

The Nigerian Legal System Through the Lens of H.L.A Hart

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ABSTRACT

This thesis interrogates the existence and nature of Nigerian legal system from the perspective of analytical jurisprudence. It does this by looking at the fundamental requirements needed to prove the existence of a modern municipal legal system as primarily articulated by H.L.A Hart. In his celebrated work *The Concept of Law*, Hart postulated two minimum conditions necessary and sufficient for the existence of a modern municipal legal system: first, the primary rules of obligation that have been validated by the system's rules of recognition, must be generally obeyed or followed by ordinary citizens. Secondly, the legal system's rules of recognition which state the criteria of legal validity and its rules of change, as well as its rules of adjudication must be effectively accepted as common general standards of official behaviour by the public officials of the legal system. The frugality of this account makes it very attractive, and its simplicity enables this study to evaluate the existence of Nigerian legal system with a relatively compact and concise set of tools. At the level of Nigeria legal system, there has been widespread refusal comply with the foundational and authoritative rules of the Nigerian legal system. Also, there has been a problem of multiple conflicting legislations yielding to a parallel legal system. This unavoidably triggers the question of the ontological value of Nigerian legal order as a modern municipal legal system. Invariably, the pertinent question is, has Nigeria got a legal system? This thesis attempts to respond to the above question by examining the conditions necessary and sufficient for a legal order to exist as a complete legal system in a modern enlightenment, and also see whether or not, at present, such minimum requirements have been met by the Nigerian legal order. In achieving this, this study used some selected egregious cases and events to interrogate whether there is the presence of an authoritative rule of recognition in Nigerian legal order and if there is, whether Nigerian officials take the internal point of view towards it. The major findings are that: first, the Constitution, judicial precedents and international laws, all form part of the rules of recognition in Nigeria. Secondly, Nigerian officials deliberately do not take the internal point of view towards the rules of recognition so identified. Therefore, the conclusion of this dissertation is that Nigerian has got a legal order that is not worthy of being called a modern or complete legal system.

DECLARATION

This work has not previously been accepted in substance for any degree and is not being concurrently submitted in candidature for any degree.

Signed: Sylvester Adejoh Ogba (candidate)

Date 24th April 2023

STATEMENT 1

This thesis is the result of my own investigations, except where otherwise stated. Other sources are acknowledged by way of footnotes giving explicit references. A bibliography is also attached.

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STATEMENT 2

I hereby give consent for my thesis, if accepted, to be available for photocopying and for inter-library loan, and for the title and summary to be made available to external institutions.

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Abbreviations

AC	Appeal Cases
AG	Attorney General
AGF	Attorney General of the Federation
ALL	FWLR All Federal Law Reports
ANLR	All Nigerian Law Reports
APC	All Progressive Congress
AU	African Union
All E.R	All England Law Reports
CA	Court of Appeal
CAP	Chapter
CFRN	Constitution of the Federal Republic of Nigeria
CJN	Chief Justice of Nigeria
COP	Commissioner of Police
DSSS	Directorate of State Security Service
ECOWAS	Economic Community of West African States
ECSLR	East Central State Law Reports
FGN	Federal Government of Nigeria
FHC	Federal High Courts
IG	Inspector General of Police
IMN	Islamic Movement of Nigeria
INEC	Independent National Electoral Commission
IPOB	Indigenous People of Biafra
JSC	Justice of the Supreme Court (Nigeria)
JUSUN	Judiciary Staff Union of Nigeria
LFN	Laws of Federation of Nigeria
LPELR	Law Pavilion Electronic Law Reports
N.R.N.L.R	Northern Nigeria Law Reports
NCLR	Nigeria Constitutional Law Reports

NEPA	Nigerian Electric Power Authority
NLR	Nigeria Law Reports
NMLR	Nigeria Monthly Law Report
NSCC	Nigerian Supreme Court Cases
NWLR	Nigeria Weekly Law Reports
PDP	Peoples Democratic Party
SARS	Special Anti-Robbery Squad
SC	Supreme Court
SMC	Supreme Military Council
UILR	University of Ife Law Reports
UN	United Nations
WACA	West Africa Court of Appeal

CHAPTER ONE: INTRODUCTION

1.1 Background to Study

Joseph Raz's assertion that the existence and nature of a legal system depends largely on whether it has features that make it worthy of the name 'legal system' holds true.¹ The aim of this study is to interrogate the existence and nature of the Nigerian legal system from the perspective of analytical jurisprudence. The study does this by looking at the fundamental requirements that are necessary and sufficient to prove the existence of a modern municipal legal system as primarily articulated by H.L.A Hart. In *The Concept of Law*, Hart claims that law is a legal system, and a legal system is a 'union of primary and secondary rules'.² He further proposes two minimum conditions are necessary and sufficient for the existence of a modern municipal legal system: first, the primary rules of obligation that have been validated by the system's rules of recognition, must be generally obeyed or followed by ordinary citizens.³ Secondly, the legal system's rules of recognition which state the criteria of legal validity and its rules of change, as well as its rules of adjudication have to be clearly accepted as common general standards of official behaviour by the public officials of the legal system.⁴ The frugality of this account makes it very attractive, and its simplicity enables this study to evaluate the existence of Nigerian legal system with a relatively small and concise set of tools. In this study, I will canvass the jurisprudential literatures on these two Hartian requirements for the existence of a legal system to examine whether the Nigerian legal system has such features that would place it within that requirements' referents.

Regarding whether any legal system meets these Hartian criteria in recent times, Pavel and Galligan claim that Hart believes that the legal systems of many advanced or developed democracies certainly do.⁵ Thus, what do the legal systems of developed Europe, North America, New Zealand, Australia, Japan, and possibly, the Republic of South Korea have in common that make them likely examples of legal systems that meet Hart's two criteria?

¹ Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of a Legal System* (2nd edn, OUP 1980) 203-208

² H.L.A Hart, *The Concept of Law*, (1st edn, Clarendon Press 1961) 55. The second edition which has a postscript, was edited by Penelope Bulloch and Joseph Raz in 1994. The third and last edition was published in 2012 and had an Introduction by Leslie Green). These two latter editions are the same in content and page number with Hart's unedited original book. Therefore, it would not be necessary to always mention the particular edition in subsequent citations. 94

³ Ibid 116

⁴ Ibid

⁵ Pavel Carmen, Is International Law a Hartian Legal System? (2018) 31 Ratio Juris 3. 1 and Dennis Galligan, *Law in Modern Society* (OUP 2007) 19-23

Pathological situations like revolution and war excepted, when one looks more closely at these legal systems, it is safe to say that they possess a reasonably stable and efficient nature that make them uniquely modern. They are modern in that they use law extensively to resolve most of their social and political issues.⁶ The existence of these legal systems cannot be said to be in doubt because they have highly advanced administrative structures that enable the efficient application and enforcement of rules.⁷ Indeed, they have well defined evolutionary authoritative and foundational rules regulating and restraining the utilisation of legal instruments within their systems.⁸ Furthermore, they have government or public officials who with intention and in practice accept the fundamental laws of the system and do so with tremendous regard for the legal order.⁹

In Nigeria, the operation of the legal system has also been increasingly justified by the existence of some foundational rules,¹⁰ particularly those existing as autonomous sources of law, and which also give legal validity to other primary rules. However, the motivation for this study is that I have pondered for a while on why the Nigerian legal system that was largely a bequest of the British system cannot exist or function exactly or nearly the same way the British legal system (and others like it) do. Indeed, several shortcomings can be perceived as factors that create scepticism regarding the existence and nature of the Nigerian legal system as a modern municipal legal system. First, the Nigerian legal system provides the classic example of a legal order whose existence is in serious doubt as a result of increased disparagement of the fundamental rules of the legal system by its public officers, especially those in the executive arm of government. For example, the frequent suspension of some parts of the Constitution of the Federal Republic of Nigeria (herein after referred to as CFRN or the Constitution) by successive military governments¹¹ and the incessant violation of human rights and other

⁶ Mikaila Arthur, *Law and Justice around the World: A Comparative Approach* (1st edn, UCP 2020) 1-16

⁷ Michael Doherty, *English and European Legal Systems* (3rd edn, Old Bailey Press 2003), R. David and J. E. Brierley, *Major Legal Systems in the World Today*, (Sweet & Maxwell Ltd, 1985)

⁸ A. W. Bradley and K.D. Ewing, *Constitutional and Administrative Law* (15th edn, Pearson Education Ltd, 2011), 31-32.

⁹ For excerpts on the existence and nature of legal systems in developed societies, see Galligan (n 5) 20-21; F. Beveridge and S. Nott, 'A Hard Look at Soft Law', in P. Craig and C. Harlow (eds) *Law-making in the European Union* (London 1998).

¹⁰ Foundational rules in this context refers to those rules which have autonomous sources and determines the validity of other subordinate rules within the legal system. For example, the Constitution of Nigeria, judicial precedents, international law, among others.

¹¹ See, Decree No. 1 1966 (Constitution Suspension and Modification) and Decree No 1 of 1984 (Constitution Suspension and Modification), Decree No. 26 of 1986 (Constitution Suspension and Modification), among others. These decrees ousted the parts of the Constitution that were not favourable to military government

important provisions of the Constitution by successive civilian administrations.¹² On the part of the legislatures, there is gross disregard for the Constitution and judicial precedents, especially by way of unlawful impeachments of those constitutionally elected to represent the people,¹³ as well as the deliberate lack of compliance with precedents by judges.¹⁴ Secondly, the operations of parallel legal systems and rules resulting from legal pluralism has generated difficulties. For example, the establishment of Hisbah Police by Hisbah Board contrary to section 214 of the Constitution of the Federal Republic of Nigeria (herein after referred to as CFRN or Constitution) and its tacit recognition by the federal government, undermines the foundational rules of the legal system, and invariably challenges its existence as a legal system.¹⁵

Based on the problems highlighted above, the central question which this thesis focuses on is: does Nigeria have a legal system? If it has, then to what extent can the Nigerian legal system be adjudged a modern legal system? In addition to this central thesis question, the following sub-questions will also be addressed:

- what laws constitute the authoritative rules of recognition in the Nigerian legal system?
- To what extent do Nigerian public officials take internal point of view towards these rules?
- How has modern adaptations of the rules of recognition dealt with the problem of legal pluralism in Nigeria?
- What are the implications of the rules of recognition for Nigerian nascent democracy?
- In what manner can civil disobedience be construed as a form of moral attitude internal point of view?

¹² See S. Tyoden, 'State and Security in Nigeria Fourth Republic' in A. Gana and Y. Omelle (eds) *Democratic Rebirth in Nigeria* Vol I (Africarus Multimedia: Hampshire, 2005), O.J Atake & W.A Dodo 'Democracy, Good Governance, and Nation Building: A Multi-Dimensional approach' (2010) 1 Int'l J. of Advanced Legal Stud. 1; J. A. Dada, 'Human Rights Protection in Nigeria: the Past, the Present and Goals for role Actors for the Future' (2013) 14 JLPJ.

¹³ *Inakoju v Adeleke* 2007 ALL FWLR 353, *Abaribe v The Speaker, Abia State House of Assembly & Anor* (2000) LCN/0783 (CA), *Ekiti State House of Assembly v Ayodele Peter Fayose & Anor* (2009) LCN/3464 (CA), *Ugwu v Ararume* (2007) 7 MJSC 1, *Amaechi v INEC* (2007) LCN/231 (CA), *Rimi v INEC* (2005) 6 NWLR (pt 920). In all the above-mentioned cases, the court declared the actions of both the legislature and INEC as unconstitutional.

¹⁴ See *Agbaje v Fashola* (2008) 6 NWLR pt 1082 at pp.127-8; *Fayemi & Ors v Oni & Anor* CA/IL/EP/GOV/25/2009

¹⁵ S. 214 of the Constitution of the Federal Republic of Nigeria (CFRN) categorically provides; 'there shall be a Police Force for Nigeria which shall be known as the Nigerian Police Force, and subject to the provisions of this section, no other police shall be established for the Federation or any part thereof'. See also S. 3 of Nigerian Police (Establishment) Act, 2020

Therefore, in testing these minimum conditions theory against the Nigerian legal system, I argue that the first criterion which requires general obedience from the citizens is anchored on the authority of the rule of recognition because a citizen obeys a rule only because the rule has been validated by the rule of recognition.¹⁶ The reason for holding this view is because if there is no authoritative rule of recognition that confers validity on the primary rules within the legal system, it implies that there is really no duty to obey those primary rules.¹⁷ So, general obedience in this way by the citizens is premised on the presence of some authoritative rules within the legal system. Hart claims that the existence of an obligation (i.e., the duty to obey) on a person suggests that there are rules imposing such obligations.¹⁸ Invariably, having an obligation demands of a citizen to act or refrain from acting in a particular way because of the existence of some authoritative rules that validate the primary rules to be obeyed.¹⁹ I argue contrary to received wisdom that the rule of recognition is capable of grounding the ordinary citizens' obedience as much as the officials'. The reason being that, if the existence of the rule of recognition is based on officials' acceptance, it follows that the duty to obey which comes from such acceptance would have definitely been meant for only officials. However, these officials are only officials because the citizens have accepted them as such and recognised their capacity to create laws that should be obeyed by all. If this argument is valid, then rule of recognition is capable of grounding citizens' obedience too. On the strength of the above argument, the presence of the rule of recognition becomes the first criterion for the existence of a legal system in this study.

The second requirement proposed is that public officials take a uniform internal point of view towards the authoritative rules of the legal system. I will argue that this second requirement is the most important because the enduring existence of a legal system and its efficacy largely depends on public officials approaching the rule of recognition from the internal point of view.²⁰ But there is the sense that there may be a foremost difficulty that needs to be tackled here before embarking on testing the theory. This is because the internal point of view is somewhat problematic and quite ambiguous. Thus, I argue that there may be different forms of the internal point of view. The first and most popular interpretation is the norm-relative

¹⁶ According to Hart, the rule of recognition is the ultimate authoritative rule of the legal system that validates all other primary rules of the system. In chapter two, I will do a detailed analysis of the rule of recognition as the ultimate validating rule. See Hart (n 2) 95

¹⁷ See similar argument at Michael Payne, 'Hart's Concept of a Legal System' (1976) 18 Wm. & Mary L. Rev. 4.

¹⁸ Hart (n 2) 84-5

¹⁹ Mathew Kramer, 'Power-Conferring Laws and the Rule of Recognition' (2019) 19 Jeru Rev. of Legal Stud. 1.

²⁰ Hart (n 2) 116

internal point of view; and the second, I called the moral attitude or practical reasoning internal point of view. For norm-relative internal point of view, internal legal statement (statement made from the internal point of view) made by a participant are merely norm-relative statements and does not necessarily imply any moral commitment, whereas practical reasoning internal point of view implicates some moral attitude.²¹ In this study, I privileged moral attitude internal point of view over the norm-relative one because the latter cannot explain normativity of law. It is on the strength of moral attitude constraint that I will investigate whether Nigerian public officials take internal point of view towards the rules of recognition.

My main argument is that lack of compliance with the legal system's authoritative rules by public officials is the major reason the existence of Nigerian legal system remains relatively dubious today. However, I will not deny that there have been some instances of compliance by some public officers. But compared to the number of times the officials disobeyed, the claim here is that the instances of noncompliance by officials outweigh those few instances of compliance. Thus, the instances of lack of compliance are significant enough to affect the overall ontological status of the Nigerian legal system.

1.2 Statement of the Research Problem

Galligan²² draws on Hart's minimum and necessary condition for a legal system to describe an ideal modern municipal legal system. According to him, the existence of foundational rules that helps to identify and validate other primary rules, a well-developed administrative structure that enhances the application and enforcement of law, general obedience, and commitments by the citizens to the fundamental rules, and above all, a practical acceptance and compliance with the authoritative rules of the system by public officials, are the features that describe a modern municipal legal system.²³ He further adds that "state law has, or claims to have, final authority over other systems of rules within its jurisdiction and does not generally tolerate the existence of competing legal orders."²⁴ Of course, the above descriptions already have the two vital elements required for the existence of a municipal legal system proposed by Hart,²⁵ and it suffices to say that any legal order that has these features, qualifies as a model for a modern municipal legal system. But in reality, where can one find a legal order that has or close to

²¹ A more detailed explanation regarding the distinction between this two versions of internal point of view is provided for in Chapter Two of this study.

²² Galligan, (n 5) 20

²³ Ibid

²⁴ Ibid 21

²⁵ Hart (n 2) 116

having these features? According to Galligan, these “modern legal systems can be said to exist in a reasonably well-developed form in countries of western Europe, north America, parts of British Commonwealth, and occasionally elsewhere.”²⁶

The above briefly describes the ontological and epistemic qualities of a modern legal system. However, it is doubtful if these qualities are present in the Nigeria legal system. As observed briefly in the preceding section, the problem currently besetting the Nigerian legal system lies, firstly, in the attitudes of public officials who are supposed to be the custodians of the laws of the system. Secondly, the problem of conflicting laws (including court judgments) and inability of some state laws to claim final authority over other rules of the legal systems has created more problems for the legal order.

A plethora of evidence abound of regarding the deliberate gross violations of the provisions of the fundamental rules of the legal system. Writing in the late 1980s, Salacuse bewailed that the Nigerian experience in regard to public officials respecting the Constitution has not been a great one in the many years of its postcolonial experience.²⁷ He argued that the excitement which heralded the new legal order of the early sixties upon which Nigerian foundational rules (especially the Constitution and international law instruments which were the basis for fundamental human rights and democratic governance) were built had been destroyed by the disparaging attitude of successive officials of government.²⁸ Incidentally, public officials at the three tiers of government cannot be exonerated from such violations. For example, the fundamental human rights protection which is supposed to be seen as one of core measurement of public officials’ attitude of compliance with the Constitution has been violated by successive government administrations. Under the various military administrations, the existence and efficiency of the Constitution was at the pleasure of the Federal and State military officials. At this time, the authoritative powers of the Constitution were determined by the Federal Military Decrees and in some situations, the Military Governor’s Edicts.²⁹ The first promulgation of the military government was usually the Constitution (Suspension and Modification) Decree. This

²⁶ Galligan op. cit. 20

²⁷ Jeswald W. Salacuse, Forward to ‘Building Constitutional Orders in Sub-Saharan Africa’ (1988) 7 Third World Legal Studies 1. xi. Oko also made similar remarks in an article. See Okechukwu Oko ‘Consolidating Democracy on a Troubled Continent: A Challenge for Lawyers in Africa’ (2000) 33 Vand. J. of Tran’l L. 571-9.

²⁸ Salacuse Ibid

²⁹ For example, the Constitution (Suspension and Modification) Decree No. 1, 1966 in section 1 provided thus: The Federal Military Government hereby decrees as follows: 1(1) The Provisions of the Constitution of the Federation mentioned in Schedule 1 of this Decree are hereby suspended. 1 (2) Subject to this and any other decree, the provisions of the Constitution which are not suspended by subsection (1) above shall have effect subject to the modifications specified in Schedule 2 of this Decree.

decree usually limits the important provisions of the Constitution in a manner that allows the military officials to conveniently breach the fundamental rights of Nigerian citizens contained in the Constitution.³⁰

The situation is not any better even with the transition to civil rule. There are hosts of reports from many reliable Nigeria and international organisations suggestive of enduring abuses of citizens' fundamental rights under constitutional democratic rules which is presumed to be models amongst others as far as fidelity to the Constitution and other authoritative rules is concerned. This resulted in the United Nations Committee on the Elimination of Racial Discrimination to express their discomfort on the nation's human rights condition as abysmal.³¹ The committee submit that there are several cases of maltreatment, use of brute and excessive force, arbitrary arrests, incarceration, extrajudicial killings of the citizens by government official contrary to chapter four of the Nigerian Constitution.³² Furthermore, when one examines how Nigerian jurisprudence is routinely administered by the judges, it suffices to say that the integrity of precedents as a foundational rule of a legal system is deliberately disregarded. There are instances of deliberate conflicting judgements from judges who apply the same law. For example, sections 33 to 41 of CFRN which concerns matter relating to citizens' fundamental rights, and to a large extent, non-citizens domiciled in Nigeria has suffered conflicting judgements as far as its enforcement is concerned. Notwithstanding the commendable nature of this provision in the Constitution, it has of late become problematic for the legal system due to lack of uniformity concerning its interpretation by judicial officers. While the Constitution makes provision for two types of High Courts in Nigeria with distinct jurisdictions, it provided a flexible platform for aggrieved victims of human right abuses to seek redress in a 'High Court' without explaining which of the high courts to approach and the situations that could qualify the high court to entertain the human right application. In the case of *Bronik Motors Ltd v Wema Bank Ltd*,³³ the apex court posited that the Federal High Court (FHC) as well as the High Court of various States have parallel jurisdiction on all matters

³⁰ See generally, *Ken Saro-Wiwa v A.G Federation* (1995) 1 NWLR pt.374 p.759 CA, *FRN v Lekwot & Ors.* Suit No. KD/CCDT/5/92 of 02/02/1993, *Oseni v Dawodu* (1994) 4 NWLR pt. 339, p. 659 SC.

³¹ Concluding Observations of the Committee on the Elimination of Racial Discrimination: Nigeria 01/11/2005 CERD/C/NGA/CO/18 at the Sixty-Seventh Session 2-19 August 2005. Ugochukwu did an exhaustive analysis of report. See Basil E. Ugochukwu, 'Adjudicating Human Rights in Transitional Contexts: A Nigerian Case Study 1999-2009' (PhD thesis, Osgoode Hall Law School 2014) 2

³² See paragraph 16 of the report.

³³ (1985) 35 NCLR 296.

regarding the enforcement of people's fundamental rights. However, in *Tukur v Government of Gongola State*, the same apex court Per Obaseki, held that:

Considering the fact that the jurisdiction provided by section 42 (2) of CFRN is a very important one and given in accordance with the provisions of the Constitution, the enforcement of the fundamental rights in matters outside the jurisdiction of the Federal High Court is not within and cannot be in the contemplation of the section. If any consideration and determination of the civil rights and obligations in matters outside jurisdiction of the Federal High Court inextricably involves a consideration and determination of the breach or threatened breach of any of the fundamental right provisions, the exercise of jurisdiction which the Federal High Court does not possess is mouthy. The lack of jurisdiction inexorably nullifies the proceedings and judgment.³⁴

As similar instance happened in *Agbaje v Fashola*³⁵ and *Fayemi & ors v Oni & Anor*,³⁶ the facts of the cases were the same but the decision by the Court of Appeal were totally different. The refusal by judges to follow their precedents regarding the enforcement procedure of those constitutional rights, casts serious doubt on the existence and functionality of the Nigerian legal system.

A second major problem with the Nigerian legal system has to do with multiculturalism and legal pluralism. For the most part, the main laws within the Nigerian legal system include Shariah law, common law, and customary law. The multicultural nature of Nigeria created the space for legal pluralism within the system. Legal pluralism is equally demonstrated via the federal system that is in operation, whereby the central government shares some law-making authorities with the various state governments, with the state government having broader legislative powers most times. This has resulted in legal pluralism which in turn creates confusion that threatens the existential condition of the entire legal system. For example, the Child Right's Act 2003 prescribes attainment of 18 years as the minimum age qualification for marriage and section 3(1) of the Matrimonial Causes Act 2004 declares any marriage between persons less than 18 years as invalid. However, in Northern Nigeria where marital rites are heavily influenced by Islam, there is no minimum age requirement for marriage under shari'ah law.³⁷ It should be noted that this legal mixture has created a lot of problems for both the legal

³⁴ (1989) 4 N.W.L.R (Pt. 117) 208

³⁵ *Supra*

³⁶ *Supra*

³⁷ J. Nasir, 'Shari'a Implementation and Female Muslims in Nigeria's Shari'a States' in P. Badru and B. Sackey (eds) *Islam in Africa South of Sahara: Essays in Gender Relations and Political Reforms* (2013) 256

system and the society at large.³⁸The muddle which the citizens are thrown into regarding which particular law to follow casts doubt on both the validity of the laws and authoritative rule that confers validity on them. Some of the complexities and confusions that arise in Nigerian legal system can be linked to the parallel legal orders existing in the system without mutual recognition for one another and without recognition for the foundational rules. This usually happens because most people in Nigeria still prefer to live their lives according the clannish, ethnic, cultural, and religious principles upon which their local communities were founded.³⁹It is often the case that the members and leaders of these nonconforming states do strongly recognise their parallel legal system way above the national legal system. A good example is the setting up of Hisbah⁴⁰ by the Kano state government contrary to section 214 of the Nigerian Constitution.⁴¹ Notwithstanding denial of recognition by the central government, the Kano State government has persisted in the belief in the authority of Hisbah.⁴²The Federal government for its part, without making formal concessions, has acted in a manner suggestive of an informal acceptance of the authority of Hisbah.⁴³Two possibilities are open here: first, where the central government fails to recognise a parallel legal order as law, then that creates an open question regarding the ontological disposition of the legal system as an indivisible entity. On the second note, where the federal government recognise or give tacit recognition to the parallel order, then the authority of the Federal government and the existential disposition of its legal system comes under serious scrutiny. So, the establishment of Hisbah Police by Hisbah Board contrary to section 214 of the Constitution and the tacit recognition by the

³⁸ In January 2000, there were serious uprisings and riots resulting to a complete breakdown of laws and order in the cities of Kaduna, Kano, Bauchi, and Zaria over the implementation of Islamic law. The non-Muslims in these states vehemently refused to accept the newly introduced Islamic criminal laws as part of the legal system. This kind of resistance from the people puts a question mark on the nature and existence of the legal system. For details, see Brandon Kendhammer, 'The Sharia Controversy in Northern Nigeria and the Politics of Islamic Law in New AND Uncertain Democracies' (2013) 45 Comparative Politics 3.

³⁹ See Justin Su-Wang Yang, *Domestic Legal Pluralism, and the International Criminal Court: The Case of Shari'a Law in Nigeria* (1st edn., Routledge, 2021), Rhoda Ige, 'Legal Pluralism in Africa: Challenges, Conflicts and Adaptation in a Global Village' [2015] JLPG. Oladapo K. Opatina, 'Legal Pluralism in Contemporary States: Between Traditional and Formal Justice Mechanisms in Nigeria and Ivory Coast' (2017) 1 GJCPI.

⁴⁰ Hisbah is a law enforcement agency set up by the Kano State government in the form of community Policing. Its main duty is to ensure that citizens comply with all Islamic, legal, cultural, moral, and social norms, customs, and laws.

⁴¹ Section 214 of CFRN categorically provides; 'there shall be a Police Force for Nigeria which shall be known as the Nigerian Police Force, and subject to the provisions of this section, no other police shall be established for the Federation or any part thereof'.

⁴² See Rasheed O. Olaniyi, 'Hisbah and Sharia Law Enforcement in Metropolitan Kano' (2011) 57 Africa Today 4. See also, A. A. Siro and P. Sundramoorthy, 'Police and Hisbah: The Status of Urban Kano Security Management' (2017) 12 JSSH 2.

⁴³ T. H. Gwarzo, 'Activities of Islamic civic Associations in the Northwest of Nigeria: with Particular Reference to Kano State.' (2003) 38 African Spectrum, 3. 313-8 and E. S., Nwauche, 'The Nigeria Police Force and the Enforcement of Religious Criminal Law.' (2014) 14 AHRLJ. 211 -6

Federal government, undermines the foundational rules of the legal system, and invariably challenge its existence as a legal system.

The above-mentioned problems have had tremendous negative impact on the current nature of the Nigerian legal order and the society as at large. These problems have created disorderliness, lack of meaning for constitutional rights and duties, an enduring chaos and anarchy, culture of impunity and disparaging of the Constitution, general ineffectiveness of the legal order, legislative highhandedness, contradictory judgments, lawlessness among citizens, restiveness, among other things.⁴⁴To borrow the words of Hobbes,⁴⁵ the lives of the citizens is already nasty, brutish and short in the current set up in Nigeria because of the ineffectiveness and dysfunctionality of the present legal system. The relevance of a legal system cannot be overemphasised because it assures law, order, and peace in society, for where there is no law, there is no wrong.⁴⁶Accordingly, it is important to examine the features necessary and sufficient for the existence of a legal system.

It is on the above basis that the ontological worth of a legal system or law has been traditionally linked with the existence of an uncommanding commander strong enough to demand obedience from all the subjects.⁴⁷Hans Kelsen claims that a legal system comprise of a set of all the norms whose creation is authorised by the system's grundnorm.⁴⁸On his own part, Llewellyn considers a legal system as an artistry of advocacy, counseling, adjudication, legislation, administration, conciliation, association, policing, education, etc.⁴⁹Similarly, Dias views a legal system as principles and standards which guides legal development and administration in the society.⁵⁰Likewise, Raz claims that a legal system is a system of minimum efficacy, bindingness, permanency, membership, inherited, and operative norms, and norms that regulate human behaviour. He further asserts that existence, identity, structures, and contents are the problems of legal system.⁵¹ For Baxi,⁵² there are three explanations concerning

⁴⁴ For detailed appreciation of the current problems of the Nigerian law, legal system, and society, see Jacob A. Dada 'Human Rights under the Nigerian Constitution: Issues and Problems' (2012) 2 Int'l JHSS 12. 34-5, Jacob A. Dada 'Impediments to Human Rights Protection in Nigeria' (2012) 18 Ann. Survey of Int'l & Comp. L. 85; R. Zahn, 'Human Rights in the Plural Legal System of Nigeria.' (2009) 1 Edin Student L. Rev., 1. 84; R. Anazodo, J. C., Okoye & U. Ezenwile, 'Leadership-Corruption: The bane of Nigeria Development' (2012) 2 Afr. J. S.S 3. 123-4

⁴⁵ Thomas Hobbes, *Leviathan* (Christopher Brooke ed. Penguin Classics 2017)

⁴⁶ Judith Embley, Peter Goodchild and Catherine Shephard, *Legal Systems & Skills* (4th edn., OUP 2020)

⁴⁷ Hobbes (n 45), John L. Austin, *The Province of Jurisprudence Determined* (Wilfrid E. Rumble ed. CUP 2009)

⁴⁸ Hans Kelsen, *The Pure Theory of Law* (University of California Press 1967)

⁴⁹ Karl Llewellyn, *Jurisprudence: Realism in Theory and Practice* (James J. Chriss ed. Routledge 2008)

⁵⁰ R. W. M., Dias, *Jurisprudence* (5th edn., Butterworth & Co. Pub. 1994) 47

⁵¹ Raz (n 1)208

⁵² Upendra Baxi, *The Crisis of the Indian Legal System* (published online by Cambridge University Press 2008)

the mode of existence of a legal system: firstly, legal system can be understood merely as a harmonious relationship among legal norms; Secondly, a legal system can be conceived as a system of social behaviour and rules of structure; Thirdly, a legal system can be explained as synonymous with a social control system. Burazin on the other hand views a legal system as an abstract institutional artifact whose existential value depends on common intentionality in the form of collective recognition.⁵³ Furthermore, Luhmann considers, a legal system is a closed or autopoietic system with its own internal mechanism for categorising actions as lawful or unlawful.⁵⁴

While the above-mentioned works have made important contributions to theorising the nature of a legal system, research concerning the nature of legal system has mainly been based on two things: first, mere presupposition without any actual relations to social reality.⁵⁵ Secondly, too much energy has been expended in seeking for the meaning of a legal system rather than doing a deep analysis of the criteria that determine the existence of a legal system. Thus, a gap in the literature remains in exploring, not in seeking the best definition of a legal system, but on how to apply a theory of law to an actual social reality.

Hence, this thesis aims to contribute to the body of existing literature in two main ways. First, a unique recontextualising of Hart's rule of recognition from a broader perspective and applying it to an actual legal system. Secondly, the thesis focuses on the reconstruction of the concept of internal point of view as a moral attitude constraint and testing its workability in determining whether the Nigerian legal order still exists.

1.3 Aims and Objectives

In the light of problems discussed in Section 1.2 above, the overall goal of this study is to critically examine the nature of the Nigerian legal order through Hart's minimum conditions of a legal system. This study does this by discursively exploring the standards that constitute the rules of recognition in Nigeria and probes whether the public officials take the internal point of view towards those standards, with a view to determining whether Nigeria has a legal system. To this end, the objectives of this study are:

⁵³ L. Burazin, 'Legal Systems as an Abstract Institutional Artifact' in L. Burazin, K.E. Himma, and C. Roversi (eds) *Law as an Artifact* (OUP 2018)

⁵⁴ See Niklas Luhmann, *Law as a Social System* (A. Ziegert tr., OUP 2004) 325-9. See also Andreas Philippopoulos-Mihalopoulos, *Niklas Luhmann: Law, Justice, Society* (1st edn., Routledge: New York 2010).

⁵⁵ For instance, Kelsen claims that the grundnorm as the foundation of a legal system is based on presupposition without any actual existence. The details of this discussion will be in Chapter two.

1. establish the proposition that some ultimate criteria of legal validity are necessary as authoritative or foundational rules within the Nigerian legal system.
2. derive the relevant standards that genuinely satisfy this proposition referred to as foundational rules.
3. examine selected high-profile cases and events that are egregious enough to serve as study samples to investigate whether Nigerian public officials take internal point of view towards the system's rules of recognition.
4. analyse the practical implications of the rules of recognition and internal point of view for legal pluralism, democracy, and civil disobedience as the burning issues in contemporary Nigeria.

These objectives are explicated further in Chapter Three of this study as well as in related empirical chapters (i.e., Chapters Four and Five). The following section summarises the importance of an existent modern municipal legal system to the Nigerian society in order to further foreground the salience of this research project.

1.4 Significance of the Study

There are many issues plaguing the current Nigerian legal system. However, the most challenging of the issues remain the attitudes of public officials towards the foundational rules of the system, and also the existence of parallel legal orders and institutions, which as stated earlier, casts serious doubt on the ontological and epistemological value of the Nigerian legal system as a modern legal system. As observed by Nwalimu, these problems have occurred under successive administrations and continue to be part of the national life of Nigeria and Nigerians.⁵⁶ Of course, entrenched impunity and disregard for the fundamental rules of the system by public officials have grave implications for democratic rule, citizens fundamental rights, rule of law, etc.⁵⁷ In the same vein, the running of parallel systems or laws portends confusion and conflicts for any legal system.⁵⁸

⁵⁶ C. Nwalimu, *The Nigerian Legal System* Vol. III (Peter Lang, New York 2005)

⁵⁷ M. A., Ajomo 'Fundamental Human Rights Under the Nigerian Constitution' in A. Kalu and Y. Osinbajo (eds.) *Perspectives on Human Rights* (1992). N. J., Udombana 'The Rule of Law and the Rule of Man in Military Dictatorship' in I. O., Agbede and E. O., Akanki (eds.) *Current Themes in Nigerian Law* (1997) 73, J. O., Ihonvbere 'Politics of Constitutional Reforms and Democratization in Africa' (2000) 41 *Int'l Journal of Comp. Soc.* 9; A. A., Mazrui 'Who Killed Democracy in Africa? Clues of the Past, Concerns of the Future' (2002) 9 *DPMNB* 1.

⁵⁸ J. Church 'The Place of Indigenous Law in a Mixed Legal System and a Society in Transformation: A South African Experience' (2005) 1 *ANZLH*.

In the light of the problems mentioned above, it becomes absolutely important to talk about the nature and existence of Nigerian legal system because the existence of a proper legal system is a necessity in the overall interest of all Nigerians and the society. In fact, the motivation for this research has been based on the lucid statement from Egwummuo saying

A society without a functional legal system suffers from the wreckage done by fights, plundering, and disputes. A chaotic and disorderly situation in any society can only be remedied by a functional legal system whose laws are actively in force. Undoubtedly, a legal system is indispensable in the creation of a peaceful and prosperous society since it helps to eliminate anarchy.⁵⁹

The above claim holds true because discourses in contemporary analytic jurisprudence revolves around the nature of law and existence of a modern legal system.⁶⁰ Thus, the assertion appreciates the significance of having a complete and properly functional legal system. Oluwole and Sanni submit that there is a significant relationship between a nation and its legal system.⁶¹ According to them, a nation is more prosperous, stable, efficient, and healthy as a result of the stability, efficiency, and viability of its legal system.⁶² Based on the problems of the Nigerian legal system stated above, this argument holds true because a country where the fundamental rules of the legal system are not appropriately accepted and followed by the citizens and public officials, becomes a disorderly society where every member of the society attempts to overcome the shares of others. Indeed, a society without a legal system today is one which is in such anarchy that order cannot be observed, even by its public officials like judges, police, lawmakers, governors etc.⁶³ Therefore, this research project finds justification in studying the existence and nature of the Nigerian legal system because a legal system exists essentially for the advancement and betterment of the society and its members. The possible findings of this research will expose the citizens and officials to the knowledge of the fact that the existence of a modern legal system absolutely depends on the presence of authoritative rules that validate all other rules in the legal system, as well as the level of compliance with these authoritative rules of the system.

⁵⁹ J. N., Egwummuo, *Dynamics in Nigerian Legal System* (Academic Publishing Company 2003)

⁶⁰ W. Twining, 'General Jurisprudence' (World Congress on Philosophy of Law and Social Philosophy, Granada 2005) in M. Escamilla and M. Saavedra (eds) *Law and Justice in Global Society* (Seville 2005)

⁶¹ John Oluwole & Abiola Sanni, 'Methods of Social Control through Law' in A. Sanni (ed) *Introduction to Nigerian Legal Method* 2nd edn (OAU Press Ltd. 2002) 52

⁶² Ibid

⁶³ C. Ogwurike, *Concept of Law in English-Speaking Africa* (Nok Pub. Int'l 1979). O., Ogbuinya, *Understanding the Concept of Jurisdiction in the Nigerian Legal System* (Snaap Press: Enugu, 2008)

In recent times, much secondary literatures have emerged regarding the Nigerian legal system. However, there are two important issues which are generally overlooked in the literature concerning the nature and existence of Nigerian legal system; first, the necessity of foundational or authoritative rules that can validate and constitute other laws in the legal system. Secondly the role of the attitudes of public officials towards these foundational rules. As Ogwuche, and Uchegbu noted, , though appearing to be the core features propounded by Hart, one of the greatest legal philosophers of modern enlightenment, for the apparent decription of a modern legal system, these issues continue to endure a dearth of theorisation and poor scholarly engagements regarding Nigerian jurisprudence.⁶⁴ The works of Fawehinmi,⁶⁵ Niki Tobi,⁶⁶ Ogbu,⁶⁷ Asein,⁶⁸ Malemi,⁶⁹ Olong,⁷⁰ among others mirrored some of important issues addressed in this thesis but handle the problems from a particular thematic points of view, and in a way that is somewhat distinct from the method I use in this study. Fawehinmi discusses key legal concepts like the supremacy of the Constitution, what the judges do, including all other concepts connected to the existential value of the legal system.⁷¹ Tobi's work is similar to Fawehinmi's as it also explains the supremacy of the Constitution in relation to other laws and equally commitments of Nigerian judges to the legal system.⁷² Ogbu, Asein and Malemi on their parts were more concerned with mere descriptive analysis of the structure of the Nigerian legal system but emphasised the place of the Constitution and precedents as autonomous sources of law.⁷³ Olong was more interested in what makes a modern legal system; he mentioned the role of the Constitution, international laws, customary law among others.⁷⁴

As vital as their analyses are, these scholars did not critically investigate all the standards that constitute the rules of recognition in the Nigerian legal order. Also, none of these commentaries paid any attention to the attitudes of Nigerian public officials towards the foundational rules of the legal system. This is the main concern of this study. Therefore, the study makes important

⁶⁴ Abubakar Ogwuche and Amechi Uchegbu, *Compendium of Laws under the Nigerian Legal System* (Maiyati Chambers: Lagos 2002) 21-2

⁶⁵ G. Fawehinmi, *Courts' System in Nigeria: A Guide* (Nigerian Law Pub: Lagos, 1992)

⁶⁶ Niki Tobi *Sources of Nigerian Law* (MIJ Professional Publishers Ltd 1996)

⁶⁷ O. N., Ogbu *Modern Nigerian Legal System* (Cidjap Publishers, Enugu, 2002)

⁶⁸ J. O., Asein, *Introduction to the Nigerian Legal System* (2nd edn Ababa Press, Lagos 2005)

⁶⁹ E. Malemi, *The Nigerian Legal Method* (Princeton Publishers Co., Lagos, 2010)

⁷⁰ A. Olong *The Nigerian Legal System*, (2nd edn., Malthouse Law Books 2007) 3-7

⁷¹ Fawehinmi (n 62) 2-11

⁷² Tobi (n 63) 1-8

⁷³ See Ogbu (n 64) 2-10; Asein (n 65) 4-9; Malemi (n 66) 2. See also, Ese Maemi, *Nigerian Legal System* (3rd edn, Princeton Publishing Co. 2012) 2-7

⁷⁴ Olong (n 67) 4-18

contributions to the body of knowledge as it seeks to establish what standards constitute the fundamental authoritative rules of a legal system in order to resolve the problem of parallel legal orders and institutions in Nigerian. Also, this study becomes necessary being the first of a kind to embark on investigating the attitudes of Nigerian officials towards the fundamental rules of the system in order to know the extent to which such attitudes impact on the existential value of the whole legal system.

1.5 Methodology

This study adopts a qualitative research approach for an in-depth investigation of the research questions stated in the section 1.1. As outlined above, the hypotheses this study intends to ultimately investigate are: first, whether the standards referred to as authoritative rules in Nigeria meet the requirements to be classed as the ultimate rules of recognition. Secondly, whether Nigerian public officials do approach the system's authoritative rules of recognition from an internal point of view. Interrogating these hypotheses is by no means an easy task as it implicates issues of interpretation and nuances. Since the question of interpretation is involved, this study will utilise the qualitative hermeneutical approach. That means the study explores the relationship between interpretation and understanding of a key concept like the 'internal point of view of law'. In this research project, the internal point of view is interpreted along the line of moral attitude constraint so that it becomes easier to explain normativity. Furthermore, the hypothesis this study desires to investigate is not that Nigerian public officials obey specific provisions contained in the rules of recognition, but how often they refused to comply with these ultimate rules. The reason for holding this view is because obedience does not equate with acceptance, but disobedience can be construed as nonacceptance since the person disobeying is invariably rejecting both the rule and the authority behind.

In carrying out the study, I made use of some selected prominent cases (most of the times, they were the locus classicus) and events that were quite egregious in nature. The cases and events themselves consisted of instances where Nigerian officials deliberately disparaged some authoritative rules (for example, the Constitution, international law, precedents, customary law etc.) of the legal system. The study employed these selected high-profile empirical cases and events rather than talking about the research problem in a speculative manner as it usually done in philosophy. I did this for two reasons: first, just as it is the case with most qualitative research, the outcomes of the investigations from real-life cases and events that have taken place are less likely to be controversial or disputed. Secondly, I intend to find the particular

reasons why Nigerian public officials took or refused to take internal point of view towards the rules of recognition. By identifying the reasons for such attitudes, it is possible to replicate or prevent the future. Of course, this study does not pretend that the research method covers the entire cases and events involving Nigeria public officials. However, I will limit most of the cases to be investigated to the ones decided by the Court of Appeal and Supreme Court which directly concern the standards identified as rules of recognition and which are also high-profile in nature. In the same vein, the events that will be investigated here will be those involving egregious attitudes of the public officials.

1.6 Scope of Study and outline of the Chapters

The focus of this study is strictly on the nature of Nigerian legal system. To reiterate the point made earlier, this study will rely on some selected cases and events to assess what Nigerian officials do with regard to the authoritative rules within the legal system. This study will not analyse all the cases and events in Nigeria, rather it will limit its analyses to only those cases and events that conspicuously implicate the attitudes of Nigerian public officials towards the authoritative rules. Regarding the theoretical framework, this study does not concern itself with the utilisation of Hart's entire theory as a working tool, rather the focus here will be on only the rules of recognition and internal point of view since they make up the basic requirements for the existence of a legal system.

This research project is divided into six chapters. The first chapter incorporates preliminary considerations which attempt to place the subject of enquiry in the right perspective. By setting the background of the problem to be investigated, it spelt out the justification for embarking on this line of enquiry. It presents the focal point of the research by raising some central questions and suggests the veritable method to employ in tackling these questions.

Chapter Two details the theoretical framework as well as conceptual frameworks. The twin concepts of rule of recognition and internal point of view will be exhaustively addressed. First, the rule of recognition will be analysed as both the authoritative and foundational rules of the legal system. It is the rule that identifies, validates, and constitutes other primary rules within the legal system. By the virtue of these indispensable functions of the rule of recognition, it is argued that the general obedience expected of ordinary citizens is anchored on the existence of the rule of recognition. Hence, it is appropriate for this study to adopt the rule of recognition as the first necessary condition for the existence of a legal system. The concept of internal point

of view seems ambiguous and requires careful handling. In the first place, approaching the internal point of view as showing a non-cognitive attitude of approval of rules is the conventional understanding of that concept. However, I argue contrary to received wisdom that such understanding of the internal point of view can never explain normativity, rather internal legal statements (I.e., statements made from the internal point of view) are actually normative statements and as such express certain moral attitude of the approval of rules. It is on the strength of this that I considered internal point of view as a moral attitude expected of public officials towards the rules of recognition.

The third chapter answers the research question; what standards constitute the rules of recognition within the Nigerian legal order? This research project will examine the top fundamental laws within the Nigerian legal order in order to identify the laws that possess the characteristics of the rule of recognition. In order to achieve this, the study will consider those fundamental laws under the Nigerian legal order that have the following features: autonomous sources of law, an authoritative rule, power to identify and validate other primary rules in the legal system, among others. Thus, some top legislations and judicial practices will be examined in order to know whether the system has an ultimate rule of recognition. The likely finding in this chapter is that some of the legislations, especially the Constitution and international law seem to have the qualities of ultimate rule of recognition. Furthermore, judicial precedent being an autonomous source of law in Nigeria, might be considered as part of the rules of recognition.

Chapter Four details the extent to which public officials in Nigeria take internal point of view towards the possible rules of recognition. The research project relied heavily on previously decided high-profile constitutional and international law cases and other serious events involving the attitudes of Nigerian public official. These cases and events will be carefully analysed, and the findings would assist this study to reach the conclusion on whether Nigeria has a legal system or not. This chapter will also analyse the same cases to see if the officials have a shared or uniform internal point of view towards the Nigerian legal system.

Chapter Five attempts to answer three important questions that will be a fallout of the possible findings from Chapter Three and Chapter Four. The first question to be asked here will be, how a modern adaptation of the rules of recognition could tackle the problems of legal pluralism and multiculturalism in Nigerian jurisprudence? Secondly, this research project will attempt to evaluate the significance of the identified rules of recognition for Nigerian nascent democracy. Thirdly, the thesis will attempt to investigate how civil disobedience can be interpreted as a

form of moral attitude internal point of view? The main findings of the previous chapters were structured according to the objectives stated in Chapter one, and the aim of Chapter five will be to resolve the three issues raised above.

The last chapter will provide the summary of the entire thesis and answer the overarching question regarding whether Nigeria has a legal system.

