

Reconciling Socioeconomic Rights and Directive Principles with a Fundamental Law of Reason in Ghana and Nigeria

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Constitutions embody a fundamental law of reason that serves as an aspirational moral ideal for the common good of the people. By examining the common law tradition of the fundamental law of reason and its relevance in urging a non-positivist conception of the rule of law, this Article weaves together ideas developed by legal constructivists to develop a moral understanding of law that transcends the confines of explicit law while remaining grounded in legal discourse. The 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—provides a basis for the protection of socioeconomic rights embodied in directive principles. Accounting for this fundamental law of reason in constitutional interpretation and judicial enforcement of socioeconomic rights is critical for the achievement of human rights in young democracies like Ghana and Nigeria. However, as this Article shows, courts in Ghana and Nigeria regarding the justiciability of directive principles have yet to fully embrace such an approach. The theory of law advanced in this Article should empower courts in developing African countries to enforce the socioeconomic rights found in directive principles as part of a comprehensive approach to constitutional justice that incorporates the fundamental law of reason.

INTRODUCTION

On the outskirts of Ghana's capital of Accra lies the slum city of Agboghloshie, commonly referred to as "Sodom and Gomorrah" or "Old Fadama." By 2013, it had become home to over 40,000 squatters, including many migrants from Ghana's impoverished North, living in appalling

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conditions on the banks of a dead lagoon that receives 215,000 tons of imported electronic waste (“e-waste”) each year, making it Africa’s second largest e-waste processing center.¹ Residents scavenge secondhand electronics that can be sold in the Agbogbloshie scrap recyclers market, releasing dangerous toxins into the environment as they burn wires and appliances to get to valuable bits of copper and other precious metals.² In 2013, the e-waste dumpsite was named the world’s greatest toxic threat to humans.³ After the site was slated for an ecological restoration project in 2002, the Agbogbloshie traders faced an eviction order threatening the loss of the meager shelter and livelihood they had.⁴

Their situation is sadly not uncommon in the developing countries of Africa.⁵ Indeed, it was a similar situation that led to the famous decision of the South African Constitutional Court in the 2000 *Grootboom* case, in which Justice Zakeria Yacoob announced:

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 [sic]. The state must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done.⁶

The Court 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.”⁷ Inspired by *Grootboom*, the Agbogbloshie squatters went to the Accra High Court to challenge the constitutionality of the government’s eviction order, which was issued without a resettlement option.⁸ In *Abass v. Accra Metropol-*

1. Blacksmith Inst. & Green Cross, *Top Ten Toxic Threats 2013: Agbogbloshie, Ghana*, WORSTPOLLUTED.ORG, http://www.worstpolluted.org/projects_reports/display/107, archived at <http://perma.cc/3V2F-J9AB>.

2. For graphic depictions of the e-waste in Agbogbloshie, see Kevin McElvaney, *In Pictures: Ghana's E-Waste Magnet*, ALJAZEERA, <http://www.aljazeera.com/indepth/inpictures/2014/01/pictures-ghana-e-waste-mecca-2014130104740975223.html> (last updated Feb. 12, 2014), archived at <http://perma.cc/5LRW-KBMH>. A 2012 award-winning short film also vividly portrays the toxic devastation in the city. E-WASTELAND (David Fedele 2012), available at <http://www.e-wastelandfilm.com/>.

3. Blacksmith Inst. & Green Cross, *supra* note 1.

4. *A Decade of Struggles and Lessons of Old Fadama, SHACK/SLUM DWELLERS INT'L* (Nov. 8, 2011), <http://www.sdinet.org/blog/2011/11/8/old-fadama-decade-struggles-and-lessons/>, archived at <http://perma.cc/35Y5-MFZ3>.

5. See Paul D. Ocheje, *In the Public Interest: Forced Evictions, Land Rights and Human Development in Africa*, 51 J. AFR. L. 173, 176–77 (2007).

6. *Gov't of the Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC) at para. 93.

7. *Id.* at para. 99.

8. *Abass v. Accra Metro. Assembly*, Misc. 1203/2002 (Accra High Ct.), available at http://www.cepil.org.gh/ruling_31.pdf, archived at <http://www.perma.cc/0FYCagrPi2t>.

itan Assembly, they argued that, as a matter of Ghanaian constitutional law, a denial of the right to shelter is a denial of the rights to life and human dignity.⁹ Because of the “[i]nternational dimensions” of these claims, they cited *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.¹⁰ In 2002, they lost.¹¹ This Article posits that the squatters’ arguments should have prevailed in court both as a matter of reason and as a matter of law.

The *Abass* squatters’ loss raises important questions about the justiciability of socioeconomic rights in light of the fundamental law of reason. As a normative ideal of constitutionalism that is opposed to arbitrary rule in any form,¹² a fundamental law of reason can provide an effective way of reconceptualizing socioeconomic rights. The unwritten fundamental law of reason is a special form of foundational law that contemplates the preconditions of rule of law. It can be elucidated from relevant comparative constitutional and human rights jurisprudence, common law notions of fundamental law, and international human rights norms. Through integration with contemporary law, a fundamental law of reason provides normative force to courts’ doctrinal interpretations, and it can imbue directive principles with an imperative of justiciability.

The current trend of jurisprudence of Ghana and Nigeria suggests that while directive principles are not directly justiciable, they may nevertheless be indirectly justiciable. Applying the fundamental law of reason, this Article goes one step further, arguing that asserted rights under directive principles are justiciable when deeper constitutional values support their justiciability. Directive principles should be justiciable to the extent that they constitute the normative basis for political and civil rights deemed fundamental in constitutions. Moreover, when socioeconomic rights considered justiciable in light of the fundamental law of reason are infringed by legislative or executive action, they should be considered to void the legality of the action in question. Achieving the balance necessary for a comprehensive sense of constitutional justice requires direct interrelation between directive principles and fundamental rights; it is inappropriate to analyze constitutional rights in these legal systems within a hierarchical structure that subordinates directive principles to fundamental rights. This Article thus seeks to examine how the socioeconomic rights recognized by non-justiciable directive principles are interrelated and interdependent, through a fundamental law of reason, with explicitly justiciable fundamental rights.

9. *Id.* at 6.

10. *Id.*

11. *Id.* at 15.

12. See Mark D. Walters, *Written Constitutions and Unwritten Constitutionalism*, in *EXPOUNDING THE CONSTITUTION: ESSAYS IN CONSTITUTIONAL THEORY* 245, 265–69 (Grant Huscroft ed., 2008).

Part I of this Article considers the historical common law basis of the fundamental law of reason in matters of constitutional interpretation, discussing the conceptual structures and theoretical foundations relevant to our inquiry, and applying them to the unique nature of socioeconomic rights embodied in directive principles. Part II then analyzes judicial decisions in Nigeria and Ghana concerning directive principles, applying the framework of the fundamental law of reason to critically assess the validity of these decisions. Throughout, the Article emphasizes a view of law as a dynamic enterprise of interpretation, and therefore also of justification, in which normative and descriptive statements blend together. Such a view is an important strategy for developing countries seeking to interpret constitutional guarantees of human rights and protect vulnerable citizens like the Agbogbloshie squatters.

I. REASON-BASED CONSTITUTIONALISM AND A CONCEPTION OF FUNDAMENTAL LAW

Legal positivists like H.L.A. Hart focus on the rules found in explicit law or positive legal pronouncements, which may or may not be morally sound or just.¹³ Legal constructivists, on the other hand, seek to show that law is necessarily connected with morality, but they do so without resorting to theories of natural law that claim human law is subject to an external, higher moral law. Rather, efforts are made to find law's morality within the conceptual structure of law itself.¹⁴ Lon Fuller, for instance, looks to the formal requirements of the rule of law,¹⁵ whereas Ronald Dworkin looks to law as an interpretive concept.¹⁶ The method advanced here of integrating law and morality through constitutional interpretation borrows heavily from legal constructivists, but there are important differences. While these approaches may be less arbitrary than positivist views, they are not without their imperfections, and they may not be appropriate for transitional or young democracies in Africa. For instance, Dworkin's approach, at least as applied to the U.S. Constitution, emphasizes the written constitutional text and the moral principles it presupposes, denying the need for reference to moral principles that are considered external to the text.¹⁷ Dworkin's commitment to a strict distinction between principle and policy leads him to regard socioeconomic rights, like the right to universal public health care, as political and not legal rights—and therefore non-justiciable—even if

13. H.L.A. HART, *THE CONCEPT OF LAW* 26–48, 89–96 (1961); see generally H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

14. LON L. FULLER, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630, 639 (1958); see generally RONALD DWORKIN, *LAW'S EMPIRE* (1986).

15. See generally LON L. FULLER, *THE MORALITY OF LAW* (2d ed. 1969).

16. DWORKIN, *supra* note 14, at 19.

17. See generally RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996).

they are expressly protected by written constitutional provisions.¹⁸ In these societies, one can still be trapped by pernicious forces that may be explicit or implicit in positive law.¹⁹

Nevertheless, legal constructivists provide insights that can be used to expound a theory of law suitable for developing countries like Ghana and Nigeria. Underlying Fuller's approach is a conception of legality or the rule of law according to which power can only be perceived as law for people if it can be justified to them as consistent with their status as individuals who fully participate in a self-governing political community.²⁰ Similarly, Dworkin takes the view that law is not so much a static thing or a fact but a dynamic interpretive process that is inherently normative, and hence moral, in character.²¹ The legal discourse at the intersection of these views reveals a moral dimension of natural law that transcends the confines of positive law. What emerges 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.

A. *The Common Law Tradition of Fundamental Law*

This fundamental law should anchor constitutional interpretation in young democracies like Ghana and Nigeria. Somewhat paradoxically, support for this argument can be found by looking to the legal traditions of the system that once oppressed Ghana and Nigeria. English common law grew out of a society where the strengthening of participatory democracy depended on social acceptance and affirmation of law. Perhaps more importantly, the historical common law discourse on fundamental matters of public law was necessarily one of first principles, because the English (and later British) Constitution was an unwritten one.²² This early discourse serves as 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 of 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.²³ While that tradition has no normative power in Ghana and Nigeria today, it should inform normative interpretations as a fundamental substantive moral and legal principle.

