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FAIR MEASURE OF THE RIGHT TO VOTE: A COMPARATIVE PERSPECTIVE ON VOTING RIGHTS ENFORCEMENT IN A MATURING DEMOCRACY

*Janaí S. Nelson**

“[A] measure of such things [w]hich in any degree falls short of the whole truth is not fair measure.”¹

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¹ PLATO, *THE REPUBLIC* bk. VI, 504c (Benjamin Jowett trans., 3d rev. ed. 1892). Professor Lawrence Gene Sager's article, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, from which this article draws its premise and title, opens with a slightly longer excerpt from *THE REPUBLIC*, containing this quote, which Sager notes was cited in similar prefatory fashion in Maurice Finkelstein, *Further Notes on Judicial Self-Limitation*, 39 HARV. L. REV. 221, 221 (1925). See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1212 & n.1 (1978).

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I. INTRODUCTION

Constitutional text and government action are at times discordant in important ways. This discrepancy occurs in both mature and emerging democracies. It can result in the underenforcement of constitutional norms and implicate the rule of law. When the constitutional norm involves the right to vote, the gap between constitutions and governance inevitably triggers concerns about democracy as well.

There is rich and ample debate within American legal scholarship over the effect of the underenforcement of constitutional norms on the scope and meaning of the norm. The arguments generally fall into one of two camps. One strand of argument suggests that judicial underenforcement of a constitutional norm does not define the norm itself; nor does it absolve non-judicial actors from enforcing the full conceptual scope of the norm. That is, a constitution's "operative provisions" are the foreground where the norm is defined.² The basis of these

² The respective concepts of "operative provisions" and "decision rules" exemplify the distinction between the weight accorded to the meaning of constitutional provisions in the first instance and that accorded to the judicial doctrine used to enforce that meaning in the second. *See, e.g.,* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9 (2004) [hereinafter Berman, *Constitutional Decision Rules*] (defining "constitutional operative propositions" as "constitutional doctrines that represent the judiciary's understanding of the proper meaning of a constitutional power, right, duty, or other sort of provision" and "constitutional decision rules" as "doctrines that direct courts how to decide whether a constitutional operative proposition is satisfied"). *See also* Kermit

arguments was originally formulated by James Bradley Thayer,³ and popularized by Lawrence Sager⁴ and others,⁵ and has since spawned its own body of legal scholarship.⁶ The second branch of underenforcement scholarship suggests that judicial implementation defines constitutional norms by employing the “implementing doctrine”⁷ or “decision rules”⁸ used to enforce some aspect of the norm. A related concept advanced by Richard Fallon and others suggests that, although underenforced norms

Roosevelt III, *Aspiration and Underenforcement*, 119 HARV. L. REV. F. 193, 194 (2006) (“Decision rules . . . are rules that courts apply to determine whether rights have been violated. They are not statements about the actual contours of rights; that is the whole point of the distinction.”); Mitchell N. Berman, *Aspirational Rights and the Two-Output Thesis*, 119 HARV. L. REV. F. 220 (2006) [hereinafter Berman, *Aspirational Rights*] (further describing the “meaning/doctrine” debate as one between “taxonomists” and “pragmatists,” respectively).

³ See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

⁴ See Sager, *supra* note 1.

⁵ See, e.g., Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 57 (1997) [hereinafter Fallon, *Foreword*] (arguing that “the Court often must craft doctrine that is driven by the Constitution, but does not reflect the Constitution’s meaning precisely”); RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 38 (2001) (arguing that the Court’s function of “identifying constitutional norms and specifying their means” is conceptually distinct from its function of crafting doctrine).

⁶ Indeed, there is a plethora of scholarship derived from Sager’s conception of constitutional norms and enforcement. See, e.g., Berman, *Constitutional Decision Rules*, *supra* note 2; Berman, *Aspirational Rights*, *supra* note 2, at 220 (noting that Professor Richard Fallon “set forth the most complete and forceful call to deprive meaning relative to doctrine”); Fallon, *Foreword*, *supra* note 5, at 57.

⁷ See Roderick M. Hills, Jr., *The Pragmatist’s View of Constitutional Implementation and Constitutional Meaning*, 119 HARV. L. REV. F. 173, 173 (2006) (defining “implementing doctrine” as rules that courts use “in their enforcement of the relevant [constitutional] value or principle in a cost-effective, institutionally sensitive manner”).

⁸ See, e.g., Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 890 (1999) (arguing that decision rules shape the contours of constitutional propositions or rights); Hills, *supra* note 7, at 179 (asserting that constitutional values “do not determine the shape of doctrine but rather are shaped by the doctrine”). Notably, the foundational propositions of these two strands of scholarship begin with this dichotomy, but most certainly do not end there. Indeed, the debate extends from the role of judicial constructs in determining the scope of norms on the one hand to the more pragmatic but no less rigorous inquiry into “decision rules” and “judicially manageable standards.” See, e.g., Berman, *Constitutional Decision Rules*, *supra* note 2 (distinguishing between “constitutional meanings” and “constitutional rules”); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1655-58 (2005) (describing the “decision rules” model of constitutional law).

may retain broader aspirational meaning, they do not mandate enforcement to the limit of their ideals.⁹

This Article aligns itself with the first branch of scholarship and borrows the “operative provisions” thesis to examine the right to vote when it exists as a constitutional norm in a maturing democracy.¹⁰ In particular, I extract two principles from the “operative provisions” thesis and employ them in the contexts of voting rights and comparative law to illustrate how and why underenforcement of a normative right to vote can occur in newer democracies. First, I adopt the position that the scope and meaning of a constitutional norm may be greater than its actual enforcement. Second, I rely on the argument that under- or non-enforcement results not only from a lack of judicial enforcement but also from underenforcement by the legislative and administrative actors that are obligated to enforce constitutional norms to their fullest extent. By employing these two principles, this Article analyzes an under-recognized underenforcement of the right to vote that has evaded the force of some of the most liberal contemporary constitutions. It also analyses the subsequent judicial enforcement of that norm as an integral step toward full enforcement of the fair measure of the right to vote.

To illustrate this phenomenon and apply the theory of constitutional underenforcement to practice, I use Ghana, in West Africa—a recently designated “maturing democracy”¹¹—as a case

⁹ See Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1324-25 (2006) [hereinafter Fallon, *Judicially Manageable Standards* (arguing that certain rights are “partly aspirational, embodying ideals that do not command complete and immediate enforcement” and thereby allowing for a “permissible disparity” between meaning and enforcement)]. *But see* Berman, *Aspirational Rights*, *supra* note 2, at 227 (rejecting Fallon’s aspirational norm thesis and arguing that policymakers do not have the right to underenforce constitutional norms).

¹⁰ My adoption of the “operative provisions” analysis is based on the positive nature of the constitutional right under consideration here and the lack of judicial interpretation of the particular matter of prisoner voting rights in Ghana, which is the subject of this Article, until recently. Unlike less choate constitutional values, the right to vote as articulated in Ghana’s 1992 Constitution is clear and unequivocal. *See infra* Part II.A. While significant case law supports an expansive reading of the right to vote, there were no decisional rules or supplementary doctrine concerning this discrete application of the right until March of this year. *See cases cited infra* notes 17, 73. Moreover, as a normative matter, allowing for expansive conceptions of constitutional meaning seems more consistent with the advancement of developing democracies, particularly those with illiberal pasts, than do the more constricted conceptions that emerge from a decision rules framework.

¹¹ Francis Kokutse, *Opposition Leader to Be Ghana’s President: Atta Mills Wins in W. African Nation’s Peaceful Balloting*, WASH. POST, January 4, 2009, at A16, available at

study. In particular, I examine Ghana's former practice of denying voting rights to its incarcerated citizens, despite a constitutional grant of universal adult suffrage, and the recent judicial enforcement of the fair measure of the right to vote. The former practice amounted to what I term a "systemic electoral inconsistency." Systemic electoral inconsistencies are instances in which a nation's election laws, systems, policies, or practices are at odds with its stated ideals for democracy. Put another way, it is when the rhetoric of a nation's democracy does not comport with its reality.¹² When a systemic electoral inconsistency manifests as a derogation of the constitution, it becomes a matter of constitutional underenforcement. I argue that fair measure of the right to vote is determined by the democratic ideals that define the systemic electoral inconsistency when that right is an underenforced constitutional norm. Despite underenforcement of the right to vote, the underlying constitutional norm remains as broad as its governing democratic ideals. Full enforcement of the norm, thus, can be actively pursued and ultimately achieved as it been now in Ghana.

During the course of Ghana's fifty-year history of independence and democratization, it has served as one of Africa's few reliable guideposts for the advancement of democracy.¹³ It

<http://www.washingtonpost.com/wp-dyn/content/article/2009/01/03> (discussing Ghana's two successful transfers of governmental power and declaring that the transfers of power between opposing parties is a significant indicator of a nation's democratic maturity).

¹² In a previous article I discussed one such systemic electoral inconsistency in which the rhetorical goals of the Voting Rights Act and majority-minority districts, at times, do not comport with electoral outcomes. See generally Janai S. Nelson, *White Challengers, Black Minorities: Reconciling Competition in Majority-Minority Districts with the Promise of the Voting Rights Act*, 95 GEO. L.J. 1287 (2007) (arguing that the inherent goals of the Voting Rights Act are compromised when competition in majority-minority districts results in the election of an individual other than the candidate of choice of the majority-minority community).

¹³ See René Lemarchand, *Ghana's Electoral Commission Provides Regional Model*, AFR. VOICES (U.S.), Winter/Spring 1998, at 1 ("Set against the backdrop of blocked, aborted, flawed, and contested elections in west and central Africa from 1992 to the present, Ghana's is a remarkable success story."). See also Kwame Bofo-Arthur, *Democracy and Stability in West Africa: The Ghanaian Experience*, in 4 CLAUDE AKE MEMORIAL PAPER SERIES 1, 7 (2008) (examining Ghana's regional success as a democracy and attributing it largely to its ability to manage election contestation among stakeholders without compromising democratic stability). Other examples of successful democracies in Sub-Saharan Africa include Benin, Botswana, Mali, Namibia, Senegal, and South Africa. See GRETCHEN BAUER AND SCOTT D. TAYLOR, POLITICS IN SOUTHERN AFRICA: STATE AND SOCIETY IN TRANSITION 6 (2005) (stating that Botswana, Namibia, and South Africa have received widespread acclaim for their successful transitions to democracy). See generally J. Tyler Dickovick, *Legacies of Leftism: Ideology, Ethnicity,*

was the first country in sub-Saharan Africa to gain independence from colonial rule and has since earned the designation of a "maturing democracy" as a result of the successful transfer of power between the country's leading political parties in its two previous presidential elections.¹⁴ Most recently, Ghana's Supreme Court reinforced its commitment to constitutionalism and full democratic participation by enforcing the fair measure of the right to vote.¹⁵

Its notable progress notwithstanding, since its inception as a constitutional democracy in 1992 until March of this year, Ghana harbored a longstanding systemic electoral inconsistency. The plain terms of Ghana's constitution provide that "[e]very citizen of Ghana of eighteen years of age or above and of sound mind has the right to vote and is entitled to be registered as a voter for the purposes of public elections and referenda."¹⁶ Ghana's highest court had characterized the constitutional right to vote as belonging to "every sane Ghanaian citizen of eighteen years and above,"¹⁷ making no exceptions for any category of citizens other than on the basis of age and mental capacity. Yet, Ghana did not permit its incarcerated citizens to vote until recently.¹⁸

and Democracy in Benin, Ghana, and Mali, 29 THIRD WORLD QUARTERLY 1119 (U.K.) (2008) (discussing successful democracies in Benin, Ghana, and Mali). *But see* Arch Puddington, *The 2008 Freedom House Survey: A Third Year of Decline*, J. DEMOCRACY, Apr. 2009, at 93, 101-02 (finding that after years of democratic progress Sub-Saharan Africa has experienced a year of reversals with Senegal and Namibia experiencing declines).

¹⁴ See Kokutse, *supra* note 11.

¹⁵ See *infra* Part II.B.

¹⁶ GHANA CONST. 1992 art. 42 (emphasis added). Article 55 provides additional political rights to Ghanaian adult citizens: "Every citizen of Ghana of voting age has the right to join a political party." *Id.* art. 55(2). "Subject to the provisions of this constitution, every citizen of voting age has the right to participate in political activity intended to influence the composition and policies of the Government." *Id.* art. 55(10). Although these additional political rights are not expressly explored here, it follows that the same analysis—concerning whether Ghana's incarcerated citizens possess voting rights under the constitution—would generally apply to the exercise of these rights as well.

¹⁷ *Tehn Addy v. Att'y Gen. & Electoral Comm'r*, [1997] 1 G.L.R. 47, 52-53 (Sup. Ct., Accra) (Ghana) [hereinafter *Tehn Addy*].

¹⁸ Since its adoption in 1992, the Provisional National Defense Council Law [PNDCL] 284 has barred incarcerated persons from voting by virtue of its residency requirement. Section 7(1) of the PNDCL requires that a voter be a resident of the polling division where they seek to register. Provisional National Defense Council Law (PNDCL) 284 § 7(1) (Ghana). This residency requirement effectively prevents incarcerated citizens from voting because section 7(5) declares that a person "who is detained in legal custody of any place shall not be treated as a resident there." *Id.* Complying with Sections 7(1) and 7(5) of the PNDCL, the EC refused to register prisoners for the 1992, 1996, 2000, and 2004

This systemic electoral inconsistency derived from both judicial and non-judicial underenforcement of the right to vote. Ghana's Electoral Commission (EC) refused to register Ghana's incarcerated citizens (GICs) to vote, notwithstanding the expansive universal adult suffrage provided in the text of Ghana's constitution, which does not limit voting rights based on criminal status. By all accounts, the EC's refusal to enforce the constitution in this regard was an unofficial administrative decision that had gone unchecked by the judiciary and the legislature, resulting in underenforcement by all branches of government. The constitution authorizes the EC and the president appoints its commissioners.¹⁹ The EC's justification for not registering GICs rested on two primary factors: (1) GICs could not meet the registration qualifications of subsidiary laws that required prospective voters to register at their current place of residence but prohibited registrants from using prisons as an address for this purpose;²⁰ and (2) the judiciary had not instructed the EC to register GICs to vote.²¹ As demonstrated in this Article, neither of these explanations justified the underenforcement of the constitution's affirmative grant of universal adult suffrage. Thus, Ghana's unauthorized practice of criminal disfranchisement for nearly two decades and subsequent judicial enforcement of the right to vote provides an opportunity to analyze the broad implications of the underenforcement of the right to vote as a systemic electoral inconsistency and its direct bearing upon constitutionalism and the rule of law in a maturing democracy. Ghana now stands poised to serve as a model for both emerging and other maturing democracies throughout sub-Saharan Africa and beyond Africa's borders. Indeed, Ghana's constitutional development is still sufficiently nascent to illustrate the universal

elections. See Centre for Human Rights & Civil Liberties (CHURCIL) v. The Attorney General and Electoral Commission, [2010] __ G.L.R. __ (Sup. Ct., Accra) (Ghana) (unpublished opinion on file with author) (hereinafter *Ocansey/CHURCIL*) (opinion of Owusu, JSC) (declaring "prisoners were excluded from exercising their franchise in the 1992, 1996, 2000, 2004 and indeed they were so excluded in the 2008 elections"). The *Ocansey/CHURCIL* decision was issued in five separate opinions, individually authored by each of the five justices in the Superior Court of Judicature in the Supreme Court of Ghana, otherwise referred to as the Supreme Court of Ghana, which is its highest court of appeal. See GHANA CONST. 1992 art. 129.

¹⁹ GHANA CONST. 1992 art. 43.

²⁰ See *infra* Part II.C.1.

²¹ See *supra* note 18.

challenges of newer democracies in their constitutional enforcement efforts and overall democratization.²²

In Part II, I explore the broader context of underenforcement of the right to vote. Building on the premise that underenforcement can result from a lack of judicial, legislative, or administrative enforcement, I argue that non-judicial actors are obligated to fully enforce constitutional norms.²³ I begin by briefly defining the concept of a constitutional norm and then measuring the scope of Ghana's constitutional norm of universal suffrage through a disquisition of relevant legal doctrine, including the constitutional provisions, case law, and statutes to which the EC is bound. Unlike the U.S. Constitution,²⁴ both a literal and

22 Far too infrequently Africa is mined for its didactic potential in the area of political development and nation-building, where it can serve as both an exemplar of negative and positive outcomes and a means to better understand this area of the world. See H. Kwasi Prempeh, *Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa*, 80 TUL. L. REV. 1239, 1249 (2006) [hereinafter Prempeh, *Marbury in Africa*] (describing how scholars have largely disregarded Africa's constitutions as comparative law sources). Indeed, because "[c]ontemporary Africa's democracy and constitutionalism projects are still works-in-progress, and relatively young ones at that," they are rich terrain for research and study. H. Kwasi Prempeh, *Africa's "Constitutionalism Revival": False Start or New Dawn?*, 5 INT'L J. CONST. L. 469, 506 (2007) [hereinafter Prempeh, *Africa's "Constitutionalism Revival"*]. Moreover, because the bedrock of successful democratization is respect for the rule of law, examining how developing democracies like Ghana resolve minor threats to—or deficiencies in—adherence to the rule of law in forming their democratic identity, or in pursuing constitutionalism, is instructive to other countries on a similar quest. This didactic exercise is, of course, a two-way street.

Africa's newly democratizing states, like transitional democracies generally, start off with an impoverished stock of homegrown constitutional case law. . . . This dearth of domestic constitutional case law necessitates some reliance . . . on relevant constitutional precedents and doctrine developed elsewhere. While wholesale borrowing from any one foreign source is plainly unwise and must be avoided, there is much that Africa's transitional democracies can gain by looking to the experiences of other jurisdictions.

H. Kwasi Prempeh, *A New Jurisprudence for Africa*, J. DEMOCRACY, July 1999, at 135, 146.

23 This argument does not originate with this Article, although it is a developing area of scholarship within the broader area of metadoctrinalism. Indeed, there are several articles discussing the extent to which, if any, non-judicial actors have enforcement obligations with respect to constitutional norms. See, e.g., Robin West, *Unenumerated Duties*, 9 U. PA. J. CONST. L. 221, 223 (2006) (highlighting a void in liberal constitutional theory concerning the moral duties of legislative actors to enforce constitutional norms). See also Sager, *supra* note 1, at 1220-28 (providing one of the earliest articulations of this idea).