CHAPTER TWO: SETTING THE BOUNDS OF A MODERN LEGAL SYSTEM

2.0 Introduction

Theories are very important in comprehending and unpacking variables employed in research projects. They also assist the researcher in explicating the behavioural dispositions of an individual or institutions in various disciplines and situations. It is on this note that this chapter aims to explain the suitability of Hart's theory of rules as the best theoretical model that can explain the nature of the Nigerian legal system. Amidst the various theories of law, this study settles for Hart's because it offers the most successful explanation of a modern understanding of a legal system.⁷⁵ Hart's theory of the transition from a pre-legal or primitive system to a mature or developed legal order best explains the existence of institutions that explains the legal system as modern. Such transition involves a union of primary rules, which the ordinary citizens must generally obey, and secondary rules, which the officials must take the internal point of view towards. These two criteria for the existence of legal system, equally carry two indispensable concepts worth analysing: first, the rule of recognition, which is the foundation of a legal system and the internal point of view, which is the attitude expected towards the rule of recognition. This Hartian theory of a legal system is worthwhile because in contemporary analytic jurisprudence, a legal system is not a legal system merely because there exist some laws, decrees, orders or commands within the legal system which the people must obey, it is a legal system in that it satisfies certain minimum criteria of the fundamental rule(s) of the group.⁷⁶ This contemporary common understanding of law aims to create an explanation that claims to be true of all modern legal systems in the world.⁷⁷ Therefore, this chapter is a theoretical framework on the nature of a legal system, that is on those requisite elements that engineer a modern legal system and the analysis of the criteria that are fundamental to a modern legal system. This is important to this study because the authority of a legal order depends largely on whether it has the basic characteristics that explains a legal system. The major finding from a thorough and complete examination of the theories and literatures on legal system will aim to establish a well-grounded thesis that can serve as a standard for determining

⁷⁵ Most successful in the sense of its popularity and acceptance in comparison to other theories of legal systems. Kramer shares this view also. See Mathew Kramer, *H.L.A Hart (Key Contemporary Thinkers)* (John Wiley & Sons 2018) 1.

⁷⁶ For contemporary theories of law, see Michael Doherty, *Jurisprudence: The Philosophy of Law Sourcebook* (3rd edn., Hit Publications 2004); Duncan Spiers, *Jurisprudence Essentials* (Dundee Univ. Press Ltd., 2011); Sean Coyle, *Modern Jurisprudence: A Philosophical Guide* (2nd edn., Hart Publishing 2017).

⁷⁷ Raz for example, claims that modern legal systems possess some characteristic institutions, therefore, he intends to make his theory of legal systems general in a way that may be characteristically true of all modern legal system. See Raz (n 1) 1

the existence or otherwise of the Nigerian legal system. The methodology employed here will be analytical and hermeneutics. It is analytical in that it involves a critical examination of some theories and literatures relevant to this study. It is also hermeneutical because some theories and concepts will receive logical interpretations according to the wisdom of the researcher.

2.1 The Concept of Modern Legal System: A Snapshot

The term ‘modern legal system’ may be used to refer primarily, or even exclusively, to those legal orders that are to a moderate or acceptable degree settled, stable, egalitarian, and standardised.⁷⁸ Galligan observes that, legal orders of England and Wales, European Union (EU), America and other developed western countries possess the basic feature that made them uniquely modern.⁷⁹ His reasons for adjudging these legal orders as distinctively modern is because of their ‘wide-ranging utilisation of law to realise social and political goals, possession of a developed administration to enact, apply, and implement the law, specific ideas guiding and restraining the use of law and official behaviour, and a huge level of acceptance of the law’.⁸⁰ These qualities may seem general, but when considered together they consists of a specific kind of legal system described by H.L.A Hart,⁸¹ which arguably I will term as modern legal system in this study. A modern legal system in the context of this enquiry is restricted to Hart’s description of a municipal legal system. A description Winch claims utilises both sociological and analytical methodology in providing explanation for meaningful behaviour according to rules.⁸²

Hence, in Chapter six of *The concept of Law*, Hart claims that the emergence of a modern municipal legal system is a process that begins from a pre-legal stage, and the process is like this: first, there exists a common or uniform habits among members of the group which at best can be called social habit. At this point, all the members of the group simply act in accordance with the habit in a rather uncritical way, without considering the fact that every member of the group ought to act in that regard. At this point, refusal to act in accordance with these social habits of the group, does not occasion any criticism from the group because there is no such

⁷⁸ C. R. M. Dlamini, ‘The transition from the traditional to the modern legal system’ (1988) 21 *The Comp. & Int’l J. of S.A.* 243

⁷⁹ Galligan (n 5) 20

⁸⁰ *Ibid*

⁸¹ For detailed arguments demonstrating that contemporary European Community legal system, English legal system, and the legal systems of some developed western countries’ legal system influenced H.L.A. Hart’s postulation of municipal legal systems, See Neil MacCormick, *Questioning Sovereignty*, (OUP 1999) 84-7, Robert S. Summers, ‘Professor H.L.A Hart’s Concept of Law’ (1964) 1963 *Duke Law J.* 4. , Mark Jones, ‘The Legal Nature of European Community: A Jurisprudential Analysis using H.L.A Hart’s Model of Law and a Legal System’ (1984) 17 *C.I.L.J.* 1. William C. Starr, ‘Law and Morality in H.L.A Hart’s Legal Philosophy’ (1984) 67 *Marquette Law Rev.* 4. 679-680,

⁸² Peter Winch, *The Idea of the Social Science, and its Relations to Philosophy* (2nd edn., Routledge 1990)

thing as ‘critical reflective attitude’ yet. Eventually, the group’s common social habits grow into what Hart calls ‘social rule’.⁸³ Indeed, the transition into social rule is made possible at the instance when the group realise that there is a common standard of acceptable practice which every member is expected to act in accordance with. The refusal to act in accordance with this common acceptable standard of the group begins to attract criticisms from some members of the group. This consciousness that there is now a common standard of behaviour by which all members must conform, is what Hart calls ‘internal aspect’ of a social rule, which is lacking in a social habit. In the case of a habit, each member simply believes in a way that others also in fact do:

By contrast, if a social rule is to exist some at least must look upon the behaviour in question as a general standard to be followed by the group as a whole. A social rule has an internal aspect, in addition to the external aspect which it shares with social habit, and which consist in the regular uniform behaviour which an observer could record.⁸⁴

The consciousness by the group members that there is now a rule which is the general standard for conformity creates a critical attitude among members of the group. Those members who follow the rules faithfully are able to criticise those who refuse to follow the common rule. Invariably, social rules, by the reason of the critical reflective attitude of the members of the group, grows to be part of the legal system and become legal rules. At this instance, the society has moved from a pre-legal or primitive system to a complete legal system. Thus, a legal system in the modern sense is created. Thus, Hart’s use of the term ‘legal system’ spans two distinct concepts as explained above: one pre-legal stage or primitive stage and the other a developed or modern stage of law. The term ‘legal system’ is used by Hart in the second sense to convey the idea that the requirements for a developed or mature legal order are synonymous to the concept of a modern legal order.⁸⁵ Although, Hart did not outrightly mention the term ‘modern legal system’, but in *the concept of Law*, he was essentially interested in describing the character of a modern municipal legal system. Of course, his critique of the imperative or command theory of law is claimed to be ‘its inability to account for some essential qualities of a modern municipal legal system’.⁸⁶ As an alternative to the imperative theory, Hart’s

⁸³ The best source for an extended discussion on the transition from and a distinction between a primitive legal system and a modern legal system, is Joseph Omoregbe, *An Introduction to Philosophical Jurisprudence* (Joja Edu Publishers 1997) and Philip Pettit, ‘Social Norms, and the Internal Point of View: An Elaboration of Hart’s Genealogy’ [2019] 39 Oxford J. Legal Stud. 229

⁸⁴ Hart (n 2) 55.

⁸⁵ *ibid*

⁸⁶ *ibid* 97

explanation of a developed municipal legal system centres on rules (especially the rule of recognition) and the behaviour of officials. In order to determine whether a modern legal system exists, one needs to examine whether the primary rules of the legal order are generally obeyed, and whether the rule(s) of recognition serves for the identification and application of those primary rules by officials of the system. These two criteria explain a modern legal system and will enable this study to evaluate the Nigerian legal system with a relatively small and precise tool.

The aim of this Chapter is to streamline the analysis by restricting the criteria for the existence of a modern legal system to two most important concepts; the rule of recognition and the internal point of view, and by so doing, give the analysis depth by evaluating whether these two key features are present in the current Nigerian legal order. Therefore, this chapter is basically an analysis of the concept of a modern legal system, that is on those requisite elements that engineer a modern legal system and the analysis of the criteria that are fundamental to a legal system as developed or modern. This is important to this study because the authority of a legal order depends largely on whether it has the basic characteristics that defines a legal system. What, then, are the specific contributions of this study to knowledge? First of all, there is the need to restructure Hart's claim, especially with regards to the internal point of view, the claim that officials should take uniform internal point of view towards the rule of recognition in order determine the existence of a municipal legal system. Whether this claim is true depends on some form of empirical analysis of an actual legal system, which neither Hart nor any other scholar of analytic jurisprudence to my knowledge has carried out. Thus, the objective of this study is to test Hart's theory against the Nigerian legal system. The methodology in analysing the conditions for a legal system is partly historical in that it uses earlier theories as the starting point of the investigation. It is also analytical because of the logical examination of the nature, existence, meaning and application of the laws that make the legal system. Thus, this chapter seeks to set out the conditions – individually necessary and cumulatively sufficient – for explaining the existence and essence of a modern legal system.

2.2 Theorizing Legal System in Modern Literature

As observed by Raz, 'individual rules may not exist in isolation, they always form part of greater wholes called the legal system'⁸⁷. In other words, any given law will belong to a legal

⁸⁷ Joseph Raz, 'The Identity of Legal Systems' (1971) 59 California Law Rev. 795

system, be it that of Germany or of America, that of the Catholic Church or that of a community. Before going any further it is appropriate to do a brief analysis of the concept of a 'legal system'. Indeed, the expression 'system' cannot by any stretch of imagination be used to describe an indistinguishable jumble of incongruent elements. Whereas, when one talks of several elements forming a system, one ordinarily suggests that they are in a way co-ordinated, organised, interrelated, and that there exist some relations of order between them. For example, we talk about a computer system as the 'entire computer comprising of the Central Processing Unit (CPU), memory, and all the miscellaneous devices connected to it, plus the operating system'⁸⁸. In a similar manner, we can talk of security system of a state or communications system of a firm; but it is absurd to refer to the content of waste bin as system or a set of bottles and cans littering the park after a concert. Hence, when we say that a set of legal norms form a system, we imply that they 'form a (more or less) cohesive whole system which is (to a certain degree) consistent in its application and, further, that there are relations between these norms such that some of them are superior in rank to others or that some derive their validity from others'⁸⁹ Accordingly, I will offer a thumbnail sketch of selected prominent explanations of frameworks for legal systems and their relevance to this study.

First, the imperative or command theory of law offered by Bentham and Austin considers law or a legal system as an order backed by threat of punishment which comes from a sovereign to his subjects and must be obeyed by the same subjects.⁹⁰ By 'sovereign' Bentham means "an individual or a group of people whose instructions or order the entire members of the community must follow or be punished."⁹¹ Hence, both view a legal system as basically the command of the superior(s) to their inferiors with a threat of evil should the latter disobey. These orders need not come directly from the sovereign himself; Omoregbe argues that it can be delegated through the subordinates of the sovereign too.⁹² The imperative theory of legal system has been scrutinised by Hart and many other legal scholars already. In fact, one can say that it barely has a contemporary defender. Hence, there would not be any point rehearsing the criticisms that trail this theory because I will not be using the theory subsequently.

⁸⁸ Noam Nisan and Shimon Schocken, *The Elements of Computing Systems: Building a Modern Computer from First Principles* (Illustrated edn., MIT Press, 2008) 1

⁸⁹ J.M Elegido, *Jurisprudence* (Spectrum Law Publishing 2019) 378

⁹⁰ Jeremy Bentham, *Of Laws in General* (H.L.A Hart ed., The Athlone Press 1970) 1 and Austin (n 47) 1.

⁹¹ Ibid Bentham 2

⁹² Joseph Omoregbe, *An Introduction to Philosophical Jurisprudence* (Joja Edu. & Research Publishers 1997) 130

Hans Kelsen goes beyond the imperative theory, for he attempts to explain a legal system as a set of norms created expressly or indirectly by an authoritative foundational norm that can be called the basic norm.⁹³ When Kelsen speaks of norm here, he refers to something that ought to be or ought to happen, especially that a human being ought to behave in a certain manner. Norm is that meaning of an act by which certain behaviour is commanded, permitted, or authorized.⁹⁴ Kelsen made a distinction between norms of morality and norms of law. A moral norm does not spell out sanctions or punishment, but a legal norm invokes sanctions and punishment.⁹⁵ However, a legal norm is only valid on the premise that it is within a valid legal system. In other words, for a particular norm to be considered as valid, it must proceed from another norm that shares the same legal system with it. Then the validity of this other norm also comes from yet another norm within the same legal system and so on. Thus, a legal system is a dynamic chain of creation (“Erzeugungszusammenhang”).⁹⁶ Furthermore, “the norm which confers upon an act the meaning of legality or illegality is itself created by an act which in turn, receives its legal character from yet another norm”⁹⁷. Hence, it suffices to say that each norm within a legal system is validated by yet another norm within the same legal system. But the pertinent question to ask at this point is that, how about the validity of the legal system itself? Kelsen’s reply is that the system itself derives its validity from the basic norm. But in probing further, I would ask what precisely the basic norm is? What norm then validates the basic norm? The basic norm does not get its validity from any other norm because it is the source of all norms and therefore, the ultimate standard for rule’s validity for the entire legal system.⁹⁸ The existence and validity of the basic norm is not dependent on the legal system, but it is based on presupposition, mental construction or a hypothetical norm which owes its validity to no other norm beyond itself. Hence, in his *The Pure Theory of Law*, Kelsen claims that the legal system is made up of hierarchical norms in which the norms get their validity from the very norm ahead of them in hierarchy. The least norms relate only to specific individual decisions by the judge in cases between parties. But these general norms derive their validity from case law or from statute, which in turn derives its own validity from norms laying down the doctrine of precedent or the binding force of statute⁹⁹. These latter norms in turn are validated by the State’s Constitution which is the penultimate norm.

⁹³ Hans Kelsen, *General Theory of Law and State* (Reprinted edn., The Lawbook Exchange Ltd, 2009) 111

⁹⁴ Kelsen (n 48) 5

⁹⁵ Ibid

⁹⁶ Hans Kelsen, *Introduction to the Problems of Legal Theory* (B Paulson & S. L Paulson trans. 1992) 56-57

⁹⁷ Kelsen (n 93) 4

⁹⁸ Omoregbe, (n 92)136

⁹⁹ Funsho Adaramola, *Jurisprudence* (LexisNexis Butterworths Durban, 2008) 129

Kelsen's analysis of a legal system is complex and difficult to comprehend but deserves close attention. My aim is to point out the many lacunae noticeable with this theory, and then provide reasons for not fully adopting his approach as a tool for assessing the nature and existence of Nigerian legal order as a modern legal system, although relying from time to time on some relevant aspects of it. The first issue to consider here is the relevance of this theory in analysing the nature of a legal system and the implication of adopting it. This involves two perspectives: one has to do with its intercourse with Hart's theory of a modern legal system, the other concerns the pragmatic value of adopting it. Concerning the connection to Hart's account, the Kelsen's basic norm is the ultimate source and criterion of legal validity of the entire legal system.¹⁰⁰ It is not an aspect of the legal system in itself, nor is it created by any legal procedure, but it is "the root or foundation of legal validity in every positive legal system".¹⁰¹ Hart's classification of norms, which analysis will take greater proportion of this chapter, seems to acknowledge that norms have hierarchical nature and structure, in a manner that the existence and validity of some norms, invariably depends on some higher norms called the rule of recognition.¹⁰² This prompted Bix to remark that, Hart's theory of rule of recognition appears to utilise Kelsen's argument of the basic norm, because the two theories function on the notion of chains of rule legitimacy.¹⁰³ That is, the validity of a rule ultimately depends on it being identified by a more general or basic legal rule. Since the chain of norm validity cannot continue ad infinitum, it therefore means that there must be a foundational rule that determines other rules but itself undetermined; the rule of recognition or basic norm comes under this classification. Paulson observes that there is a methodological difference in both of their approaches,¹⁰⁴ while Hart describes his approach as an exercise in descriptive sociology,¹⁰⁵ Kelsen's pure theory excludes all ingredients of sociology.¹⁰⁶ However, methodology is not as important as the philosophical content expressed in general jurisprudence. Therefore, the melting pot is that the basic norm and rule of recognition are both

¹⁰⁰ Kelsen (n 96) 16

¹⁰¹ Omoregbe (n 92) 137

¹⁰² Hart (n 2) 96-7

¹⁰³ Brian Bix, *Jurisprudence Theory and Context* (6th edn., Carolina Academic Press 2012) 63

¹⁰⁴ See Stanley L. Paulson, 'Continental Normativism and Its British Counterpart: How Different are they?' [1993] 6 *Ratio Juris*. 227. See also, S.L Paulson 'The Neo-Kantian Dimensions of Kelsen's Pure Theory of Law' (1992) 12 *Oxford J. Legal Stud.* 3. 313-19

¹⁰⁵ Hart (n 2) 240. Hart argued that his account of law is merely descriptive and morally neutral in the sense that there is actually no justificatory objective to it. A position I do not accept entirely because of the difficulty in maintaining non-alignment when developing theories of law from evaluative queries. The expanded form of this argument dominates the next section.

¹⁰⁶ Kelsen (n 93) 1

foundational rules that derive no further validation from any other rule apart from their acceptance.

Kelsen's model of normativity presents another reason why his theory might be useful in this study. Central to the Kelsenian and Hartian theory of law is the conception of every legal order as a normative system, and their idea that any theory of legal system should be able to explain normativity.¹⁰⁷ Similar to the rule of recognition, the basic norm grounds the unity of the legal system and serves as the source of normativity for all the other norms of the legal system.¹⁰⁸ Thus, objective validity or membership in a normative system distinguished by the basic norm, is the exact manner of existence of all norms. If a norm is valid, it must be validated by the virtue of it being traceable to the basic norm. Invariably, it can be said that the valid norm exists only in the mode that norms are said to exist. Brian Bix shares this view concerning the normativity of basic norm. According to Bix, to demonstrate that some orders are valid norms because they are traceable to the basic norm is, impliedly, to provide justification on the reason a person ought to act according to such orders, at least on the basis that the validity of the basic norm is assumed.¹⁰⁹ Depending on the basic norm for this role, given this assumption or presupposition, presents at least a conditional justification for the demand created by the validated norm. The argument I want to defend here can be summed up as follows: the basic norm is a foundational rule and also can explain normativity in the context of moral attitude. In one of his works, Alf Ross claims that central Kelsen's theory was the argument that, 'the (legal) norm demonstrates a true (moral) obligation: individuals are not only ordered to act in a particular manner, but they equally do so in "truth", "objectively" ought to act according to the norm.'¹¹⁰ Ross further argues, 'on Kelsen's account of normativity, the moral bindingness

¹⁰⁷ Kelsen's theory of law and legal system majorly centred on the normative nature of law and legal system- the argument that the legal system fundamentally comprises of norms, and that this requires a theory that explains law of the legal system as different from descriptive, empirical approaches. See Hans Kelsen, 'A Realistic Theory of Law and the Pure Theory of Law: Remarks on Alf Ross's on Law and Justice' in L. Duarte d'Almeida, J. Gardner and L. Green(eds.), *Kelsen Revisited: New Essays on the Pure Theory of Law* (Hart Publishing 2013) 217. Hart, like his predecessor Kelsen, stresses the normativity of law in his criticism of the works of his predecessors, and in building his own explanation of the nature of law. Hart claims that the previous theories did not clearly differentiate a group acting out of fear of the gunman from a group where the officials and some citizens consider the law as giving reasons for action. See Hart (n 2) 603

¹⁰⁸ On the detail roles of the Basic Norm, especially regarding normativity, S. L. Paulson, 'A Justified Normativity Thesis in Hans Kelsen's Pure Theory of Law?' in Matthias Klatt (ed.) *Institutionalised Reason: The Jurisprudence of Robert Alexy* (OUP 2012) and Peter Langford and Ian Bryan, 'Hans Kelsen's Concept of Normative Imputation' [2013] 26 Ratio Juris. 85

¹⁰⁹ Brian Bix, 'Kelsen, Hart and Legal Normativity', 34 J. for Const. Theory and Phil of Law 2018 25-42. Paulson also holds a similar view but from the perspective of a Neo-Kantian transcendental deductions. See details in S.L Paulson, 'On Transcendental Arguments, Their Recasting in Terms of Belief, and the Ensuing Transformation of Kelsen's Pure Theory of Law' (2000) 75 Notre Dame Review 4.

¹¹⁰ Alf Ross, 'Validity and the Conflict between Positivism and Natural Law' in S.L. Paulson and B.L. Paulson (eds.), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Clarendon Press 1998) 147, 150

of law comes from certain objective standard that infringes on the subject.¹¹¹ Hence, Kelsen's account of normativity presupposes objective values that influenced the legal subjects and provide them with the justification for obeying the law. Notwithstanding that he did not clearly admit, Raz's understanding of Kelsen's model of normativity is similar to Ross's.¹¹² Similar to Ross, Raz understands Kelsen's normativity from the perspective of moral bindingness, where bindingness is understood as 'justified normativity'.¹¹³ Raz argues that a theory of legal validity that recognises validity along the line of justified normativity opposes the view that standards of behaviour can be adjudged as norms irrespective of whether they possess real normative force. Instead, it presupposes that 'actions that meet legal standard are norms so long as they are justified'.¹¹⁴ Although there are scholars that are opposed to this kind interpretation of Kelsen. Harris, Bindreiter and Dickson, for example, argue that Kelsen's notion of normativity is sterile and cannot explain moral bindingness.¹¹⁵ I will not be interned by the discourse on whether or not Kelsen's model of normativity contains moral bindingness, Raz's 'justified normativity' explains the existence of objective moral reasons for behaviour.¹¹⁶

Having looked at the reasons why Kelsen's theory should be adopted, I will now examine the second perspective: the reasons it should be dropped and not used, or to be specific, to what extent it can be used in the analysis of a modern legal system. First, the pragmatic value of his theory is not too clear and seems like a mere epistemological conjecture. To uncover the validity of a norm in Kelsen's theory, a person needs to relate to a system of precedent rules; and the final structure that gives validity to all other norms is the basic norm. The critical question to ask is, what is the source of existence and validity of the basic norm? Of course,

¹¹¹ *ibid*

¹¹² See Joseph Raz, *The Authority of Law* (2nd ed., Clarendon Press 2009) 133-4; J. Raz, 'The Purity of the Pure Theory', in S.L Paulson and B.L Paulson eds., *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Clarendon Press 1998) 244-5.

¹¹³ *ibid* 'The Purity of the Pure Theory'. 14

¹¹⁴ *ibid* 134-5. Raz's argument is that Kelsen was badly misunderstood because majority of his readers do not fully appreciate his theory of legal normativity which, by and large, is grounded on these three assertions: First, legal validity in a way is a kind of justified normativity; secondly, a particular citizen who is a legal subject might consider the law as normative or justified if he accepts it as morally good; thirdly, legal science "considers legal orders to be normative in a similar context of 'normativity'. However, this does not commit it to accepting the laws as just.

¹¹⁵ J. Harris 'Kelsen's Pallid Normativity' (1996) 9 *Ratio Juris* 94; U. Bindreiter, *Why Grundnorm? A Treatise on the Implications of Kelsen's Doctrine* (Springer 2002) *passim*; J. Dickson, 'Interpreting Normativity' in T. Endicott et al (eds.), *Properties of Law: Essays in Honour of J.W Harris* (OUP 2006) 22.

¹¹⁶ Objective moral reasons for behaviour' is the generally accepted understanding of normativity. See Wojciech Zaluski, 'Three Senses of Moral and Legal Normativity' in J. Stelmach, B. Brozek (eds), *Studies in the Philosophy of Law: Vol.6 The 'Normativity of Law'* (Krakow: Copernicus Centre Press 2011) 51-62.

Kelsen did not push this argument to any logical conclusion but merely replied that ‘the basic norm exists in juristic consciousness’.¹¹⁷ This prompted Hughes’s reaction,

The flaw in Kelsen’s presentation may be revealed by pursuing further the sense in which a presupposition can be a reason for anything. We are dealing here with the concept of a functioning legal system, not with a species of geometry, and presuppositions, if they are advanced as reasons for the viability of fundamental concepts, ought to be susceptible to a process of verification. The appropriate verification for the proposition that a basic norm is valid can only be its acceptance in the community.¹¹⁸

Hence, the basic norm being merely a presupposition or hypothetical norm is incapable of validating any rule within a positive legal system. Except at the price of absurdity, how can a metaphysical construct be postulated as the foundational and the ultimate-validating rule of a positive legal system? Of course, this contradicts the legal positivists’ point of view that a legal system is validated by the rules within the legal system, without reference to any higher rule outside the system.¹¹⁹ Kelsen by the virtue of his theory of basic norm, traced the ultimate criterion of rules’ validity beyond the positive legal system. But apart from having its ontological value as mere presupposition, the postulation of the basic norm does not seem to genuinely disclose any new criteria for the identification of a modern legal system over and above those already provided by the rule of recognition, for identifying valid primary rules to be obeyed by the ordinary citizens. It therefore appears that the basic norm cannot perform any exceptional factual function here, even as I accept Kelsen’s model of normativity, it is only to the extent that it supports the existence of objective values.

Furthermore, from the perspective of contemporary analytic jurisprudence, Raz’s explanation of a legal system is founded on three important insights. First, he views a legal system as a system that regulates the structure of rules within a particular political or social system.¹²⁰ Secondly, legal systems are normative systems which exists as a form of institutions: a system formed by norms and invariably functions on the basis of norm.¹²¹ Thirdly, a legal system consists of complex network of interrelated laws.¹²² Contrary to Austin, Kelsen and Hart, Raz argues that the explanation for a modern legal system necessarily has to be based on his third

¹¹⁷ Ibid 236

¹¹⁸ Graham Hughes, ‘Validity and the Basic Norm’ (1971) 59 California Law Rev. 699-700

¹¹⁹ See John Gardner ‘Legal Positivism: 5½ Myths’ [2001] 46 American J. Juris. 203–8

¹²⁰ Raz (n 1) 3

¹²¹ Joseph Raz, *Practical Reason and Norms* (Princeton University Press 1990) 123-27

¹²² Raz (n 1)183

insight i.e. ‘intricate webs of internally connected laws’.¹²³ According to him, two laws are considered internally connected if and only if either one depends on the existence of the other, or one of the laws have impact on the interpretation or use of the other.¹²⁴ Based on these insights, Raz argues that legal systems comprise of both legal norms and non-legal norms, and every single non-legal norm is linked to legal norms by the virtue of the relations among laws (internal relations).¹²⁵ So, legal systems involve norms which have the purpose of providing binding effect even to non-legal or extra-legal norms,¹²⁶ such as the customary rules of intestacy and inheritance in Nigeria which sometimes require courts in one jurisdiction to apply the law of another jurisdiction. Nonetheless, nobody would expect that a Nigerian judge who is required to apply an Ivorian law in a private matter incorporates Ivorian law into the Nigerian legal system.

Raz’s theory of legal system is somewhat relevant to this thesis since it does not diverge significantly from Hart’s, especially with regards to normativity of law. Both professedly ignored any metaethical commitment regarding justification for accepting ultimate rules of a legal system.¹²⁷ Hart’s official stance, as I will later explain in detail, was one of metaethical nonalignment together with an unambiguous normative inertia,¹²⁸ A position I will later refer to as ‘norm relative internal point of view’. This position portends a challenge in the explanation of normativity. However, Raz offered Hart a way out by his idea of ‘detached legal statement’.¹²⁹ I will argue that it is only by attributing moral stance to the internal point of view that this concept could be made to yield an intelligible account of normativity of law. Nonetheless, this will not be an artificial or forced metaethical configuration. My argument is premised on the fact that there are elements in Hart’s theory that naturally lend themselves to a practical reasoning or moral attitude model.

¹²³ *ibid*

¹²⁴ *ibid* 24

¹²⁵ *ibid* 95-6, 113-4

¹²⁶ Raz (n 87) 151–154.

¹²⁷ See Hart (n 2) 168. See also Raz (n 1) 234-38, Raz ‘The Authority...’ (n 112) 171-177, Raz ‘The Authority of Law’ (n 112) 153-7.

¹²⁸ Hart refused to accept that the internal point of view involved a moral attitude constraint, but left it riddled with normative languages.

¹²⁹ Succinctly put, a detached legal statement states a certain view that is not necessarily the view of the statement maker; but essentially from the point of view of those who hold such view. For detailed commentaries on detached legal statements, see generally K. Culver, ‘Shiner on “Detached Legal Statements”: A Defence of Raz’ (1995) 8 Canadian J. of Law & Juris. 2., M. McBride, ‘Raz on Internal Point of View’ [2011] 17 Legal Theory 227-235. F.O.C Njoku, *Studies in Jurisprudence: A Fundamental Approach to the Philosophy of Law* (2nd edn., Claretian Publications 2007) 219-227. S. Shapiro, *Legality* (Harvard University Press 2011), J. Broome, *Rationality through Reasoning*, (Oxford, Blackwell 2013).

Nicklas Luhmann defines a legal system as a closed or autopoietic social sub-system within the larger society which has the internal basis for deciding what is law, and the authority to categorise behaviours as legal or illegal.¹³⁰ Conceived in this way, a legal system exists as an interaction among various laws and cannot have intercourse with elements external to law.¹³¹ Luhmann thinks that a legal system is analogous to a telephone system; nobody can stop a ringing telephone by merely telling it to stop, one necessarily has to input the internal electronic network for it to do what you want it to do. In the same vein, actions of the external larger society do not interact directly with the legal system, rather social rules or actions would need to be changed into a legal form before it is considered fit for the legal system. Luhmann argues that Hart's theory does not properly provide for a unique feature of a modern legal system since his reasons for the existence and validity of the rule of recognition as the ultimate rule is subject to the attitudes of officials.¹³² This implies that, rather than being objectively factual and verifiable, such a vital foundational rule is subjective to officials and definitely not reliable.¹³³ Therefore, as an alternative to explaining the legal system as a system of rules, Luhmann argues that a legal system should be understood as operations and communications which are internal to the legal system and objectively empirical in a way that the object is to determine whether an act is legal or illegal.¹³⁴ The most important character of a modern legal system is its ability to translate all other social actions into a legal language, which is in turn employed to determine those particular actions that are lawful or unlawful. This condition for a legal system is an empirical social fact that has nothing to do with the subjective attitudes of officials, unlike the explanation of the legal system focusing on rules. The conditions that determine the closure and uniqueness of a modern legal system are internal to it and not external. As interesting as this theory is, I would not be using it to analyse the Nigerian legal system because this theory merely reduced the legal system to a set of operations based on a two-fold decoder that determines whether an act is lawful or unlawful without stating clearly how these internal operations can work independent of human actions. This prompted Galligan to raise an objection that, 'a study of law's operations only, with the actions of judges, other officials, and citizens being excluded, is necessarily limited and incomplete'. His reason for saying this is that 'the actions of officials, the reasons they give, and the way cases are framed in legal terms,

¹³⁰ Luhmann (54) 325-32

¹³¹ *ibid*

¹³² *ibid* 130

¹³³ *ibid*

¹³⁴ *ibid*

are normally and naturally considered to be a part of the enquiry into law in society. Since for Luhmann human actors are not regarded as part of law's operations, that enquiry is out of bounds. Thus, Luhmann's theory of legal system negates the normative aspect of law and therefore, cannot be a reliable tool for assessing the nature of a modern legal system.

John Finnis views a legal system as a close association of legal rules with basic moral conditions.¹³⁵ Finnis's conception of law or the legal system has a significant connection to his idea of the common good which he puts forward through the concept of community. Finnis claims that the community is a closely knit team of persons.¹³⁶ Even though Finnis suggests the presence of several dimensions of unity in the community, such as the unity that exists among people that share common physical and biological features, Finnis specific interest regarding the idea of the common good mainly concerns the unifying relationship between persons that arises through common action.¹³⁷ A community in this sense is considered to exist each time there is a coordination of activity in the community by members over time from the point of view of a shared aim.¹³⁸ So, Finnis claims that the common good signifies the shared objective of the persons who live within a community. According to him, 'a common good is a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other (positively and/or negatively) in a community.'¹³⁹ Finnis indicates that this expression of the common good is connected to two other approaches concerning the understanding of common good: first, the approach that the basic values are commonly good for everybody so long as they are human beings, and secondly, the approach that each of the basic values is intrinsically a kind of 'common good' to the extent that each good may be followed in as many ways as possible.¹⁴⁰ Finnis further states that encouraging the common good of the community is a perfect condition of practical reasonableness that is to serve as a guide to help a person choose the basic values. Since the basic goods is good for all, practical reason pursuit of the basic values by a person cannot be carried out in a way that looks forward to the person's well-being alone: rather, this pursuit ought to be mindful of the principles of 'integral human fulfilment', the promotion of all the

¹³⁵ John Finnis, *Natural Law and Natural Rights*, 2d ed. (Oxford University Press 2011)

¹³⁶ Ibid 136

¹³⁷ Ibid 36-8

¹³⁸ Ibid 37-39

¹³⁹ Ibid 155

¹⁴⁰ Ibid

members of the society in basic goods.¹⁴¹ The condition necessary for the promotion of the common good is, as Finnis observes, a reaffirmation of the 'master principle of morality' (i.e., all of an individual's desires and other forms of voluntary choices should be open to integral human fulfilment) as this applies to an individual's behaviour in the context of community life, and is significant to any pursuit of the basic values that depends upon communal cooperation.¹⁴² In all, Finnis conception of a legal system is one that has moral attitude as foundation and also has its fundamental rules propagated by a legitimate authority to 'reasonably settle all of the community's coordination issues... for the common good of that community'.¹⁴³

Finnis conception of a legal system is relevant to this research project to the extent that it resonates with this study's approach and interpretation of the second requirement (internal point of view) for the existence of a legal system which shall be explicated later on in this thesis. The point of agreement between Finnis and this study centres on the former's explanation that the authority and foundation of a legal system exist only 'when practically reasonable subjects, with the common good in view, would think that they ought to consent to it.'¹⁴⁴ What this means is that practical reasoning internal point of view demands that legal obligations (whether from citizens or officials) is treated as at least presumptively a moral obligation.¹⁴⁵ I agree with Finnis's explication because the idea of normativity is grounded in reason-givingness of the legal system or law. Later in this chapter, I shall argue that viewing normative obligations strictly on legal terms will be too feeble to be of any practical interest because a legal decision cannot be legally justified unless it is also morally justified.¹⁴⁶ It is through this approach that general obedience of the citizens and officials' internal point of view can be complete.

¹⁴¹ Ibid. 451. Here, Finnis opines that "reason undeflected by sub-rational motivations directs us to the fulfilment of all human persons in all societies."

¹⁴² Ibid 456-8

¹⁴³ Ibid 276

¹⁴⁴ Ibid 251-2

¹⁴⁵ Ibid 246

¹⁴⁶ Spaak shares this view as well. See Torben Spaak, 'Legal Positivism, Law's Normativity, and the Normative Force of Legal Justification' 16 *Ratio Juris* 4, 2003. 480. See also, Michael S. Moore, 'Law as Justice.' in E. F. Paul, F. D. Miller Jr., and J. Paul (eds.) *Natural Law and Modern Moral Philosophy* (Cambridge University Press 2001) 130, David Lyons, *Moral Aspects of Legal Theory* (CUP 1993) 132-5

2.3 The Minimum Conditions for a Modern Municipal Legal System

There are several theories that describe the minimum standards necessary and sufficient for a legal system. However, Hart's theory of rules offers a better explanation of the systematic quality of a modern legal system. The advantage of using Hart's idea is the detailed explanation it offers concerning the basic conditions for a modern legal system. The idea of a transition from a pre-legal society with an unorganised set of primary rules into a better organised society with a legal system reflecting an enduring structure of a modern quality system, gives the basic conditions necessary for any legal system that aspires to become an organised modern municipal system. Thus, in building on this framework discourse, Hart elaborates two minimum requirements that are individually necessary and jointly sufficient for the existence of a modern legal system: first, those rules of behaviour which are valid as per the system's rule of recognition must be obeyed by most of the citizens. Secondly, the same rules of recognition specifying the criteria of legal validity must be effectively accepted as common public standards of official behaviour by its officials.¹⁴⁷ It is important to clarify here that the first requirement demands merely general obedience, rather than acceptance, by the members of the public.

The first condition is the only one which private citizens need satisfy: they may obey each 'for his part only' and from any motive whatever; though in a healthy society they will in fact often accept these rules as common standards of behaviour and acknowledge an obligation to obey them, or even trace this obligation to a more general obligation to respect the constitution.¹⁴⁸

The second requirement states that public officials ought to go beyond mere obedience of the rules of recognition, "they must consider the rule of recognition as general standards of official behaviour and critically judge their own and other's refusal to conform as eccentricity."¹⁴⁹ Hart considers these two conditions roughly sketched above as a logical necessity of a developed or modern municipal legal system, and any legal order that exists without meeting these conditions cannot be adjudged as a modern or developed municipal legal system. According to these requirements, the existence of a modern legal system is still possible by fulfilling only the second requirement.¹⁵⁰ However, Hart claims such a legal system 'might be deplorably

¹⁴⁷ Hart (n 2) 113

¹⁴⁸ *ibid*

¹⁴⁹ *ibid*

¹⁵⁰ *ibid* 114

sheeplike; the sheep could end up in abattoir without knowing'.¹⁵¹ However, Hart did not offer any substantial explanation for holding that the second condition alone cannot produce a developed legal system.

Therefore, to explicate these requirements, I will argue that the first condition is strongly linked to the authority of the rule of recognition¹⁵² because the existence of authoritative rule is the basis for general obedience. If there is no authoritative rule that validates the primary rules, it follows that there is no duty to obey the primary rules, general obedience of primary rules implies the recognition of the existence of the authoritative rule. Thus, the rule of recognition is the first necessary condition for the existence of a legal system. The second condition is that public officials take a uniform internal point of view towards the authoritative rule. I will argue that this condition is about the most important for a modern legal system to exist.

2.3.1 General Obedience by Ordinary Citizens

Indeed, Hart privileges acceptance by officials (second condition for the existence of a legal system) over general obedience by citizens. However, general obedience still plays a crucial role in the existence of a modern legal system but at the same time contingent on the second condition. The idea of acceptance of the rules of the legal system is quite significant in appreciating the existence of a legal order, not just because only public officials are required to accept the rules of recognition, but also because the rule of recognition which prescribes the particular primary rule to be obeyed by the citizens is determined by officials' acceptance. Regarding the citizens attitudes toward social rule, general obedience is the notion used as the substitute for acceptance in cases involving the citizens. For example, when a citizen complies with a primary rule verified by the rules of recognition, employing the language of obedience to describe such gesture might be justified to some extent since the very act of compliance constitutes acceptance of the primary rules. Obedience by the citizens is not the same as following a habit. Following a habit involves a convergence of unreflective behaviour that attracts no criticism. However, general obedience by the citizens as a condition for the existence of a legal system involves complying with those primary rules validated by the rules of recognition, in the sense that the rule so complied with, is considered as a standard of

¹⁵¹ Ibid

¹⁵² According to Hart, the rule of recognition is the ultimate authoritative rule of the legal system that validates all other primary rules of the system. In the next session, a detailed analysis of the rule of recognition as the ultimate validating rule is considered.

behaviour to which the complier develops a critical reflective attitude towards it. In fact, citizens who obey these primary rules, criticise themselves and other citizens who refuse to obey it. As important as citizen's obedience is to the existence of a legal system, it is nonetheless contingent on acceptance by the officials because if the officials do not accept the rules of recognition, we cannot expect citizens to obey the primary rules. In his quest to explicate the conditions for the existence of a legal system, Hart has to adopt a legal system mainly sustained by officials' acceptance and with citizens obedience playing a second fiddle. The reason for this might be that modern legal systems follow the Hobbesian philosophy that sees the relationship between citizens and officials as that of a social contract. This manifest itself in a number of ways. For example, members of the executives and lawmakers are elected by the ordinary citizens, functioning according to the rules stipulated in the citizens' Constitution and judicial precedents. Their authorities are likely to be regulated by some international laws too. Thus, there is an inherent relationship between the citizen's obedience and acceptance by public officials.

The two minimum requirements relate to the difference between primary rules which ought to be obeyed by private citizens and the secondary rules of recognition, change and adjudication meant for officials' acceptance. As already stated above, the first condition for the existence of a legal system species general obedience of the primary rules by ordinary members of the society. Also, as observed above, Hart recommends that only the officials need take the internal point of view towards the rules of recognition. The ordinary citizens just need to conform with the rules of the primary kind and may not have to take the internal point of view. In this first condition, it will seem that Hart requires nobody at all to accept primary rules. But, as Sherwin observes, if this is the point, how then are they adjudged as social rules in the first instance (since the condition for those kinds of rules is their acceptance by at least some members of a group from an internal point of view)? And if they cannot, how can they be relevant enough to engineer a legal system?¹⁵³ In response to this criticism, I argue that since the primary rules are the creation of the rule of recognition, ordinary citizens are invariably committed in advance to its acceptance. So, there's a naturally implied acceptance propelled by the rule of recognition. Also, Dworkin thinks that this kind of claim does not explain the normative essence of conventional rule because it does not include the justification upon which citizens

¹⁵³ Richard K. Sherwin, 'Opening Hart's Concept of Law' (1986) 20 Valparaiso Univ. Law Rev. 3. 396

act.¹⁵⁴ I argue to the contrary that it does actually explain normativity as result of the descriptive manner in which Hart presented it. Hart never disputed that conventional norm cannot be morally accepted, nonetheless, it is not the only justification for legal obligation.¹⁵⁵ For instance, citizens who are subjects of Nigerian legal system may have obligation to obey an unconstitutional or unlawful order or law, but they do not have to obey it if it runs afoul of the rules of recognition. Hart was more explicit about this in the separability thesis, he claims that if a particular primary rule was not validated by the authoritative rule, citizens do not have to obey such rule.¹⁵⁶ Coyle explains it better, ‘the claim that a particular legal rule is ‘valid’ thus does not have to involve any justification of the rule’s moral standing, also, it does not have to involve any evaluation of the policy or objective which the rule serves’.¹⁵⁷ Whether or not such appraisals play any role in claims concerning the existence of rules will ultimately depend on the exact criteria of validity provided by the authoritative rule of recognition (whether the rule is morally binding or not depends on the criteria provided by the rule of recognition).¹⁵⁸ Of course, law in general, as observed by Himma, is a normative institution which normativity depends on its capacity to create legal obligations among subjects.¹⁵⁹

Therefore, by considering this first condition, I argue that there is a strong correlation between the rule of recognition and the private citizens’ duty to obey. To explicate more, I do not argue that private citizens have a general duty to obey all the rules and regulations of the legal system. Rather, I consider a line of argument that has never been reasoned by any Hartian scholar: from a general duty of citizens’ obedience follows their recognition of the ultimate authoritative rule. Based on this argument, I also stretch the point further that, if the private citizens of the legal system, do not first and foremost, accept the authority of the rule of recognition, it follows that they do not have a duty to obey any of the primary rule of the system. This is because the lack of obligation to obey the primary rules implies outright negation of obedience. According to Green, general obedience by private citizens means acting out of sense of obligation and, in particular, following a primary rule because one has the obligation towards the ultimate

¹⁵⁴ Ronald M. Dworkin, ‘Social Rules and Legal Theory’ [1972] 81 Yale Law Journal. Gilbert expresses the same concern. See Margaret Gilbert, ‘Social Rules: Some Problems for Hart’s Account and an Alternative Proposal’ [1999] 18 Law and Philosophy. 143-46

¹⁵⁵ Hart (n 2)257

¹⁵⁶ H.L.A Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 Harvard Law Rev.4. 594

¹⁵⁷ Sean Coyle, ‘Practices and the Rule of Recognition’ (2006) 25 Law and Philosophy 4. 421

¹⁵⁸ Ibid

¹⁵⁹ Kenneth E. Himma, ‘Towards a Comprehensive Positivists Theory of Legal Obligation’ in Imer Flores and Jorge Fabra (eds.) *50th Anniversary of Hart’s The Concept of Law* (1st edn. Problema 2011) 216

validating rule.¹⁶⁰ He further argues that such obligations towards the authoritative rule of the system is the reason for obeying primary rules.¹⁶¹ If there is no obligation from the main authoritative rule for citizens to obey the primary rules, it is, as a conceptual issue, impossible for such private citizens to generally obey those primary rules because general obedience implies acting out of a sense of duty to obey an order by the authority. Raz agrees with this line of argument when he claims that it is authoritative order that creates the duty of general obedience for the citizens.¹⁶² In a similar vein, Pavel claims that the necessity of the ultimate authoritative rule for primary rules is simply that, in any legal system ordinary citizens must be able to differentiate the rules of their legal system from those of other legal system, and legal rules from social rules more generally or from mere rules of etiquette.¹⁶³ For instance, when one's neighbour says, 'C is the law concerning driving in this area,' one must be able to ascertain whether such a neighbour is saying the truth by referring to the authoritative rule that brought rule C into existence, because the authoritative rule is the reason for obeying rule C. Hence, the refusal to acknowledge the authority of the rule of recognition or any other ultimate authoritative rule by ordinary citizens, invariably means a lack of obligation to obey the primary rules of the legal system. Then, from the absence of obligation to obey comes a lack of general obedience by the citizens. A simple illustration may help clarify the point better. A is an individual who was born and raised in apartheid South Africa. Until the age of 39, A believed in the federal legislations, and considered that he had to follow all state laws as well since they were products of the constitution. And so, he did so. For A, until the age 39, the apartheid constitution was the ultimate authoritative rule. When he became 39, however, A joined a radical legal/social movement. In this group's discourses, A became opened to such ideas about ideal democratic tenets and a constitution that reflects the collective acceptance of the people. After several months of intellectual engagements, A became convinced that the underlying philosophy of any modern constitution should be 'all men are born equal, and no citizen of South Africa deserved to be venerated above all other because of his status or race'. In reaction, A stopped recognising the apartheid constitution as the ultimate authoritative rule and liberated himself from the obligation to obey the federal and state laws. Accordingly, A stopped obeying all the primary rules validated by the apartheid constitution. Instead, A said,

¹⁶⁰ Leslie Green, 'Law and Obligations', in J. Colesman and S. Shapiro (eds) *The Oxford Handbook of Jurisprudence & Philosophy of Law* (Reprint edn., OUP 2004) 516-17

¹⁶¹ Ibid

¹⁶² See Joseph Raz, 'Promises and Obligations' in, P.M. S Hacker & J. Raz (eds) *Law, Morality and Society: Essays in Honour of H.L.A Hart* (Oxford: Clarendon Press 1977). See also Leslie Green, *The Authority of the State* (OUP 1988) 60.