The common law tradition of fundamental law has normative power today because it manifests clearly in two theoretical frameworks that shed

18. RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 412–13 (2011).

19. Evan Fox-Decent, *Is the Rule of Law Really Indifferent to Human Rights?*, 27 L. & PHIL. 533, 539–40 (2008).

20. FULLER, *supra* note 15, at 33–94.

21. See generally DWORKIN, *supra* note 14.

22. Walters, *supra* note 12, at 250.

23. MARTIN LOUGHLIN, *FOUNDATIONS OF PUBLIC LAW* 3 (2010).

light on constitutional interpretation—frameworks that help define the unwritten fundamental law underlying constitutional texts. The first is a substantive rule of law theory based on the notion that a higher law was a key part of medieval and feudal jurisprudential thought.²⁴ This stream of constitutional discourse—while it may not be perfectly compatible with modern constitutional circumstances—offers lessons that resonate normatively today, and would equally have universal attraction for societies at any juncture. It is important to return to the fundamental issue about the benefit of invoking the concept of fundamental law in its historic common law sense.

Charles McIlwain observed that medieval jurists generally presumed that “there is a law fundamental and unalterable, and rights derived from it indefeasible and inalienable.”²⁵ 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.²⁶ As Sir Edward Coke stated, “the fountaine of all the fundamentall lawes of the Realme,” Magna Carta, was to be understood as “a confirmation or restitution of the common law,” and if any statute were made contrary to it, the statute would be void,²⁷ because “Magna Carta is such a Fellow, that he will have no Sovereign.”²⁸ Magna Carta protected the freedom and property of freemen from invasion except by lawful judgment of their peers or *per legem terræ*—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.”²⁹ Fundamental law was thus not so much a set of substantive rights, but rather a substantive rule of law theory that basic rights to liberty and property were protected from arbitrary power by due process of law.

Perhaps Coke’s most famous and controversial assertion of fundamental law is his dicta in the well-known case of *Bonham v. College of Physicians*:

And it appears in our books 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

24. CHARLES HOWARD MCILWAIN, *THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY* 44 (1910).

25. *Id.* at 51–52.

26. *Id.* at 52–53.

27. EDWARD COKE, *THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE*, pt. 6 (Steve Sheppard ed., 2003), available at <http://oll.libertyfund.org/title/912/224446>, archived at <http://perma.cc/PH3A-6YSS>.

28. 2 WILLIAM COBBETT, THOMAS CURSON HANSARD & JOHN WRIGHT, *THE PARLIAMENTARY HISTORY OF ENGLAND, FROM THE EARLIEST PERIOD TO THE YEAR 1803, FROM WHICH LAST-MENTIONED EPOCH IT IS CONTINUED DOWNWARDS IN THE WORK ENTITLED “THE PARLIAMENTARY DEBATES”* 357 (London, T.C. Hansard 1807).

29. MAGNA CHARTA, 1215, c. 29, §2(2), reprinted in EDWARD COKE, *THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, CONTAINING THE EXPOSITION OF MANY ANCIENT AND OTHER STATUTES* 46 (The Lawbook Exchange, Ltd. 2002) (1817).

and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such acts to be void.³⁰

Debate has raged about whether Coke meant that statutes might be struck down by judges or simply construed to avoid injustice.³¹ However, it is now generally accepted that Coke and other seventeenth-century lawyers wildly exaggerated this “ancient constitution” as part of a political struggle against absolutist claims by Stuart monarchs—a struggle that involved civil war and revolution.³² In stating that Parliament itself was bound by a law of reason, Coke was restating an idea that was, by then, commonplace among English lawyers.³³ Indeed, while Coke was still on the bench, Sir Henry Finch published a treatise stating that “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.”³⁴ Perhaps the only novel aspect to Coke’s statement, then, was the assertion that this fundamental law of reason was part of the ordinary common law.³⁵

That common law lawyers appropriated fundamental law in their political struggle against royal absolutism only underscores the relevance of fundamental law discourse for transitional Ghanaian and Nigerian democracies emerging from similar periods of arbitrary government. Fundamental law should be understood as a normative ideal of constitutionalism that is opposed to arbitrary rule in any form.³⁶ It is a special form of law that developed before ordinary law from a sense of moral reason, providing the conditions of legality or rule of law necessary for ordinary law to exist; it is also integrated within ordinary law, providing normative force to courts’ doctrinal interpretations. Substantive equality, justice, human dignity, and human welfare, as well as effective responses to extreme political paternalism and over-centralization of political power, are as important in their

30. *Bonham v. Coll. of Physicians*, [1606] 77 Eng. Rep. 638, 652.

31. The view here is not that Coke calls on judges to strike down statutes in service of the law of reason. Rather, the suggestion is that statutes can—to limit the defects of positive law in appropriate cases—be construed as to cohere with the virtues of the fundamental law of reason, an approach that is consistent with modern accounts of constitutionalism. See, e.g., JOHN WIEDHOFFT GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* 35 (1955); see also F.W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 301 (1908); Frederick Pollock, *Expansion of the Common Law*, 11 *HARV. L. REV.* 423 (1898).

32. See J.G.A. POCOCK, *THE ANCIENT CONSTITUTION AND FEUDAL LAW: A STUDY OF THE ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* 30–69 (1987).

33. See, e.g., Mark D. Walters, *St. German on Reason and Parliamentary Sovereignty*, 62 *CAMBRIDGE L.J.* 335, 343–49 (2003).

34. HENRY FINCH, *A DESCRIPTION OF THE COMMON LAWS OF ENGLAND, ACCORDING TO THE RULES OF ART, COMPARED WITH THE PREROGATIVES OF THE KING* 53 (trans. London, A. Millar, 1759) (1613).

35. Martin Loughlin has argued that the medieval concept of fundamental law was historically regarded as separate from the ordinary laws enforced by ordinary courts. LOUGHLIN, *supra* note 23, at 1–13.

36. See Walters, *supra* note 12, at 265–69.

modern context as they were in their distant past. It is not coincidental that fundamental law discourse was at its strongest in England during the seventeenth century, when England itself was in a transitional state from absolutism to constitutionalism. The political and social anxieties confronting emerging democracies are similar in character and scope from those that occasioned the emergence of the immutable principles of the fundamental law in feudal and medieval Europe.

The second relevant theoretical framework to emerge from the early common law discourse on fundamental law 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 synonymous with morality; nor was fundamental law limited to natural law.³⁷ As the sixteenth-century writer Christopher St. German observed, English lawyers preferred the term “law of reason” over “law of nature,” and by “reason” they often meant something narrower than natural law. What St. German called the “lawe of reason secundarye” involved a more legalistic reasoning about the full implications of positive laws rather than the abstract requirements of natural law.³⁸

Coke famously stated that the common law may be reason, but it is the “artificial reason” of judges who had undergone long study and training in the law.³⁹ This law of reason was less focused on substantive rights than it was on a particular form of legal discourse. As Sir John Davies asserted, the common law was *ius non scriptum* (unwritten law) in the sense that it was not made by princes and imposed on subjects, but rather emerged over time and grew “to perfection.”⁴⁰ Common law approximated “the lawe of *Nature*” and thus “far excell[ed] our *written* lawes, namely our Statutes or Actes of Parliament”; for Davies, the common law was really a discourse of reason in which judges sought coherence or “harmonie of reason” in the law.⁴¹ Scholars have 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, such as Dworkin’s theory of law as integrity.⁴²

37. See GOUGH, *supra* note 31, at 35.

38. Walters, *supra* note 12, at 251 (quoting CHRISTOPHER ST. GERMAN, ST. GERMAN’S DOCTOR AND STUDENT 33–39 (T.F.T. Plucknett & J.L. Barton eds., Selden Soc’y 1974) (1528)); see also Walters, *supra* note 33, at 339–40.

39. Prohibitions del Roy, [1607] 77 Eng. Rep. 1342, 1343.

40. JOHN DAVIES, LE PRIMER REPORT DES CASES ET MATTERS EN LEY RESOLUES & ADIUDGES EN LES COURTS DEL ROY EN IRELAND [A REPORT OF CASES AND MATTERS IN LAW RESOLVED AND ADJUDGED IN THE KING’S COURTS IN IRELAND] (London, Co. of Stationers 1628), in 2 THE WORKS IN VERSE AND PROSE (INCLUDING HITHERTO UNPUBLISHED MSS) OF SIR JOHN DAVIES 249 (Alexander B. Grosart, ed., St. George’s, Blackburn, Lancashire 1876), available at https://archive.org/details/worksinverseand05_grosgoog.

41. *Id.* at 254.

42. See Mark D. Walters, *Legal Humanism and Law as Integrity*, 67 CAMBRIDGE L.J. 352, 352–55 (2008).

These theoretical frameworks, by invoking the concept of fundamental law in its historical common law sense, lend support to a theory of constitutional interpretation that relies on the fundamental law of reason to enforce socioeconomic rights in developing countries. Law should not be regarded simply as the product of lawmakers' decisions and intentions, but also to some extent as the embodiment of fundamental values that gain normative force independently of what is decided by lawmakers. While the particular values that may gain a special normative force under this approach are context-dependent (with respect to both time and place), they are certain to reflect immutable principles of liberty, non-repugnancy, reason, and justice. The fundamental law of reason is a form of interpretive discourse that forces us to ask questions such as: 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? Importantly, it does not claim that the identification of fundamental law is a matter of pure political or moral reasoning. Rather, it is a conception of the law as a rule of reason that suggests a uniquely judicial form of discourse. This makes the reason of the fundamental law key to this work; court decisions should be considered valid by the ordinary person not merely because they are based on legal precedent or lawmakers' intentions, but because they are also based on acceptable values as understood from the reason of the fundamental law.