24 The U.S. Constitution does not contain a positive right to vote in its text and, thus, is arguably subject to a different measure for enforcement purposes. This point was most recently reinforced by the Supreme Court of the United States in *Bush v. Gore*, 531 U.S.

contextual interpretation of Ghana's constitution reveal a positive right to vote for the enjoyment of all qualified citizens, regardless of criminal status. I further argue that one of the threats posed by the underenforcement of constitutional norms by administrative actors is the deference accorded to the administrative interpretations of the norm that may later limit judicial review. The recent litigation in Ghana's Supreme Court on the constitutional interpretation of the right to vote, and whether it extends to the country's more than 13,000 prisoners, bore directly on how Ghana's judiciary resolves systemic electoral inconsistencies produced by administrative underenforcement of constitutional norms. Fortunately, in this instance, the administrative interpretation of the norm did not prevent Ghana's Supreme Court from according the right to vote its fair measure.

In order to understand why a systemic electoral inconsistency such as underenforcement of the right to vote could exist for so long in a maturing democracy like Ghana, I explore the political

98 (2000), where the Court recommitted itself to the principle that "[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States . . ." *Id.* at 104. Curiously, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), which is widely cited as establishing voting as a fundamental right, was not a voting rights case. Rather, in *Yick Wo*, the Court invalidated a facially neutral California law regulating laundries because the law was applied exclusively against Chinese laundry owners. *See id.* The Court reasoned:

[T]he very idea that one man may be compelled to hold . . . any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.

There are many illustrations that might be given of this truth, . . . [and] the political franchise of voting is one.

Id. at 370. The Court further stated that voting is a fundamental right because it is "preservative of all rights." *Id.* Nearly a century later, in *Wesberry v. Sanders*, 376 U.S. 1 (1974), a voting rights case, the Court underscored this point. *Id.* at 17-18 (holding that "[o]ur Constitution leaves no room for classification of people in a way that unnecessarily abridges" the right to vote).

However, unlike in Ghana, U.S. Courts have enforced the equal protection norm that undergirds the right to vote for all citizens in the absence of a positive right to vote. For example, through enforcement of the Fourteenth, Fifteenth, Nineteenth, and Twenty-Fourth Amendments, the Court has upheld an equal right to vote for various categories of citizens. *See, e.g.,* *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (holding poll taxes unconstitutional in both state and federal elections); *Reynolds v. Sims*, 377 U.S. 533 (1964) (establishing the principle of populations equality or "one person-one vote" under the Fourteenth Amendment); *Lane v. Wilson*, 307 U.S. 268 (1939) (holding that the Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination" based on race in voting); *Lesser v. Garnett*, 258 U.S. 130 (1922) (holding that the Nineteenth Amendment had been properly adopted).

context of the underenforcement. Starting with an overview of Ghana's development as a constitutional democracy, Part III explains how Ghana came to be the recognized constitutional democracy that it is today. Many emerging democracies with a similar history of military dictatorship and political unrest share Ghana's trajectory in pursuit of constitutionalism. I argue that, in emerging democracies with such histories, the underenforcement of constitutional norms results from the entrenchment of illiberal extra-constitutional norms among judicial and non-judicial actors despite the existence of a liberal constitution.²⁵

Part IV acknowledges that while constitutional norms should be enforced fully by all government officials, reality proves that the constitutional provisions articulating such norms are not sufficient if there is no judicial enforcement. As Ghana's case demonstrates, multilateral enforcement is necessary to ensure protection of the right to vote. This analysis also considers the importance of the rule of law for maturing democracies and briefly explores the relationship between the rule of law, constitutionalism, and democratization as enforcement imperatives for modern constitutional democracies. At the heart of this analysis is the determination that underenforcement of the right to vote as a constitutional norm is detrimental to constitutional democracy as a whole. This is especially so when the practice contradicts popular sentiment. This appears to be supported by at least one informal empirical study conducted in Ghana among GICs, opinion leaders, and others, suggesting that

²⁵ The term "illiberal" was introduced as a modifier of democracy in 1997 by author and journalist Fareed Zakaria. See Fareed Zakaria, *The Rise of Illiberal Democracy*, 76 *FOREIGN AFF.* 22 (1997). Zakaria suggests that illiberal democracies are those that run open, free, and fair elections but do not secure basic civil rights and civil liberties for citizens, and whose governments do not observe constitutionally determined limits on their powers. See *id.* at 22-25. My use of the term illiberal to describe Ghana's underenforcement of the right to vote does not suggest that Ghana is *itself* an illiberal democracy. For reasons fully articulated in this Article, it is clear that Ghana is thriving as a democracy in both form and substance. Indeed, by Zakaria's own definition, Ghana is a liberal democracy; its "political system [is] marked not only by free and fair elections, but also by the rule of law, separation of powers, and the protection of basic liberties of speech, assembly, religion, and property." *Id.* at 22. Rather, I employ delicate use of the term "illiberal" to underscore the inconsistency—i.e., the systemic electoral inconsistency—between Ghana's broad constitutional grant of universal suffrage and the underenforcement of that right by its government, which results in part from Ghana's illiberal history. See *infra* note 165 and accompanying text.

Ghanaians as a whole did not support the disfranchisement of GICs.²⁶

Finally, the Article concludes by considering why systemic electoral inconsistencies occur concerning the right to vote. The conclusion posits that in many, but not all, instances where the right to vote is underenforced, marginalized populations with fewer resources to command enforcement suffer the consequences of underenforcement most directly. Ghana's prior disparate treatment of its citizens abroad and its incarcerated citizens at home underscores this point.

Passivity toward the enforcement of constitutional norms, particularly systemic electoral inconsistencies involving the right to vote, is antithetical to the democratic identity and the principles of a constitutional democracy. In Ghana's case, like many others, the underenforcement of the right to vote with respect to a marginalized class of citizens, such as persons incarcerated for criminal behavior, may not by itself threaten to dismantle an entire democratic regime. However, it is one of the many wounds that systemic electoral inconsistencies and the underenforcement of constitutional norms inflict on the integrity of constitutional democracies, especially newer ones, which can cumulatively weaken the democratic enterprise. Judicial enforcement of constitutional norms is therefore a crucial backstop to preserve democratization and constitutionalism in maturing democracies.

II. MEASURING THE RIGHT TO VOTE IN A MATURING DEMOCRACY: GHANA AS CASE STUDY

The right to vote, while popularly recognized as fundamental to democracy, is also widely understood to be subject to reasonable limitations. The legal instrument that grants the right to vote often aids the determination of the scope and breadth of the right, as well as the reasonableness of the limitations placed upon it. When a written constitution establishes the right to vote, the constitution becomes the baseline for constructing the scope of the right and gives rise to the enforcement of the right.²⁷

²⁶ In 2005 and 2006, I lived and conducted research in Ghana on democratization, prison conditions, and the practice of criminal disfranchisement as a Fulbright Scholar. The methodology for and outcomes of my informal empirical research are set forth in Part IV.B. *See also infra* note 202.

²⁷ However, as noted above, the right to vote is not always constitutionally enshrined. *See supra* note 24.

However, constitutional text establishing the right to vote and government action enforcing that same right are not always harmonious and, in fact, can be discordant in important ways. At least one of the important ways in which this discord manifests is in the underenforcement of constitutional norms. The effect of this underenforcement, particularly if it results from judicial passivity, is particularly acute not only from the standpoint of those directly affected by the underenforcement but also because of the impact that judicial underenforcement has in the legislative and administrative arenas.

American scholars have engaged in rigorous debate regarding constitutional interpretation and the scope of underenforced constitutional norms since the 1970s. Professor Mitchell Berman coined the term “metadoctrinalism,” to refer to the body of scholarship that “concerns itself with the fact of doctrine but not with its particular *content*.”²⁸ Examples include the study of the U.S. Supreme Court’s role in interpreting and implementing the Constitution without regard to the substantive content of the provisions at issue. This Article contributes to the metadoctrinal discussion—at a point before the debates surrounding “decision rules,”²⁹ “implementing doctrine,” “operative propositions,”³⁰ “aspirational rights,”³¹ and the like begin—by extracting the underlying query regarding the effect of the underenforcement of constitutional norms and employing it in the contexts of voting rights and comparative law.

Indeed, the foundational principles within the body of metadoctrinal scholarship are universal. A threshold query is whether a constitutional norm can exist in a form that is broader than its enforcement. As noted above, this question is usually answered in one of two ways. Some constitutional theorists argue that judicial underenforcement co-terminously circumscribes the scope of the right.³² Others argue that the right maintains its original scope and breadth despite the judicial

²⁸ Berman, *Constitutional Decision Rules*, *supra* note 2, at 4 (emphasis in original) (defining the term and citing Larry Sager’s *Fair Measure*, among examples of metadoctrinal scholarship, as one of the earliest works of metadoctrinalism).

²⁹ *Id.* at 16.

³⁰ *Id.*

³¹ See Fallon, *Judicially Manageable Standards*, *supra* note 9, at 1324-25 (arguing that certain rights in the constitution are “partly aspirational, embodying ideals that do not command complete and immediate enforcement”).

³² See, e.g., *supra* note 2.

underenforcement.³³ One of the reasons that the effect of judicial underenforcement matters is because of what Sager and others have described as the independent onus of legislative and administrative constitutional norm enforcement. If other government actors have a burden to enforce the constitution that is equal to or greater than that of the judiciary, whether judicial underenforcement of a constitutional norm involving the right to vote defines the scope of the right becomes even more consequential.

I examine below what constitutes a constitutional norm and use Ghana's constitution to demonstrate how a norm is constructed in the form of a right to vote. I then explore the prior underenforcement of Ghana's right to vote, and the recent judicial enforcement of the norm, within the current metadoctrinal debate on the impact of underenforcement. I conclude that underenforcement of the right to vote by any government actor is careless at best and detrimental to democracy and the rule of law at worst, but that judicial enforcement of the fair measure of the norm potentially remediates the underenforcement in all spheres.

A. *The Right to Vote as a Constitutional Norm*

A constitutional norm is a concept expressed in the text of a constitution that embodies a normative value.³⁴ Some constitutional texts, including that of the United States, articulate precepts that give rise to specific rights and privileges because of the rules used to enforce them, otherwise known as the "decision rules."³⁵ Accordingly, a specific concept, such as the right to vote, can achieve normative status in a constitution if it is expressed as a positive right,³⁶ and if other constitutional provisions also reinforce the concept. A supermajority of national constitutions in the world contains a positive right to vote.³⁷ The right to vote as set

³³ *Id.*

³⁴ See Sager, *supra* note 1, at 1213 (describing a constitutional norm as "a statement which describes an ideal which is embodied in the Constitution").

³⁵ See Berman, *Constitutional Decision Rules*, *supra* note 2, at 9.

³⁶ See JOSEPH RAZ, PRACTICAL REASON AND NORMS 175 (2d ed. 1990) (1975) (defining normative statements as those that are not precatory or stated in the conditional, but rather, are assumptive of the validity of what ought to be done).

³⁷ This assertion is based on my informal survey of world constitutions, which reveals that a supermajority of the constitutions of democratic nations contains an express right to vote in their texts. See generally Constitutions of All Countries, <http://www.cmseducation.org/wconst/> (reprinting and excerpting text from constitutions

forth in Ghana's 1992 Constitution is among the most expansive and robust.

Ghana's 1992 Constitution, which became effective in 1993, sets forth the blueprint for the latest and most lasting incarnation of democracy since Ghana achieved independence in 1957.³⁸ Essential to Ghana's democratic framework is the position that the Constitution occupies as the nation's supreme body of law.³⁹ The Constitution's seventh chapter, which is entitled "Representation of the People," sets forth the constitutional mandates concerning the right to vote; the establishment, composition, and duties of the Electoral Commission of Ghana; and the structure and operation of political parties.⁴⁰

Article 42 of the Constitution contains the textual basis for the right. The plain text of Article 42 establishes that "[e]very citizen of Ghana of eighteen years of age or above and of sound mind has the *right to vote* and is entitled to be registered as a voter for the purposes of public elections and referenda."⁴¹ The Constitution confers these rights, referred to collectively herein as "the right to vote," without any qualification, restriction, or

around the world). Among these, the right to vote is not without limitation. Indeed, many constitutions have express limitations based on age, citizenship, and, to a lesser extent, criminal status or other legal standing. *See infra* note 121.

³⁸ H. Kwasi Prempeh, *Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa*, 35 HASTINGS CONST. L.Q. 761, 766 (2008).

³⁹ *See* Afrobarometer, Briefing Paper No. 20, Parliament of the Fourth Republic of Ghana—Views from the Grassroots 1 (2005), available at <http://www.afrobarometer.org/papers/AfrobriefNo20.pdf> [hereinafter AFROBAROMETER NO. 20]. Ghana's 1992 Constitution consists of twenty-six chapters, containing a total of 299 articles, excluding schedules. In 1990, the Provisional National Defense Council (PNDC) created the National Commission for Democracy (NCD), and charged it with organizing a series of regional debates considering Ghana's political and economic future. T.C. McCaskie, *Recent History*, in AFRICA SOUTH OF THE SAHARA 2003, at 446, 447 (Katharine Murison ed., 32d ed. 2003). In March 1991, the NCD presented its results and recommendations for a constitutional framework to the PNDC. *Id.* at 448. Around this time, a Committee of Experts was created to draft proposals that would be incorporated into a new constitution, taking into account previous constitutions of Ghana, the work of the NCD, and other national constitutions. Kwame Boafo-Arthur, *A Decade of Liberalism in Perspective*, in GHANA: ONE DECADE OF THE LIBERAL STATE 1, 2-3 (Kwame Boafo-Arthur ed., 2007). In March 1992, the Consultative Assembly endorsed most constitutional recommendations from the Committee of Experts. McCaskie, *supra*, at 448. In a national referendum on April 28, 1992, with 43.7% of the electorate voting, 92% of voters approved the draft constitution. *Id.*

⁴⁰ *See generally* GHANA CONST. 1992 ch. 7.

⁴¹ *Id.* art. 42 (emphasis added).

condition, other than the three prerequisites of (1) citizenship,⁴² (2) age (18 and above), and (3) sanity.⁴³ Importantly, unlike certain other provisions of the Constitution, Article 42 is self-executing.⁴⁴ Article 42 cannot be subject to any other constitutional provision or to the discretionary authority of any government official or institution; nor does its enforceability require legislative action by Parliament. Accordingly, as a matter of strict interpretation, Article 42 establishes the right to vote as irreducible and inviolable.⁴⁵

Article 42 is devoid of the express restrictions based on criminal status contained in pre-independence versions of the Constitution.⁴⁶ Article 1 of the 1960 Constitution of Ghana provided:

[W]ithout distinction of sex, race, religion or political belief, every person who, being by law a citizen of Ghana, has attained

⁴² The 1992 Constitution sets forth the laws establishing citizenship in Ghana. *See id.* art 6(1). Section 18 of the Citizenship Act of 2000 establishes the criteria for deprivation of citizenship. *Citizenship Act, 2000 (Act 591)* [Ghana], 5 January 2001, available at <http://www.unhcr.org/refworld/docid/3eda135a2.html> (last visited March 28, 2010). Notably, neither the 1992 Constitution nor the Citizenship Act of 2000 conditions citizenship, or the deprivation thereof, upon criminal status.

⁴³ The EC's website generally mirrors these registration qualifications:

Who can register:

Every citizen of Ghana of sound mind has the right to vote and entitled to be registered as a voter for the purpose of public elections and referenda[.]

....

Qualification for registration:

- Applicant must be a Ghanaian
- Must be 18 years of age or above
- Must be of a sound mind
- Should be residents or ordinarily residents in the electoral area where he /she wants to register
- Must not be prohibited by any law in force from registering as a voter

Electoral Commission of Ghana, Who Can Register, <http://www.ec.gov.gh/?q=node/51> (last visited Aug. 14, 2009) (formatting and punctuation of original source altered).

⁴⁴ For example, Article 22, which regulates the property rights of spouses, and Article 28, which defines the rights of children, requires parliamentary action to enact appropriate legislation to give effect to these constitutional provisions. *See* GHANA CONST. 1992 arts. 22, 28.

⁴⁵ *Ocansey/CHURCIL*, *supra* note 18 (opinion of Wood, C.J.), at 21 (holding that “the express provisions of article 42 of the 1992 Constitution confer[] the right to vote on all Ghanaians, save those below eighteen years and persons on unsound mind”).

⁴⁶ *See* F.A.R. BENNION, THE CONSTITUTIONAL LAW OF GHANA 119 (1962) (discussing the repeal of Ghana's previous constitutions).

the age of twenty-one years and is not disqualified by law on grounds of absence, infirmity of mind *or criminality*, shall be entitled to one vote, to be cast in freedom and secrecy.⁴⁷

However, in every subsequent constitution, Ghana has omitted any reference to criminality in favor of an increasingly broad right to universal adult suffrage.⁴⁸ The contextual interpretation of the Constitution signals a post-independence intent to grant a more expansive franchise than in previous constitutions and to eliminate restrictions on voting for all citizens, including GICs.

B. Evolving Judicial Enforcement of the Right to Vote

As noted above, the metadoctrinal debate regarding the scope of underenforced constitutional norms is expansive. An important outgrowth of this scholarship is a closer examination of non-judicial government actors in the context of constitutional enforcement.⁴⁹ Judicial underenforcement occurs when the rules or constructs that courts use to enforce a constitutional norm result in extending a right that is narrower than the norm.⁵⁰ Legislative underenforcement similarly occurs when legislators fail to enact laws that implement the constitutional norm at issue for reasons ranging from practical costs to apathy. Likewise, administrative underenforcement occurs when administrators fail to create rules or take sufficient enforcement action to animate a constitutional norm. With respect to each of these categories of

⁴⁷ GHANA CONST. 1960 art. 1 (emphasis added).

⁴⁸ GHANA CONST. 1969 art. 29 (“Every citizen of Ghana being twenty-one years of age and of sound mind shall have the right to vote; and accordingly shall be entitled to be registered as a voter for the purposes of public elections.”); GHANA CONST. 1979 art. 36 (“A citizen of Ghana not being less than eighteen years of age and of sound mind shall have the right to vote; and accordingly he shall be entitled to be registered as a voter for purposes of public elections and referenda”). Despite the existence of these clear constitutional provisions since 1969, GICs have never been afforded the right to vote.

⁴⁹ See, e.g., West, *supra* note 23, at 221.