¹⁶³ Carmen (n 5)316-317

he began to follow what to him were the right motivations or reasons for actions until a generally accepted Constitution is made. For instance, A no longer attended the university prescribed by the apartheid constitution for only his ethnic group, nor did he pay the federal and state taxes that would assist to run the country. Nevertheless, from time to time, A still continued to obey some of the primary rules sanctioned by the apartheid constitution. And yet, A's obeying of these primary rules was no longer an act of obedience since it was not done because the rules were sanctioned by the constitution, but rather for A's convenience. For example, A kept selling his goods at the Saturday weekend market not because Saturday was the constitutional chosen market day, but because it was convenient for A to sell his goods on the day that citizens assembled to do shopping at the market. Although the apartheid constitution is still in force and still claims authority over A, but A's behaviour is no longer regarded as act of obedience because of his refusal to accept the ultimate authoritative rule.

Consequently, general obedience by private citizens involves an obligation to obey, and such obligation must be predicated on the existence of an authoritative rule.¹⁶⁴ As logically analysed by Payne, the primary rules are norms to be generally obeyed because they are valid norms of the legal order; they are valid rules of the legal order since they meet all the criteria stipulated by the authoritative rule of recognition.¹⁶⁵ The point I want to defend here is that general obedience of primary rules by private citizens is dependent on the authority of the rule of recognition. This agrees with Gardner's argument that the existence and validity of any law depends on the source and as much as the merit.¹⁶⁶ Therefore, since obedience of primary rules is predicated on the authority that gives them validity, refusal to obey the primary rules might indicate that there is a denial or rejection of the rule of recognition.¹⁶⁷ Hence, it is safe to conclude that the rule of recognition represents the first condition for the existence of a legal system. Ehrenberg equally shares this view and argues that an obligation to follow the law can come from the common acceptance of an institution.¹⁶⁸ This study agrees with Ehrenberg that acceptance of an institution by a greater number of citizens under that institution speaks to the legitimacy (morality) of its exercising coercive power over those citizens and it is also conclusive as to general citizens' obligations to obey the laws of the legal system. I thus

¹⁶⁴ Ibid

¹⁶⁵ Michael Payne, 'Hart's Concept of a Legal System' (1979) 18 William and Mary Law Review 4. 299

¹⁶⁶ Gardner (n 119) 199.

¹⁶⁷ Green, (n 162) 60-61

¹⁶⁸ See Kenneth Ehrenberg, 'Law's Artifactual Nature: How Legal Institutions Generate Normativity,' in George Pavlakos and Veronica Rodriguez-Blanco (eds.), *Reasons and Intentions in Law and Practical Agency* (Cambridge University Press 2015) 245-8

disagree with Raz who claims that citizens should object to the classical equation of legitimacy to rule with moral obligation to obey.¹⁶⁹

2.3.2 Acceptance by Public Officials

The second condition for a modern legal system lies with public officials accepting the rule of recognition from a uniform internal point of view.¹⁷⁰ This second requirement is intertwined with the first requirement discussed above and it provides the foundation for the first condition. This is because, when public officials take a shared internal point of view towards the rules of recognition, then the action invariably validates the primary rule within the legal system for obedience by private citizens. Accordingly, the validated primary rules put the subjects in the position of general obedience. Nonetheless, Hart warns that ‘obedience’ is not a term properly designed for the manner in which secondary rules (rule of recognition) are used by public officials.¹⁷¹ For example, Hart claims that when lawmakers conform to the rules of legislating, or judges comply with a rule of recognition, it implicates the internal view that what they do is ‘the generally acceptable thing both for themselves and for others’, whereas obeying does not necessarily give rise to such thinking.¹⁷² This made Mario Prost to conclude that the second condition requires that the rule of recognition must be ‘effectively internalised’ by officials of the legal system.¹⁷³ Hence, what Hart expects is that there should be a shared or uniform official acceptance of secondary rules, especially the rule of recognition, which is considered by Hart as the foundational aspect of the legal order.¹⁷⁴ This explains the point that the existence of the rule of recognition alone (the first condition) is not sufficient to affirm the existence of the entire legal system, as they need to be uniformly accepted by public officials of the legal system.¹⁷⁵ So, the second condition for the existence of a legal system is predicated on the attitude of public officials, and Hart calls this attitude the internal point of view of law.

Public officials play a sacrosanct role in Hart’s theory for two reasons. First, officials play the role of enactment, interpretation, and enforcement of the law;¹⁷⁶ the other is in their acceptance

¹⁶⁹ Joseph Raz, ‘Authority, Law and Morality’ in T. Campbell *Legal Positivism* (1st edn, Routledge 1999) 296-310

¹⁷⁰ Internal point of view is a practical rule acceptance by officials of a group who consider such rule as the general standard for conformity. See Hart (n 2) 56. I will explicate more on this in subsequent section.

¹⁷¹ Hart (n 2) 117

¹⁷² *Ibid* 115

¹⁷³ Mario Prost, *The Concept of Unity in Public International Law* (Hart Publishing 2012) 87

¹⁷⁴ Hart (n 2) 116

¹⁷⁵ *Ibid*

¹⁷⁶ *Ibid* 94-98

of the rule of recognition as the ultimate authoritative rule of the system, and in doing so ensure the efficiency of a legal system and its continuous existence.¹⁷⁷ Hart expounds that the creation of legal institutions with the power to enact new legislations, to provide authoritative decisions when there is a dispute, and to implement them, indicates the transition from a pre-legal to a developed legal system. According to Galligan, the picture of Hart's pre-legal order is one that have rules in the form of primitive customs imposing obligations, but without a law-making body, courts or officials of any form'.¹⁷⁸ Such primitive organisation, Hart explains, is best for a small, closely knitted society, but would not serve a modern or developed ones, which require institutions to tackle with uncertainty concerning the validity of a rule, and which have the power to alter a rule.¹⁷⁹ It also requires institutions to deal with the eventual inefficiency from lack of authoritative determination of some rules.¹⁸⁰ Since a pre-legal system apparently has rules, it is the introduction of the legal institutions that signals the commencement of a developed or modern municipal legal system.¹⁸¹ Thus, the idea of legal institutions (courts, legislature, and other public officials) and the attitude of officials, is for Hart the second requirement of a municipal legal system.

The distinction between the roles of private citizens and the attitude of officials signals the complexity of a legal system. The difference between a pre-legal order and a developed or modern one depends on the officials and their attitudes (internal point of view) towards the rule of recognition. Chen Xu explains,

If we compare a pre-legal society with chess game that only has simple primary rules, then we might notice that such primary rules must be generally obeyed in a game or a society in order to provide logical foundation of its efficacy. However, in a modern legal world, a legal system itself needs not only efficacy but also validity to check whether some rules in pre-legal world can be given that new identity. So, it is officials' role to mark such rules with the label "law" and they cannot do this without holding an internal point of view to secondary rules.¹⁸²

Thus, acceptance of the rule of recognition from an internal point of view by public officials as stated above, is a variable notion for the second condition. Hart warns that, except public

¹⁷⁷ Ibid 116-117

¹⁷⁸ Galligan (n 5) 125

¹⁷⁹ Hart (n 2) 92

¹⁸⁰ Ibid

¹⁸¹ G.R Mayes, 'The Internal Aspect of Law: Rethinking Hart's Contribution to Legal Positivism' (1989) 15 Social Theory and Practice 2. 238-239

¹⁸² Chen Xu, *Secondary Rules, the Internal Point of View, and the Foundations of a Legal System: A Re-understanding to H.L.A Hart's Theory of Legal System* (Atlantis Press 2018) 114

officials take a uniform view of the rule of recognition and approach it from an internal point of view, the legal system is going to send out contradictory orders to the whole members of the group.¹⁸³ Goldsworthy adds that, ‘the legal system will lose authority, legitimacy and efficiency.’¹⁸⁴ Also, Kramer claims that the legal order will become inoperative in the absence of officials’ uniform internal point of view.¹⁸⁵

2.4 Foundational Aspect: Explicating the Rule of Recognition

The rule of recognition lies at the centre of Hart’s theory of legal system, and it is also a fundamental rule which constitutes the foundation of the legal system.¹⁸⁶ Hart claims that the rule of recognition is that ultimate rule in a system whose function is to address legal uncertainty and confusions surrounding primary and other rules.¹⁸⁷ Thus, to ascertain the validity of any rule within a legal system, such a rule must have fulfilled the criteria spelt out by the rule of recognition.¹⁸⁸ While every other rule of the legal system receives its status as legal rule by the virtue of being validated by a higher-level norm, the ultimate rule of recognition is not validated in the same way; there is no other rule higher than it by which it can be validated.¹⁸⁹ The acceptance of the rule of recognition implies a recognition of its validity.¹⁹⁰ To explain: the fact that it is employed as a criterion of validity for every other rule implies the acceptance of its own validity within the legal order.

A person who seriously asserts the validity of some given rule of law, say a particular statute, himself makes use of a rule of recognition which he accepts as appropriate for identifying the law. Secondly, it is the case that this rule of recognition, in terms of which he assesses the validity of a particular statute, is not only accepted by him but is the rule of recognition actually accepted and employed in the general operation of the system. If the truth of this presupposition were doubted, it could be established by reference to actual practice; to the way in which courts identify what is to count as law and to the general acceptance of or acquiescence in the identifications.¹⁹¹

¹⁸³ Hart (n 2) 116

¹⁸⁴ Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (OUP 2001). 240-41

¹⁸⁵ Mathew Kramer, ‘In Defense of Hart’ in Wil Waluchow & Stefan Sciaraffa (eds) *Philosophical Foundations of the Nature of Law* (OUP 2013) 45

¹⁸⁶ Hart (n 2) 98

¹⁸⁷ Ibid 92-93, 107

¹⁸⁸ Ibid 101-103

¹⁸⁹ Ibid 112-14

¹⁹⁰ Ibid

¹⁹¹ Ibid 105

From the above, it could clearly be understood that the validity of the rule of recognition is assumed, and this can be demonstrated by reference to actual practice among public officials. Hart warns that the question of validity of the rule of recognition should not be confused with its existence.¹⁹² That it really exists is a matter of fact which any observer can verify for himself.¹⁹³ Omoregbe argues that when a rule of recognition is accepted and used to identify or validate other rules, then its existence is no longer in question and the fact they are used to validate other rules presupposes their own validity.¹⁹⁴ Thus, actual social practice among officials is enough to affirm the existence of the rule of recognition, no other demonstration needed. Morawetz puts it analogously, ‘it is like saying that we assume, but can never demonstrate, that the standard metre bar in Paris which is the ultimate test of the correctness of all measurement in metres, is itself correct’.¹⁹⁵

There is a persistent problem concerning the rule of recognition that if not properly dealt with here, might pose a great difficulty for further enquiries in the next chapters. First of all, when Hart spoke about the supreme criterion and ultimate rule of recognition, his focus was a bit narrower than mine. His perspective of a legal community, perhaps, did not stretch beyond the culturally and legally homogenous British society and this could be why Hart claims that ‘whatever the Queen in parliaments produces as law can be referred to as the British rule of recognition’.¹⁹⁶ Impliedly, parliamentary sovereignty which is tacitly the Constitution of Britain becomes the rule of recognition within the English legal system. Although, Shapiro disagrees vehemently with this kind of conclusion, he argues that reducing the rule of recognition to only ‘what the Queen enacts in parliament’ confuses it with the rule of change because the Queen in parliament has the authority to repeal old laws and also to make new laws for the citizens.¹⁹⁷ Tucker supports this claim and argues that the rule of recognition becomes indeterminate when reduced to parliamentary sovereignty. He suggests that the rule of

¹⁹² Ibid

¹⁹³ The reality and factual existence of the ultimate rule of recognition is what differentiates it from Kelsenian Basic norm or grundnorm. See the previous section on Kelsen’s ‘Pure Theory of Law’ where I made a detailed distinction between the basic law and the rule of recognition. Whereas the Basic norm has but only metaphysical existence—a Kantian transcendental notion that permits the legal scientist to understand and make sense of the idea of legal rules—Hart’s rule of recognition has actual existence.

¹⁹⁴ Omoregbe (n 92) 141

¹⁹⁵ Thomas Morawetz, *The Philosophy of Law* (New York: Macmillan 1980) 20

¹⁹⁶ Hart (n 2) 107

¹⁹⁷ Scott J. Shapiro, ‘What Is the Rule of Recognition (And Does It Exist)?’ in M.D Adler and K.E Himma (eds), *The Rule of Recognition and the U.S Constitution* (OUP 2009).

recognition exists but according to judicial and legislative values.¹⁹⁸ Also, Jeremy Waldron holds that ‘what the Queen in parliament enacts as law’ explains the rule of change rather than the rule of recognition.¹⁹⁹ According to him, the parliament is set up publicly and primarily as a place- as the place- for enacting and amending law and the secondary rules that it symbolises to administer is the rule of change. In the same vein, Perry contends that, this Hartian claim (‘whatever the Queen in parliament enact as law...’) is best understood not as a rule of recognition, but rather as a composite claim of two distinct fundamental rules. According to him, the first means the Queen in parliament has power to enact valid laws for all British citizens, of course, such conception makes it a rule of change. The second, which could be construed as ‘the judges (and other law enforcing officials) have the obligation to implement all the laws that satisfy the requirements of validity, including, especially, the criterion of having been made by the Queen in parliament’, is a rule of recognition.²⁰⁰ This last objection is an idea original to Raz, who also holds the view that the logical existence of the rule of recognition is that ‘all law-applying officials have the duty to apply all and only laws that meet the conditions stipulated by the ultimate rule...’.²⁰¹ In respect of Nigeria, anyone searching for the rule of recognition in contemporary Nigerian system will have no issues in accounting for the fact that the Nigerian legal order has, since independence, been different from that of Britain. As a fact, the rule of recognition accepted and used by Nigerian officials no longer includes among its criteria of validity any reference to the contemporary decisions of the Queen in parliament.²⁰² Invariably, the rule of recognition in Britain is absolutely different from that of Nigeria.

Bearing all this in mind, I will now raise some salient issues for consideration. How do Hart’s categories apply in a socially and legally pluralistic legal system with conflicting laws, institutions, and officials? what is the intercourse between a system with written constitution and the rule of recognition that supposedly lies at the foundation of a legal order? Is a written constitution the only instrument of law that qualifies as the rule of recognition? Or are other fundamental rules, such as precedents, customary law, executive orders etc. eligible to be called

¹⁹⁸ Adam Tucker, ‘Uncertainty in the Rule of Recognition and in the Parliamentary Sovereignty’ (2011) 31 Oxford Journal of Legal Studies 1. 79-88

¹⁹⁹ Jeremy Waldron, ‘Who Needs Rules of Recognition?’ in M.D Adler and K.E Himma (eds), *The Rule of Recognition and the U.S Constitution* (OUP 2009). 331-36

²⁰⁰ Stephen Perry, ‘Where Have All the Powers Gone? Hartian Rules of Recognition, Noncognitivism, and the Constitutional and Jurisprudential Foundations of Law’ in M.D Adler and K.E Himma (eds) *The Rule of Recognition and the U.S Constitution* (OUP 2009) 307

²⁰¹ Raz ‘The Authority of Law’ (n 112) 93

²⁰² Section 2, Nigeria Independence Act, CAP 55, 1960

rules of recognition? The answers to the above queries, no doubt, is complex because the rule of recognition is not explicitly stipulated in any legal document or practice in Nigeria. Therefore, there is a real difficulty of knowing which law or practice qualifies as the ultimate rule and the criterion of validity. Nonetheless, in following Hart's social rules, the rule of recognition plays certain fundamental roles in a legal system that when assessed, one can allude to rules playing similar roles in any other legal system as the rules of recognition. First, the rule of recognition connects all the other rules in order to produce a legal system.²⁰³ Regarding this role, Hart calls it a 'master rule or ultimate rule' which confers on certain rules their authority as laws.²⁰⁴ Any law which becomes a product of rule of recognition receives a binding character with which public officials and citizens have an obligation to conform.²⁰⁵ The binding character of a rule proceeds from the acceptance of the rule of recognition and does not depend on any other additional reason.²⁰⁶ Secondly, the rule of recognition provides the criteria with which a new law can be created, and it is equally the basis for determining whether a particular social rule qualifies as a legal rule.²⁰⁷ Therefore, it offers those fundamental requirements for recognising a legal system as a unique and distinct system of social rules. Hence, the existence and validity of the rule of recognition in the contemporary Nigerian legal system will depend on the fundamental rules of the legal order that are ultimate in nature and are set of criteria for validating other rules.²⁰⁸ In addition, those fundamental rules must be such that enjoy general acceptance among officials and legal natives.²⁰⁹

2.5 Unpacking the Internal Point of View

Hart set out to explain his idea of internal point of view of law by observing that, within a social organization of individuals who have rules of conduct, "there are some who are concerned about the rules, either as mere observers who don't accept those rules, or as members of that

²⁰³ Hart (n 2)92-93, 97-120

²⁰⁴ Ibid

²⁰⁵ Ibid

²⁰⁶ Ibid

²⁰⁷ Ibid

²⁰⁸ For an extended discussion on these fundamental attributes of the rule of recognition, see Jules Coleman, *The Practice of Principle* (OUP 2001), Benjamin C. Zipursky, 'The Model of Social Facts' in Jules Coleman (ed) *Hart's Postscript: Essays on the Postscript to The Concept of Law* (OUP 2001), and Neil MacCormick, *H.L.A Hart*, (2nd ed., Stanford University Press, 2008). Definitely, certain laws and practices (constitution, judicial precedent, international law, executive orders, among other things) can be demonstrated in a way that one can point to some specific qualities in them as authoritative determinants of primary rules.

²⁰⁹ Indeed, Hart emphasised that the rule of recognition is a conventional rule by the virtue of the fact that public officials accept it as a matter of practice, their reasons being a separate case

organization who not only accept them but use those rules as guides for behaviour”.²¹⁰The members, who accept the rules and use them as guides to conduct, as claimed by Hart, embrace the internal point of view.²¹¹ According to Rodriguez-Blanco, Hart’s definition of the internal point of view is basically an analogical reference to the idea of rules’ acceptability and usage by a group of individuals.²¹² Internal point of view is best understood in the clear distinction he made between individuals of the group who merely observe how rules are followed by participants and the perspectives of participants who accept and use such rules as a general standard of behaviour within the social group.²¹³ The viewpoint of the latter is what internal point of view means in the opinion of Hart, and he explains this with much clarity:

At any given moment of the life of any society which lives by rules, legal or not, is likely to consist in tension between those who, on the one hand, accept and voluntarily co-operate in maintaining the rules, and so see their own and other persons’ behaviour in terms of the rules, and those who, on the other hand, reject the rules and attend to them only from the external point of view as a sign of possible punishment. One of the difficulties facing any legal theory anxious to do justice to the complexity of the facts is to remember the presence of both points of view and not to define one of them out of existence²¹⁴

The internal point of view, therefore, becomes the point of view of participants in a social group who accept the norms of the group and think of such norms as a guide to the general conduct of the group.²¹⁵ It involves considering the rule as the basis for; the participant’s behaviour,²¹⁶ demanding conformity, punishment, and criticisms (including self-criticism)²¹⁷, and providing justification for such demands and criticisms.²¹⁸

The internal point of view is central to Hart’s approach to theory of a legal system. But regrettably it happens to be the most misunderstood aspect of his philosophy. In his ‘Interpretation and Methodology in Legal Theory’, Perry claims that internal point is simply the ‘point of view of insiders’.²¹⁹ He argues that internal point of view resonates with the

²¹⁰ Hart (n 2) 89-92

²¹¹ Ibid

²¹² Veronica Rodriguez-Blanco, ‘Peter Winch and H.L.A Hart: Two Concepts of the Internal Point of View’ (2007) 20 Canadian J. of Law and Juris. 2.

²¹³ Hart (n 2) 89

²¹⁴ Ibid 89-90

²¹⁵ Ibid 56

²¹⁶ Ibid 11

²¹⁷ Ibid 90

²¹⁸ Ibid 57

²¹⁹ Stephen Perry, ‘Interpretation and Methodology in Legal Theory’ in Andrei Marmor (ed.) *Law and Interpretation* (Clarendon Press 1995) 99-100

jurisprudential explanation of law by the insiders.²²⁰ Postema shares the same view and argues that the idea of law is not only explained by the complex pattern of social conducts within the system alone, but by the views, appraisal and perspectives of insiders.²²¹ Similarly, Leiter reiterated Perry's claim in a footnote on page 295 of his work.²²² However, Shapiro²²³ and Kaplan²²⁴ think that all the above understanding of internal point of view is absolutely misleading. Kaplan claims that it is possible for a person within a legal system to take an external point of view in the same way the person can take an internal point of view from the outside.²²⁵ Since internal point of view is a practical behaviour of participants in rule acceptance, the implication is that any practical behaviour of the participants that is not in conformity with rule acceptance is bound to be classified as action without reason.²²⁶ Oliver Holmes's concept of the bad man is a good example of external point of view in this sense.²²⁷ Internal point of view entails taking some form of attitudes towards a generally evaluated standard.²²⁸ In this right, internal point of view can be considered as similar to the 'internalized' rather than insider's perspective as misconstrued by many writers.²²⁹ Hence, internal point of view is the practical behaviour of the people who observe the rules and accept them as not only legitimately binding but as conforming to an acceptable general standard of behaviour.²³⁰

Three social conditions are implicated in the internal point of view: acceptance, criticisms or social pressure, and the use of normative terminology. First, Shapiro argues that the internal point of view in Hart's legal theory is the "the practical attitude of rule-acceptance".²³¹ When a

²²⁰ Ibid

²²¹ Gerald Postema, 'Jurisprudence as Practical Philosophy', (1998) 4 Legal Theory 4. 329-32

²²² Brian Leiter, 'Rethinking Legal Realism: Toward a Naturalized Jurisprudence', (1997) 76 Texas Law Rev. 7.

²²³ Scott Shapiro, 'What is Internal Point of View?' (2006) 75 Fordham Law Rev. 3. 1158-59. A more detailed argument on this, is available in Shapiro's article, 'The Bad-man and the Internal Point of View' in Steven J. Burton (ed.) *The Path of the Law and Its Influence: The Legacy of Oliver Wendell Holmes*, (CUP 2000) 197

²²⁴ Jeffrey Kaplan, 'Attitude and the Normativity of Law', (2017) 36 Law and Philosophy 5. 6-7

²²⁵ Ibid

²²⁶ Ibid

²²⁷ Oliver W. Holmes 'The Path of Law', (1897) 10 Harvard Law Rev., 3. 459-61. Holmes believed that the law may be understood as a prediction, in particular, a prediction of how the courts is acting. The logic assumed about the view of a "bad man". Bad men, Holmes argued in his speech "The Path of the Law", care less about morality, rather they are concern about not going to prison and to avoid fines. In Holmes Opinion, defining the law as a prediction of what would bring punishment or other consequences from a court was most useful. Hart rejected the hypothesis and argued that such was deaf to the law's internal point of view, at best, it can only qualify as external point of view. The sense expressed by the officials and complying citizens that the rules of law are meant to be obeyed. Secondly, it may undermine the very approach through which law is employed to regulate the lives and times of citizens outside the court.

²²⁸ Ibid

²²⁹ Shapiro 'What is the Internal Point of View'(n 223) 1159

²³⁰ Hart (n 2) 91

²³¹ Shapiro (n 223) 1157

person takes the internal point of view with regard to social rules, it implies that the person accepts a convergent style of behaviour as a standard of conduct.²³² The internal point of view is a kind of practical attitude observable by certain insiders, namely those who accept the legitimacy of the rules.²³³ Assuming legal system is a set of social practices created by conventional rules in the way Hart claims, then acceptance by public officials is akin to acceptance of rules of other social practices, such as those of sports or social society. Galligan argues that any modern legal system worth the name, must also have a set of conventions regarding what the law is, so that anyone taking part in the legal activities of such system must accept it as binding.²³⁴ The implication is accepting both the conventions as per what qualifies as rule and rules made in accordance with them.²³⁵ Harris considers this an substandard foundation for a legal system; he is baffled as to how merely accepting the practices of law makes the practice binding and able to produce obligation.²³⁶ He argues that something greater than acceptance is certainly required for law to be capable of creating obligation.²³⁷ Also, Coleman queries whether the rule is accepted on the grounds that it is binding, or it is binding on the grounds that it is accepted.²³⁸ Contrary to received knowledge from Hart, I argue that there should be a distinction between the act of acceptance and reasons for acceptance.²³⁹ While the simple act of acceptance might mean receiving and using a rule, the reason for acceptance dwells on the justification for receiving and using the rule. Secondly, internal point of view could be demonstrated through criticisms (including self-criticism).²⁴⁰ Hence, members of the group who accept the rules of the system criticize other members, and possibly criticize themselves as well, for failing to adhere to the rules. Additionally, not only does failure to conform to the rule creates criticism, but such critical attitude is considered to be legitimately based on good justification.²⁴¹ The justification of the criticism's legitimacy is, according to Shapiro, "signalled, at least in part, by the fact that the critics are not themselves criticized for engaging in the criticism".²⁴² Lastly, internal point of view could be demonstrated via

²³² Ibid 1159

²³³ Ibid

²³⁴ Galligan (n 5) 88

²³⁵ Ibid

²³⁶ J. W. Harris, *Legal Philosophies* (2nd edn., OUP 1997) 123-8

²³⁷ Ibid

²³⁸ Jules Coleman, 'Incorporationism, Conventionality, and the Practical Difference' in Jules Coleman (ed) *Hart's Postscript: Essays on the Postscript to The Concept of Law* (OUP 2001)

²³⁹ Hart claims that a judge who recognises a valid law and applies it to a matter before him, treats such law as a reason for his decision, and will consider his decision as legally justified since it is made in accordance with a legally valid rule. See Hart (n 2) 105

²⁴⁰ Ibid 55

²⁴¹ Ibid

²⁴² Shapiro (n 223) 1162

normative terminologies like ought, must, wrong, right etc.²⁴³ Thus, when a person accepts the quarantine rule that no staff or student must enter the Law School Building without an express permit from the Dean of the School, this practical attitude could be expressed by normative statements like “John, you ‘ought’ not to enter the Law School Building without the Dean’s permit” or “it was ‘wrong’ of me to have accessed the Law School Building without the Dean’s permit”. These statements, in Hart’s view, are internal statements that express the internal point of view.²⁴⁴

2.5.1 Two versions of Internal Point of View

Having generally examined the concept of internal point of view and the various opinions of scholars about it, I would be advancing further discussions on it by arguing that Hart has two versions of the internal point of view. The first version is the norm-relative internal point of view; and the second, I will term the moral or practical reasoning internal point of view. An insider or participant who is conscious of the rules has the norm-relative internal point of view and can make internal legal statements regardless of his or her moral position and attitudes towards the rule. Norm-relative version of internal point of view is congruous with noncognitivism and arguably appears to be Hart’s own view. This is because Hart claims that internal legal statements (that is, statements made from the internal point of view) are normative statements that do not essentially imply any moral commitment to it.²⁴⁵ The second version of internal point of view is the moral or practical reasoning one, which only members of the group taking an attitude of approval towards the rule of the system are expected to have. It is this version of the internal point of view, I argue, is the second constituent requirement for the existence of a legal system. The practical reasoning internal point of view involves a cognitivist moral stance for there to be normativity or authority.

Filtering out these two perspectives of the internal point of view will assist in offering a leeway for Hart’s account of the normativity of law. In order to realise this task, a great deal of attention must be paid to all Hart’s liberal use of the term ‘internal point of view’ and the recurrent references to it by many Hartian scholars. As noted in the previous topic, as a term, internal point of view is ambiguous and slippery. Hart makes it all the more complicated by his several

²⁴³ Hart (n 2)57

²⁴⁴ Ibid 102-03

²⁴⁵ Ibid 203. Hart claims that internal point of view does not necessarily involve any moral commitment on the part of the insider or participant. He further claims that even internal legal statements have no moral undertone. For detailed discussion on the detachment of internal legal statements, see Raz (n 112) 49-59

usages of the phrase, without issuing any caveat to his readers concerning the variations in meaning.²⁴⁶ Therefore, these two approaches to the internal point of view will be critically evaluated and their respective roles in the existence of a legal system set out. The norm-relative internal point of view, it will be argued, is a non-cognitivist perspective, and also a popular version held by most positivists. Nonetheless, in this study, it is not an integral element of the conditions for the existence of a modern legal system because it can neither explain normativity nor the authority of law. On the other hand, I argue that the moral attitude constraint or practical reasoning internal point of view is the source of normativity or authority in a modern legal system. But Hart seems to deny that practical reasoning internal point of view is a moral point of view. I argue further that such denial has two major consequences for internal point of view as a second condition for a legal system: first, there will be privation of normativity in the entire idea. Secondly, the distinction between the internal and external points of view will become futile because there will be no justification for insiders or anybody to take internal point of view. It is only by sifting out these two versions that Hart's concept of the internal point of view can be made to coherently explain 'normativity of law'.

2.5.1.1 Norm- Relative Internal Point of View

When one considers Hart's explanation of the internal point of view, the natural thing that comes to mind is to think that a person who takes the internal point of view believes that the rule is legitimate standard of behaviour, where legitimacy is construed as moral legitimacy or legitimacy from the point of view of right or practical reason.²⁴⁷ Nonetheless, Shapiro argues that such understanding of internal point of view is altogether wrong because Hart stresses that a person does not necessarily have to believe in the moral legitimacy of the rule in order to accept the authority of the same rule.²⁴⁸ Given that internal point of view does not necessarily involve a moral stance or any practical reason, in what other way can it be understood? As explained in the previous section, internal point of view can be understood as the attitude of participants which manifest itself by conforming to a set standard of conduct.²⁴⁹ Also, as mentioned earlier, internal point of view can be expressed through social pressure and internal

²⁴⁶ To add, Hart equally makes use of other terms, which I could, for want of a better description, classify as 'equivocation of internal point of view'. These equivocal terms include, 'internal aspect of rules', 'acceptance of the rule of recognition', 'internal legal statements', 'practical acceptability', 'voluntary acceptance', among other terms which are often used synonymously with the internal point of view.

²⁴⁷ Shapiro (n 223) 1161

²⁴⁸ Ibid

²⁴⁹ Hart (n 2) 55-56

legal statements by participants.²⁵⁰ Internal point of view understood this way, and devoid of any moral stance or commitments, represents the norm-relative perspective of it. A recent work by Kevin Toh, provides a detail explanation on norm-relative internal point of view and argued strongly that Hart's language for internal legal statements were absolutely norm-relative or non-cognitivist in nature.²⁵¹ Shapiro and Perry subscribe to the same line of thought, arguing that Hart's introduction of the concept of internal legal statements was a way of understanding internal point of view as a norm-relative rather than a moral point of view.²⁵² Toh adumbrates, 'according to Hart, in expressing an internal legal statement, a statement maker (i) demonstrates his acceptance of a certain rule as the rule of recognition of her legal system; and (ii) presumes that this particular rule of recognition enjoys a wide acceptance from public officials.'²⁵³ In understanding this framework, the internal legal statement that the statement maker overtly expresses is not a committed statement, and as such it is no expression of some belief.²⁵⁴ Adler corroborates, such belief is not a belief that the rule of recognition has a binding force, or it is legitimate- but rather a non-belief state of accepting or being committed to the rule of recognition.²⁵⁵ In using this language of legal obligation, Hart believes that public officials were displaying an apparent attitude towards the law, which is an attitude of endorsement.²⁵⁶ Hart claims that this attitude of endorsement sufficiently explains normativity without violating the separability thesis.²⁵⁷ As explained by Hammer, Hart's aim is that jurisprudence should be constructed around the point of view of individuals who accept the legal system, but the theory itself or the legal theorist must not endorse the legal system (as a system that is altogether, equitably just or which obligations are morally binding).²⁵⁸ Furthermore, Raz attempts to offer Hart's norm-relative internal point of view a leeway by introducing his idea of 'detached normative statements.'²⁵⁹ According to him, detached statements are statements which accepts a certain normative perspective with the aim of making limited claim, but without the maker

²⁵⁰ Ibid 56-57

²⁵¹ Kevin Toh, 'Hart's Expressivism and his Benthamite Project' (2005) 11 Legal Theory 75.

²⁵² Shapiro (n 223) 1161-62, Stephen Perry, 'Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View', (2006) 75 Fordham Law Rev. 1143.

²⁵³ Toh (n 251) 112-13

²⁵⁴ Ibid

²⁵⁵ Mathew Adler, 'Social Fact, Constitutional Interpretation, and the Rule of Recognition' in M.D Adler and K.E Himma (eds) *The Rule of Recognition and the U.S Constitution* (OUP 2009) 201

²⁵⁶ See H.L.A Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (OUP 1982)144-5

²⁵⁷ ibid

²⁵⁸ see Hill H. Hammer, 'H.L.A Hart's Hermeneutic Positivism: On Some Methodological Difficulties in the Concept of Law' (1990) 3 Canadian J. Law and Jur. 113. For a similar argument, see Aldo Schiavello, 'Rule of Recognition, Convention and Obligation: What Shapiro can still Learn from Hart's Mistakes' in Damiano Canale and Tuzet Giovanni (eds) *The Planning Theory of Law: A Critical Reading* (Dordrecht: Springer).

²⁵⁹ See Raz 'The Authority of Law' (n 112) 123-29. See also Raz (n 87) 153-56,

of the statement endorsing the normative perspective. Hence, in a refectory, a person can tell his vegetarian mate that ‘considering your beliefs, you ought not to demand that meal’, even though the maker of the statement is not a vegetarian himself. In the same vein, Raz argues that ‘legal scholars- and this includes ordinary practising lawyers- can use normative language when describing the law and make legal statements without thereby endorsing the law’s moral authority.’²⁶⁰ Consequently, a legal practitioner can tell his client: if you accept the validity of C as a rule (which imposes moral obligations too), then you ought to follow C or desist from following B.²⁶¹

However, the main difficulty with norm-relative approach is how a person will be able to accept the point of view of legal participants in practice and at the same time, genuinely keep a distance reasonable enough to be able to criticise the legal system and its participants. This difficulty has created an enduring contemporary discourse in political and social philosophy as well. The central argument concerns whether in seeking to explain a culture or group according to its own terms precludes an account which presents them as wrong, deceptive, and disordered.²⁶² Winch and Habermas once argued that, if a person says that he understands the point of view of the participants of a certain practice, but considers the practice to be absurd and barbaric contrary to what the participants believe, then the person has not genuinely understood or accepted the point of view of the believing participants, because that is not how the practice appears to them.²⁶³ Hence, the norm-relative approach cannot explain normativity of law in that normativity of law means that law is capable of trumping reasons (even moral ones) that motivate citizens to obey it.²⁶⁴ Of course, the internal point of view is an attitude through which the members of the group assumes there are reasons to follow the law.²⁶⁵

2.5.1.2 Practical Reasoning or Moral Internal Point of View

In order to demonstrate that the internal point of view can sufficiently explain the normativity of law within any modern legal system, I will adopt the less popular interpretation of internal

²⁶⁰ Ibid (n 87)156

²⁶¹ This norm relative internal point of view, derived from H.L.A Hart and Joseph Raz, is well summarised in the works of Dennis Patterson, ‘Explicating the Internal Point of View’ (1999) 52 SMU Law Rev. 1. 69-71, Bix (n 103) 44-45, Jeffrey A. Pojanowski & Paul B. Miller, ‘The Internal Point of View in Private Law’ [2022] 67 American Journal of Jurisprudence.

²⁶² See Charles Taylor, *Philosophy and the Human Sciences* (CUP 1985)

²⁶³ Winch (n 82) 23-34 and Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (W. Rehg, trans., Cambridge MIT Press 1996)

²⁶⁴ Gerald J. Postema, ‘Coordination and Convention at the Foundations of Law’, (1982) 11 J. of Legal Stud. 1. 165. See also, Raz (n 46), David Enoch, ‘Giving Practical Reasons’ (2011) 11 The Philosopher’s Imprint 4.

²⁶⁵ Leslie Green, ‘The Concept of Law Revisited’, (2006) 94 Michigan L. Rev. 6.

point of view which is the practical reasoning or moral point of view. This thesis does not argue that this sense of understanding the internal point of view is accurately Hart's approach. In fact, as stated earlier, Hart was less interested in the normativity of law, therefore, he did not categorically claim that the internal point of view has any form of moral attitude approval. Nevertheless, I argue that, rather than Hart was willing to accept, his explanation of the internal point of view gives it away as more of a moral point of view. If internal point of view is a practical attitude to rule acceptance by public officials, then those officials who accept the rule as general standard of conformity have justifications (moral reasons) for doing so, which implies a sense of moral obligation. Unfortunately, Hart does not accept it this way; as explained in the previous section, Hart explicitly holds that internal point of view is not a moral point of view and claims that it is possible public officials can approach the law from an internal point of view without having any feeling of moral commitment to it.²⁶⁶ One of the difficulties identified with internal point of view being understood in this way is its inability to explain normativity and which Holton succinctly classified as 'moral attitude constraint'.²⁶⁷ According to him, acceptance of the rule, in the opinion of Hart, involves the belief that there are normative reasons for such acceptance, therefore, extricating moral attitude from internal point of view will render it normatively otiose.²⁶⁸ Similarly, Wendel argues that the core elements of internal point of view are acceptance and justifications for such acceptance, and if citizens and officials accept the law on the grounds that its demands are justified, it implies that officials could take a moral attitude towards the law as much as legal.²⁶⁹ I agree with Holton and Wendel in that in internal legal statements express belief in the same way that moral judgements do, and this belief so expressed produce the idea of reason-givingness which invariably is a moral justification. Thus, irrespective of varieties of reason for obligation, those reasons will definitely implicate belief which is a product of moral judgment. In his book 'Legal Reasoning and Legal Theory', MacCormick, while reacting to Hart's claim that there are varieties of reasons (outside moral ones) for taking the internal point of view, pushes the argument in support of moral point of view to a logical conclusion, 'if taking internal point of view toward a rule requires that there are reasons for doing so with regards to the rule, there is no reason why moral reasons should not be part of such reasons.'²⁷⁰ He further corroborated this point in

²⁶⁶ Hart (n 2) 203. This view of Hart describes the norm relative version of internal point of view earlier discussed.

²⁶⁷ See Richard Holton, 'Positivism and the Internal Point of View' [1998] 17 Law and Philosophy. 609

²⁶⁸ Ibid 6

²⁶⁹ W. Bradley Wendel, 'Lawyers, Citizens, and the Internal Point of View' [2006] 75 Fordham L. Rev. 1474

²⁷⁰ Neil MacCormick, *Legal Reasoning and Legal Theory*, (Oxford rev. paperback edition, OUP 1994) 287-89 (emphasis added). For an extended discussion on this, see Antony Duff, 'Legal Obligation and the Moral Nature of Law' [1980] 25 Juridical Rev. 67-72

‘Law, Morality and Positivism’ arguing that, the idea of internal point of view implies that rules either constitute or sub serve values, values which he considers as moral values.²⁷¹ Surprisingly, Raz, at some point believes that taking the internal point of view towards the rule of recognition necessitates that one has a moral reason in support of the rule of recognition.²⁷² He further argues “no system is a system of law until it fulfils the requirements of legitimacy or moral authority. This is to say that legal conditions are morally binding, that is, legal duties are actually moral duties resulting from the instance of law”. Hence, the notion of practical reasoning or moral attitude internal point of view is that it is appropriate for public officials to take the law as morally acceptable as much as they see it as legally valid.²⁷³

The practical reasoning internal point of view, implicating as it does, an attitude of approval of law—provides the platform for moral bindingness of law which invariably explains normativity.²⁷⁴ In articulating this idea of practical reasoning internal point of view, Finnis draws on Aristotle’s works on the nature and purpose of community, and further adumbrates on Thomas Aquinas’s articles regarding the common good as contained in his *Summa Theologiae*.²⁷⁵ Finnis agrees with Raz that internal perspective is significant in understanding the features of a legal system or law; However, he claims that Hart’s internal point of view cannot perform the task being given to it because the interpretation is narrow. Finnis argues that a broader interpretation can be provided; and that is, the law or a legal system should be considered from the point of view of a person who possess practical reason.²⁷⁶ As stated earlier in the literature review, Finnis holds that every explanation regarding the nature of a legal system or law should come from the perspective of practical reasonableness of an agent. This is because practical reasonableness permits an understanding of the unique features of law or a legal system in the fulfilment of the common good. The point of view of an agent who has practical reasonableness, Finnis argues, will reveal whether a legal system has such feature as

²⁷¹ Neil MacCormick, ‘Law, Morality and Positivism’ (1981) 1 J. of the Society of Legal Scholars 2, 1981. 137 (emphasis added)

²⁷² Joseph Raz, ‘Hart on Moral Rights and Legal Duties’ (1984) 4 Oxford J. of Legal Studies. 129 (emphasis added)

²⁷³ Holton (n 267) 1-2. See also, Mathew Kramer, ‘Of Final Things: Morality as one of the Ultimate Determinants of Legal Validity’ (2005) 24 Law and Philosophy 1. 51-94

²⁷⁴ I am indebted to a conversation with Caroline Jones, Andrew Iwobi and Alex Latham which made me realised that the understanding of internal point of view as a moral attitude approval of the law is somewhat original to John Finnis.

²⁷⁵ See Aristotle, *Politics* in Ernest Barker, ed., *The Politics of Aristotle*, trans. Ernest Barker (Oxford: Oxford University Press, 1946), Bk. I, Ch. 1. Finnis states that his primary description of the common good is similar to that articulated in a commentary to a French translation of Aquinas’s *Summa Theologiae*: see Thomas Aquinas, *Somme théologique: La justice*, trans. M. Gillet (Paris: Société Saint Jean L’Évangéliste, 1932), Vol. 1 at 209, 242, cited in Finnis NLNR, *ibid.* at 160.

²⁷⁶ Finnis (n 135) 126

the pursuit of the common good. Some legal theorists support this claim and argue that it is easier to explain law as a legal system carrying the ideals of justice because of the members of that system hold the laws from a practical reasonableness point of view.²⁷⁷ This understanding of internal point of view is attractive and will be employed in this study for two reasons: first, the centrality of normativity to contemporary analytic jurisprudence implies that a theory of a law must be able to explain normativity for it to be relevant.²⁷⁸ Normativity is meant to be an important feature of law or rule which precludes any theory of law that refuses to account for it.²⁷⁹ As already explained in the preceding section, internal legal statements from norm-relative internal point of view does not disclose any form of moral commitment because normative statement expresses value judgment and also utilise moral verbs. On the basis of this, I argue that practical reason, but not norm-relative internal point of view can account for normativity. Secondly, from the problems observed with the Nigeria legal system, it is safe to argue that the most significant qualities of law or a legal system cannot be discovered in its source-based attribute alone, but in the legal system's capacity to promote the common good, to safeguard the fundamental human rights, or to rule with integrity.

So, why should I adopt the moral attitude version of internal point of view rather than the norm relative version? First, considering Hart's explanation for rule's acceptance, Hart claims that the members of the group who take the internal point of view towards the rule, demand obedience from others, criticize (including self-criticism) others for refusing to conform to the normative standard and consider such criticism as justified.²⁸⁰ This Hartian explanation, no doubts, corresponds with most definitions of moral attitude in philosophy. Scanlon, for instance, defines moral motivation as that desire in individuals to justify their behaviours before others on the basis they could not reasonably deny or discard; and this in turn is fulfilled if 'they realise that there is a sufficient reason for their behaviour despite the possibility that others refuse to accept it'.²⁸¹ Nonetheless, as I remarked at the outset, Hart claims that

²⁷⁷ See, V. Rodriguez-Blanco, 'Tracing Finnis's Criticism of Hart's Internal Point of View: Instability and the 'Point' of Human Action in Law' in T. Spaak & P. Mindus (eds.) *The Cambridge Companion to Legal Positivism* (CUP 2021)

²⁷⁸ Regarding the importance of normativity in modern legal theory, see D. Enoch, 'Reason-Giving and The Law', in Leslie Green & Brian Leiter (eds.), *Oxford Studies in Philosophy of Law* (OUP 2011); J. L. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (OUP 2001); A. Marmor, *The Language of Law* (OUP 2014); A. Marmor, 'Norms, Reasons and the Law', in K. Himma et al (eds) *Unpacking Normativity* (Hart Publishing 2018); Gerald J. Postema, 'Coordination and Convention at the Foundations of Law', 11 *Journal of Legal Stud.* 1, 1982.

²⁷⁹ Kaplan (n 224) 1

²⁸⁰ Hart (n 2) 56

²⁸¹ Thomas Scanlon, 'Contractualism and Utilitarianism' in A. Sen and B. Williams (eds.), *Utilitarianism and Beyond*, (CUP 1982) 102-24. For further discussions on moral attitudes and moral motivations, see D. Copp,

acceptance of the law might be for varieties of reasons (long-term interest, others' interest, traditional attitude, bandwagon, among other things) that may not include any moral drive.²⁸² The pertinent question to ask here is, how is it possible for an official not to accept the law on moral grounds but at the same time think that the demands of such law are justified? Therefore, if Hart claims that acceptance in this context has nothing to do with moral point of view, he has to prove that officials can think they have normative reasons for accepting the rules without ever imagining that they have moral reasons for doing so. The explanation (the use of detached internal statement) he offered to this in the norm-relative version of internal point of view is not utterly convincing, because it is not possible to talk of 'the right or wrong action' without contemplating it within the context of a 'morally right or wrong action'. Holton puts the argument better:

if one wants to explain rule's acceptance in the manner that Hart requires (as involving the notion that demands conformity with the general standard, and criticisms of deviants as justified), it becomes very difficult to comprehend how one could accept the rule whilst deciding at the same time that, morally, they ought not to accept the rule.²⁸³

For if the officials consider that they ought not to accept the rule, then certainly they should think that such demands and criticisms are not justified. Hence, the moral stance interpretation enjoys a comparative advantage over norm relative version in that it explains normativity of law better. Definitely, the normativity that comes with taking the internal point of view needs to be grounded in something more than mere acceptance. Accordingly, I argue that the acceptance ought to be justified as per the reasons for accepting the ultimate rules. It is at this stage reason-giveness that public officials choose whether or not take the internal point of view towards the rules of recognition. At this level, practical reasoning and moral attitudes are raised about the rule and whether or not such rule should be employed. Marmor presents the argument this way: 'whether court officials or any other person, ought to or ought not to regard the ultimate rule of the legal system is entirely a moral problem that can only be settled by moral arguments.... The presence of a social practice, in itself, does not give a person an

'Moral Obligation, and Moral Motivation' [1995] 21 Canadian J. of Phil. 111-121, R. J. Wallace, 'Moral Motivation', in J. Dreier (ed.), *Contemporary Debates in Moral Theory*, (Malden, MA: Blackwell 2006) 184-192, M. Mameli, 'Evolution, Motivation, and Moral Beliefs' in K. Sterelny, R. Joyce, B. Calcott, and B. Fraser, (eds.), *Cooperation and its Evolution* (Cambridge, MIT Press 2013).

