compartmentalized and prioritized at an \textit{a priori} or abstract level has no place within the fundamental law of reason. It is a theory of law that emphasizes interpretive integrity and coherence, and it focuses less on formal statements of rights and more on a distinctive style of justificatory reason. If the primary question relating to any exercise of state power is, what would justify this act of power as ‘law’ for the people it affects, then the human rights that will matter in the subsequent analysis will be those rights that happen to be important to ensuring the conditions of legality, or the rule of law, for those people in their circumstances. Sometimes respecting the demands of legality will mean giving particular respect to the socio-economic as opposed to the political-civil aspect of people’s rights.

My claim, therefore, is that once we accept the perspective of the fundamental law of reason and justice, it would be wrong to suggest from the outset that Directives do not contain principles or rules of law with a justiciable character. It would be wrong because Directives may be either rights in themselves, or they are integrally related with (so-called) Fundamental Rights, so that in some cases judges may have to declare laws that violate Directives unconstitutional in order to protect Fundamental Rights. In such instances, the subordinate-superior analytical structure, proffered above, will not only fall apart, but will lose its constitutional propriety in the legal system. Accordingly, the justiciability, fundamentalness and bindingness of the human rights found in Directives in these legal systems can be sustained.  

Implicit with the cases examined above is a concern relating to socio-economic rights that judges seem to have about enforcing positive duties on legislatures, and the related and more general concern about violating the doctrine of the separation of powers by interfering with the development of socio-economic policy making. Central to this line of judicial analysis is the idea that, given the topics they address, Directives are inherently unsuited for enforcement as constitutional rights in a court of law. Whether independently or as aspects of other rights that are recognized as justiciable, socio-economic rights are simply outside the judicial sphere; their vindication lies with the legislative and executive branches of state and ultimately with the public or the

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The people have the obligation to use their electoral voting power to force the legislature and the executive to enact positive measures that will bring the fruits of the Directives to them.

Under this argument, Directives might be said to be part of the constitutional law of Nigeria or Ghana, but not as rules of law enforceable in a law court. That they cannot be judicially enforced is not contingent upon their treatment by the framers of the Constitution, but rather it is simply a result of the fact that they do not bestow any legal rights, powers or remedies on any person. Why? Because under the doctrine of the separation of powers the development of social and economic policy is an inherently political matter involving decisions about regulatory detail or design, collecting and assessing technical and bureaucratic expert opinions, coordinating large scale social interests and goals, making tax, fiscal and monetary policies, and making political choices about allocation of scarce resources, decisions that are institutionally and democratically suited for the executive and legislature branches of state, but unsuited for the judiciary.

There are valid and invalid aspects to this general argument. First, to the extent that it is connected to the structure and hierarchy of human rights existing in some Western democracies, according to which socio-economic rights, as ‘second generation’ rights, are not justiciable, whereas political-civil rights, as ‘first generation’ rights, are, it is unacceptable. That structure and hierarchy is not only dubious in general, but inappropriate in Ghana and Nigeria. The preference of civil and political rights to socio-economic rights by such democracies is a function of the argument that freedom in a state
only entails the removal of state constraints on the individual and that it is feasible to enforce the former rights as made possible by their easy institutionalisation. This is a weak argument. As suggested by Maurice Cranston, the viability of rights is contingent on the feasibility of their enforcement, the institutionalisation of such rights and industrialisation of a state.\textsuperscript{695} Such a view seems to downplay the difficulties associated with the realisation of rights such as rights to life, fair trial and freedom of expression.

Amartya Sen observes that to “guarantee that every person is ‘left alone’ has never been particularly easy” as it is difficult to “prevent the occurrence of murder somewhere or other every day”.\textsuperscript{696} It would thus seem a mistake to ground the philosophical understanding of rights on the reasons of feasibility and institutionalisation of such rights. Difficulties in the realisation of rights do not make the claimed rights non-rights. Thus the “exclusion of all economic and social rights from the inner sanctum of human rights, keeping the space reserved only for liberty and other first-generation rights, attempts to draw a line in the sand that is hard to sustain”.\textsuperscript{697}

We may also say that subscription to democracy and human rights in Ghana and Nigeria necessitates a clear commitment of value by the state, the fulfilment of which entails both the removal of constraints on the exercise of freedom and positive duties to facilitate the equal enjoyment of such freedom.\textsuperscript{698} If human rights are to be secured to all, it does not make sense to ignore other constraints on the ability of individuals to exercise

\textsuperscript{695} Cranston, What Are Human Rights?, supra note 212 at 13.
\textsuperscript{696} Sen, Idea of Justice, supra note 235 at 385.
\textsuperscript{697} Ibid.
\textsuperscript{698} Sandra Fredman, Human Rights Transformed: supra note 254 at 9.
their rights. Such constraints can arise as much from poverty, poor health, and lack of education as from tyranny and intolerance. In fact, freedom of the individual within a society directly entails a positive duty on the state to ensure the provision of a range of options, of public goods and the framework within which human relationships can flourish.

For developing African countries, where there is not a long tradition of governmental action securing socio-economic justice, this approach to rights is defensible. It is part of an “African approach to legal theorising.” But it is not a matter of saying, as some African scholars once did, that the political-civil rights found in liberal democracies must be denied in order to achieve socio-economic justice. On the contrary, it is a matter of insisting that for the political-civil rights that make liberal democracy possible to be honoured in developing African countries, they cannot be separated from socio-economic rights and a deep commitment to social democracy.

The second, valid, part of the argument above is that judicial enforcement of socio-economic rights is problematic for the doctrine of the separation of powers. The decisions about how best to develop a society in which resources are fairly managed and distributed are indeed polycentric in nature and therefore unsuited, in general, for

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702 For a compelling version of this argument, see Tiyanjana Maluwa, “Discourses on Democracy and Human Rights in Africa: Contextualising the Relevance of Human Rights to Developing Countries” (1997), 9 African Journal of International and Comparative Law 55.
adjudication in the courts. But it does not follow that courts have no role to play in ensuring that these decisions respect basic socio-economic rights. On this point, reference must be made to international and comparative law, and so the answer to this claim will wait until the next chapter.

7.5 The Constitutional Significance of the Unenumerated Rights Thesis

Before turning our attention to the issue of socio-economic rights, constitutional interpretation and comparative/international law, it is important to return to the argument, which several judges in Ghana have accepted, that there is a relationship between Directive Principles and article 33(5) of the Ghanaian Constitution, or the (so-called) unenumerated rights provision. Article 33(5) stipulates:

The rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.

To get a sense of the potential richness of this provision, one needs only to think about the richness of the concept of democracy, and what rights might be “inherent in a democracy.” Consider, just as an example, the words of Musdapher J.S.C. in *Amaechi v. INEC*[^703]:

Democracy’s world is rich and multifaceted. Democracy should not be viewed from a one dimensional vantage point. Democracy is multidimensional. It is based both on the centrality of laws and democratic values, and, at their centre, human rights. Indeed democracy is based on every individual’s enjoyment of rights of which even the majority cannot deny him simply because the power of the majority is in it hands.

[^703]: (2008), 1 S.C. (Pt. 1) 53, at 141. Note that The passage is followed by a reference to a work by Ronald Dworkin. [Ronald Dworkin, *A Bill of Rights for Britain* (1990), 35-36].
The vision underlying article 33(5), I suggest, is that the socio-economic rights (such as the right to health, housing, shelter, work, food, livelihood, water, etc.) that are intimately related with the civil and political rights specifically mentioned in the Constitution are also constitutionally protected. To ignore this all-inclusive vision is to jettison the theory of public law rights which is sensitive to questions of appropriate remedies from the courts that hold sacrosanct such constitutional values central to the preservation of human dignity and just democratic governance. Since constitutions will usually recognise a set of rights rooted on some of such values, it is not wrong to seek their comprehensive and adequate enforcement.

But rights enumerated in a particular constitution are not necessarily, on the account of the thesis advanced here, conclusive of rights that are necessary to sustain the arguments for just democratic governance and human dignity. To hold that they are would be to undermine the normative value of *a priori* rights within a complete theory of rights for a comprehensive rights regime. The Nigerian Constitution does not contain a provision like article 33(5). However, once the idea of a fundamental law of reason is accepted as the normative background for written constitutions within liberal democratic societies, then it follows that something like article 33(5) is implicitly part of every written constitution—including Nigeria’s.

The Supreme Court of Ghana has indicated in the *CIBA Case*, considered in the preceding section, its inclination to read in rights only if such rights meet the threshold of article 33(5). Though this holding did not relate directly to socio-economic rights, it
suggests hope for the human rights advocate that a proper case made pursuant to this provision may have the sympathetic ear of the Court. The enforcement of such rights can, as I have mentioned above, be linked to other rights, such as the right to life and human dignity. However, as I have also stated, this will depend on the temperament of the court or individual Justices hearing such a case. It may also depend on how the courts productively engage human rights and constitutional jurisprudence of foreign sources. A judge steeped in the general traditions of constitutional positivism would have limited use for such a provision. Such a person would likely hold that a right asserted pursuant to article 33(5) must also be deemed as a right protected by the Fundamental Right chapter as the Directive jurisprudence would suggest. But since the Fundamental Rights in the Constitution are largely civil and political rights, it would seem that judicial enforcement of socio-economic rights is foreclosed under this approach.

To see the uncertain legacy of the *CIBA Case* for the unenumerated rights thesis, we may now return to where we started in this chapter, to the case of *Abass*. As we saw, the plaintiffs had been squatters, traders and residents at Sodom and Gomorrah - a slum suburb of Accra. The defendants were the City Authority of Accra and the Attorney-General of the Republic. In 1999, the government of Ghana, through the first defendant, initiated the “Korle Lagoon Ecological Restoration Project”, which included the plaintiffs’ area of commercial activities and residence. The chief purpose of this project was to check flooding in parts of Accra during the rainy season. The execution of the project thus required that the plaintiffs be evicted from their shelters. They were not offered alternative accommodation or relocation to different markets to carry on their
businesses. Acting under the apprehension that there was no legal duty to resettle and relocate the plaintiffs since they were squatters without any form of land titles, the first defendant served a two-week eviction notice on them to vacate the area or face forced eviction.

The economic and social consequences for the squatters’ eviction were enormous, and they therefore went to the High Court to seek an injunction against the defendant. As the eviction order was issued by a public authority in relation to public land, the plaintiffs argued that the eviction would violate a number of their constitutional rights. According to the judge, Justice Yaw Appau, they relied upon article 12(1), which provides that the Fundamental Rights in chapter 5 shall be enforced by the courts, article 23, which secures fairness and reasonableness in administrative decision making, and article 33, which, in addition to the above-mentioned unenumerated rights provision, simply provides for judicial mechanisms for enforcing rights. In terms of the substantive rights claimed, they were described variously as: “rights to human dignity, rights to housing or shelter, right to work and right to due process of law”; “fundamental rights … to life, shelter or housing or to work”; “rights to life and … livelihood….”; and, “the rights of plaintiffs’ children to education”.

No particular constitutional articles were cited in support of these claims. Certain of these rights are expressly protected as justiciable Fundamental Rights in chapter 5 of the Constitution; these are: the right to life (article 13), the right to human dignity (article 15), the right to due process (article 23), and the right to equal educational opportunities (article 25). The other rights claimed could have been supported by Directive Principles
from chapter 6 of the Constitution; thus, the rights to work, livelihood, housing and shelter could be supported by the directive that the state shall take steps to manage the economy in such a manner as to (inter alia) “provide adequate means of livelihood and suitable employment”, recognizing that “the most secure democracy is the one that assures the basic necessities of life for its people as a fundamental duty” (articles 36(1) and 36(2)(e)).

But the Directive Principles from chapter 6 were not expressly mentioned in the judgment, and may not have been argued by counsel. Appau J. summarized the basic legal question to be addressed as: “Would the eviction of plaintiffs under the circumstances, infringe their fundamental rights as enshrined under Chapter 5 of the 1992 Constitution?” And he summarized the plaintiffs’ arguments in this way:

In his arguments, some of the rights counsel for the plaintiffs mentioned as the rights to be infringed by the planned eviction of plaintiffs are: the right to life which includes the right to a livelihood, the right to housing and shelter which though counsel said is not enshrined in our constitution, could be implied from Article 33 (5) of the Constitution and the right to human dignity.