⁵⁰ Judicial non-enforcement occurs when judicial actors fail to enforce a constitutional provision, including for reasons of non-justiciability. See, e.g., Sager, *Fair Measure*, *supra* note 1, at 1224-27 (attributing certain judicial enforcement to nonjusticiability under the political question doctrine); Fallon, *Judicially Manageable Standards*, *supra* note 9, at 1306 (observing that “a determination of nonjusticiability due to the absence of judicially manageable standards is simply the limiting case of a decision to underenforce constitutional norms”).

governmental underenforcement, there may also be non-enforcement resulting from inaction.⁵¹

This Article takes the position that a constitution's operative provisions define the scope of the right, and that both judicial and non-judicial actors are duty bound to enforce the right to its fullest extent.⁵² Ghana's prior underenforcement of the 1992 Constitution concerning GICs' right to vote illustrates this point. Even though Ghana had not enforced its right to vote provisions fully, those norms were no less expansive in their definition than when first enacted, permitting Ghana's Supreme Court later to enforce the fair measure of the constitutional norm. Integral to the analysis of whether Ghana's prior disfranchisement of GICs will have measurable repercussions in shaping its profile as a democracy is the extent to which the recent judicial enforcement of the right to vote reverses the administrative departure from the Constitution and the scope and timeliness of the implementation of the court's decision. This investigation involves a literal interpretation of the text of Ghana's Constitution, as well as an understanding of how the foremost arbiters of its meaning—the judiciary, legislature, and administrative agencies of Ghana—have interpreted it. Ghana's practice of disfranchisement violated the rule of law and constitutionalism because it was inconsistent with the broad grant of universal adult suffrage contained in the Constitution. Remediating this systemic electoral inconsistency required an unambiguous constitutional interpretation and a forceful statement of the constitutional norm by Ghana's highest court in the first instance. Full realization of the fair measure of

⁵¹ The failure to fully implement or enforce a constitutional norm may result from both underenforcement and non-enforcement. In the case of a constitutional norm of universal suffrage, voting rights may be enforced with respect to most eligible voters most of the time, but may not be enforced with respect to others, which results in under-enforcement of the norm as a whole and non-enforcement with respect to the individuals or groups denied voting rights.

⁵² The position I take in this Article falls shy of Sager's "justice seeking" approach, outlined in his composite work, LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE (2004). Sager's "justice seeking" thesis envisions a "transtemporal partnership at the heart of our constitutional practice" between the framers and judges, because "the heart of the social project of constitutional justice is the impartiality and generality of the moral perspective." *Id.* at 73, 76 (internal citation omitted). While I do not disagree with this position, the specific issue and case study that I examine here do not require that I to employ Sager's more generous outlook, considering the strength of the constitutional provisions under consideration. The "justice seeking" approach, however, is more closely aligned with my notion of "systemic electoral inconsistencies." *See id.* at 76.

the norm now lies in thoughtful administrative enforcement of the norm as framed by the judiciary.

1. *The Ghanaian Context*

Prior to March of this year, there were no reported judicial opinions involving the voting rights of prisoners in Ghana. On November 12, 2009, the Court consolidated the cases of *Ahumah Ocansey v. The Electoral Commission*,⁵³ and *Centre for Human Rights and Civil Liberties (CHURCIL) v. The Attorney General and the Electoral Commission*⁵⁴ [hereinafter *Ocansey/CHURCIL*], both of which sought an interpretation of Article 42 of the constitution to determine its application to convicted and remand prisoners, respectively.

Ahumah Ocansey, a legal practitioner and advocate for prisoner rights, brought suit in his capacity as a Ghanaian citizen.⁵⁵ Ocansey asserted that under Article 42 of the 1992 Constitution, and other articles within the constitution, it is unconstitutional and illegal to exclude prisoners from the class of persons qualified to vote.⁵⁶ CHURCIL brought its suit as a non-profit civil society organizer committed to upholding the fundamental human and constitutional rights of remand prisoners under the 1992 Constitution.⁵⁷ Their collective prayers for relief were for declaratory judgment that (1) Section 7(5) of the Representation of the People Act (ROPAL) is unconstitutional because it violates Article 42 of the Constitution by denying voting rights to remand and convicted prisoners; (2) Parliament acted in excess of its

⁵³ Suit#J1/4/2008 (2010) (Ghana) (unpublished opinion on file with author).

⁵⁴ Suit#J1/5/2008 (2010) (Ghana) (unpublished opinion on file with author). About the same time that *Ocansey v. The Electoral Commission* was filed, the Legal Resources Centre (LRC) in Ghana filed an action for a writ of mandamus to compel the EC to register GICs in advance of the December 2008 presidential and parliamentary elections. LRC filed the case on behalf of Kobla Senorpe, a prisoner of Ghana's Ho region, and on behalf of all other prisoners otherwise eligible to register and vote in public elections and referenda. *LRC Files Writ to Register Prisoners to Vote*, MODERN GHANA NEWS, July 28, 2008, <http://www.modernghana.com/news/176219/1/lrc-files-writ-to-register-prisoners-to-vote.html> (last visited March 27, 2010). In its supporting affidavit, LRC asserted that it wrote to the EC in May 2008 to remind the EC of its responsibilities to register Ghanaian prisoners who meet the age and sanity qualifications so that they could vote in public elections and referenda and that, on June 10, the EC responded that it was unable to register the prisoners for voting because of legal restrictions under PNDCLs. *Id.* The writ failed with no reported decision, essentially leaving no judicial footprint on this issue.

⁵⁵ *Ocansey/CHURCIL*, *supra* note 18 (opinion of Wood, C.J.), at 3.

⁵⁶ *Id.* at 4.

⁵⁷ *Id.* at 1-3.

powers by enacting Provisional National Defense Council⁵⁸ Law 284 (PNDCL); and (3) Section 7(5) unduly discriminates against remand prisoners because the amended Section 8 of PNDCL 284 enables Ghanaian residents abroad to register and vote in public elections and referenda—despite the residency requirement—while denying prisoners in Ghana the right to vote—as a result of the residency requirement.⁵⁹ In addition, the petitioners prayed to the Supreme Court to compel the EC to exercise its constitutional powers to facilitate and ensure registration of and voting by GICs.⁶⁰ Both the Attorney General and the EC opposed the relief sought by plaintiffs on the grounds that the vote denial was not a curtailment of the rights of GICs under the constitution, in light of the statutory provisions prohibiting GICs from registering to vote for want of a noncustodial legal residence.⁶¹

There are only a handful of cases that loosely create a doctrinal framework within which to analyze the scope of Article 42 and the novel challenges to Ghana's criminal disfranchisement practice that these consolidated cases present. In *Tehn Addy v. Electoral Commissioner*, one of Ghana's few election law cases,

⁵⁸ The PNDC was Ghana's governmental regime from December 31, 1981, through January 7, 1993, and came into force as a result of a coup d'état orchestrated by Jerry Rawlings. PNDCL 284 and all other legislation passed under the PNDC's governance are considered law even though their passage preceded the establishment of the current constitutional democratic government. PNDCLs, along with other laws passed under previous regimes, retain full force under the 1992 Constitution unless they are expressly repealed, abrogated, or in conflict with the Constitution. See GHANA CONST. 1992 art. 1(2) ("This Constitution shall be the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void."). Subsequent laws passed by the EC share the same degree of authority as PNDCLs and other laws subordinate to the Constitution. See generally Kim Stanton, *The Subsidiary Legislation Process in Ghana: Review and Recommendations for Reform* (Ghana Ctr. For Democratic Dev., Critical Perspective No. 14, 2003) ("Parliament does not make all of the laws that regulate the daily conduct and activities of Ghanaians. Rather, Parliament frequently delegates authority to an external body to create a form of law referred to as *subsidiary legislation* (or delegated or subordinate legislation)"). *Id.* at 1. Although subsidiary legislation typically connotes laws promulgated by legally authorized public bodies other than Parliament, the fact that PNDCL was not enacted by the current parliament makes it more akin to subsidiary legislation in terms of its procedural genesis. Nonetheless, PNDCL is accorded the same weight as Parliamentary legislation unless expressly abrogated or repealed. *Id.* at 2 ("[S]ubsidiary legislation like primary legislation itself, has the full force of law and often creates or alters legally enforceable rights and obligations.").

⁵⁹ *Ocansey/CHURCIL*, *supra* note 18 (opinion of Wood, C.J.), at 3.

⁶⁰ *Id.* Ocansey also separately sought declarations that PNDCL was in contravention of other constitutional provisions. See *id.* at 4.

⁶¹ *Id.* (opinion of Wood, C.J.) at 12-13.

Ghana's Supreme Court provided an expansive interpretation of Article 42 and illuminated its breadth.⁶² The *Tehn Addy* decision involved a challenge to a voter registration policy, set by the EC, whereby voters could register only within a specified period.⁶³ Relying on Article 42, the Court unanimously held that the EC could not refuse to register Mr. Addy and ordered the EC to register him.⁶⁴ The Court reasoned that the right to vote is a constitutional right, derived from Article 42, and that, because the Constitution is the supreme law of Ghana, no qualified citizen of Ghana can be denied the rights it confers.⁶⁵ Indeed, while acknowledging the various interpretations of the right to vote, the Court advised that, "[w]hatever the philosophical thought on the right to vote, article 42 of the Constitution, 1992 of Ghana makes the right to vote, a constitutional right conferred on every Ghanaian citizen of eighteen years and above."⁶⁶ Emphasizing the importance of the right to vote within the larger framework of democracy, the Court stated that through "the exercise of this right, the citizen is able not only to influence the outcome of the elections and therefore the choice of a government but also he is in a position to help influence the course of social, economic and

⁶² *Tehn Addy*, *supra* note 17, at 47-54.

⁶³ *Id.* at 50. Mr. Addy, the named plaintiff, a fifty-seven year-old pastor, was on a clergy visit in Toronto, Canada during the one-month period in October 1995 that Ghana's Electoral Commission established for registering eligible voters intending to vote in the 1996 general elections. *Id.* Upon his return to Ghana, Mr. Addy wrote a letter to the EC, dated March 27, 1996, demanding that it permit him to register, to which he received no response. *Id.* The EC later established a supplementary registration period from June 1 through June 9, 1996, for the purposes of registering Ghanaians who attained the age of eighteen after the close of the October 1995 registration window. *Id.* Mr. Addy made a second attempt to register during this period and the EC refused to register him. *Id.* Mr. Addy subsequently brought a challenge in the Supreme Court against the EC and the Attorney General seeking: (1) declaratory judgment that the EC's failure or refusal to register him as a voter was inconsistent with and in contravention of Articles 42, 45, and 46 of the constitution; (2) declaratory judgment that the Articles 42, 45, and 46 require the EC to exercise its discretion to register him as a voter outside the October 1995 window, as it exercised its discretion to register newly eligible voters in early June 1996; and (3) a permanent injunction against the EC's certification of the provisional register until it registered Mr. Addy as a voter. *Id.* Although the EC conceded the substance of Mr. Addy's claim, it argued that the suspension of the registration exercise was the result of a pending suit against the EC, brought by the New Patriotic Party (NPP) and People's Convention Party (PCP), and filed in the high court for declaratory judgment that the supplemental registration exercise was illegal. *Id.* at 50-51.

⁶⁴ *Id.* at 53-54.

⁶⁵ *Id.* at 53.

⁶⁶ *Id.* at 52-53.

political affairs thereafter.”⁶⁷ For these reasons, the Court found that “the exercise of this right of voting, is . . . indispensable in the enhancement of the democratic process, and cannot be denied in the absence of a *constitutional provision* to that effect.”⁶⁸

In summarizing that the letter and spirit of Article 42 establishes that “every sane Ghanaian citizen of eighteen years and above, ha[s] the right under Article 42 of the 1992 Constitution to be registered as a voter,” the Court made no exception for GICs.⁶⁹ Rather, the Court linked this important right to the Preamble to the 1992 Constitution, which proclaims, “The Sovereignty of Ghana resides in the people of Ghana in whose name and for whose welfare the powers of Government are to be exercised in the manner and within the limits laid down in this Constitution.”⁷⁰ The Court further explained that “in order to give meaning and content to the exercise of this sovereign power by the people of Ghana, article 42 of the Constitution, 1992 guarantees the right to vote to every sane citizen of eighteen years and above.”⁷¹

The Court recognized the EC’s authority to place limits on the right to vote. However, in order to determine the constitutionality of the EC’s conduct, the Court employed a balancing test, weighing the timing of the elections and the potential hardship to the EC in conducting its voter registration program, in the face of a pending legal challenge, against permitting the exercise of the constitutional right to vote. The Court’s analytical approach suggests that a balancing test might be an appropriate means of determining the extent to which the EC

⁶⁷ *Id.* at 50. The Court also relied heavily on international law as persuasive authority, citing in particular the seminal U.S. Supreme Court case *Wesberry*, in which the Court held that “[n]o right is more precious in a free country than that of having a choice in the election of those who make the laws” *Id.* at 52 (citing *Wesberry*, 376 U.S. at 17). In addition, the Court relied on scholarship and legal opinions from England and Canada in order to support its decision. *Id.* at 52.

⁶⁸ *Tehn Addy*, *supra* note 17, at 50 (emphasis added). Ghana’s constitution can only be amended by national referendum in which at least forty percent of eligible voters participate and seventy-five percent of those voters cast ballots in favor of amending the Constitution as proposed. GHANA CONST. 1992 art. 290(4).

⁶⁹ *Id.* at 53.

⁷⁰ *Id.*

⁷¹ *Id.* at 53-54. To further substantiate the importance of the right to vote, the Court cited the significant civil disabilities that attach to non-registration. *See id.* (citing GHANA CONST. 1992 art. 62(c)).

has authority to place limitations on the right to vote.⁷² However, the absence of a test is not what gives rise to the systemic electoral inconsistency resulting from the disfranchisement of GICs.

In *Apaloo v. Electoral Commissioner*, Ghana's highest court reiterated its commitment to universal suffrage and identified the right to vote as a right of international scope and import, stating, "In the contemporary world, any limitation on suffrage is rejected. It is universally accepted that there is no reason at all for exclusion of the right to vote or any limitation to it considering that all men are created equal and have a vote each."⁷³ With respect to the EC's obligations, the Court further declared, "[I]t is incumbent on the Electoral Commission to provide by all legitimate means for the free and unlimited exercise of the citizens' franchise in conformity with both the letter and spirit of the Constitution."⁷⁴ The Court also provided guidance on the construction of election laws generally, stating that "[t]he principle regarding the interpretation of election laws is that they should be construed liberally in favour of the right to vote rather than a denial of that right."⁷⁵

Read together, *Tehn Addy* and *Apaloo* instruct that judicial enforcement of Article 42 favors an expansive reading of the right

⁷² *Id.* at 54 ("Looking at the timetable for the 1996 Presidential and Parliamentary Elections, and further on the balance of hardship, the plaintiff and other qualified unregistered citizens as opposed to the political parties in the High Court suit, stand to be deprived of their voting rights on the election day. We therefore realized that it would be unfair to deny the plaintiff and the unregistered citizens such a constitutional right.").

⁷³ *Apaloo v. Electoral Comm'r*, [2001] 1 G.L.R. 1 (Ghana).

⁷⁴ *Id.* at 19.

⁷⁵ *Id.* The Court's constitutional analysis in *Apaloo* involved a determination of the substance of the right to vote granted under Article 42 and its relationship to the EC's authority to regulate elections and promulgate rules concerning election administration. *Id.* at 11-12. Specifically, the court considered whether the EC could satisfy the notice and publication requirements of Articles 51 and 297(e) of the Constitution by publishing a directive concerning the use of Photo Identity Card for voting in the 2000 Presidential and Parliamentary Elections in a *Gazette*. *Id.* at 6-7. The Supreme Court unanimously ruled that the EC's actions were unconstitutional. *Id.* at 1. As part of its analysis, the Court considered to what extent the EC could limit the right to vote in the fulfillment of its duties and obligations under the Constitution. *Id.* Starting from the premise that Article 42 of the Constitution requires a "benevolent approach" in construing its ambit, the Court relied on two state court opinions from the United States to support its expansive reading of the right to vote. *See id.* (citing *State ex rel. Carpenter v. Barber*, 198 So. 49, 51 (Fla. 1940) ("Generally, the courts in construing statutes relating to elections, hold that the same should receive a liberal construction in favor of the citizen whose right to vote they tend to restrict and in so doing to prevent disfranchisement of legal voters . . .") and *State ex rel. Whitley v. Rinehart*, 192 So. 819, 823 (Fla. 1939) ("Election laws should be construed liberally in favor of the right to vote . . .")).

to vote. The *Ocansey/CHURCIL* decision subsequently exemplified the appropriate judicial enforcement of the fair measure of this constitutional norm. Against a backdrop of longstanding underenforcement of the norm, Ghana's Supreme Court relied on the doctrinal framework set forth above to hold that Article 42 conferred voting rights on both convicted and remand prisoners, notwithstanding subsidiary legislation to the contrary.⁷⁶ In reaching this conclusion, Ghana's Supreme Court embraced a "fair measure" construct in noting that

[t]he jurisprudence of this court does show that [Constitutions and fundamental human rights] must be broadly, liberally, generously or expansively construed, in line with the spirit of the constitution, history, our aspirations, core values, principles, and with a view to promoting, enhancing human rights rather than derogating from it [sic].⁷⁷

The court further recognized that the lack of enforcement of Article 42 stands in contradiction to these goals.⁷⁸

As a textual matter, other provisions of Ghana's constitution reinforce a broad reading of Article 42 and support the general notion that equality under the law, as well as respect for the rule of law, are integral to Ghana's democratic identity. The Preamble of Ghana's Constitution declares a clear commitment to the "[p]rinciple of [u]niversal [a]dult [s]uffrage" and the "protection and preservation of fundamental [h]uman [r]ights and [f]reedoms."⁷⁹ Similarly, Article 37(1) of the Constitution affirmatively compels the state to maintain a public environment of the highest order:

The State shall endeavour to secure and protect a social order founded on the ideas and principles of freedom, equality, justice, probity and accountability as enshrined in Chapter 5 of this Constitution; and in particular, the State shall direct its policy towards ensuring that every citizen has equality of rights, obligations and opportunities before the law.⁸⁰

⁷⁶ See, e.g., *Ocansey/CHURCIL*, *supra* note 18 (opinion of Wood, C.J.), at 24-33.

⁷⁷ *Id.* at 20.