B. The Interpretive Relevance of the Unwritten Fundamental Law of Reason

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. Yet, law's existence cannot depend only on materials that are merely the consensus of those persons participating in the legal realm, for those persons' judgment, and thus the materials, may be flawed. Dworkin⁴³ and Fuller⁴⁴ both acknowledge that the morality woven into the law may require judges to acknowledge deeply unjust or "evil" laws in rare circumstances, such as laws permitting slavery. For African peoples whose ancestors suffered from the slave trade and who themselves suffered under the unjust laws of military dictators, an approach to legal theory only accounting for the current and constructed morals of lawmakers cannot suffice at an intuitive level. Law's existence, as Fuller insists, must depend on 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 ideals of individual dignity and autonomy with membership in a political community

43. DWORKIN, *supra* note 18, at 410–13.

44. Although Fuller is essentially citing Hart in this respect, the claim aligns with the general tenor of this Article and by extension the general import of Fuller's conceptions about the utility of law to a political community. FULLER, *supra* note 15, at 162–63.

that strives for a shared sense of normative order and common good.⁴⁵ Under this approach, slavery laws could never be valid laws for slaves because the laws did not treat slaves as equal members of the political community for which the laws were made.⁴⁶ The insights of the early common law discourse on fundamental law help take Fuller's argument a step further by establishing that the unwritten law of reason is *a priori* to ordinary law, infusing it with normative reason. Indeed, in his most recent work, Dworkin observes that in Coke's time, parliamentary authority was regarded as limited by natural rights, and that this view was rejected during the nineteenth century as the ideas of positivists like Bentham took over.⁴⁷ Yet a similar idea is once again emerging among judges and lawyers.⁴⁸

Perhaps the combination of these ideas comes closest to the liberal theory of the rule of law advanced by T.R.S. Allan. Allan argues that an unwritten constitution of reason lies beneath written constitutions in all liberal democracies.⁴⁹ This unwritten constitution of reason focuses on a substantive version of the rule of law according to which state power, to be law, must be the subject 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.⁵⁰ State power that fails to fulfill this ideal is not just constitutionally invalid but does not even count as law from a theoretical, jurisprudential, or conceptual perspective. Indeed, the theoretical invalidity of such acts of power as law, rather than inconsistency with some written constitutional document, is what renders them doctrinally invalid.⁵¹

Implicit in the rule of law are certain classic civil and political rights that form the necessary conditions of legality for law to exist.⁵² The list of rights implicit in the rule of law, however, is not necessarily the same for all liberal democracies. What is needed for the conditions of legality to exist in emerging African democracies must necessarily be different from what is needed in developed western democracies. Law must rest not only on moral grounds, but also on reason and established custom that speak to the "com-

45. FULLER, *supra* note 15, at 162–63.

46. *Id.*

47. DWORKIN, *supra* note 18, at 413–14.

48. *Id.* at 405–09.

49. Here, Allan's distinction between the moral and legal components of law supposes that positive law is not an exhaustive account of the nature of law. Rather, beneath a positive law is moral reason which anchors and validates it. Such moral reason should underlie all written constitutions. See T.R.S. ALLAN, *CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW* 62–66, 218 (2001).

50. *Id.*

51. On account of unwritten fundamental law, the validity of positive law or written law requires consistency with reasoning that is capable of being sustained by the common values of a political community. The value of law cannot solely depend on its text as enacted by the parliament; rather, it must be understood in the broader spirit of the unwritten fundamental law of reason. *Id.* at 70–73; see also Mark D. Walters, *The Common Law Constitution in Canada: Return of Lex Non Scripta as Fundamental Law*, 51 U. TORONTO L.J. 91, 93, 96 (2001).

52. See ALLAN, *supra* note 49, at 34, 40, 58.

mon good”⁵³ of society. Law must then conform to certain intrinsic standards of justice that are essential to the common good or collective well-being and individual dignity.⁵⁴ There is no basis in reason to seek a rigid distinction between the moral aspirations of the legal system and its laws. The moral justification of law must be a precondition of its obligatory force, and citizens’ moral judgment should be inextricably engaged in the interpretation of law.⁵⁵

The unwritten fundamental law acknowledges the importance of the written constitution for the purpose of certainty in governance. However, a written constitution—even if it expressly settles all questions of enactment, intent, formality, and clarity—must be interpreted to respect the conscience of the unwritten fundamental law in order to permit justice and fairness, respect for reason, human dignity, and well-being. Judicial decisions in established liberal democracies like the United States, Australia, and Canada suggest that judicial resort to an unwritten fundamental law of reason is not uncommon even if it is not always openly acknowledged.⁵⁶ For instance, positivist approaches normally assume that anything that is not supported by the written text is not law, and a norm’s constitutional validity depends entirely on the written text.⁵⁷ Yet, it is important that courts try, in matters of interpreting written constitutions, to recognize and incorporate into interpretation an underlying fundamental law of reason. To the extent that it adds quality to and enriches the moral content of law, the reason of fundamental law should discipline the interpretation of law to make it more useful and meaningful for society at large. Such discipline ensures that laws are not merely an exercise of power but are reasonable and justifiable institutions for all citizens they impact. The distilled reason that is inherent in the fundamental law allows for a conception of constitutional law that exemplifies the *a priori* values of the affected people, makes sense of their collective well-being, and secures for them the conditions of legality.⁵⁸ It does so by uniting the enduring values of the past with the current “practices, expectations and necessities” of the present to avoid contradictions between fundamental law and written laws that result in morally repugnant law.⁵⁹ To the extent that this view can influence the constitutional imagination of young democracies like Ghana and Nigeria, judges may

53. *Id.*

54. *Id.* at 5.

55. *See id.* at 75.

56. *See* Walters, *supra* note 12, at 261–70; Mark Van Hoecke, *The Use of Unwritten Legal Principles by Courts*, 8 *RATIO JURIS* 248, 249–51 (1995); Walters, *supra* note 51, at 92–95.

57. *See, e.g.*, JOSEPH RAZ, *THE AUTHORITY OF LAW* 113 (1979); *see also* H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 49–50 (1983).

58. *See* Virendra Kumar, *Harmony and Balance: A Static or Dynamic Process (Minerva Mills in Retrospect)*, 8 *ALL INDIA REP. J.* 113, 113–15 (1981).

59. PHILIP SELZNICK, *THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF CONTINUITY* 450 (1992).

have more freedom to progressively interpret the law without necessarily being seen as its architects.⁶⁰

The virtues of unwritten fundamental law must not only mediate constitutional interpretations, but also the interpretation of ordinary laws, to express 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 distinguish enduring values from temporary premonitions of leaders controlled by other less compelling considerations. Narratives of law that suggest law is merely what is posited by lawmakers who follow some preordained or officially-accepted rules regardless of their moral propriety should be regarded as suspicious at best. To some extent, the unwritten fundamental law of reason developed here is simply an illustration of how "[l]aw is effectively integrated with morality."⁶¹ It shows how, as approaches to political morality are revised, so are basic propositions of constitutional law. A fundamental law of reason grounded in the conceptual structure of law is not contingent on the state of law or morality in given places or at given times, though the application of the fundamental law will vary considerably as the understanding of moral values and the common good changes.

*C. The Fundamental Law of Reason and its Relationship to
Socioeconomic Rights*

The fundamental law of reason is essentially a substantive conception of the rule of law 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 well-being of the people. The failure to honor these rights has the doctrinal implication of failure to create effective law at all. For law to be law rather than mere power, it must be capable of explanation that carries the convictions and aspirations of its subjects. For subjects to be in a position to treat law as law rather than as a mere imposition of force or power, the law must respect their status as humans capable of following laws.⁶² This idea is very similar to Etienne Mureinik's and David Dyzenhaus's ideas

60. By virtue of the principle of separation of powers and judges' traditional role as interpreters and not creators of the law, interpreting law with recourse to the unwritten fundamental law of reason allows judges to ascertain the proper meaning of the law without taking on the task of lawmaking. See Frederick Pollock, *The Continuity of the Common Law*, 11 HARV. L. REV. 423, 433 (1898) (describing the role of judges as interpreters of the law).

61. Dworkin thus gives little weight to the unenumerated rights provision in the U.S. Constitution. DWORKIN, *supra* note 17, at 80.

62. This is an extension of the view of law as "implicit," or the belief that law is not made but discovered. LON L. FULLER, *ANATOMY OF LAW* 86 (1968).

of law as a “culture of justification,”⁶³ which Allan also employs in developing his theory of constitutional justice.⁶⁴

Almost thirty-five years ago, Joseph Raz refuted the idea that the rule of law is linked to social justice.⁶⁵ His argument has obscured the debate ever since, but it was not entirely correct. The rule of law cannot be the same as social justice, but Raz was wrong to think that it therefore had no necessary connection to social justice. Once legality is seen as reason rather than just order,⁶⁶ and once people accept that the rule of law means being able to establish law as rules to be respected by its citizens rather than as rules to be imposed on and feared by its subjects, then the rule of law can embrace aspects of a more general theory of social justice. Such a theory must necessarily exist before it can be said that a group of people is not just a random group of people, but rather a political community consisting of people sharing a common sense of equal citizenship.

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 true legality cannot exist.⁶⁷ For the destitute, government rule, even if it is well-intentioned and beneficial, is only power, not law. Indeed, governments may even extend formal political and civil rights, but these aspects of the rule of law cannot exhaust the demands of the rule of law, because on their own they fail to fulfill a necessary condition for legality to exist: a political community based on shared citizenship. Under these circumstances, socioeconomic rights may well be seen as an implicit aspect of the rule of law, and of the fundamental rule of reason that defines constitutionalism in a democratic state. Socioeconomic rights may need to form part of enforceable constitutional law, not because a constitution says so, but because, under the circumstances, the very possibility of law fails without them. The justiciability of socioeconomic laws then becomes the gateway to shared citizenship and legitimate rule of law in developing countries.

The preambles of the constitutions of Ghana and Nigeria epitomize the moral aspirations of the people by providing for, inter alia, the values of justice, freedom, and equality. These pledges find expression in separate chapters of the respective constitutions dealing with fundamental rights on

63. David Dyzenhaus, *The Past and Future of the Rule of Law in South Africa*, 124 SALJ 734, 759 (2007); Etienne Mureinik, *A Bridge To Where? Introducing the Interim Bill of Rights*, 10 SAJHR 31, 32 (1994).

64. See generally ALLAN, *supra* note 49.

65. See Joseph Raz, *The Rule of Law and Its Virtue*, in ARGUING ABOUT LAW 181, 181–82 (Aileen Kavanaugh & John Oberdiek eds., 2009).

66. Mark D. Walters, *Legality as Reason: Dicey, Rand and the Rule of Law*, 55 MCGILL L.J. 563, 567–72 (2010) (distinguishing between “legality as reason” and “legality as order”).