Plaintiffs’ counsel also invoked unspecified “International Human Rights Instruments” in support of the argument and the South African case of Grootboom. Taking stock, then, we may say that one aspect of their case was clearly that the right to live and the right to work and the right to dignity and to shelter are all integrated and interdependent rights, the socio-economic rights of work and shelter being just specific aspects of the more abstract rights to life and dignity. Therefore, if a person is deprived of his job as a result of his eviction from the land in question, his very right to life is put in jeopardy. This squares up with the contention that the State and its organs
are under an obligation to provide the citizens the basic necessities of life. The interesting aspect of this case is the reliance on article 33(5) by the plaintiffs for the enforcement of the right to housing and livelihood—that is, the assertion by the Constitution that the express listing of certain fundamental human rights in chapter 5 “shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.” The High Court rejected these various claims. Appau J. predicated his decision in part on the legal status of the plaintiffs in relation to the land. Once it was established that the plaintiffs were merely squatters and did not have any legal right or interest in the land, the defendant was deemed justified in ordering their eviction. Appau J. illustrated the court’s position by stating that it is erroneous to suggest that “these rights be achieved through lawlessness.” In other words, once the plaintiffs were shown to be squatters without legal rights or interests to the land, their claims could not be sustained by the court. He made this position clearer by declaring that “the mere eviction of plaintiffs who are trespassers, from the land they have trespassed onto, does not in anyway amount to an infringement on their rights as human beings.” The Court further held that absent a binding contract between the parties, the defendant did not owe the plaintiffs any obligation to resettle them. The ruling in this case ignored the constitutional relevance of article 33(5) and, by extension, failed to appreciate the limited legal virtues of the *CIBA Case*. It illustrates how those virtues may be obscured by the unresolved implications of the *CIBA Case*. A difficulty with the court’s reasoning in the *Abass Case* is that it adopted what was

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704 Page 15 of the unreported decision.
essentially a private law approach to the case, examining (i) whether there was an enforceable contract between the two parties requiring resettlement of the plaintiffs by the defendant and (ii) whether the plaintiffs had legal rights in the affected land. The examination of these questions effectively blocked the public law route through which the plaintiffs approached the court for the protection of their constitutional rights to life, housing, dignity and livelihood. A more reasonable approach would have been, I suggest, for the Court in this case to have determined: (i) the extent to which such rights are guaranteed by the Constitution; (ii) whether the eviction would infringe these rights; and (iii) whether the defendant has the constitutional obligation to respect such rights despite the fact that the plaintiffs were, at present at least, asserting their rights to shelter and work by trespassing. With regard to this third point, perhaps it is true that the right to shelter and work of squatters must yield to the right of property of landowners; but it is difficult to know how that conclusion, which requires balancing two sets of constitutional rights, could be reached until after the first point is fully reasoned through. Interestingly enough, Appau J. was willing to accept, without any analysis at all, that all of the constitutional rights asserted, including those that we have described as socio-economic, are part of Ghana’s Constitution; but with equal lack of analysis he swiftly dismissed their relevance because they had been asserted through an unlawful act. He said: “Whilst I admit that all citizens of Ghana are entitled to those rights as mentioned by counsel for plaintiffs, and that plaintiffs are no exception, I don’t think counsel is suggesting that these rights must be achieved through lawlessness.” Appau J. did not use the expression, but his concern here is with “the rule of law”. To recognize that socio-economic rights to
shelter and livelihood may be asserted by thousands of people through a violation of law raises real concerns for the rule of law. To stop the eviction would be to permit people to claim their present rights to shelter and work by an unlawful act, but to allow the eviction with the caveat that government find an alternative site for these people to live and work would be to permit people to leverage immediate access to some form of public housing through an unlawful act when there are presumably many other people waiting for public assistance patiently, without taking the law into their own hands. Not only should this concern us from the rule of law perspective, but it also raises the old problem of the separation of powers, for such a court order requiring the government to find alternative housing for the squatters would divert scarce resources from existing social planning exercises aimed at addressing problems for the public generally to this group of people, who would have managed to ‘jump the queue’ so to speak by their unlawful actions. Needless to say, the issues raised here represent a challenge to the argument that has been made in this chapter concerning the fundamental law of reason, that a proper understanding of the rule of law means that government power may not count as ‘law’ for people starved of the basic necessities of life. How does survival and legality co-exist? How do we escape the survival-legality paradox? This issue will be taken up in the next chapter. For now it is important to observe that the Ghanaian Court failed to appreciate the constitutional ambit and relevance of article 33(5) of the Constitution, the unenumerated rights provision. The trajectory of the Court’s reasoning in this case is that rights not explicitly provided for in the Constitution may not be recognized through Article 33(5). This approach represents a curious and rigorous insistence on the letter of
the law, underlying a judicial belief that rights are only protected under the Constitution when supported by clear constitutional language. Thus express textual provision is required to sustain an argument of a purported protected constitutional value. Article 33(5) thus fails to incorporate into the Constitution unenumerated rights inherent in a democracy and valuable to the dignity of a person. As stated in Chapter Two, denuding article 33(5) of its constitutional relevance reflects judicial fear about expanding protection of rights.\textsuperscript{705} It signals a clear attempt to render redundant such a provision and a rejection of the notion of ‘implied rights’. The problem with this approach is its alliance with a positivist theory of rights and its hostility to an all-inclusive rights thesis urged in Chapter Four above. It is plain that the unenumerated rights provision will, under this approach, languish in constitutional obscurity.\textsuperscript{706} But why must that be so when the provision seeks to protect a penumbra of rights that are ancillary to those expressly made part of the Constitution? This article is designed to address the situation where the explicit language of the Constitution runs out in protecting certain fundamental rights. This allows the protection of all such rights and values in a democratic system, identified by criteria such as well-being, autonomy, justice and equality. Such rights have a vital role in cementing those fundamental interests that are recognised as basic to a decent and truly human existence, and they provide a checklist against which we can measure our democracy, the justice of our laws, the fairness of our economic and social system and


\textsuperscript{706} Kurt T. Lash, “The Lost Jurisprudence of the Ninth Amendment” (2005) 83 Texas Law Review 597.
the appropriateness of our conduct towards other people.\textsuperscript{707} While such rights and values are, at the very least, an affirmation of universal value of human dignity,\textsuperscript{708} they may not necessarily be the subject of the legal rules that define the legal rights. Yet they may triumph on the account of their merit to our shared humanity and objective universal moral principles and represent morally valid and fundamental human interests.\textsuperscript{709} A Constitution containing only civil and political rights projects an image of truncated humanity and will seek to exclude those segments of society for whom autonomy means little without the necessities of life.\textsuperscript{710} There is thus no water-tight division between civil and political rights and economic, social and cultural rights.\textsuperscript{711} The dignity of an individual cannot and should not be divided into two spheres – that of the civil and political and that of economic, social and cultural. The individual must be able to enjoy freedom from want as well as freedom from fear. The ultimate goal of ensuring respect for the dignity of an individual cannot be achieved without that person’s enjoying all of his or her rights.\textsuperscript{712} Without adequate housing, as the fate of the plaintiffs in the Ghanaian eviction case would show, employment is difficult to secure and maintain, physical and

\textsuperscript{707} Tom Campbell, \textit{Rights}, supra note 202 at 95.
mental health is threatened, education is impeded, violence is more easily perpetrated, privacy is impaired and relationships are strained.\textsuperscript{713} The open texture of article 33(5) not only represents the possibility of the indivisibility and interrelatedness of these rights, but also supposes the courts as the appropriate fora for enforcing such rights. In the particular case of the High Court, its jurisdiction and authority to uphold such rights and freedoms of all persons has been established by article 33(1) of the Ghanaian Constitution. It reads:

Where a person alleges that a provision of the Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress.

By this, the Constitution contemplates both committed acts and those acts yet to be committed, but with the possibility of violating the rights and freedoms of persons. There is no need to wait for the act to be committed before the jurisdiction of the court can be seized. Once there is a reasonable apprehension that the intended act, as in the case of the first defendant of the case under discussion, will contravene the guaranteed rights of the applicant, s/he is justified to apply to the High Court for a redress. In \textit{Abel Edusie v Attorney-General \& Director of Bureau of National Investigations (BNI)}, the Supreme Court in 3-2 majority decision held that it is only the High Court that has the sole original jurisdiction in the enforcement of the fundamental human rights and freedoms in Ghana. That means that the Supreme Court does not have a concurring original jurisdiction with the High Court in matters of enforcing the rights and freedoms enshrined in the Constitution. This is an awkward position given the fact that many of these rights

\textsuperscript{713} Centre on Housing Rights and Evictions (COHRE).
claimants are indigent and cannot bear the financial cost to sustain a legal battle through to the Supreme Court.

It should be argued that the conclusion reached by the court in the Abass Case is a denial of a legal forum to vindicate rights contemplated by the Constitution. It is an act of judicial “exclusion of one set of interest from the list of protected rights” which in effect is “a vast legal judgement lending universality and authority” to only those interests that enjoy explicit constitutional protection.\textsuperscript{714} Denying an individual or group, as in the case of the plaintiffs in this instance, the ability to make constitutional claims against the state with respect to housing and livelihood, is to exclude those interests from a process of reasoned interchange and discussion, and forecloses a useful forum for the recognition and redressing injustices.\textsuperscript{715}

It is important that the court recognises as a principle of adjudication that the meaning of constitutional guarantees such as the rights in question will always be underdetermined by their wording and that reference must always be had, explicitly or implicitly, to more general normative understandings of the society in which a legal decision-maker operates.\textsuperscript{716} This allows the court to discover and determine through the principles of the fundamental law of reason and justice the inherent meaning of a right not by a mere inclusion of words in a constitutional document, but responding to

\textsuperscript{714} Scott and Macklem, “Constitutional Ropes of the Sand or Justiciable Guarantees?”, supra note 710 at 28.
\textsuperscript{715} Ibid.
\textsuperscript{716} Ibid., at 29.
arguments over the kinds of normative values a decent and just legal system like Ghana would uphold.\footnote{Ibid.}

But such an exercise would have to be conducted by the court consistent with those values that are inherent in a democracy, and in the interest of human dignity, as article 33(5) stipulates. The underlying principle, it seems plausible to suppose, in this set of cases is to afford the court the ability to protect the unenumerated rights as “no language is so copious as to supply words and phrases for every complex idea.”\footnote{The Federalist No. 37 at 236.} Thus non-specification of some rights in the Constitution is not a sufficient ground to subordinate, debase or discard such rights.\footnote{Charles v. Brown 495 F. Supp. 862 (N.D. Ala. 1980).} If legitimacy to judicial construction of fundamental rights in the Constitution is entirely dependent on those rights overtly mentioned in the Constitution, then we are not far from a regrettable act of denuding the noble vision of article 33(5) which has since 1992 been part of the Constitution.

From the above analysis, the Constitutions of the legal systems under discussion are the supreme law and both the Fundamental Rights and the Directive Principles contained in such Constitutions are part of that supreme law. It would thus be wrong to reject the Directive Principles as law\footnote{Paramjit S. Jaswal, Directive Principles Jurisprudence and Socio-Economic Justice in India at 149.} properly conceived, and to deny them any value as justiciable rights in the court of law. These Directives, as should be clear by now, contain a number of essential rights loosely referred to as socio-economic rights. These include rights to education, health, food, economic livelihood, and housing. Such rights
are at the core of advancing constitutional justice in these young democracies and must not be excluded from a proper account of the law for the well-being of the people. Therefore, any conduct of the legislature or the executive that derogates unreasonably from the values of the Directive Principles must be declared by the courts as unlawful or unconstitutional.

At the very least rights have become “a fact of the world”721 and are “the great ideas of our time”.722 We can rely on rights for a common moral language and global political morality. Thus the existence of rights and their application to everyone represents an articulation in the public morality of the idea that each person is a subject of global concern.723 Understandably, our conception of these values in our legal systems must avoid the restrictive and narrow path of reducing them to only the written law. It is a mistake to suppose that rights only have determinate and intelligible meaning in a state if claims about such rights are referable to a determinate law of that state, even if that law properly conceived, is deficient. The legitimacy of rights must not be contingent on their recognition by a positive law. The courts in Ghana and Nigeria have an interpretative obligation to make this right.