⁷⁸ *Id.* at 29 ("There can be no true democracy without protecting human rights, rule of law, and the independence of the judiciary.") (quoting former President of the Israeli Supreme Court Judge Aharon Barak, AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* (2005)).

⁷⁹ GHANA CONST. 1992 pmbl.

⁸⁰ *Id.* art. 37.

The underenforcement of voting rights vis-à-vis GICs appears to violate other constitutional norms as well. Chapter 5, which defines the fundamental human rights and freedoms recognized and enforced by the government, specifically provides that “[a]ll persons shall be equal before the law,”⁸¹ and “[a] person shall not be discriminated against on grounds of . . . social or economic status.”⁸² Furthermore “[a]ll citizens shall have the right and freedom to form or join political parties and to participate in political activities subject to such qualifications and law as are necessary in a free and democratic society and are consistent with this Constitution.”⁸³ Notably, the court stopped short of holding that the denial of voting rights to GICs constituted a violation of this provision.⁸⁴ Moreover, none of the opinions of the justices of the court went as far as to impugn the EC for its failure to register GICs.⁸⁵ Instead, the court rejected the EC’s arguments of administrative impossibility by stating that those arguments “examined in the best of lights . . . would have no place in participatory democracy, with the guaranteed rights that are enshrined in the Constitution.”⁸⁶

2. *The International Context*

Courts in several other countries have decided constitutional challenges to the practice of criminal disfranchisement, offering further guidance on constitutional enforcement of the particular norm of the right to vote. Indeed, since 2003, the highest courts in

⁸¹ *Id.* art. 17(1).

⁸² *Id.* art. 17(2).

⁸³ *Id.* art. 21(3). Additional underenforcement concerns arise with respect to persons who are in detention awaiting trial or other procedural action and have not been found guilty, of which there are a relatively considerable number. *See, e.g., id.* art. 15(3) (“A person who has not been convicted of a criminal offence shall not be treated as a convicted person and shall be kept separately from convicted persons.”).

⁸⁴ *See, e.g., Ocansey/CHURCIL, supra* note 18 (opinion of Date-Bah, J.S.C.), at 8-9 (finding it “unnecessary to determine, on the facts and pleadings on this case, the scope of the right to dignity under the 1992 Constitution”). The Chief Justice acknowledged, however, that while the right to vote established under Article 42 is not enumerated in Chapter 5 and, rather, falls under Chapter 6, “there is no doubt, that voting rights constitute a fundamental right of such significance or importance it does qualify as a fundamental human right.” *Id.* (opinion of Wood, C.J.), at 18-19.

⁸⁵ *See, e.g., id.* (opinion of Dotse, J.S.C.), at 29 (“[I]n my humble opinion, the Electoral Commission cannot be faulted.”); (opinion of Date-Bah, J.S.C.) at 9 (expressing reluctance to grant relief that would suggest that the EC “is defeatist of the civic responsibility of Ghanaians”).

⁸⁶ *Id.* (opinion of Wood, C.J.), at 36.

South Africa, Canada, and Australia have issued legal opinions interpreting the right to vote as set forth in their respective constitutions and governing instruments and determining the validity of criminal disenfranchisement. Reflecting a broader global trend of expanding opportunities for political participation by underrepresented groups, each of these opinions favors the extension of voting rights to incarcerated persons in some form.⁸⁷

In *Sauvé v. Canada*, the Supreme Court of Canada determined the constitutionality of a law passed by the Canadian Parliament denying the right to vote to “every person who is imprisoned in a correctional institution serving a sentence of two years or more.”⁸⁸ Rejecting the government’s arguments that criminal disenfranchisement would enhance civic responsibility, respect for the rule of law, and the general purpose of criminal sanctions, the Court struck down the law. The Court rejected this law, finding that the right to vote is fundamental to the rule of law and criminal disenfranchisement is inconsistent with the respect for the dignity of every person that lies at the heart of democracy.⁸⁹ The Chief Justice, speaking for the Court, explained that electoral democracy demands full enforcement of the right to vote by all sane, voting-age citizens:

Denying penitentiary inmates the right to vote misrepresents the nature of our rights and obligations under the law and consequently undermines them. In a democracy such as ours, the power of lawmakers flows from the voting citizens, and lawmakers act as the citizens’ proxies. This delegation from voters to legislators gives the law its legitimacy or force In sum, the legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote

⁸⁷ See, e.g., United Nations Public Administration Network, Chapter 6: Political Participation, available at <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN002539.pdf> (last visited Oct. 17, 2009) (discussing United States Agency for International Development (USAID) efforts to increase opportunities for women in political participation in Mali, Thailand, and Peru); see also James Pomfret, *Hong Kong to Thaw Political Reform Process Next Month*, N.Y. TIMES, Oct. 14, 2009, <http://www.nytimes.com/reuters/2009/10/14/world/international-uk-hongkong-democracy.html?emc=eta1>.

⁸⁸ *Sauvé v. Canada*, [2002] 3 S.C.R. 519, 521, 2002 SCC 68, available at <http://csc.lexum.umontreal.ca/en/2002/2002scc68/2002scc68.pdf> (citing Canada Elections Act, R.S.C., ch. E 2 (1985), available at <http://www.efc.ca/pages/law/canada/elections.html>).

⁸⁹ *Id.* ¶ 1.

The government gets this connection exactly backwards when it attempts to argue that depriving people of a voice in government teaches them to obey the law. The “educative message” that the government purports to send by disenfranchising inmates is both anti-democratic and internally self-contradictory. Denying a citizen the right to vote denies the basis of democratic legitimacy.⁹⁰

In particular, the majority opinion, written by Chief Justice McLachlin, grounds its decision on the Constitution’s right to vote:

The right of every citizen to vote, guaranteed by [section] 3 of the *Canadian Charter of Rights and Freedoms*, lies at the heart of Canadian democracy. . . . The question is whether the government has established that this denial of the right to vote is allowed under [section] 1 of the *Charter* as a “reasonable limi[t] . . . demonstrably justified in a free and democratic society.” I conclude that it is not. The right to vote, which lies at the heart of Canadian democracy, can only be trammled for good reason. Here, the reasons offered do not suffice.⁹¹

Similarly, following a decision in an earlier case,⁹² South Africa’s Parliament enacted a statute that prohibits voting by incarcerated individuals.⁹³ In *Minister of Home Affairs v. National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)*,⁹⁴ the Constitutional Court reviewed the government’s reasons for limiting the voting rights of prisoners and unanimously held the new statute unconstitutional, reaffirming its earlier holding that the practice of disenfranchising incarcerated persons is unconstitutional.⁹⁵ In explaining its reasoning, the Court stated

⁹⁰ *Id.* ¶¶ 31-32.

⁹¹ *Id.* ¶ 1 (second alteration in original).

⁹² *August & Another v Electoral Comm’n & Others* 1999 (3) SA 1 (CC) at 8 (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/1999/3.pdf> (holding that, absent constitutional or statutory authority providing for voter disqualification on the basis of incarceration, the EC must make the necessary arrangements to allow prisoners to register and vote in elections).

⁹³ *Electoral Laws Amendment Act 2003*, GOVERNMENT GAZETTE 25687 GN 1641, 6 November 2003, ¶4, available at <http://www.info.gov.za/view/DownloadFileAction?id=68011>.

⁹⁴ *Minister of Home Affairs v Nat’l Inst. for Crime Prevention and the Re-Integration of Offenders (NICRO)* 2005 (3) SA 280 (CC) at 311-13, 2004 (5) BCLR 445 (CC) at 476-78 (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/2004/10.pdf>.

⁹⁵ *Minister of Home Affairs*, 1999 (3) SA 280 (CC) ¶ 16 (S. Afr.). The Court expressly rejected the government’s arguments based on costs, scarce resources, a desire to appear tough on crime, and retribution. *Id.* at ¶¶ 45, 49, 56, and 66. Instead, the Court reasoned that disqualifying prisoners from voting was inappropriate and inconsistent with enhancing respect for the law and ensuring appropriate punishment, because it profoundly affects a

that “[t]he vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts.”⁹⁶ Chapter 2 of South Africa’s Constitution sets forth a Bill of Rights, which contains, among many other enumerated positive rights, the right to vote. Specifically, Section 19(3)(a) provides that “[e]very adult citizen has the right to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret.”⁹⁷

Most recently, in *Roach v. AEC and Commonwealth of Australia*, the High Court of Australia held that sections 7 and 24 of the Constitution, which require that the Houses of Parliament be “directly chosen by the people,” enshrine the right to vote and that only a “substantial reason,” which did not include imprisonment for a period of less than three years, may limit this right.⁹⁸ Specifically, the Court reasoned that limitations on the right to vote must be “appropriate and adapted” or “proportionate” to the substantial reason proffered by government actors.⁹⁹ By this calculus, the Court upheld the validity of the law, providing that prisoners serving a sentence of three years or longer are not entitled to vote.¹⁰⁰

In 1974, in one of the earliest U.S. cases concerning criminal disfranchisement and constitutional rights—*Richardson v. Ramirez*—the Supreme Court of the United States decided an equal protection challenge to a state’s criminal disfranchisement policy, holding that it did not violate the U.S. Constitution.¹⁰¹ As noted above, the U.S. Constitution does not contain a positive right to vote.¹⁰² Accordingly, the *Richardson* Court did not have to reconcile the practice of criminal disfranchisement with a positive right to vote, but rather reconciled it with the Equal Protection Clause in section 1 of the Fourteenth Amendment. In light of the fact that section 2 of the Amendment provides for criminal

person’s self-respect and relegates him or her to the status of second-class citizen. *Id.* at ¶ 80.

⁹⁶ *Id.* ¶ 28 (quoting *August & Another*, 1999 (3) SA 1 (CC) ¶ 17 (S. Afr.)).

⁹⁷ S. AFR. CONST. 1996 § 19(3)(a).

⁹⁸ *Roach v. AEC and Commonwealth of Austl.* (2007) 233 C.L.R. 162 ¶¶ 7, 155.

⁹⁹ *Id.* ¶¶ 85, 95.

¹⁰⁰ *Id.* ¶¶ 95, 105.

¹⁰¹ *Richardson v. Ramirez*, 418 U.S. 24 (1974).

¹⁰² *Bush v. Gore*, 531 U.S. 98 (2000) (reaffirming the principle that there is no constitutional right to vote for electors for the President of the United States); *United States v. Reese*, 92 U.S. 214 (1876) (declaring that the Fifteenth Amendment does not confer the right of suffrage but rather protects against interference in voting).

disfranchisement for “participation in rebellion, or other crime,” the Court held that the practice is constitutionally permissible.¹⁰³

Each source country of the aforementioned criminal disfranchisement opinions is a constitutional democracy. The constitutions of South Africa and Canada both contain a positive right to vote. Australia’s Constitution does not have a positive right to vote; instead, Section 41 states:

No adult person who has or acquires a right to vote at elections for the more numerous Houses of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.¹⁰⁴

Other sections of the Australian Constitution require that members of the House of Representatives be chosen directly by the people,¹⁰⁵ and that, until the Commonwealth Parliament otherwise provides, the qualification of electors of members of the House of Representatives shall be in each state prescribed by the law of the state as the qualification for electors of the state Parliament.¹⁰⁶

The significance of the international precedent on the issue of prisoner voting rights was not lost on Ghana’s Supreme Court. It referred to these cases throughout its opinions to compare and contrast the clarity of Article 42.¹⁰⁷ Situating Ghana within this international framework, its Chief Justice forcefully reiterated a commitment to constitutionalism: “I have based the call on Ghana to join the League of Nations who place a high premium on prisoners’ fundamental right to vote, not on sentimentality or some other non legal reasoning, but on the just requirements of

¹⁰³ *Id.* at 42-43 (quoting U.S. CONST. amend. XIV, § 2). Sager offers a metadoctrinal analysis of *Richardson v. Ramirez* in *Fair Measure*. See Sager, *supra* note 1, at 1241-42. In particular, he uses *Richardson* as an exemplar of the underenforcement of a constitutional norm—in this case equal protection—“on a purely analytical basis” as opposed to “institutional perceptions.” *Id.* at 1241. See also generally Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781 (2005) (applying the distinction between decision rules and operative propositions to gerrymandering claims).

¹⁰⁴ AUSTL. CONST. § 41.

¹⁰⁵ *Id.* § 24.

¹⁰⁶ *Id.* § 30.

¹⁰⁷ *Ocansey/CHURCIL*, *supra* note 18 (opinion of Wood, C.J.), at 22-23 (citing *Roach v. AEC and Commonwealth of Austl.* (2007) 233 C.L.R. 162); *id.* at 34 (citing *Sauvé v. Canada* (Chief Electoral Officer), [2002] 3 S.C.R. 519, 2002 SCC 68. and *August & Another*, 1999 (3) SA 1 (CC) (S. Afr.)).

the Constitution, the Supreme Law of this land as it stands.”¹⁰⁸ What is most instructive about the *Ocansey/CHURCIL* decision, as well as the international grouping of cases extending voting rights to incarcerated persons of which it now forms part, is the difference that an express, positive right to vote makes in the enforcement analysis. Indeed, the express articulation of fundamental rights, particularly those that relate to the operation of democracy, such as the right to vote, is an important cornerstone to enforcement in emerging and maturing democracies because it permits constitutionalism and adherence to the rule of law to prevail more readily over shifting normative judgments.

C. Non-Judicial Underenforcement of the Right to Vote

Underenforcement can result not only from judicial omission but also from a lack of legislative or administrative enforcement. Unlike judicial underenforcement, which may occur legitimately due to judicial restraints and questions of justiciability, underenforcement by non-judicial actors does not typically warrant similar justification.¹⁰⁹ In addition to the direct consequences of underenforcement, the tangible threat posed by the underenforcement of constitutional norms by non-judicial actors is the deference accorded to the legislative and administrative interpretations of the norm, which may later limit judicial review. Furthermore, even when there is judicial enforcement, when resources are scarce, legislative and administrative actors are more susceptible to making enforcement determinations based on suspect factors, including social status. Both the legislative and administrative contexts of Ghana’s underenforcement of the right to vote underscore this point. How each branch of government responds to the judiciary’s new demand for a constitutional instrument to ensure enforcement of the right to vote will test Ghana’s maturation as a democracy.

¹⁰⁸ *Ocansey/CHURCIL*, *supra* note 18 (opinion of Wood, C.J.), at 39.

¹⁰⁹ See Roosevelt, *supra* note 2, at 197 (noting that “many of the reasons that can be offered for judicial underenforcement do not justify its practice by nonjudicial actors”). But see generally Fallon, *supra* note 9 (extending to non-judicial actors his “permissible disparity thesis,” whereby underenforcement by judicial actors is excused for want of judicially manageable standards).

1. *Legislative Underenforcement of the Right to Vote*

The *Ocansey/CHURCIL* decision rendered null and void the subsidiary legislation that resulted in the legislative underenforcement of the right to vote established under Article 42. However, to understand fully how such legislative underenforcement operated successfully in a maturing constitutional democracy, we explore the legislative landscape in Ghana concerning the right to vote that predated the *Ocansey/CHURCIL* decision.

The legislative underenforcement of Article 42 was twofold. First, there was subsidiary legislation that specifically undermined the force and scope of Article 42. Second, the legislature amended this subsidiary legislation to ensure that voting rights would extend to a particular category of Ghana's citizens—who were also denied the right to vote by the EC—but failed to include GICs as beneficiaries of this legislation. This further undermined the force of Article 42 by enacting legislation to “grant” rights that Article 42 already establishes. I discuss both of these aspects of legislative underenforcement and the *Ocansey/CHURCIL* court's treatment of these issues below.

PNDCL 284 requires that voters be “resident in the polling division” in which they seek to be registered, and “not otherwise disqualified to be registered as a voter by any law for the time being in force.”¹¹⁰ PNDCL 284 further provided that a place of detainment cannot establish residency for purposes of voter registration. Specifically, this subsection states that “[a] person . . . who is detained in legal custody in any place shall not be treated as resident there for the purposes of [voter registration].”¹¹¹ This section contemplated that sane, adult citizens who are detained in legal custody may not use their institution as a residence for registration purposes; however, it did not affirmatively restrict GICs from registering at their prior legal residence. As a technical matter, however, because of another provision, only a narrow group of individuals in such institutions would be permitted to register under these laws. PNDCL 284 section 7(4) imposed a temporal requirement on residency for registration purposes: “A person shall not be deemed to be resident in a polling division if he has been absent from his place of abode for a continuous period of

¹¹⁰ Representation of the People Law, 1992, (PNDCL 284) § 7(1)(d).

¹¹¹ *Id.* § 7(5) (emphasis added).

six months ending on the qualifying date.”¹¹² Accordingly, only GICs in legal custody for fewer than six months at the time of the qualifying period for registration would have been eligible to register to vote using their prior legal residence under the Act. Read together, PNDCL 284 sections 7(4) and 7(5) combined to restrict the franchise from GICs because of residency requirements that most GICs could not satisfy.

Of the EC regulations, only the 1995 Registration Regulations have direct bearing on the matter of criminal disfranchisement in Ghana.¹¹³ Of particular relevance is Part I, section 5.3 of the Registration of Voters’ Public Elections (Registration Regulations) Act, 1995 CI 12 (PERR Act), which requires that otherwise eligible voters reside or ordinarily reside in an electoral area and reserves the EC’s discretion to designate registration areas based on “suitability” and convenience to voters.¹¹⁴ This law and PNDCL 284 form the legal basis of Ghana’s criminal disfranchisement policies. Rather than expand or define the qualitative right to vote, PNDCL 284 and Part I, section 5.3 of the PERR Act restate the constitutional requirements for voting eligibility and regulate the procedural aspects of the right by

¹¹² *Id.* § 7(4).

¹¹³ The EC also promulgated the 1996 Ghanaian Public Elections Regulations and the 2000 Political Parties Law as part of its lawmaking authority under the Constitution. Public Elections (Registration of Voters) Regulations Act, 1995; The Political Parties Law Act 574, (2000) available at <http://www.ec.gov.gh/node/17?q=node/27>. These laws have no direct bearing on the disfranchisement of GICs.

¹¹⁴ The full text of the regulation provides:

Regulation 1—Qualification for Registration

A person who –

- (a) is a citizen of Ghana;
- (b) is of 18 years of age or above;
- (c) is of sound mind;
- (d) is resident or ordinarily resident in an electoral area; and
- (e) is not prohibited by any law in force from registering as a voter is entitled to have his name included in a register of voters for the electoral area during a period set aside for the registration of voters.