67. See Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*, 141 U. PA. L. REV. 1 (1992).

the one hand and directive principles on the other.⁶⁸ Many of the rights identified by the constitutions as fundamental rights are commonly known as civil and political rights, like the rights to liberty, equality, and freedom of expression. However, they also include rights that have a social, economic, or cultural aspect to them, like the rights relating to property, education, and languages.⁶⁹ Directive principles, in contrast, identify a variety of general economic and political aims, including the objective of fulfilling what may be called socioeconomic rights, like “public assistance to the needy” or “basic necessities of life” (Ghana),⁷⁰ 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).⁷¹ 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 justice. However, the debated nature of these ideals undergirds tension within the legal community regarding the realization of this ideal of constitutional justice.⁷²

The fundamental law of reason resists the idea that political and civil rights found in chapters on fundamental rights are separate from—rather than different manifestations of—the socioeconomic rights found in directive principles. Directive principles may identify a socioeconomic right that supplements, qualifies, or supports a justiciable human right. For example, the right to vote may be meaningless for someone unless they have a right to some basic level of education. To the extent that directive principles call on states to provide access to education, they should be enforced as an aspect of protecting voting rights. Directive principles may also identify socioeconomic rights that are simply more concrete manifestations of, and thus an integral part of, justiciable human rights. The rights to food and shelter, for example, are just specific manifestations of the more abstract human rights, like the rights to life, liberty, or equality. The idea that human rights may be compartmentalized and prioritized at an *a priori* or abstract level thus has no place within the fundamental law of reason, because 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

68. In the Ghanaian Constitution, the Fundamental Rights and Freedoms are found in Chapter Five, and the Directive Principles are found in Chapter Six. CONSTITUTION OF THE REPUBLIC OF GHANA May 8, 1992, arts. 12–41. In the Nigerian Constitution, the Fundamental Objectives and Directive Principles of State Policy are found in Chapter Two, and the Fundamental Rights and Freedoms are found in Chapter Four. CONSTITUTION OF NIGERIA (1999), §§ 13–24, 33–44.

69. CONSTITUTION OF THE REPUBLIC OF GHANA May 8, 1992, arts. 12–33; CONSTITUTION OF NIGERIA (1999), §§ 33–44.

70. CONSTITUTION OF THE REPUBLIC OF GHANA May 8, 1992, arts. 34–41.

71. CONSTITUTION OF NIGERIA (1999), §§ 13–24.

72. See, e.g., Hakeem O. Yusuf, *The Judiciary and Constitutionalism in Transitions: A Critique*, 7 GLOBAL JURIST 1 (2007).

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 for those people in their circumstances. Sometimes, respecting the demands of legality will mean giving particular respect to the socioeconomic as opposed to the political and civil aspects of rights.

The idea of law as a “culture of justification,” developed by Etienne Mureinik, speaks eloquently to this point in the South African context:

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.⁷³

For political and civil rights to be meaningful for people, certain minimum socioeconomic conditions must prevail; otherwise, those rights will be capable of realization and enjoyment only by persons who are free from want, disease, ignorance, and illiteracy.⁷⁴ Because directive principles direct the state to cultivate those conditions, they are integrally linked to fundamental rights.⁷⁵

To be sure, the idea of a fundamental law of reason, based on a theory of justificatory reason, has greater normative power for transitional democracies than established ones where moral grounding of laws in reason has had greater opportunity to evolve. For developed countries with long histories of political progress, socioeconomic rights have a greater ability to be worked out in political as opposed to judicial forums. In contrast, in developing countries like Ghana and Nigeria, which are transitioning out of military dictatorship without deep-rooted political consideration of socioeconomic progress, concerns about the separation of powers and institutional competence become weaker as relative to competing concerns about the relationship between socioeconomic rights and civil and political rights become stronger. In these countries, certain fundamental socioeconomic rights should be protectable in courts, where they will be safe from the vicissitudes of politics that may still be unpredictable and particularly vulnerable to the whims of an elite minority privileged enough to participate in political deliberations. The importance of political community has special implications for nation-building in Africa, which requires that interpretive decisions (whether regarding law or the conception of rule of law) must incorporate the true convictions of the people. Indeed, several commentators have developed a uniquely African perspective on legal theory

73. Mureinik, *supra* note 63, at 32–37.

74. See PARAMJIT S. JASWAL, *DIRECTIVE PRINCIPLES, JURISPRUDENCE AND SOCIO-ECONOMIC JUSTICE IN INDIA* 118 (1996).

75. *Id.* at 149 (arguing that it “is wrong to say that the directive principles are not law”).

and the rule of law—one that puts socioeconomic rights at the heart of the very idea of what law must be to count as law in a transitional democracy and developing economy.⁷⁶ For political and civil rights to make liberal democracy possible in developing African countries, they cannot be separated from socioeconomic rights and a deep commitment to social democracy.⁷⁷ Therefore, constitutional law in countries like Ghana and Nigeria should be conceived as an aspirational moral goal and applied to bring about genuine freedom that aligns with the demands of the fundamental law of reason.

II. THE JUSTICIABILITY OF DIRECTIVE PRINCIPLES

It is not controversial that directive principles, though not judicially enforceable, are judicially cognizable and therefore available for courts to look to for interpretive assistance in resolving legal ambiguities. Similarly, if the conduct that counts as a violation of a non-justiciable directive principle also affects a justiciable fundamental right, it may give rise to indirect justiciability.⁷⁸ In contrast, to suggest that a person can go to court seeking, for example, an order that a particular enacted law be declared void for violating directive principles, or that a law be made in furtherance of the objectives embedded in directive principles, seems, at first glance, to be altogether different. However, at least some of the rights and principles embraced by directive principles should be viewed as having the normative force of freestanding justiciable constitutional rights. Some of the values identified in directive principles are rooted in the fundamental law of reason and therefore are essential for creating and maintaining legal institutions and socioeconomic practices. This view may resonate more strongly in Ghana, because its Constitution does not expressly deny the justiciability of directive principles as the Nigerian Constitution does.

The idea of directive principles as freestanding justiciable constitutional rights is not necessarily inconsistent with the notion that they are cognizable as interpretive aids, but mere judicial cognizance should not be the approach of the courts of Ghana or Nigeria. To be sure, the legislature may give effect to or implement directive principles by legislation, and in most cases, the socioeconomic rights embedded in directive principles cannot be fully honored without legislation. However, courts, “in deciding cases re-

76. See Chidi A. Odinkalu, *Back to the Future: The Imperative of Prioritizing for the Protection of Human Rights in Africa*, 47 J. AFR. L. 1, 2–6 (2003); see also Shedrack C. Agbakwa, *A Path Least Taken: Economic and Social Rights and the Prospects of Conflict Prevention and Peacebuilding in Africa*, 47 J. AFR. L. 38, 39–43 (2003).

77. See Tiyanjana Maluwa, *Discourses on Democracy and Human Rights in Africa: Contextualising the Relevance of Human Rights to Developing Countries*, 9 AFR. J. INT'L & COMP. L. 55 (1997).

78. Such an approach has been taken in India, where “courts have . . . tried to harmonise [Directive Principles and Fundamental Rights] by importing the Directive Principles in the construction of the Fundamental Rights.” *Minerva Mills Ltd. v. Union of India*, A.I.R. 1980 S.C. 1789.

lating to the subject-matter of these principles should, by virtue of the fundamental character of the Constitution, take cognizance of the general tendencies, even when no legislative effect has been given to them.”⁷⁹ It is important that courts not refrain from having recourse to directive principles in their interpretive duties merely on the account that the legislature has not acted in that regard; it is equally important that the legislature not be justified in not acting to implement directive principles just because the courts already consider them. Complementary efforts are needed from all branches of government to secure the ends of socioeconomic justice.

Thus, when decisions regarding directive principles made by other branches fail to meet the relevant constitutional standards that are implicit within directive principles, then the judiciary, after a proper and impartial examination of the decision in light of the fundamental law of reason, should feel empowered to intervene and order a remedy. Importantly, directive principles “may be used as an aid to the interpretation and construction of a law when impugned for being in contravention of the Constitution.”⁸⁰ In India, where similarly written Directive Principles are regarded as non-justiciable under the Constitution,⁸¹ arguments along these lines have gained acceptance, and the Directive Principles may be indirectly protected through the protection of other human rights provisions within the Indian court system.⁸² Going a step further, the Supreme Court of India has held that if the legislature passes a law that violates the Directive Principles, the Court can declare that law unconstitutional.⁸³ However, this approach has yet to take root in Nigerian and Ghanaian courts.

Such an approach necessarily raises concerns about the adequate 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

79. GULABHAI NARANHI JOSHI, ASPECTS OF INDIAN CONSTITUTIONAL LAW 27 (1965).

80. B. Obinna Okere, *Fundamental Objectives and Directive Principles of State Policy Under the Nigerian Constitution*, 32 INT'L & COMP. L. Q. 214, 223 (1983).

81. INDIA CONST. arts. 36–51.

82. JASWAL, *supra* note 74, at 118 (arguing that “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”); *see also* B. Errabi, *The Constitutional Scheme of Harmony between Fundamental Rights and Directive Principles of State Policy in India: Judicial Perception*, in JUSTICE AND SOCIAL ORDER IN INDIA 175, 177 (Ram Avtar Sharma ed., 1984). However, not all commentators agree with such an approach. For instance, Upendra Baxi does not believe that directive principles are necessarily bereft of all legal value, even though he agrees that the Directive Principles are subordinate to the Fundamental Rights. Even though Baxi resists the claim that the character of such legal values makes directive principles directly enforceable in a court of law, he accepts that “[a]dvertence to the directives in governance” of a country may be “termed a ‘duty,’” as in the case of India. Upendra Baxi, *Directive Principles and Sociology of Indian Law*, 11 J. INDIAN L. INST. 245, 250 (1969); *see also* 2 H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA, at 1032–33 (3d ed. 1984) (arguing that 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.)

83. *Central Inland Water Transp. Corp. v. Ganguly*, (1986) 2 S.C.R. 385–88.

resources—decisions that are institutionally and democratically suited for the executive and legislative branches of state, but unsuited for the judiciary. One could argue that it is the obligation of the electorate to force the legislature and the executive to enact positive measures that will bring the fruits of the directive principles to them. 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 for adjudication in the courts.⁸⁴ Judges may be good at adjudicating legal disputes on specific points of law, but they lack the institutional competence to make broad decisions on socioeconomic development. Yet it does not follow that courts have no role to play in ensuring that these decisions respect basic socioeconomic rights; rather, courts can and should enforce socioeconomic rights in certain public rights disputes ripe for judicial review. When called upon to do so in furtherance of fundamental socioeconomic rights, courts should be able to check a government action or inaction that results in impermissible derogation of directive principles.