²⁸² Hart (n 2) 198-9

²⁸³ Holton (n 224) 6

obligation to get involved in the practice.’²⁸⁴For example, if the law commands citizens to make financial contributions to a charity organization, as long as a citizen makes her monetary donation to the organization, she has satisfied the demands of the law, and the reasons for the donation is somewhat irrelevant in the view of norm relative internal point of view. But without reasons or justification for the donation, the acceptance to donate by the legal agent cannot be evaluated; the agent has no right to judge or criticize those who refuse to donate to charity. In the same vein, Taiwo holds that public officials are not robots applying the law, they have justification for their acceptance and application of the law.²⁸⁵ A newly recruited public official meant to enforce an illogical and repugnant law will definitely ask himself why he joined the public service in the first place; once having done so, he is not likely to go ahead with the enforcement.²⁸⁶Enoch and Kaplan will argue that acceptance of the law is not enough to determine the normativity of law, we may need to establish reasons for keeping or upholding the law as well.²⁸⁷Definitely, whatever reasons a public officer has for accepting a law might equally be the same reasons he has for enforcing or implementing it. In the view of Soper, understanding the demands of the law requires any sensible citizen to understand the normative implications for the society. Officials who implement the law do so because they are convinced that the law is reason-giving.²⁸⁸Hence, the normativity of internal point of view will necessarily involve a moral attitude because one does not just accept the law for the sake of acceptance, except at the price of being regarded a stooge or puppet. According to Webber, ‘understanding the manner in which law provides reasons for citizen’s behaviour implies understanding its practical point or purpose’.²⁸⁹ So, there must always be a motivational reason for acceptance and that implies a moral stance.

2.6 Objective Justification of Moral Commitments

I take it that the moral commitment to the rule of recognition must be objectively justified. First, considering his norm-relative alignment, Hart does not think that the practical reasoning

²⁸⁴ Andrei Marmor, *Positive Law and Objective Values* (OUP 2001) 1 (emphasis added). In addition to this, issues of acceptance and its normativity have been explained with great details and clarity by Kramer from whose explanation this research has benefitted immensely. See Kramer (n 185) specifically at chapter 8.

²⁸⁵ Olufemi Taiwo, ‘The Legal Subject in Modern African Law: A Nigerian Report’ [2006] 7 Human Rights Rev. 29

²⁸⁶ Ibid

²⁸⁷ Kaplan (n 224) 2., David Enoch, ‘Reason-Giving and The Law’ in Leslie Green & Brian Leiter (eds.), *Oxford Studies in Philosophy of Law* (OUP 2011)

²⁸⁸ Philip Sober, ‘Law’s Normative Claims’, in Robert P. George (ed.) *The Autonomy of Law*, (Clarendon Press 1996) 216-23

²⁸⁹ Gregoire Webber, ‘Some Internal Points of View and the Study of Law’ (2014) University of Minnesota Digital Conservancy. <http://www.hdl.handle.net/11299/163470>. Accessed 23rd October 2021.

internal point of view has any moral bindingness. It is at this stage that I made an important contribution to knowledge arguing that practical reasoning internal point of view would have to be read as a form of acceptance by the officials which involves moral commitment. Indeed, the model of moral commitment among public officials that this thesis proposes is objective. The reason for this claim is that public officials' attitudes towards the rules are not only theirs but apply to the entire citizenry. The argument is like this, if A does not share the attitudes of B, B is strictly restricted to not make a moral demand of A. To be certain, this thesis avoids the pitfalls of fallacy of composition when I argue that the normativity of law implies that moral judgments are supposed to be applicable to everyone in a situation identical to the one referred in the particular moral judgment in question. When a public official judges that something is morally right, he judges so as right objectively. Indeed, internal point of view means the practical acceptability of rules by those who look up to the rule as a general standard (objective justification) for conformity. Apart from acceptance, another critical element of internal point of view is the critical attitude of members of the group towards themselves and other members who deviate from the acceptable standard.

Having argued that internal point of view taken by officials ought to have a moral commitment that is objectively justified, the next consideration is to examine the implications such objective justification will have for the many legal systems of the world that are numb to just laws. On this point, I argue that if the attitude of officials towards the rules of recognition is not morally objective, then the members of the group (in this case, the officials) will be left with nothing to say to those other members who, in their view refused to conform with the generally acceptable standard. For example, if the generally accepted rule in Nigeria is that 'it is wrong to hurt animals for fun', the concern here will be that officials cannot have a lever on a 'Savage Moses' or a 'brutish shepherd' unless there is an objectively moral grounds for doing so. The justification does not come from the individual action of the members of the group, but from the reasonableness of the action itself. In this case, the reason for acceptance of the rule stems from the fact that such action causes sufferings in animals. Hence, officials giving one another reasons for complying with the acceptable standard are the fibre of moral discourses. This goes to show that the moral commitment expected from officials as far as practical reasoning internal point of view is concerned, must be objectively justified.

2.6 .1 Threshold of Moral Valuableness of a Legal System

On Hart's account, a legal system is only realised when citizens generally obey the rules validated by the rules of recognition and officials take the internal point of view towards the same rules of recognition. In other words, when the officials and citizens believe there are justifications for following the law and applying it, then a legal system could be said to exist. As argued earlier, the justification for following the rules implies that internal point of view is a moral point of view. The natural questions that follow is, how morally valuable must the system be to count as a modern legal order? And do all the officials need to accept the rules of recognition for the right reasons? My position is that a legal system is considered worthy of the name if it is not morally depraved. What then is meant by moral depravity? A legal system where the fundamental rights of the citizens as enshrined in the rule of recognition are grossly violated is considered as a morally depraved system. The same applies to a situation where the core provisions that safeguard fundamental human rights as contained in the rule of recognition is suspended by officials. First, the essential characteristic of a legal system, I argue, rests on the ability of officials to approach the authoritative rules of the system from shared internal point of view. Of course, this places upon them certain commitments, and these commitments are moral in nature. The moral commitments derive from practical reasoning acceptance of the authoritative rules by officials and internal legal statements. The internal aspect creates a deep sense of normativity which elicits the use of purely moral terms like 'ought' and 'ought not' capture the sense of moral obligation imbued in actions which this internal aspect requires. This is what accounts for the sanctity of a legal system and the reverence with which it is treated. In Nigeria for example, the Constitution contains some significant framework for the protection of the citizens' fundamental human rights in its Chapter Four, the supremacy of the Constitution as the source of power and authority to preside over the government is well stated in Section one, the nature and limit of governmental authorities, the relationship between the executive, legislature and the judiciary, the qualifications and elections of members of the National Assembly and the procedures for summoning and dissolving the National Assembly, power and control over public funds, the establishment and powers of the different courts, amongst others, are some of the key provisions under the Constitution that aim to ensure a proper government and stable legal system. In common with all the previous Nigerian Constitutions and some international laws, the 1999 Constitution provides for an array of fundamental human rights and the obligation of public officials who pilot the affairs of government to protect the citizens against gross breach of these rights. One may argue that the

rights contained in the 1999 Constitution are rights supported strictly by law, rather than morality. I argue to the contrary that there are certain rights also available in Chapter II under the title- Directive Principles of State Policy which are social, economic, and cultural rights. These rights are rights of aspirational goals rather than legally binding and enforceable rights. Invariably, moral consciousness is required for its implementation. The Constitution is an important authoritative rule in Nigeria, and for a morally valuable legal system, the Constitution for the most part, should not be arbitrarily suspended as it was under military. Also, there must not be gross violations of its provisions by officials. Thus, for a legal order to be rightly considered as one, it has to be morally valuable, and for a legal system to be morally valuable, the officials must not treat the authoritative rules with disdain and scorn. If the authoritative rules are treated as such, the system becomes immoral or depraved.

Furthermore, all officials are expected to take the internal point of view for the right reasons towards the rules of recognition. The understanding behind the existent condition of a legal system is convergence among its officials with regard to the rules of recognition. Nevertheless, it is unlikely that all the officials will take the internal point of view. So, the convergence must not be absolute convergence, rather the convergence of some official's conceptions of the system's rules of recognition which only needs be sufficient to sustain the existence and working of the legal system. Of course, the number of officials who take the internal point of view can criticise those remaining officials who refused to take the internal point of view.

2.6.2 Moral Point of View: What is New?

The proposal to read internal point of view along the lines of moral commitments may, at first blush, hardly seem novel. As I will show later, Joseph Raz, Kevin Toh, Richard Holton, Neil MacCormick, John Finnis and others have proposed a reconstruction of internal point of view along moral commitment. At the surface, these legal theorists' project may appear to approximate mine here, nonetheless, there are some important differences between the two works, both of approach and of outcome. There are two main points of difference between the moral commitment internal point of view projected in this thesis and the ones proposed by these morally inclined legal philosophers. The first noticeable difference is in respect of internal legal statements. Raz was the first to acknowledge that internal point of view involves some moral commitments, and he did so by pointing to the fact that any plausible theory about legal statements ought to consider how realistic it is to make legal statements (which in his view are the same as moral statements), but without moral commitment to its justification on

behalf of the statement maker. As discussed in chapter two, the philosophical nature of legal statements appears to absolutely preclude such a possibility. Raz has to offer an explanation regarding how legal statements, despite being synonymous with moral statements, does not necessarily imply moral commitments of the kind expected of a usual moral statement. Raz offered a way out for this position through the idea of detached normative statements (I made an elaborate explanation on this at 2.5.1.1). Detached normative statements involve situations where the maker of a statement gives moral reasons that an official has for his action, whereas the statement maker remains uncommitted to the moral judgments thereof. While this research thesis agrees with Raz that normative legal statements are moral statements, I nevertheless, contends that the outcome of detached statements is neither realistic nor deontological (they are merely hypothetical in the sense that they are not true). Of course, truth involves logical conformity of the intellect to reality or logical conformity between the knower and the the known (object-subject relationship). Hence, I argue that internal legal statements are not only moral statements but implicates the logical belief of the maker of the statement.

Secondly, Toh, Holton and MacCormick proposed a reconstruction of internal point of view along the lines of moral commitments. Nonetheless, the moral commitment they projected can be understood as non-cognitive attitude of approval by public officials towards the rule of recognition (See 2.5.1.2 of this thesis for a detailed explanation in this regard). For these legal theorists, internal point of view is definitely a moral point of view, but the moral commitments involved thereof do not implicate any substantial truth conditions because they believe there are really no existential moral facts. Hence, whenever moral statements are made by officials, they are not usually expressing states of mind which are beliefs, or which are cognitive in the manner that beliefs are, rather they are merely demonstrating non-cognitive attitudes closely related to desires, approval, or disapproval. While I hold the view that internal point of view is a moral point of view, I nevertheless argue that the moral judgments or commitments involved here can count as beliefs which invariably have the possibility of being true by the reason of their real representation of events within the particular legal system. Thus, the point of difference between me and the legal philosophers mentioned above centres on approach, while they express a non-cognitivist moral commitment to internal point of view, I argue that the moral commitments expressed by public officials are accurate representation of moral reality and have the potentiality of being true (or false). It is on this note that my interpretation proposed in this research work should be considered as a contribution to filling Hart's theory of internal point of view with its missing gaps. I expanded this contribution further by applying

my interpretation of internal point of view to an actual legal system to see to what extent it can explain the existence of such legal system.

2.7 Conclusion

The aim of this study is to determine the existence, nature, and the normative quality of the Nigerian legal order as a modern legal system. In doing that, I sought contemporary models that can serve as framework for realising a modern municipal legal system. There were several modern postulations concerning the existence and nature of rules and legal systems, oscillating between the point of view of hierarchical models and sanction-centred models and others emphasizing the normative understanding as the basis of legal system. I argue that, none of the models, Hart's excepted, entails all the necessary and sufficient conditions for a modern municipal legal system. Hart's model of legal system was employed because of its simple but comprehensive character. Hart expounds two minimum requirements that are individually necessary and cumulatively sufficient for the existence of a modern municipal legal system. On the first requirement, Hart claims that all the primary rules of the legal system approved by the rule of recognition must be generally obeyed by the citizens. Secondly, the officials must uniformly take the internal point of view towards the secondary rules (with emphasis mainly on the rule of recognition). Explicating the first condition, I argue that general obedience by the citizens is predicated on the authority of the rule of recognition because the rule of recognition creates the obligation of obedience. I argue further that, if the citizens do not accept the authority of the rule of recognition as the ultimate norm-validating and norm-creating criteria, then they neither have any justification nor obligation to obey the law. Therefore, I remarked that the existence of the rule of recognition must be the first requirement for the legal system. Regarding the second requirement, the situation was a bit trickier because of the equivocal nature of the concept of internal point of view. Contrary to received common knowledge, I postulated two versions of internal point of view, namely norm relative and practical reasoning or moral attitude. Notwithstanding that the former enjoys wider acceptance among most Hartian scholars, I did not adopt it because of its inability to account for normativity of law. I, therefore, settled for the moral attitude version as the second condition for a legal system since it provided justification for the actions of officials. Hence, the two key concepts for the existence of a legal system are the rule of recognition and the internal point of view.

CHAPTER THREE: NORMS IDENTIFIABLE AS RULES OF RECOGNITION IN NIGERIA

3.0 Introduction

The aim of this chapter is to examine those authoritative rules within Nigerian legal order that can qualify as the rules of recognition within the legal system. As stated in chapter two, regarding the construction of a modern municipal legal system as a union of primary and secondary rules, Hart's first minimum condition for the existence of such legal system is that the primary rules of obligation, which are valid according to the rule of recognition, must be generally obeyed by the ordinary citizens. I argue that, since the existence of the primary rules and the general obligation to obey is a creation of the rule of recognition, it logically follows that proving the existence of the rule of recognition amounts to satisfying the first minimum condition of the existence of a legal system. So, the fundamental question to be resolved in this chapter is, what standards within Nigerian legal order are individually necessary and cumulatively sufficient to constitute the rule of recognition for a modern legal system? As stated in chapter two, Hart himself concedes that in a modern legal system where there are several 'sources' of law, the rule of recognition is usually complicated or complex and the standards for identifying the law can be many. The rule of recognition is not outrightly specified in any part of the Nigerian legal system but employing Hart's theory from a normative perspective as argued in chapter two, this study discovers amongst other things that the Constitution of the Federal Republic of Nigeria, the judgments of the constitutional courts of record and international law, all form part of the rules of recognition within the Nigerian jurisprudence. But it is not enough to present the Constitution, precedents, and international laws as exhaustive lists of the rule of recognition in Nigeria, there ought to be reasons to support this finding. Hence, while their main characteristics revolve around the fact that they are secondary rules, each of their basic functions discovered in this study is capable of serving as tool that can identify the primary rules within Nigerian legal structure. Also, proving the existence of rule of recognition before analysing the second minimum condition will definitely create the problem of circularity for this study. Central to the problem of circularity in Hart's thesis is that the rule of recognition which Hart claims is the foundation of any modern legal order, apparently presupposes the existence of a legal system, but the existence of the rule of recognition depends on its acceptance by public officials of the legal system. Thus, it will be necessary to resolve this perennial problem so that it will not pose a threat to the project of assessing the second minimum condition in the subsequent chapter.

3.1 Resolving the problem of circularity and the validity of ROR

One of the queries that needs to be properly resolved before applying the theory of the rule of recognition to the Nigerian jurisprudence is the controversy concerning what comes first, the rule of recognition or public officials? If it is acceptance by officials that is responsible for the existence of the rule of recognition in a legal system, then officials in their capacities as officials do exist prior to the rule of recognition and their function as public officials can no longer be created by this same rule of recognition which they themselves established. Hart claims that public officials, for example lawmakers or court officials, can obtain their duty as officials only by the virtue of the rule of recognition.²⁹⁰ So, is it not also the case that the rule of recognition presupposes public officials? Thus, MacCormick adumbrates, one would not be able to say which persons qualify as officials without knowing the rule(s) that makes them officials.²⁹¹ This is a worrisome circularity and the fact that Hart himself offered no solution to this problem means that it poses a big challenge for the project of determining whether Nigeria has got a legal system. The reason is that, once the standards that constitute the rules of recognition are identified in Nigeria, it will no longer be necessary to examine whether officials take internal point of view towards the rule of recognition.

Admittedly, Hart's theory is conventionalist, that is, the existence of the rule of recognition is grounded in its acceptance by public officials. According to Greenawalt, if a public officer wants to determine what counts as law in a legal system, she must utilise the rule of recognition and what can be derived from it.²⁹² Thus, in referring to the rule of recognition as social rule, Hart actually meant that the constraints of this ultimate should be 'effectively accepted as common public standards of official behaviour by a system's officials.'²⁹³ However, as to Nigerian public officials' acceptance of rule of recognition, a distinction should be made between 'what people say' and 'what people do'. The former means that public officials merely claim to accept or approve the ultimate rule of recognition but do nothing to support that claim- in other words, it involves public officials merely paying lips service to rule acceptance without more. Whereas 'what people do' means that public officials demonstrate what they really think and feel by what they actually do, rather than by what they say. In the context of this study,

²⁹⁰ Hart (n 2) 80, 97

²⁹¹ MacCormick, (208) 34

²⁹² Kent Greenawalt, 'The Rule of Recognition and the Constitution' in M.D Adler and K.E Himma (eds), *The Rule of Recognition and the U.S Constitution* (OUP 2009). 6

²⁹³ Hart (n 2) 113.

‘what people do’ is synonymous with practical reasoning internal point of view.²⁹⁴ The reason being that both involve actions and reasons for actions by officials. A soccer referee who took part in the formulation of the fundamental rules of a game can say that he accepts all the rules of the game as binding, but deliberately, fell afoul of those fundamental rules at every point of the match while officiating. Such an official claims to approve or accept the fundamental rules, but so far, he’s only paid lip service to the rules. The same applies to law: it is possible for legislators to make and approve of a constitution but behave contrary to the dictates of the constitution in practice. Hence, it is possible for officials in Nigeria to accept or approve a set of legal rules for dealing with particular issues without being able to justify such acceptance by their practical behaviour. For example, on 17th July 2019, Justice Tanko Ibrahim Mohammed²⁹⁵ while addressing the National Assembly (here in after referred to as NASS), public declared that constitutional cases will always be decided purely on their merits and technicalities will not be allowed to defeat constitutional matters, especially as it concerns fundamental human rights.²⁹⁶ Similarly, several Judges often say that technical considerations should not be allowed to frustrate applications for the enforcement of citizens’ fundamental human rights. Thus, in *Sea Trucks Nigeria Ltd v Payne*,²⁹⁷ M.E Ogundare JSC, by way of obiter dictum, claims that judges should adopt judicial activism in dealing with issues of fundamental human rights and should not be slave to the rules of court and their application (technicalities). However, in reality, the attitudes of judges do not tally with what they say. There is overwhelming evidence as per the magnitude of inconsistency or non-conformity demonstrated now and again in various areas of the human rights adjudication process in Nigeria that it can no longer be safely discarded as insignificant. Thus, in *Nurudeen Adeleke v Isiaka Oyetola & Ors*,²⁹⁸ the appellant who scored the highest number of votes in the Osun State gubernatorial election of 2018, was initially denied by Independent National Electoral Commission (here in after referred to as INEC) but affirmed by the Election Petition Tribunal as the authentic winner. Nonetheless, the Court of Appeal and the Supreme Court quashed the judgment of the Tribunal on the grounds that one of the trial judges missed a sitting. According to Ibrahim Tanko CJN who delivered the lead judgment, ‘the correct order to make is to declare the judgment of the trial Tribunal a nullity as a result of one of the panellists not sitting on a day

²⁹⁴ Here, I mean to use the phrase ‘what people do’ to denote practical rule acceptability by Nigerian officials. See Chapter two for discussion on the two versions of internal point of view.

²⁹⁵ Justice Mohammed Tanko was the Chief Justice of Nigeria (CJN) then and also the chairman, National Judicial commission (NJC) then.

²⁹⁶ Stephen Ubimago, ‘When Justice Tanko failed to prove his Competence’ *Independent* (Abuja, 1 August 2019)

²⁹⁷ [1999] 6 NWLR (Pt 607) 514 [Ng Ct App]

²⁹⁸ SC/553/2019

proceeding was held'. In public statements like the one made by Justice Tanko before NASS on the abhorrence of technicalities, the highest court officer raised hopes to high levels about their commitments to the Constitution and precedents. He then turned around to frustrate such expectations in reality by not practicing what he declared in the public. Contrary to Justice Tanko's declaration, the apex court did same in *Shanu v Afribank Nig. Ltd*,²⁹⁹ *Nyesom Wike v Peterside*,³⁰⁰ and most recently, *Kunle Kalelaye v Legal Practitioners Disciplinary Committee & Anor*.³⁰¹ These decisions provide sufficient indication that there is really a distinction between what people say and what they actually do.

The above distinction is necessary because actions are more revealing of a person's genuine attitude towards the rules because it is easy to say things or make a claim, but it takes assessment of the behaviour of the person making the claim to ascertain if he actually believes in his own claim, which in turn means having an internal point of view. Interestingly, these two kinds of acceptance can establish the rule of recognition. Support for this claim is based on the fact that Hart's theory is concerned with sheer acceptance of the rule of recognition and not the reasons.³⁰² If that is the case, any form of acceptance (whether verbal or conduct) is sufficient to establish the rule of recognition. Nevertheless, the rule of recognition represents a necessary condition but not a sufficient condition for the existence of a legal system, because it focuses on the efficacy of the law which is required for every kind of legal order to achieve its purpose. Indeed, the existence of the rules of recognition alone do not establish the entire legal system. I argue that the rule of recognition, given the manner in which it is presented by Hart, cannot be solely responsible for the existence of the whole legal system, but rather a constitutive rule of the primary rules as elements of a legal system. Since I consider a legal system to be a conglomeration of rules and official practices, I argue that, in order to account for the entire legal system, at least the practical attitude of officials (what people do), in addition to the rule of recognition, is needed.

3.1.1 Existence and Acceptance of Rules of Recognition

Regarding what is currently referred to as the 'existing' rule (s) of recognition, the rule of recognition can be referred to in the simplest sense as a social rule that is employed to identify

²⁹⁹ [2002] LPELR- 3036 (SC)

³⁰⁰ [2016] 7 NWLR (Pt. 1512) 452 @ 504

³⁰¹ [2020] LCN/4850 (SC)

³⁰² Galligan (n 5) 91. For an extended discussion on this aspect of rule of recognition, see Gerald Postema (n 264) 165. See also MacCormick (n 208) 35.

those primary rules that are valid as law in every legal system. The rule of recognition is the most superior of all rules in a legal system: all other rules definitely owe their validity to it. In other words, other rules owe their legal status to the rule of recognition. Concerning its ontological status, the existence of the rule of recognition is a matter of fact. In fact, there are two necessary conditions for its existence, namely, public officials have to accept and conform with this rule. But what does “accepting and conforming” with the rule of recognition really mean? First, public officials conform with the rule of recognition when there exists a shared practice of identifying particular rules as a valid legal rule. And second, public officials accept the rule of recognition when they display a normative attitude towards that common practice, or, as Hart would put it, they take internal point of view towards it.

With respect to framing a hypothesis around the rule(s) of recognition in order to identify the rule(s) of recognition in Nigeria, the rule of recognition can take on various forms, i.e., it can set different criteria of identification by listing different characteristic that a rule must have in order for it to be a rule of the relevant community. I argue that the simplest criterion of identification is a reference to some authoritative text of rules within the legal order. All the rules that have the feature of being written down in a text are the rules of the legal system having this particular rule of recognition. More complex criteria of identification consist in listing some more general features. These can be “the fact of their [rules] having been enacted by a specific body, or their long customary practice, or their relation to judicial decisions. In this research thesis, I proposed a reconstruction of Hart’s account of rule of recognition along the lines of formal acceptance (e.i what the officials say they do) and actual acceptance (what they actually do) in a manner that responds to the Nigerian reality. The justifications for this kind of distinction are two: first, to free the rule of recognition from circularity i.e, the confusion of which comes first between the rule of recognition. An exhaustive explication of this has been done in the chapter three of this thesis. The rule of recognition—whether or not it is charged with the additional justificatory function—constitutes one of the most crucial existence conditions of a legal system. Now, the sort of ‘acceptance’ that constitutes the rule of recognition (regardless of whether it exist be) in a legal order is crucial to the understanding of the rule of recognition. The ‘acceptance’ which constitute a rule of recognition must necessarily be moral acceptance and would have the effect of satisfying the existence conditions for the legal system. Secondly, Hart did not delve into the reasons for which officials accept the rule of recognition, all that matters for Hart is that public officials accept the

authoritative rules of the legal system. I argue that this kind of approach to the rule of recognition cannot explain normativity of law.

3.1.2 Between Validity Criteria which Constitute the ROR and Legal Sources

There are several legal rules that provide authoritative criteria for the validation of standards as belonging to a system, e.g., primary laws within a legal system can provide criteria for the validation of other subordinate legislation in the same system. But such rules are themselves validated by other legal rules, which may in turn be validated by yet further legal rules. Ultimately this chain of validation cannot continue ad infinitum and therefore, must come to an end with a rule that validates other rules but is not itself validated by any higher rule: this is the validity criteria which constitute the ultimate rule of recognition. Hart claims that the rule of recognition may contain multiple distinct criteria for the validation of the standards of the system, such as enactment by lawmakers or previous ruling of courts or international laws, but the rule of recognition establishes a single rule because it provides a ranking of criteria as superior and inferior, so that if rules satisfying different criteria conflict, the superior one prevails. Hence, the rule of recognition may be internally complicated and complex, but it still the ultimate criteria for legal validity. The rule of recognition is presented as a core condition for the identification and validation of other rules. How does the rule of recognition manifest this validity criteria in a legal system? its two characteristics being uniform behaviour on the part of officials, and an internal attitude which considers the behaviour as obligatory. Whatever rule the officials accept as a matter of practice automatically becomes the rule of recognition, which is recognised by looking closely at the conventions which the officials practice, and how they provide reasons for their actions in that regard. The conventions observed by the officials are likely to suggest the constitution, judicial precedents, international laws, amongst others. Hence, the above-mentioned conventional practices by public officials can serve as validity criteria for other rules within the legal system. The rule of recognition also plays an ontological role in the sense that no other rule is responsible for its existence, whereas it is responsible for the existence of other rules in the legal system. Invariably, it is not only a source of law but an autonomous source. In Nigerian system, the main authoritative rules (Constitution, judicial precedents, international law etc.) serve as both the sources of law and the criteria of validity for other primary rules within the system. A detailed explanation of this will be seen in subsequent sections of this chapter.

3.2 The Rule of Recognition and the Nigerian Constitution

One way to demonstrate that the Constitution actually gives Nigerian jurisprudence the rule of recognition is to consider what Hart says about the American system.³⁰³ Hart claims in the Postscript that ‘in some systems of law, as in the United States, the ultimate criteria of legal validity might explicitly incorporate besides pedigree, principles of justice or substantive moral values, and these may form the content of legal constitutional restraints.’³⁰⁴

A part from being the first condition for a legal system, the rule of recognition is the most important rule because of the role it plays in the realisation of a legal system.³⁰⁵ It is a set of criteria employed by public officials to determine what rule deserves to be part of the legal system.³⁰⁶ As also argued in chapter two, the standards employed are referred to as justifications for the action of the public officials,³⁰⁷ even though the standards are somewhat established by those actions of legal officials. Bix explicates better:

Sometimes the standards applied are written down in an official text (e.g., a written constitution) or at the least are clearly expressed in criteria that the official state that they are following (e.g., ‘to become valid law, proposed legislation must be passed by a majority of each House of the Congress and then signed by the President’). At other times, the standards the officials are following can only be determined, after the fact, by reference to the decision they have made.³⁰⁸

This section is about how the Constitution as the ultimate standard of law can suffice as the ultimate rule of recognition in Nigerian jurisprudence. It is therefore not surprising that the constitution appears prominently in most discourses concerning the ultimate standards of law. Since the Constitution was frequently treated by judges and lawyers as the ultimate rule of the legal system,³⁰⁹ it served as a good starting point for this study. The Constitution is the first legislative text that comes to mind as equivalent of parliamentary supremacy in the Nigerian context. In a constitutional democracy like Nigeria, the constitution is the ultimate rule and the

³⁰³ The US political and legal system is akin to that of Nigeria,

³⁰⁴ Hart (n 2) 247

³⁰⁵ It plays an epistemic role in that it helps individuals to recognise or identify which rule is part of the legal community. Also, it plays an ontological role since it is constitutive of all other rules in the legal system. For further discussions on this, see J. R. Searle, *The Construction of Social Reality*, (New York, The Free Press 1995) 44-45, J. Coleman (n 208) 84, L. Burazin, ‘The Rule of Recognition and the Emergence of a Legal System’ [2015] 26 J. for Constitutional Theory and Phil. of Law. 3

³⁰⁶ Hart (n 2) 94

³⁰⁷ In the context of this study, such justifications for the action of legal officials refers to normativity of law. In chapter two, I argue that only practical reasoning or moral stance internal point of view can explain normativity.

³⁰⁸ Bix (103) 40

³⁰⁹ ANPP v Commissioner of Police (2007) JELR 33842 (CA)

main source of the validity of most primary rules within the legal system. To borrow the phrase Hart used in describing the British rule of recognition, ‘whatever the constitution authorises is law’. In *Uyo Local Government Council v Akwa-Ibom State Government & Anor*,³¹⁰ the Court of Appeal was called upon to determine the question of whether the entire provision of the Taxes and Levies (Approved List for Collection) Act 2004 is validated by the constitution. The court relying primarily on the fact that the Act contains ouster clauses not recognised by the constitution, declared the Act as null and void. This role of the constitution has been defended by Nwabueze:

When a court decides a particular case, it does so by virtue of the authority conferred upon it by the constitution. It follows that the validity of the constitution is a question completely beyond the competence of any other legislative text or authority. If it be supposed that the constitution is not valid, then all other laws and even courts created by it have no rights to receive obedience from the citizens.³¹¹

There are two implications that can be drawn from the above view: first, the Constitution is the ultimate rule of recognition from which other rules and officials (including the courts) derive their legal validity. Secondly, the validity of the constitution comes from the fact of its enactment and use by officials. Elegido supports this view when said, ‘the constitution is the foundation of the legal system in that most of the laws and institutions are derivable from it, and when a case of validity or legitimacy arises, the main question that a judge has to ask himself is, under which constitution am I sitting?’³¹² In this regard, the basic features of the rule of recognition noticeable in the Nigerian Constitution are of two folds; first, the Constitution is the ultimate rule or law in Nigeria and provides authoritative criteria for the identification of other primary rules within the Nigerian legal system.³¹³ Secondly, the validity of the Constitution lies in its acceptance by officials and Nigerians.³¹⁴ These two characteristics are sacrosanct in the understanding of the Nigerian Constitution as a rule of recognition.

3.2.1 First Condition: Existing as the Supreme Criterion and Ultimate Rule

The first feature of the Nigerian Constitution, and perhaps the most important one which made this study to identify it as the ultimate rule of recognition is its ultimacy or supremacy over all

³¹⁰ Suit No. CA/C/388/2017

³¹¹ Ben Nwabueze, *Judicialism in Commonwealth Africa* (London Hurst, 1977) 65

³¹² Elegido (n 89) 375

³¹³ Section 1 (1) of the first schedule of CFRN, 1999 (As amended).

³¹⁴ The preamble to the constitution states that all Nigerians have willingly accepted to be bound by the provisions of the Constitution.

other laws in the Nigerian legal system. As the ultimate criterion of legal validity, it performs the epistemic function of identifying the primary rules of the legal system in Nigeria and equally serves as the foundation of laws, thereby providing an ontological role in that regard.³¹⁵ According to Hart, rules of recognition are basic rules concerning rules, and their function is basically to rectify any legal uncertainty created by doubts over what the primary rules are and what the precise scope of the given rules is³¹⁶ by providing ultimate criteria through which the validity of other rules in the legal system can be evaluated. Hart further claims that, to confirm that rules are valid is to recognize that the rules meet all the tests required by rules of recognition.³¹⁷ As Hart has profoundly articulated, there is a standard that a rule of recognition does not derive from a higher rule but only from acceptance of it by officials.³¹⁸ In relation to the constitution, the content of the constitution are the basic principles by which all other rules or laws within Nigerian jurisprudence are identified and constituted.³¹⁹ Invariably, the Nigerian constitutional provisions take pre-eminence over all other legislations within the legal system, identifying which laws are validly part of the legal system and which laws are not part of it.³²⁰ It is in this sense that the Supreme Court, rightly or not, often refers to the constitution as the ‘grundnorm’.³²¹ In chapter two, I argue that, their mode of existence excepted, the difference between the Kelsenian grundnorm and Hart’s rule of recognition is not conspicuous because they are both foundational rules that derive no further validation from any other rule apart from themselves or their acceptance.³²² Thus, in the context of this study, both could be understood to mean the constitution. In a nutshell, the rule of recognition is expressed in the constitutional doctrine of supremacy and consistency criteria embedded in the Nigerian constitution:

the constitution is supreme, and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria. The Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the government of Nigeria or any part thereof, except in accordance with the provisions of this constitution. If any other law is inconsistent with the provisions of

³¹⁵ Brian Leiter, ‘Realism. Hard Positivism and Conceptual Analysis’ (1998) 4 Legal Theory 4. 533-47

³¹⁶ Hart (n 2) 102

³¹⁷ Ibid 101-103

³¹⁸ Ibid p.103

³¹⁹ Kehinde M. Mowoe, *Constitutional Law in Nigeria* (Malthouse 2008) 521

³²⁰ Section 1 (3) of the Constitution of the Federal Republic of Nigeria (1999 as amended). See also Chief Gani Fawehinmi v General Sani Abacha & Others [1996] 9 NWLR (Pt 475) 710

³²¹ See generally, Independent National Electoral Commission & Anor v Musa & 4 Ors (2003) 3 NWLR (pt 806) p.157, Okulate v Awosanya (2000) 2 NWLR (PT. 646) 530 and Savannah Bank of Nigeria Limited v Pan Atlantic Shipping and Amp. Transport Agencies Ltd (1987) 1NWLR, Part 49. P.212.

³²² Kelsen (48) 194-5 and Hart (n 2)105-06

this constitution, this constitution shall prevail, and that other law shall to the extent of the inconsistency be void.³²³

Of course, this supreme criterion contained in the Constitution received judicial affirmation in *Adisa v Oyinwola*,³²⁴ where the apex court held that the constitution of the nation is the most fundamental and ultimate rule in the country, and its provisions bind all persons and authorities throughout the Federal Republic. Also, in *Attorney General of Abia State & 35 others v Attorney General of the Federation*, the Supreme Court held:

by the provisions of section 1 (1) of the Constitution of the Federal Republic of Nigeria 1999, all laws contained in the Constitution are superior to all provisions contained in the various Acts or Laws of the Federation. Thus, they have binding force on everyone and must be obeyed and upheld by all citizens and authorities in Nigeria. The nation's Constitution is the grundnorm and the basic law of the land.³²⁵

The above reiterates the central argument that the Constitution, as the rule of recognition, is the ultimate rule which determines the requirements through which the validity of other laws are identified and made in the system. It is difficult for any rule to function in the legal system without satisfying the basic conditions of the ultimate rules of recognition,³²⁶ this is also applicable in Nigerian jurisprudence, where it is believed that the Constitution determines the existence and validity of all other laws in Nigeria.

The constitution is the ultimate law in Nigeria. Short of it no law can independently exist. This is obviously contained in Section 1 (1) thereof where it is categorically stated that “this Constitution is supreme, and its provisions shall bind all citizens and public officials throughout the country.”³²⁷

And to emphasize this supreme criterion of the Constitution and its authoritative ability to bring into existence other laws, it is further provided in Section 1(3) of the same Nigerian Constitution that, “if any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be null and void”. Thus, the Constitution remains the foundational rule or rule of recognition within the Nigerian jurisprudence. In *Fasakin Foods Nigeria Limited v Shosanya*,³²⁸ the Supreme Court further emphasized that the constitution is the definitive and foundational rule in Nigerian

³²³ Section 1, 2 and 3 CFRN

³²⁴ (2002) 10 NWLR (part 674) p.116 particularly at p.191

³²⁵ Per Sylvester Onu JSC in *A.G Abia State & 35 Ors v A.G Federation* (2002) NWLR (pt 763) p.264 at p.479

³²⁶ Hart (n 9)92

³²⁷ *A.G Abia State & 35 Ors v A.G Federation*, supra.

³²⁸ (2006) 10 NWLR (Part 987) p.126 at p.148

system; it is the most important law, and it is synonymous to the grundnorm. Furthermore, the court opines that ‘constitution is the source and origin of all the other laws within the Nigerian legal system.’³²⁹In applying the supreme criterion feature of the rule of recognition to the Nigerian jurisprudence, what seems obvious is the fact that the constitution is very important in constituting the the legal system.³³⁰As affirmed by Hart, when a rule of recognition is accepted, both ordinary Nigerians and officials are equipped with authoritative criteria for identifying primary rules in the legal system.³³¹

3.2.2 Second Condition: General Acceptance

Hart claims that whereas in a simple legal system, it is the social practice of citizens that constitutes the rule of recognition, in a complex legal system the rule of recognition is constituted by the social practice of public officials, rather than those of the citizens.³³² However, Hart concludes that where public officials and the ordinary citizens ‘accept’ the rule of recognition from the internal point of view, conditions necessary and sufficient for the existence of a legal system would be satisfied.³³³ Irrespective of whether the social practice in question is that of ordinary citizens (as is the case in a simple legal system) or that of public officials (as is the case in a complex legal system), I argue in the previous section that the social rule that constitutes the rule of recognition need not be anything more than just a de dicto alignment with the rules of recognition. The officials do not necessarily have to de re approve the ultimate rule. Thus, in Nigeria, the rule of recognition can be created by the people (most especially, the officials) simply saying they accept it, and it is immaterial whether their practical attitudes demonstrate otherwise. So, the rule of recognition in Nigeria is largely created by de dicto (what people say they do) acceptance of the rule of recognition. It bears emphasis that this form of acceptance remains norm-relative acceptance or internal point of view because all that is needed to satisfy the existence conditions of a rule of recognition by public officials is that they identify the law in accordance with the rule of recognition, their attitudes or motivating reasons for doing so, notwithstanding.³³⁴Hence, with regard to the second requirement for the Nigerian Constitution existing as a rule of recognition, the constitution must be recognised and generally accepted as a fundamental rule by officials since

³²⁹ Ibid

³³⁰ Ikenga Oraegbunam, ‘Islamic Criminal Law and Constitutionalism in Nigeria: Any Lessons from Turkey?’ [2015] 33 J. of Law, Policy and Globalisation. 28

³³¹ Hart (n 2) 100

³³² Hart 114

³³³ Ibid

³³⁴ Hart, ‘Essays on Bentham’ (n 256) 265

Hart holds that the validity of the rule of recognition does not come from any other rule but just a matter of acceptance. Accordingly, the constitution serves as a standard of behaviour in the sense that the officials and the citizens have accepted (at least in words) to comply with the provisions.³³⁵ This claim is supported by the preamble to the 1999 Constitution of the Federal Republic of Nigeria.

We the people of the Federal Republic of Nigeria: Having firmly and solemnly resolved to provide for a constitution for the purpose of promoting the good government and welfare of all persons in our country on the principles of Freedom, Equality, and justice, and for the purpose of consolidating the unity of our people. And to live in unity and harmony as one indivisible and indissoluble sovereign nation under God dedicated to the promotion of inter-African solidarity and world peace, international cooperation and understanding³³⁶.

The above passage from the constitution settles issues concerning the source and validity of the constitution as the rule of recognition. Like the rule of recognition, the existence and validity of the constitution is also determined by its acceptance as quoted above.³³⁷ Hart claims that such acceptance is demonstrated either by courts or other officials.³³⁸ In this context, the constitution as the rule of recognition presupposes the existence of Nigerian judges and other officials whose obligations are equally provided by the same constitution. One could argue to the contrary that judges and other officials (for example, the lawmakers) are empowered by the rules of adjudication and change. That notwithstanding, even those rules of adjudication and change cannot be said to be valid if they fail to satisfy the basic requirements of the rule of recognition, and this explains why the rule of recognition is the foundation of the legal system. From verbal expressions of officials and Nigerians, there appears to be some level of acceptance of the constitution as the rule of recognition in expressions that imply the notion of demands for obedience, conformity, and criticisms of deviants.³³⁹ In line with this fact, the constitution established by the express will of the people as per the preamble of it, implies acceptance. Whether the acceptance is mere lip service, or an expression of what people actually do, will be investigated in the next chapter.

³³⁵ Adole Umar, *Reflecting on the Supremacy of the Constitution* (Ujoli Press Nig Ltd., 2015) 23

³³⁶ The preamble to CFRN 1999

³³⁷ Hart (n 2)115

³³⁸ Ibid 101

³³⁹ Criticisms and social pressure on those who fail to conform with the provisions of the Constitution is expressed through such internal statements like; 'his or her action is unconstitutional', 'that was a clear breach of the constitution', 'it does not meet the minimum constitutional requirements' etc.

Notwithstanding its acceptance, an objection might be raised regarding the voluntariness of the acceptance of the constitution by Nigerians. For example, Kuye argues that the 1999 Constitution is not a law that came voluntarily from Nigerians themselves, it was hurriedly prepared and imposed on the citizens by the military government of General Abdulsalami Abubakar. According to him:

There are major problems with the process of enacting the 1999 Constitution and equally the content of the law. The Constitution was enacted during the Military junta. The law was approved by the then Armed Forces Provisional Ruling Council (AFPRC) which comprised of only 26 members, all males. The people did not partake in the process of enacting the Constitution. This is the reason the opening phrase which starts with “we the people of the Federal Republic of Nigeria, do hereby make, enact and give ourselves the following Constitution has been seriously criticized as fraudulent assertion³⁴⁰

Also, Remi argues that 1999 constitution absolutely lacks validity because it was largely a project of military government.³⁴¹ In a similar vein, Ibanga claims that the basic issue with the 1999 constitution is the lack of consultation and participatory input by the Nigerian citizens.³⁴²

Be that as it may, Ibiam argues that no constitution in the world is without flaws, the flaws do not strip the constitution of its role as the ultimate criteria for legal validity.³⁴³ Thus, he concluded that the CFRN 1999, although did not go through the democratic process of legislating, it still has a legal binding force by the virtue of its acceptance and continuous use by Nigerians.³⁴⁴ The argument is tenable because the validity of the rule of recognition is merely assumed and this can be demonstrated by reference to practices in court.³⁴⁵ The Nigerian Constitution might not have come into existence by way of constitutional democratic process, but it has been used by the courts to validate the primary rules within the legal system.

³⁴⁰ Omowale Kuye, *A Review of the 1999 Constitution of the Federal Republic of Nigeria*, (Ibadan Fountain Publications Ltd., 2001) 23

³⁴¹ Anifowose Remi, ‘Constitution and Constitutionalism’ in A. Remi and E. Francis (eds.), *Elements of State and Politics* (Lagos Malthouse Press Ltd) 20

³⁴² Ignatius Ibanga, “Major Contentions in the 1999 Constitution of the Federal Republic of Nigeria” available at <http://ignatiusibanga.blogspot.com/2011/06/major-contentious-issues-m-1999.html> accessed on 7th February 2020.

³⁴³ Amah E. Ibiam, ‘Federalism, Democracy and Constitutionalism: The Nigerian Experience’. [2016] 53 J. of Law, Policy and Globalisation. 6

³⁴⁴ Ibid

³⁴⁵ Hart (n 2)105

3.3 Precedent-Based Adjudication and the Rule of Recognition in Nigeria

This study also identifies judicial precedents or case laws as forming a strong part of the rule of recognition within the Nigerian legal system. There are two reasons for this finding: first, it is possible for the courts to establish judgments concerning the validity of primary rules in the legal system outside the provisions of the constitution, especially in penumbra or open texture cases.³⁴⁶ Secondly, the court has the power to give life or ignore certain provisions of the constitution in the interest of public morality. For instance, notwithstanding the fact that item II of the Concurrent Legislative List and section 7 (6) of the Constitution empowers the State and Local Governments to own a joint account for the purpose of statutory allocation and revenue, the Supreme Court ruled that by allowing such, there will be a breach of the fundamental principle of true federalism.³⁴⁷ This kind of precedent is somewhat independent of the constitution, and provides judges practice with necessary tool to be considered as forming a part of the rules of recognition in Nigeria. These findings agree with Hart's original theory on the rule of recognition as a rule that can be established by reference to actual practice among the judges.³⁴⁸ The practice is that judges or officials of the court apply precedents in identifying the valid law that will be part of the legal system. This study's interpretation of the rule of the rule of recognition in this light equally flourishes among some Hartian philosophers. Greenawalt, for example, thinks officials of the court are mandated not to depart from the standards of precedents and the interpretations thereof.³⁴⁹ He argues that these judicial standards created by precedents ought to be highly recognised among the ultimate rules of recognition.³⁵⁰ From the normative perspective, Maccormick and Raz agrees that the rule of recognition in a legal system is the standard set by officials, especially court officials.³⁵¹ This result also builds on existing claim of Fallon that:

Once it is recognized that the foundations of law necessarily lie in social facts involving contemporary acceptance, the claim that judicial precedent cannot establish valid law contrary to what otherwise would

³⁴⁶ See generally, *Nafiu Rabi v The State* [1981] 2 NCLR 326, *A.G Bendel State v A.G Federation* [1981] 10 SC 179-180 and *PDP v INEC* [1999] 7 SC (pt ii) 30. For detailed discussions on penumbria cases, see Hart (n 156) 71 Harv. L. Rev. 4. 608, Lon L. Fuller, 'Positivism and Fidelity to Law- A Reply to Professor Hart' [1958] 71 Harv. L. Rev. 661-64., Brian Bix, 'H.L.A Hart and the Open Texture of Language' (1991) 10 L and Phil. 1.