Regulation 2—Registration Centres and Electoral Areas

- (1) The Commission shall designate any place it considers appropriate as a registration centre for the purpose of registering voters.
- (2) In designating a place as a registration centre, the Commission shall take into account—
 - the suitability of the place for use as a polling station on election day; and the convenience of prospective applicants for registration.

imposing residency and domicile requirements. Importantly, however, nothing in these provisions restricts registration or voting eligibility based upon criminal status *per se*. Indeed, on the specific matter of criminal disfranchisement, there is no direct mention of voting by incarcerated persons in the Constitution, PNDCLs, EC regulations, or any other body of law. The only language that remotely approximates a restriction of the franchise based on criminal conviction is set forth in PNDCL 284 section 9(21), which provides that, when an election is contested by an unsuccessful candidate on the grounds that he receives a majority of the lawful votes, the EC or such other body as the court may determine shall conduct a recount of the votes and strike, among others, “the vote of a person who has been disqualified from voting at the elections because of a *conviction for a corrupt or illegal practice* or because of a report made by a court under this Law.”¹¹⁵ However, even this language does not require the blanket restriction of the franchise for persons with criminal convictions, under which Ghanaian elections currently operate. Specifically, PNDCL 284 section 21(e) effectively invalidates the votes of persons who have been affirmatively disqualified from voting because of a conviction for a “corrupt or illegal practice” which may or may not encompass all criminal convictions.¹¹⁶

By contrast, section 9(2) of PNDCL 284 contains specific temporal restrictions concerning persons with criminal convictions and their ability to qualify as a member of Parliament:

A person shall not be qualified to be a member of Parliament if he—

....

(c) has been convicted—

- (i) for treason or for an offence involving the security of the State, fraud, dishonesty or moral turpitude; or
- (ii) for any other offence punishable by death or by a sentence of not less than ten years imprisonment; or

¹¹⁵ PNDCL 284 § 21(e) (emphasis added).

¹¹⁶ *Id.* “Corrupt practice” is defined by PNDCL 284 section 50 as “the offence of personation, bribery, treating or undue influence[,] or of aiding, abetting, counseling [sic] or attempting the commission of such offence.” *Id.* § 50. The term “illegal practice” is not defined in the statute. The only reference to post-incarceration disfranchisement occurs in PNDCL 284 sections 27, 28, 29, and 36, which provide that persons who commit election offences in particular shall be subject to a substantial monetary fine or a prison term of up to two years “and shall, for a period of five years from the date of the expiration of his term of imprisonment be disqualified from being registered as a voter or voting at an election.” *Id.* §§ 27-29, 36.

(iii) for an offence relating to, or connected with[,] public elections under a law in Ghana at any time . . . ¹¹⁷

The Act further states that such persons shall not be so disqualified if a period of at least ten years has passed or unless pardoned.¹¹⁸ Furthermore, although no law in Ghana compels it, voter participation is firmly urged upon all eligible Ghanaian citizens.¹¹⁹

Far from demonstrating that GICs may lawfully be denied the right to vote, the laws and policies set forth above, when read together, suggest that the people of Ghana have considered restrictions on political participation based on criminal status and have adopted them expressly in establishing qualifications for Members of Parliament, but not with respect to eligibility for voter registration. The *Ocansey/CHURCIL* decision makes a similar point:

It bears emphasis that the Constitution did not set down the residency criteria; it (the residency criteria) is the product of the subordinate law PNDCL 284. But the people of Ghana adopted and enacted for themselves a democratic regime of constitutionally guaranteed adult suffrage for all Ghanaians, save only persons under eighteen years of age and of unsound mind. We crafted for ourselves a Constitution that set out its own limitations on the right to vote and perhaps having regard to the value it places on the right in question, did not cede any of its authority to either the EC or some other authority to add further to the list of who shall have the right to vote.¹²⁰

Article 42 does not require voters to reside in a specific constituency or impose any other residency requirement in order to vote. Rather, Article 42 grants the right of universal adult suffrage to “every citizen” of sound mind. Indeed, both the literal

¹¹⁷ *Id.* § 9(2).

¹¹⁸ *Id.* § 9(5). In addition, Articles 62, 79, and 94 of the Constitution prohibit persons convicted of certain crimes from holding office as President of the Republic of Ghana, Minister of State, or Member of Parliament, respectively. GHANA CONST. 1992 arts. 62, 79, 94. While the disqualification from eligibility from these offices may not present the same concerns for GICs as it does for other citizens—since the fact of their incarceration may, by itself, provide an independent basis for disqualification of GICs—it is worth noting the significance that voter registration is accorded in the Constitution as further evidence that encumbrances placed on it may contravene the Constitution’s letter and spirit.

¹¹⁹ See Electoral Commission of Ghana, Registration & Voting, <http://www.ec.gov.gh/node/20> (last visited Aug. 28, 2009) (“Voting is both a right and a responsibility.”).

¹²⁰ See *Ocansey/CHURCIL*, *supra* note 18 (opinion of Wood, C.J.), at 22.

and contextual interpretations of the relevant laws and policies make clear that the force of Article 42's provision of universal adult suffrage had not been circumscribed by subsidiary legislation, but the fair measure of this provision remained underenforced as a result of this legislation.¹²¹

¹²¹ For example, Botswana's Constitution states:

Every person who is registered in any constituency as a voter for the purposes of elections of the Elected Members of the National Assembly shall, unless he is disqualified by Parliament from voting in such elections on the grounds of his having been convicted of an offence in connection with the elections or on the grounds of his having been reported guilty of such an offence by the court trying an election petition *or on the grounds of his being in lawful custody at the date of the election*, be entitled so to vote in that constituency in accordance with the provisions made by or under a law in that behalf; and no other person may so vote.

BOTS. CONST., 1966 § 67(5) (emphasis added). Similarly, Romania's Constitution provides:

Every citizen having attained the age of eighteen up to or on the election day shall have the right to vote The mentally deficient or alienated, laid under interdiction, *as well as persons disenfranchised by a final decision of the court cannot vote.*

ROM. CONST. 2003 art. 36 (emphasis added). Likewise, in Chile, the right to vote is suspended "[w]hen the person is being tried for a crime deserving afflictive punishment or for a crime that the law should define as a terrorist conduct." CHILE CONST. 1980 art. 16. Other constitutions contain less specific bases for exclusion. For example, the Constitutions of Angola and Nigeria both contain some language of disqualification based on deprivation of rights. In Angola the right (and duty) to vote is expressed as follows:

It shall be the right and duty of all citizens aged over 18, *other than those legally deprived of political and civil rights*, to take an active part in public life, to vote and stand for election to any State body, and to fulfill their offices with full dedication to the cause of the Angolan nation.

ANGL. CONST. 1992 art. 28 (emphasis added). Nigeria's basis for criminal disfranchisement is similarly worded:

- (1) A person shall be qualified for registration as a voter if such a person:
 - (a) is a citizen of Nigeria;
 - (b) has attained the age of eighteen years;
 - (c) is ordinarily resident, works in, originates from the Local Government/Area Council or Ward covered by the registration centre;
 - (d) presents himself to the registration officers of the Commission for registration as a voter; and
 - (e) is not subject to any legal incapacity to vote under any law, rule or regulations in force in Nigeria.

ELECTORAL ACT 2002, PART I, § 2(1) (NIGERIA), *available at <http://www.nigeria-law.org/ElectoralAct2002.htm>* (emphasis added). This sampling of constitutional provisions provides an example of affirmative bases for denying voting rights or establishing voter qualifications based on criminal conviction.

Another factor contributing to Article 42's underenforcement was the indirect attack on its validity by virtue of the passage of the Representation of the People (Amendment) Law (ROPAL) in 2006. Ghana passed ROPAL to amend its election laws and enable Ghanaian citizens living abroad to register to vote.¹²² Following its passage, concerns over logistics, financial and human resources, partisanship, and general implementation prevented ROPAL's enforcement in subsequent elections.¹²³ Notwithstanding this administrative underenforcement, ROPAL's passage indicates that there is steadfast concern and engagement by the Ghanaian citizenry concerning electoral participation and democracy.

ROPAL's text provides that the statute's purpose is to "enable Ghanaians resident abroad to register to vote in public elections and referenda."¹²⁴ As a technical matter, ROPAL supersedes that portion of PNDCL 284 that limits voter registration to citizens who maintain a residence in Ghana. The other legal byproduct of ROPAL is that it established that the Constitution extends the right to vote to all age-appropriate Ghanaian citizens of sane mind, regardless of domicile.¹²⁵

ROPAL's potential reformative impact on the electoral process in Ghana is manifold. First, once enforced, ROPAL will transform the demographics of the current electorate by permitting Ghanaian diasporans who hail from nearly every country in the world to cast ballots in public domestic elections and referenda processes. Second, prior to the *Ocansey/CHURCIL* decision, ROPAL's passage called into question any extension of the right to vote beyond those groups of citizens traditionally

¹²² REPRESENTATION OF THE PEOPLE ACT OF 2006, Act 699 (amending PNDCL 284 to enable Ghanaians resident abroad to register to vote in public elections and referenda).

¹²³ Representation of the People (Amendment) Act 2006 (Ghana) [hereinafter ROPAL]. There was no shortage of rancor and controversy in the debate surrounding ROPAL's passage. In fact, three days before ROPAL was initially passed, twenty Ghanaians were injured in a demonstration against the bill when Ghana's police force used excessive force to diffuse the protest. Linda Akraasi, *Opposition MPs Return to Parliament After 14-Day Protest*, GHANAIAN CHRON., Mar. 3, 2006.

¹²⁴ ROPAL, *supra* note 122. ROPAL amends section 8 of PNDCL 284 as follows: "A person who is a citizen of Ghana resident outside the Republic is entitled to be registered as a voter if the person satisfies the requirements for registration prescribed by law other than those relating to residence in a polling division." *Id.*

¹²⁵ Robert Bates, *There is Economic Growth but the Structures of Africa's Economies Remain Unaltered*, BOSTON REV., May/June 2008, at 13 ("Remittances rank as the country's second largest source of foreign earnings, less than the gains from gold exports, but greater than those from coco.").

permitted to vote absent legislative amendment. Indeed, in the process leading up to the passage of ROPAL, the presumed need for the amendment was questioned by some as an affront to constitutionalism and ultimately justified as a matter of political expediency rather than legal necessity.

The right to vote and to be registered to vote does not come from or depend on legislative grace, the reported amendment to our existing election statute introduced in Parliament, ostensibly for the purpose of enabling Ghanaians abroad to vote, is really a re-invention of the wheel. In fact, Parliament's action may have created the mistaken impression that the nonresident Ghanaian's right to vote is a gift or privilege that can come only from an Act of Parliament. That is not so. However, because the EC persists in excluding absentee Ghanaians from voting, the alternative to legislative action is a constitutional challenge before the Supreme Court. Given the fact that the Electoral Commission appears these days to have been empowered to do whatever pleases it in whatever way it chooses . . . it is probably better, if only to avoid all doubt, for Parliament to affirm by legislation what is already there, in black and white, in article 42 of the Constitution.¹²⁶

While the specific text of ROPAL does not bear directly upon the residency requirement that locks GICs out of the electoral process, it has expanded the overall definition of the Ghanaian electorate and has put the question of whether residency is a voting prerequisite squarely within the scrutiny of the public and Parliament. In some ways, the principle of universal adult suffrage for which Article 42 stands is strengthened by ROPAL. Indeed, in enacting ROPAL, the supremacy of Article 42 was expressly acknowledged by the Attorney General and Minister of Justice:

The right to vote in an election is an entrenched provision of the Constitution. Article 42 of the Constitution empowers every citizen of Ghana of eighteen years of age or above and of sound mind to register as a voter and vote in public elections and referenda. This right is not restricted to citizens resident in the country because the reference is to a citizen without qualification. Furthermore, section 2(1) of the Political Parties Act, 2002 (Act 574) provides that every citizen of voting age has the right to participate in political activity intended to

¹²⁶ *Playing Politics With the Enfranchisement of the Wrongfully Disenfranchised*, DEMOCRACY WATCH 4 (Ghana Ctr. for Democratic Dev.), Mar. 2004, at 1.

influence the composition and policies of government, the least of this participation is the right to vote.¹²⁷

Despite this recognition, the passage of ROPAL effectively bypassed the opportunity for judicial and administrative enforcement, and potentially undermined the force of the Constitution as supreme law, absent reinforcing legislation. To be sure, because the matter of voting rights for Ghanaian diasporans was so politically charged, the absence of legislative process to enforce their voting rights might have proved more damaging to Ghana's stability than would have direct administrative enforcement of the Constitution. Arguably, despite Article 42's guarantees, the importance of ROPAL is underscored by its implication of broader, more fundamental questions concerning the definition and breadth of citizenship in ways that are not present in the debate over GICs' voting rights.

Importantly, despite its superfluosity, ROPAL did not spell defeat for a broad reading of Article 42 of the Constitution that would grant universal voting rights to all Ghanaian adult citizens of sane mind, absent legislative amendment. To the contrary, the *Ocansey/CHURCIL* decision acknowledged that ROPAL was indeed an unnecessary legal instrument in light of Article 42's breadth.¹²⁸

2. Administrative Underenforcement of the Right to Vote

Judicial and legislative underenforcement notwithstanding, Ghana's systemic electoral inconsistency with respect to criminal disfranchisement originated in the administrative

¹²⁷ Memorandum from J. Ayikoi Otoo, Attorney-Gen. & Minister for Justice, Representation of the People (Amendment) Bill (Apr. 19, 2005).

¹²⁸ Specifically, Justice Dotse declared:

In view in the analysis that has been made in relation to the wide nature of article 42 of the Constitution 1992, there is no doubt in my mind that every sane citizen of Ghana wherever located or settled, who is eighteen years and above is entitled to be registered for the purposes of voting in public elections and referenda in Ghana, in my mind therefore, there was really no need for the passage of the Representation of the People (Amendment) Act 2006 [The Act] is a surplusage since without it, Ghanaians in the diaspora already had the right to be registered.

Ocansey/CHURCIL, *supra* note 18 (opinion of Dotse, J.S.C.), at 29. It is uncertain what effect, if any, the *Ocansey/CHURCIL* decision will have on the force of ROPAL as law. Because ROPAL was not the subject of the litigation, and a majority of the court did not rule on its validity, it will presumably remain in effect as confirming that Ghanaian diasporans fall within Article 42's purview.

underenforcement of Article 42. As noted above, the EC is authorized by the Constitution, and the President appoints its commissioners.¹²⁹ Despite Article 42's clear and unqualified terms, self-executing nature, and broad interpretation by Ghana's highest court, the EC had not enforced this constitutional provision to grant the right to vote to GICs over eighteen years of age and of sound mind. While the EC has acknowledged the expansive nature of Article 42, it had, until recently, nonetheless refused to register GICs to vote or otherwise allow them voting privileges. To justify its acts and omissions in this regard, the EC relied on the subsidiary legal authority, discussed above, which was either enacted by a parliament that preceded the 1992 Constitution or developed by the EC appurtenant to its administrative authority over elections under the 1992 Constitution.¹³⁰ The EC also relegated all authority for constitutional enforcement on this matter to the judiciary.¹³¹

Like judicial and legislative underenforcement, administrative underenforcement holds particular consequences and concerns. In particular, administrative actors may be susceptible to impermissible influences and corruption absent strict regulation. In addition, in the formal symbiotic relationship between lawmaking and administrative enforcement—whereby courts defer in part to administrative and legislative interpretation and intent—underenforcement by non-judicial actors threatens to seal off all potential avenues for constitutional enforcement.

¹²⁹ See *supra* note 19 and accompanying text.

¹³⁰ Specifically, Article 45 of the 1992 Constitution provides that the EC shall have the following functions:

- (a) to compile the register of voters and revise it at such periods as may be determined by law;
- (b) to demarcate the electoral boundaries for both national and local government elections;
- (c) to conduct and supervise all public elections and referenda; . . .
- (d) to educate the people on the electoral process and its purpose;
- (e) to undertake programmes for the expansion of the registration of voters;
- and
- (f) to perform such other functions as may be prescribed by law.

GHANA CONST. 1992 art. 45. Article 46 of the 1992 Constitution further provides that “in the performance of its functions, the Electoral Commission, [sic] shall not be subject to the direction or control of any person or authority.” *Id.* art. 46.

¹³¹ See, e.g., S. Makalo, *Prisoners to Vote in Ghana*, AFROL NEWS, May 13, 2008, <http://www.afrol.com/articles/28889> (quoting EC Chairman Dr. Kwadwo Afari-Gyan, “The commission is not against the right of prisoners to vote. Once the courts say we should go and set up registration centres and polling stations at the prisons, we will go.”).

To be fair, in light of ROPAL and the failure of the judiciary and legislature to take up the issue of voting rights for GICs until very recently, the EC, as an administrative agency, understandably might have perceived itself to be in a precarious enforcement position. However, the positive nature of the right, coupled with the EC's election administration charge, provides support for the EC's power to enforce the fair measure of the right to vote. Certainly, these factors indicate the EC's ability and obligation to seek clarification of any conflict of law that appears to narrow the constitutional norm that the EC is duty bound to enforce as a body established under the Constitution by executive appointment. Indeed, the EC's reliance on PNDCLs and self-promulgated statutory regulations as a justification for the disfranchisement of GICs squarely called into question the hierarchy of Ghanaian law, the subsidiary legislation process,¹³² and respect for the rule of law. To the extent that there was any question concerning the supremacy of Article 42 vis-à-vis PNDCL 284, the Supreme Court had spoken expressly on this issue as a generally matter: "Article 1(2) of the Constitution, 1992 says that the Constitution is the supreme law of the land. It precedes any other law including PNDCL 284."¹³³ *Ocansey/CHURCIL* now firmly establishes that this principle applies to the specific context of criminal disfranchisement.¹³⁴

Despite the significant constitutional development resulting from the *Ocansey/CHURCIL* decision, the question of administrative underenforcement remains open as Ghana waits for the EC to fulfill the judicial mandate to create "the necessary regulatory framework"¹³⁵ to enable registration of and voting by GICs. Faced with an unequivocal judicial proclamation that its practice of disfranchising GICs lacks viable legal justification under the Constitution, the EC must now act carefully and swiftly¹³⁶ to correct the longstanding underenforcement under its

132 "Without a system to subject regulations to *substantive* scrutiny, the public may be adversely affected by regulations that have been improperly promulgated or ill-considered but nonetheless have become law." Stanton, *supra* note 58, at 1-2 (emphasis in original). For a well-considered critique and comparative analysis of Ghana's subsidiary legislation process, see generally *id.*

133 *Republic v. Electoral Commission and Another; Ex Parte Amoo* [1997-98] 1 G.L.R. 938, 957-58 (High Court, Ghana).