If an asserted right under directive principles is or can be linked to a justiciable fundamental right or is the subject of legislation, there is a strong presumption that any infringing law or executive action is unconstitutional. In failing to recognize the fundamental law of reason, though, courts are hesitant to create justiciable rights from constitutional provisions that do not *prima facie* suggest justiciability. Undue reliance on constitutional positivism serves as a barrier to judicial cognizance of foreign constitutional and human rights jurisprudence, common law notions of fundamental law, or unincorporated international human rights norms which may illuminate interpretations of directive principles. The absence of appropriate judicial checks on Parliament's interpretations of the legality of state actions stands to threaten judicial protection of rights and, more broadly, rule of law.

A. *Directive Principles in Nigeria*

In Nigeria, the Constitutional Conference of 1994–1995—convened by the then-military government, which later approved its work—only gave the Directive Principles a very brief review.⁸⁵ The Directive Principles had been first added to the 1979 Constitution, and the work of the 1979 Constitution Drafting Committee was accepted as a reasonable basis for the deliberations of the Constitutional Conference.⁸⁶ Although there had been some discussion in the 1980s about making the Directive Principles justici-

84. See E.W. Vierdag, *The Legal Nature of the Rights Granted by the International Covenant of Economic, Social and Cultural Rights*, NETH. Y.B. INT'L L. 69, 103 (1978); see also Scott & Macklem, *supra* note 67, at 24.

85. See 2 NIGERIA CONST. CONF., REPORT OF THE CONSTITUTIONAL CONFERENCE CONTAINING THE RESOLUTIONS AND RECOMMENDATIONS 48–55 (1995).

86. *Id.* at 105–10.

able,⁸⁷ the Constitutional Conference, like the 1979 Committee, was dismissive of the suggestion that the Directive Principles be made enforceable in courts of law, but also rejected the proposition that the Directive Principles be expunged from the Constitution altogether.⁸⁸

The general position adopted was that the Directive Principles should form part of the Constitution and serve as guidelines in matters of governance. Although the Constitutional Conference recommended that the right to education be elevated to justiciable status in the 1995 Draft Constitution,⁸⁹ this provision did not make it into the current justiciable provisions of the 1999 Constitution.⁹⁰ Rather, Section 6(6)(c) stipulates that the 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 [Directive Principles].”⁹¹ At the same time, though, 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.⁹²

Importantly, the justiciability question considered by the Constitutional Conference was not whether or not courts would have jurisdiction to apply or make pronouncements by reference to directive principles. Rather, the concern was whether or not an enforcement action might be founded solely on the Directive Principles.⁹³ When the Directive Principles were first adopted, the philosophical bases or political considerations explaining such an apparent contradiction had not been clearly laid out. However, in a case considered under the 1979 Constitution, *Archbishop Anthony Okogie & Others v. Attorney-General of Lagos State*, the Court of Appeal had held that Section 6(6)(c) trumps Section 13.⁹⁴

In 2002, the justiciability of the Directive Principles under the 1999 Constitution was further considered in the Nigerian Supreme Court’s *Cor-*

87. The Political Bureau report of March 27, 1987 recommended that social and economic rights be made justiciable, but this was rejected by the government. See Kaniye A. Ebeku, *Nigeria’s New Constitution for the Third Republic: An Overview*, 5 AFR. J. INT’L & COMP. L. 581, 583, 586 (1993).

88. NIGERIA CONST. CONF., *supra* note 85, at 105.

89. NIGERIA CONST. CONF., *supra* note 85, at 106.

90. See CONSTITUTION OF NIGERIA (1999); see also NIGERIA CONST. CONF., *supra* note 85, at 106 (discussing the government’s commitment to education for all). This not only calls into question the government’s commitment to provide education to all by the year 2000, but diminishes the value of basic education in national life.

91. CONSTITUTION OF NIGERIA (1999), § 6(6)(c).

92. *Id.* §§ 6(6)(c), 13.

93. See NIGERIA CONST. CONF., *supra* note 85, at 105–10; COMM. OF EXPERTS (CONST.) ON PROPOSALS FOR A DRAFT CONST. OF GHANA, PROPOSALS FOR A DRAFT CONSTITUTION OF GHANA ¶¶ 94–97 (1991).

94. See generally *Archbishop Anthony Okogie & Others v. Att’y Gen. of Lagos State*, [1981] 2 NCLR 350 (CA) (Nigeria) (holding that the Directive Principles are not justiciable).

ruption Act case.⁹⁵ Following the inauguration of a democratically elected constitutional government in 1999, it became obvious that the pervasive nature of corruption in Nigeria⁹⁶ would be strongly confronted by the new government. General Olusegun Obasanjo, who was then sworn in as President, proclaimed a desire to tackle what he described as “the greatest single bane” of Nigerian society.⁹⁷ Consistent with this objective, a bill on anticorruption efforts 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 2000 was passed into law.⁹⁸ This Act made any corrupt practice a punishable criminal offense and established an Independent Corrupt Practices 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.⁹⁹ In the *Corruption Act* case, which arose when the Commission attempted to prosecute an Ondo State official, the Supreme Court of Nigeria was invited to decide the constitutionality of this Act, and by extension the legality of the jurisdictional powers of the Commission.¹⁰⁰ One amicus curiae commented that the case dealt with “the cardinal principles of Nigeria’s federal system.”¹⁰¹ The legal question in the *Corruption Act* case was whether the National Assembly was competent to create offenses on corruption and abuse of power by virtue of its obligation to implement the Directive Principles.¹⁰² The petitioner argued 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.¹⁰³ Therefore, the only means the National Assembly had of claiming such a power was to rely on the Directive Principles and the duty to enforce them, and the Directive Principles are not justiciable.¹⁰⁴ Because the Directive Principles were intended to be guidelines for the exercise of executive, legislative, and judicial powers, it was argued, any enactment to enforce their observance would only apply to public officials, not private persons.¹⁰⁵

95. Att’y Gen. of Ondo State v. Att’y Gen. of the Fed’n (*Corruption Act*), [2002] 9 Sup. Ct. Monthly 1, 16–18 (Nigeria).

96. See O.O. Umoh & A.S. Ubom, *Corruption in Nigeria: Perceived Challenges of the Economic and Financial Crimes Commission (EFCC) in the Fourth Republic*, 3 INT’L. J. ADVANCED LEGAL STUD. & GOVERNANCE 101, 101–03 (2012).

97. *Id.* at 102.

98. See generally Paul D. Ocheje, *Law and Social Change: A Socio-Legal Analysis of Nigeria’s Corrupt Practices and Other Related Offences Act, 2000*, 45 J. AFR. L. 173 (2001).

99. Corrupt Practices and Other Related Offences Act 2000, Act No. 5 of 2000, §§ 8–42, 61–64.

100. See *Corruption Act*, 9 Sup. Ct. Monthly at 2–4.

101. *Id.* at 29.

102. See *id.* at 3–4.

103. See *id.* at 8, 10.

104. See *id.* at 16.

105. *Id.* at 7–8.

While the Court held that the Directive Principles are not in and of themselves justiciable, they can have legal effect if enacted into law in furtherance of the fundamental values and objectives they represent.¹⁰⁶ Through a combined reading of Section 4(2),¹⁰⁷ Section 15(5),¹⁰⁸ and Item 60(a) of the Second Schedule¹⁰⁹ of the Constitution, the impugned Act was upheld 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.¹¹⁰ Rejecting the contention that the Directive Principles may serve as the basis for legal obligations only for those with public authority, then-Chief Justice Mohammed Lawal Uwais stated that such a conception would “do violence to” and “fail to achieve the goal set by the Constitution.”¹¹¹ Justice Uwais noted that the Indian Supreme Court in *Mangru v. Commissioner of Budge Budge Municipality* held that “the Directive Principles require to be implemented by legislation, and so long as there is no law carrying out the policy laid down in a Directive Principle, neither the State nor an individual can violate any existing law or legal right under colour of following a Directive.”¹¹² Justice Emmanuel Obiona 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.”¹¹³

However, serious problems arise if the content or necessary implication of 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 or the “conscience” of the Nigerian Constitution. A decision from the outset that the Directive Principles 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, and that they are not among the principles of the rule of law contemplated by Section 13 of the Constitution. The judicial segregation of the Directive Principles as public policy statements on the basis of

106. *See id.* at 16. In theory, the Directive Principles may even support a presumption in favor of the constitutionality of social welfare legislation. *See* Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 530 (1992).

107. “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.” CONSTITUTION OF NIGERIA (1999), § 4(2).

108. “The State shall abolish all corrupt practices and abuse of power.” CONSTITUTION OF NIGERIA (1999), § 15(5).

109. “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.” CONSTITUTION OF NIGERIA (1999), sched. 2, pt. 1, item 60(a).

110. *See Corruption Act*, 9 Sup. Ct. Monthly at 15–19.

111. *Id.* at 39.

112. *Id.* at 38 (citing *Mangru Meya v. Comm’rs of the Budge Budge Municipality* (1951) 87 Calcutta L.J. 361, 369).

113. *Id.* at 67.

a conception of law that dwells merely on written legal rules is a mistake.¹¹⁴ If, as St. German argued, “to follow the words of the law were in some case both against justice and the commonwealth,” then it is “necessary to leave the words of the law, and to follow that reason and justice.”¹¹⁵ The strict positivist approach, moreover, does not provide optimal textual coherence within the Constitution. Nigeria’s Constitution calls on courts to conform to the Directive Principles but not enforce them, leaving it to Parliament to assess whether the state has fulfilled its constitutional responsibilities vis-à-vis the Directive Principles.¹¹⁶

The Directive Principles should figure in a sound theory of law that can serve as a justification for the explicit substantive and institutional rules of Nigeria.¹¹⁷ A judgment should show how its interpretation of explicit law like Section 6(6)(c) passes a threshold test of instantiating a coherent and unified political morality.¹¹⁸ As Justice Niki Tobi noted in a later case:

[T]he nonjusticiability 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.” 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.¹¹⁹

Justice Tobi’s reading of Section 6(6)(c) is arguably narrower than the text provides; Section 6(6)(c) does not say that the non-justiciability rule is specifically subject to other *sections* of the Constitution. Under a less narrow reading, the Constitution incorporates in its spirit the fundamental law of reason, which entails observance of certain socioeconomic rights embodied in the Directive Principles. Once specific socioeconomic rights are understood as 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 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

114. The importance of this point is footed on Dworkin’s policy and legal rule distinction in the conception of law. Principles and policy in a fit test or case can have a proper character of legal rules enforceable through a judicial interpretation that respects the best political morality of the legal system. Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 35 (1967).