³⁴⁷ See *A.G Ondo State v A.G Federation & Ors* [1983] 2 SCNLR 269. See also *A.G Abia State & 35 Ors v A.G Federation* [2002] 4 SCNJ or (2002) 4 SC (Pt. 1) 1

³⁴⁸ *Ibid* p.108

³⁴⁹ Greenawalt (292)655-7. See also Steven D. Smith, 'Stare Decisis in a Classical and Constitutional Setting: A Comment on the Symposium', (2007) 5 Ave Maria Law Rev. 153

³⁵⁰ *Ibid*

³⁵¹ MacCormick, (208) 113-15 and Raz (n 1) 198-99

be the best relatively acontextual interpretation of the written Constitution immediately appears doubtful.³⁵²

As argued at the outset of this section, the constitution alone will not suffice as the rule of recognition, judicial precedents also play a fundamental role in determining the existence and validity of other laws in the Nigerian legal system. In the Postscript to *The Concept of Law*, Hart describes the rule of recognition as an effective kind of traditional judges' rules which exist only by the virtue of their acceptance and practice in the identification and application of laws by the judges.³⁵³ Thus, for Hart, understanding the rules of recognition involves the law-applying operations of officials of the judiciary.³⁵⁴ Notwithstanding this claim, some legal theorists have disputed this, they believe that the collective practices of all the officials (executives, legislators, and judicial officers) make up the rules of recognition and not just the practices of judges (judicial precedents) alone. Adler, for example, in explicating the rule of recognition argues that Hart is often unequivocally understood to present his rule of recognition as general and conventional practice by public officials, be they judges or non-judges.³⁵⁵ Himma also supports this view, according to him, judges are not the only officials whose practices figure into determining the existence and the content of the rule of recognition, the attitudes of other public officials play a vital role in determining the rule of recognition as well.³⁵⁶ Nonetheless, Green holds a contrary view and argues that, 'in H.L.A. Hart's theory of rules, something is the law of a jurisdiction if it satisfies the criteria that the jurisdiction's officials (judges, legislators, sheriffs and the like) have accepted for enforcing norms.'³⁵⁷ Similarly, in explaining those who make up a recognitional community in Hart's perspective, Waldron mentioned lawmakers, judicial officers, senior civil servants, police officers, etc.³⁵⁸

In the context of this study, I argue that the practices of other public officials may be considered as internal point of view that constitute the rule of recognition and even the legal system,

³⁵² Richard H. Fallon, "Precedent-Based Constitutional Adjudication, Acceptance, and the Rule of Recognition" in M. Adler & K.E Himma (eds) *The Rule of Recognition and the U.S Constitution*, (OUP 2009) 52

³⁵³ Hart (n 9) 256

³⁵⁴ *ibid*

³⁵⁵ Matthew D. Adler, 'Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?' [2006] 100 North-western Univ. L. Rev. 719

³⁵⁶ Kenneth E. Himma, 'Making Sense of Constitutional Disagreement: Legal Positivism, The Bill of Rights, and the Conventional Rule of Recognition in the United States', [2003] 4 J. Law & Society. 149, 152–56

³⁵⁷ Michael S. Green, 'Does Dworkin Commit Dworkin's Fallacy? A Reply to Justices in Robes', (2008) 28 Oxford J. of Legal Stud. 1. 33-34

³⁵⁸ Jeremy Waldron, 'All We Like Sheep', (1999) 12 Canadian J. of L & Juris. 1. 180

nevertheless, the practices by judges make for a stronger standard that constitute the rule of recognition in Nigeria. The reason for this argument is that, assuming but not conceding that practices by other officials constitute the rule of recognition as much as precedent-based constitutional adjudication does, in situations of conflicts between such practices and judicial practices, the latter will definitely prevail. This claim has a strong support in *Musa v INEC*³⁵⁹ where the Supreme Court overruled some legislative enactments of NASS, and also invalidate the actions of the chairman of INEC in order to defend plaintiff's rights to freedom of association and peaceful assembly, especially his constitutional right to membership of a political party as per the provisions of section 40 of the constitution. In doing this, the apex court rejected several provisions of the Electoral Act 2001 and the guidelines set up by INEC as being inconsistent with her earlier precedents in *PDP v INEC*³⁶⁰ and *Agbai v Okogbue*³⁶¹. Also, in *Obi v INEC & Ors*,³⁶² there was conflict between an action INEC/police and the Court of Appeal and the apex court was called upon to determine whose practice should prevail. In this case, the appellant had barely spent a year in office as governor of Anambra State, when INEC, relying on section 180 of the Constitution conducted another election for the same office. The election had another person, Andy Ubah, sworn in as the governor of the same Anambra State. The police had the appellant ejected from the State House on the grounds that his tenure was exhausted. However, the court of appeal, against the will of INEC, reinstated him and further issued an order instructing the police to grant the appellant full access to the State House. Nonetheless, INEC/police were obstinate concerning the judgment of the court of appeal and insisted on being constitutionally right about their action. Of course, this actions of INEC and police conflict with the decision of the Court of Appeal that reinstated the appellant. The appellant further approached the Supreme Court by way of originating summons for the interpretation of section 180, he sought a declaration thereof, to know who was right between the Court of Appeal and INEC/police. The Supreme Court gave a declaration that the decision of the Court of Appeal prevails, and that the plaintiff's office was not vacant. In doing so, the Supreme Court relied on judicial practice, particularly Order 22 of the practice and procedures of the Supreme Court and the case of *Atiku Abubakar v A.G Federation*³⁶³.

³⁵⁹ (2003) 3 NWLR (pt. 806) p.72. Also, similar decisions were reached in *A.G Federation v Abubakar* (2007) 10 N.W.L.R. (Pt. 1041) p.1 at 171-72, *Mbanefo v Molokwu & Ors* (2014) LPELR- 22257 (SC) at 31-33, *Aduasim & Ors v Emeh & Ors* (2018) LPELR- 46066 (CA).

³⁶⁰ (1999) 11 NWLR (pt. 626) 200, 254-255

³⁶¹ (1991) 7 NWLR (part 204) at 391

³⁶² (2007) 11 NWLR (Pt.1046) p.565

³⁶³ (2007) 3 NWLR (Pt. 1022) at 601

In recent impeachment cases, the Supreme Court evidently privileged judicial practices and interpretations over the practices of other non-judicial officers. By this, the apex court also demonstrated that judicial precedents also determine to a large extent, the existence and validity of laws in Nigerian jurisprudence. Hence, in *Balarabe Musa v Auta Hamza*,³⁶⁴ the court construed section 170 (10) of the 1979 Constitution which is in pari materia with section 188(10) of the 1999 Constitution to be truly an ouster clause, which means, the outcome of impeachment proceedings in the House of Assembly cannot be challenged at the courts. However, the court intervened in legislative practice in the cases of *Adeleke & Anor v. Oyo State House of Assembly*³⁶⁵ and *Ladoja v INEC & Ors*³⁶⁶, and held that the impeachment proceedings for which the courts' jurisdiction is ousted are proceedings which followed due process as contained in the Constitution. Thus, where the legislative practice runs afoul of the constitution or judicial precedent, the court will step in so that justice can be done.

Looking at Hart's approach to the ultimate rule of recognition, the power of the drafters of Nigerian Constitution to alter the nature of judge's power does not mean that the legal status of precedents comes from implicit authorization. Since precedent-based adjudication stems from a different positively implied authority other than the constitution, the enquiry here should be whether judicial precedent is worthy of being part of the rule of recognition in Nigeria. Indeed, the argument so far has shown that the authority of judicial precedent is part of the supreme criteria of validity, which invariably makes it part of the ultimate rule of recognition in Nigerian jurisprudence. Notwithstanding that Hart assumes that the existence and validity of judicial precedent itself is impliedly established merely by the legislative or constitutional provision,³⁶⁷ it is a fact that judges through precedents, do not only validate laws but create new laws too. Such law-creating powers of the judge is neither explicit in the Nigerian Constitution nor any other local legislative text. Nonetheless, precedent as a secondary rule of recognition is connected to the constitution in that judges are the only officials allowed to determine the true meaning of the provisions of the constitution. Whatever meaning the judges provide in the course of the interpretation of the constitution becomes law (precedent). This law so created, is as much a criterion for validation as the written constitution is. So, regarding

³⁶⁴ (1982) 3 N.C.L.R. 229

³⁶⁵ (2006) 52 W.R.N.173.

³⁶⁶ (2007) 12 N.W.L.R. (Pt. 1047) 119

³⁶⁷ Hart 274-75

the law-creating power of judges under the Nigerian legal system, it is safe to argue that practices of officials of the court is uniquely part of the rule of recognition.

3.4 International Law as part of the Rule of Recognition

In this section, the aim is to determine whether the operations of international law within Nigerian legal system could be adjudged as part of the system's secondary rule of recognition. In doing this, I will explore those systematic qualities present in international law that enable it to meet the basic necessary conditions for the existence of a rule of recognition. But before doing that, the definition and scope of international law ought to be briefly explained in order to get a clearer picture of the object of assessment.

Jeremy Bentham's definition is one of the most classical definitions of international law in modern times, according to him, 'international law is a collection of rules governing the relations between states.'³⁶⁸ In considering this classic definition and current studies on international law, it is safe to say that international law has evolved significantly since its beginnings. In 1927, the Permanent Court of International Justice (hereafter referred to as PCIJ) explained that international law is the law regulating the relationship among free states, and therefore its binding authority comes from the consent or acceptance by those states – either expressly or impliedly.³⁶⁹ Hence, this created the popular perception among scholars that international law applies strictly to states alone. Oppenheim opines,

Since the Law of Nations is based on the common consent of individual States, and not of individual human beings, States solely and exclusively are the subjects of International Law. This means that the Law of Nations is a law for the international conduct of States, and not of their citizens. Subjects of the rights and duties arising from the Law of Nations are States solely and exclusively.³⁷⁰

Nevertheless, the exclusive applicability of international law exclusively to states is debatable. Remarkably, in contemporary international jurisprudence, apart from states, international corporations, institutions and even individuals have equally been handled as relevant subjects of international law. First, in respect of international institutions, organisations and corporations, the issue of their personality under international law has been judicially settled

³⁶⁸ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (J. H Burns and H.L.A Hart eds. Batoche Books 2000) 10

³⁶⁹ The SS Lotus (1927) PCIJ Ser A No 10, p 18.

³⁷⁰ L. F. Oppenheim, *International Law. A Treatise* (Vol. I, 2nd edn., Longmans, Green and Co 1912) 19-20.

by the International Court of Justice (hereafter referred to as ICJ) in the Reparation case where it was decided that the United Nations (UN) as a matter of fact can sue and can be sued which implies that the UN has an international legal personality.³⁷¹ The implication of this judgment for international institutions or corporations is that they can be considered as subjects of international law along with states, and can be rightfully adjudged as fit to acquire rights and obligations under international law.³⁷² Secondly, in respect of individuals, PCIJ once held that, notwithstanding the fact that international agreements cannot be construed to provide rights and duties for individual persons, they can have a binding force on the states to incorporate them into some of their fundamental domestic laws in order to replicate those rights and duties for the citizens.³⁷³ For example, Nigeria is State party to several of international legal treaties creating several distinct human rights rules, including some that are as well adopted as part of the fundamental rules, such as the Nigerian Constitution.³⁷⁴ This shows that, in some circumstances, individual persons have the ‘the right *intuitu personae*, which they can claim through international actions.’³⁷⁵ Furthermore, regarding obligation, the Nuremberg Tribunals has established that international law is capable of imposing duties and liabilities on individuals as a kind of responsibility for international crimes committed by such individuals in their states, and indeed, such international criminal law can as a fact be implemented absolutely by the punishment of those individual culprits.³⁷⁶ However, notwithstanding the inclusion of organisations and individuals in international law, states are still considered to be the most relevant subject of international law and as a hub for social relations for all persons in conjunction with international law.³⁷⁷ Jessup affirms this, ‘the world is today organized on the basis of the coexistence of states, and that fundamental changes will take place only through State action, whether affirmative or negative’³⁷⁸

On whether international law can exist as part of the rules of recognition; Hart claims that there are several legal systems across the globe that fit the description of his two minimum criteria for the existence of a modern legal system, and the legal orders of several advanced democracies definitely do. Nevertheless, Hart believed that international law to be in a period

³⁷¹ Reparation for Injuries incurred in the Service of the United Nations, Advisory Opinion: ICJ Reports 1949, 174

³⁷² See Malcolm N. Shaw, *International Law* (6th edn, CUP 2008) 1298.

³⁷³ Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928 P.C.I.J. (ser. B) No. 15 (Mar. 3), 17–18

³⁷⁴ Edwin Egede, ‘Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria’ [2007] 51 J. of African Law 248-9

³⁷⁵ J. Crawford, *Brownlie’s Principle of Public International Law* (8th edn, OUP 2012) 121-2

³⁷⁶ Shaw (n 372) 400.

³⁷⁷ Ibid 197.

³⁷⁸ See Philip G Jessup, *A Modern Law of Nations* (Macmillan Company 1948) 17

of obscurity. In fact, many times in his writings he compared international law to primitive legal orders, which were still embryotic legal systems, because for most part international law lacks the rule of recognition.³⁷⁹ Thus, regarding international law being part of rule of recognition, Hart unequivocally claims that international law is not a legal system and as such does not necessarily involve a rule of recognition. Explicating that:

We shall not discuss the merits of these and other rival formulations of the basic norm of international law; instead, we shall question the assumption that it must contain such an element. Here the first and perhaps the last question to ask is: why should we make this a priori assumption (for that is what it is) and so prejudge the actual character of the rules of international law? For it is surely conceivable (and perhaps has often been the case) that a society may live by rules imposing obligations on its members as 'binding', even though they are regarded simply as a set of separate rules, not unified by or deriving their validity from any more basic rule. It is plain that the mere existence of rules does not involve the existence of such a basic rule ... Yet if rules are in fact accepted as standards of conduct and supported with appropriate forms of social pressure distinctive of obligatory rules, nothing more is required to show that they are binding rules, even though, in this simple form of social structure, we have not something which we do have in municipal law: namely a way of demonstrating the validity of individual rules by reference to some ultimate rule of the system.³⁸⁰

However, many scholars think that there are a number of reasons to revisit this Hartian position. Pavel argues that Hart wrote shortly after the second world war when the Westphalian notion of international law³⁸¹ was predominant, but international law has advanced significantly since then, and now has a binding force on States who accept it.³⁸² This revisiting of Hart's account of international law has also received plausible vindication in the works of Besson, Waldron, and Payandeh who all agreed that international law is part of the complex modern legal system by the virtue of having all the attributes of a rule of recognition.³⁸³ These scholars argue that the existence of a developed legal system is possible largely by acceptance of rule of the rule

³⁷⁹ Hart (n 2) 4-5

³⁸⁰ *ibid* 323-5 (emphasis mine)

³⁸¹ At the centre of the Westphalia Treaty is the idea of absolute sovereignty of the state and non-intervention by any external factor. For an expanded discussion on this, see David Kennedy, 'A New Stream of International Law Scholarship' (1988) 7 *Wis Int'l Law J* 14; Andreas Osiander, 'Sovereignty, International Relations and the Westphalian Myth' (2001) 55 *Int'l Org* 251

³⁸² Carmen (n 5) 308-309

³⁸³ Samantha Besson, 'Theorizing the Sources of International Law' in S. Besson and J. Tasioulas (eds.) *The Philosophy of International Law* (OUP 2010) 163-85. Jeremy Waldron, 'International Law: "A Relatively Small and Unimportant" Part of Jurisprudence?' in L. Duarte d'Almeida, J. Edwards and A. Dolcetti, *Reading H.L.A Hart's 'The Concept of Law'* (Oxford: Hart 2013) ch.10. Mehrdad Payandeh, 'The Concept of International Law in the Jurisprudence of H.L.A Hart' [2010] 21 *European J. of Int'l L.* 967-80

of recognition, and its validating power of other rules, indeed, an assessment of the character of international law shows that it has these fundamental attributes. My argument extends and deepens the above scholars' views to provide this study a better picture of the place of international law within Nigerian jurisprudence. The focal point of my argument is, Hart's criteria for the existence of a rule of recognition capture logical features of the system's fundamental rule- ultimacy (autonomous source of law), and acceptance by officials (and sometimes the citizens) and its validating effect for primary rules. Indeed, whether these features are necessary and sufficient conditions for proving the existence of an ultimate secondary rule in any modern legal system is worth evaluating. Thus, I argue that the operations of international law in Nigeria succeeds as a rule of recognition when measured against these explicit features of Hart's theory of legal system.

An inquiry into whether international law has rule of recognition and therefore, good enough to count as a legal system normally starts with the question of the legal nature of international law. As earlier stated in this chapter, Hart recognises the unavailability of international law-making officials, the absence of courts with mandatory jurisdiction, and lack of centrally put-together sanctions as the main reasons for doubting international law as a real legal system. He identifies these differences in international law as the factors that present it as similar to the 'simple form of social structure' which can be found in the pre-legal systems. Hart thinks that international law consists basically of primary rules and was sceptical of the presence of any secondary rule in international law. Hart then investigates in greater detail whether the lack of centralized sanctions excludes the status of international law as a legal system. I argue contrary to received wisdom that international law is not a legal system by itself, but it has got some authoritative rules that can serve as the rule of recognition within a domestic legal system. As the function of a rule of recognition is to provide criteria for the validity of norms, i.e., determining what the valid norms of the system are, in order to seek rules of recognition in international law, the rules that fulfil this function must be identified. Regarding the specific rule of recognition for international law, state will is a common constitutive element of the validity. Using international conventions and treaties as instances, the binding force of an international agreement is based on the principle that agreements are binding 'pacta sunt servanda', which, as discussed before in chapter three, operates as an accepted rule of recognition regarding treaties. The principle of pacta sunt servanda makes states consenting to be bound by a treaty bound by it.

Likewise, in line with the maxim ‘*pacta tertiis nec nocent nec prosunt*’, international law creates neither obligations nor rights for a third state without the assent of the officials of that state. Therefore, state acceptance by the state through its officials serves as the bedrock of validity for the source of law in the case of international law. So, by implication, the absence of genuine assent or acceptance by relevant officials of state is one of the common characteristics of the grounds for the invalidity of international law, namely error, fraud, or the coercion of a representative of a state, or of states themselves, as well as corruption of a state’s representative. If one wants to talk about the place of state wills in the formulation of international law, the question of whether acceptance by the state via her officials can be a source of validity of international law is undisputable. Hence, state wills constitute the main source of validity of international law. Invariably, it is one of the most important criteria that forms part of the rules of recognition in international law. Nonetheless, this can only take place within the states and their respective domestic jurisdictions.

3.4.1 International Law as an Autonomous Source of Law in Nigeria

As stated in the preceding topic, Hart’s description of international law as twilight area with privation of rule of recognition is doubly misleading. By rejecting the existence of the ultimate rule of recognition, Hart would have misrepresented the character of international law in which, first, as at the period he was developing this view, such fundamental character of international law was already existing and have been put to use in many jurisdictions including Nigeria. Secondly, he may have mischaracterised the basic necessary conditions which international law needs to fulfil to qualify as a rule of recognition. Of course, the practical relevance of this investigation with regards to Nigerian is by no means less important. I argue that whether a particular law is part of the rules of recognition of a legal order speaks to its mode of existence as an autonomous source law and thus, secondly, to its acceptance by the officials (and also indirectly, to the citizens) of the legal system. Regarding my first argument, Shapiro affirms that Hart has equally demonstrated that the rules of recognition can be seen to possess two important attributes common to many modern legal orders: first, the supremacy within a system’s boundaries, and secondly, its independence from other rules of the system.³⁸⁴ I shall analyse the first argument in detail here, while the analysis of the second claim will preoccupy the succeeding topic.

³⁸⁴ Shapiro, (n 197) 243-44

Being a part of the global legal community, Nigeria is one of those nations whose legal system and her law-making authority must coexist with international law. As stated above, the Westphalian view of international law has long been overtaken by a jurisprudence that allows more international intervention on the manner in which various nations treat their citizens considering the fact that the second world war commenced in part by how the Nazi government treated her own citizens.³⁸⁵ Hence, Nigeria belongs to several international bodies, agencies, and organisations by which it accepts and practices international law.³⁸⁶ As Hart will claim, in as much as membership of a group or body confers rights and privileges, it equally bears along obligations of conformity to the rule's general standard.³⁸⁷ As a member of United Nations (hereafter referred to as UN) and African Union (hereafter AU) for example, it is expected that Nigeria (not Nigeria as an entity, but the public officials interpreting and enforcing the legal instruments) demonstrates uniform conformity to the UN Charter and also the AU Charter.³⁸⁸ In proving that international law is part of the rules of recognition, this conformity to international legal instruments ought to entail some commitments from Nigeria. Such commitments are in the recognition of international legal instruments as autonomous sources of law since the rule of recognition exists as an ultimate rule by the reason of the fact that it does not exist in virtue of any other rule but by virtue of its acceptance as a conventional rule.³⁸⁹ Accordingly, all the earlier Nigerian Constitutions gave some insight into the disposition of Nigeria concerning the operations of international law existing as an independent law.³⁹⁰ Okeke argues that all those previous constitutions acknowledged the fact that any international legal instrument ratified by Nigeria becomes an autonomous source of law.³⁹¹ In contemporary times, the disposition of Nigeria towards international law is the same, and the obvious constitutional provision in this regard is contained in section 12 of CFRN 1999, which states that 'all international treaties entered into by Nigeria shall have a binding force upon the ratification by

³⁸⁵ A. Claire Cutler, 'Critical Reflections on the Westphalian Assumption of International Law and Organization: A Crisis of Legitimacy' [2001] 27 Rev of Int'l Studies 133-7.

³⁸⁶ Nigeria is a member of the United Nations (UN), African Union (AU), Economic Community of West African States (ECOWAS), Commonwealth of Nations (CON), amongst others. For a full list of the international treaties and organisations to which Nigeria belongs, see Hylke Dijkstra, *International Organizations and Military Affairs* (Routledge 2016).

³⁸⁷ Hart (n 2) 116

³⁸⁸ The rule of recognition also determines regularity of behaviour among officials. See Timothy Endicott, 'Are There Any Rules?' [2001] 5 Journal of Ethics. 205-217. See also, A. Tucker, 'Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty.' (2011) 31 Oxford J. of Legal Stud. 1. 63-87

³⁸⁹ *ibid* 105.

³⁹⁰ See Christian Okeke, 'International Law in the Nigerian Legal System' [1997] 27 Cali. West. Int'l Law J. L (1997) 328-32, 337-38

³⁹¹ *Ibid*

the National Assembly.’³⁹²Okeke argues that ratification in this regard does not mean validation, rather it means a confirmation of the earlier acceptance by the Nigerian state.³⁹³ In his own words,

Generally speaking, Nigeria is a dualist state, a position that is reflected in section 12 of its Constitution, which requires legislative recognition or incorporation of every treaty to which it is a party before such a treaty can be enforced in the national legal system. This legislative recognition is an official confirmation of the acceptance of these international legal instruments, which confers autonomous status on them.³⁹⁴

Nigeria, in its disposition towards international law, has continue to believe in the incorporation principle of international legal instruments, and also, has exhibited some recognition for those legal instruments as independent of any other domestic law in Nigerian legal system. A good example is the domestication of the African Charter which NASS has enacted a ratifying legislation to that effect.³⁹⁵This complete incorporation and domestication of the African Charter as forming part of the laws of Nigerian legal system demonstrates how Nigeria recognises international legal instrument as part of its fundamental rules and an autonomous source of law. In practice, the above argument is supported by the fact that issues regarding the fundamental rights (arguably the most important item in Nigerian jurisprudence) of Nigerian citizens can be instituted in any of the High Courts in Nigeria, but not exclusive under the constitution³⁹⁶anymore. Issues of fundamental human rights can equally be commenced at the High Court pursuant to the African Charter on Human and People’s Rights (Ratification and Enforcement) Act. Thus, in the case of *Odafe & Ors v A.G Federation*,³⁹⁷the Federal High Court upheld the rights of inmates to healthcare under the African Charter. In the words of Lord Nwodo: ‘The African Charter entrenched the socio-economic rights of persons. The Court is enjoined to ensure the observation of these. A dispute concerning socio-economic rights such as the right to medical attention requires the Court to evaluate State policies and give judgment consistent with the Constitution.’³⁹⁸Similarly, in the case of *Ahamefule v Imperial Medical*

³⁹² Ibid (Emphasis added)

³⁹³ Christian N. Okeke, ‘The Use of International Law in the Domestic Courts of Ghana and Nigeria’ (2015) 32 *Arizona J. Int’l & Comp. Law* 2. 405-7

³⁹⁴ Ibid

³⁹⁵ The African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act No. 2 (2004) Cap. A9 (Nigeria).

³⁹⁶ Under Section 46(1) of CFRN, any citizen who contends that any of his or her human rights “has been, is being or likely to be violated in any State in relation to him/her may apply to a High Court in that State for the enforcement of those rights.”

³⁹⁷ (2004) AHRLR 205 at 211

³⁹⁸ Ibid

Centre & Anor,³⁹⁹ the High Court of Lagos State held that the termination of the employment of the plaintiff on the grounds of her testing positive to Human Immunodeficiency Virus is unlawful. The court further held that refusing the plaintiff to access the medical facility of the defender contravenes article 16 of the African Charter of Human and Peoples' Rights (Ratification and Enforcement) Act and also article 12 of the International Covenant on Economic, Social and Cultural Rights (hereafter referred to as ICESCR) which has been ratified and domesticated by the Federal Republic of Nigeria. Notwithstanding that the citizens' rights to healthcare are also contained in section 17 (3) of the constitution, the court decision to rely on the provisions of African Charter and ICESCR demonstrate the recognition for international law as an independent source of law.

Furthermore, Nigerian officials' approach to international law as an autonomous validating source of law should not be entirely seen through the ratification clause in the Constitution alone, but from the generality of conventional practice by the officials themselves. Indeed, there are instances where the court applied international law that has not been ratified. Thus, the apex court show its disposition towards this point of view in *Abacha v Fawehinmi*,⁴⁰⁰ where it was *ad idem* with the *Privy Council's position in Higgs v Minister of National Security*,⁴⁰¹ that 'unincorporated and unratified treaties might still have an indirect effect upon the interpretation of statutes or might create a legitimate expectation by citizens that the government, in its act affecting them would observe the terms of the treaty.' The apex court agrees with this claim and held that it aptly applies to Nigerian jurisprudence too.⁴⁰² Also, in the referencing international law as an autonomous source of law and a part of the rules of recognition in Nigeria, it is fitting to analyse the case of *Garuba & 9 Ors v A.G Lagos State*⁴⁰³ where the judges relied on the African Charter as alternative to the suspended parts of the 1979 Constitution by the military government. In this case, the claimants were sentenced to death by an Armed Robbery Tribunal and decided to file a counter claim against the tribunal's judgment at the High Court of Lagos State. The claim of the plaintiffs was grounded on the right to life contained in the 1979 Nigerian Constitution and the African Charter on Human and Peoples' Rights. The respondent opposed the application on the grounds that, Section 30-39 of the 1979

³⁹⁹ Suit No. 1D/1627/2000/27/09/2012. Unreported. Also available at <http://www.escri-net.org/node/364987>. Accessed on 27th December 2021.

⁴⁰⁰ [2000] 6 NWLR 228 (Nigeria)

⁴⁰¹ [2000] A.C. 228 (P.C.) (appeal taken from Bah.).

⁴⁰² For detailed analysis of this decision, see Richard F. Oppong, 'Re-Imaging International Law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems in Africa' [2007] 30 Fordham Int'l Law J. 323-26

⁴⁰³ Suit ID/599M/91 (31 October 1991)

Constitution which centres on human rights has been suspended by Decree No. 17 of 1985 (Suspension and Modification) and also, Section 10(3) of the Robbery and Firearms (Special Provisions) Decree oust the jurisdiction of the High Court, therefore the court cannot entertain the case. Nevertheless, the court showed extraordinary tenacity and discountenanced the respondent's arguments. In its judgment that it has jurisdiction to entertain the case, 'without prejudice to the Decree No. 17 (Suspension and Modification) 1985 and Robbery and Firearms Decree, the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983 grants fundamental rights to the claimants and implicitly protects the jurisdiction of the High Courts to hear matters concerning those rights. The court further held that, assuming the parts of the African Charter that were contained in the 1979 Constitution were to be suspended or expunged by any Nigerian legislation, its international law parts were intact and could not be unilaterally retracted.'⁴⁰⁴

Similarly, in the case of *Oshevire v. British Caledonian Airways Ltd*,⁴⁰⁵ the complainant craved the indulgence of the court regarding the interpretation of the provisions of the 1953 Carriage by Air (Colonies, Protectorates, and Trust Territories) Order. The claim before the court of first instance concerns the claimant's missing video camera while transiting the respondent's airline at London en-route Kano. The claimant, therefore sought redress in court and prayed for compensation for his lost item. The defendant argued that the plaintiff's claim was overtaken by time since it was not instituted within two years of the event as per Article 29 (1) of the 1929 Warsaw Convention as amended by the 1955 Hague Protocol, which was ratified and fused into the 1953 Carriage by Air (Colonies, Protectorates, and Trust Territories) Order. The court of first instance upheld the argument of the defendant. The Court of Appeal also dismissed the claimant's appeal on the basis that the Warsaw Convention and other incorporated international treaties or conventions supersede our domestic law.⁴⁰⁶ This Warsaw Convention was equally relied on in *Ibidapo v Lufthansa Airlines*.⁴⁰⁷ This particular case has is a significant precedent in the Nigeria's aviation field and equally in the overall operations of

⁴⁰⁴ *ibid* (emphasis added)

⁴⁰⁵ [1990] 7 NWLR (Pt 163) 507

⁴⁰⁶ The Court of Appeal relied on this judgment in *UAC Ltd v. Global Transport S.A.* [1996] 5 NWLR (Pt. 448) 291, concerning how to apply the Hague Rules as per the Carriage of Goods by Sea Act 1926. The court held that the case against the 1st respondent (a shipping company and an agent to the second respondent) for failing to deliver some automobiles in good time from Brussels was overtaken by time and invariably, statute barred. The reason the court gave was that the plaintiff did not commence his action within one year of the failure to deliver the cars as provided by Article III of the Hague Rules. See also the case of *Harka Air Services Ltd v. Emeka Keazor* [2011] LPELR-SC.262/2005,

⁴⁰⁷ [1997] 4 NWLR (Pt498) 124.

international law as a fundamental secondary rule in Nigeria. This case equally settled all the arguments concerning the legal consequence of an omission of an international legislation from the compilation of Nigerian municipal laws. The main question of law that the Supreme Court sought to determine in this case was whether the 1953 Carriage by Air (Colonies, Protectorates, and Trust Territories) Order has any significance in Nigeria owing to the fact that it was not included in the compilation of the Laws of the Federation of Nigeria (LFN) 1990. The apex court ruled that the international law was still very relevant in Nigeria. Delivering the lead judgment, Wali JSC adumbrated:

I have not been able to find any law that repealed the 1953 Order or any court judgment that has declared it illegal, extraneous, abrogated, or obsolete. A very significant international treaty like the Warsaw Convention cannot be said to be irrelevant or repealed when this nation is still taking advantage of its provision and has not promulgated similar legislation to replace it. The convention is too significant to this nation both locally and internationally to be ignored. A void of such magnitude is unacceptable in our legal system.⁴⁰⁸

From the cases analysed above, it is evident that international law within the Nigerian legal system demonstrates two vital qualities evident enough to be part of the ultimate rules of recognition of the system. First, international law does not exist in virtue of any other domestic rule; its existence is founded on the fact of being used by Nigerian officials, especially officials of the court. Secondly, international law resolves normative uncertainty concerning which law to follow as per issues of aviation, human rights, healthcare etc. Thus, the above analysis of the autonomous nature of international law in Nigeria makes it analogous to a rule of recognition in a way.

3.4.2 State wills as Source of Acceptance and Validity in International Law

As observed in chapter two of this study, the most important quality that defines a rule of recognition in a modern legal system is acceptance. If a legal system has a rule of recognition, it invariably has a set of conventions as to what the rules of the system are, so that all public officials (sometimes citizens) engaging in the activity of law must accept the binding force of those conventions. This implies accepting both the conventions as per what should be law in the legal system and laws made in agreement with them. I argue in this section that international law, given the way it is accepted (through state will) and supposedly used as criteria of validity

⁴⁰⁸ *ibid*

by Nigerian public officials, can be adjudged as part of the system's ultimate rule of recognition.

The acknowledgment of state wills by all the parties involved, including Nigeria can serve as a criterion of validity by unifying other primary rules of the system. Regarding treaties and conventions, the bindingness of an international law on State officials is based on the principle that agreements entered into willingly by consenting States are binding 'pacta sunt servanda', which operates as an accepted rule of recognition regarding treaties.⁴⁰⁹ Indeed, Nigeria through its officials have accepted, ratified, and domesticated several international legal instruments creating and validating distinct norms in areas of environmental protection, human rights, women's protection, aviation, shipping, amongst others.⁴¹⁰ Some of the international treaties and conventions that Nigeria has demonstrated acceptance (either by signature or by ratification) are: UN Charter,⁴¹¹ International Covenant on Economic, Social and Cultural Rights (ICESCR),⁴¹² International Convention on the Rights of the Child (ICRC),⁴¹³ Vienna Convention on the Law of Treaties (VCLT),⁴¹⁴ Convention against Torture (CAT),⁴¹⁵ UN Convention against Corruption (UNCAC),⁴¹⁶ the International Convention on the Elimination of All forms of Discrimination against Women (ICEAFDAW),⁴¹⁷ among many others. Similarly, in the area of environmental law, many international conventions and treaties have been accepted by Nigeria through its public officials. To mention but a few, The Basel Convention on the Control of Trans-boundary Movement of Hazards Matter and Disposal,⁴¹⁸ The Vienna Convention on the Protection of the Ozone Layer,⁴¹⁹ UN Framework on Climate Change,⁴²⁰ and Montreal Protocol on Substances that deplete the Ozone Layer.⁴²¹ Apart from treaties accepted by Nigeria through its officials at the level of the United Nations and its

⁴⁰⁹ T. M. Franck, 'Legitimacy in the International System' (1988) 82 *The American J. Int'l Law*. 753

⁴¹⁰ Egede (374) 249

⁴¹¹ Accepted on 7th October 1960 by Prime Minister Abubakar Tafawa Balewa led government.

⁴¹² This was ratified on 29th July 1993 by President Ibrahim Badamosi Babangida led government.

⁴¹³ This was signed on 26th June 1990 and ratified on 19th April 1991, all by President Babangida's regime.

⁴¹⁴ Accepted on 31st July 1969 by General Yakubu Gowon led government

⁴¹⁵ This was signed on 28th July 1988 by President Babangida's government and ratified on 28th June 2001 by President Olusegun Obasanjo's led administration.

⁴¹⁶ Accepted by President Olusegun Obasanjo in 2003.

⁴¹⁷ This was signed on 23rd April 1984 and ratified 13th January 1985, all by the administration of General Muhammadu Buhari.

⁴¹⁸ Accepted in 1992 by President Babangida led government and ratified in 2011 by President Goodluck Jonathan.

⁴¹⁹ Accepted on 31st October 1988 by President Babangida led government.

⁴²⁰ Earth Summit Agreement was signed on 25th June 1992 by President Babangida and Ratified on 21st March 2001 by President Obasanjo's government. The Kyoto Protocol was accepted in 1997 by President Abdulsalam Abubakar.

⁴²¹ Accepted in 1992 by President Babangida's government.

numerous bodies, the country has also evidently accepted various laws recognized under the African Union and Economic Community of West African States (ECOWAS). For example, the African Charter on Human and Peoples Right⁴²² which has been over flogged in the preceding topic. Also, the Bamako Convention on the Trans-shipment of Waste in Africa,⁴²³ then notorious Dakar Protocol Relating to Free Movement of Persons, Residence and Establishment,⁴²⁴ among several others.

My reason for considering Nigeria's signing or ratification of international legal instruments as a form of acceptance that defines international law as a rule of recognition is simple; what is the actual purpose of a state signing, approving, or ratifying international treaties and conventions, if such State has neither any intention of observing the attendant obligations imposed by the treaties nor accepting the accruing rights from them? I argue that when a state signs any international legal instrument, that process of signing serves as *prima facie* evidence of acceptance by the State and her officials who signed those documents, because the signing implies that it intends to honour the obligations and accept the rights thereof. Of course, as argued before, this is the main objective of the international law term of '*pacta sunt servanda*' which loosely translates as 'an international obligations willingly entered into, are sacrosanct and intended to be respected.' Hence, in the preamble to VCLT 1969, the State parties, including Nigeria recognized the significance of treaties and conventions as forming the foundation of international law and as a pathway to harmony, economic growth, and collaborations among member States regardless of their political and social systems. State parties further noted that 'the principle of *pacta sunt servanda* (voluntary acceptance and good faith) rule receives global acceptance and binding by nature. Furthermore, the treaty provides that 'Any State that is party to the agreement should not invoke the provisions of its domestic law as reason for refusing to perform a treaty.'⁴²⁵ There can be no better evidence of acceptance of international law by Nigerian public officials than the cumulation of these provisions, thus, if any nation subscribes to international conventions and treaties, they commit themselves into being bound by their content. Accordingly, state consent serves as the main source of validity for international law in the case of treaties. Therefore, the absence of unfettered consent from

⁴²² Signed and ratified in 1983 by President Shehu Shagari's led government

⁴²³ Accepted by President Umar Musa Yaradua on 22nd December 2008.

⁴²⁴ Accepted and Ratified on 29th May 1979 by President Shehu Shagari led government.

⁴²⁵ See the Preamble and also, Article 27 of The Vienna Convention on the Law of Treaties (VCLT) 1969, 23 May 1969 which Nigeria signed on 31st July 1969 and ratified 26th January 1980. For detailed discussion, see Noppadon Detsomboonrat 'International Law as a Constitutionalised Legal System' (PhD thesis, University of Edinburgh 2015) 20

states that are parties to international agreements is one of the common grounds for vitiation international legal instruments,⁴²⁶ namely error,⁴²⁷ deceit,⁴²⁸ and duress.⁴²⁹ Galligan emphasizes the importance of this acceptance as a necessary condition for the existence of a rule of recognition when he said, ‘the binding quality of law derives from acceptance of the rule of recognition and does not depend on any other additional criteria or justification’.⁴³⁰ This leads on to the validating power of the rule of recognition: any law enacted in accordance with the rule of recognition invariably has a binding force by the mere reason of its acceptance by officials.⁴³¹

Remarkably, Nigeria did not stop at just acceptance of these treaties; some have been contemporaneously utilised alongside other ultimate rules of recognition (like the constitution) in the legal system. A good example is the African Charter, ICCPR, ICEAFDAW, CAT etc., which guarantee several rights also covered in the constitution. Indeed, international laws dealing with human rights is heavily contained in the current Nigerian Constitution, and even had an entire chapter dedicated to it.⁴³² There were also comparable provisions in the previous Constitutions of the country. Evidently, these human rights provisions in the constitution were driven by the global humanitarian philosophy that they are universal⁴³³ and also as already stated previously, an incidence of Nigeria’s membership of various international human rights treaties. Elias supports this view, and once argued that ‘the human rights provisions contained in the constitution were seriously lifted from the U.N. Charter, Universal Declaration of Human Rights, European Convention on Human Rights and other international sources of law.’⁴³⁴ According to him, this is a common inclination among Anglophone countries in Africa upon getting their independence.⁴³⁵ I also argued in the preceding topic that the practice of human rights among court officials in Nigeria is inclined towards making international legal instruments an upgraded alternative criterion for validating human rights rules, to such a level that a petitioner can successfully depend on those provisions in the Nigerian municipal

⁴²⁶ S. E Nahlik, ‘The Grounds of Invalidity and Termination of Treaties’ [1971] 65 A. J. Int’l Law. 736-41

⁴²⁷ Article 47 of VCLT

⁴²⁸ Article 49 of VCLT

⁴²⁹ Article 51 of VCLT

⁴³⁰ Galligan (n 5) 84

⁴³¹ *ibid*

⁴³² Chapter four of CFRN 1999

⁴³³ For example, the American Declaration of Independence which expresses the view that all persons are equal and entitle to certain fundamental rights, the European Convention for the Protection of Human Rights, the French Declaration of the Rights of Man and of the Citizen, among others.

⁴³⁴ Taslim O. Elias, *New Horizons in International Law* (Francis M. Ssekandi ed, 2nd edn, Springer 1992) 90-91

⁴³⁵ *Ibid*

courts.⁴³⁶In respect of this, the constitution⁴³⁷ mandates the Chief Justice of the Federation (CJN) to make rules for High Courts as per the rights of citizens safeguarded by the African Charter and other international human rights legal instruments. In fulfilment of this constitutional directive, the CJN created the Fundamental Rights (Enforcement Procedure) Rules 2009. Rule 3 (b) of that primary legislation confirms:

This rule is made for the purpose of advancing but never for the purpose of restricting the applicant's rights and freedoms, the Court shall respect municipal, regional, and international bills of rights cited to it or brought to its attention or of which the Court is aware, whether these bills constitute instruments in themselves or from parts of larger documents like constitutions. Such bills include (i) The African Charter on Human and Peoples' Rights and other instruments (including protocols) in the African regional human rights system.

Hence, a humdrum case of daily recommendations for the application of international legal instruments in Nigeria shows that it is accepted in a way as part of the system's secondary rules of recognition.

3.4.3 International Law: what do Officials Actually do in Nigeria?

As argued earlier, while acceptance of international treaties and conventions confer rights and privileges on public officials and citizens, it equally brings along obligations to conform with the rules so accepted. As a party to various international legal instruments, Nigerian public officials are expected to show their acceptance not only by signing or ratifying them but also by a practical behaviour that demonstrates that they actually do. Although, I argued in the preceding topic that the numerous international treaties and conventions that were signed or ratified by Nigeria explains acceptance of international law by its public officials, this kind of acceptance may be akin to what people say. Also, notwithstanding that some courts in Nigeria have roughly demonstrated certain inclinations towards the articulation and implementation of international law, the attitude of acceptance (regarding what they actually do) exhibited by officials is more of non-acceptance.

⁴³⁶ In the case of *Akinnola v Babangida* Suit no. M/462/93, the court asserted its jurisdiction through the African Charter to protect the litigant's freedom of expression. See also *Fawehinmi v Abacha* (supra)

⁴³⁷ Section 46 (3)

On the point of fact, the lengthy stay of the military in government seriously undermined Nigeria's commitments to international treaties and conventions.⁴³⁸ More often than not during this era, Nigerian officials displayed practical nonconformity to international law signed or ratified. The first time this happened was in 1966 when the General Aguiyi Ironsi government promulgated Decree 1 Constitution (Suspension and Modification) 1966. This decree ousted the jurisdiction of the courts to entertain all matters of human rights contained in the 1963 constitution and the various international law instruments.⁴³⁹ The recurrent violations of human rights by successive military regimes culminated in the extra-judicial execution of human right activists, Ken Saro-wiwa and eight others without recourse to any form of fair hearing or trial as per article 10 of Universal Declaration of Human Rights (UDHR) and Article 7 of African Charter on Human and People's Right. Consequently, this singular attitude of Nigerian officials was so grievous that it cost the nation its membership of Commonwealth and ECOWAS.⁴⁴⁰ In addition, The UN General Assembly, in its resolution, condemned the executions in the strongest of term.⁴⁴¹ There were other human rights violations documented during the period of military administration that differed greatly from the human rights obligations contained in some international treaties which Nigeria is a party to.⁴⁴² For example, there were cases of unlawful and extra-judicial imprisonment,⁴⁴³ unfair trials without a right of appeal,⁴⁴⁴ torture by the military or their agencies,⁴⁴⁵ mass executions and public killings,⁴⁴⁶ mysterious disappearance of journalists, among many other human rights abuses.⁴⁴⁷ these behaviour of military officials could be considered as gross disregard to UDHR, African Charter, ICCPR, ICESER, and the International Convention against Torture which Nigeria claims to have

⁴³⁸ Nigeria had her independence in 1960. Shortly afterwards, the military seized power for sixteen years. power. Nonetheless, in the period between 1979 and 1983, Nigeria enjoyed a short civilian administration, which was abruptly ended by a military coup. Consequently, the military held on to power and ruled until 1999.

⁴³⁹ Okeke (n 298) 339-40

⁴⁴⁰ M. A. Ajomo, 'Human Rights under the Nigerian Constitutions' in A. Kalu and Y. Osinbajo (eds.), *Perspectives on Human Rights* (Lagos: Fed. Min. of J, 1992) 105-06, Adewale M. Pearce, *Remembering Ken Saro-wiwa and other Essays*, (CIPP 2011) 133,

⁴⁴¹ *ibid*

⁴⁴² For a detailed account of human rights abuses under the military, see Abiola Ojo, *Constitutional Law and Military Rule in Nigeria* (Evans Bro. Ltd 1987) 252-287

⁴⁴³ There were also retrospective Decrees, detention of persons without trial, suppression of press freedom. For example, Decree No. 4 of 1984. Through the instrumentality of this Decree, Tunde Thompson and Nduka Irabor, were sentenced to one-year imprisonment and the Newspaper was ordered to pay fine.

⁴⁴⁴ *Adigun v Military Government of Oyo State* (1987)1 NWLR (pt53) 678, (1987)3 SCNJ 118. Where the appellant was executed while the case was still before the appeal court.

⁴⁴⁵ 'Torture in Nigeria: In Summary: <https://www.amnestynigeria.org.html>. Accessed 23rd November 2021.

⁴⁴⁶ 43 Nigerian accused of armed robbery were summarily executed by General Sani Abacha led military government on 25th July 1995. See details at <https://www.legit.ng/1135618-details-execution-43-nigerians.html> Accessed 23rd November 2021.

⁴⁴⁷ For more discussions on this, see Akin Ibidapo-Obe, *Essays on Human Rights Law in Nigeria* (Lagos: Concept Publications, 2005) 105

accepted via signing or ratification. This justifies the argument that what people say might be different from what they actually do.

Furthermore, this disregard for signed or ratified international law in Nigeria is not exclusive to military regimes alone, in January 1983, President Shehu Shagari issued an executive order expelling two million West African migrants to Nigeria, more than half of those expelled were Ghanaians.⁴⁴⁸ This action of President Shagari led government contravenes section 27 (2) of ECOWAS Treaty on free movement and trade 1979, popularly referred to as Dakar Protocol. According to this very section, 'member States shall by agreements with each other exempt community members from holding visitor's visa and resident permits and allow them to work and undertake commercial and industrial activities within their territories. Paragraph 2 of the same section 27 defines a community citizen as 'any person who is a citizen of any of the States that are members of ECOWAS'. Of course, Ghana is a bonafide member of ECOWAS, which invariably makes Ghanaians community citizens. This behaviour of Nigerian public officials shows complete disregard for international law which they created the impression of acceptance in 1979. Similarly, certain practices of the criminal aspect of Islamic jurisprudence by officials in northern Nigeria,⁴⁴⁹ contradicts Nigeria's acceptance of some international treaties and conventions. For example, In 2002, a lady, Amina Lawal, from Katsina State, who had a daughter out of wedlock, was sentenced to death by stoning by a Shariah Court in Katsina on grounds of adultery.⁴⁵⁰ This introduction of death by stoning for offences of adultery and decapitation for blasphemy against the prophet of Islam, undermines Article 6 (2) of ICCPR,⁴⁵¹ CEDAW, the Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment,⁴⁵² and the African Charter on Human and Peoples' Rights.⁴⁵³

⁴⁴⁸ Lynne Brydon, 'Ghanaian Responses to the Nigerian Expulsions of 1983' (1985) 84 African Affairs 337. 561-584

⁴⁴⁹ Shari'a criminal law was introduced by 12 states (Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, Yobe and Zamfara) in the north. For an extended discussion on this, see Rose C. Uzoma, Religious Pluralism, Cultural Differences, and Social Stability in Nigeria, (2004) B.Y.U. L. REV 651, 661-62 (2004).

⁴⁵⁰ H. Ibrahim, 'Reflections on the Case of Amina Lawal' <https://www.wcl.american.edu/hrbrief/11/3ibrahim.pdf>. Accessed 25th November 2021.

⁴⁵¹ This international legal instrument permits nations that are yet to repeal the death penalty to impose death punishment only with regard to the most serious crimes, and in line with the provisions of the Covenant. Barrow thinks that 'adultery' cannot by any stretch of imagination be upgraded to a grievous crime. See Shannon V. Barrow, Nigerian Justice: Death-By-Stoning Sentence Reveals Empty Promises to the State and the International Community, [2003] 17 Emory Int'l Law Rev. 1205-9

⁴⁵² See Articles 1, 2 and 3

⁴⁵³ See Articles 4 and 5

Digressing a bit from human rights towards international law on environmental law, Nigerian officials have also been guilty of noncompliance with accepted international treaties and conventions. For example, Nigeria has been accused of not providing protection for the biodiversity of its oil rich Niger Delta as expected under the Earth Summit and Kyoto Protocol.⁴⁵⁴ Also, the various hydrocarbon pollution caused by oil spillages and gas flaring, and the deliberate refusal to clean-up Ogoni-land by various administrations violates international conventions such as Montreal Protocol on Substances that deplete the Ozone Layer, the Vienna Convention on the Protection of the Ozone Layer and the African Convention on the Conservation of Nature and Natural Resources 1968. Hence, the above illustrations reflect the extent to which international law is considered as part of the rules of recognition in Nigeria. Going by what people say, there is acceptance of international law as playing a role of rule of recognition. However, the practical cases analysed latter, shows that there is a huge difference between what people say and what they actually do.