134 See *Ocansey/CHURCIL*, *supra* note 18.

135 *Id.* (opinion of Dotse, J.S.C.), at 32.

136 *Id.* (opinion of Date-Bah, J.S.C.), at 18 (ordering the EC to exercise its regulatory power "to make an appropriate constitutional instrument enabling prisoners to exercise

authority. Understanding the multiple causes and sources of constitutional underenforcement within Ghana's broader legal framework underscores the extent and complexity of underenforcement in a maturing democracy. Understanding the political context of this underenforcement underscores the potential harm to democratization as a whole.

III. THE POLITICAL CONTEXT OF UNDERENFORCEMENT OF THE RIGHT TO VOTE IN GHANA

By definition, metadoctrinalism examines the fact of underenforcement and the doctrinal consequences that flow from it, but does not emphasize the political or social context of underenforcement. If underenforcement and its consequences are to be weighed, challenged, and fully understood, it is important also to consider the factors that produce underenforcement, including the historical background and contemporary social and political contexts. My analysis of Ghana as a case study suggests that underenforcement in a mature, stable democracy, while still problematic, does not potentiate the same consequences concerning the rule of law and democracy as in an emerging or maturing democracy.

It is particularly significant to explore the political and administrative context in which constitutional underenforcement arose in Ghana, because it is a context common to many newer democracies that have traded military or other undemocratic or illiberal regimes for constitutional democracy in recent decades. Moreover, having established that there was no legal justification for the practice of criminal disfranchisement in Ghana, it is important to view the practice within the broader context of Ghana's modern democratic development in order to understand more fully the potential impact that continued underenforcement could have on a maturing democracy and the potential for judicial enforcement to yield a complete remedy.

Ghana's trajectory in pursuit of constitutionalism is shared by many emerging democracies with a history of military dictatorship and political unrest.¹³⁷ These democracies have abandoned

their right to vote" as soon as practicable and within no more than twelve months of the date of the order).

¹³⁷ See H.W.O. Okoth-Ogendo, *Constitutions without Constitutionalism: Reflections on an African Political Paradox* in *CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD* (1993) (analyzing the role of constitutions in shaping

military dictatorships and adopted liberal constitutions, but they must still grapple with the entrenchment of illiberal extra-constitutional norms among judicial and non-judicial actors. Ghana, as a successful democracy on a continent of compromised political regimes, has much at stake—both nationally and regionally—in continuing its democratic development. In Africa, a democratic revolution that began in the post-colonial era and gained traction in subsequent decades has been slowly transforming the continent's political landscape.¹³⁸ Coined the “third wave of democracy” by political scientist Samuel P. Huntington,¹³⁹ the rapid proliferation of democracies from 1974 to the present has spurred an incipient entrenchment of democracy in Africa. According to Freedom House, a non-profit, non-governmental organization that issues an index of “democratic freedoms” with assigned values from one to seven (for the most to least democratic nations, respectively), most African countries’ indexes averaged around six until the past two decades.¹⁴⁰ This signified that democracy was nearly non-existent, despite commonplace democratic structures and election processes.¹⁴¹ Much of this democratic development has occurred simultaneously with—and, arguably, as a product of—the rise of constitutionalism in Africa.¹⁴² Ghana’s democratic development is consistent with this story.

government and power in the African political context, including the challenges of constitutionalism in Central African Republic, Lesotho, Malawi, Mauritius, Nigeria, Swaziland, Uganda, Zaire, Zambia, and Zimbabwe).

¹³⁸ Prempeh, *Africa's “Constitutionalism Revival,”* *supra* note 22, at 473 (“Neither democracy nor constitutionalism is a new term on the agenda of postcolonial Africa.”).

¹³⁹ See Samuel Huntington, *Democracy's Third Wave*, J. DEMOCRACY, Spring 1991, at 12, (identifying and defining the then-current era of democratic transitions as the “third wave” of democracy in modern history); see also Samuel Huntington, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 13-26 (1991) (defining the first, second, and third waves of democratization).

¹⁴⁰ See *Freedom in the World: 2008*, Freedom House, Sept. 2008, <http://www.freedomhouse.org/template.cfm?page=411&year=2008>; see Edward Miguel, *Is It Africa's Turn?: Progress in the World's Poorest Region*, BOSTON REV., May/June 2007, at 7.

¹⁴¹ Bates, *supra* note 125, at 13. See Freedom House, *Electoral Democracies 2008*, <http://www.freedomhouse.org/template.cfm?page=411&year=2008> (last visited Aug. 17, 2009).

¹⁴² See Prempeh, *Marbury in Africa*, *supra* note 22, at 1281 n.183. For a detailed summary of the trajectory of constitutionalism in Africa, see Prempeh, *Africa's “Constitutionalism Revival,”* *supra* note 22, at 471, 473–84 (“The recent democratic openings in Africa have been backstopped by constitutional changes.”).

A. *The Path to Democracy*

Since the early 1990s, Ghana has stood out from African and other nations for its political stability, economic progress, and social development.¹⁴³ Despite some stumbling on the road to institutionalizing its democracy, including a twelve-year military autocracy, Ghana has consistently advanced toward its goal of constitutional democracy since its first democratic elections in 1951.¹⁴⁴

Ghana's overall trajectory is one familiar to the majority of countries on the African continent—one of complex, traditional legal and political systems, followed by foreign occupation, colonization, emancipation, and, finally, development toward democratic goals “in fits and starts.”¹⁴⁵ Ghana gained its freedom from British rule through political resistance and popular protests, earning it the lauded title of “The Black Star of Africa” and its

¹⁴³ See, e.g., Robert Mattes & E. Gyimah-Boadi, *The Quality of Two Liberal Democracies in Africa: Ghana and South Africa 1* (Oct. 10-11, 2003) (initial draft, presented at Conference on “The Quality of Democracy: Improvement of Subversion?”, Ctr. on Democracy, Dev. and Rule of Law and European Forum, Inst. for Int'l Studies, Stanford Univ.), available at http://iis-db.stanford.edu/pubs/20442/CoD_paper_Mattes_-_Gyimah_Boadi.pdf (“While the Third Wave of Democracy swept through many African countries in the 1990s, South Africa and Ghana stand out as two of the continent’s real success stories politically.”). In addition to these scholarly perspectives, popular sentiment suggests that Ghana will serve as a template and yardstick for other African nations living the democratic experiment. See, e.g., Lord Aikins Adusei, *Did the African Union Get Ghana’s Message?*, <http://www.articlesbase.com/politics-articles/did-the-african-union-get-ghanas-message-726487.html> (last visited Aug. 20, 2009) (“The recent elections in Ghana have been hailed as a successful African story. The praises, admirations[,] and messages of commendations coming from all corners of the globe [are] an indication that the world is hoping for a change in Africa. It is also an indication that the world is expecting something different, different from the way things are done all the time on the continent.”); *Ghana Elections Set Pace for West Africa, Says IU Faculty Member Who Served as Monitor*, IU NEWS ROOM, <http://newsinfo.iu.edu/news/page/normal/9593.html> (last visited Aug. 20, 2009) (quoting Amos Sawyer, a research scholar at the Workshop on Political Theory and Policy Analysis at Indiana University at Bloomington: “Ghana continues to set the pace for West Africa.”); Commonwealth Observer Group, *Ghana Parliamentary and Presidential Elections 37*, (Dec. 2008), available at <http://www.thecommonwealth.org/files/187673/FileName/GHANA2008ELECTIONS-COGREPORTFINAL.pdf> (stating that Ghana’s maturing democracy has become a good reference point for the African continent and the Commonwealth as a whole).

¹⁴⁴ See generally GHANA: ONE DECADE OF THE LIBERAL STATE, *supra* note 39 (a series of essays regarding Ghana’s first decade as a liberal democracy).

¹⁴⁵ See Christopher Fomunyoh, *Democratization in Fits and Starts*, J. DEMOCRACY, July 2001, at 37, 49; Marc Lacey, *By Fits and Starts, Africa’s Brand of Democracy Emerges*, N.Y. TIMES, Nov. 23, 2005, at A4.

status as the first independent African nation.¹⁴⁶ Following this significant milestone, Ghana struggled through a series of intermittent attempts at democratic government and military regimes for nearly forty years.¹⁴⁷ In 1992, following nearly a decade of military rule by movement leader John Rawlings, Ghanaians elected Rawlings, who represented the PNDC, president in the country's second presidential multi-party election since its 1957 emancipation.¹⁴⁸ That same year, Ghana adopted its current constitution.¹⁴⁹

Since that time, Ghana's growth as a stable constitutional democracy has been noteworthy.¹⁵⁰ There have been relatively few instances of domestic conflict.¹⁵¹ In addition, Ghana has adopted the traditional markers of a constitutional democracy: the right to vote, separation of powers, free and fair elections, freedom of the press, and respect for the rule of law.¹⁵² The first democratic transfer of power occurred between Rawlings and John Kufuor of the National Patriotic Party (NPP)¹⁵³ in 2000, following Ghana's

¹⁴⁶ Indeed, most of Ghana's fifty-year existence has been dominated by military and autocratic one-party regimes. See generally Kwame A. Ninsin, *One Party and Military Regimes in GHANA'S TRANSITION TO CONSTITUTIONAL RULE: PROCEEDINGS OF A SEMINAR ORGANISED BY THE DEPARTMENT OF POLITICAL SCIENCE, UNIVERSITY OF GHANA, LEGON 21-32 (1991)*.

¹⁴⁷ Among these was the controversial 31st of December 1981 Revolution in Ghana, a national women's movement headed by the wife of the head of state, Nana Konadu Agyeman Rawlings. The 31st of December Movement is largely credited with setting in motion the national democratic transformation that is manifest today. See KEVIN SHILLINGTON, *GHANA AND THE RAWLINGS FACTOR 157 (1992)* (arguing that the December 31st Movement catalyzed the PNDC's promulgation of laws addressing women rights).

¹⁴⁸ McCaskie, *supra* note 39, at 4479.

¹⁴⁹ See generally GHANA CONST. 1992.

¹⁵⁰ See Prempeh, *Marbury in Africa, supra* note 22, at 1290 ("[T]he quality of constitutionalism in Ghana has improved consistently and appreciably over the ten-year period since its current constitution came into effect.").

¹⁵¹ See, e.g., BENJAMIN A. TALTON, *POLITICS OF SOCIAL CHANGE: THE KONKOMBA STRUGGLE FOR POLITICAL EQUALITY (2010)*; Benjamin A. Talton, *The Past and Present in Ghana's Ethnic Conflicts: British Colonial Policy and Konkomba Agency, 1930-1951*, 38 J. ASIAN & AFR. STUD. 192, 192 (2003).

¹⁵² See, e.g., WALTER F. MURPHY, *CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER 8-10 (2007)* (summarizing the mandates of constitutionalism); DAVID BEETHAM, *DEFINING AND MEASURING DEMOCRACY 29-30 (1994)* (describing the components of democratic society).

¹⁵³ The NPP is one of the two leading political parties in Ghana, in addition to the NDC. Minion K.C. Morrison, *Political Parties in Ghana through Four Republics: A Path to Democratic Consolidation*, 36 J. COMP. POLITICS 421, 438 (2004). Other major political parties include the Convention People's Party (CPP), Democratic Freedom Party (DFP), Democratic People's Party (DPP), People's National Convention (PNC), and the Reform

third democratic presidential election.¹⁵⁴ In the final weeks of 2008, Ghana successfully cleared its second democratic transfer of political power after administering widely scrutinized general and run-off presidential elections.¹⁵⁵ This “double alternation,” the democratic process through which governance is twice transferred between competing political regimes, earned Ghana its recent designation as a “maturing democracy.”¹⁵⁶

B. The Political Structure and Electoral System

Ghana’s representative, constitutional democracy closely mirrors the British parliamentary system. Ghana’s elections are administered and regulated by the EC.¹⁵⁷ The EC was established by Articles 43, 44, and 45 of the Constitution, as well as the Electoral Commission Act (Act 451) of 1993.¹⁵⁸ The EC is comprised of seven members appointed by the President—one chairman, two deputy chairmen, and four other members.¹⁵⁹ The EC has constitutionally-derived administrative authority over the conduct of elections, as well as regulatory authority of elections through the issuance of rules and regulations.¹⁶⁰ Importantly, the

Patriotic Democrats (RPD). See Electoral Commission of Ghana, Registered Political Parties, www.ec.gov.gh/node/28 (last visited Aug. 28, 2009).

¹⁵⁴ Ghana has had presidential elections in each of the following years: 1992, 1996, 2000, 2004, and 2008. E. Gyimah-Boadi, *Another Step Forward for Ghana*, J. DEMOCRACY, Apr. 2009, at 138.

¹⁵⁵ *In the Annals of the Ghanaian Elections*, DEMOCRACY WATCH 8 (Ghana Ctr. for Democratic Dev.), May 2009 at 1. See generally Heinz Jockers, Dirk Kohnert, & Paul Nugent, *The Successful Ghana Election of 2008: A Convenient Myth?: Ethnicity in Ghana’s Elections Revisited* (German Inst. of Global & Area Stud., Working Paper Number 109, 2009), available at http://repec.gigahamburg.de/pdf/giga_09_wp109_jockers-kohnert-nugent.pdf. For a comprehensive analysis of Ghanaian national elections from 1992 forward, and their relation to Ghana’s political stability, see Boafo-Arthur, *supra* note 39, at 21-42.

¹⁵⁶ See *supra* note 11.

¹⁵⁷ GHANA CONST. 1992 art. 45,

¹⁵⁸ GHANA CONST. 1992 arts. 43, 44, 45; Electoral Commissions Act No. 451 § 2 (1993).

¹⁵⁹ GHANA CONST. 1992 art. 43.

¹⁶⁰ GHANA CONST. 1992 art. 51 (“The Electoral Commission shall, by constitutional instrument, make regulations for the effective performance of its functions under this Constitution or any other law, and in particular, for the registration of voters, the conduct of public elections and referenda, including provision for voting by proxy.”). In addition, the Electoral Commission Act of 1993 provides:

The Commission shall by Constitutional instrument, make regulations for the effective performance of its functions under this Act or any other law, and in particular for—

(a) the registration of voters for public elections and referenda;

Constitution provides that the EC acts as an independent government institution.¹⁶¹

With 230 constituencies, over 21,000 polling stations, and 5000 electoral areas under its direct authority, the EC's election administration responsibilities are of considerable magnitude considering its limited resources to fulfill its existing obligations.¹⁶² Notwithstanding these limitations, international observers have generally judged Ghana's elections progressively "free and fair" for the past five general election cycles, beginning in 1992 and including the most recent presidential and parliamentary elections in December 2008.¹⁶³

C. Liberal Constitution, Illiberal Underenforcement

Despite bearing the structural trappings of a constitutional democracy, Ghana's underenforcement of the right to vote cast a pall over its commitment to constitutionalism and democratization until just recently. This paradox is endemic to emerging—and

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- (b) the conduct and supervision of public elections and referenda, including provision for voting by proxy;
 - (c) the issue of identity cards; and
 - (d) other matters connected with the foregoing.

Electoral Commissions Act No. 451 § 1.5(12)(1) (1993).

¹⁶¹ GHANA CONST. 1992 art. 46 ("Except as provided in this Constitution or in any other law not inconsistent with this Constitution, in the performance of its functions, the Electoral Commission, [sic] shall not be subject to the direction or control of any person or authority.").

¹⁶² See *Parties Disappointed at EC's Attitude*, DAILY GRAPHIC, April 29, 2009, <http://news.myjoyonline.com/news/200804/15825.asp> (discussing the EC's decision not to re-open the Voter Register at all 21,000 polling stations but rather limit it to only 5,000 electoral centers due to financial constraints); see also Miranda Greenstreet & V.C.R.A.C Crabbe, *Pre-Election Press Statement*, Dec. 6, 2004, COALITION OF DOMESTIC ELECTION OBSERVERS, http://www.cddghana.org/documents/CODEO%20Pre-election%20Press%20Statement%20Dec6_2004.pdf (discussing the Coalition of Domestic Election Observers' (CODEO) deployment of 7,400 election day observers to Ghana's 230 constituencies, which cover 21,000 polling stations).

¹⁶³ Some reports of election controversies exist. See generally Jockers, Kohnert, & Nugent, *supra* note 155 (arguing that there was measurable electoral fraud and ethnic block voting in the 2008 elections and that the perceived inaction of the EC regarding these claims will delegitimize future elections). However, the widely held perception, both within and outside the country, is that Ghanaian elections have relatively low incidences of the election administration violations, fraud, and corruption that often characterize newer democracies. See Commonwealth Observer Group, *supra* note 143, at 38. Commonwealth Secretary-General Kamalesh Sharma said, "The Commonwealth Observer Group found that the Electoral Commission of Ghana managed the process in a professional and inclusive manner. The credible election has helped to further consolidate Ghana's democracy." *Id.*

maturing—democracies that have long labored under dictatorships or military regimes.¹⁶⁴ New constitutions supplant old operations, but not always the old operators. Judicial, legislative, and administrative actors in newer democracies are often holdovers from earlier regimes and, through inertia and the entrenchment of norms, may carry on the status quo in ways that prohibit the full expression of new, liberal constitutional values.¹⁶⁵

Judicial underenforcement may occur when members of the judiciary carry over from the previous political era and are not retrained or reoriented.¹⁶⁶ In these instances, there is a natural proclivity toward continuity and the practice of “things as they were” unless expressly prohibited. This outlook leaves affirmative rights vulnerable to underenforcement. Not surprisingly, in maturing democracies like Ghana, there are long-entrenched, illiberal dispositions toward rights, especially with respect to those who are less powerful. For example, until recently, citizens living in prisons in Ghana were unable to compel the EC to enforce their voting rights and register them to vote without judicial mandate, while Ghanaian diasporans, whose substantial remittances help to fuel the economy, were able to circumvent the judiciary by successfully securing a legislative amendment to the constitution to ensure their voting rights.¹⁶⁷

One scholar has argued that the judiciary’s weakened enforcement of liberal constitutional norms in Ghana is symptomatic of this phenomenon.¹⁶⁸ In particular, he asserts that the failure of Ghanaian courts to give full force to the liberal constitutional ideals in the 1992 Constitution has produced

¹⁶⁴ See Fareed Zakaria, *The Rise of Illiberal Democracy*, 76 *FOREIGN AFF.* 22, 24 (1997) (“Far from being a temporary or transitional stage, it appears that many countries are settling into a form of government that mixes a substantial degree of democracy with a substantial degree of illiberalism.”).