115. CHRISTOPHER ST. GERMAN, DOCTOR AND STUDENT 45 (16th ed., London, S. Richardson & C. Lintot 1761) (1528).

116. CONSTITUTION OF NIGERIA (1999), §§ 6(6), 13.

117. See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 66 (1978).

118. See Walters, *supra* note 12, at 265–69; see also DWORKIN, *supra* note 14.

119. Stanley Ibe, *Implementing Economic, Social and Cultural Rights in Nigeria: Challenges and Opportunities*, 10 AFR. HUM. RTS. L.J. 197, 202 n.27 (2010) (quoting Fed. Rep. of Nigeria v. Anache, [2004] 1 Sup. Ct. Monthly 36, 78).

them with rights already protected by the bill of rights.”¹²⁰ Currently, however, “[j]udicial 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 meant that Nigerian courts are almost always incapable of or unwilling to entertain socio-economic rights claims.”¹²¹

B. *Directive Principles in Ghana*

In Ghana, the Consultative Assembly on the Constitution in 1992 relied on the report of the Committee of Statutory Experts (appointed in 1991 by the Provisional National Defence Council government to make proposals for a Draft Constitution) to find that the Directive Principles should not be justiciable.¹²² The final draft was approved through a nationwide referendum.¹²³ However, the final approach seems to have been contrary to the constitutional tradition established by Ghana’s previous 1979 Constitution. The Constituent Assembly that debated the justiciability of similar Directive Principles in the 1979 Constitution had resolved that the Directive Principles should not be made non-justiciable.¹²⁴ Even though the Committee of Statutory Experts acknowledged in 1991 that the 1979 Constitution was the basis of its deliberations,¹²⁵ it erroneously concluded in its final report that “[b]y tradition Directive Principles are not justiciable.”¹²⁶ The Committee further suggested that the Directive Principles could be regarded as spelling out in broad strokes the spirit or conscience of the Constitution.¹²⁷ Accordingly, their legal relevance 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.”¹²⁸ They “should not of and by themselves be legally enforceable by any court,” though the courts should consider them in interpreting laws based on them.¹²⁹

Unlike the Nigerian drafters, the Ghanaian Committee of Statutory Experts suggested two distinct reasons for the inclusion of the Directive Prin-

120. Tom Allen, *Commonwealth Constitutions and Implied Social and Economic Rights*, 6 AFR. J. INT’L & COMP. L. 555, 555–56 (1994).

121. Stanley Ibe, *Beyond Justiciability: Realising the Promise of Socio-Economic Rights in Nigeria*, 7 AFR. HUM. RTS. L.J. 225, 241 (2007).

122. See COMM. OF EXPERTS, *supra* note 93, ¶¶ 94–97; see also *New Patriotic Party v. Att’y-Gen. (December 31)*, (1994) 2 Ghana L. Rep. 35, 68–71 (Sup. Ct.) (quoting CONSTITUENT ASSEMBLY, PROCEEDINGS OF THE CONSTITUENT ASSEMBLY: OFFICIAL REPORT 69 (1979)).

123. See 1 GHANA CONSULTATIVE ASSEMBLY, PROCEEDINGS OF THE CONSULTATIVE ASSEMBLY: OFFICIAL REPORT 29–31 (1991).

124. When the issue was presented to the House, the recorded result was, “Question put and negatived.” *December 31*, (1994) 2 Ghana L. Rep. at 68–71 (quoting CONSTITUENT ASSEMBLY, *supra* note 122).

125. COMM. OF EXPERTS, *supra* note 93, ¶ 94.

126. *Id.* ¶ 95.

127. *Id.* ¶ 94.

128. *Id.* ¶ 96.

129. *Id.*

ciples in the 1992 Constitution. First, the Directive Principles represented an enunciation of “a set of fundamental objectives” of expectation, and second, the Directive Principles in the long run constitute “a barometer by which the people could measure the performance of their government.”¹³⁰ However,

[t]he 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.¹³¹

It is thus not surprising that the 1992 Constitution of Ghana did not go so far as to include a provision declaring the Directive Principles non-justiciable, leaving open the question of whether constitutional silence on the justiciability of the Directive Principles in the Ghanaian Constitution still provokes a conclusion of non-justiciability. Importantly, 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.”¹³² Because an explicit denial of the justiciability of the Directive Principles is not found in the Ghanaian Constitution, socioeconomic rights are said to be more justiciable in Ghana than in most other African countries.¹³³

1. *The December 31 Case*

In the 1994 case of *New Patriotic Party v. Attorney-General* (“December 31”), Ghana’s New Patriotic Party sought a declaration in the Supreme Court of Ghana that a public celebration of the overthrow of the legally constituted Government of Ghana on December 31, 1981 with public funds was “inconsistent with or in contravention of the letter and spirit of the Constitution,” relying on Articles 35(1) and 41(b) of the Ghanaian

130. *Id.* ¶ 95.

131. Ben Kunbor, *Epistolary Jurisdiction of the Indian Courts and Fundamental Human Rights in Ghana's 1992 Constitution: Some Jurisprudential Lessons*, LAW, SOC. JUST. & GLOBAL DEV.; see also COMM. OF EXPERTS, *supra* note 93, ¶ 139.

132. CONSTITUTION OF THE REPUBLIC OF GHANA May 8, 1992, art. 34(1).

133. While the South African Constitution was the first to make socioeconomic rights justiciable, Uganda’s 1995 Constitution took significant steps in this direction. Other African countries, such as Lesotho, provided for such rights through Directive Principles to serve as guides to the three branches of government. John Cantius Mubangizi, *The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation*, 2 AFR. J. LEGAL STUD. 1, 16, 18 (2006). Many other countries like Botswana neither entrenched socioeconomic rights in their constitutions nor expressed them as Directive Principles. Bonolo Ramadi Dinokopila, *The Justiciability of Socio-Economic Rights in Botswana*, 57 J. AFR. L. 108, 109 (2013).

Constitution.¹³⁴ The petitioner argued 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; because the celebration of December 31 was a glorification of *coups d'état* in the country, it should not be publicly financed.¹³⁵ In response, the Attorney General argued that the values of the December 31 celebration were ineluctably connected to the manifesto of the party in power and, more importantly, that the petitioner was relying on non-justiciable provisions.¹³⁶

In a five-to-four majority decision, the Court ruled in favor of the petitioner and held that public financing of the December 31 celebration was inconsistent with the letter and spirit of the Constitution.¹³⁷ The decision on the justiciability of the Directive Principles, though, was less forceful. Two members of the majority divided on the issue of justiciability: Justices Amua-Sekyi and G.E.K. Aikins, in a rare occasion, made no explicit reference to the Directive Principles.¹³⁸ Two others in the majority, Justices R.H. Francois and Charles Hayfron-Benjamin, arrived at their conclusion by relying mainly on the spirit of the Constitution.¹³⁹ Only Justice N.Y.B. Adade on the majority's side directly confronted the Directive Principles, stating:

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.¹⁴⁰

After examining the debates of the 1979 Constituent Assembly and the 1991 report of the Committee of Experts, Justice Adade observed that the earlier body had indeed accepted their justiciability.¹⁴¹ However, he concluded if the framers of the 1992 Constitution (despite being misled on this point) really intended to make them non-justiciable, “that intention was

134. *December 31*, (1994) 2 Ghana L. Rep. 35, 36 (Sup. Ct.). Article 35(1) of the Constitution provides that “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”; Article 41(b) further provides that “[t]he 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.” CONSTITUTION OF THE REPUBLIC OF GHANA May 8, 1992, arts. 35(1), 41(b).

135. *December 31*, 2 Ghana L. Rep. at 36–37.

136. *Id.* at 37.

137. *Id.* at 37–38.

138. *See id.* at 120–31 (Amua-Sekyi, J., concurring); *id.* at 131–41 (Aikins, J., concurring).

139. *Id.* at 77–88 (Francois, J., concurring); *id.* at 167–79 (Hayfron-Benjamin, J., concurring).

140. *Id.* at 66.

141. *Id.* at 69.

not carried into the Constitution,” which as a whole is justiciable in the absence of a clear contrary statement.¹⁴²

Although two members of the minority, Justice A.K. Ampiah and then-Chief Justice P.E. Archer, failed to consider the Directive Principles in their judgments, one member, Justice Isaac Kobina Abban, thought that the plaintiff’s reliance on the Directive Principles was misconceived and of no relevance.¹⁴³ It was only Justice Joyce Bamford-Addo of the minority who boldly stated that the Directive Principles were not justiciable.¹⁴⁴ Given that several justices addressed or failed to address the issue of Directive Principles and their justiciability, no clear majority or minority view on this point emerged. It is unclear whether members of the majority subscribed to the open declarations of Justice Adade that the Directive Principles are justiciable or if Justice Bamford-Addo’s rebuttal of that claim was supported by the other members of the minority.

With Justice Adade and Justice Bamford-Addo acting alone in advancing their respective views, the case did not reach a determination of whether the Directive Principles are justiciable. Indeed, an important tension arises from the observance of directive principles as legal duties of all government agencies and public officials while courts are unable to directly enforce them. As Justice Adade asked: “How do the [directive] principles guide the judiciary ‘in applying or interpreting the Constitution’ if not in the process of enforcing them?”¹⁴⁵ Or, as Obinna Okere put it: “In the absence of justiciability, does it mean that the Directive Principles are no more than moral precepts, fond hopes and pious wishes?”¹⁴⁶

2. *The CIBA Case*

Some of the confusion produced by the *December 31* case with respect to the justiciability of the Directive Principles was clarified in the 1997 case of *New Patriotic Party v. Attorney-General* (“CIBA”). In this case, the petitioner challenged the constitutionality of the Council of Indigenous Business Association Law of 1993, which required certain associations specified in its Schedule to be registered with the Council and subject to substantial monitoring and regulation by a Minister of State.¹⁴⁷ The petitioner argued that the law infringed the right to freedom of association, relying on Article 21(1)(e) from Chapter Five (Fundamental Rights), as well as Articles 35(1), 37(2)(a), and 37(3) from Chapter Six (Directive Principles) of the Constitu-

142. *See id.* at 66–69 (referring to the judicial review provisions found in Articles 1(2) and 2(1) and stating, “I have not seen anything in chapter Six or in the Constitution, 1992 generally, which tells me that chapter Six is not justiciable”).