7.6 Conclusion

This chapter has examined how the fundamental law of reason provides a basis for understanding the status of socio-economic rights in Ghana and Nigeria. The focus has been on domestic constitutional law. However, the analysis leaves a number of unanswered questions that are potentially very troubling. There may still be doubts about whether political-civil rights can really be seen as linked or as unified with socio-economic rights. There is the related concern that judicial intervention on behalf of socio-economic rights will mean judicial interference with socio-economic policy, a field that it is institutionally and democratically unsuited for the judiciary, a problem that does not seem to arise in quite the same way in relation to judicial protection of political-civil rights.

There is also a concern specific to the argument for socio-economic rights based upon the fundamental law of reason. If we say that it follows from a proper understanding of the rule of law that government power may not count as ‘law’ for people unless their rights to the basic necessities of life are met, then it would seem that laws preventing theft or trespass do not count as ‘laws’ for people in poverty struggling to survive; it seems to suggest, in other words, that poor people may simply appropriate the resources they need from others, a proposition that seems to be contrary to rather than inherent within the idea of the rule of law. This is the survival-legality paradox. Indeed, it was this concern that grounded the denial of rights to shelter and work to the squatters of Sodom and Gomorrah in the Abass case. To complete the argument about the fundamental law of reason and socio-economic rights in Ghana and Nigeria, these arguments must be
addressed, and for this reason we turn to comparative and international law in the next chapter.
Chapter 8

Consolidating an Integrated Rights Approach: Socio-Economic Constitutional Justice in Ghana and Nigeria

8.1 Introduction

The preceding chapter presented a relatively gloomy picture of the prospects for enforcing the socio-economic rights contained in the Directive Principles of the Constitutions of Ghana and Nigeria. It may be said that the courts have adopted a positivist conception of rights when approaching the justiciability of the Directives. I have argued that such a position is not warranted by a proper conception of a fundamental law of reason and a comprehensive rights structure for these jurisdictions. This chapter extends the debate by examining in greater detail the normative constitutional claim that the enforcement of socio-economic rights is central to protecting the values that are necessary for the wellbeing of the people, and hence for the existence of a state of legality.

The general objective is to begin to integrate the arguments about Ghanaian and Nigerian law on this point into the broader context of international and comparative law, on the theory that identifying the ‘conscience’ of the Constitutions under study invariably requires identifying the ‘conscience’ of law more generally speaking. The analysis will
supplement and assist the argument developed in the preceding chapter, by addressing troubling issues that remain outstanding, like the extent to which a unified theory of human rights is possible, the problem for the judicial enforcement of socio-economic rights presented by the separation of powers, and the survival-legality paradox.

8.2 Constitutional Positivism and Socio-Economic Rights

As noted in Chapter Two, constitutional positivism insists that the interpretative role of judges must be circumscribed by the legislature’s commands. In determining in a particular case of law what the legislature intended, judges must avoid relying on arguments about what moral ideals they think the legislature ought to be trying to achieve. The acceptance of this claim will mean that the written Constitutions of Ghana and Nigeria will have similar force on judges. The express provisions of each Constitution become conclusive of the legal values that the state intends to protect. The judge’s role is to enforce strictly the Constitution by relying on the framers’ intentions or the literal reading of the provisions at all material times. Though statutes and constitutions in this context are by no means the same in terms of either form or content, the constitutional-positivist judge understands them both as exhaustive accounts of operative legal norms and principles in the state. Such an understanding is informed by the fact that both documents have been duly enacted by the competent authorities in the country. Questions of the moral value of such legal documents as law do not concern the positivist judge. He is content to focus on the factual basis for the enactments and

724 This is in fulfilment of Hart’s rule of recognition. See Hart, Concept of Law, supra note 84.
refrains from looking outside legal texts to the surrounding terrain of political morality, except when directed to do so by the text. Constitutional positivism supposes dualism in a variety of dimensions. In addition to the basic division it makes between law and morality, its adherence to two related sorts of dualism concern us here. As was suggested in Chapter Two, we should be concerned to address the doubled-faced tension between domestic law on the one hand and the law of other countries and the international community on the other, and between the law derived from statutes or other written instruments and the fundamental law that emerges from unwritten or common law discourses. These are separate concerns, but they both arise from a tension between the conception of law as an aspirational moral virtue and the conception of law as posited facts. In the particular case of dualism between domestic law and international human rights norms, judges of constitutional-positivist leanings will conclude that unless international human rights norms are explicitly incorporated into domestic law by the legislature, such norms are inapplicable. This remains true even if it is proven as a matter of principle that their judicial application would enhance the normative value of the domestic law. A similar result will obtain if fundamental principles of common law clash with statutory law—that is, unless common law principles are explicitly incorporated by positive law, they will be irrelevant.

The constitutional-positivist’s fears about incorporation or integration of legal ideas from multiple sources some of which are clearly disconnected from the sovereign or the rule of recognition for the system are therefore closely connected with judicial resistance to reading into the Constitution rights that are not explicitly guaranteed. This is
partly obvious from the Directives jurisprudence considered above, and it arises in part from general concerns about limitations inherent within the adjudicatory role of courts. Such resistance may seem counterintuitive in legal systems like Ghana’s, where constitutional provisions explicitly or implicitly appear to contemplate a broader interpretative approach.

As seen in the preceding chapter, in Ghana, for example, article 33(5) of the Constitution provides that the human rights and freedoms “specifically mentioned” in the chapter on Fundamental Human Rights “shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man”, and several judges have looked to international law to determine what those unenumerated rights might be. The resistance of constitutional positivism in the face of such provisions is often justified by the argument that the open space seemingly left for unenumerated rights is not to be taken as an invitation to judges to legislate on rights. From this perspective, there may be a gap in the rights regime as established by the Constitution, but it is not the role of the judiciary to fill that gap. That is the duty of the legislature.

The rejection by constitutional positivism of both the judicial incorporation of international human rights norms and the relevance of unenumerated rights provisions poses a challenge to the conception of law as a moral ideal and for the possibility of a comprehensive rights regime for legal systems like Ghana and Nigeria. It reduces to the periphery a conception of law as an aspirational moral ideal for society. By retaining the positivist approach in this increasingly globalised world, the result will be not only to
obfuscate a holistic understanding of constitutions, but also to risk the violation of major international human rights norms that are part of the post-war global human rights constituency. This would deepen the plight of the vulnerable and create a dominant legal discourse that will reduce socio-economic rights to mere non-justiciable public policies in Ghana and Nigeria.

It is beyond the scope of this thesis to address international human rights law in any detail. However, it is necessary to review, if only superficially, how international human rights law deals with three topics important to the discussion here: whether human rights are compartmentalized and hierarchical or integrated and equal; whether socio-economic rights should be justiciable; and how socio-economic rights should be defined given their impact on governmental policies and resources.

Many of the Fundamental Rights affirmed in the Ghanaian and Nigerian Constitutions parallel rights asserted in the United Nations International Covenant on Civil and Political Rights (ICCPR) of 1966. The Directive Principles, in contrast, reflect the socio-economic rights affirmed in the International Covenant on Social, Economic and Cultural Rights (ICESCR) of 1966. Rights of both descriptions are also affirmed by the African Charter of Human and Peoples’ Rights of 1981.725 It was long assumed that in the hierarchy of human rights, political and civil rights enjoyed a special place, being inherently legal in character, while socio-economic rights were, due to their inherently political and therefore non-justiciable character, lesser rights.

There was also a classical liberal ideological explanation for the difference: political-civil rights were assumed to be premised upon a negative conception of liberty, with the idea of restraining state power and state activities because individuals were supposed to take care of themselves, whereas socio-economic rights were associated with a positive conception of liberty, with the expectation that the state had to provide at least some level of care for the wellbeing of people, and classical liberals preferred the former over the latter approach to rights.

It is not necessary to chart the demise of the classical liberal theory of rights in international law; it is sufficient just to say that it seems to have been firmly rejected. It was never compelling to African jurists and scholars, and so it is not surprising that an early and forceful assertion of the unity and equality of human rights is found in the African Charter, which states that “civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights...”726 The official understanding of the International Covenant on Social, Economic and Cultural Rights has followed suit. The 1998 United Nations Vienna

Declaration states: “All human rights are universal, indivisible and interdependent and interrelated.”

Finally, it is worth noting that the principle of the unity of rights has been applied judicially against Nigeria in Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria (the SERAC Case). In this important case, the African Commission on Human and Peoples’ Rights, which adjudicates complaints under the African Charter, held in 2001 that the government of Nigeria had violated the rights of the Ogoni People of the Niger Delta by sponsoring or supporting destructive practices in the oil industry. For present purposes, it is simply worth noting the Commission’s approach to the interpretation of rights parallels that which was argued for in the preceding chapter. The Commission held that “[a]lthough the right to housing or shelter is not explicitly provided for under the African Charter”, it is a “corollary” of the right to mental and physical health (article 16), the right to property (article 14), and the protection accorded to the family (article 18); the “combined effect” of these articles “reads into the Charter a right to shelter or housing which the Nigerian Government has apparently violated.”

The Commission also held that the right to food, though not mentioned, “is implicit in the African Charter”, for it is “essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation”, and so Nigeria is

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729 Ibid., para. 60.
legally bound “to protect and improve existing food sources and to ensure access to adequate food for all citizens.” So, we may say that although counsel for the squatters of Sodom and Gomorrah in the Ghanaian case of Abass did not indicate which international human rights instruments he was relying upon, he was on solid ground in suggesting that international human rights law supports the argument that the socio-economic rights to earn a livelihood and shelter could be derived from the rights to life and dignity. The indivisibility and interrelatedness of human rights, in particular the inherent connections between political-civil and socio-economic rights, is an undeniable part of international human rights law.

The second point to note about the international human rights law, which follows directly from the first, is the strong presumption that states should ensure that socio-economic rights are justiciable domestically. This point is made in General Comment no. 9 of the Committee on Economic, Social and Cultural Rights (CESCR). The Committee observes that although it is “generally taken for granted” that judicial remedies for violations of political-civil rights are essential, “[r]egrettably, the contrary assumption is too often made in relation to economic, social and cultural rights.” This discrepancy, it concluded, is not warranted.

While the Committee accepted that the general approach of each legal system must be taken into account, “there is no Covenant right which could not, in the great

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730 Ibid., paras. 64, 65.
732 Ibid., para. 10.
majority of systems, be considered to possess at least some significant justiciable dimensions.” The Committee conceded that the respective competences of the different branches of state had to be respected, and that applying socio-economic rights often had resource implications ideally left to political authorities. However, the Committee also insisted that courts already adjudicate matters having important resource implications, and so “[t]he adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent.”

If courts are one way of enforcing socio-economic rights, how can they do this job without interfering with policy matters properly in the hands of other branches of state? If socio-economic rights had some concrete standards, perhaps they could be more easily enforced. The third point to note about international human rights law is the attempt to do just this—to define socio-economic rights with greater precision. The project is traced to the idea of “core minimum obligation” first spelled out in General Comment no. 3 of the Committee on Economic, Social and Cultural Rights. The idea seems simple enough. The Committee stated that there is a “minimum core obligation” on each state to provide at least the “minimum essential levels of each of the rights” to

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733 Ibid.
734 Ibid.
people, for example, meeting basic levels “of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education…”

The Committee appreciated that the Covenant calls for the “progressive realization” of socio-economic rights subject to resource constraints, but it concluded that meeting the core minimum obligation was a duty with “immediate effect.” Here is a rule-like approach that courts could employ. Of course, even meeting the core minimum obligation might be difficult in some developing countries, and international law does not demand the impossible. But the Committee stated: “In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”

In addition to the idea of core minimum obligation, international law has attempted to structure state obligations more precisely in two other basic ways. First, it provides that there is a state obligation “to respect, protect and fulfil” socio-economic rights, so that, in other words, there is both a negative duty to refrain from violating the rights but also a positive duty to fulfill the rights. Second, these various duties can be analysed from two different perspectives: as obligations of conduct and as obligations of

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736 Ibid., para. 10.
737 Ibid., para. 1.
738 Ibid., para. 10.
result, the former focusing on the efforts made by the state, the latter focusing on whether those efforts have worked or not.\textsuperscript{740}

**8.3 Socio-Economic Rights and Some Contemporary Justiciability Debates**

Before we examine the courts’ decisions on these concerns, it is important to address some background issues with respect to the legal debate on the justiciability of socio-economic rights. First, it should be clear by now, that explicit legal protection of socio-economic rights in a legal system does not, in and of itself, completely resolve all theoretical issues about justiciability. At the outset, justiciability may speak to the extent to which a matter is suitable for judicial determination.\textsuperscript{741} As I said in Chapter Seven, justiciability relates to the capacity and competence of the courts; their mutual relationship with other branches of government; and above all, the nature of the question presented.