3.5 Conclusion

The main task I set out to achieve in this chapter was to find out what standards constitute the ultimate rules of recognition within the Nigerian legal order, and also to determine propositions satisfy those standards that made them fit as rules of recognition. First, notwithstanding that there were many laws and rules within the Nigerian legal system, this study discovers that the Nigerian Constitution creates the impression that it is the ultimate rule of recognition within Nigerian jurisprudence. In addition, judicial precedents and international law were also discovered as important variables that form part of the rules of recognition within the same system. The obvious features of the constitution which make it the ultimate rule of recognition stem from its normative supremacy as per section 1(3) CFRN 1999 and its acceptance by all as per the preamble of the same constitution. There is a connection between these three sources of law that make them function together as rules of recognition. The argument goes like this, only judges are allowed interpretation to ascertain the letter and spirit of the constitution and which law should be considered as unacceptable by the reason of its conflict with the constitution. Decisions reached from such interpretation of the constitution becomes a fundamental law (judicial precedent). The same process of interpretation of law and precedent is also applicable to international law. Notwithstanding the fact that secondary rules of

⁴⁵⁴ Kaniye Ebeku, 'Biodiversity Conservation in Nigeria: An Appraisal of the Legal Regime in Relation to the Niger Delta Area of the Country', (2004) 16 Journal Environmental Law. 361-2

international law do not result in a centralized system as those of state law, it is not to be concluded that international law is a primitive legal order without a rule of recognition as it has been alleged by Hart. This study discovers amongst other things that the capacity of international law to operate as a secondary rule of recognition in Nigeria is grounded on two points; on the one hand, international law is given such recognition as a source of law that is autonomous and sometimes, an alternative to other rules of recognition. There are instances where the courts invoked international law as alternative to the constitution on issues regarding human rights of citizens. Similarly, constitution excepted, international law has often prevailed in any event of conflict with domestic law. On the second hand, international law embraces state wills as one of the sources of validity of the primary rules of the Nigerian system. State wills is demonstrated through the Nigerian officials (especially Presidents, Prime Minister and Legislators) signing, approving, ratifying and sometimes, domesticating the international legal instruments. The significance of embracing state will as a source of validity of international law in Nigeria is evidenced in the preamble of the VCLT that states that, States that are party to the international treaties must treat it as binding obligations and must not use domestic legislation to circumvent it. I argued that by virtue of being a signatory to any of the international treaty or convention, Nigerian officials have accepted international law as a conferring rights and imposing obligations. Indeed, such acceptance is enough to define international law as part of the rules of recognition in Nigeria. However, in analysing some instances where this acceptance was put into actual practice, this study finds out that what Nigeria officials say do not correspond with what they actually do. This study was able to show significant instances where the officials were in gross violation of international law contrary to their acceptance of it through state-will. Hence, based on the findings from the instances illustrated, the conclusion that can be drawn in this chapter is that Nigeria has a rule of recognition from the perspective of what people say, rather than not what they do. This leads on to the next chapter where the second condition for the existence of a modern municipal legal system will be critically analysed. In this succeeding chapter, I shall examine the extent to which Nigerian public officials take eternal point of view towards the rules of recognition identified in chapter three.

CHAPTER FOUR: EVALUATING THE ATTITUDES OF PUBLIC OFFICIALS

4.0 Introduction

The aim of this chapter is to examine various high-profile events and cases in Nigeria in order to determine whether Nigerian public officials take internal point of view towards the rules of recognition identified in chapter three. In the previous chapter, the first necessary condition for the existence of a modern legal system in Nigeria was affirmed. In a complex legal system like that of Nigeria where there are several sources of law, this study discovers amongst other things that the standards that constitute the rules of recognition are equally multiple therein- including the Nigerian Constitution, judicial precedents, and international law. In this chapter, the secondary necessary condition for the existence of a modern legal system in Nigeria, will be investigated. As mentioned in chapter two of this study, Hart holds that the second minimum condition necessary and sufficient for the existence of a modern municipal legal system is for the public officials of the legal system to take a uniform internal point of view towards the rules of recognition specifying the criteria of legal validity therein.⁴⁵⁵ The attitudes of the citizens do not have as much impact on the legal system as the attitudes of the officials do. The citizens may fail to take the internal point of view towards the rules of recognition without serious consequences for the legal system and the rules of the system will still be considered as still in existence.⁴⁵⁶ But when the officials fail to take the internal point of view towards the rules of recognition, the legal system becomes uncertain, chaotic, unstable, and deplorable.⁴⁵⁷ Indeed, the attitudes of officials have grave consequences on the entire legal system. Thus, the sustainability, functioning and stability of any modern legal system depends largely on the attitudes of the officials toward the rules of recognition in that legal system.⁴⁵⁸ It is obligatory on officials to demonstrate responsiveness and responsibility by linking their acts to the general standard of behaviours created by the rules of recognition within the legal system. This concern in particular would respond to one of the main questions raised in the overall research, that is, whether Nigerian public officials take internal point of view towards the rules of recognition within Nigerian legal system. In responding to this question, this chapter will analyse a number of Nigerian cases and events involving the attitudes of top Nigerian public officials towards the Constitution, judicial precedents, and international law in order to determine if those

⁴⁵⁵ Hart (n 2) 116

⁴⁵⁶ Ibid

⁴⁵⁷ Ibid

⁴⁵⁸ Kramer (n 185) 45

attitudes meet the common public standards of official behaviour. The findings from the analysis of these cases will assist this study to reach a conclusion on whether Nigeria has got a modern legal system.

4.1 Preliminary Objections

Three sorts of objection might instantly be raised against the task of investigating whether the second minimum condition for the existence of legal system is present in Nigerian legal order. First, in modern studies, there is this common pressure on social theory (which also is starting to rub off on legal philosophy), to make claims more "empirical", on a similarity with scientific researches.⁴⁵⁹ The understanding of the word empirical here is that, descriptive theories like Hart's internal point of view be made in reasonably objective and practical manner, such that "observations" made by a legal philosopher could be verified or falsified by other legal theorists.⁴⁶⁰ There is the anxiousness that human behaviour and legal system, when subjected to similar methods used in the study of nature, might produce a similar or the same incontrovertible results that the scientific approaches offer the natural sciences.⁴⁶¹ The theories can provide a pathway to development and a better institution (legal or political) through the means of empirical method, rather than the traditional simple, speculative and armchair philosophising that yields no more than intellectual entertainment in the past. Therefore, the first protestation that might be made against this study is, how can the internal point of view of Nigerian officials be empirically verified?⁴⁶² This sort of concern has been raised by Gardener who thinks that Hart's entire project is merely descriptive rather than evaluative.⁴⁶³ And he argues that it is only logical for someone to know what law is before creating empirical theories concerning it.⁴⁶⁴ For Gardner, Hart's theory concerns what law is, it spells out the basic ingredients to take into cognisance before creating empirical theories of law. So, the knowledge

⁴⁵⁹ See for example, Winch (n 82) 67-82 where he paid great deal of attention to J.S Mill's approach to social theory.

⁴⁶⁰ For extended discussions on falsifiability and verifiability theories, see Karl Popper, *The Logic of Scientific Discovery* (2nd edn, Routledge 2002).

⁴⁶¹ Rommen claims that there is a strong connection between legal theory and the empirical approach used in the social sciences, he insisted that law needs to adopt the empirical method in order to narrow down on reality and create certainty. See Heinrich A. Rommen, *The Natural Law: A Study in Legal and Social History & Philosophy* (Indianapolis: Liberty fund 1998)

⁴⁶² For discussions concerning the possibility of an empirical, scientific, and general theories of law, see Michael S. Moore, 'Law as a Functional Kind' in Robert P. George (ed.) *Natural Law Theory* (OUP 1992) 188, 193-208 and Brian Bix, 'Natural Law Theory' in Dennis Patterson (ed.) *A Companion to Philosophy of Law and Legal Theory* (2nd edn, Blackwell Publishing Ltd 2010) 223-40

⁴⁶³ John Gardner, *Law as a Leap of Faith: Essays on Law in General* (OUP 2012) 275

⁴⁶⁴ Ibid

of what law is comes before any empirical theory or statement.⁴⁶⁵ Some social theorists like Posner and Schauer support this claim and insist that law was never at any time involved in the conversion of its normative character to matters of empirical fact.⁴⁶⁶ Agreed, but my query is, is there any problem with attempting to make legal theory more empirical, in terms of stressing facts, or making an easy ratification or falsification of a claim? Although Hart's simple answer is that law is not a science and adopting an empirical approach to law will produce no result at all.⁴⁶⁷ Hart believes that scientific approach cannot capture much of the crucial information that happens within a legal system.⁴⁶⁸ Indeed, this study somewhat assumes a perspective remotely resembling that of Hart. Thus, in chapter two, I argued that internal point of view was normative in nature, and normative languages and behaviours do not always fit easily with an empirical or scientific method. Of course, there exists the possibility of unpredictability of human behaviour that most social or behavioural sciences encounter in their research.⁴⁶⁹ For example, in a complex legal system like that of Nigeria, where there are many officials with diverse behaviours, it is enough for these officials to successfully present a false impression that they accept the rules of recognition when in reality they do not.⁴⁷⁰ So, how can this study practically ascertain that, on the average, Nigerian officials take uniform internal point of view towards the rules of recognition? This study will not fall into the temptation of employing a purely scientific approach to resolve this concern, but I will attempt to restate normative phenomena among Nigerian officials in a somewhat qualitative way. Hart's approach, with particular reference to the internal aspect of rules, is a hermeneutical approach because it attempts to construe a practice in a manner that considers the way the practice is perceived by members of the group who accept.⁴⁷¹ Qualitative methodology in the sense it is being used here involves issues of interpretation and nuance. So, it is not the size of the sampling cases that matters, but how these cases are employed to interpret and explicate official's attitude in Nigerian system. The hypothesis I will be ultimately testing is whether Nigerian public officials

⁴⁶⁵ Ibid

⁴⁶⁶ Richard Posner, 'The Problems of Jurisprudence', (1990) 57 Univ. of Chicago Law Rev. 4. 20 and Frederick Schauer, 'Legal Positivism as Legal Information', (1996) 82 Cornell Law Rev. 5. 49

⁴⁶⁷ Hart (n 2) 86-88. See also, William C. Starr, 'Law and Morality in H.L.A Hart's Legal Philosophy' (1984) 67 Marquette Law Rev. 4. 682-84

⁴⁶⁸ Ibid Hart 88

⁴⁶⁹ Cziko questions raises serious issues regarding the certainty and reliability of a quantitative experimental approach to research in the social sciences. He concluded that the validity of the results of such research creates a bigger problem because of the unpredictability of human behaviours. See Gary A. Cziko, 'Unpredictability and Indeterminism in Human Behaviour: Arguments and Implications for Educational Research' (1989) 18 Educational Researcher 3. 17-19

⁴⁷⁰ This point was discussed in detail in chapter three of this study where I argued that there is a difference between what people say and what they actually do.

⁴⁷¹ Brian Bix, 'H.L.A Hart and the Hermeneutic Turn in Legal Theory', (1999) 52 SMU Law Rev. 1. 176

adhere to a uniform internal point of view towards the Nigerian rules of recognition. In conducting this investigation, the cases to be analysed will be carefully drawn from Nigerian law reports and other historical sources. Apart from being locus classicus in their own right, these cases are adjudged by many writers as being landmark judgments touching on the most sensitive (for example human rights) constitutional and international matters.⁴⁷² I am persuaded that they represent the most historically egregious behaviour ever expressed by senior public officials in Nigeria towards the constitution, precedent, and international law.⁴⁷³ All this points to the fact that the appropriate method for approaching the research question above is qualitative and hermeneutics (interpretative). I prefer to use already decided specific cases and events concerning Nigerian rules of recognition, rather than to address those issues speculatively, for the reason that, just as in the approach of legal education, at least if properly handled, discussion of specific cases is less likely than speculative philosophical debates to erase doubts concerning the eventual research findings here.

The second objection that might likely be raised goes this way; indeed, taking a common or uniform internal point of view towards the rules of recognition is very crucial to the legal system, because the authorities who do so could criticise or correct other authorities who seem to be deviating from the common mark, what then happens to an official who deliberately and publicly flouts or disrespects the rule of recognition? Would he lose the authority to criticise or correct others for behaving in the same way? The answer to this objection is simple. In the context of this study, internal point of view has been argued in chapter two as practical reasoning or moral point of view, rather than a norm-relative one. On the strength of the argument that considers internal point of view as moral point of view, if officials deliberately flout the law, it is hard to claim that they are demonstrating an internal point of view towards the system. There might likely be further objections to the answer given above, especially from some Hartian philosophers who strongly hold that taking the internal point of view towards the

⁴⁷² See, Jack Donnelly, 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Human Rights Conceptions' (1982) 76 *Am Political Science Rev.* 298-306, Osita Eze, *Human Rights in Africa: Some Selected Problems* (Macmillan Nig. Pub. Ltd., 1984), Tunji Abayomi, 'Continuities and Changes in the Development of Civil Liberties Litigation in Nigeria' (1991) 22 *U Tol Law Rev.* 1035-39. Also, Based on Civil Liberties Organization (CLO), Annual Report on Human Rights in Nigeria (Yearly reports of violations of various constitutional provisions, especially human rights in the country); Other human rights organizations had similar reports. See for example Committee for the Defence of Human Rights, 2019 Annual Report on The Human Rights Situation in Nigeria (2021). See also, Amnesty International Reports in Nigeria (2021)

⁴⁷³ For example, Niki Tobi described various instances of Nigerian Military officers refusing to comply with the constitution and international treaties: Niki Tobi, 'Development of Constitutional Law and Military Regimes in Nigeria' in Emmanuel Bello & Bola Ajibola, (eds.) *Essays in Honour of Judge Taslim Olawale Elias* (Dordrecht: Martinus Neuhoff 1992) 674-5. This led Tobi to remark daringly that 'Nigerian military chiefs have no iota of respect for the constitution'.

rules by officials does not demand any moral reason whatsoever.⁴⁷⁴ The strongest of this objections coming from Shapiro who thinks that the internal point of view is not necessarily the moral point of view.⁴⁷⁵ Accordingly, Shapiro will think that the choice by the Nigerian officials to disobey the ultimate law, might be a moral decision with no serious legal obligation attached. I have already made a contrary argument against this position in chapter two, but I will restate it to answer this objection. This study understands internal point of view in motivational attitudinal terms. Consequently, the normativity of internal point of view cannot be explained without invoking the notion of reason givingness or the moral right to conform with directives of the lawgiver. The practical reasoning model explains ‘normativity of law’ wholly in terms of moral attitudes taken by officials towards the ultimate rules of recognition. Hence, any official that refuses to conform to the fundamental rules of the legal system has no justificatory grounds to criticise another deviant.⁴⁷⁶ From the moral attitude or practical reason internal point of view, the authority of such an official as a stabilising agent in the legal system is already undermined.⁴⁷⁷ What then happens when a higher official, for example, the President, asks the Attorney General of the Federation (AGF) to act outside the provisions of the ultimate rules of recognition? These norm-relativist scholars might argue that the AGF should have followed the President’s directive for prudential reasons since Hart permits acceptance of rules for such reasons.⁴⁷⁸ Of course, Hart provides room for acceptance for prudential reasons, but flouting the rules for prudential reasons obviously disrupts the operations of rules and the general effectiveness of the legal system.⁴⁷⁹ If we concede that it is crucial to accept the internal point of view on the premise that officials who adopt it could use it to demand obedience from those officials who deviate from the common standard of conformity, it is trite that any official who disobeys the law consciously does not have the justification to criticise other officials who disobey the laws too.⁴⁸⁰ Thus, the answer to this objection is, an official who refuses to obey

⁴⁷⁴ See generally, Kaplan (n 224) 5, 7, Enoch (n 287) 4-13, Bix, (n 471) 18., among others. See also Hart (n 2) 257, and Hart (n 256) 267.

⁴⁷⁵ Shapiro (n 223) 1162

⁴⁷⁶ Andrei Marmor *Social Conventions* (Princeton Univ. Press), Kaila Morin, ‘Bridging the Conceptual Gap between Law and Morality: A Critical Response to H.L.A Hart’s The Concept of Law’ (2011) 1 UCL Journal of Law and Juris. 1., Marina L. Costerbosa, ‘Some Reflections on the Relationship between Law and Morality- Neil MacCormick’s Point of View’ A. Menendez and J. Fossum (eds) *Law and Democracy in Neil MacCormick’s Legal and Philosophy Library* (Dordrecht: Springer) 97-103

⁴⁷⁷ Maris K. Inture, ‘Finnis on Legal and Moral Obligation’ in John Keown and Robert P. George (eds) *Reason, Morality, and Law: The Philosophy of John Finnis* (OUP 2013) 6-17

⁴⁷⁸ See Hart (n 2) 198-99

⁴⁷⁹ Goldsworthy (n 184) 240-41

⁴⁸⁰ David G. Carlson, Hart avec Kant: On the Inseparability of Law and Morality, Washington University Jurisprudence Review, vol.1, No.1, 1999. pp.28-31

an unlawful order will also be presumed to have taken the internal point of law.⁴⁸¹ He is impliedly displaying a moral attitude or practical reason internal point of view, at least by his attitude he is implicitly criticising those officials who created the rule, and as such will be somewhat demonstrating the internal point of view.⁴⁸²

This leads on to a third objection that might be raised against the project of investigating the attitudes of Nigerian public officials towards the fundamental rules. The objectors may argue that Hart was interested in the attitude rather than the behaviour of officials. Of course, I do not deny that fact, nonetheless I will still argue that it is not illogical to deduce attitudes from disobedience as much as it will be from obedience. Because there is plethora of reasons for obeying a rule and these reasons may not always include acceptance of the rule's authority, but the reasons for disobeying the rule would necessarily involve refusal to accept the rule's authority. Hence, in as much as obedience may not connote acceptance, disobedience implies absolute refusal to accept.

4.1.1 Emending Rule of Recognition in Nigeria

There is some of deviation from Hart's account regarding my definition of rules of recognition. The distinction comes in the analysis of acceptance of authoritative rules by public officials. First, as was noted in chapter three, the acceptance found in the rule (s) of recognition have two versions as far as Nigerian jurisdiction is concerned. The first version is what I described as formal acceptance – which involves a mere assent or approval of authoritative rules by officials. The second version involves the actual attitudes of officials towards those authoritative rules. Hart's account of the rule of recognition did not involve two versions. In fact, it did not even delve into the reasons for which officials accept the rule of recognition, all that matters for Hart is that public officials accept the authoritative rules of the legal system.

As stated above, when I examined Nigerian officials and their behaviours towards the system's authoritative rules, a common reality is that what officials say is not necessarily what they really do. This often happen in the Nigerian legal system when officials assent to fundamental laws but fail to imbibe the spirit of the law. The link between the attitudes of officials and the fundamental rules which they assented to, is not always strong. In fact, Nigerian officials have penchant of saying one thing and then doing the exact opposite of what they said. If a President

⁴⁸¹ Bernard Williams 'Internal and External Reasons' in B. Williams (ed) *Moral Luck* (CUP 1981) 106-112. Dahlman Christian, 'The Difference between Obedience Assumed and Obedience Accepted' (2009) 22 *Ratio Juris* 2. 188-91.

⁴⁸² Holton (n 224) 34

assents to section 39 of the Constitution of the Federal Republic of Nigeria, while truly believing it, that he is fully committed to upholding the document, one expects him to behave consistently with that statement. Nonetheless, in Nigeria, the civic space continues to shrink because successive Presidents and Governors have carried out consistent attack on journalists and citizens who criticise the ills of the government. The attitudes of these Nigerian authorities contradict section 39 of the constitution which they assented. Thus, prompting one to conclude that the acceptance that creates the rule of recognition in Nigeria has two versions namely- what the officials say and what the officials actually do.

4.2 Attitudes of Executive Authorities in Nigeria

Executive authority or power in many systems of the world is virtually the most authoritative and impactful. Wade puts it tersely; “broadly speaking, the executive function comprises the whole corpus of authority to govern, other than that which is involved in the legislative function of parliament and judicial functions of the courts”.⁴⁸³ In Nigeria, it is the branch of government that is most authoritative, influential, and enduring in the scheme of things. Executive officials in Nigeria refer to the members of the arm of government saddled with the obligation of maintaining and enforcing the rules or norms in Nigeria.⁴⁸⁴ Section 5 (1) of the 1999 Constitution gives legal validity to the laws and rules enforceable by the President. In a similar vein, the executive laws and powers of the Governors receive validation through section 5(2) of the Constitution. In this study, officials which make up the executive arm of government in Nigeria include, the President and his vice, Governors and their deputies, Ministers, Commissioners, Civil Servants, Attorney General of the Federation and States etc.⁴⁸⁵ Also, the military government will be considered as part of the executive. At least, the finding of this research in chapter three shows that these Nigerian officials proclaim to accept the constitution, judicial precedents, and international law as the rule of recognition. Nevertheless, the question to be resolved in this section now is whether they actually treat these rules as common or uniform official standards of behaviour? This study sets out to examine relevant cases in this

⁴⁸³ E.C.S Wade, *Constitutional and Administrative Law* (8th edn. New York Longman Inc. 1977).

⁴⁸⁴ Joseph Omoregbe, *Socio-political Philosophy and International Relations* (Joja Edu. Research & Pub. 2007) 23

⁴⁸⁵ The executive authorities whose attitudes would be largely tested in this study would be the Presidents and the Governors. I will exclude the internal point of view of Ministers, Commissioners, and other Civil Servants in this particular study. I do not suppose by this to mean that these officials are not critical players in the executive arm of government. Definitely, they are. However, since the samples that will be employed in this study are mainly case laws, it is safer and simpler to employ only the attitudes of Presidents, Governors and of course, their Attorney Generals.

regard and therefore begins the investigation from the military administration since they also ruled Nigeria for substantial number of years.

4.2.1 Attitudes of Military Officials

In this section, I will be assessing whether the military officials take a uniform or common internal point of view towards the Nigerian Constitution, precedents, and international law. Nonetheless, investigating this hypothesis presents a specific problem- the 1963 Constitution did not envisage a situation where its power as the ultimate rule of recognition will be threatened or usurped by any other law or authority. But the emergence of the intervention of the military rule adversely affected the ultimacy of the 1963 Constitution. What is ridiculously striking is the fact that on assuming office through the use of brute force as against a democratic process, the military officials usually declare their absolute acceptance of the rule of law (which is one of the most important features on which the constitution depends).⁴⁸⁶ For example, General Idiagbon, upon the attainment of power in 1983, alluded to the rule of law and protection of citizens' rights as the reason why Buhari/Idiagbon took over government.⁴⁸⁷ According to him 'stable government is absolutely impossible anywhere in the world if the governed are denied their basic rights and they have nowhere else to seek redress.'⁴⁸⁸ Nevertheless, such proclamations might just be mere lips service to the constitution because whenever the military authorities grab power, some provisions of the existing constitution are suspended or put off through the usual Constitution Suspension and Modification Decree. As mentioned in Chapter one, this was evident when the military first commandeered power on the 15th of January 1966, and the first legislation promulgated was the 'Constitution (Suspension and Modification) Decree No 1, 1966'. The implication of this new law for the ultimate rule of recognition in Nigeria was the suspension of some parts of the 1963 Constitution. So, the normative superiority of the constitution was invariably affected. The legal problem this portends is, which becomes the ultimate rule between the Constitution and the Federal Military Decree No 1, 1966? In this research, my finding in this regard is that the Constitution remains the ultimate rule of recognition because it contains a passage that indicates its common acceptance by all.⁴⁸⁹ Granted that the Federal Military Decree stands as the number one rule under the military government, it is not the rule of recognition because it

⁴⁸⁶ Mustapha Akanbi, 'Rule of Law in Nigeria' [2012] 3 J. Law, Policy & Globalisation. 3

⁴⁸⁷ Ibid

⁴⁸⁸ Ibid

⁴⁸⁹ See the preamble to CFRN 1999 which states 'we the people and officials of Nigeria have accepted...'

lacks the basic criteria for norm validation.⁴⁹⁰ The constitution as the ultimate norm-creating and norm-validating rule presents a distinct platform compared to any other form of authoritative text. Its Supremacy provision⁴⁹¹ does not create any vacuum concerning its status as the ultimate criteria of legal validity in comparison to other norm-generating sources like the military decrees and edicts. Besides, all rules (primary or secondary) ought to be validated by the constitution as every single disobedience to the rule must directly or indirectly relate to the provisions clearly stipulated in the constitution.⁴⁹² With this confusion resolved, the study will proceed to examine whether the officials under the military government observe a uniform or common internal point of view towards the Nigerian rule of recognition which is the constitution and other principles or standards which the study discovered in chapter three as forming part of the ultimate rules of recognition in Nigeria.

The introduction of the decree, 'Constitution (suspension and Modification) Decree No 1, 1966' by the military government has far reaching implications for its approach towards the constitution which is the ultimate rule of recognition of the system. Indeed, a critical analysis of Decree No.1 will reveal enough evidence to determine whether or not the Military officials' attitude towards the Nigerian rule of recognition or Constitution was a form of internal point of view. First of all, the military decree modified and suspended most parts of the existing Constitution. Secondly, the decree created a new method of legislating. Instead of the usual democratic process of law-making, section 4 of that military law proposed that only the military authorities will have powers to make laws in the form of Decrees and Edicts. Thirdly, the Supreme Military Council (hereafter referred to as SMC) usurped legislative, judicial, and executive powers, becoming the only organ that makes, interprets, and implements the law. This has far reaching implications for the principle of power separation and the possibility of voluntary acceptance by officials. Fourthly, the rule of law which is a cornerstone of the constitution was undermined by the provisions of section 6 of the decree, because the validity of the law was determined by the SMC and not subjected to any judicial consideration and

⁴⁹⁰ Decrees are akin to the command of a sovereign; they are usually superimposed on the subjects and does not have such things as internal point of view of rule. Decrees are expressed wishes of the Commander in Chief to Nigerian citizens that something be done, with known evil to accompany if his order is not complied with. For example, Public Order Decree No 33, 1966.

⁴⁹¹ As per Section 1 (3) CFRN

⁴⁹² Zahn puts it this way; "Nigeria is a legal complex legal system with diverse laws, the constitution provides the ultimate principles, rules and doctrines from which the legitimacy and hierarchy of all other norms in Nigeria are derived" see Rebecca Zahn, 'Human Rights in the Plural Legal System of Nigeria' (2010) 1 *Edinburg Student Law Rev.* 1, 2010.

review. Apparently, the contents of Decree No.1 demonstrate strong findings that the Military officials did not recognize the Constitution as the ultimate law (rule of recognition) of the land. Invariably, the possibility of approaching the Constitution from a uniform or shared internal point of view becomes illusive here.

The case of *Lakanmi v A.G Western Nigeria*⁴⁹³ will suffice as a practical example to buttress this point. In this case, a military Edict⁴⁹⁴ established a tribunal to investigate individuals suspected to have dubiously acquired their properties without the permission of the Governor of Western Nigeria. The tribunal declared that the claimant's properties were acquired through a questionable means and as such, the accruing rents and other proceeds from the properties ought to go into the government treasury. The claimant sought an Order of Certiorari from the High Court to squash the decision of the Tribunal. His application was brought under section 22 of the 1963 Constitution to secure his life and that of his family, and section 31 of the same Constitution to restate the inherent power of the court to intervene in a matter of fundamental human right. Unfortunately, while the application was awaiting hearing, the military government promulgated a decree which simultaneously ousted the jurisdiction of the High Court to entertain the matter and reaffirmed the previous decisions of the Tribunal. This was a horrible assault on the Constitution as the ultimate law of the nation and raised a serious legal question.⁴⁹⁵ What exactly is going to be the implication of this action of the military government for the pending case and for the entire legal system? The High Court bowed to pressure and struck out the application on the grounds that the court lacks jurisdictional and constitutional powers to continue the matter. Dissatisfied with the decision of the High Court, the complainant appealed the decision. Regrettably still, the Court of Appeal (CA) dismissed the appeal claiming that it lacks jurisdiction to entertain the case, because the jurisdiction has been ousted by the new military Decree. The complainant was undaunted and further sought the intervention of the highest court of the land. The legal difficulty before the Supreme Court to consider was whether the constitution has a binding effect on the military government considering the unconstitutional way in which they ascended to power. Also, whether the Decree was superior to the Constitution. In what later became one of the most remarkable locus

⁴⁹³ (1971) 1 UILR 201 SC

⁴⁹⁴ Edict No 5, Western Region of Nigeria, 1967.

⁴⁹⁵ The legal question that arose was, between the unsuspended parts of the Constitution and the Military Decree, which is higher in the hierarchy of our laws? What if the conflict of law was between the unsuspended parts of the Constitution and the Edict of the Military Governor? This issue has been resolved earlier in this section.

classicus as far as military authorities violation of the constitution is concerned,⁴⁹⁶ the Supreme Court ruled that the military government was merely a constitutional interim government and as such bound by the 1963 Constitution.⁴⁹⁷ It further maintained that the Constitution was the ultimate rule of recognition and any provision of Decree or Edit that contradicts the Constitution becomes null and void to the extent of its inconsistency.⁴⁹⁸ Although, the claimant's case was still pending, the apex court was laying a proper foundation before granting his application. However, this temerity of the Supreme Court caused serious resentment and crossness among the military hierarchies. In what follows, the SMC immediately passed the Federal Military Government (Supremacy and Enforcement of powers) Decree No 28, 1970. The Decree restate the supremacy of all Federal Military Decrees over the constitution, defined the military regime as a revolutionary legitimate government and nullified the Supreme Court's preliminary rulings on the Lakanmi's case. This behaviour exhibited by the SMC towards the constitution demonstrates a clear case of the officers' refusal to take internal point of view towards the constitution.

Similarly, in *Agbaje v Commissioner of Police (COP)*⁴⁹⁹, the plaintiff pressed charges against the Federal Military Government for unlawful detention by the commissioner of police contrary to sections 35 and 41 of the 1963 Constitution. The respondent contended that such provisions in the constitution have been overtaken by the Armed Forces and Police (Special Powers) Decree No 24 of 1967 which gives the Inspector General of Police (hereafter IG) and the Chief of Army Staff to detain any citizen without recourse to any other law or the courts. Nevertheless, the court held among other things that first, the plaintiff's rights to liberty and freedom of movement as per section 35 and 41 of the constitution are still intact. Secondly, that the Armed Forces and Police (Special Powers) Decree which oust the jurisdiction of the court violates the constitution. In what follows, the military government discountenanced the judgment and continue to detain the claimant. Of course, this attitude of the military authority reflects gross disregard for both the constitution and the court judgment. Unvaryingly, the authorities in question do not take internal point of view towards the Nigerian rules of recognition. Another case with historical and legal significance in this context is the Council

⁴⁹⁶ Pat Acholonu (J.C.A), 'Threats to the Jurisdiction of the Court and the Rule of Law in Nigeria', A Paper presented at *All Nigeria Judges Conference* (International Conference Centre Abuja, 12th September 1995) 43-7

⁴⁹⁷ For a detailed exegesis of this judgment, see Tunji Abayomi, "Continuities and Changes in the Development of Civil Liberties Litigation in Nigeria" (1991) 22 Univ. of Toledo Law Rev. 8.

⁴⁹⁸ Ibid

⁴⁹⁹ [1969] 1 NMLR 137

of *Council of University of Ibadan v Adamolekun*.⁵⁰⁰ In this case, there was a pending appeal from the High Court to Supreme Court. In this period, appeals from High Courts usually go directly to the Supreme Court as per section 117 of the 1963 constitution. While this particular appeal was pending at the apex court, a state military administrator promulgated an edict which created the Western Region Court of Appeal. The promulgation of this edict affected the pending appeal because appeals can no longer go straight to the Supreme Court unless through the newly created Court of Appeal. So, the issue for determination was whether the provisions of section 35 of the Court of Appeal Edict, Western Nigeria, No. 15 of 1967 violates the provisions of section 117 of the 1963 constitution. The court held that edict was invalid by the virtue of the fact that it contradicts the constitution and also attempts to oust the jurisdiction of the court. In reaction to this judgment, the SMC promulgated Decree No 28 of 1970 which suspended section 117 and other provisions around human rights in the constitution. This case is one of the phenomenal cases where the military government outrightly disparaged the constitution and judicial precedents as ultimate rules of recognition in Nigeria.

In *Chief Ojukwu v Military Administrator of Lagos State*⁵⁰¹ This case concerns the rights to own property pursuant to section 40 of the 1979 constitution. The plaintiff and his family were in occupation of the plaintiff's late dad's property at No. 29 Queens Drive Ikoyi when the military governor of Lagos wrote him to vacate the property. Prior to the issuance of the ejection letter, the government had declared the same property as an abandoned property. The plaintiff who considered such ejection as arbitrary and a deliberate infringement on his fundamental human rights as per chapter four of the 1979 constitution, sought redress at the Lagos State High Court. The respondent argued on two points; first, the ejection procedure was proper because the demise estate in question is an abandoned property as per Abandoned Properties Edict No. 8 of 1969. Second, the said property belongs to Ojukwu Transport Limited, which was owned by the plaintiff's father and since the plaintiff is not a member of the board of directors of the company, he cannot lay claim to any right thereof. The trial court held that the ejection notice was in order as per section 5 of No 8 Abandoned Properties Edict 1969, and therefore resolved the matter in favour of the military governor of Lagos. The plaintiff who was dissatisfied with the judgment, pursued an appeal. The Court of Appeal declared the action of the military governor as arbitrary and a gross violation of the rights of the appellant provided by the constitution. The military governor refused to comply with both

⁵⁰⁰ [1967] 1 ANLR 223

⁵⁰¹ CA/L/196/85 (1)

the constitution and the ruling of the appellate court and went ahead to forcefully eject the plaintiff from the property.

A more egregious representation of the military officials' disregard for the constitution and precedent was the case of *Aliu Bello v A.G Oyo State*.⁵⁰² In this case, the appellant was convicted of the offence of armed robbery and sentenced to death by the High Court of Oyo State. He appealed his conviction at the Federal Court of Appeal and gave a copy of the process to the Military Governor of Oyo State via the Attorney General of Oyo State. The Military Governor discountenanced Bello's appeal and ordered that he should be executed. Bello's dependents were aggrieved about their benefactor's execution and commenced an action against the Governor at the High Court. The matter continued up to the apex court. Accordingly, the Supreme Court ruled that Bello's execution was not only premature, but a gross violation of chapter four of the 1979 constitution which grants the deceased right to life and right to pursue his appeal. In addition, the dependents have been unjustly deprived of the benefits that come from the deceased.

Correspondingly, there is the case of *Tukur v Military Governor of Gongola State*,⁵⁰³ *Military Governor of Lagos State v Adebayo Adeyiga*,⁵⁰⁴ *Obeya v Federal Military Government & anor*,⁵⁰⁵ *Utomudo v Military Governor of Bendel State*,⁵⁰⁶ *Ajakaiye v Military Governor of Bendel State*,⁵⁰⁷ *Nkwocha v A.G Anambra State*,⁵⁰⁸ *Military Governor of Anambra State & ors v Job Ezemuokwe*,⁵⁰⁹ *Mustafa Oladokun v The Military Governor of Oyo State & ors*,⁵¹⁰ *Military Governor of Ondo State & ors v Victor Adegoke*,⁵¹¹ *Olugbemi Obada & ors v Military Governor of Kwara State*,⁵¹² *Garba v University of Maiduguri*⁵¹³ amongst many others. The facts of these cases might be somewhat different, but the attitudes of all the military officers involved in these cases is the same. Their conscious refusal to comply with the provisions of the constitution or court decisions supports the evidence that military authorities do not take internal point of view towards the rules of recognition in Nigeria.

⁵⁰² [1986] 12 LLER 1

⁵⁰³ [1988] LCN/2056 (SC)

⁵⁰⁴ [2012] JELR 33985 (SC)

⁵⁰⁵ [1987] 3 NWLR (Pt 60) 325

⁵⁰⁶ [2014] LCN/4280 (SC)

⁵⁰⁷ [1993] 9 SCNJ 242

⁵⁰⁸ [1984] LCN/2217 (SC)

⁵⁰⁹ SC.152/1994

⁵¹⁰ [1996] SC. 201/1991

⁵¹¹ [1988] 1 All N.L.R 274

⁵¹² SC.131/1990

⁵¹³ [1986] 1 NWLR (Pt.18) 550

Shifting a bit from constitutional and precedential cases to international law, I have argued extensively through a number of cases and events in chapter three that, military officials do not accept the rule of recognition in Nigeria. It is needless rehearsing the same cases and arguments here. However, the case of *Fawehinmi v Abacha*,⁵¹⁴ which happens to be the most cited case regarding the behaviour of military officials towards international law is worth analysing. In this case, the claimant Gani Fawehinmi, a human rights activist, was illegally arrested and imprisoned by the Directorate of State Security Services (hereafter referred to as DSSS) during the military government of General Sani Abacha. The claimant brought an action before the High Court requesting for the enforcement of his fundamental rights as contained in chapter four of the 1979 Constitution of Nigeria and Chapter 10 (now chapter 9) of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act. The defendant filed a preliminary objection to the matter and argued that the court lack jurisdiction to entertain the matter as a result of the ouster clauses contained in the Directorate of State Security Service (Detention of Persons) Decree No. 2 1984, the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 1984, and the Constitution (Suspension and Modification) Decree No.107 of 1993. These ouster clauses undermine the rights of the plaintiff which is guaranteed both the constitution and African Charter (an international legal instrument). The High Court bowed to the defendant's contention and held that it lacked jurisdiction to entertain the matter, thereby striking out the case. Aggrieved by the judgment of the High Court, the claimant appealed to the Court of Appeal. The appellate court upheld the appeal and ruled that 'the constitution excepted, the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, which domesticated the African Charter, is superior to, and cannot be overridden by, any other municipal law.' Discontented with the judgment of the Court of Appeal, Abacha's government appealed to the Supreme Court, which affirmed the decision of the Court of Appeal and accorded the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act and other international laws such recognition and bindingness.⁵¹⁵ Consequently, the government ignored the decision of the court and maintained its ground.

The cases analysed above say it all about the attitude of military officials towards the constitution, judicial precedents, and international law. In principle, the military officials do

⁵¹⁴ [2000] 6 NWLR (Pt. 660) 228.

⁵¹⁵ For detailed discussion on this case, see Chilenye Nwapi, 'International Treaties in Nigerian and Canadian Courts', (2011) 19 African. J. Int'l & Comparative Law. 44-47

say that they accept the rules of recognition, however, their attitudes show blatant disregards for all the legal instruments and standards that constitute the rules of recognition in the legal system. Also, there is an obvious lack of shared or uniform internal point of view towards the rule of recognition. In fact, if there is quality of uniformity in the attitudes of the military officers, it is in their common disparaging of the ultimate rules of recognition. Hence, in practice, ‘acceptance’ of the secondary rules of recognition as a crucial ingredient of internal point of view was apparently lacking in such various regime. As observed earlier, the trademark of the actions of the military officials resembles the command theory of Austin which this study rejected earlier as a framework for a modern legal system.⁵¹⁶ Since it has been established that the officials under this regime did not conform to the common standard of behaviour as stipulated by the rules of recognition in Nigeria, my conclusion is that the military officials have failed the first phase of the uniform or common internal point of view test.

Let us now examine the second leg of internal point of view which involves social pressure or criticisms. It is important to note that acceptance or demand for conformity to the general rules alone, may not absolutely determine whether the officials took the internal point of view towards the legal system.⁵¹⁷ Hart says that such acceptance should be expressed in the form of ‘criticisms (including self-criticism)’ as well. According to him,

a social rule exists for members of a group if only a certain pattern of behaviour among the members of the group is a common standard, and deviation from the general pattern of behaviour should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of ought, must, should, right, wrong etc.⁵¹⁸

Most fundamentally, what distinguishes a social rule from mere habit of obedience is criticisms. Shapiro puts it better “an official or citizen takes the internal point of view towards a legal system when he desires to conform to the rule, criticizes others who fail to conform, accepts the criticisms of others without chastising them and expresses his criticism using evaluative languages”⁵¹⁹. Criticisms and acceptance of criticisms is an important element in determining whether the officials take a uniform internal point of view towards the rules of recognition of

⁵¹⁶ Recall that according to Austin, a rule is considered as legal system or law so long as it was issued, directly or indirectly, by a superior person who is habitually obeyed and does not habitually obey anybody else.

⁵¹⁷ Hart (n 9) 55-56

⁵¹⁸ *ibid* (emphasis is mine)

⁵¹⁹ Shapiro (n 134) 1162 (emphasis added)

the legal system. So, my second investigation is to assess how much the military officials accepted or were desirous of accepting criticism as an evaluative standard. Since it is outside the general outline of this study to cover all the cases of military officials' tolerance or otherwise to criticisms, I would cite some remarkable instances to buttress my point. Thus, I would give a brief account of the attitude of the military officials towards criticism and state what my findings are in this regard.

The media is traditionally the mouthpiece of the society.⁵²⁰ It is through the media that the feelings, observations, perspectives, and opinions of other public and private officials/citizens of the society are usually expressed.⁵²¹ So, what was the attitude of military officials towards media users and critics?⁵²² The first military onslaught against the media happened in 1973. Mr Minere Amachree had earlier criticised the action of the military government in the Lakanmi's case as uncivil and a gross violation of the constitution. The military government could not stomach such criticism and had to arrest Amachree immediately. The outspoken journalist was comprehensively beaten, humiliated, and incarcerated for many weeks without trial contrary to the provisions of the constitution.⁵²³ The military government offered no explanation for this brutish act towards a citizen who merely criticised the action of the government. This case set the stage for a full-blown military dictatorship and intolerance towards criticisms. There were litanies of indiscriminate arrests, false imprisonment, torture and sometimes disappearance or death of critics after the Amachree's case. On the 11th of April 1984, the editors of 'The Guardian'⁵²⁴, Ndukar Irabor and Thomson Tunde were arrested by the military government of General Muhammadu Buhari for exposing the regime's unconstitutional plans to overhaul the foreign service and relations. These critics were unconstitutionally held in military custody for months and terribly manhandled.⁵²⁵ In another example, the editors of 'The Statesman', also a National Daily in Owerri, did a publication criticizing the Buhari's regime for incarcerating former Vice President Late Alex Ekwueme, while former President Late Shehu Shagari who

⁵²⁰ Nicholas Carah and Eric Louw, *Media & Society: Production, Content and Participation* (Sage Publications Ltd. 2015) 2

⁵²¹ *ibid*

⁵²² There might be objection to using the criticisms from media users for the reason that they are not public officials and as such, their views are not critical for the existence of a legal system or for understanding constitutional law. I argue that media practitioners by the virtue of the fact that they serve the public are included among the public officials. Moreover, there are media users that are also part of the government.

⁵²³ For a more detailed account, see, Chris W. Ogbondah, 'The Pen is mightier than the Koboko: A Critical Analysis of the Amachree's case in Nigeria'. (1991) 8 J. Political Comm. and Persuasion 1. 109

⁵²⁴ The Guardian is a daily newspaper publication domiciled in Lagos. It is one of the National Dailies widely read across the country.

⁵²⁵ *Ibid*

was the main leader of the defunct civilian regime was allowed to stay in his personal house. The conclusion of the publication was that ethnic bigotry and tribal sentiments were the reasons for such action of the military officials. Consequently, the newspaper house was shut down and the two editors were arrested and detained for months.⁵²⁶ Other journalists, public affair analysts and social critics arrested and detained for criticising the military government were Niyi Onigoro, a reporter for a newspaper in Ibadan; Adamu Haruna, an editorial consultant to Punch newspaper domiciled in Lagos Nigeria; Idowu Odeyemi, editorial consultant to one of the National Dailies domiciled in Ibadan.⁵²⁷ Furthermore, some of the decrees prescribed stringent requirements for registration of a media company⁵²⁸ and in some circumstances the existing media outlets were shut by the Decrees.⁵²⁹ Several of them who worked with the government owned newspapers, radio, and television, were fired. Those who were tried, did not have their cases in the civilian court, rather they were charged before a special tribunal headed by three senior military officers. The burden of proof was usually on the accused and no appeal against the judgment of the Tribunal was allowed.⁵³⁰ Many media practitioners were detained and tortured. Ogbondah in his work, chronicled all the incidences up till 1990.⁵³¹ In some extreme cases, letter-bombs were even sent to journalists who were adjudged critics of the government. The case of Dele Giwa, the editor of Newswatch Magazine who was killed by a letter bomb alleged to be from the Federal Military Government of General Ibrahim Badamasi Babangida, represents this point.⁵³² The experiences of political opponents and activists were like those of media practitioners during the military regime. For example, Olusegun Obasanjo, Lewan Gwadabe, Shehu Musa Yar'Adua, Bayo Onanuga and Shehu Sani who were all top former public servants were unconstitutionally imprisoned by General Abacha's junta for criticising his abuse of human rights and disregard for the constitution and court orders.

The attitudes of these officials were supposed to manifest itself most obviously through conforming behaviour to the rules of recognition of the system because a person who takes internal point of view towards the ultimate rules, behaves according to what the rules

⁵²⁶ Clifford D. May, Nigerian Military Regime is Reining in one of the freest Presses in Africa, The New York Times, 30th April 1984, section A, p.7

⁵²⁷ *ibid*

⁵²⁸ See generally The Newspapers (Registration, Regulation and Guideline) Decree No 43 of 1993

⁵²⁹ See generally, Offensive Publications (Proscription) Decree No 35 of 1993. The Federal Military Government was empowered to shut down any news house that criticises the government. The Government was also empowered to detain and punish media practitioners publish uncensored articles targeted at the government.

⁵³⁰ Akwasi Assensoh, 'African Writers: Historical Perspectives on their Trials and Tribulations' (2001) 31 J. Black Stud. 2. 351- 53

⁵³¹ Ogbondah (n 523) 109-112

⁵³² Mercy Ette, 'Agent of Change or Stability? The Nigerian Press Undermines Democracy' (2005) 5 Hary Int'l J. Press & Politics, 1. 67-69

demand.⁵³³ Of course, conformity with the rules is not all that is required of the internal point of view since the bad man also conforms with rules. Thus, this study decided to investigate the second manner through which internal point of view may be demonstrated, which is critical evaluation. Based on the fact that they claim to accept the rule of law⁵³⁴ and international law, they ought to have shown this acceptance by condoning criticisms from other members (journalists, civil society groups, civil servants, top public servants etc.) of the legal system and should even be able to criticise themselves for deviating. In all the events analysed above, a crucial feature of internal point of view which is critical evaluation is lacking in the attitudes of the above officials. In these cases, the media users were justified in their criticisms of the military officials' deviations from the Nigerian rule of recognition. Then the refusal to accept those criticisms by the officials suggests that they do not take a shared internal point of view. Secondly, the outright onslaught on members of the group for merely expressing this internal aspect of rule violates their rights to freedom of press and expression under section 39 of the constitution. Therefore, the finding from the second way in which internal point of view can be expressed is, officials of the military government do not take internal point of view towards the Nigerian rules of recognition. Another finding is that, apart from the fact that the above-mentioned cases set the military officials on an Austinian imperative kind of system, the lack of the uniform internal point of view will have far reaching implications through different periods of governments including the subsequent democratic regimes.