143. *See id.* at 102 (Abban, J., dissenting).

144. *See id.* at 149–50 (Bamford-Addo, J., dissenting).

145. *Id.* at 36.

146. Okere, *supra* note 80, at 223.

147. *New Patriotic Party v. Att’y-Gen. (CIBA)*, (1997) Sup. Ct. Ghana L. Rep. 729, 729.

tion.¹⁴⁸ Again, the Attorney General responded that the Directive Principles are not justiciable.¹⁴⁹

The majority in this case found for the petitioner, but the opinions were again somewhat indecisive about the justiciability of the Directive Principles,¹⁵⁰ although less so than in the *December 31* case. Two members of the majority, Justices Sophia Akuffo and A.K. Ampiah, found that the Directive Principles are not justiciable.¹⁵¹ One member of the majority, Justice William Atuguba, saw them as merely “rules of construction,” but, in a very interesting argument, asserted by way of the unenumerated rights provision (Article 33(5)) that the Directive Principles may “pass as supplementary rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms.”¹⁵²

Justice Bamford-Addo authored the majority opinion and sought to explain how the Directive Principles, though generally not justiciable, might be protected as enforceable rights when linked with other parts of the Constitution that are justiciable. After reviewing the Committee of Experts report, she concluded that the Directive Principles provide “principles of state policy” and “goals for legislative programmes” and “are not of and by themselves legally enforceable by any court.”¹⁵³ Qualifying this statement, she added that “there are exceptions to this general principle.”¹⁵⁴ Justice Bamford-Addo further 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.”¹⁵⁵ She explained:

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

148. *CIBA*, (1997) Sup. Ct. Ghana L. Rep. at 730–31. Article 21(1)(e) reads, “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.” CONSTITUTION OF THE REPUBLIC OF GHANA May 8, 1992, art. 21(1)(e). Article 37(2)(a) provides that “[t]he 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,” and Article 37(3) adds that “[i]n 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.” *Id.* arts. 37(2)(a), 37(3). For Article 35(1), see *supra* note 134.

149. *CIBA*, (1997) Sup. Ct. Ghana L. Rep. at 730–31.

150. *See id.*

151. *See id.* at 752–61 (Ampiah, J., concurring); *id.* at 791–803 (Akuffo, J., concurring).

152. *Id.* at 787 (quoting CONSTITUTION OF THE REPUBLIC OF GHANA May 8, 1992, art. 33(5)).

153. *CIBA*, (1997) Sup. Ct. Ghana L. Rep. at 745.

154. *Id.*

155. *Id.*

rights in themselves. In those instances, they are of themselves justiciable also.¹⁵⁶

Applying these ideas to the case at hand, Justice Bamford-Addo concluded that the *CIBA* case “provides a good example of the special case where a provision under Chapter Six can be said to be an enforceable right,” because “Article 37(2)(a) and (3) regarding associations read together with article 21(1)(e) undoubtedly mean that every person in Ghana has ‘the freedom of association free from state interference.’”¹⁵⁷ In an apparent effort to counter the claim that, as a Directive Principle, Article 37 only identifies general policy objectives, Justice Bamford-Addo made the textualist argument that the article identifies “rights,” and the words “can only mean what they clearly say.”¹⁵⁸ Although these words are found in Chapter Six rather than Chapter Five, “they create a ‘right’ and can be held as a qualification” on the right of freedom of expression found in Chapter Five.¹⁵⁹ Such a conclusion is buttressed by 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.¹⁶⁰

Having articulated and applied to the relevant provisions the “criteria or test” for the justiciability of Directive Principles, Justice Bamford-Addo then sought to summarize the criteria or test again in a different way.¹⁶¹ 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 Six 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.¹⁶²

Here, Justice Bamford-Addo seems to suggest that if a Directive Principle created (what the fundamental law of reason would establish as) a fundamental human right, that would be enough for it to be justiciable. At the heart of her analysis is a concern about substantive principle and not technical form. For her, what really matters is whether the provision at issue identifies a fundamental human right. If it does, then its justiciability

156. *Id.*

157. *Id.* (citing CONSTITUTION OF THE REPUBLIC OF GHANA May 8, 1992, art. 37(2)(a)).

158. *Id.* at 746.

159. *Id.*

160. *Id.*

161. *See id.* at 747.

162. *Id.*

should not turn on its location in Chapter Six as opposed to Chapter Five.¹⁶³ Similarly, applying a fundamental law of reason, finding a formal link between Chapters Five and Six should not present any real barrier to the judicial protection of human rights.

3. *The Abass Case*

To illustrate the uncertain legacy of the *CIBA* case for the justiciability of socioeconomic rights advanced by the Directive Principles, we return to the case of the squatters and traders of Agbogbloshie.¹⁶⁴ In 1999, the government of Ghana, through the Accra Metropolitan Assembly, initiated the Korle Lagoon Ecological Restoration Project—undertaken to check flooding in parts of Accra during the rainy season—and required that the plaintiffs be evicted. The project extended to the plaintiffs' area of commercial activities and residence. Acting under the understanding that there was no legal duty to resettle and relocate the plaintiffs because they were squatters without any form of land titles, the Accra Metropolitan Assembly served a two-week eviction notice on the plaintiffs to vacate the area or face forced eviction.¹⁶⁵ The squatters sought an injunction against their eviction. Citing the recommendation of the project's Environmental and Social Impact Statement that the residents be relocated and resettled, they argued that because a public authority issued the eviction order in relation to public land, an eviction without a resettlement option would violate a number of their constitutional rights.¹⁶⁶

The plaintiffs relied on Articles 12(1), which states that “the fundamental human rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislative and Judiciary and all other organs of government and its agencies and, where applicable to them, by all natural and legal persons in Ghana, and be enforceable by the Courts as provided for in this Constitution;” Article 23, which secures fairness and reasonableness in administrative decision making; and Article 33, which provides for court enforcement of the Fundamental Rights.¹⁶⁷ They claimed that their eviction implicated the Fundamental Rights to life (Article 13), human dignity (Article 15), and equal educational opportunities (Article 25), as well as the unenumerated but interrelated and interdependent rights to work, livelihood, housing, and shelter.¹⁶⁸ With respect to the latter set of rights, the plaintiffs emphasized Article 33(5), which, reflecting the fundamental law of reason, states that “the fundamental human rights and freedoms specifically mentioned in this Chapter shall not be regarded as

163. *See id.* at 746.

164. *See generally* Abass v. Accra Metro. Assembly (*Abass*), Misc. 1203/2002 (Accra High Ct.), available at http://www.cepil.org.gh/ruling_31.pdf, archived at <http://www.perma.cc/0FYCagrPi2t>.

165. *Id.* at 1–2.

166. *Id.* at 2–4.

167. *Id.* at 4–5.

168. *Id.* at 6.

excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.”¹⁶⁹ Moreover, the rights to work, livelihood, housing, and shelter could be supported under the Directive Principles’ instruction that the state shall take steps to manage the economy in such a manner as to “provide adequate means of livelihood and suitable employment,” as “the most secure democracy is the one that assures the basic necessities of life for its people as a fundamental duty.”¹⁷⁰ Plaintiffs also invoked unspecified international human rights instruments and the South African *Grootboom* case in support of their argument.¹⁷¹

The Accra High Court rejected these claims, predicating its decision in part on the conceded status of the plaintiffs as squatters without formal legal rights to the land. Justice Appau found it erroneous to suggest that “these rights [can] be achieved through lawlessness,” and that “the mere eviction of plaintiffs who are trespassers, from the land they have trespassed onto, does not in anyway [sic] amount to an infringement on their rights as human beings.”¹⁷² The court held that, absent a binding contract between the parties, the defendant did not owe the plaintiffs any obligation to resettle them.¹⁷³ As squatters and trespassers, the plaintiffs were found to not be in a position to assert their constitutional rights against the owner of the land they occupied, or against the government. On this point, the court quoted an isolated passage from *Grootboom*:

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.¹⁷⁴

Unfortunately, the court adopted a narrow reading of this passage taken out of context to assume that squatters are automatically barred from claiming constitutional rights to housing on the ground that lawlessness detracts from respect for constitutional rights.¹⁷⁵ *Grootboom*, in contrast, held that squatters, like everyone, have constitutional rights to housing, and whether

169. CONSTITUTION OF THE REPUBLIC OF GHANA May 8, 1992, art. 33(5).

170. *Id.* arts. 36(1), 36(2)(e).

171. *Abass*, Misc. 1203/2002, at 4.

172. *Id.* at 14.

173. *Id.* at 11–12.

174. *Id.* at 13 (quoting *Gov't of the Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC) at para. 92).

175. On this, the court stated that “the court can only make an order for resettlement or relocation of a people whose property rights have been interfered with by others or by any natural catastrophe but such an order cannot be made in favour of a wrongdoer.” *Id.* at 14.

the character of their occupation of land bars them from asserting those rights depends on the circumstances and on what is reasonable.¹⁷⁶

The court adopted what was essentially a private law approach to the case, focusing on whether there was an enforceable contract requiring resettlement of the plaintiffs by the defendant, while at the same time failing to consider any rights the plaintiffs may have acquired through two decades of adverse possession, a doctrine explicitly recognized under Ghanaian law.¹⁷⁷ Underlying the private law approach was the presumption that the case concerned a horizontal relationship between private citizens of Ghana. From this perspective, it did not make any sense to allow the plaintiffs to benefit from an unauthorized occupation of private property. However, the legal relationship between the plaintiffs and the defendant was a vertical one between private citizens and a public authority, and in such a relationship the exercise of power vested in a public institution must be mediated by the interest of the governed.¹⁷⁸ Therefore, assessing the duties and rights in such a relationship is not simply a matter of matching up legal rights as known in private law but must involve a comprehensive examination with the view towards protecting the interests of the people from whom the power of the public authority is derived. The focus in this regard should be on the constitutional propriety of a public authority's conduct vis-à-vis the rights of vulnerable private persons like the plaintiffs. Thus, a more reasonable approach better suited to protect human rights would have been for the court to have determined the extent to which such rights are guaranteed by the Constitution; whether the eviction would infringe these rights; and whether the defendant has the constitutional obligation to respect such rights despite the plaintiffs having, at present at least, asserted their rights to shelter and work by trespassing (if they had not gained title through adverse possession). By ignoring the relevance of Article 33(5), the court failed to appreciate the limited legal virtues of the *CIBA* case.