In all of these, legality and enforceability may be important, but not always the exclusive determinants of justiciability. The basic idea of justiciability simply refers to the ability to determine judicially whether or not a person’s right has been violated or whether the state has failed to meet a constitutionally recognised obligation to respect, protect, or fulfil a person’s right.\textsuperscript{742} This determination may be made with or without a remedy. However, the debates about the justiciability of socio-economic rights tend to emphasise the simultaneous existence of the three constitutive elements of justiciability:

\begin{itemize}
  \item \textsuperscript{740} General Comment no. 3, above, at para. 1.
  \item \textsuperscript{742} Ibid.
\end{itemize}
judicial competence, separation of powers, and the political character of questions on such rights, and, in addition, there is a presumption that enforceability is inevitably a species of justiciability on such matters.

The scepticism that exists about the justiciability of socio-economic rights may be due not to the prevalence of constitutional positivism, but simply to a general concern about judicial ability to address the moral and political problems that must be resolved when constructing a just socio-economic order. Despite claims to the contrary made by the Committee on Social, Economic and Cultural Rights, it is argued that “the implementation of these claims is a political matter, not a matter of the law and hence not a matter of rights.” In support of this claim, Christian Starch argues that making socio-economic rights justiciable amounts to a necessary breach of the principle of separation of powers. Their enforcement by the courts leads to an intrusion into the legislative domain. The principle of “separation of powers…encompasses the notion that there are fundamental differences in governmental functions – frequently but not universally denoted as legislative, executive and judicial – which must be maintained as separate and distinct, each sovereign in its own area, none to operate in the realm assigned to another.”

This set of objections relates closely to the character of the rights in question and the competence of the courts to discover their true nature and content. There are in fact several levels to the objections. At one level, it is claimed that socio-economic rights are not legal rights at all and that therefore it is illegitimate for an unelected judiciary to direct elected bodies as to the extent of their protection. At another level, it is claimed that, even if they are ‘rights’, they are not the sort of rights that judges, given their limited institutional role, have the capacity to interpret and enforce.\footnote{Scott & Macklem, “Constitutional Ropes of the Sand or Judicial Guarantees?”, supra note 710 at 15.} Lack of conceptual clarity on these rights presents an insurmountable task for the courts. In part, useful decisions on these rights demand expertise in complex policy issues which the courts lack. Nor can social science evidence provide a clear basis for the courts to decide on these rights. Further, socio-economic rights have wider policy implications which cannot be sufficiently evaluated by courts. By implication judicial pronouncement on them is likely to be reactionary, which can undermine the ability of legislatures to deal systematically with issues of social justice.\footnote{See Paul Breast, “The Fundamental Controversy: The Essential Contradictions of the Normative Constitutional Scholarship” (1981), 90 Yale Law Journal 1063.} For critics of socio-economic rights, attempts at defining ‘core minimum obligations’ that courts might enforce, do not offer an acceptable way out of this problem.

The range of charges has been pushed further to suggest that socio-economic rights are not only indeterminate, but are “positive” rights whose enforcement depends on
availability of resources.\textsuperscript{748} It would thus be better for such matters to be left to legislatures to deal with through careful policy studies and structural economic and social programmes. While this argument attempts to define justiciability through enforceability, it also presumes that judicial review can play no role in the whole exercise of protecting socio-economic rights. Courts must adopt a “stay off” attitude as their involvement with socio-economic rights will necessarily constitute an affront to the central principles of democracy – majority rule. This claim was dismissed in Chapter Four on the ground that it relies upon a theory of democracy which is only exhaustive at the procedural and statistical levels, and fails to articulate a better theory of rights that contemplates the application of unwritten fundamental law for the protection of values necessary for human well-being.

Though it recognizes these various concerns, the Committee on Social, Economic and Cultural Rights has, as noted, insisted that socio-economic rights can be justiciable. Furthermore, a number of African states have defied the logic of these objections and provided for such rights in their constitutions—with the South African Bill of Rights being a notable example.\textsuperscript{749} Indeed, there is a growing body of literature that insists that an African theory of human rights, one that fits the normative demands of

\textsuperscript{748} See Michael Dennis & David Steward, “Justiciability of Economic, Social and Cultural Rights: Should there be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?” (2004), 98 America Journal of International Law 462 (This rationale is grounded in the conception that these rights are positive in nature requiring governments to spend significant amount of resources for their realisation).


The rationale, in part, is to demonstrate a commitment to social integration, solidarity and equality, including tackling the question of income distribution\footnote{Asbjorn Eide et al. (ed.), \textit{Economic, Social and Cultural Rights} (Martinus Nijhoff Publishers, 2001).} in the larger society. It also illustrates a major concern for the protection of vulnerable groups, such as the poor and the handicapped.\footnote{Ibid., at 5.} These are human needs which should not be at the mercy of changing governmental policies and programmes, but should be defined as entitlements.\footnote{Ibid., at 6.} For Amartya Sen, the correct conception of these rights should properly relate to how a person can function or exist as a human being.\footnote{Amartya Sen, “Well-Being, Agency and Freedoms: The Dewey Lectures 1984” (1985), The Journal of Philosophy 169.} Such rights should thus be conceived as components of a commitment to individual well-being and freedom.\footnote{David Feldman, \textit{Civil Liberties and Human Rights in England and Wales} (2nd ed., 2002) at 113.}

But this argument does not articulate any specific response to the set of objections raised above. Any attempt to defend the justiciability of socio-economic rights must meet these objections head-on. First, I shall argue that while the separation of powers point is.
thoughtful, as it focuses our attention on the proper allocation and exercise of political power in a legal system, it fails to take account of the danger associated with ceding the entire currency of socio-economic rights to the arena of politics with the potential of an indefinite postponement of their realisation.\textsuperscript{756} Scholars who argue for the judicial enforcement of socio-economic rights in Nigeria, for example, emphasize that courts must step in precisely because legislatures and executives have failed miserably in performing their constitutional functions when it comes to socio-economic justice.\textsuperscript{757} In the end, the separation of powers argument ignores the structural relevance of the doctrine of checks and balances and how the judiciary has a legitimate role to play in preventing the abuse of rights; in other words, the principle of separation of powers is qualified under limited constitutional government where the preservation of values necessary for human wellbeing are deemed central to good governance.

I shall also argue that a theory of rights and adjudication which is exclusively predicated on an uncritical dichotomy between positive and negative rights, especially in young democracies, is a bad one. It is inconceivable that a person in the barren corridors of Sokoto State in Nigeria can turn his mind to the right to vote or to a fair trial if denied access to food, water, housing and medical care. Therefore, any attempt to remove these


rights from the hierarchy of enforceable rights potentially negates the benefits accorded to individuals by the civil and political rights.

As I argued in Chapter Seven above, in a just democracy, civil and political rights must be seen as intimately connected with socio-economic rights. To separate these sets of rights, and to provide remedies for the breach of one but not the other, introduces a structural imbalance in our conception of rights. The decision to include socio-economic rights with political-civil rights in the same justiciable Bill of Rights was challenged as

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We must aim at a comprehensive human rights regime that values the life and dignity of persons. Socio-economic rights are a prior commitment to such a regime and a foundation to the wellbeing of individuals. Civil and political rights will exist in form but not substance without enforceable socio-economic rights. As Obiajula Nnamuchi argues in relation to Nigeria and rights to health care: “Protecting fundamental rights in isolation of complementary socio-economic rights leaves a gaping hole which seriously undermines the value and robustness of the former.”

It is a sweeping and doubtful claim to state that civil and political rights do not require resources in their enforcement. For instance, democratic rights require governments to spend a significant amount of resources to enable citizens to participate in the democratic process. In South Africa, the decision to include socio-economic rights with political-civil rights in the same justiciable Bill of Rights was challenged as

violating the doctrine of the separation of powers. In holding that the justiciability of socio-economic rights does not violate the separation of powers, the South African Constitutional Court stated in *In Re: Certification of the Constitution of the Republic of South Africa*\textsuperscript{761}:

> It is true that the inclusion of socio-economic rights may result in Courts making orders which have direct implications for budgetary matters. However, even when a Court enforces civil and political rights...the order it makes will often have such implications ... In our view, it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the Courts so different from that ordinarily conferred upon them by a bill of rights that results in a breach of the separation of powers...

> Many of the civil and political rights entrenched...will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion...

This was also the opinion of the same Court in *August v Electoral Commission*\textsuperscript{763} when it held that the state has an obligation to take reasonable steps to enable prisoners to vote in an election. Such steps involve providing for a voter register and extending to the prisoners the opportunity to register and to cast their votes. This cannot be done without resources. It is simplistic to suggest that only socio-economic rights demand governments to spend resources. It may be true in certain cases, of course, but it cannot be asserted as a general proposition. In this area, we need to be mindful of what counts as “resources” if we are not to be misled in our conceptions and conclusions.

\textsuperscript{762} Ibid at paras. 77, 78.
\textsuperscript{763} (1999) 3 SA 1 (CC).
If we are to respect humanity we must engage in forms of constitutional order that move beyond mere formal or linguistic categorisations to the task of addressing the socio-economic plight, disease, malnutrition and neglect that people endure. Where these misfortunes are preventable, governments must accept and take the responsibility. To release governments from this responsibility through simplistic generalisations about negative and positive rights, or the nature of the judicial role, will produce dire results for the poor and vulnerable. There is nothing to be gained by hiding behind empty legal concepts to consign a cross-section of the population to a perpetual suffering. This view is best illustrated by Scott and Macklem:

A failure to entrench social rights is an act of institutional normatisation that amounts to a powerful viewing of members of society by society itself. A constitutional vision that includes only traditional civil liberties within its interpretative horizon fails to recognise the realities of life for certain members of the society who cannot see themselves in the construction and legitimation of a legal self for whom social rights are either unimportant or taken for granted.764

On this account, arguments concerning the institutional incompetency of the courts lose their force. First, there is a patent failure in the institutional argument to understand that judges deal with real, specific cases. As a result, they have a specific factual context within which to test the particular implications of abstract principles and discover problems, a context that legislatures, when legislating, do not have.765 Besides, there is the presumption that the judicial process is an unorganised exercise. On the contrary, it is


The indeterminacy argument thus fails, for it underestimates the role of judicial interpretation as a disciplined discourse. Interpretation partly targets the discovery and preservation of community values which goes to the survival of the people. Socio-economic rights are nothing but the constitutionalisation of such values. The concerns about the separation of powers must be converted from a claim against the justiciability of socio-economic rights into a claim for a careful and modest approach to the judicial interpretation and application of socio-economic rights. The South African experience, examined below, suggests certain ways in which this may be done.

8.4 Judicial Incorporation of Norms of International Human Rights Law

International human rights law provides a wealth of resources for socio-economic rights claims that could, in theory, affect the constitutional law of Ghana and Nigeria domestically. Not only do international human rights instruments expressly recognize and protect specific socio-economic rights, but the discussion above suggests that it provides interpretive principles that may be very relevant to the articulation of human rights domestically, in particular: the assertion of the unity and equality of all human rights, the justiciability of socio-economic rights, and the attempts to articulate a more concrete analytical structure for socio-economic rights to address concerns about their uncertainty.
that might affect their justiciability. For all of these reasons, judicial reference to international human rights law makes sense.

As we have already seen, the Constitution of Ghana has limited provisions on socio-economic rights, but the Nigerian Constitution, except for protecting the right to property, does not. In both cases, however, there has been little evidence that such rights have been, or will be, effectively protected by the courts. The tendencies toward constitutional positivism mean that the citizens of these jurisdictions must take as conclusive those rights provided for by a formal or literal reading of the relevant constitutional texts. The presence of the Directive Principles within those texts offers little assistance, as demonstrated above. We can now turn our attention to a different approach, which could be seen either as an alternative but is best seen as a supplementary argument, one that focuses upon the possibility that socio-economic rights embraced by international human rights instruments may be judicially incorporated into domestic constitutional law if they are supported by the founding constitutional values from these legal systems. In other words, these rights could be judicially incorporated and enforced if there are no constitutional impediments, and by a proper understanding of the ‘conscience’ of the constitution.