4.2.2 Attitudes of Officials under Civilian Regimes

When the military era came to an end on 29th May 1999, the various Federal Military Decrees and Edicts which were anti-democratic and inimical to the fundamental rules of the legal system were abrogated in order to create a conducive environment for civil and constitutional rules to thrive. Therefore, the general expectation was that a return to civil rule, implies automatic recognition and practical acceptance of all the rules of the legal system by civilian officials, especially the rule of recognition which is the ultimate rule. At least, democracy is often considered as the best system that facilitates obligation to the rule of law.⁵³⁵ Fukuyama in his "End of History and the Last Man standing", argued that democratic traditions and values are

⁵³³ Hart (n 9)55

⁵³⁴ The rule of law is a major component of the constitution and judicial precedents. I will discuss the rule of law in detail in the next chapter.

⁵³⁵ Joseph K. Young, 'State Capacity, Democracy, and the Violation of Personal Integrity Rights' (2009) 8 J. Human Rights 1. 284

the most sustainable political systems in this century when compared to any other alternative system of governance.⁵³⁶ Freedom of speech (criticisms), free and fair elections, principle of separation of power and absolute respect for the ultimate rule or rule of law are the tenets which allowed democracy to outlast fascism, monarchy, authoritarianism, military rule and communism.⁵³⁷ On the point of fact, it can be argued that democracy is increasingly becoming the global choice of an ideal socio-political system.⁵³⁸ Ake corroborates this view, “liberal democracy which has its foundation on the people’s Constitution is the most sensible way to create the best functional legal system.”⁵³⁹ Yet, Popper thinks democracy does not settle the problem of bad leadership. What is important in his opinion, is how to extricate bad leaders without violence or bloodshed. Having an expert or good hand in leadership is more important than talking about liberal democracy.⁵⁴⁰ Aido in his article “African: Democracy without Human Rights”⁵⁴¹ thinks that there seems to be an over-exaggerated confidence reposed in liberal democracy. Democracy may create an enabling environment fair enough to protect the freedom and rights of the citizenry, but it may not always determine whether the officials are going to respect the Constitution or the rule of law.⁵⁴² There are many other philosophers who criticised liberal democracy, nevertheless, none was ever convinced that monarchy, aristocracy, authoritarianism, totalitarianism, fascism, communism, theocracy etc., are superior alternatives to liberal democracy as a form of social organization. In fact, the Islamic world that has been historically known to practice monarchy and theocracy, wanted a refreshing dynamism by demanding for liberal democracy.⁵⁴³ The tenet of an ideal democracy involves respect for the rule of law and freedom of speech. It is upon this assumption that officials under the civil rule are expected to do better than the military officials as far as uniform internal point of view towards the Nigerian legal system was concerned. The pertinent question at this point is, did the officials under the civilian regime approach the Nigerian rules of recognition from a shared internal point of view?

⁵³⁶ Francis Fukuyama, *The End of History and the Last Man* (Maxwell Macmillan Inc. New York, 1992) 131

⁵³⁷ Ibid

⁵³⁸ Ibid

⁵³⁹ Claude Ake, *Is Africa Democratizing?* (Malthouse Press Lagos, 1998) 34

⁵⁴⁰ Karl Popper, *The Open Society and Its Enemies*, (Routledge 1945) 131

⁵⁴¹ Akwasi Aidoo, ‘Africa: Democracy without Human Rights’, (1993) 15 Human Rights Quarterly 3. 706-709

⁵⁴² Ibid

⁵⁴³ This call for democracy began in the spring of 2011 among several Islamic countries in the Middle East and North Africa, it is loosely referred to as ‘Arab Spring’. Although, some of the revolutions were unsuccessful, it created a culture of freedom and democratic governance all the same.

First of all, I will consider the attitudes of these officials to the most important content of the constitution which is the citizens' right to life enshrined in article 33 of the constitution of the Federal Republic of Nigeria 1999. It provides that 'no person shall be intentionally deprived of his right to life, save in execution of the sentence of a court in respect of a criminal offence which he has been found guilty in Nigeria.' However, the first apparent violation of this provision under a democratically elected government happened on 20th November 1999 in horrific manner. The entire nation was taken aback when President Olusegun Obasanjo ordered the killing of over two thousand and five hundred Nigerians in Odi, Bayelsa State.⁵⁴⁴ With the exception of civil war, there was never a time in Nigerian history that a government has caused the citizens the loss of lives in such a massive form.⁵⁴⁵ Unfortunately, this happened under a civilian regime. The reason for such heinous crime has not been given by the government until this day. But Aka thinks the victims were merely peacefully demanding for compensation for their environment that has been devastated by the activities of multi-national and government owned oil companies.⁵⁴⁶ If Aka's claim is true, then the Obasanjo led administration would have violated not only the constitution but other international legal instruments on environmental law which Nigeria is a signatory.⁵⁴⁷

Two years after the apparent genocide in Bayelsa, on the instruction of the Federal Government, the Nigerian Army killed over a hundred defenceless citizens in Zaki-Biam, Benue State on 22nd October 2001. Although not verifiable, the villagers were alleged to have killed some Nigerian soldiers during an earlier inter-community clash.⁵⁴⁸ It was therefore anticipated that officials under constitutional democracy will recognise the constitution and not resort to self-help, but that was not the case here.⁵⁴⁹ Thus, a crucial part of the constitution was deliberately violated by Obasanjo led civilian government. In a similar event in February and May of 2016, over a hundred and fifty members of the Indigenous People of Biafra (IPOB) were killed by the Nigerian security forces.⁵⁵⁰ Dissatisfied with the state of affairs in Nigeria,

⁵⁴⁴ Bonaventure I. Ozoigbo, 'Democracy and Human Rights in Nigeria: A Critical Enquiry' (2017) 5 Global J. Arts, Humanities and Soc. Sciences 5. 29

⁵⁴⁵ Ibid

⁵⁴⁶ Philip C Aka, 'Nigeria Since May 1999: Understanding the Paradox of Civil Rule and Human Rights Violations under President Olusegun Obasanjo' (2003) 4 San Diego Int'l Law J. 1. 34

⁵⁴⁷ Such legal instruments like the United Nations Framework Convention on Climate Change (e.g., the Kyoto Protocol 1997 and Rio Convention 1992), the Vienna Convention for the Protection of the Ozone Layer, Convention on Biological Diversity (CBD), Nairobi, 1992, among other things.

⁵⁴⁸ Ibid

⁵⁴⁹ Human Rights Watch, "World Report 2009: Events of 2008 (Human Rights Watch, 2009) p. 98

⁵⁵⁰ Amnesty International Report titled "Deadly Repression of Pro-Biafra Activists". Available at <http://www.amnesty.org/en/documents/afr44/2016>. Accessed 24th November 2020.

the victims went to the streets peacefully demanding for freedom and independence. Sadly, over a hundred and fifty of them were killed. Successive civilian governments have been implicated in the violation of the citizens' constitutional right to life. Also, the case of Zaria massacre is a reprehension worthy of mention here too. On the 12th of December 2015, the Nigerian Army acting on the instructions of the Buhari led civilian government shot at the members of Islamic Movement of Nigeria (IMN) killing at least 348 of them and burying them in a mass grave.⁵⁵¹ The army claimed that they were reacting to an assassination attempt on the Chief of Army Staff, Yusuf Buratai. This claim has been strongly disputed by the members of IMN and other civil society groups (Amnesty International, Socio-Economic Rights and Accountability Project, Open Society Justice Initiative, Basic Rights Action, Muslim Youth Initiative, Human Rights Watch, among others) who argued that the killings occurred without any form of provocation from IMN.⁵⁵² This incident is adjudged by scholars as one of the most outrageous violations of right to life guaranteed by section 33 of the constitution since the return to civil rule.⁵⁵³

Similarly, the killing of many innocent citizens during the ENDSARS nationwide protest that took place in October 2020 is one of a kind. Nigerians, comprising mainly of young people took to all the major streets in the nation, protesting against the notorious defunct Special Anti-Robbery Squad (SARS), a department of the Nigerian Police.⁵⁵⁴ The protest later escalated to an extent where the dissenters started demanding for the resignation of the President, end to bad governance, accountability from public officials, among other things. Nonetheless, the protest grew bigger and was hijacked by suspected government hoodlums resulting in serious violence and destruction of properties. The protest was ended by the killing of many protesters at Lekki Tollgate Lagos, by a group of Nigerian soldiers on the order of the Buhari led Federal government.⁵⁵⁵ There is a reason for the action of the ENDSARS protesters, the reason was the violation of their fundamental rights (right to life and dignity of person) as per chapter four of the constitution, by the police. Hence, the cruel methods of a supposedly civil regime on the lookout to kill or violently disperse civil protests by citizens in Nigeria, has been chronicled in

⁵⁵¹ Report of the Judicial Commission of Inquiry into the Clashes between the IMN and the NA in Zaria. <https://kdsg.gov.ng/kdsg-releases-zaria-inquiry-report>. Accessed 23rd January 2022.

⁵⁵² 'Zaria Violent Clash: Army, Shiite sect trade blames' Vanguard Newspaper of 12th December 2015.

⁵⁵³ A. Carl LeVan and Patrick Ukata, *The Oxford Handbook of Nigerian Politics* (OUP 2018)

⁵⁵⁴ T. Makinde, 'EndSARS Protests in Nigeria show that the youths want change now'. Available at <https://gal-dem.com/endsars-protests-in-nigeria-change.html>. Accessed 14th June 2021

⁵⁵⁵ "How the End Sars protests have changed Nigeria forever - BBC News." @ <https://www.bbc.co.uk/news/world-africa>. Accessed 14th June 2021.

Okafor's work.⁵⁵⁶In all of the events reported above, the various civilian administrations are in clear violation of the fundamental rights to life guaranteed by the constitution. Also, all the cases contain elements of crime against humanity as per article 7 of Rome Statute of International Criminal Court.⁵⁵⁷and also evidence of bodily harm as per article 1 UN Convention against Torture. Therefore, these attitudes exhibited by the officials violate both the constitution and international law.

A classic instance of gross violation of the Constitution, precedent and international law was the case of *Shugaba v Minister of internal affairs*.⁵⁵⁸ In this case, the plaintiff was the majority leader of Bornu House of Assembly. He was declared an illegal immigrant by the government of President Shehu Shagari and deported to Chad Republic by the Federal Minister of Internal Affairs, Alhaji Yusuf Maitama. The reason for his deportation was that his father hails from Chad Republic and also, that the plaintiff poses a serious security threat to the country.⁵⁵⁹ These allegations are weighty, and the constitution will ordinarily demand fair hearings before commencing any process of deportation. Prior to the plaintiff's deportation, he argued that he was a citizen of Nigeria and demanded that his case be thoroughly investigated. The President Shagari and his minister shoved his claim away and still had him dumped in Chad. He filed for the enforcement of his fundamental rights as per section 42 of the 1979 constitution at the Borno State High Court. Also, he sought compensation for the breach of his rights against deportation as contained in section 38 of the same 1979 constitution. The court held that his deportation was a violation of section 38 of the constitution and awarded the sum of three hundred and fifty thousand naira to him as compensation. The judgment of the High Court was upheld by the court of appeal upon appeal by the minister. Despite the decision, the president and his minister remain obstinate in complying with the decision and the constitution. Notwithstanding that the International Convention on the Protection of the Rights of All

⁵⁵⁶Obiora C. Okafor, 'Remarkable Returns: The Influence of a Labour-led Socio-Economic Rights Movement on Legislative Reasoning, Process and Action in Nigeria, 1999 – 2007' (2009) 47 J. Modern African Stud., 15. 259-64

⁵⁵⁷ The definition of crimes against humanity differs to some extent according to treaties, but with regards to customary international law the phrase 'crimes against humanity' involves a list of serious human rights violations carried out as part of a widespread or systematic violence by a government against civilian population. See Rodney Dixon, 'Crimes against humanity', in Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (3rd edn., Routledge 2015) 122. See also, William A. Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, CUP 2009) 172, 241.

⁵⁵⁸ [1981] 2 NCLR 459

⁵⁵⁹ Ben Nwabueze, *Constitutional Democracy in Africa* (Spectrum Books 1985) 205

Migrant Workers and Members of Their Families⁵⁶⁰ was not in existence as at this time, there were several other international legal instruments that covered the protection of the human rights of all persons, regardless of the person's nationality or origin.⁵⁶¹ Nigerian officials' deviation from its obligation under the constitution and international law makes one to conclude that civilian officials do not take the internal point of view towards the rules of recognition.

Furthermore, section 35 of the 1999 CFRN guarantees the basic rights of every citizen and alien to personal freedom and liberty. It further provides that nobody (citizen or alien) should be detained for more than 48 hours without the permission of the Magistrate. The implication is that whoever is detained unlawfully for more than the given time, could bring an application for his release under section 287 of the same Constitution. But due to the unreflective attitudes of Nigerian officials towards the Constitution and as well as the various court orders that demand their conformity to the provisions of Constitution, these officials have refused to follow the authoritative rules often. Recently, in *Kanu v Federal Government of Nigeria*⁵⁶² where the court granted the plaintiff constitutional bail several times, but the Director of SSS refused to comply with the directives of the court. The plaintiff was unlawfully detained for about two years before international pressure led to his release. In recent times, there are many similar situations where the executives outrightly disregarded constitutional orders of the court. Some of these cases are *Sambo Dasuki v FGN*,⁵⁶³ *FGN v Agba Jalingo*⁵⁶⁴, *FGN v Omoyele Sowore*⁵⁶⁵, *A.G Federation v Islamic Movement of Nigeria & Ors*,⁵⁶⁶ among others. An official that flagrantly disobeys court order, especially an order on constitutional matter, cannot be said to take the internal point of view because disobedience suggests refusal to accept the law and the authority behind it. It is as though refusal to comply with court order has become a norm among Nigerian officials, the most striking of these cases is *A.G Lagos State v A.G Federation*⁵⁶⁷ where an order of the Supreme Court for the release of Lagos State Local Government's statutory monthly allocations was deliberately disobeyed by the administration of President Olusegun Obasanjo. The Supreme Court relying on section 165 of the Constitution

⁵⁶⁰ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, U.N. Doc. A/RES/45/158 (July 1, 2003)

⁵⁶¹ For example, the UDHR, ICCPR and ICESCR,

⁵⁶² Suit No FHC/ABJ/CS/873/2015

⁵⁶³ (ECW/CCJ/JUD/23/16) [2016] ECOWASCJ 54.

⁵⁶⁴ FHC/CAL/308/2019 (unreported)

⁵⁶⁵ FHC/ABJ/CS/909/2019 (unreported)

⁵⁶⁶ FHC/ABJ/CS/876/2019

⁵⁶⁷ [2003] 12 NWLR pt. 833

and the Allocation of Revenue (Federation Account, etc.) Act No.1 1982 which is a product of the same constitution, ruled that the Federal Government should immediately release the monthly monetary allocations of Lagos State Government illegally withheld for several months. The then president, Obasanjo vehemently refused to comply with the constitutional order of court.

In the view of Hart, the most important factor in a legal system is the “rule of recognition,” which is meant to be an ultimate social rule that is accepted as binding by all, especially the officials in the system.⁵⁶⁸ The rule of recognition stipulates the ultimate requirements of legal validity for every legal system. The viability of the rule of recognition is dependent on how much the officials take a uniform internal point of view towards it and consider it as an evaluative standard for assessing the regularity of their conducts.⁵⁶⁹ However, in all of these cases, the Nigerian officials have not exhibited any behaviour suggestive of approaching the rules of recognition from an internal point of view. For if the officials think that they ought not obey the law, then indeed such officials will not find any justification to demand conformity and criticisms from deviants. It follows that, Nigerian officials, having undermined the constitution, precedents, and international law as rules of recognition, taking the internal point of view towards it becomes a mirage. It is a form of analytic proposition that the acknowledgement and compliance to the criteria of the rule of recognition necessitates a uniform internal point of view towards the rule, but it does not follow here

4.3 Attitudes of Parliamentarians towards the Rules of Recognition

Turning to officials in the congress, I aim to examine the remarkable cases and events that involve their attitudes towards the rules of recognition in Nigeria. Hence, In the case of *Nasir El Rufai v Senate*,⁵⁷⁰ the appellant was the Minister of Federal Capital Territory (FCT) between June 2003 and May 2007. Some members of the public petitioned him to the senate claiming that, the appellant, while in office, embezzled a certain amount of money and unlawfully obtained a luxurious home for himself. The senate after investigation, declared the applicant persona non-grata in the parliament. The appellant challenged the decision and brought an application to the Federal High Court under section 36 (1) of the Constitution for the violation of his right to fair hearing by the legislative arm of government. The Federal High Court

⁵⁶⁸ Hart (n 9)90

⁵⁶⁹ Shapiro (n 197) 238-9.

⁵⁷⁰ (2016) 1 NWLR part 1497. P.507

dismissed his case as lacking jurisdiction. However, the Court of Appeal upheld his application and declared the action of the senate unconstitutional and afoul of the principles of the pillar of justice enshrined in the rule of recognition. In what follows, the senate refused to revert themselves despite the intervention of the court. The attitude of the congress men violates the ultimate rule of the system which they swore to keep. The latest instance of lawmakers disregarding constitutional order is in the case of *Jarigbe Agom v Stephen Odey*⁵⁷¹ where the Supreme Court declared the complainant as the rightful candidate and winner of a senatorial election in Cross River State, and subsequently ordered the Senate President to have him sworn in accordance with the constitution. The President of the Senate, however, outrightly refused to comply with the order.

In investigating the attitude of lawmakers towards international law, the case of *Momoh v President of the Senate*⁵⁷² stands as the most authoritative representation of this point. This case centres on freedom of expression. Freedom of expression as contained in section 39 of the 1999 constitution is one of the most fundamental rights of Nigerians because of its relevance in driving democratic liberty. Most importantly, is also protected under the Universal Declaration of Human Rights (UDHR) and the various international treaties and conventions which Nigeria is a signatory, including the African Charter that has been domesticated.⁵⁷³ Accordingly, article 19 of UDHR provides thus: ‘Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinion without interference and to seek, receive and impart information, and ideas through any media and regardless of frontiers’. In a similar vein, sections (1) and (2) of Article 19 of the International Covenant on Civil and Political Rights (ICCPR) provides for the right to freedom of expression as follows.

Everyone shall have the right to hold opinions without interference.
Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or print in the form of art or through any other medium of his choice.

Furthermore, article 9 of the African Charter provides that ‘every citizen shall have the right and freedom to receive, express and give out information without any form of compulsion or

⁵⁷¹ SC/CV/1055/2020

⁵⁷² [1981] 1 NCLR. p.105

⁵⁷³ The Nigerian constitution, especially chapter iv which deals extensively with citizens’ fundamental human rights draws a good deal from the Universal Declaration of Human Right. See Osita N. Ogbu, *Human Rights Law and Practice in Nigeria: An Introduction* (Enugu: CIDJAP Press 1999) 183-5

undue duress. In explicating the scope of freedom of expression contained in the constitution and the various international legal instruments, the apex court, in *Olubunmi Okogie v A.G Lagos State*⁵⁷⁴, held that freedom of expression involves unreserved right to receive and disseminate information through any medium (whether orthodox mass communication or new media) including schools. However, the officials of the parliament meant to be custodians of this fundamental rights have been implicated in breaching the provisions of this international law that guarantee freedom of speech and expression in Momoh's case where a journalist who earlier exposed the corrupt practices rocking the congress, received threat of punishment from the congressmen and was also coerced to divulge the source of his information. This behaviour of the parliamentarians violates the constitution and the international legal instruments mentioned above. Also, at the time of writing this thesis, there are two bills before NASS concerning freedom of expression of the citizens contrary to section 39 of CFRN 1999 and the various international legal instruments cited above. The first one is the 'Independent National Commission for the Prohibition of Hate Speeches Bill' popularly known as the 'Hate Speech Bill'⁵⁷⁵ sponsored by Senator Aliyu Abdullahi. Although, the bill is still at the second reading stage, it has already received several domestic and international condemnation for proposing life imprisonment or death sentence as punishment for hate speeches.⁵⁷⁶ The second of these bills is the 'Protection from Internet Falsehood and Manipulations Bill' which is being sponsored by Senator Mohammed Sani Musa.⁵⁷⁷ While the first bill seeks to regulate what people say against others and the government officials, the second bill aims to prohibit the transmission of information that affects Nigeria's external relations, outcomes of elections and such information that diminishes public confidence in the performance of duties by the government.⁵⁷⁸ Many perceive the bills as an attempt by parliamentarians to gag critics and limit the freedom of expression of citizens, a fundamental human right contained in both the constitution and several international treaties to which Nigeria is party.⁵⁷⁹ This behaviour obviously demonstrate that the lawmakers do not actually take the internal point of view towards the ultimate rules.

⁵⁷⁴ [1981] 2 NCLR 625

⁵⁷⁵ FRN National Assembly's Bill Tracker. Available at <https://www.nassnig.org/documents/bills/10613.html> accessed on 23rd January 2021

⁵⁷⁶ Mohammed Abdullateef, 'Regulating Social Media in Nigeria: A Quantitative Perception Study' (2021) 2 Nile J. Pol. Science 1. 53-54

⁵⁷⁷ N. E. Osuigwe, 'Social Media Regulations and the Library in Nigeria', (2019) 3 Lib. Research J. 1. 16

⁵⁷⁸ Ibid

⁵⁷⁹ P. N. Ndubueze, *Cyber Criminology: Contexts, Concerns, and Directions* (ABU Press Nig. 2018) 34-8

This disregard for the rules of recognition in Nigeria is not exclusive to the federal legislators, the congressmen at the level of the states have also exhibited same attitudes towards the rules of recognition. Thus, in *Inakoju v Adeleke*⁵⁸⁰, a legislative arm of government unacceptably disparaged the provisions of the constitution as stipulated in section 188. The matter is about unconstitutional removal of Governor Rasheed Ladoja by some members of Oyo State House of Assembly influenced by a popular politician, Alhaji Lamidi Adedibu. The plaintiff challenged his impeachment at the High Court Ibadan, but the defendants used their influence to persuade the court to decline the plaintiff's application on grounds of jurisdiction. Ladoja being dissatisfied with the judgment and most especially, the behaviour of the lawmakers, appealed the decision. The Court of appeal described the action of the lawmakers as shameful and a deliberate breach of the Constitution. The appellate court held that the plaintiff was unconstitutionally removed and as such, he remains the Governor of Oyo State. The lawmakers rejected the decision of the appellate court and headed to the Supreme Court. The apex court upheld the decision of the court of appeal. This case is a locus classicus on how lawmakers grossly disregard constitutional provisions and procedures in carrying out impeachment.

Also, in *Elder Friday Sani v Kogi State House of Assembly*,⁵⁸¹ the defendant interfered with the process of nominating a minority leader as stipulated by section 90 of the Constitution. The plaintiff was unconstitutionally suspended from the parliament of Kogi State because he vehemently opposed the unlawful act by the lawmakers. He challenged his suspension at the High Court in Lokoja by way of originating summons and prayed the court to squash the suspension and reinstate him. His prayers were granted by the High Court. The defendant being dissatisfied with the decision, proceeded to the Court of Appeal. The appellate court set aside the judgment of the High Court on the grounds that the suspension was duly complied with. The plaintiff headed to the apex court to challenge the judgment of the Court of Appeal. The Supreme Court declared the action of Kogi State House of Assembly as completely contrary to the spirit and letter of the Constitution. The apex court ordered the plaintiff's reinstatement and payment of all his remunerations. Unfortunately, the Speaker House of Kogi State House of Assembly neither reinstated the plaintiff nor paid him his remunerations. In fact, Kogi State House of Assembly is notorious for violating the Constitution and discountenancing judicial orders. In a recent case of *Simon Achuba v Kogi State House of Assembly & 29 ors*,⁵⁸² the defendants commenced an impeachment proceeding against the plaintiff. The panel that

⁵⁸⁰ (2007) 4 NWLR (pt.1025) 423.

⁵⁸¹ (2019) LPELR-46404(SC)

⁵⁸² Suit No: HCL/53/2019

investigated the plaintiff did not find him wanting of the allegations levelled against him by the defendants. In such situation, by the virtue of section 188 of the Constitution, the ghost of the impeachment ought to be laid to rest. Unfortunately, the defendant went ahead and removed the plaintiff as the Deputy Governor contrary to the provisions of section 188 of the Constitution. The court declared the action of the lawmakers unlawful and unconstitutional.

There are many other cases in which the legislative arm of government outrightly disregarded the Constitution and disobeyed court orders in the exercise of their official duties. Some of these cases are *M.O Oloyo v Speaker Bendel State House of Assembly*,⁵⁸³ *Dapialong & Ors v Dariye & Ors*,⁵⁸⁴ *Eyinaya Abaribe v Abia State House of Assembly*,⁵⁸⁵ *Nasiru Ajana & Anor v Kogi State House of Assembly & Ors*,⁵⁸⁶ among others. These points are illustrated in the context of the attitudes of the Nigerian elected officials' attitudes towards the ultimate rule. To voluntarily accept the rule is assumed as approaching it from an internal point of view.⁵⁸⁷ If one understands 'acceptance of the law' strictly in the context of Hart's internal point of view, then it includes demands for conformity and justification of the criticisms of participants who obey. So, how can one imagine then that an official could obey the law and at the same time see no reasons for its acceptance? This takes me back to my initial worry of what people do as distinct from what they say. It is difficult to know if officials take internal point of view toward the law simply because they obey the law. Holton argues that obedience to the law does not connote acceptance, since it is possible to discard the authority of the law and still obey the law for certain prudential reasons.⁵⁸⁸ As argued earlier, disobeying, or refusing to comply with a law by an official expressly implies the fact that he neither accepts the law nor the authority of the law. From the cases analysed so far, it is safe to say that disregard for the rule of recognition is as prevalent among the legislative officials as it is with the executive officials. The implication is that legislators have not taken a common internal point of view towards the rule of recognition too.

4.4 Attitudes of the Judges

Every single attempt at investigating the performance of the Nigerian judges in respect of their adjudicatory and law-making roles, either during the military regime or democratic rule,

⁵⁸³ (1983) SC/94/1982

⁵⁸⁴ (2007) 8 NWLR part 1036. p. 332

⁵⁸⁵ (2002) 14 NWLR part 788. P. 466

⁵⁸⁶ Suit No: HC/KK/11CV/2018

⁵⁸⁷ Hart (n 9) 56

⁵⁸⁸ Holton (n 178) 4

produces several results of judicial collaboration in the subversion of a common perspective or internal point of view towards the legal system. Here are a few instances of such investigations.⁵⁸⁹ Let me start with the study of the Nigerian judiciary carried out shortly after independence by Ezejiofor. He observes that the judges were implicated in the failure of the First Republic because of their inability to approach the construction of the Constitution from a uniform or common dispassionate point of view.⁵⁹⁰ The implication of this kind of judges' attitude for the larger society was the disenchantment by the citizens in the judiciary. He argues,

The unwillingness to approach the court was due to the restrictive way the judiciary handled cases. Therefore, there was a sharp decline in the number of reported constitutional matters after 1962. The evidence of this is that only a single statute was voided and declared unconstitutional and that was the case of *Balewa v Doherty*. The judges feared taking active intervention in the construction of the constitution in a liberal spirit, because it will result in an open confrontation with the politicians. By implication, many of the judges were anxious to give judgments in favour of the government and their supporters, then find arrangements to justify those judgments later.⁵⁹¹

This Ezejiofor's survey of the performances of the judges shortly after independence implicates their shared internal point of view towards the constitution. The attitude of these judicial officials anticipated the disregard for the constitution by the later military and civilian regimes. This Ezejiofor's claim was corroborated by Nwabueze's study of the performance of the judges among the English-speaking African countries.

The picture that emerges is that of an abysmal performance by the judiciaries in the commonwealth African countries, e.g Tanzania, Kenya, Botswana, Zimbabwe and Zambia, no legislation whatsoever, has ever been declared unconstitutional by the judges. In Nigeria, notwithstanding the Federal arrangement, only twice has Constitutional provisions been declared invalid by the court.⁵⁹²

⁵⁸⁹ It is curious that the several Courts from which conflicting judgments and judicial attitudes emanated deliberately refused to be guided by the Constitution and judicial precedents. For example, in January 2016, there were three conflicting judgments emanating from three divisions of Federal High Court at the same time; the first from Abuja division declared Ali Modu Sheriff as chairman of Peoples Democratic Party, the judgement of PortHarcourt division recognised Ahmed Makarfi as the chairman of the same party, while the verdict from Lagos court pronounced Jerry Gana as the PDP chairman. Similarly, the Courts gave conflicting decisions in the gubernatorial case of Uche Ogah v Okezie Ikpeazu FHC/ABJ/CS/71/2016. To be sure, it is difficult to find how these judicial officials are taking the internal point of view not to speak of taking a common internal point of view.

⁵⁹⁰ Gaius Ezejiofor, 'A Judicial Interpretation of Constitution: The Nigerian Experience during the First Republic' in A. B. Kasunmu (ed.) *The Supreme Court of Nigeria 1956–1970*, (Ibadan: Heinemann 1977) 67

⁵⁹¹ Ibid 87

⁵⁹² Nwabueze, (311) 308

Regarding that of Nigeria, Nwabueze argues that the courts ruined their legitimating role by subverting the legitimacy of governmental measures and eroding the foundation of public confidence in its judgments. He further states ‘the attitude of the court this time seems like it was aiding the politicians to deal with their opponents and at the same time the subversion of the constitution.’⁵⁹³ Hence, in the case of *Ojiegbe & Another v Ubani & Anor*⁵⁹⁴ the court was called upon to determine whether holding of general elections on a Saturday violates the petitioner’s constitutional rights to vote. The petitioner being a member of the 7th Day Adventist Church felt that putting election on a Saturday implies that he would not be able to vote because his church forbids voting on a sabbath day. The court was equally called upon to determine whether this INEC’s act encroach on the petitioner’s constitutional rights to freedom of conscience and religion. The Federal Supreme Court held that assuming all the members of the said church could vote, their votes would not determine the outcome of the election. The court seems not to care about the questions of constitutional breaches raised here, rather the court was more concerned with the outcome of the election. Considering the constitutional questions raised in this case, the proper thing for the court to do was to determine whether putting a general election a Saturday infringes the constitutional rights of the petitioners. Here the court refused to take an internal point of view towards the constitution and at the same refuses to demand conformity to it from the officials (executives) who were alleged to have breached the constitution. The judiciary plays a fundamental role in demanding conformity from other officials (legislative and executive) to the rules at the various levels that they are generated or reinforced, most especially the rule of recognition. This is a theme that resonates throughout this research. While there are some socio-political and legal challenges for the judges in applying the rule of recognition, the genuine way out is to seek a shared internal point of view from themselves towards the constitution and criticise or chide the actions of the executives who fail to comply with the constitution.

The court took the same approach to the constitution in *Williams v Majekodunmi*⁵⁹⁵ and *Adegbenro v A.G Federation*.⁵⁹⁶ The main legal issue for determination in these cases was whether sedition as contained in the Criminal Code contradicts the constitutional rights of the plaintiffs to freedom of expression. The court held that the supremacy provision of the

⁵⁹³ Ibid

⁵⁹⁴ [1961] 1 All NLR 277

⁵⁹⁵ Supra

⁵⁹⁶ Supra

Constitution as well as the fundamental right of speech and expression cannot invalidated the law of sedition. A critical assessment of this judgment reveals that the court tried to elevate a mere Act (Criminal Code) above the Constitution which ought to be considered as the rule of recognition. The implication is that other officials may hide under the other rules and claim the justifications to disregard the rule of recognition. Invariably, there will be conflicting instructions from the officials to the citizens which can result to confusion and ineffectiveness in the legal system. I argued earlier that the functionality of a legal system is premised on a shared view taken by the officials towards the rule of recognition within the legal system. This explains why the unconstitutional behaviours of officials, especially the judges are deemed responsible for the ineffectiveness of the Nigerian legal system.

Granted that court has acted unconstitutionally several times in the past, however, on some occasions, the court has stood firmly demanding conformity to the Constitution and expressing a critical view for their refusal to conform. The cases of *Gokpa V Inspector General of Police*⁵⁹⁷ and *Olasoji v A.G Western Nigeria*⁵⁹⁸ represent such occasions. But without having a common approach or what Hart calls ‘shared internal point of view’ towards the Constitution, there will be confusion in the legal system. The challenge of conflicting judgement is one of the biggest problems facing the Nigerian legal system today.⁵⁹⁹ In Chapter one, I mentioned *Agbaje v Fashola*⁶⁰⁰ and *Fayemi & ors v Oni & Anor*⁶⁰¹, where the question of law to determine by the court in both cases concerns whether the negligence of INEC in an election could affect the parties/candidates in the election. The Court of Appeal held in the former’s case that parties/candidates should not be vicariously liable for INEC’s negligence but held in the latter’s that parties/candidates could be affected by INEC’S negligence as per the Electoral Act, 2006. Similarly, in *Amosu v INEC*,⁶⁰² the Court of Appeal presided by Justice M.L Garuba dismissed the appeal of Amosu on the basis Tunde Yadeka was not a forensic expert. Two months after, the same *Court of Appeal*, in *Aregbesola v Oyinlola*⁶⁰³ which had the same facts, upheld the appeal of the applicant on the grounds that Tunde Yadeka was a forensic expert. The most

⁵⁹⁷ [1961] All NLR 423

⁵⁹⁸ [1965] NMLR 111

⁵⁹⁹ In a statement which unveiled the negative impacts of conflicting court decisions on Nigerian democracy, the Chairman of INEC, Mahmud Yakubu, complained: ‘within three months, we received 11 court judgments and orders, almost all of them conflicting, from courts of coordinate jurisdiction. In fact, in two days, 15th and 16th of this month, we received one judgment and three court orders from courts of coordinate jurisdiction. It is really a huge challenge.’ The Daily Times Newspaper of 29th January 2019.

⁶⁰⁰ Supra

⁶⁰¹ Supra

⁶⁰² CA/I/EPT/GOV/01/2009

⁶⁰³ (2010) 9 NWLR (pt.1253) 458 at 596

striking of these conflicting judgments was the case *Faleke v INEC & Anor*⁶⁰⁴ where the Supreme Court held per Kudirat Kekere-Ekun JSC that gubernatorial tickets between flagbearers and running-mates are not joint tickets, and as such the appellant being the running-mate to the deceased, cannot benefit from his votes. However, in a sharp contrast to the above judgment, the Supreme Court per Mary Odili JSC held in *PDP & Ors v Biobarakuma & Ors*⁶⁰⁵ that gubernatorial tickets are joint tickets, and the benefits/liabilities must be jointly shared by the flagbearers and their running-mates. Thus, the gubernatorial flagbearer of All Progressive Party who won the election in Bayelsa State was sacked because the respondent who was his running-mate submitted a phoney degree certificate. These conflicting decisions send a wrong signal to the members of the public, thereby weakening the cohesion of the legal system.

This study discovered that the Nigerian officials pay mere lip service to the Constitution as the ultimate rule, they do not regard it as a rule of recognition. Impliedly, it has affected their common internal point of view towards the Constitution and other laws. To sum up this section: it is sacrosanct that judicial officials determinately avoid blatant disregard for the provisions of the Constitution and take a uniform internal point of view towards it as the rule of recognition. The way to demonstrate a shared or uniform internal point of view towards the Constitution and allied statutes, is by ensuring a consistent and impartial interpretation of the provisions therein. The commitment to a consistent and fair construction of the Constitution by the officials is contingent on the fact that, the judges, unlike the officials under the executive arm, do not have the coercive machinery to implement their judgments. A good part of their power will come from the uniform internal point of view which they take towards the laws. Even though Hart would not be willing to accept, I consider this as moral authority. This moral authority is procured with the goodwill of the citizens and the confidence they have in the judiciary. When the judges fail to take the shared internal point of view towards the law, they become even more vulnerable to executive recklessness and legislative overbearing.

4.5 Findings: The possibility of a Uniform Internal Point of View?

According to Hart, the continuous existence of a legal system is only possible when the state officials approach the secondary rules of obligation from a collective or shared perspective and do so from an internal point of view.⁶⁰⁶ Otherwise, the information from the legal system to the ordinary citizens will be medley of contradictory orders or directives and as such, be at the

⁶⁰⁴ (SC. 648/2016) [2016] NGSC 84(30/09/2016)

⁶⁰⁵ App. No CA/A/1053/2019- SC. 1/2020

⁶⁰⁶ Hart (n 2) 115

risk of becoming invalid, inadequate, powerless, dysfunctional, and imperative. The affirmation of Hart on this point is that officials ought to have a common or uniform view and acceptance of these secondary rules, especially the rule of recognition. In analysing this idea, I unearthed two variables in this Hartian claim; first, officials ought to possess a common approach or view towards the secondary rules. Secondly, they ought to accept it as a general standard of behaviour. The interpretation to the first variable is that the official's approach to the secondary rules must be a uniform approach, because the existence of a modern legal system is dependent on consensus view taken by the officials towards the rules of recognition.⁶⁰⁷ I observed that Hart was interested in the uniformity of officials' internal point of view towards the secondary rules of recognition in order to have an overall stable and effective legal system.⁶⁰⁸ The second variable which is 'acceptance' appears somewhat confusing as equally indicated in chapter two and three of this study. Since the ontological value of the rule of recognition is dependent on all or almost all the members of the group taking the internal point of view, and also since Hart claims that the members of this group are mainly the officials, it implies that a legal system like that of Nigeria cannot be ontologically certain unless all or most of Nigerian officials take an internal point of view towards the rule. This study discovered among other things in chapter three that Nigeria public officials, for most of the times, claim to accept the ultimate rules of recognition via oath of office, passing of laws, signing or ratification of international legal instruments, etc., but their practical attitudes as discovered in this chapter do not reflect what they say. Since Hart did not specify the kind of acceptance that needs to be taken,⁶⁰⁹ I drew the conclusion in chapter three that official may bring about the existence of a rule of recognition by simply accepting it even if they do not always, in practice, behave in accordance with its principles.⁶¹⁰ However, in the case of the entire legal system, what officials actually do is important in birthing a modern legal order. The distinction I made between acceptance based on what people say and acceptance based on what they do is clearer if one focuses on the reasons public officials have for accepting the

⁶⁰⁷ Ibid

⁶⁰⁸ Perry and Shapiro agree with this observation in their explanations of the roles of internal point of view. see Perry (n 163) 1172 and Shapiro (n 223) 1157

⁶⁰⁹ Galligan (n 5) 96-7

⁶¹⁰ Webber maintains this view as well and considers 'what people say' as sufficient form of acceptance. See Max Webber, *Economy and Society* (G. Roth and C. Wittick eds. CUP 1968) 312. Also, the acceptance based on conventionalism which Hart talked about does not require a corresponding practical behaviour to accepted rules. A detailed explanation on Hart's conventionalism and general legal conventionalism can be found in the works of David Lewis, *Convention: A Philosophical Study* (HUP 1969). Coleman (208) 226; Green (n 160) 89-121; Andrei Marmor, 'Legal Conventionalism', in Jules L. Coleman ed., *Hart's Postscript: Essays on the Postscript to The Concept of Law*, (OUP 2001).

fundamental rules of the legal system. There is no way anyone can talk about the intelligibility of internal point of view without implicating normativity. As Coleman observes, ‘the distinctive feature of law’s governance on this view is that it purports to govern by creating reasons for action’.⁶¹¹ Raz also asserts that ‘the law claims that the existence of legal rules is a reason for conforming behaviour’.⁶¹² Indeed, the idea for this kind of argument was taken from Perry who also thinks that Hart’s non-cognitivist account of the meaning of legal statements is grounded on the notion that the most plausible understanding of the normativity of law appears to be expressing a standard of conduct instead of demonstrating the law’s ability to establish normativity that in turn creates reason-givingness.⁶¹³ On the basis of this, I argue that the practical reason internal point of view defines what the officials actually do rather than what they claim to do. Hence, in what follows, I sought to test the first variable against the attitude of the Nigerian officials to determine whether they actually take the internal point of view towards the rules of recognition in Nigeria. A logical way to determine whether the Nigerian officials’ take a uniform internal point of view was to assess their level of compliance with the extant fundamental laws, which were identified in chapter three as the standards that constitute the rules of recognition. This is how I did it, if the president, senators, judges, chief law officers, among others decide to deliberately violate the constitution, it is hard to claim that such officials are demonstrating an internal point of view towards Nigerian rules of recognition. I argued in the preliminary objections that the reason for privileging disobedience to the rules of recognition by the Nigerian officials over their obedience to the rules was because reasons for obedience do not always include acceptance of the authority of rule, but reasons for disobeying the law must necessarily imply the refusal to accept the authority of the rule. Thus, drawing from several landmark cases and events involving public officials and their attitudes towards the constitution, judicial precedents, and international law, I probed to know if the extent of noncompliance with these fundamental rules. The findings from the analyses of these cases and events reveal that officials at all levels of government (executives, legislatures, and judiciary) exhibited an egregious attitude of disobedience or disregard towards the rules of recognition in Nigeria.

⁶¹¹ Jules Coleman, *Hart’s Postscript* (Clarendon Press 2001) 71. Pojanowski and Miller also hold similar view, see Jeffrey Pojanowski and Paul Miller, ‘Internal Point of View in Private Law’ [2021] 67 *American J. Jurisprudence*. See also, Chris Essert, ‘Legal Obligations and Reasons’ [2013] 19 *Legal Theory*. 1-24

⁶¹² Raz, ‘The Authority of Law’ (n 112) 30

⁶¹³ Stephen Perry ‘Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View’ (2006) 75 *Fordham Law Review* 3. 1173

An important point to clarify here is whether all apparent disregard for the rules of recognition by Nigerian officials can count as lack of acceptance and invariably, a refusal to take internal point of view towards the legal system. In a legal system, there ought to be a uniform approach towards the rules of recognition, which invariably is the practice of having collective recognition of the legal system's fundamental rules. It is a social and moral practice because it is performed (at least in part) for both social and moral reasons. Of course, this is the idea of normativity I explained in chapter. Officials' social and moral reasons to common acceptance that their rules of recognition exist consist in the fact that other officials accept it too and are expected to do so. This acting on the attitudes and actions of other officials brings about for each official the feeling of being bound to recognize a legal system and all the deontic authorities (e.g., the duty to comply with the norms of the system) that follow from its institutional status. Since officials have both moral and social reasons to accept the existence of a rules of recognition and expect other officials to do so, it is safe to say this practice of common acceptance makes for the existence of a legal system and all apparent deviations by officials are often adjudged as refusal to take the internal point of view. However, it seems that some deviations from the rules of recognition cannot be absolutely considered as lack of acceptance and refusal to take internal point of view towards the rules of recognition -there could be deviations occasioned by mistakes. Indeed, rules are considered as general standards regulating behaviour; therefore, every deviation is a reason for criticism, and not merely the basis for prediction. Occasions of mistake have already been taken care by practical reasoning internal point of view which involves normativity. Of course, normativity implicates the claim about the existence of objective moral reasons for action. So, if it involves reason-givingness, the action of the official can be evaluated to ascertain whether it was a mistake or intentional. Furthermore, there might be refusal to comply on grounds of the depraved nature of the law. I argue that in such circumstance, moral reasoning internal point of view considers nonconformity as equivalent to taking the internal point of view.

Ordinarily, the presumption is that all apparent deviations from the rule of recognition by officials must count as lack of acceptance on their part. It is important to clarify that the cases analysed which reviews that officials do not take a uniform internal point of view towards the Nigerian rules of recognition are not merely occasions of disagreement regarding application of shared criteria. On a point of fact, there is no conceptual possibility that certain officials within the Nigerian legal system accept the existence of rules of recognition without, at the same time, having the belief that the other officials to which this rule of recognition should

relate accept the system as well, and without their existing the mutual belief within the legal system that they all accept the rules of recognition. Those officials who were to accept the rules of recognition without it being mutually believed among all the officials that the members accept the existence of the rules of recognition would not constitute a legal system, but something different from it, since what they purportedly accept and follow does not imply the existence of a system whose officials have mutual we-beliefs that they all (or the majority) recognize that a uniform approach towards the fundamental rules is what is allowed. Since the existence of a legal system involves a shared internal point of view by officials, it implies that disagreements among officials regarding the approach towards the rules of recognition might create more problems for the legal system. Thus, officials ought to recognize the fact that taking a uniform internal point of view towards the rules of recognition is a *sine qua non* for the life of a legal system. The primary norms (property law, family law, electoral Act, industrial law, law of obligations, etc.) created by the rules of recognition have uniform regulation on the lives of the members of the communities, and also, they have a uniform binding effect between individuals and the state (e.g., criminal law, same sex prohibition law, tax law etc.). Thus, if an official interpreting these norms recognises their uniformity in application to all members of the community, then he must recognise the fact that its application ought to be uniform leaving no room for noticeable disagreement. Finally, that the recognition and application of the laws of a legal system cannot be subjective, but objectively uniform in a manner that follows the general standard of conformity. What this means is that a Nigerian official who appreciates the morally objective way of following the fundamental rules of the system, cannot, independently of others, blatantly depart from the generally accepted point of view.

4.6 Conclusion

This study has been able to test Hart's theory of internal point of view against the practice of officials in the Nigerian legal system. Now putting the major outcomes of this research together, what is the submission of this chapter? Do the Nigerian officials really have a uniform internal point view of the Nigerian rules of recognition? As already mentioned above, the study relied more on state laws and other major events that took place in Nigeria. On the basis of what people say, this study found some evidence to show that there exists a possibility of a common internal point of view towards the rules of recognition within the Nigerian legal system. Among Nigerian citizens and officials of government, the conventional view remains that the courts provide the main authoritative interpretations of the law, although there might

be other unofficial approaches (e.g., executive orders and legislative oversight quasi-judicial functions) that are also effective in the determination of matters, but the judges are generally considered as the highest interpreters of the law. For this reason, there are uniform inclinations among Nigeria judges to tenaciously uphold the independence of the judiciary and the binding authority of the courts' decisions serves as evidence in this regard.⁶¹⁴ Nevertheless, the views of officials of the court were contradictory and far from being uniform. The most striking is the case of *Amosu v INEC*⁶¹⁵ and *Aregbesola v Oyinlola*⁶¹⁶ which had exactly the same facts but received different judgments.⁶¹⁷ Thus, the conclusion drawn from examining the attitudes of judges is that they do not take a uniform internal point of view towards the rules of recognition. With regards to the officials in the executive, the presidents, governors, and their attorney generalss tend to undermine the rules of recognition and could even go to the extent of altering or relieving the provisions or obligations of the constitution or international law. They were many instances of outright disobedience to court orders (even those concerning constitutional matters) regardless of any social pressure from the court or civil society groups.⁶¹⁸ Lack of uniform internal point of view was also discovered among the members of the parliament: the striking case that represents this situation was *Momoh v President of the Senate*.⁶¹⁹ Thus, after a careful analysis of these cases and events, this study discovers among other things that Nigerian officials do not take internal point of view towards the rules.