To recognize that socioeconomic rights to shelter and livelihood may be asserted by thousands of people through a facially unlawful act 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. 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 patiently waiting for public assistance. This also raises the problem of separation of powers, for such a court order requiring the government to find alternative housing for the

176. See *Grootboom*, 2001 (1) SA at paras. 92–94.

177. Limitation Act, 54 N.R.C.D. § 10 (1972).

178. This point is reinforced by the government's fiduciary role as a necessary response to the power assumed and threats posed by public institutions. See Evan Fox-Decent & Evan J. Criddle, *The Fiduciary Constitution of Human Rights*, 15 *LEGAL THEORY* 301, 310 (2009).

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 by their unlawful actions. Such a process may not take into account the relative need of the person and if a person meets the criteria for public assistance. Yet the plaintiffs were victims of the seduction of urban economic opportunity and most likely lived in the slums of Sodom and Gomorrah because of the inability to secure other shelter. If the right to life means anything, one must have a means of livelihood. It is difficult to see how the state could fulfill its constitutional duties to provide for the means of livelihood and basic necessities of life if the plaintiffs can be evicted from their place of commercial activity without resettlement.

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.”¹⁷⁹ Someone who invades privately owned land to pressure the government to provide her with shelter is in a very different position than someone raised in a slum city that has developed over time because of 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 and examined before its implications for human rights and the rule of law can be understood. An estimated 70% of urban inhabitants in Africa lived in slums a decade ago, and it is plausible to suggest that this figure has risen since.¹⁸⁰ Most slum residents have no formal rights to land and live in abject poverty. This presents the survival-legality paradox. If power may not count as law for people unless their 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; in other words, poor people may simply appropriate the resources they need from others. Such a proposition seems to be contrary to, rather than inherent within, the idea of the rule of law.

C. The Fundamental Law of Reason: An Example from South Africa

Looking to South Africa, where the 1996 Constitution includes socio-economic rights in a single justiciable Bill of Rights,¹⁸¹ may help address the survival-legality paradox. In the case of *President of the Republic of South Africa v. Modderklip Boerdery*, the South African Constitutional Court relied expressly on the rule of law in holding that an order evicting thousands of squatters from privately owned land was not enforceable because it would deprive the squatters of their right to shelter. That the squatters had no

179. See Ocheje, *supra* note 5, at 176–79.

180. *Id.* at 174.

181. See, e.g., S. AFR. CONST., 1996 §§ 26–27, 29–30.

legal right to occupy the land did not mean that 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, even if that form of shelter infringed someone else's constitutional right to property.¹⁸² As Chief Justice Langa stated in writing the judgment for the Court, “[t]o 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.”¹⁸³

Yet, 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 Section 34 of the Constitution, would be infringed, thus also undermining the rule of law.¹⁸⁴ 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 failed to respect the rule of law. According to Justice Langa, 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.”¹⁸⁵ 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. Justice Langa reaffirmed the government's duty 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.¹⁸⁶

Viewed as an interpretive ideal, or as Fuller put it, an aspirational value, the rule of law becomes an end to work toward, rather than an all-or-nothing

182. *See President of the Republic of S. Afr. v. Modderklip Boerdery Ltd.* 2005 (5) SA 3 (CC).

183. *Id.* at 27.

184. *See id.* at 23–24 (citing S. AFR. CONST., 1996 § 34); *id.* at 28–29.

185. *Id.* at 25.

186. *Id.* at 27–28.

state.¹⁸⁷ It is possible that for the squatters in *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.

Ultimately, reciprocal and reasonable attempts to achieve and maintain the conditions needed for a state of legality to exist, including meeting the basic socioeconomic needs of people so that a political community exists, are what make power into law. On this account, the reasoning in the *Abass* case failed the test of the fundamental law of reason advanced here. The constitutional protection of only civil and political rights projects an image of truncated humanity that excludes those segments of society for whom autonomy means little without the necessities of life required for true freedom.¹⁸⁸ Without adequate housing, employment is difficult to secure and maintain, physical and mental health is threatened, education is impeded, violence is more easily perpetrated, privacy is impaired, and relationships are strained.¹⁸⁹ The individual must be able to enjoy freedom from want as well as freedom from fear. Courts must recognize as an interpretive principle that the meaning of constitutional guarantees will always be underdetermined by their wording, so reference must always be had, either explicitly or implicitly, to more general normative understandings of the society in which a legal decision maker operates.¹⁹⁰ Only then can they discover and determine through the principles of the fundamental law of reason the inherent meaning of a right, based on the normative values a decent and just legal system would uphold.¹⁹¹

CONCLUSION

The United Nations has declared that “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.”¹⁹² Subscription to democracy and human rights in Ghana and Nigeria necessitates a clear commitment of value by the courts, the fulfillment of which entails both the removal of constraints on the exercise of freedom and positive duties to facilitate the

187. See generally FULLER, *supra* note 15.

188. *Report of the World Conference on Human Rights: Report of the Secretary-General*, ¶ 5, U.N. Doc. A/CONF.157/24 (pt. I) (Oct. 13, 1993) (“All human rights are universal, indivisible and interdependent and interrelated.”); see also Scott & Macklem, *supra* note 67, at 9–11; P.H. Kooijmans, *Human Rights – Universal Panacea? Some Reflections on the So-Called Human Rights of the Third Generation*, 37 NETH. INT’L L. REV. 320, 321–27 (1990); *Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) at 11–12 (1979).

189. JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS: IN THEORY AND PRACTICE* 31–39 (2003).

190. See *id.* at 31.

191. See *id.*

192. *Id.* at 18.

exercise of that freedom.¹⁹³ If human rights are to be secured to all, it does not make sense to ignore constraints that arise as much from poverty, poor health, and lack of education, as from tyranny and intolerance.¹⁹⁴ For developing African countries where there is not a long tradition of governmental action securing socioeconomic justice, an approach to rights that accounts for the fundamental law of reason is crucial. Notwithstanding this imperative, courts in Ghana and Nigeria seek to distinguish principles of the rule of law from principles of policy, the former justiciable and the latter not. In Ghana, justiciability may be achieved if the Directive Principles can be read as part of or linked to a justiciable fundamental right. In Nigeria, the justiciability threshold may be higher, depending instead on an explicit legislative act. From the perspective of the fundamental law of reason, though, socioeconomic rights would be better protected and enforced if the Directive Principles were directly enforced without making their justiciability subject to other rights. There should not be a scale of justiciability that treats the socioeconomic rights advanced by directive principles as subordinate to or separate from other rights, but instead a system whereby such rights are treated as a different manifestation of the same rights necessary for legality to exist.

Law is a dynamic enterprise of interpretation, and therefore of justification, in which normative and descriptive statements blend together. A rigid focus on the particular text of constitutional provisions or framers' intentions displaces the proper judicial role, which must account for the fundamental law of reason in shaping the constitution as a body of values capable of protecting individual dignity and providing, sustaining, and enhancing the collective well-being or moral good of citizens. A focus on judicial enforceability as a definition for law and justiciability is overly simplistic and oversimplifies the role of law as a distinctive form of interpretive discourse. Directive principles are at the core of advancing constitutional justice in young democracies and must not be excluded from a proper account of the law for the well-being of the people. The claim that socioeconomic rights are legal rights in developing countries does not mean that governments must suddenly transform their countries into wealthy economies where poverty is unknown; it requires them to take reasonable steps toward the progressive realization of those rights, and to refrain from impermissible retrogression that puts citizens in a worse socioeconomic position. Thus, any law, act, or omission of the legislature or the executive that unreasonably derogates from the values of directive principles must be declared by courts as unlawful or unconstitutional. The virtues of the fundamental law of reason must mediate not just in the construction and interpretation of constitutions, but also in the understanding of the value of ordinary laws in

193. See SANDRA FREDMAN, *HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES* 9 (2008).

194. *Id.* at 11.

expressing norms of human dignity, welfare, and justice. The force and persistence of the values of directive principles must be shown in these legal systems as foundational ideas that protect individuals' rights and freedoms from the whims of politicians.

In the end, the Ghanaian government was able to obtain external funding to relocate the residents of Agbogbloshie to Adjen Kotoku, just 100 meters away.¹⁹⁵ In large part, however, they were compelled to do so by the continued resistance they met when trying to evict the squatters.¹⁹⁶ To some extent, this outcome lends support to the thesis advanced in this Article. Because the Agbogbloshie squatters had nowhere to go when they received the eviction order, they ignored the rule of law and refused to leave. For them, the law could not be law if following the law meant taking away their only means of survival. As one Agbogbloshie resident put it, "I don't have anything otherwise."¹⁹⁷ In these dire conditions, human rights, including the socioeconomic rights advanced by directive principles, must provide a common moral language to guide courts in developing constitutional interpretations that best support a cohesive theory of the rule of law.

195. As of February 2014, the Agbogbloshie traders are seeking an extension of their deadline to relocate. *Extend Deadline for Relocation – Traders to AMA*, KUMASI (Jan.28, 2014), http://www.kumasionline.net/index.php?option=com_content&view=article&id=6024:extend-deadline-for-relocation—traders-to-ama-&catid=1:general-news&Itemid=3, archived at perma.cc/ND3Q-Q9YV.

196. For a complete history of the Agbogbloshie squatters' struggle with the government, see *A Decade of Struggles and Lessons of Old Fadama*, *supra* note 4.

197. Chris Stein, *Inside Ghana's Electronic Wasteland at Agbogbloshie*, ALJAZEERA, <http://www.aljazeera.com/indepth/features/2013/10/inside-ghana-electronic-wasteland-2013103012852580288.html> (last modified Nov. 2, 2013), archived at <http://perma.cc/U52R-LVKL>.