But the language of ‘incorporation’ needs qualification here. It has a positivist tinge to it. It suggests that there are separate blocks of law, and the block of law out there, in the world, to have relevance in a domestic system, must be brought in, or incorporated,

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767 See article 24 generally and the right to Education (art. 25) and property (art. 20).
768 Section 43.
either by legislation or judicial decision. Another way of looking at it is to think of law as not attached to systems but, again, as a form of normative discourse with different degrees of abstraction and concreteness, and at the abstract level the (unwritten) fundamental law is everywhere, but as it is applied in different contexts it takes on more specific manifestations, including international and domestic manifestations. On this view, there is no need to incorporate international norms into domestic law. Rather the idea is to aim for interpretive coherence and ensure that the manifestations of the fundamental law domestically and internationally can fit together within the same general theory of law.

Judicial reference to international law, then, is, in this sense, an attempt to get at principled coherence of specific legal norms within a general theory of fundamental law as reason. If international law has a thorough theory of socio-economic rights, and domestic law does not, then this suggests one or other of these manifestations of the fundamental law of reason must be adjusted to obtain integrity, or some theory consistent with political morality must be developed to explain how the two results can sit comfortably together as a matter of principle. In any case, this general approach to understanding the relationship between domestic and international human rights law can be extended to explain the need for judges to have regard to comparative legal materials, since integrity should reach across different legal systems too, if those systems are committed to the same idea of legality and constitutionalism.\footnote{Allan’s \textit{Constitutional Justice}, supra note 128, is premised on this idea.}
There are, however, problems with this argument. If courts insist upon a constitutionally positivist approach to interpretation, they may conclude that the relevant socio-economic rights norms cannot be enforced if the international instruments from which they are derived are not fully made part of the domestic laws.\textsuperscript{770} In the case of Nigeria, section 12 of the 1999 Constitution requires explicit legislation by the National Assembly in order to have a treaty integrated into domestic law. Without legislative enactment, no treaty entered into by the Federation can have the force of a binding law in Nigeria. Similarly, Article 75 of the Constitution of Ghana stipulates that the execution of treaties, agreements or conventions in the name of Ghana by the President is subject to explicit ratification by Act of Parliament; or a resolution of Parliament. Human rights treaties which fall within this category are thus required to be domesticated before their enforcement in the domestic legal system – in the national courts.\textsuperscript{771} Such constitutional positions of the two jurisdictions are in no doubt consistent with the concept of dualism with regard to international law. This principle is well-established in British constitutional law, and it has been described as a “colonial relic” in Nigerian law (and one could therefore say Ghanaian law too).\textsuperscript{772}


The dualist states in international law theory are required to domesticate a ratified treaty before it becomes part of the national law.\textsuperscript{773} In the relevant literature, domestication in a dualist state may take one of two forms.\textsuperscript{774} First, there is direct domestication by incorporation, where the whole treaty is adopted by a parliamentary act or resolution as part of the national law.\textsuperscript{775} Second, domestication can occur indirectly through the process of reception, where provisions of the treaty are considered to be manifested by domestic laws, whether constitutions or ordinary laws, either as they exist or after amendment that brings them into conformity with the human rights norms enunciated in the treaty.\textsuperscript{776} In many cases constitutional provisions and Acts of Parliament substantially overlap with those of the international bill of rights.

Of course, in dualist states, the scope or reach of provisions in domestic constitutional law remains contingent upon the prevailing political will. On the one hand, the civil and political human rights provisions in many of domestic constitutions suggest an intention to copy the provisions of the International Covenant on Civil and Political Rights. On the other hand, however, in dualist states, unlike monist states, national laws in the domestic legal system take primacy over international law in an event of a conflict

\textsuperscript{776} \textit{Ibid.}
between the two.\footnote{Ibid.} In the domestic hierarchy of legal norms, national laws are at the apex.

Any inconsistency that exists between the constitution of a dualist state and international human rights treaty or law is thus expected to be resolved in favour of the former. Though judges may seek to interpret domestic laws consistently with international treaties where possible, to avoid conflict, and in some cases their interpretive efforts are so effective that the supremacy of domestic law is more theoretical than practical, such that, barring very explicit language to the contrary, it will be presumed that all regular domestic laws must conform with the domestic laws implementing international treaty; the most extreme example of this is perhaps the status of EU law in the UK.

These general conclusions are consistent with positivist approaches to the constitutional or legislative protection of human rights. Under this approach, as I said in Chapter Four, the force of international human rights instruments is limited to the authority and legitimacy accorded human rights by virtue of their expression in such instruments authorised by party states. Positivism may tend to undermine an international or cosmopolitan basis of human rights because of the emphasis positivists place on the supremacy of national sovereignty without accepting the restraining influence of an inherent right above the state.\footnote{Jerome J. Shestack, “The Philosphic Foundations of Human Rights” supra note 210 at 209-10.} If so, actions of states may not be tested against

\footnote{Ibid.}.
universal norms enunciated in the human rights instruments, thereby negating their fundamental value to the human rights community.

It must also be observed that universal consensus on the need for the legal protection of rights does not necessarily imply a universal consensus on the content of the rights legally protected. Moreover, so long as rights are assumed to be grounded upon a positivist rights theory, the interests protected by the state may be limited to stated rights. As a result, “to secure a constitutional protection, the proponent of the right will either have to agitate for constitutional reform or, if there is already a Bill of Rights, persuade those entrusted with the task of interpreting it to recognise the new right under the heading of some existing provision”.779 Whether this will be possible will, of course, depend upon the temperament of the political forces at the time.780

The non-incorporation thesis and the dualism upon which it is based lies at the heart of constitutional positivism and it poses two challenges to this thesis. First, its acceptance would mean that the argument in favour of the justiciability of the socio-economic rights contained in the Directive Principles could not draw normative inspiration, so to speak, from the international human rights regime. Secondly, and more generally, it is allied closely with the arguments that such rights cannot be enforced as an interrelated and indivisible part of the civil and political rights provided for in the constitution. Both of these challenges are supported by that theory of legal rights considered in Chapter Four according to which rights are legal rights only insofar as they

779 Waldron, “A Right-Based Critique of Constitutional Rights”, supra note 216 at 11.
780 See Jane Mansbridge, Why We Lost the ERA (Chicago: University of Chicago Press, 1986).
are recognised by positive law, the actual law of actual states, which give power to rights-holders to invoke the coercive power of the state for their fulfilment or recompense in their non-fulfilment.

There must be an authoritative remedial mechanism that is called into action to deal with alleged rights violation, so that rights may be said to exist even if they are frequently violated, save that there is an appropriate and available legal response to such violations.\textsuperscript{781} Thus judges are not to cite and discuss unincorporated human rights treaties alongside domestic constitutions or statutory law as a way of judicially incorporating and enforcing many of the rights guaranteed by those treaties. With this, an appropriate judicial response to the tension between the positivist’s deep-seated dualism and law as a moral ideal for human well-being, as in the sense of a comprehensive human rights regime for a legal system, is lost.

Under this approach, it may be difficult to say that where a statutory provision is vague or open to two or more interpretations, and of course most constitutional provisions fall into this category, then judges will presume that the drafters of the law intended that it be interpreted consistently with the country’s international legal obligations, so that the ultimate interpretation will not place the country in violation of international law. Even though this may sound like a positivist line of reasoning, since it relies on a presumption about legislative intention, it may achieve the ends of our non-positivist argument, which is that judges can incorporate norms of international human rights through the reason of judicial discourse that puts the state on a pedestal for

\textsuperscript{781} Campbell, \textit{Rights, supra} note 202 at 89; Hart, \textit{The Concept of Law, supra} note 84.
respecting and protecting rights. In that case, the focus is not exclusively on the positive law or the legislative intent; rather, the attention is on the results that the law of reason can bring to the human rights debate and in respect of the fluidity of the interpretative process to discipline law in order to protect rights.

Note also that the use of the judicial presumption of legislative intent in this instance is very similar to the judicial presumptions commonly made to read ouster clauses down. True, there is a superficially positivist aspect to the argument. But really judges are not interested in the specific intent of legislatures; they are using intention in a very attenuated way, upholding a theory of law that justifies legislatures, one that we must assume legislatures are committed to honouring. The presumption of intent is really a message to the legislature: you must be deemed to honour the rule of law, and we assume, of course, you do. When the court “imputes to the legislature the will to protect [a] right” it is “because the legislature must be supposed to be committed” to a general normative theory as to what legislatures “of the kind it represents” are like and to “a constitution that justifies those kinds of legislatures.”

The Supreme Court of Ghana has in the *CIBA Case* suggested that it is open to looking to international law for guidance when interpreting the human rights in Ghana. The fact that an international treaty has not been incorporated by legislation into domestic law does not mean it cannot inform judicial interpretations of rights. Indeed, Justice William Atuguba went so far as to say that the principles of international human rights

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instruments relating to fundamental human rights are “enforceable” to the extent that they fit into the provision set out in article 33(5), which, as discussed in the preceding chapter, states that the express mention of certain human rights in the Constitution “shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.”

Combining article 33(5) with international human rights instruments was, as we saw, also an argument employed by counsel for the inhabitants of Sodom and Gomorrah in the Abass Case, an argument that was not rejected, at least in principle, by the judge in that case. Finally, Justice Bamford-Addo, in the CIBA Case, rejected the contention that for international instruments to guide the state in the exercise of its duties in article 37(2), the Directive Principle on freedom of association for development processes (considered in the preceding chapter) such instruments must be ratified and domesticated by legislation, though in this instance there was an explicit constitutional direction in article 37(3) that, in the discharge of its duties under article 37(2), “the State shall be guided by international human rights instruments which recognize and apply particular categories of basic human rights to development processes”, and so there was some textual grounding for her expansive approach to international law.

In contrast, the Supreme Court of Nigeria has held in Abacha v. Fawehinmi that any international treaty ratified by the Nigerian government “does not become binding

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783 *The CIBA Case, supra* note 53 at 728.
until enacted into law by the National Assembly”⁷⁸⁶ This case was discussed in detail in Chapter Six. In this case, the respondent was arrested without a warrant and detained by members of the Nigerian security services. He sought relief in court in part on the grounds that his rights as guaranteed under the African Charter on Human and Peoples’ Rights had been violated. As seen, the African Charter had been incorporated into the municipal law of Nigeria.⁷⁸⁷

Justice Uwaifo identified one of the principal legal questions for the court as: “whether an individual can rely on the Act, first, as to the jurisdiction of the national courts to entertain his cause and second, to sustain that cause on the basis that his human rights protection under that Charter has been violated.”⁷⁸⁸ In response, the Court was unanimous in the view that a domesticated treaty like the Charter is enforceable in the national courts and could be invoked like any other domestic statute to sustain an action against the violation of individual rights. Justice Ejiwunmi stated: “[T]he Charter, having been enacted into municipal law, the courts had jurisdiction to apply it and to grant redress to anyone whose rights under the Charter had been violated. However, the Charter could not be superior to the Constitution.”⁷⁸⁹

⁷⁸⁶ *Ibid* at LRC 308h and AHRLR at para 12. In deciding *Fawehinmi*, the Supreme Court of Nigeria relied on the majority opinion in the English case of *Higgs & Anor. v. Minister of National Security & Ors* [2000] 2 AC 228, where it was said that “In the law of England…Treaties formed no part of the domestic law unless enacted by the legislature. Domestic Court has no jurisdiction to construe or apply a treaty, nor could unincorporated treaties change the law of the land. They had no effect upon citizens’ rights and duties in common or statute law.”


⁷⁸⁸ *Abacha v. Fawehinmi* supra note 499 at 361.

At first blush, the *CIBA* and *Abacha* cases seem promising. Thus notwithstanding some analytical difficulties to be considered below, both cases seem to present at least some support for the view that judges in Ghana and Nigeria are receptive to considering international norms when interpreting their Constitutions, and thus they provide at least limited hope for the enforcement of socio-economic rights insofar as those rights are a part of international human rights law.