¹⁶⁵ It is important to reemphasize that none of this means that Ghana is an illiberal democracy. Rather, it is a maturing democracy in the process of developing its identity and attitudes concerning respect for the rule of law, constitutionalism, and democracy. See generally Zakaria, *supra* note 25.

¹⁶⁶ There are obvious parallels with respect to long-term officeholders in the legislative and administrative contexts.

¹⁶⁷ See *supra* notes 54, 63.

¹⁶⁸ See Prempeh, *A New Jurisprudence for Africa*, *supra* note 22, at 139 (noting that a study of appellate decisions from 1993 to 1999 suggests that the “Ghanaian judiciary remains attached to a jurisprudence that is far more authoritarian than liberal”).

“asymmetrical jurisprudence” with respect to the constitutional norm of freedom of press.¹⁶⁹

The assumption seems to have been that, given a new constitution with a host of rights-friendly provisions, limitations on government power, and guarantees of judicial independence, judicial review will lead to a liberal-democratic jurisprudence almost as a matter of course. Yet the evidence that is emerging, especially from the common-law jurisdictions, suggests that there is a significant risk that an *asymmetrical jurisprudence* will take hold, with the constitutional text contemplating a rights-friendly, liberal-democratic jurisprudence while the actual decisions and reasoning of the courts take a different course.¹⁷⁰

However, Ghana’s Supreme Court’s broad interpretation of Article 42 in *Ocansey/CHURCIL* is indicative of significant doctrinal development on matters of democratic participation that may impact positively the enforcement of other constitutional norms. It is precisely the “hard” cases where Ghana’s commitment to newer constitutional norms and democratic principles is rigorously tested. By enforcing constitutional principles to invalidate criminal disfranchisement, the judiciary has passed the test.¹⁷¹ The clear textual support for GIC voting rights made this a relatively easy case of constitutional interpretation. However, the force of inertia and the strength of the status quo could have proved formidable impediments to constitutional enforcement in this context. The enforcement of constitutionalism requires a broader paradigm shift to fully and finally distance newer democracies from their less liberal pasts. Failure to do so may carry significant long-term costs. An enforcement imperative brings the issue to the fore and a progressive and independent judiciary is essential to this solution.

IV. THE ENFORCEMENT IMPERATIVE FOR MATURING DEMOCRACIES

While many developing democracies focus heavily on the democratic processes and rights that cement the structure of democracy, the goal of democratization is to ensure the rule of law

¹⁶⁹ See generally *id.* (illustrating instances of “asymmetrical jurisprudence” in the Ghanaian judiciary’s freedom of press jurisprudence).

¹⁷⁰ *Id.* at 136 (emphasis in original).

¹⁷¹ *Id.* at 138.

as it is developed through processes that reflect the will of the people. Accordingly, constitutional democracies must rely on the recognition, protection, and enforcement of their constitutions as the principal means of maintaining their legitimacy and integrity. Constitutionalism assumes an articulation of principles, standards, and rights that collectively serve as both authority for and limitations on government power by higher, supreme law. Accordingly, one could argue that the rule of law is where constitutionalism and democracy intersect. The rule of law provides an important element of absolutism that is necessary to ensure that the ideals of constitutional democracy are in fact realized. Without the rule of law, constitutional democracy might only exist as a well-articulated set of laws, principles, and aspirations devoid of force and dependent upon the mutual interests and assent of traditional law enforcers, such as the judiciary, administrative agencies, and the police.

By its “thinnest”¹⁷² definition, the rule of law is flouted when government fails to abide by legal strictures on its authority and abrogates laws absent legal process.

Formal conceptions of the rule of law do not however seek to pass judgment upon the actual content itself. They are not concerned with whether the law was in that sense a good law or a bad law, provided that the formal precepts of the rule of law seek to go beyond this.¹⁷³

Indeed, “[t]he rule of law is open to any kind of content.”¹⁷⁴ By contrast, democracy derives its legitimacy from the assent of the people subject to governance under a democratic regime and necessarily embodies a normative judgment of the law’s substance.¹⁷⁵

¹⁷² See generally BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 102-13 (2004) (defining the cumulative conceptions of the rule of law from “thinner” to “thicker” in their reliance on or incorporation and embodiment of formalism and substance).

¹⁷³ *Id.* at 91-92.

¹⁷⁴ *Id.* at 97. This article does not espouse the rule of law as an absolute moral good in and of itself. Rather, this Article operates from the less controversial premise that the rule by law—government’s adherence to its own laws—is generally preferable to lawlessness or arbitrary override.

¹⁷⁵ Despite the important links among and between the rule of law, democracy, and constitutionalism, “[d]emocracy and the rule of law are not necessarily congruent Yet realising the principle of democracy necessarily implies realising the principle of constitutionality—and vice versa.” *We Believe in a Rule of Law Which Respects and Protects*, WASH. POST, June 9, 1984, at A14 (quoting Declaration of Democratic Values).

Legal scholarship on African countries often provides an undifferentiated analysis, focusing on extreme failures of governance or humanitarian operations. Rarely are components of constitutionalism subjected to thorough and detailed analysis. Instead of tweaking around the edges, scholars look to overhaul. However, when faced with a scenario like that of Ghana, where the system is workable and has ultimately produced the constitutionally correct result, refinement is a better, more affirming, and deserved solution. Indeed, while the purpose of this Article is not to determine whether Ghana's practice of disfranchising GICs was sound as a normative matter,¹⁷⁶ it presumes that an expansive right to vote is integral to free and fair elections, which are, in turn, the bedrock of constitutional democracy.¹⁷⁷ To the extent that excluding participation in the electoral processes that help determine the constructs of the democracy compromises its legitimacy, such exclusion is anathema to the concept of democracy itself.¹⁷⁸ Moreover, in a constitutional

"Constitutionality enables democracy to exist as a way of life for self-responsible and self-determined citizens." BERTELSMANN FOUNDATION, THE KAF DEMOCRACY REPORT 2006, at 10 (2006), available at http://www.kas.de/upload/Publikationen/research_dem_rep_06.pdf (last visited Aug. 29, 2009).

¹⁷⁶ While this Article does not take a position on the propriety of criminal disfranchisement as a normative matter, it is important to note that the compound conception of the rule of law—as both formal legalism and political liberty—would seem to support the notion that the disfranchisement of GICs violated the rule of law. This is not to be confused with an argument in support of a universal franchise as a moral matter. Instead, permitting greater electoral participation enhances the procedural safeguards that democratic processes provide to formal legality, which may or may not produce a moral outcome. "When democracy is cited as grounds for the legitimacy of law, and the values of formal legality are offered as additional reasons for legitimacy, the moral claim of law to obedience might seem weighty. It should not be forgotten, however, that neither of these formal mechanisms ensure that the laws enacted and carried out will be moral in content or effect." Tamanaha, *supra* note 172, at 101. See also *Ocansey/CHURCIL*, *supra* note 18 (opinion of Owusu, J.), at 11 ("The issue is not whether prisoners must be given the right to vote but rather what the position of the law is under the constitution.").

¹⁷⁷ H. Kwasi Prempeh artfully argues that analyses of structural constitutionalism in Africa have received short shrift, if any, and the overwhelming focus on procedural constitutionalism has overshadowed this important means of fully realizing democratization in Africa. See Prempeh, *Marbury in Africa*, *supra* note 22, at 1294. By focusing on the right to vote, this Article does not attempt to value juridical or procedural constitutionalism more than structural constitutionalism as means of achieving democratization. Rather, the analysis here assumes that the right to vote is not a creation or expansion of constitutionalism but rather a protection of the same through full expression and enforcement of the constitution. *Id.*

¹⁷⁸ See *Ocansey/CHURCIL*, *supra* note 18 (opinion of Wood, J.), at 29 ("True democracy recognizes certain key fundamental values and principles. Without these there can be no functional democracy. A core value of any democratic system is the concept of

democracy, there is little beyond flagrant human rights violations that is a greater affront to the democratic process than a failure to enforce and protect rights guaranteed by the Constitution, especially when those rights are integral to the operation of democracy, such as the right to vote.¹⁷⁹

Independent of democracy concerns, the rule of law violation is at the heart of the matter. A violation of the rule of law is corrosive to a maturing democracy, and was even more concerning than denying the vote to the relatively small number of GICs, because it called into question Ghana's commitment to its constitutional values. Guarding the constitution is a most important commitment for a maturing democracy and one in which the judiciary plays an integral role. Failure to do so would make the court—as the ultimate guardian of the constitution—complicit in its underenforcement and in the perpetuation of a systemic electoral inconsistency.¹⁸⁰

sovereignty of the people, and as expressed through right [sic] to choose representatives, through whom the sovereign will of the people, shall be exercised.”)

¹⁷⁹ For a general discussion of constitutionalism in Africa and the role of the judiciary, see Prempeh, *Marbury in Africa*, *supra* note 22, at 1244-48 (advocating for structural constitutionalism rather than juridical constitutionalism, arguing that the focusing on the latter “plac[es] undue faith in judicial review”). Prempeh’s critique in both papers is that the focus on democratization through the political process has been at the expense of extending constitutionalism to government structure (structural versus procedural constitutionalism). Recognizing this critique, this Article does not suggest that this reform or reforms like it will launch Ghana or other developing/maturing democracies into an entrenched democratized state. Rather, I see these as preventive measures against the backsliding and neglect of constitutional enforcement that may undermine the broader goals of constitutionalism and democracy. Also, unlike the critique that election reform inures largely to the benefit of rival elites, respecting Ghana’s Constitution as an inviolable legal instrument ensures that its expansive and inclusive language is given meaningful effect. The attendant result will be to empower a marginalized sector of the population, which furthers democratic goals and is also consistent with the proposition that the goal was “not to reform or transform government as to be a part of government.” Prempeh, *Africa’s “Constitutionalism Revival,” supra* note 22, at 501 (emphasis in original). See generally TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* (2003); Peter Vondoepp, *The Problem of Judicial Control in Africa’s Neopatrimonial Democracies: Malawi and Zambia in Comparative Review*, 120 *POL. SCI. Q.* 275 (2005) (underscoring the importance of an independent judiciary for new democracies in Africa); Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 *AM. J. COMP. L.* 605 (1996).

¹⁸⁰ This is indeed why the current legal challenge to GIC vote denial is important. See generally Charles Takyi-Boadu, *N.G.O. Opposes E.C. at Supreme Court*, *GHANAIAN CHRON.*, June 22, 2009.

A. *Criminal Disfranchisement as a Systemic Electoral Inconsistency*

As a maturing democracy, Ghana is continuously establishing and reinforcing the rule of law and constitutionalism. Underenforcement of the constitutional norm of universal suffrage threatened both efforts. Ghana's Constitution expressly affirms its commitment to democracy and constitutionalism: "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."¹⁸¹ However, by disfranchising its incarcerated citizens, Ghana flouted the very precept of its democracy in at least two key respects: respect for constitutionalism and respect for the rule of law. This was cause for concern, not only for Ghana as an individual constitutional democracy, but also to the extent that Ghana serves as a barometer of democracy in sub-Saharan Africa.¹⁸²

Rather than engage in the familiar practice of evaluating African democracy exclusively through a western lens, Ghana's practice of disfranchising GICs should be evaluated according to Ghana's own articulation of democratic principles, the rule of law, and constitutionalism. Indeed, this is what the analysis of systemic electoral inconsistencies requires. By examining the government's professed democratic ideals and pairing them with relevant electoral practices and policies, we can determine whether systemic electoral inconsistencies exist. Furthermore, Ghana's professed ideals ultimately appeared to guide its Supreme Court in determining how to bring the rhetorical electoral inconsistency into alignment with Ghana's democratic identity.¹⁸³

There is a surfeit of historical and contemporary rhetoric embracing the rule of law in Ghana. Ghana's earliest and most prominent modern leaders have emphatically espoused the virtues

¹⁸¹ GHANA CONST. 1992 art. 35(1).

¹⁸² Indeed, Ghana has popularly acknowledged and even embraced its position of role model within the African political landscape. See Francis Okeke, 2011: *Nigeria Can Get It Right, Says Ghana Electoral Chief*, DAILY TRUST, Oct. 8, 2009, http://www.news.dailytrust.com/index.php?option=com_content&view=article&id=7469:2011-nigeria-can-get-it-right-says-ghana-electoral-chief&catid=1:latest-news&Itemid=119; Uchenna Awom, *Ghana to Lecture Nigeria on Credible Elections*, LEADERSHIP NIG., Sept. 27, 2009, <http://www.leadershipnigeria.com/index.php/news/cover-stories/6523-ghana-to-lecture-nigeria-on-credible-elections>.

¹⁸³ *Ocansey/CHURCIL*, *supra* note 18 (opinion of Wood, C.J).

of the rule of law widely and often.¹⁸⁴ In his inaugural address, after the election that marked Ghana's evolution from a nascent to a maturing democracy, newly-elected President John Atta Mills proclaimed that he would uphold and prioritize the rule of law.¹⁸⁵

In addition to popular and political rhetoric, Ghana's general respect for the rule of law is visible in several seminal legal opinions. For example, in *New Patriotic Party v. Rawlings and Another*,¹⁸⁶ Ghana's highest court held that the new framework of the 1992 Constitution could be applied against its highest officer, the President, in determining the scope of presidential immunity. Specifically, the Court held:

[W]henever it is alleged that the President has by himself or any agent acted in a manner inconsistent with or in contravention of a provision of the Constitution, 1992 an action may be brought against him under Article 2 of the Constitution for a declaration to that effect, and for consequential orders.¹⁸⁷

Considering Ghana's post-colonial history of dictatorial governance and militarism, this ruling signaled the country's integrated commitment to upholding the new constitution.¹⁸⁸ Ghana's more recent constitutional jurisprudence has reflected "a growing determination" for the rule of law and due process.¹⁸⁹ In *Tuffour v. Attorney-General*,¹⁹⁰ the Court of Appeal, sitting as the

¹⁸⁴ Ghana's leaders have embraced the concept of the rule of law since independence. See, e.g., Kwame Nkrumah, *Ghana: Law in Africa*, 6 J. AFRICAN L. 103, 103 (1962) ("Law, to be effective, must represent the will of the people and be so designed and administered as to forward the social purpose of the state.").

¹⁸⁵ But see Kwesi Jonah, *Mills' Rule of Law Clause Dangerous*, <http://ghanaelections2008.blogspot.com/2009/01/kwesi-jonah-mills-rule-of-law-clause.html> (Jan. 8, 2009, 5:01 EST) (articulating concerns in certain political camps about the new president's reference to the rule of law as code for anticipated prosecution of former political leaders).

¹⁸⁶ *New Patriotic Party v. Rawlings and Another*, [1994] 2 G.L.R. 193, 207 (Ghana).

¹⁸⁷ *Id.*

¹⁸⁸ Indeed, Ghana's juridical development concerning the rule of law has ripened significantly since the notorious 1961 decision in *In re Akoto*, in which the Supreme Court dealt a blow to individual rights and the rule of law. See *Tsatsu Tsikata (No. 1) v. Attorney-General*, [2002] S.C.G.L.R. 189, 222 (Ghana) (noting that "if the decision had gone the other way" in *In re Akoto*, [1961] 2 G.L.R. 523, individual rights and the rule of law would have been entrenched in Ghana far sooner).

¹⁸⁹ *Tsatsu Tsikata*, S.C.G.L.R. at 225 ("There is now a growing determination on the part of the peoples of the modern state to have enshrined in their constitutional process the concept of the rule of law, or what is called in other jurisdictions 'due process.'"). The *Apaloo* decision further suggests that a challenge to the disfranchisement of GICs would receive thoughtful consideration by the Supreme Court.

¹⁹⁰ *Tuffour v. Attorney-General*, [1980] G.L.R. 637 (Ghana).

Supreme Court of Ghana, quashed any doubt as to whether the constitution was the supreme law of the land.¹⁹¹ Further, the *Apaloo* decision cemented the Court's role as the ultimate arbiter of protecting the right to vote and, by extension, enforcing constitutionalism:

[T]he courts should and would protect the right to vote at all costs as it has previously protected the right to register, otherwise, democracy in this country would be undermined As guardians of the Constitution, and the rights and freedoms provided therein . . . including the right to vote, which is the first basic right and the pivot upon which all other rights rest, it is the bounden duty of this court, to strike down an act which has the effect of taking away the full and free enjoyment of the franchise¹⁹²

The forceful protectionist language of the Court underscores Ghana's broad commitment to constitutionalism and protection of the right to vote as integral to that effort.

To be sure, considering the relatively small number of citizens directly harmed by criminal disfranchisement in Ghana, this practice was not a dire threat to Ghana's democratic or constitutional foundation.¹⁹³ Moreover, as a practical matter, given Ghana's priorities concerning democratization, it is unlikely that the practice of criminal disfranchisement, in and of itself, could be viewed as an emergent threat to its legitimacy as a democracy. However, these are not the appropriate inquiries for purposes of judging the significance and cost of continued constitutional underenforcement and what could mean for Ghana's democracy. The disfranchisement of GICs, as an abrogation of the Constitution's conferred right to vote, signified a loose thread in the fabric of Ghana's constitutional democracy;

¹⁹¹ *Id.* at 647-48.

¹⁹² *Apaloo*, G.L.R. at 14-16.