The implications of the *Abacha* are particularly significant in this respect. Although the socio-economic rights in Nigeria’s Directive Principles are, as we saw in the preceding chapter, expressly stated to be non-justiciable, Nigeria has enacted the African Charter into its domestic law, and the Charter contains socio-economic rights like the rights to health,\(^{790}\) work,\(^{791}\) education,\(^{792}\) free disposal of wealth and natural resources,\(^{793}\) and property,\(^{794}\) and, according to the *SERAC Case* discussed above, by implication the rights to shelter and food. There is a growing body of scholarly literature arguing that socio-economic rights should be seen to have an almost quasi-constitutional status in Nigerian law by virtue of the incorporation of the African Charter by legislation and the strong judicial presumption that other domestic laws must be read consistently with the African Charter legislation.\(^{795}\)

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\(^{790}\) Articles 16 and 18.
\(^{791}\) Article 15.
\(^{792}\) Article 17.
\(^{793}\) Article 21.
\(^{794}\) Article 14.
Having been accepted by the courts as part of the justiciable domestic legal rules in response to an explicit legislative action, the socio-economic rights in the African Charter would seem to balance or ameliorate the paucity of constitutional provisions in Nigeria on such rights. As Obiajula Nnamuchi has written, “the legal impact of the domestication of the African Charter is that the National Assembly [of Nigeria] bestowed legislative imprimatur of justiciability to those Directive Principles of the Constitution that are also enshrined in the African Charter.”

Although one author submits that the socio-economic rights in the Charter could not be enforced given the high levels of poverty in Nigeria, the argument has been made in response that, even so, Nigerian governments could be made at least to make earnest attempts to ameliorate conditions— or to use the language of human rights organizations examined above, the obligations of conduct can be judicially reviewed even if the obligations of result cannot be. We shall return to this argument below.

Similarly, the CIBA Case, would seem to suggest that any right, including socio-economic rights, from undomesticated international human rights instruments, which fall within the ambit of article 33(5) of the Constitution of Ghana are enforceable in the national courts of Ghana. In effect, a litigant could have socio-economic rights enforced in a law court provided such rights are within the interpretative scope of article 33(5).

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797 Edwin Egede, “Bringing Human Rights Home” at 262.
A closer look at both cases does, however, suggests that their support for a non-positivist approach to constitutional interpretation is limited. The cases manifest two problems in particular, and examination of these two problems suggests that the judges were actually influenced by both the dualist thesis of international law and the positivist rights theory. Norms of international human rights are only enforceable in Nigeria, according to the case of *Abacha*, in domestic court if there is an official legal recognition of such norms in the municipal law. Ghana does not escape this limitation, even though the *CIBA Case* suggests that domestication of an international human rights instrument is not a precondition for its invocation and enforcement in the domestic courts. Both Justices Atuguba and Bamford-Addo seem to adopt lines of reasoning consistent with the positivists’ interpretative approach, as evidenced by their declared intent to link the enforceability of rights to a specific constitutional provision. It is certainly not clear that the Court in this case intended to discount the legal necessity of domestication in the enforcement of international human rights instruments, or that it discounted the importance of Article 75\(^798\) of the Constitution. The general but limited effect of the Court’s position rests on the ability of an applicant to bring a provision of an undomesticated human rights treaty into the constitutional reach of Article 33(5).

In short, the import of the cases is not obvious, and before considering their significance in more detail it must be acknowledged that the invocation of

\(^{798}\) Article 75(1) The President may execute or cause to be executed treaties, agreements or conventions in the name of Ghana.(2) A treaty, agreement or convention executed by or under the authority of the President shall be subject to ratification by- (a) Act of Parliament; or (b) a resolution of Parliament supported by the votes of more than on-half of all the members of Parliament.
undomesticated international human rights norms in the courts in Ghana and Nigeria as the principal legal basis for an action may legitimately face the claim that these norms need to be ratified by the legislature. The basis of this claim is very simple: there are constitutional provisions which say so or which suppose that legislative ratification is an act legally required. Thus the courts may not have difficulty dismissing a suit founded solely on the International Covenant on Social, Economic and Cultural Rights for the enforcement, for example, of the right to housing, a right perhaps not explicitly provided for in a domestic legislation. The fact of the matter is, however, that the ratification of this treaty by both Ghana and Nigeria has not been followed by a domestication of same into their municipal law by Acts of Parliament. Even in the case of Ghana, the applicant in court should be able to show how article 33(5) supports legal norms contained in the invoked instrument, otherwise, his action may not succeed.

In my view, however, this explanation should not be accepted for it is inconsistent with the approach to constitutional justice advanced in this thesis that sees rights as interrelated and indivisible. In fact, the Abacha case introduces a judicial determinism in constitutional adjudication that seriously discounts any role of the court as the expounder of human welfare and fair treatment, even when the content of these ideals is not expressed as a matter of justiciable positive law: the justiciable positive law in this context will include all incorporated treaties, but excludes non-incorporated human rights treaties. By this set of legal reasoning the courts in Nigeria cannot rely on the values or norms of non-incorporated treaties to understand a law or the Constitution as an embodiment of inspirational moral values for the people’s wellbeing. Interpretation with
such exclusive fixation on rules of incorporation legitimates an inert, perhaps more generally, problematic structure and hierarchy of human rights that undercuts any possibility of conceiving rights as comprehensively indivisible and interrelated human entitlements, and it also forecloses judicial incorporation of socio-economic rights norms from undomesticated international human rights treaties.

As it may be clear from Justice Ejiwunmi’s assertion noted above, the ratified African Charter is subject to the Constitution, which is the supreme law of the land. Given the fact that the Nigerian Court is largely positivistic in its search and application of legal values in matters of adjudication it is doubtful whether the Charter can be of help to a potential litigant whose socio-economic rights have been violated. The result will not be different even if we advert to the court’s classification of the treaty as one that takes precedence above ordinary domestic statutes. Justice Ogundare writing for the Court stated that: “[N]o doubt Cap. 10 [the Nigerian law implementing the African Charter] is a statute of international flavour. Being so, therefore, I would think that if there is a conflict between it and another statute, its provisions will prevail over those of other statute for the reason that it is presumed that the legislature does not intend to breach an international obligation.”\textsuperscript{799} But like Justice Ejiwunmi, he added that the fact that the Charter possesses “a greater vigour and strength” than any other domestic statute does not mean that the Charter is superior to the Constitution.\textsuperscript{800} In this context, one possible way out for socio-economic rights claimants \textit{vis-à-vis} the enforcement of the

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\textsuperscript{799} Abacha v. Fawehinmi supra note 499 at 309.  \\
\textsuperscript{800} Ibid. \\
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implementing law on the Charter in the domestic courts is to show that the Constitution as the supreme law of the land does not forbid the enforcement of such rights.

But if this interpretive route fails the socio-economic rights claimant, an alternative approach would be that the Charter rights can be claimed in the Nigerian courts by the said litigant if the view, as articulated in the Corruption Act Case discussed in Chapter Six, is that the Nigerian legislation which incorporated the African Charter into the municipal law is a necessary legislative act to enforce the Directive Principles. Otherwise, since the Constitution is deemed not to have any provisions on justiciable socio-economic rights, there is no known viable hope for such a litigant to sustain his claim on rights of that nature if he is faced with the preliminary objection that the supreme law of the land – the Constitution – does not explicitly or implicitly anywhere contemplate such rights.

Even if this person is successful in rebutting such a claim on the account that the silence of the Constitution on the socio-economic rights does not necessarily prohibit their legislative protection, and that the asserted rights are a function of the realities of the Directive Principles in the Constitution, that in itself is not totally absolved from the serious jurisprudential hurdles left by the court in the Corruption Act Case. In any case, the difficulty with either of the two interpretive routes as shown above supposes, I suggest, a denial of a unity of constitutional justice which seeks to unite the content of all categories of rights in the legal system. On a reflective inspection, it is a narrow view of the constitutive function of law that presumes that only past choices of the people are sufficient to discover the true import of law and largely precludes present values of the
legal system from being considered. Besides, it serves as the foundation of a theory of social subordination and to strengthen constitutional hostility to political inclusiveness and good governance at the core of inclusive human rights regime.

It should be acknowledged that the *CIBA Case* from the Ghanaian Court is more liberal in its reach as it opens up the possibility of enforcing all manner of legal norms from the law of international rights. But this is dependent on the temperament of the court in a particular point in time. On this account, the same qualification should apply to the jurisprudence of *Abacha v. Fawehinmi* and *CIBA Case*, which is that an application of an international human rights norm should not necessarily be contingent upon domestication of the instrument in which such a norm is found. A qualification to this is that: Courts can incorporate such norms if such acts of judicial incorporation are a necessary part of protecting rights or values explicitly or implicitly contemplated by a proper interpretation of the constitution as law for the aspirational moral wellbeing of the people.

A rigid thesis of domestication presents the narrow viewpoint of legal rights which considers such rights as exhaustive of the rights to be enforced in a state. Through the prism of the fundamental law understood in the sense of the public law rights theory as urged in this work, claims of rights that cohere with objective and universal principles of morality, which exist independently of close inference from legislative enactment or can be evaluated and sustained through an interactive process of critical scrutiny with open impartiality by the courts must be accepted. By this, rights would not only be seen as entitlements grounded on values that respect and protect the humanity, wellbeing and shared values of the people, but also would validate the claim that such values are
interrelated and indivisible. The list of rights expected to ground just democratic governance, human dignity, wellbeing and substantive equality can thus be supported by the international human rights norms. Courts can therefore have scrutinised recourse to such norms when interpreting their constitutions.

8.5 The Relevance of Comparative Law Analysis for Socio-Economic Rights in Ghana and Nigeria

Consideration of international human rights law helps us to answer some of the concerns about socio-economic rights left over from the preceding chapter, but not all of them. The separation of powers concern is not fully addressed, for beyond offering a general analytical structure for socio-economic rights, the international discourse does not seem to answer hard questions about how courts can both enforce these rights yet avoid entering into the proper domain of legislatures and executives. Also, what we called the survival-legality paradox remains: if the fundamental law of reason means that government power may not count as ‘law’ for people suffering severe socio-economic deprivation, does that mean that these people can engage in ‘lawless’ acts to get what they need to survive? Comparative legal analysis helps answer these concerns.

As stated in Chapter Two above, comparative constitutional jurisprudence emerges as a crucial source of legal values for judicial consideration of rights enforcement.\textsuperscript{801} It may yield insights into matters of constitutional justice.\textsuperscript{802} Reference to the legal values and principles acknowledged by other jurisdictions that are committed to

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\textsuperscript{802} See Allan, \textit{Constitutional Justice, supra} note 128.
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liberal-democratic values may assist national courts to, among others tasks, fill gaps in their domestic law, clarify a legal position, or attempt homogenising constitutional ideals. Comparative analysis is, at its core, based upon the view that “there is a significant degree of congruence between problems and their possible solutions across the spectrum of contemporary constitutional democracies.”\textsuperscript{803} In other words, there are universal constitutional ideals that lay beyond the limited legal jurisdiction of a particular country. A dialogical engagement entered into by national courts on that account could thus facilitate the homogenization of such common constitutional ideals and yield a coherent constitutional jurisprudence.

It does not follow, however, that the use of comparative jurisprudence by a national court is inconsistent with the objective of establishing an indigenous constitution, including a set of human rights protections.\textsuperscript{804} The idea is not so much to borrow than to seek the benefits of comparative deliberations\textsuperscript{805} in order to validate the claim that “judges are not into passive reception of foreign decisions, but in active and ongoing dialogue.”\textsuperscript{806} It means that constitutional understanding is not entirely inward-looking. It can also be outward - referencing foreign decisions in an attempt to understand, interpret, explain and evaluate the values of the national constitution.

\textsuperscript{803} Ibis., at 8.
does not necessarily warrant commonality of textual provisions, history, culture and social values.

There are occasional hints of resistance to comparative legal analysis, especially in Nigeria. “[I]t is the Constitution of Nigeria 1999 that is under scrutiny in this matter,” stated one judge, “it is certainly not the Constitution of any other country no matter how desirable and perfect that Constitution may be.” But often these statements are more about escaping the sense of inferiority to British law that is part of a natural part of post-colonialism, and part of building a self-sufficient and self-confident indigenous jurisprudence. In general, Ghanaian and Nigerian judicial opinions make frequent reference to comparative law.