¹⁹³ There are approximately 13,000 incarcerated citizens in Ghana out of a total population of approximately 23,832,495. See CIA, *The World Factbook: Ghana*, <https://www.cia.gov/library/publications/the-world-factbook/geos/gh.html> (last visited Dec. 2, 2009); King's College London, *Prison Brief for Ghana*, http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_country.php?country=22 (last visited Dec. 2, 2009). At present, there are approximately forty-seven prison establishments. *Id.* Of this population, approximately 29.1% are pre-trial detainees. *Id.* With an official capacity of 8,004, Ghana's prison facilities are operating at 171% capacity. *Id.* The conditions of Ghana's prisons impact both internal and external assessments of democracy. For a compelling narrative account of the Ghanaian prison condition, see Raymond A. Atuguba, *Ghana and Her Prisons and Prisoners: Stories from the Field*, AFLA LEGAL AID J. (forthcoming 2010).

while this may not lead to its full unraveling, it certainly frays it. This is particularly so when there is little formal resistance to the underlying normative question of whether prisoners should have the right to vote.¹⁹⁴ Moreover, constitutional violations are evaluated not on the number of persons harmed but on the direct harm to constitutionalism as a foundational principle of constitutional democracy. In addition, because the citizens most affected by this breach of the rule of law and constitutionalism are part of a discrete and insular minority removed from the political process, this violation of rights should be subject to the most stringent review.¹⁹⁵ For these reasons, there can be no greater priority for a developing or maturing democracy than obedience to the principles of constitutionalism and the rule of law. Not only does constitutional underenforcement harm Ghana's constitutionalism objectives directly, it also reinforces an undervaluation of constitutionalism in the region as a whole.¹⁹⁶

¹⁹⁴ See Tazoacha Asonganyi, *Rule of Law as Bulwark of Independents Electoral Commissions*, ENTREPRENEUR (Cameroon), Jan. 28, 2009, available at <http://www.entrepreneurnewsonline.com/2009/01/rule-of-law-as-bulwark-of-independents-electoral-commissions.html>.

Indeed, the entire Constitution reads like a manifesto of the people of Ghana that they hand to every elected representative of the people to ensure that they do not deviate from the principles laid down in the Constitution and only make qualifications, rules and laws "... as are necessary in a free and democratic society and are consistent with this Constitution"

The Ghanaian electoral commission does its work well because it is protected by the rule of law, which is upheld by a Judiciary that is independent.

Id. See also Tazoacha Asonganyi, *Electoral Commission: Pillar of Ghana's Successful Democracy*, ENTREPRENEUR (Cameroon), Jan. 28, 2009, available at <http://www.entrepreneurnewsonline.com/2009/01/electoral-commission-pillar-of-ghanas-successful-democracy.html> (lauding the organization and accomplishments of Ghana's Electoral Commission in contrast with Cameroon and other African nations).

¹⁹⁵ This argument finds support in the well-known American constitutional law case of *U.S. v. Carolene Products Co.*, 304 U.S. 144 (1938), in which the Supreme Court of the United States laid the groundwork for strict scrutiny of constitutional infringements based on the argument that "prejudice against *discrete and insular minorities* may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Id.* at 153 (emphasis added).

¹⁹⁶ There are many countries that allow persons with a criminal conviction to vote based on an expansive interpretation of a constitutionally granted universal right to vote. See *supra* pp. 21-25. Moreover, there are numerous examples of countries that have disfranchised their incarcerated citizens expressly within a constitutional framework. See *supra* note 121. Ghana's practice of disfranchising GICs follows neither approach and instead results in a de facto denial of the right to vote that neither honors the right to vote

Conversely, the willingness of Ghana's Supreme Court to enforce the fair measure of the right to vote by acknowledging and enforcing the voting rights of GICs strengthens the concept of constitutionalism within Ghana and among other countries in the region.

Notwithstanding the constitutionalism objectives, it is important to analyze, as a pragmatic matter, where this issue falls within Ghana's scheme of national priorities. Certainly, the substandard economic condition of the majority of Ghanaians and widespread illiteracy threaten the growth and sustainability of democracy in Ghana.¹⁹⁷ However, juxtaposing the necessities of democratization to quotidian societal needs as a zero-sum calculus does a disservice to the very populations such analysis is intended to protect. Democratization in Africa and socioeconomic development can no longer be legitimately "framed as a choice between 'a full belly' . . . and the ballot," and certainly not in a politically and economically stable nation such as Ghana, despite the overwhelming concerns that remain on matters of poverty, education, employment, and health.¹⁹⁸ Indeed, the challenge to constitutionalism lies in part with low levels of public demand for judicial enforcement because of limited literacy and limited awareness of rights.¹⁹⁹

Against this backdrop, it is clear that the continued underenforcement of the right to vote did not comport with Ghana's professed dedication to the rule of law and constitutionalism, its progress toward democratization, or its role as a regional model in democracy building. To maintain its

established under Article 42 of the Constitution nor appropriately amends this provision to be consistent with its practice.

¹⁹⁷ See Posting of Ben Ofosu-Appiah to African Path Blog, http://www.africanpath.com/p_blogEntry.cfm?blogEntryID=5488 (June 6, 2003, 5:55 EST) [hereinafter Ofosu-Appiah].

¹⁹⁸ Prempeh, *Marbury in Africa*, *supra* note 22, at 1285. *But see* Ofosu-Appiah, *supra* note 197 ("Ghana cannot pride itself as being democratic if a section of the people are ill-fed, ill-clothed, ill-housed, and economically insecure.").

¹⁹⁹ See Prempeh, *Marbury in Africa*, *supra* note 22, at 1296-98 (2006) (describing the "[d]emand [s]ide [c]hallenges to [j]udicial [r]eview in Africa"). *See also* Stanton, *supra* note 58.

The current process . . . forces anyone who disagrees with the legality of a regulation once passed to initiate a judicial review process. This is an expensive and cumbersome way in which to address problems that could be avoided if there were an opportunity for stakeholder consultation and scrutiny prior to promulgation of proposed regulations.

Id.

adherence to principles of constitutionalism in its democratic processes, Ghana's judiciary rightfully permitted GICs to vote, thereby avoiding the process of constitutional amendment to legitimize the practice. Ghana's continued failure to enforce the fair measure of the right to vote would have left it outside the bounds of its internal laws and, more significantly, outside the rule of law. Instead, by heeding the imperative of enforcement, Ghana's courts have helped to solidify its development as a maturing democracy and a model of democratization. Now the task of enforcement is left to the EC and, ultimately, to the judiciary to ensure that its decree is followed.

B. Popular Sentiments Supporting Enforcement

Although it has been established that, as a matter of law, GICs have the right to vote, it is also important to examine the social context that ripened the enforcement of the fair measure of the right to vote. In the years leading up to Ghana's Supreme Court's decision to enforce the voting rights of GICs, popular debate in the press and electronic media—surrounding whether GICs should be permitted to vote—revealed little formal dissensus on the matter. Most opposition arose in response to the legal action filed by the LRC prior to the most recent presidential elections²⁰⁰ and, later, in response to the action filed by CHURCIL.²⁰¹ However, notable powerbrokers and stakeholders have generally been in accord that, as a normative proposition, GICs should not be denied the right to vote. This sentiment is generally consistent with the informal empirical research I conducted on this issue.²⁰² My informal empirical studies

²⁰⁰ See *supra* note 54. See also Richard Obeng-Mensah, *Are Detainees & Prisoners Entitled to Vote?*, Ghana Home Page (May 19, 2008), <http://www.ghanaweb.com/GhanaHomePage/features/artikel.php?ID=143965> (discussing prisoner voting).

²⁰¹ Takyi-Boadu, *supra* note 180.

²⁰² To the best of my knowledge, this Article contains the only empirical data regarding the popular views of Ghanaians on the policy of criminal disfranchisement. A brief note on my research methodology is in order: I lived in Ghana for ten months from 2005 to 2006, conducting research as a Fulbright Scholar on issues of democracy, criminal disfranchisement, and prison conditions. By relying on a plethora of domestic data, I have attempted to authenticate the concerns surrounding criminal disfranchisement through the voices and perspectives of Ghanaians and minimize emphasis on foreign participants and observers about national and local views. I conducted legal research at the University of Ghana, Legon, the Ghana National Archives, and at Kwame Nkrumah University of Science and Technology in Kumasi, Ghana (KNUST). The Legal Resources Centre of Ghana was my host institution for this project and provided immeasurable support. With

demonstrate that, long before the two actions that precipitated Ghana's Supreme Court's enforcement of prisoner voting rights were filed, the Ghanaian citizenry possessed the political and social will to adhere to constitutionalism and enforce the voting rights of GICs. This popular sentiment is relevant to the extent that it reinforces the chasm between the rhetoric of democracy and the manner in which it is practiced in a maturing democracy.

In a survey of 600 Ghanaians of varied demographic backgrounds, seventy-two percent stated that they would vote "yes" on a public referendum to allow prisoners the right to vote.²⁰³ Only forty-one percent stated that they believed prisoners should lose the right to vote while in prison.²⁰⁴ Anecdotally, many people surveyed seemed to believe, as the Court later held, that the Constitution prohibited GICs from voting. When they were read the text of Article 42, nearly all of these individuals thought that GICs should be permitted to vote since nothing in the Constitution expressly forbids GIC voting. A smaller number of interviewees concluded that GICs should be permitted to vote regardless of whether they are denied or granted the right to vote by law. On balance, it seemed that the opinions of the interviewees were shaped by their perception of the rule of law (that is, whether the Constitution provides any affirmative support for the current practice of disfranchisement).

The results of these studies not only underscore the general support for and lack of formidable opposition to enforcement of GIC voting rights, but also serve to buttress the popular commitment of Ghanaians to the rule of law. Indeed, other

the assistance of eight trained graduate students of KNUST, I oversaw the administration of over 600 surveys. All interviewees were Ghanaian citizens of at least 18 years of age. In addition, all interviewees were informed that the surveys formed part of an academic research project and were not related to any partisan, governmental, or commercial enterprise, and that all identifying information, such as names and contact information, would be kept confidential.

In addition to the surveys, I also conducted approximately twenty-five formal, in-depth interviews of government representatives, members of the judiciary, international organizations, local nongovernmental organizations, and academics. I also had informal discussions with representatives of these groups and other members of the public. I found nearly all of my contacts to be very open, responsive, and receptive to inquiry. All meetings, surveys, and interviews that I conducted directly were in English. Please note that those who contributed to the empirical research either as assistants or interviewees do not necessarily endorse my analysis or my conclusions, nor are they responsible for any errors I may have made.

²⁰³ *See id.*

²⁰⁴ *Id.*

surveys conducted from 1999 to 2005 show that Ghanaians, as a whole, overwhelmingly embrace democracy.²⁰⁵ While Ghanaians have generally expressed satisfaction and patience concerning the development of democracy in their homeland,²⁰⁶ as the longevity of Ghana's democracy advances, popular expectations of its future implications are increasing.²⁰⁷

The views articulated in the survey results anecdotally reflect an expansive view of citizenship best summarized by E.H. Ofori-Amankwah, Dean and Professor of the Faculty of Law at Kwame Nkrumah University of Science and Technology:

[E]ven though the institutional treatment of [prisoners] male or female, young and old does present many knotty problems of law and human rights issues, they do not cease to be citizens of the state and members of the community out of which they were whisked into prison, and into which they will ultimately return after serving their sentences.

....

Offenders do not cease to be human beings, much less citizens of the state and only the necessary "human rights" can be taken away in keeping with their status as convicted persons (such as the curtailment of their movement etc.).²⁰⁸

Moreover, as Ghanaians have recently grappled with both internal and external conceptions of citizenship in connection with extending voting rights to Ghanaians citizens living abroad, the connection between this issue and the voting rights of GICs has not been lost.²⁰⁹

²⁰⁵ See AFROBAROMETER, BRIEFING PAPER NO. 18, SUSTAINED SUPPORT FOR DEMOCRACY IN GHANA 1, 7 (2005), available at <http://www.afrobarometer.org/papers/AfrobriefNo18.pdf> [hereinafter AFROBAROMETER NO. 18]; AFROBAROMETER, BRIEFING PAPER NO. 9, DEMOCRACY AND ELECTORAL ALTERNATION: EVOLVING AFRICAN ATTITUDES 2 n.4 (2004), available at <http://www.afrobarometer.org/papers/AfrobriefNo9.pdf>.

²⁰⁶ See AFROBAROMETER NO. 18, *supra* note 205, at 6-7.

²⁰⁷ Eighty-eight percent, or almost nine out of ten, "Ghanaians expect their views to form the basis of programmes initiated by their elected representatives [in Parliament]." AFROBAROMETER NO. 20, *supra* note 39, at 1.

²⁰⁸ E.H. Ofori-Amankwah, *Human Rights and the Criminal Process in Ghana*, 1 KNUST L.J. 111, 121, 127 (2005).

²⁰⁹ Many of the individuals I interviewed, including GICs, were aware of the then-ongoing debate regarding whether voting rights existed or should be extended to the Ghanaian diaspora. They uniformly posited that if Ghanaian citizens who did not presently reside in the country should have the right to vote, then surely those citizens residing in the country, even in prison facilities, should be permitted to vote absent express law to the contrary.

Among opinion leaders who have spoken out on the issue, support for enforcing the right to vote of GICs is consistent.²¹⁰ Nana Obiri Boahen, former Minister of State at the Ministry of the Interior, has argued that “[e]ven if there were any such law [denying voting rights to GICs,] that would be against the fundamental rights of people.”²¹¹ In addition to embracing the rule of law, President Atta Mills has espoused basic principles of equality under the law and democratic egalitarianism, suggesting a general support for the enforcement of the constitutional rights of GICs. Indeed, President Mills has stated that Ghana must:

ensure that [its] laws work in a system that is blind to one’s place in society or one’s political persuasion . . . [and] ensure social justice, equity and equality under the laws of Ghana. There is only one Ghana, and that Ghana must work in the interests of every Ghanaian.²¹²

Most notably, the EC seemed to agree with the concept of extending voting rights to GICs.²¹³ The Chairman of the EC, Dr. Afari-Gyan, was primarily concerned with the safety of the staff of the EC and a lack of clarity on the legal provisions for prisoners to vote.²¹⁴ The EC acknowledged that there is a conflict between Article 42 and the residency requirement prohibiting a prison from serving as a place of residence for purposes of registration but argued that clarification must be sought in a court of law and did not seek administrative clarification of the law.²¹⁵ With the added

²¹⁰ See also Interview with Judge Francis Emile Short, Former Chairperson of the Commission on Human Rights and Administrative Justice in Ghana from 1993 to 2004, TV 3, ModernGhana.com (last visited April 26, 2010).

Even with people who are in prison, I don’t see any problem about exercising that right [to vote]. I really, I can’t speak for the Electoral Commission but I would, I think, it should be possible to put in the necessary mechanisms in the prisons to ensure that, you know, prisoners exercise their right to vote.

Id.

²¹¹ Will Prisoners Vote?, <http://ghanaelections2008.blogspot.com/2008/05/will-prisoners-vote.html> (May 15, 2008 2:49, EST).

²¹² President Professor John Evans Atta Mills, Inaugural Speech, January 7, 2009 available at <http://www.ghc-ca.com/Animation/speech.pdf>.

²¹³ See Makalo, *supra* note 131.

²¹⁴ *Prisoners Have Constitutional Right to Vote—CHRI*, DAILY GRAPHIC, May 26, 2008, available at <http://news.myjoyonline.com/news/200805/16655.asp>.

²¹⁵ See Makalo, *supra* note 131. To be sure, there are some legitimate concerns about the integrity of the voting process as it concerns GICs: (1) the government might engage in election fraud by registering prisoners and forcing them to vote for the party in power, (2) violence or disruption in prisons may occur around elections and election results based on partisanship, and (3) the safety of election personnel could be threatened. Indeed, at a

force of the *Ocansey/CHURCIL* decision, the enforcement imperative requires that Ghana's judiciary ensure that its decree is honored and that the EC enforces the constitution in a timely and efficient manner.

V. CONCLUSION

In 2002 democratization expert Nicholas van de Walle wisely counseled that “[w]e must not forget that even if day-to-day politics falls short of democratic ideals, the typical sub-Saharan country is measurably more democratic today than it was in the late 1980s.”²¹⁶ Today, the democratic landscape in Africa is even more verdant with promise than when van de Walle made these remarks. Ghana's recent judicial enforcement of its constitutional provisions to allow prisoners the right to vote is strong evidence of this promise and of the self-regulation necessary for African nations to advance their democratization. Indeed, if African nations and other developing democracies are to be recognized internally and externally as democracies, then the unwavering expectations at home and abroad must be that democratic principles are followed, the rule of law is respected, constitutional norms are enforced, and systemic electoral inconsistencies are minimized. For all democracies, failure to adhere to the rule of law is a threat to internal stability and external standing. For developing and maturing democracies, such as Ghana, the threat is necessarily greater in magnitude and impact, notwithstanding the resource limitations and other internal challenges that may legitimately frustrate constitutional enforcement.

When faced with the existing chasm between the constitutional norm of the right to vote and its practice of disfranchisement, Ghana's judiciary followed the only option consistent with Ghana's democratic trajectory and sound constitutional enforcement: it followed the rule of law by enforcing fair measure of the right to vote. Ghana has successfully

2008 colloquium organized by CODEO, the EC expressed concerns regarding the safety of its staff and the constitutionality of permitting GICs to vote. Will Prisoners Vote?, *supra* note 211. See also Makalo, *supra* note 131 (“It is the courts that can get them out to come and vote and, if that happens, the EC cannot prevent them. But if we are going to do this, we must get assurances that our officials will be safe.”). However, most if not all of these concerns would apply to the general citizenry as well, and to the extent that there are empirical justifications for these concerns, there are safeguards that can be put in place that would be more viable and exact a lesser cost than vote denial or abridgement.

²¹⁶ Nicolas van de Walle, *Africa's Range of Regimes*, J. DEMOCRACY, Apr. 2002, at 67.

transitioned from its status as a new democracy to a “maturing” one. It is continuing to clear significant hurdles and serving as a regional and global model of democracy. By resolving the systemic electoral inconsistency that resulted from the under-enforcement of its right to vote, Ghana’s judiciary demonstrated that a constitutional norm as integral to its democratic identity as the right to vote cannot be undermined by administrative fiat if it seeks to maintain an abiding faith in constitutionalism, democracy, and the rule of law.

As a case study, Ghana also highlights the concern surrounding non-judicial underenforcement of constitutional norms and the susceptibility of non-judicial actors to consciously or unconsciously condition enforcement on impermissible factors such as social status. This is illustrated most acutely by the disparate treatment of GICs and Ghanaian diasporans with respect to enforcing the right to vote. The microanalysis of underenforcement of such a constitutional norm in a maturing democracy further underscores the importance of understanding the broader legal and political contexts in which underenforcement occurs. Indeed, “[c]onstitutionalism is the end product of social, economic, cultural, and political progress; it can become tradition only if it forms part of the shared history of a people.”²¹⁷ This is especially true if the insights derived from U.S. Constitution-based metadoctrinal analysis are exported to an international comparative context, as in this Article, further expanding the instructional value of this important body of scholarship.

²¹⁷ Okoth-Ogendo, *supra* note 137, at 80.