8.6 The South African Approach to the Separation of Powers Concern

The most famous African case on socio-economic rights is the South Africa Constitutional Court decision in Government of the Republic of South Africa and Others v. Grootboom and Others. In this case, the respondents were rendered homeless

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808 See for example, Olafisove v. Federal Republic of Nigeria (2004), 4 NWLR (Pt. 864) 580, per Niki Tobi. J.S.C., at 674 (“As our country is sovereign, so to [is] our Constitution and this court will always bow or kowtow to the sovereign nature of our Constitution…. Gone are the days when all things from older common law jurisdictions were preferred to everything from the younger common law jurisdictions. Gone are also the days when differences between judgments of this court and foreign judgments implied that the judgments of this court could be wrong.”); and Adigun v. The Attorney-General of Oyo State (No. 2) (1987) 2 NWLR (Pt. 55) 197, per Karibi-Whyte J.S.C. at 230 (“This Court has reached the stage when it does not regard differences from, the highest English or the Commonwealth Court or other courts of common law jurisdiction as necessarily suggesting that it is wrong.”).
following an eviction from their informal homes built on a piece of private land earmarked for formal low-cost housing. At the time of the eviction many people including the respondents were on a waiting list for low-cost housing from the municipal authorities. It was not clear when the respondents would be able to access the low-cost houses. The question for the Court was twofold: whether at the point of the eviction the government was constitutionally obliged to have taken reasonable steps to provide them with basic shelter until they obtained permanent accommodation; and how reasonable were government measures in realising the squatters’ right to housing.  

In a unanimous Court, it was held that the eviction was in violation of the respondents’ constitutional right to housing and that the government had a positive constitutional obligation to take reasonable steps to provide adequate basic shelter to the respondents after the eviction.

_Grootboom_ affirms several basic points about human rights also found in international human rights law. In response to the claim that the socio-economic rights found in the South African Bill of Rights, which also contains political-civil rights, could not be justiciable, Justice Zakeria Yacoob, writing for the Court, stated: “[a]ll the rights in our Bill of Rights are inter-related and mutually supporting” and [a]ffording socio-economic rights to all people therefore enables them to enjoy the other [human] rights enshrined in [the Bill of Rights]”; “[t]he question is therefore not whether socio-

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810 Note that in South Africa, section 26 of the Constitution entitles everyone to have access to adequate housing. It also requires reasonable legislative and other measures for, subject to availability of resources, the progressive realisation of this right. Finally, it frowns upon arbitrary evictions and laws that permit such actions.
economic rights are justiciable under our Constitution, but how to enforce them in a given case.\textsuperscript{811}

One approach to how the right to housing can be understood judicially might have been to adopt the “minimum core obligation” from international human rights law as a constitutional right that courts could enforce immediately in favour of homeless people. This argument was advanced by counsel.\textsuperscript{812} But it was rejected by the Court. Instead, adopting another set of terms from international human rights law, it can be said that the Court focused upon “obligations of conduct” rather than “obligations of result”. In this respect, the Court opted for a test of “reasonableness” when reviewing the conduct of the government.

What would constitute reasonable action by the government in respect of enforcing the guaranteed rights? As Viljoen observes, the Court concluded that reasonableness is constituted by three distinct elements.\textsuperscript{813} First, reasonableness does not require the court to “enquire whether or not other desirable or favourable measures could have been adopted or whether public money could have been better spent. The question is whether the measures that have been adopted are reasonable.”\textsuperscript{814} Note that this first element does not accept silence or inaction on the part of the government. But the court will be precluded by this principle from reasoning by comparison – abstract comparisons of whether government could have better spent money adopting different measures or

\textsuperscript{811} Grootboom, supra note 809 at paras. 23, 20.
\textsuperscript{812} Ibid., at paras. 18.
\textsuperscript{813} Frans Viljoen, International Human Rights Law in Africa at 576.
\textsuperscript{814} Grootboom, supra note 809 at para 41.
projects. Rather, the reasoning that this principle invites the court to do is internal – to focus on the reasonableness of the particular program in question. Secondly, government would be required to address through the adopted program the needs of those desperately in need to access the right. A program which is aimed at addressing a long term housing needs of the population is not sufficient if it excludes the short term needs of those in intolerable and desperate conditions.

Thirdly, such programs adopted in respect of facilitating access to the benefits of the rights must be effectively implemented. A beautiful and reasonable program without effective implementation is nothing but pretence. Within this context, the Court held that although the government was pursuing a long-term public housing strategy, it had failed completely to address the immediate short-term needs of people evicted from their homes, and this was unreasonable. The evidence that the housing project was progressing did not adequately justify the reasonableness of the project if temporary relief for the respondents’ desperate conditions were not provided for. Beneath this understanding was the Court’s conception of “access to” housing. To the Court, to be able to access a house, it must not only be affordable, but also there must be land, services and a dwelling. Congruence of these elements is necessary if the government is to be considered as taking reasonable steps towards honouring the right to access adequate housing. The Court explicitly denied that there was a right “to claim shelter or housing immediately upon

815 Ibid., at para 95.
816 Ibid., at para 42.
817 Ibid., at para 35.
818 Ibid., at para 34.
demand”; instead, it ordered the government “to devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing.”\textsuperscript{819}

The \textit{Grootboom} principle of reasonableness places the emphasis on obligations of conduct rather than obligations of result. Although the result matters, and the Court will review the substance of governmental policy on socio-economic issues, substantive results matter only at a fairly abstract or general way, and the real focus is on whether the steps taken by government towards policy objectives are reasonable. By turning the focus of analysis from substance to process, matters of open-ended socio-economic policy that really ought to stay within the domain of executives and legislatures, can be analysed legally within the judicial domain. It was the concern for the separation of powers, then, that led the Constitutional Court in South Africa to reject the “minimum core obligation” approach advocated by the U.N. Committee on Social, Economic and Cultural Rights.

It reiterated its position in this respect in \textit{Minister of Health v. Treatment Action Campaign (No. 2)}\textsuperscript{820} in which it held that a government decision to restrict the supply of the antiretroviral drug novirapine (which reduces the transmission of HIV between mothers and children) to pregnant women and children at government research sites, rather than make it broadly accessible, was unreasonable. It rejected the core minimum obligation approach to the right to health care, stating that it would be impossible for the state to provide everyone the core minimum of each socio-economic right

\textsuperscript{819} \textit{Ibid.}, at paras. 95, 99.
\textsuperscript{820} 2002 (5) SA 721 (CC).
immediately.\textsuperscript{821} “The Constitution contemplates rather a restrained and focused role for the Courts” because courts are “ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community.”\textsuperscript{822}

Advocates attempted once again to have the core minimum obligation approach accepted in \textit{Mazibuko and Others v City of Johannesburg and Others}\textsuperscript{823}, where rights to water in Soweto were at issue; it was argued that inhabitants, many of whom had no access to running water in their homes and limited access to other sources of water, had a constitutional right to 50 litres of water per day per person. The Constitutional Court rejected the argument, holding that at most the Court could ensure that the government’s endeavours to improve access to water were reasonable under the circumstances, which, it concluded, they were. Given “the proper role of courts in our constitutional democracy”, wrote O’Regan J., “ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right.”\textsuperscript{824} He then summarized the constitutional law of socio-economic rights in this way:

Thus the positive obligations imposed upon government by the social and economic rights in our Constitution will be enforced by courts in at least the following ways. If government takes no steps to realise the rights, the courts will require government to take steps. If government’s adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness. From \textit{Grootboom}, it is clear that a measure will be unreasonable if it makes no provision for those most desperately in need. If government adopts a

\textsuperscript{821} Ibid., at para. 35..
\textsuperscript{822} Ibid., at para. 38..
\textsuperscript{823} 2010 (4) SA 1 (CC).
\textsuperscript{824} Ibid., at para. 57, 61.
policy with unreasonable limitations or exclusions, as in Treatment Action Campaign No 2, the Court may order that those are removed. Finally, the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised.\textsuperscript{825}

\textit{Grootboom} is “widely regarded as an international test case of the enforceability of socio-economic rights.”\textsuperscript{826} Does the South African reasonableness doctrine of socio-economic rights bring answers to the concerns about the separation of powers? It did for Cass Sunstein, who, after looking at the \textit{Grootboom} principle, changed his mind on the wisdom of including socio-economic rights within justiciable bills of rights.\textsuperscript{827} The case has, however, provoked intense debate, with some scholars favouring the core minimum obligation approach, others the reasonableness approach, and still others are suggesting some combination of the two.\textsuperscript{828} What is clear, however, is that the South African experience with socio-economic rights is at the centre of a “transnational exchange of ideas and experience about the rule of law and human rights”, and that if judges from other countries engage within this exchange as “juridical citizens of the world”, then a

\textsuperscript{825} Ibid. at para. 67.


The principle of reasonableness from the Constitutional Court of South Africa can be useful for the courts in Ghana and Nigerian in developing an approach to the enforcement of the directive principles consistent with the ideals of the constitutional justice and the theory of rights herein argued. It provides a response to the view that socio-economic rights cannot be considered as proper legal rights. The ultimate aim is not only to achieve constitutional justice and a comprehensive rights regime for these young democracies, but also to foster a desirable natural unity between legal values and non-legal ethical claims that cohere with norms of international human rights (or some objective and universal principles of morality) and which could be evaluated and sustained through an interactive process of critical scrutiny with open impartiality by the courts, from the perspective of the fundamental law as urged in this work.

A litigant from Niger Delta in Eastern Nigeria or Yendi in Northern Ghana who goes to court seeking, for example, the enforcement of his rights to health care, economic livelihood, and housing as contained in the Directive Principles would not simply be dismissed on the account that such rights are not justiciable rules of law in the Constitution. Nor will such a person abandon his action only by dint of the fact that the legal nature and content of such rights cannot be determined by the courts. The rights contained in the Directives can have the benefits of both justiciability and enforcement if
the courts in Ghana and Nigeria can turn their attention to the principle of reasonableness as it has been manifested in the comparative constitutional jurisprudence. The reasonableness or otherwise of a government conduct relative to the rights embedded in the Directive Principles can be ascertained by the courts and there is no obstacle as to the judicial enforcement of these principles through the appropriate court orders. In any case, our acceptance of the essence of rights as not being contingent upon any enforceability theory will help us appreciate the true legal import of the directive principles\textsuperscript{830} in these legal systems.

Signs of the transnational exchange of ideas on socio-economic rights were evident in the Ghanaian case of \textit{Abass} involving the squatters of Sodom and Gomorrah. The court in this case was invited to consider the plight of the plaintiffs from perspectives of two cases from India and South Africa. First, in \textit{Olga Tellis & Ors v. Bombay Municipal Corporation & Ors}\textsuperscript{831} the Indian Supreme Court was confronted with similar facts arising from the fate of squatters and slum dwellers in the heart of the City of Bombay. The plaintiffs in this case, like their counterparts in \textit{Abass Case}, faced the threat of an imminent eviction from the City Authority for erecting their hutments on pavements. They also depended on their slums to make a living by engaging in menial economic jobs. One of the fundamental questions for the determination of the Court was whether the eviction would deprive them of their means of livelihood and consequently


\textsuperscript{831} [1985] INSC 155 (10 July 1985).
right to life. In answering this question in the affirmative, Chandrachud C.J. for the Court, stated:

The sweep of the right to life conferred by Article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to live, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life.\textsuperscript{832}

The Court, by this pronouncement, recognised livelihood, an economic right, as a necessary adjunct of the right to life. On the basis of this conclusion, the City of Bombay was asked by the Court to resettle the slum dwellers and take all reasonable steps to avoid the deprivation of the squatters’ means of livelihood. The Court did not waste time and energy to consider the issue of an existing enforceable contract as considered by the Ghanaian High Court. Nor was it relevant to consider whether the slum dwellers, who had been there for a good number of years, had any legal right in the land. It was also not denied that clearing the pavements of the squatters was necessary to curb heavy vehicular traffic.

Given the similarity of facts in the two cases, a proper engagement with the reasoning of the Indian case would have helped the Accra High Court. The Constitution

\textsuperscript{832} Ibid., at 79-80.
could have been interpreted so that the right to livelihood was seen as a component of the right to life. No doubt, the jurisprudence of the Indian court in this case would have been helpful to that end. But the High Court, by focusing on private law issues, closed all possibilities of utilising this useful jurisprudence. The court did not even make an attempt to distinguish the Indian case on the facts. We may guess that the Court viewed the principles established in the Indian jurisprudence to be inapplicable, though given the similarity of the facts of the two cases it is not clear why.

Counsel for the squatters in Abass Case also relied upon the Grootboom case and its reasonableness principle. The Court did not scrutinize closely the elements of reasonableness and fairness in the administrative actions of the first defendant. For instance, the Court did not question the very short eviction notice served on the plaintiffs. But, more seriously, Appua J. did not even think the South African experience could have any relevance to Ghana. Justice Appua concluded that there are differences in the historical settings of Ghana and South Africa, a fact that, in his view, determined the purpose of an explicit constitutional provision to protect the right to housing in the latter country. He said that the reason for the right to housing in the Constitution of South Africa “was purposely meant to correct a situation or an imbalance created by the forcible appropriation of black peoples’ land by white settlers during the white domination or
apartheid era.” 833 “There are,” he continued, “therefore real homeless people in South Africa unlike Ghana, where nothing of that sort was ever experienced.”

But, even if this is so, it does not follow that it is the exclusive rationale for the constitutional recognition of the right to housing in South Africa, for constitutions are not merely meant to cure past experiences. On the contrary, constitutions must also be conceived as the living soul of a nation. 834 In other words, constitutional interpretation must encapsulate the expectations and interest of the past, present and future. Otherwise, a nation like Ghana may exclusively be ruled by the rigid hand of history. Justice Appua’s distinguishing rationale ignores a compelling case that an enforcement of such a right represents an alliance with the international human rights regime, which endorses the interrelated and indivisibility thesis of rights in a decent legal system. The fact that Ghana does not share the same land problem as South Africa does not mean that it does not share similar socio-economic challenges, nor is it a compelling justification to disentangle Ghana from the web of transnational and international legal ideas concerning human rights and constitutionalism to which the South African experience has contributed so much.

833 Issa Iddi Abass & others v. Accra Metropolitan Assembly and Anor, supra note 597 at 12.
834 For judicial decision on this see Edwards v. Canada (Attorney General) [1930] A.C. 124 – also known as the “Persons Case” – is a famous Canadian and British constitutional case where it was first decided that women were eligible to sit in the Canadian Senate; Reference re Same-Sex Marriage [2004] 3 S.C.R. 698, 2004 SCC 79; Gosselin (Tutor of) v. Quebec (Attorney General) 2005] 1 S.C.R. 238 [language rights]; Grant v. Torstar Corp., [2009] SCC 61 [tort of defamation, defence of responsible communication].
The inhabitants of Sodom and Gomorrah lost their case before the Accra High Court because Appau J. concluded that, as squatters and trespassers, they were not in a position to assert whatever constitutional rights to housing or work they might have had against the owner of the land they occupied, or against the government. On this point, at least, Appau J. did rely upon *Grootboom*, or at least an isolated passage from it. He quoted the following statement from the case:

> This judgment must not be understood as approving any practice of land invasion for the purpose of coercing a state structure into providing housing on a preferential basis to those who participate in any exercise of this kind. Land invasion is inimical to the systematic provision of adequate housing on a planned basis. It may well be that the decision of a state structure, faced with the difficulty of repeated land invasions, not to provide housing in response to those invasions, would be reasonable. Reasonableness must be determined on the facts of each case.  

Unfortunately, Appau J. did not apply the principle stated here. He appeared to assume that, in Ghana at least, squatters are automatically barred from claiming constitutional rights to housing on the ground that lawlessness cannot lead to respect for constitutional rights. *Grootboom*, in contrast, held that squatters, like everyone, have constitutional rights to housing, and whether the character of their occupation of land bars them from asserting those rights will depend upon the circumstances and upon what is reasonable. The emergence over time of massive slum cities occupied by people with little choice about where to live is a complex phenomenon that defies simple labels like ‘squatting’ or ‘trespassing’.  

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835 *Grootboom*, *supra* note 809 at para. 92.
government to provide him with a free house is in a very different position to someone raised within a slum city that has developed over time due to trends in urbanization that accompany drought, poverty, violence, disease, joblessness, or environmental depredations in rural areas. The scale of the problem of slum cities has to be appreciated before its implications for human rights and the rule of law can be understood: in Africa it was estimated that a decade ago 70 percent of urban inhabitants lived in slums, and this number has only risen since. Most slum residents have no formal rights to land and live in abject poverty.

As already noted, the problem presents a certain paradox. If the fundamental law of reason is premised upon a conception of the rule of law according to which governmental power may not count as ‘law’ for people suffering from such severe levels of socio-economic deprivation that they cannot be said to be meaningful members of the political community, then it follows that people in this position cannot be said to break any ‘law’ by taking what they need to survive, something we would generally think to be inconsistent with the rule of law. Once again, looking to South Africa may help us address this apparent paradox.

In the case of *President of the Republic of South Africa v. Modderklip Boerdery* the South African Constitutional Court held that an order evicting thousands of squatters from privately owned land was not enforceable because it would deprive them of their right to shelter. The fact that they had no legal right to occupy the land did not mean that

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838 2005 (5) SA 3 (CC).
they had no constitutional right to housing; unless the government could provide them with an immediate alternative, which it could not, eviction would deprive them of the only shelter they had, albeit a form of shelter that infringed someone else’s constitutional right to property. As the Chief Justice, Pius Nkonzo Langa, stated in writing the judgment for the Court: “To execute this particular court order and evict tens of thousands of people with nowhere to go would cause unimaginable social chaos and misery and untold disruption. In the circumstances of this case, it would also not be consistent with the rule of law.”

But if the court order was not enforced, the landowner’s right of access to the courts to gain protection for his or her rights, itself a constitutional right under article 34, would be infringed, thus also undermining the rule of law. There was, in short, a contest between two competing sets of constitutional rights, and in failing to resolve this dispute in a way that respected both sets of rights, the government had failed to respect the rule of law. Said Langa A.C.J., the government is “obliged to take reasonable steps, where possible, to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law.”

The solution in this case reached by the Court was thus to stay the execution of the eviction order until alternative accommodation could be found for the occupants, with the government paying the landowner damages for the loss of the use of the land in the interim. Langa C.J.

\[839\] Ibid., at para. 46.
\[840\] Ibid., para. 43.
reaffirmed the duty on government to develop a housing policy, but expressed sympathy for those charged with the task:

Confronted by intense competition for scarce resources from people forced to live in the bleakest of circumstances, the situation of local government officials can never be easy. The progressive realisation of access to adequate housing, as promised in the Constitution, requires careful planning and fair procedures made known in advance to those most affected. Orderly and predictable processes are vital. Land invasions should always be discouraged. At the same time, for the requisite measures to operate in a reasonable manner, they must not be unduly hamstrung so as to exclude all possible adaptation to evolving circumstances. If social reality fails to conform to the best laid plans, reasonable and appropriate responses may be necessary.\footnote{Ibid., para. 48.}

Reconciling survival and legality may not be easy, but it would be wrong to think that there is a paradox here. Viewed as an interpretive ideal, or as Fuller put it, an aspirational value, the rule of law becomes an end to work towards, rather than an all-or-nothing state. It is possible to say that for the squatters in \textit{Modderklip}, the eviction order would, if executed, not have been a ‘law’ for them but mere force or power; so the attempt to fashion a remedy in this case consistent with the rule of law is an ideal illustration of how the fundamental law of reason works. In the end, what makes power ‘law’ is reciprocal and reasonable attempts to achieve and maintain the conditions needed for a state of legality to exist, including meeting the basic socio-economic needs of people so that a political community exists, then power will be ‘law’ even for people still suffering from socio-economic deprivation.
8.8 Conclusion

In this chapter, we looked to international and comparative law to address problems that were left unresolved by our discussion of socio-economic rights in Ghanaian and Nigerian domestic law in Chapter Seven. The analysis confirmed the unity and equality of political-civil and socio-economic human rights, it provided answers to the question of how courts can enforce socio-economic rights without encroaching upon the proper sphere of socio-economic policy rightfully left in the hands of legislatures and executives, and, finally, it helped to answer a problem arising from the specific theory of law advanced in this thesis concerning the supposed paradox of justifying ‘lawlessness’ through an argument about ‘legality’. The discussion also demonstrated how judicial reference to international and comparative law to address these issues is itself a path blocked or obstructed by constitutional positivism, but opened and encouraged by the theory of unwritten fundamental law developed in this thesis.
Chapter 9

Conclusion: Constitutional Justice in Africa

In this work, I have argued for a conception of law that sees an inherent link between legality, or the rule of law, and individual dignity and the common good. I have also argued that this conception of law is not just a matter of abstract legal theory, but it informs, or should inform, the practical or doctrinal interpretation of law by judges and lawyers, and, in particular, the approach taken to constitutional interpretation in Ghana and Nigeria. This is necessary in order to counter successfully the basic stance of constitutional positivism adopted by courts in Ghana and Nigeria. On that account, any meaningful constitutional discourse or interpretation with the view to achieving a unity of constitutional justice for young democracies like Ghana and Nigeria must involve the courts (a) recognizing and applying the values of legal history, fashioned by political experience and the fundamental principles of common law constitutionalism, (b) embracing a purposive-progressive interpretative model, and (c) adopting an inclination to engage in a dialogical comparative interpretative approach. A ‘mere logical disquisition on the Constitution alone’ as is the recommendation of constitutional positivism would not help the courts achieve this task.

It is important to recognise that in the early parts of 1950s in Africa, anti-colonial rhetoric was always unambiguous about the values of law to the colonies - law must serve our interest, the nationalists said. Their objective was to ensure that laws of general
application enacted by the Imperial Parliament actually benefited people in the colonies, rather than permitting the exploitation of their natural resources by others. There was a high sense of contempt for colonialism in the sense of its negative impact on the natives’ economic and political advancement. Nationalist leaders demanded of the Imperial Parliament laws that were sensitive to their wellbeing. Indeed, it is possible to discern beneath this rhetoric, Joseph Raz’s conception of the virtue of the rule of law as the virtue of a good knife – there was recognition that law, like a knife, can be used for good or bad depending upon the purposes of those who use it. Law, like a knife, can be good for the purpose of advancing the course of colonial peoples through clear cut propositions, and can as well do badly by facilitating a quick dissipation of their natural resources to Europe. Law in the latter sense is what those who struggled under colonialism denied, but they welcomed law in the former category as it added quality to their impoverished conditions and emaciated dignity. This is what David Dyzenhaus and others asserts as the rule of good law. Good law is thus that law that does what is in the collective wellbeing of the people whose obedience is required of it.

Legal systems in post-colonial Africa and particularly the nascent constitutional democracies like Ghana and Nigeria must show similar concern for the status of law. Law must be seen as a legitimate fundamental moral value that contributes to the dignity of the people and aspires to serve them in the best moral light. For Raz, the journey to this level in a legal system rests on law’s ability to exhibit respect for a certain internal criteria of legality not unlike Fuller’s “internal morality of law”. As a legal positivist, however, Raz nonetheless denies that these criteria make the law good law, though it may
make it a better law than mere arbitrary rules of men. In other words, the purpose of the rule of law for Raz is not to make the law morally good, but rather efficient and effective. This is a limited account of law as an efficient instrument for those who wield political power.

In this thesis, I sought to articulate an account of law as an expression of people’s fundamental moral values, for their collective wellbeing. My general argument is that there exists, and we should respect, a fundamental law of reason, which is essentially a substantive conception of the rule of law, i.e., one that sees the proper conception of legality as embracing certain basic human rights in light of the law’s aspiration as a moral ideal for the wellbeing of the people, such that failure to honour these rights means failure to create ‘law’ at all. It is an argument of legal theory or legal philosophy that has legal doctrinal implications. But, as we saw, the fundamental law of reason is not so much a catalogue or code of substantive rights as it is a way of thinking through legal problems. It is a form of reasoning or interpretive discourse that seeks justificatory reasons for law.

For law to be ‘law’ rather than mere power it must be capable of rational explication to its subjects (thus the argument relies heavily on Fuller), on the assumption that for them to be in a position to treat it as law rather than as mere force or power then it must respect their status as humans capable of following laws. Although based on Fuller’s insights, the idea is filled out more substantively than Fuller did; it is very similar to the idea of law as a “culture of justification”, which Dyzenhaus, Mureinik, and Allan employ in developing their theories of constitutional justice. Rather than a set list of
rights, the law of reason is a form of interpretive discourse that forces us to ask basic questions about what it takes for law to be ‘law’ in a given context. On the account of this set of questions, the thesis concludes that sometimes law must embrace socio-economic rights in order to count as ‘law’ at a theoretical level, and thus at a constitutional doctrinal level. The collective wellbeing of the people in Ghana and Nigeria as expressed in or contemplated by their Constitutions lies in a judicial recognition and adoption of this approach. In this way, legal theory can contribute to constitutional justice in Africa.
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