⁶¹⁴The case of *A.G Anambra State v A.G Federation* (2005) 9 NWLR (Pt 929-931) 574 particularly at page 606, *Doherty v Balewa* [1961] 2 NSCC 248 and *Mobil Oil Nigeria Ltd. v Assam* [1995] 8 NWLR (Pt.412) p.129 were instances where the courts took a firm uniform position on the binding force of her judgments as the authoritative criteria of what law is.

⁶¹⁵ Supra

⁶¹⁶ Supra

⁶¹⁷ There were so many similar cases bearing the same facts but contradictory judgments which were analysed in this study also. The reasons for such radical departure from precedents were not really articulated by the courts.

⁶¹⁸ The case of *Ademolekun v Council of University of Ibadan* (supra) and many other cases represent this fact.

⁶¹⁹ Supra

CHAPTER FIVE: IMPLICATIONS OF RULES FOR THE NIGERIAN SOCIETY

5.0 Introduction

In the previous Chapter, this study carried out an analysis of the attitudes of Nigerian public officials in relation to the rules of recognition in the legal system. The study interrogated the attitude of the executives, lawmakers and judges, when confronted a variety of matters centring on the constitution, judicial precedent, and international law. In doing this, I applied internal point of view as a theoretical thread to the behaviour of Nigerian public officials as a way of understanding whether they approach the ultimate rules of the legal system from such perspective. I concluded that in principle, the officials say that they approach the rules of recognition from the internal point of view, in practice however, evidence of officials taking the internal point of view was lacking.

In this chapter I shift attention to other factors in the larger Nigerian society which the outcomes of this study may have direct or indirect implications upon. These factors include legal pluralism, multiculturalism, democracy, and civil disobedience. This study's analysis in this chapter will thus interrogate three important queries: First, how can modern adaptation of the rules of recognition deal with the problems of legal pluralism and multiculturalism in Nigeria? Secondly, to what extent do democratic values depend on the adapted rules of recognition? Lastly, to what extent can civil disobedience in Nigeria be adjudged an internal point of view? In responding to these questions, the major results of this study will be structured according to the objectives stated in chapter one of this study. Mindful of the fact that there are many laws and rules within the Nigerian legal system, the research will explore the problem of legal pluralism and multiculturalism and argue that the rule of recognition has a significant role to play in the resolution of the conflict of laws in Nigeria. In respect of the second question, I will argue that the role of rule of recognition can be located in the core values of democracy if there is a proper acceptance of the ultimate rules by the officials. Lastly, I will argue that the theme of civil disobedience that has become a recurring decimal in Nigeria, can be interpreted along the line of normativity as a form of internal point of view towards the rule of recognition

5.1 The Concept of Legal Pluralism

Tamanaha, asserts that ‘since there are several competing accounts of the meaning of ‘law’, the claim that law exists in plurality leaves us with a plurality of legal pluralisms.’⁶²⁰In this regard, there are different meanings and perspectives of legal pluralism as a new issue in postcolonial jurisprudence. First, Legal pluralism refers to a situation in which there are two or more legal systems or laws in the same social and legal jurisdiction.⁶²¹Ige defines it as the existence of many laws, rules, or legal systems within a particular geographical area.⁶²² In a more detailed form, Hooker writes, ‘legal pluralism describes a situation in modern systems that involves the transfer of an entire legal systems across social boundaries.’⁶²³In this study, legal pluralism means the coexistence of plethora of laws such as common law, customary law, shariah law, civil law, private laws etc in a way that each of these laws bears legitimate authority. Torre once argued that legal pluralism in the strict sense of the word should not be understood as myriads of laws but as heterogeneity of the sources of law.⁶²⁴In other words, legal pluralism should be understood as the various arguments which present before the officials and citizens broad set of reasons for accepting the diverse laws as giving them unique reasons for action.⁶²⁵I do not think this is correct, because, first, if legal pluralism means a differentiation of laws or put differently a multiplication of reasons for holding different sources of law and acting in that right, there is nothing indicative of the claim that this plurality or multiplicity of the sources of law are necessarily interconnected to work harmoniously. Secondly, assuming Torre’s claim were even to be considered, apparently, the harmonious working of indigenous laws with common law would not require a case of interconnected normative pluralism. But the coexistence of various laws implies normative variants too, in one way or the other, there must be normative conflicts among overlapping legal systems. And for the legal system to function properly, these conflicts have to be resolved, or at least there must

⁶²⁰ Brian Tamanaha, ‘A Non-Essentialist Version of Legal Pluralism’, (2000) 27 J. Law and Society 2. 297

⁶²¹ D. Bunikowski, ‘The Right of Indigenous people to their Own Law’ (2015) 1 J. Legal Plur. & Unofficial Law 1. 4

⁶²² Rhoda A. Ige, ‘Legal Pluralism in Africa: Challenges, Conflicts and Adaptation in a Global Village’ (2015) 34 J. Law, Policy and Globalization. 59

⁶²³ M. B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-colonial Laws* (Clarendon Press 1975) 1

⁶²⁴ M. La Torre, ‘Legal Pluralism as Evolutionary Achievement of Community Law’ (1999) 12 Ratio Juris 2. 193

⁶²⁵ Ibid

be normative reasons to have them resolved. Most times it becomes quite obscure how these different sources of law would avoid having a central ultimate rule that could determine their validities. This is why it is difficult to accept Torre's idea of legal pluralism. Hence contrary to Torre, Santos whose idea may be classified as a post-modern approach to legal pluralism, aligns more with this study's conception of legal pluralism. According to the latter, legal pluralism is a coexistence of several laws or rules in a social or legal system which involves an interplay of those laws or rules and the various issues arising from the interactions between them.⁶²⁶ This perspective is equally shared by many other postcolonial scholars whose views of legal pluralism is somewhat in unison and rely on the underlying argument that 'there exist plethora of coexisting laws functioning in a legal system, of which State law is but merely a single aspect of the many existing laws, and sometimes not necessarily the strongest or the most fundamental rule of the society.'⁶²⁷ Indeed, it is at the level of interplay among these rules that problems arise. For example, in *Yinusa v Adesubokan*⁶²⁸ the matter for determination was whether a Muslim testator could by a will created under the Wills Act 1837 lawfully dispose of his assets in a way that contravenes the Islamic law of Inheritance.⁶²⁹ Both the trial court and court of appeal held that the testator's will was invalid because of its inconsistency with Islamic law. Nevertheless, the Supreme Court gave a contrary judgment on the grounds that when a testator makes a will under the Wills Act 1837, he is not encumbered by any Islamic law or customary law. In contrast, however, in *Oke & anor v Oke & Anor*,⁶³⁰ the same Supreme Court ignored the will of the testator and held Urhobo native law and customs to be superior to the Wills Act 1837. By focusing on the numerous laws in the Nigerian legal system, this study intends to highlight the power dynamics that influence and shape the application of laws in Nigerian jurisdiction. Also, this study identifies the specific role the theory of rule of recognition can play in the legal reform that derive from what I will call "legal interbreeding," i.e., from the interaction between legal orders. It is in view of this that we stick to the definition

⁶²⁶ B. D. S, Santos, *Towards a New Common Sense: Law, Globalization, and Emancipation* (Butterworths 2002) 3

⁶²⁷ Hooker (623) 2-10, S.F Moore, *Law as Process: An Anthropological Approach*, (Routledge & Kegan Paul, 1978), M. Chiba, *Asian Indigenous Law in Interaction with Received Law* (KPI, 1986), B. Z. Tamanaha, *A General Jurisprudence of Law and Society*, (OUP 2001) 171, J. Griffiths, 'What is Legal Pluralism?' [1986] 4 *Journal of Legal Pluralism*. M. Chiba, 'Legal Pluralism in Sri Lankan Society: Toward a General Theory of Non-Western Law', [1993] 33 *J. of Legal Pluralism*. W. Twining, 'Diffusion and Globalisation Discourse', (2006) 47 *Harvard Int'l Law J.* 2.

⁶²⁸ [1971] 1 All N.L.R 225

⁶²⁹ The Maliki School of Islamic Jurisprudence is applicable in Nigeria. Under the Maliki law, a Muslim testator is restricted from giving more than one-third of his estate to people that are not his direct heirs. Also, the disposition to the children ought to be fair and equal shares. The will in the above case did not follow these conditions prescribed here.

⁶³⁰ [1974] J.E.L.R 49160 (SC)

of legal pluralism as the coexistence of several conflicting or nonconflicting bodies of law within a single system.

5.2 Implications of Legal Pluralism in Nigerian Legal System

5.2.1 Implications for Criminal Law

Nigerian laws are basically derived from three distinct laws or systems namely, Customary law, Islamic law, and English Common law.⁶³¹ So, legal pluralism happens largely among state laws and institutions due to the complex intercourse between common law, Islamic law, and customary law. The interplay among these legal orders on common subject matters has created a very complicated system of internal conflict of laws too, which in turn causes several controversies and hiccups for the legal system. The bigger controversies often arise in cases involving common law and the indigenous law/Islamic law. As stated earlier, there exist several customs in Nigeria due to the multi-ethnic nature of the country, so there is always the question of which law should apply over disputes concerning English common law and customary law (including the northern part of Nigeria that largely upholds Islamic law as its customary law).

In principle, the question of legal pluralism and consequently conflict of laws appears to have been settled in relation to criminal law. This is because all criminal laws have been reduced into a written document (be it the northern penal code or the southern criminal code).⁶³² However, in practice, the concurrent law-making power as per section 4(5) of CFRN 1999 allows states “to make laws for the peace, order and good government of the state or any part thereof”. Of course, this created a soft ground for the establishment of shari’ah criminal law in the twelve northern states.⁶³³ This introduction of shari’ah criminal law into the larger part of northern Nigeria triggered a serious constitutional and social crises that threatened to rock the sovereignty of the entire nation in the earlier turn of the century.⁶³⁴ Although no court

⁶³¹ As explained in the introduction to this chapter, the reason for this is basically traced to the history of Nigeria and her legal system. As it is in many parts of Africa, the present legal system used in the adjudication of the disputes is a product of colonialism. This explains why the English common law applies till this day in Nigeria, with some substantial modifications by statutes.

⁶³² It is trite law that nobody can be punished for an offence unless it is contained in a written law. see Section 36 (12) of CFRN 1999.

⁶³³ Mohammed H. Bolaji, ‘Between Democracy and Federalism: Shari’ah in Northern Nigeria and the Paradox of Institutional Impetuses’, (2013) 59 African Today, 4.

⁶³⁴ For a more detailed analyses of the extension of shari’ah penal code in Northern Nigeria; its constitutional status, its crises-driven nature, and its impact on human rights, see generally Andrew U. Iwobi, ‘Tiptoeing through a Constitutional Minefield: The Great Sharia Controversy in Nigeria’. (2004) 48 J. African Law 2. M. H. Bolaji, ‘Shari’ah in Northern Nigeria in the Light of Asymmetrical Federalism’ [2010] 40 J. of Federalism. Ogbu U.

was called upon, nor did any court suo motu utilise its powers of judicial review to consider the constitutionality or otherwise of practicing Islamic criminal law. But many legal experts argued that this utilisation of the concurrent powers by the states to extend Islamic criminal law to the penal codes might represent the letter, but certainly not the spirit of the constitution.⁶³⁵ There are several objections to the Islamic criminal law. Of course, Shari'ah law is a form of religious law grounded on the Quran and the various books of the hadiths.⁶³⁶ The implication of adopting and implementing any religious criminal law is synonymous to adopting a state religion, which creates a form of legal pluralism as far as criminal law is concerned and also conflicts with the Constitution. Iwobi questions the constitutionality of shari'ah penal laws in a secular Nigeria.⁶³⁷ In his own words:

It thus appears that the preponderance of opinion supports the view that Nigeria is a secular state. If this, indeed, is the true import of section 10, it seriously undermines the constitutional validity of the reforms initiated by the Governments of the Sharia-compliant states. The architects of these reforms have made it abundantly clear that their paramount objective is to reaffirm the Islamic faith and revitalize the Muslim way of life. The direct involvement of state Governments in the pursuit of this objective is clearly at variance with workings of the secular polity visualized by this interpretation of section 10.⁶³⁸

This has far reaching implication for the legal system; since many of the provisions of Islamic criminal legal framework is at conflict with many constitutional provisions and also, some aspects of customary law, the constitution and customary law understood as rule of recognition are inevitably subverted.⁶³⁹ Moreover, the supremacy and the ultimacy of the constitution as the rule of recognition will be worse off for it.⁶⁴⁰ Thus, the dysfunctionalities of the adoption of shari'ah criminal law creates a form of legal pluralism in the area of criminal law as well. Recall that some of the challenges of the Nigerian legal system observed in chapter one of this

Kalu, 'Saffiyah and Adamah: Punishing Adultery with Sharia Stones in Twenty-First Century Nigeria' [2003] 102 African Affairs. Jamila M. Nasir, 'Sharia Implementation and Female Muslims. In Nigeria's Sharia States, Sharia Implementation in Northern Nigeria 1999–2006' in Philip Ostien (ed) *A Sourcebook* (Ibadan: Spectrum Books, 2007). Osita N. Ogbu., 'Punishments in Islamic Criminal Law as Antithetical to Human Dignity: The Nigerian Experience' [2005] 9 Int'l J. Human Rights. Gunnar J. Weimann, *Islamic Criminal Law in Northern Nigeria: Politics, Religion, Judicial Practice* (Amsterdam Univ. Press 2010).

⁶³⁵ See, Iwobi (n 634) 128-34, Bolaji (n 634) 138., Weimann (n 634) 24

⁶³⁶ ⁶³⁶ Raj Bhala, *Understanding Islamic Law (Shari'ah)*, (LexisNexis Publishers 2011) 23

⁶³⁷ Iwobi (n 634) 128-34

⁶³⁸ Ibid 130

⁶³⁹ The adoption of Sharia by twelve northern states contradicts federal legislative prerogatives, particularly Section 10 of the 1999 Nigerian Constitution, which clearly affirms the secularity of the Nigerian state; 'The Government of the Federation or of a State shall not adopt any religion as State religion'

⁶⁴⁰ Section 3 of the 1999 Constitution states that: 'If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void

study are the problems of legal pluralism, cultural pluralism, and democracy. Legal pluralism is a problem in Nigeria because of some characters of laws, its plural sources and the attendant numerous conflicting normative practices that comes with its relationship with other fundamental rules. Myriads of rules in a multicultural and diverse social community is an interesting subject for investigation because of the local and global demands for legal natives to have their own independent laws based on traditional, religious, ethical, and political.⁶⁴¹ Definitely, in having such views, there should be some prudent considerations of the confusion that comes with it. There are several practical examples of the confusions this coexistence of conflicting laws and customs in Nigerian jurisprudence have caused, and these examples are easier way to make these problems under investigation clearer than just a general theoretical claim about it. For instance, according to the shariah law and also some customary laws of Northern Nigeria, a girl of under sixteen years of age is allowed to marry any man of her choice. The most important factor to consider is her readiness to be a wife i.e., she is physically and psychologically grown⁶⁴². However, section 21 of the Child Rights Law provides that no person under the age of eighteen is capable of contracting a valid marriage. In fact, section 23 criminalises child's marriage and provides that anyone who marries or supports the marriage of a child under eighteen years of age is liable to five years imprisonment. Another notable example is the case of *Aoko v Fagbemi*⁶⁴³ where adultery was considered as no crime in southern Nigeria contrary to the Penal code of northern Nigeria.

5.2.2 Implications for Civil Law

Notwithstanding the fact that the impact of this legal pluralism is perceptible in criminal law, it is however more evidently noticeable with regard to civil matters. It is probably in the field of civil law that the common law has shown the least understanding and sympathy for customary norms. In this regard, most times it is difficult to determine which of the three systems of laws is to be applied in a certain situation. The High court rules of some states have attempted to resolve the question of conflict of law created by legal pluralism. Interestingly, these High court rules are in most cases very similar, with just very little variation. For example, where the transaction involves a native and non-native, but substantial injustice will be

⁶⁴¹ On global demands for indigenous laws, see: B. Z. Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' [2008] 30 Sydney Law Rev. See also, F. von Benda-Beckmann, 'Who's Afraid of Legal Pluralism?', [2002] 47 J. Legal Pluralism and Unofficial Law.

⁶⁴² Williams v Williams (1987) 7 NWLR (Pt 252) 187. Also, in *Odogwu v Odogwu* (1992) 2 NWLR (Pt 252) 539, the Supreme Court held that it is entirely possible for girls between the ages 15-18 years to marry so long as the happiness and psychological development of the child is not compromised.

⁶⁴³ *Supra*

occasioned to either party if customary law is not applied, the law prescribes that customary law be applied.⁶⁴⁴ Nonetheless, in practical terms, the presence of multiple legal systems or legal pluralism continues to provoke challenges and conflicts in the Nigerian legal system. Thus, in *Koney v Union Trading Company Limited*,⁶⁴⁵ the plaintiff, a Nigerian placed an order for the supply of portable sewing machine from the defendant European Factory. A disagreement arose thereafter. The court held: that common law should be applied. This study discovered that, the reason for this persistent problem has to do with Nigerian officials (especially judges) who are conscious of the difference involved among the parallel legal orders yet worsen the fault lines to make the system look uncoordinated. As a matter of fact, the officials often privilege one legal system above the other. For instance, in the area of family law, the judges often express preference for marriages conducted under the Marriage and Matrimonial Act. Hence, Lush referred to polygamous marriage (customary law and Islamic law allows polygamy) as a false union false marital union.⁶⁴⁶ But originally, the only marriage law known to Nigeria was the customary law marriage which varies from tribe to tribe.⁶⁴⁷

Two notorious cases that illustrate the complex nature of legal pluralism especially with regards to common law v customary law are *Mariyamo v. Sadiku Ejo*⁶⁴⁸ and *Yusufu v. Okhia*⁶⁴⁹. In the first case, a customary law by which a child born within ten months of a divorce was considered as the issue of the former husband of the child's mother conflicts with the principle of equity under the Received English law. In this case, the appellant challenged the decision of the lower court that gave the ownership of her child to the ex-husband as per this customary law. The court relying on common law and equitable principle, held that the law was invalid with regard to this case. In the opinion of the court, "we must not be understood to condemn this native law and custom in its general application. We appreciate that is basically sound and would in almost every case be fair and just in its results. The decision in this case goes to the issue of determining uncivilised nature of a custom."⁶⁵⁰ I argue that the court in holding the application of a customary law as a repugnant standard, should only reach such conclusion that the said

⁶⁴⁴ For example, section 26 of High court law of Lagos State, section 34 (2) High Court Law of Northern Nigeria, section 12(2) High Court of Western Nigeria, and Section 22(2) High court law of Eastern Nigeria.

⁶⁴⁵ (1934) 2 WACA 188

⁶⁴⁶ *Cheni v. Cheni* (1962) 3 All E.R.873

⁶⁴⁷ Paul O. Itua, 'Legitimacy, Legitimation and Succession in Nigeria: An Appraisal of Section 42 (2) of the Constitution of the Federal Republic of Nigeria 1999 on the Rights of inheritance' (2012) 4 J. Law and Conflict Resolution 3. 30-3

⁶⁴⁸ (1961) N.R.N.L.R 81

⁶⁴⁹ (1976) E.C.S.L.R. 274

⁶⁵⁰ Ibid

custom has failed the repugnancy test according to customary law and not any other law. Thus, this study views the decision in this case as a show of the failure to appreciate the possible results of application of customary law. In the second case, a woman turned down a marriage proposal from her deceased husband's brother. Notwithstanding the fact that the appellant has not performed the full marriage rights as required by Ihievbe customary law, she moved out of the matrimonial home in order to cohabit with the appellant. The respondent, who was a brother to her late husband, obtained the verdict of the High Court against the appellant for adultery and enticement on the ground that the marriage between the late brother and the widow is subsisting until the widow is able to perform the full funeral rituals for her late husband as per Ihievbe customary law. The court again, relying on common law, held that "a customary law that permits action for adultery and enticement after the death of a husband is repugnant to natural justice, the dissolution of the marriage could not be brought out by performance of 'funeral rites' but by the death of the partner". Some argue that, from the context of a general legal pluralist approach to law, the response to the question of what is "law" is arbitrarily determined because the judges chose to apply the principles of common law rather than customary law.⁶⁵¹ This study, argues that the general legal pluralism's problem offered here does not include the difficulty of identifying the definition of law. definitely, all the laws applied by the judges are state's institutional normative discourses and as such qualify as law. However, the difficulty lies in identifying the particular law that is relevant to the subject matter and the parties. This is where the adaptation of the rule of recognition as the fundamental and ultimate plays a decisive role.

Furthermore, it is often believed that legal pluralism constitutes no problem in the area of business law; first, Nigerian business law is largely an adaptation of English business law which by nature is written, unambiguous, and easy to regulate.⁶⁵² This pertains to such businesses like; sales and pledges of land, sales and bailment of goods, loan of money or articles, apprenticeship of various kinds, co-operative labour contract, contract of agreement, marriage contract, etc. Nonetheless, there are still actual presence of different applicable laws within business law in Nigeria. A good example is in the case of *Labinjo v Abake*⁶⁵³ where a girl of about seventeen years of age was sued by another girl in respect of contract debts. The

⁶⁵¹ See J. O. Ogbonanya, 'The Concept of Legal Pluralism under the Nigerian Law', (2010) 1 J. Int'l Law & Juris. Rev. 1. 335-36.

⁶⁵² For instance, the law of sale of goods in Nigeria is completely governed by the Sale of Goods Acts, 1893, an English law adopted in Nigeria via the Statutes of General Application. The same could be said of the Hire Purchase Act of 1965.

⁶⁵³ (1924) 5 N.L.R. 33

defendant relied on the Infant's Relief Act 1874 (an English statute of general application) and claimed that she was an infant at the time of transaction. Of course, infants lack the capacity to contract under this law, and the implication was that the claim of the plaintiff was unenforceable against the defendant. The plaintiff sought the application of customary law, and her prayers were granted by the court. However, in *Maidara v Halilu*⁶⁵⁴ the court insisted that the Sales of Goods Act 1893 be applied to a transaction in which the parties were Muslims and earlier agreed that their contract be regulated by Islamic Contract Law.

I argue that in the decision reached in the various cases analysed, the judges' verdicts may appear morally right in the interest of justice. However, the absurdity of the law will be seen in the event of two contracting parties entering into an executory contract, which by their conduct, cannot be said they intended to be bound by customary law (as it is in *Labinjo v Abake*) or by common law (*Maidara v Halilu*). These cases clearly represent conflicts that arise when the courts have to make decisions within a pluralistic legal system. So, legal pluralism definitely poses enormous problems here because of the multiplicity of laws and the need to accommodate those laws in a single legal system. In the case of Nigeria, legal pluralism implicates uncertainty, ineffectiveness of the legal system and the inability to meet the demands of a modern legal system. With respect to the underlying aim here, it is argued here that an ultimate rule is required as an underlying concept that will define the hierarchical relationships among the several rules.

5.3 Significance of Rules of Recognition for Legal Pluralism

5.3.1 Validating Function

An important characteristic of the rule of recognition, often noted by Hart, is that it is a fundamental rule that select which particular laws are legally valid in legal system.⁶⁵⁵ A primary rule operating in a particular jurisdiction, is not necessarily legally valid in another jurisdiction, even where both jurisdictions have the same legal systems. In the same vein, if the lawmakers of one of these jurisdictions attempt to create a law that was not in conformity with the jurisdiction's fundamental rules of validity, the purported law would only create controversies, conflicts, and confusions. Indeed, this has been the predicament of Nigerian jurisdiction as discussed in the previous sections. An example is the extension of Shari'ah-

⁶⁵⁴ (2000) LPELR-10695 (CA)

⁶⁵⁵ Hart (n 2)105

Islamic jurisprudence to the penal codes in Nigeria in 1999. As stated in the previous section, the introduction of Shari'ah penal code, which first claimed the legal system of Zamfara State, soon blew-out to eleven other northern states: Kano, Katsina, Niger, Bauchi, Kaduna, Sokoto, Borno, Gombe, Kebbi, Jigawa, and Yobe.⁶⁵⁶ Weimann confirmed the following number of Islamic criminal matters that took place in these states between 1999 to 2010. There were ultimately three classifications of these matters. In the first category, with a high number of reported cases of shari'ah trials, were Zamfara, Sokoto, Katsina, Kano, Jigawa, and Bauchi. The second category which has Niger, Kaduna, and Kebbi, were with fewer criminal trials. And the last, with no obvious case of criminal trial and conviction, were Yobe, Borno, and Gombe.⁶⁵⁷ Shari'ah criminal law prescribes such punishments as scourging for taking of alcohol, amputation for stealing, thrashing for fornication, and death by stoning for adultery. These punishments under Shari'ah criminal law have no explicit approval under any of the system's rules of recognition.⁶⁵⁸ But it continues to flourish in a multicultural and multireligious jurisdiction. Nonetheless, the consequence is in the series of violent clashes between Muslims and Northern Christians in which many lives were lost and many valuable properties destroyed.⁶⁵⁹ This example goes to show that even when a primary rule is identically worded to other rules of the system (as it is the case with Shari'ah Criminal Laws and Penal Code LFN 2004), it still requires some validity approval as per the procedural and substantive conditions of the rules of recognition of that system. In any other legal system, the rule of recognition is what characterizes the common recognizing check for the validity of the primary rules in such legal system. A specific rule can only be considered as truly valid in a given legal system only if such rule has met every important condition spelt out by the rule of recognition.⁶⁶⁰ Hart says that the rule of recognition is the necessary basis of a legal system and it is accepted by citizens and officials as authoritative standards for recognizing all the primary rules of obligations.⁶⁶¹ This implies that the rule of recognition can be a panacea for resolving many

⁶⁵⁶ Bolaji (n 633) 3

⁶⁵⁷ Weimann (n 634) 25-6

⁶⁵⁸ Iwobi (n 634) 128-9

⁶⁵⁹ For detailed account of the social and political consequences of shari'ah law in Nigerian, see Murray Last, 'Muslims and Christians in Nigeria: An Economy of Political Panic' [2007] 96 J.T.R.T. Rita K. Edozie 'Democratization in Multi-Religious Contexts: Amina vs. the (Disunited) States of Nigeria' in Kamari Maxine Clarke (ed.) *Local Practices, Global Controversies: Islam in Sub-Saharan African Contexts* (New Haven: MacMillan Centre 2005). Johannes Harnischfeger 'Sharia and Control over Territory: Conflicts between Settlers and Indigenes' [2004] 3 J. African Affairs.

⁶⁶⁰ Hart (n 2)67

⁶⁶¹ Ibid

conflicting laws in Nigerian jurisprudence. The possibility of this comes from the fact that the rule of recognition is able to define the criteria of validity.

Hart is not the only legal philosopher that treats issues of legal validity with the lens of a socially constructed institutional nature of law. Schauer and Kelsen have argued that all legal systems depend on some fundamental rule, which dissolves every basic problem concerning the system's validity requirements, a rule that has the most fundamental criteria of validity for the legal system.⁶⁶² Also, Raz claims there are several rules of recognition within a particular legal system that are responsible for the recognition and validity of the primary rules of the system.⁶⁶³ Shapiro argues that "the rule of recognition validates or recognises all the norm-creating and norm-applying parts of [a] shared plan" of constitutional order.⁶⁶⁴ This fundamental rule is what public officials follow when they maintain their jurisdiction's foundational laws in the application of primary rules and the creation of current law. Hart and these other legal philosophers who subscribe to this idea, hold that common acceptance and application of the basic validity rule by public officials determine those primary rules that should be considered as legally binding within any legal jurisdiction.

Hence, the adaptation of this basic validity rule can assist a legally pluralistic system like Nigeria to determine those valid primary rules that are necessary for a harmonious operation of the legal system. Nonetheless, there is still a gap in this Hartian view; it does not explain how a mere common acceptance of the basic rule of validity by public officials can provide for normativity i.e the rule's seemingly binding character on the legal system. This study fills this gap by arguing that the function of the rule of recognition in this regard should be an institutional fact rather than a simple social fact because the basic rule of validity must involve demand for conformity by public officials. Then such demand for conformity must carry a reason(s) for acceptance. Searle agrees with this argument, albeit he claims, "for a social fact to be institutional (at least unofficially), the constitutive rule ought to be capable of outright codification".⁶⁶⁵ According to him, codification is a formalized process of declaration for

⁶⁶² See Frederick Schauer 'The Social Construction of the Concept of Law: A Reply to Julie Dickson' [2005] 25 Oxford J. of Legal Stud. 496. Kelsen refers to his as the grundnorm. See Kelsen (19) 8. In chapter two and four, I argued that the grundnorm and the rule of recognition are partly the same and partly different, albeit the two concepts talk about a basic rule that settles all issues of legal validity in the legal system.

⁶⁶³ Raz (n 112) 146-8

⁶⁶⁴ Shapiro (n 197) 290

⁶⁶⁵ J. R Searle, 'What Is an Institution?' [2005] 1 J. Institutional Economics. 1-22

attaching or creating statuses.⁶⁶⁶ Therefore, codification carries the members of the group from tokenish status ascriptions for informal institutions and social facts more generally, to a recognised status ascription for formal institutional facts.⁶⁶⁷ In Searle's theory, an institutional fact is realised through a common consented assignment of a status role to something (normally considered as a practice among the members of the group) through a unifying institutional norm.⁶⁶⁸ Hence, an institutional fact demonstrates a particular type of social phenomenon existing over time through the validation and recognition primary rules among the members of the group. It exists when the members have a set of basic rules that determine the workings of the group through imposition of formal status on their general behaviour or the necessary primary rules.⁶⁶⁹ And as is again the case with the Nigerian Constitution, the legal document can also establish substantive provisions according to which those legal rules may be evaluated and invalidated for failure to adhere with the fundamental principles of the constitution

In Nigeria, the basic validity rule has been identified as the constitution, customary law, and precedents, these legal documents are necessarily object of common intentionality. Legal pluralism can continue to exist in Nigerian jurisprudence, and it would not be as much a problem as it is now if public officials will operate these basic validity rules with a common intentionality. The motivation for Nigerian officials' acceptance needs not be personal nor their following of the rule should simply be because it is the rule that group accepts, but the intent or reason that motivates their action should be intentionally collective. Primary rules of a legal system are pre-emptive reasons for action only when their validity has been approved from the basic validity rules.⁶⁷⁰ Even with regards to States having concurrent jurisdiction with the Federal Government on certain laws⁶⁷¹, a legitimate authority is one that, first, is supposed to base its directives on reasons that directly apply to all the citizens as reasons for action under the primary rules validated by the constitution or precedents. Raz refers to such reasons as dependent reasons.⁶⁷² The establishment of Hisbah Police by Kano State Government, for example, has neither validation from the constitution nor any precedent.⁶⁷³ In any given legal

⁶⁶⁶ Ibid

⁶⁶⁷ See also K.M Ehrenberg, *The Institutionality of Legal Validity: Philosophy and Phenomenological Research* (Wiley Periodicals 2018) 6

⁶⁶⁸ J. R Searle, *The Construction of Social Reality* (New York: Free Press 1995) 24-6

⁶⁶⁹ J.R Searle, *Making the Social World: The Structure of Human Civilization* (OUP 2010) 23

⁶⁷⁰ Hart (n 2) 105

⁶⁷¹ It is significant to note that it is on the basis of concurrent jurisdiction that the twelve Shari'ah compliant northern states relied on to extend the scope of Islamic law beyond the realm of civil law into the sphere of penal code.

⁶⁷² Raz, 'The Morality of Freedom', 46.

⁶⁷³ Recall section 214 (1) of CFRN 1999 proposes the establishment of single Police Force and prohibits the establishment of any other police unit in the country.

system, the basic rule of validity specifies the common identifying test for legal validity for that system. Thus, the creation of Hisbah Police by Kano State House of Assembly or the shari'ah penal law concerning death sentence for an adulterous woman can be treated as valid and fit for Nigerian jurisprudence assuming they satisfy the necessary criteria provided by the Nigerian rules of recognition. The simple way to know that a primary rule is fit to function in a given jurisdiction, is in how much it conforms with the rule of recognition. Therefore, when properly adapted, the basic validity rules in Nigerian jurisprudence can resolve the problem of legal pluralism by demonstrating how to recognise a particular rule as the correct rule to follow.

5.3.2 Constitutive Function

The validation and recognition of the primary rules by the rule of recognition of the legal system is crucial in the resolution of the problem of legal pluralism. Nonetheless, one result of such validity and recognition role of the rule of recognition considered in the presiding section is that only a portion of the rule of recognition is considered ultimate. Shapiro notes that 'treating the rule of recognition simply as a test of validity for primary rules, fits uncomfortably within the Hartian framework which famously acknowledges the unifying capacity of the rule of recognition as a constitutive rule.'⁶⁷⁴ Thus, there is still a second important function that the rule of recognition can perform in resolving the problem of conflict of laws occasioned by legal pluralism, such role is the unification of all the valid primary rules in Nigeria. The fact that the validity or recognition of primary rules in Nigerian system can be traced back to a single basic rule behoves on the rule of recognition another ultimate power, i.e., the power of unifying the many conflicting set of primary rules into a uniquely harmonious system of rules. By providing a harmonic collaboration among rules, which is characteristic of all modern legal systems, the rule of recognition, as Hart claims, "plays a constitutive role by the virtue of the fact that it is a social rule with the power of an ultimate rule."⁶⁷⁵

Apart from constituting or uniting the primary rules, the constitutive function of the rule of recognition as a uniting agent might extend to the legal system as a whole. For Hart, even when it has to do with pointing to an authoritative legal text as the rule of recognition (like the constitution of Nigeria), the rule of recognition introduces *the idea of a legal system* because the rules are now not merely a discrete unconnected set of rules but are, in a simple way,

⁶⁷⁴ Shapiro (n 197)5-8 (emphasis added)

⁶⁷⁵ Hart (n 2) 107-08 (emphasis is mine)

unified.⁶⁷⁶ Since the main understanding of a legal system suggests that it is a system rather than merely a set of rules, and since it is the rule of recognition that organizes or unites all the rules of the system, it is a plausible argument that the rule of recognition constitutes or unites not just the primary rules of the system but also the entirety of the legal system. One more Hart's claim that lends credence to this argument is his view that whatsoever is worth being referred to as the foundation of a legal system must be the 'social rule condition where the ultimate rule of recognition is accepted by public officials and used for the identification and unification of the primary rules of obligation within the system.'⁶⁷⁷ What this means is that the rule which serves as the validating and uniting rule for all other rules of the system can be understood as the key social rule capable of explaining the basis of existence of a legal system.⁶⁷⁸ In this sense, the rule of recognition, by the reason of being a foundational rule becomes the organizing point for all the rules of the system. Hence, it is possible for a uniform system or single operations of law to be created in legally pluralistic system, but it all depends on officials also taking a uniform internal point of view towards the rules of recognition.⁶⁷⁹ Burazin adds that a legal system's continuous existence and efficiency in the situation of many laws absolutely depends on the constitutive or unification capacity of the rule of recognition.⁶⁸⁰

In the preceding section, we saw that in most parts of Nigeria, due to the super-imposition of the laws of the colonialists upon the existing customary laws, the introduction of Shari'ah rules in Northern Nigeria, and customary laws of the various indigenous people, several types of primary rules exist.⁶⁸¹ Thus, Nigeria is a crossroad of conflicts between customary law, Islamic law, and common law. The problems we want to resolve are the questions of choice of law and secondly, the co-existence of customary law with received English law and Islamic; thirdly, each ethnic group has its own culture and lifestyle which demonstrates significant differences between one another in many respects. In chapter two, this thesis shows that the fundamental functions of the rule of recognition is the resolution of normative uncertainty. Shapiro affirms on behalf of Hart that, the rule of recognition resolves doubts and controversies within a group

⁶⁷⁶ Ibid 95

⁶⁷⁷ Ibid 100

⁶⁷⁸ Ibid 111

⁶⁷⁹ For a detailed explanation of this, see, Searle (n 668)44-46

⁶⁸⁰ Luka Burazin, 'The Rule of Recognition and the emergence of a Legal System' [2015] 27 J. for Constitutional Theory & Philosophy of Law. 118-9

⁶⁸¹ J. Akande, 'Women and the Law' in A. O. Obilade (ed.) *Women in Law*, (Southern Univ. Law Centre and Faculty of Law, Univ. of Lagos 1993) 7

about which primary rules to follow.⁶⁸² It does this by picking out properties of primary rules the possession of which mark them as binding, this in a way is also a constitutive feature of the rule of recognition.⁶⁸³ In applying this to legal pluralism in Nigeria, the rule of recognition provides ultimate criteria of validity for sieving the appropriate rule to follow in times of controversies.⁶⁸⁴ This study still remains within the framework of Hart's theory (albeit the rule of recognition is more than just a social fact, it can explain normativity of law), so it is reasonable to deduce that it is the constitutive capacity of the rule of recognition that can act as the focal point for those already validated multiple rules of the Nigerian legal system.

5.4 Manifestations of Rule of Recognition in Nigerian Democracy

The main purpose of Hart's rule of recognition is to create a theory whereby the primary rules of a legal system can be identified and validated by an ultimate law which itself is not validated by any other higher law. This is a plausible way to discriminate law from brute force, authoritarian regimes. Invariably, this manner of identifying and validating primary laws in the legal system, qualifies law as the requirement for setting the boundaries of power or force. Moreover, Hart's unique type of legal positivism might be considered as nearer the concept of democracy or explanation on the rule of law than any other positivist's explanation. For, in his radical departure from the early positivist conception of law as a command of the sovereign to the idea of law as a system of rules, Hart developed an idea of law that remotely resembles democracy and the rule of law. In this regard, the sovereignty of Nigeria alone is not enough to create a legal structure as if the officials (for example, the executives) have unlimited or unconditional power to control citizens, and these officials do not find themselves bound by their own commands or rules.⁶⁸⁵ Therefore, if, for example, there is no foundational or basic validity rule like the constitution to limit the exercising of the rule-based power of the Nigerian President, no matter the courteous nature of the occupier of the office, the likelihood of the President becoming a totalitarian dictator might arise.⁶⁸⁶ However, as the Nigerian President is subordinate to no political power outside the jurisdiction of Nigeria, the limitation of the President who exercises control over the citizens of Nigeria ought to be created by the a foundational rule established by the citizens themselves: this is the idea of having a rule of

⁶⁸² Shapiro (n 223) 8

⁶⁸³ Ibid

⁶⁸⁴ Ibid

⁶⁸⁵ Hart (n 2) 68-9

⁶⁸⁶ U. K. Preuss, 'Disconnecting Constitutions from Statehood' in P. Dobner & M. Loughlin (eds), *The Twilight of Constitutionalism* (OUP 2010) 24

recognition in the context of Nigerian constitutional democracy.⁶⁸⁷ Thus, Nigerian constitutional democracy, in this sense, is a comprehensive legal and political framework in which both the citizens and officials are bound by the rule of recognition. In this light, the existence of a viable democracy depends on rules of recognition (the constitution, judicial precedent, and international law).⁶⁸⁸ This is because the concept of constitutional democracy is strongly rooted in the notion of ‘acceptance by the people’ as evident in the preamble of Nigerian rule of recognition.⁶⁸⁹

The question that is pertinent at this point is, what’s the significance of Hart’s theory for constitutional democracy in Nigeria? Now, what this study intends to do here is to look at the implications that the findings in chapter three and four will have for Nigerian constitutional democracy. This consideration becomes necessary owing to the fact that the present political system of Nigeria is adjudged to be anchored on constitutional democracy. Moreover, a political system is interlinked to a legal system of such society in a manner that the later helps to organise the proper working of the former. In a survey conducted by Adeyinka Ajayi and Emmanuel Ojo on the usage of the word democracy, the finding was that the following concepts are broadly accepted as fundamental principles of democracy; rule of law, separation of powers, democratic legitimacy, and fundamental human rights.⁶⁹⁰ Hence, I shall succinctly explain the concept of democracy, then argue that the impact of Hart’s rule of law will be located in the democratic concepts mentioned above.

5.4.1 General Outlook of Democracy

The concept of democracy appears elusive when one attempts a definition. Notwithstanding, I will attempt some definitions from renown democracy theorists. The Black’s Law Dictionary defines democracy as: “that form of government in which the sovereign power resides in and is exercised by the whole body of free citizens directly or indirectly through a system of representation, as distinguished from monarchy, aristocracy, or oligarchy”.⁶⁹¹ The often-quoted Lincolnian definition of “government of the people, by the people, and for the people” appears to be the most workable definition. On this definition, D. D Raphael argues:

⁶⁸⁷ M. Kumm, ‘Global Constitutionalism and the Cosmopolitan State: An Integrated Conception of Public Law’ [2013] 20 *Indiana Journal of Global Legal Stud.* 604-6

⁶⁸⁸ D. Grimm, ‘The Achievement of Constitutionalism and Its Prospects in a Changed World’ in P. Dobner and M. Loughlin (eds), *The Twilight of Constitutionalism*, (OUP) 2010.

⁶⁸⁹ ‘We the people of Nigeria have agreed to....’ Is the first statement in the Nigerian Constitution.

⁶⁹⁰ A.T. Ajayi & E.O. Ojo, ‘Democracy in Nigeria: Practice, Problems and Prospects’ (2014) 4 *Developing Countries Studies* 2. 107-9

⁶⁹¹ Bryan A. Garner, *Black’s Law Dictionary*, (11th edn., Sweet & Maxwell 2019).

The essential idea of democratic government is government by the people. Strictly speaking, government by all the people should mean unanimous decisions. But this, of course, is impossible in political matters. Democracy in practice has to mean following the view of the majority. Perhaps Lincoln's addition of 'for the people' means....that the decisive view, which for practical purposes must be that of the majority, should seek to serve the interests of all, even though it does not have the agreement of all; otherwise there is the danger that majority rule may become tyranny.⁶⁹²

More specifically, Njoku argues that democracy represents a type of government where the opinions of the majority often prevail. The citizens who are represented, by the virtue of majority vote and through their representatives, impose their will on the minority.⁶⁹³ Citizens who choose democracy over any other form of government think that more freedom is safeguarded and enjoyed by them.⁶⁹⁴ Thus, majority rule is considered by many lay men to mean democracy. But this is not entirely correct, scholars are not unanimous on whether majority rule is synonymous to democracy. Robert A Dahl and Arend Lijphart, who have often been frustrated by the overlapping meaning of democracy, attempted replacing the concept with what they call polyarchy.⁶⁹⁵ Nonetheless, polyarchy, whose main dimensions are controversial, is not democracy but just an approximation of democracy.⁶⁹⁶ Therefore, democracy is better described than defined. Democracy can be described by the values it engenders, in essence, the rule of law, separation of powers, legitimacy, and fundamental human rights. According to Bolaji, "in an ideal democracy, all institutions- the legislature, executive, judiciary, and their agencies- are subordinated to achieving the equality of its citizens in enjoying their fundamental human rights and ensuring their political participation, largely through their elected representatives".⁶⁹⁷

In the view Paine, "a constitution is a precursor to a government, and a government is established but by a constitution. The constitution of a state is not the making of its government, but of the people constituting a government".⁶⁹⁸ Relying on this claim, Paine made the

⁶⁹² D.D Raphael, *Problems of Political Philosophy* (2nd Rev. London: The Macmillan Press Limited 1976) 87

⁶⁹³ F.O.C Njoku, *Philosophy in Politics, Law & Democracy* (1st edn, Claretian Communications Enugu 2002) 162

⁶⁹⁴ Ibid

⁶⁹⁵ R. A. Dahl, *Federalism and the Democratic Process* (Nomos 1993) 95. and A. Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven: Yale University 1977)

⁶⁹⁶ See D.F.J Campbell, *The Basic Concept for the Democracy Ranking of the Quality of Democracy* (Vienna: Democracy Ranking 2008). See also, P.C Schmitter, and L. K. Terry L. Karl. 'What Democracy Is . . . and Is Not' (1991) 2 Journal of Democracy 3.75-7

⁶⁹⁷ M.H.A Bolaji (n 633) 3

⁶⁹⁸ Thomas Paine, 'Rights of Man' in P. S Foner (ed.) *The Complete Writings of Thomas Paine* (The Citadel Place 1945) 278

distinction between constituted power which belongs to government and constituent power, which is retained by the ordinary citizens and creates the idea of the supremacy of the citizens over the government.⁶⁹⁹ Democracy is understood as a government constituted by the people through their voluntary will for the interest of the people.⁷⁰⁰ Therefore, the people are simultaneously the rulers and the ruled. Hence, constitution in the understanding of the rule of recognition in Nigeria is the ultimate law of the land, to which both custodians of constituted power (Nigerian government) and constituent power (Nigerian citizens) are bound, as per the principles of the rule of law.⁷⁰¹ This constitutional system explains the role that the rule of recognition plays in a constitutional democracy.

Hart was very conversant with the complex nature of contemporary democracies and understands that there must be a foundational rule that cares for the uncertainties and confusion in the legal system.⁷⁰² Of course, the rule of recognition empowers the whole system (whether legal or political) and determines the limits of all authoritarian powers within the system.⁷⁰³ Lacey affirms that, the success of Hart's theory of law, especially his idea of the rule of recognition, derives mainly from the impact it had on political system in contemporary democracies, and more specifically, the modern culture of rule of law it has created.⁷⁰⁴ Again advertent to Nigerian constitutional democracy, this study identifies rule of law, separation of powers, and Human rights as the necessary elements.⁷⁰⁵

5.4.2 Rule of Law

In its simplest form, the rule of law means the equality of all persons before the law or equal subjugation of all classes of persons in the state to the ordinary laws of the state, administered by the judiciary.⁷⁰⁶ Succinctly, the rule of law demands, as O'Donoghue claims, the "law to be applied equally, created openly and administered fairly".⁷⁰⁷ As per A.V Dicey, the rule of law involves three principles; supremacy of law, equality before the law and the predominance of

⁶⁹⁹ Ibid

⁷⁰⁰ M Loughlin, 'What is Conditionalization?' in P. Dobner and M. Loughlin (eds), *The Twilight of Constitutionalism* (OUP 2010) 50-51

⁷⁰¹ Ibid

⁷⁰² Hart (n 2) 102-08

⁷⁰³ Perry (n 163) 1171, 1183 & 1184

⁷⁰⁴ Nicola Lacey, 'H.L.A Hart Rule of Law: the limits of Philosophy in Historical Perspective' (2007) 36 *Quaderni Fiorentini* 2. 1203-24

⁷⁰⁵ Robert J. Mundt et. al. 'Politics in Nigeria' in Gabriel A. Almond et. al. (eds.) *Comparative Politics Today* (New York: Longman 2008) 706.

⁷⁰⁶ E.O John, 'The Rule of Law in Nigeria: Myth or Reality?' (2011) 4 *Journal of Politics & Law*, 1. 1

⁷⁰⁷ A. O'Donoghue, *Constitutionalism in Global Constitutionalisation* (CUP 2014) 156

judicial spirit.⁷⁰⁸ The implication of this is that nobody (official or citizen) is above the law, and that every man whatever his rank or status or condition, is subject to the law and the jurisdiction of the ordinary courts.⁷⁰⁹

The most fundamental feature of Nigerian democracy is the rule of law.⁷¹⁰ Sagay confirms this claim; “there can be no democracy without the rule of law and by common agreement”⁷¹¹. It means, the doctrine of the rule of law is synonymous with the practice of democracy in Nigeria. Thus, the implication of the identified rules of recognition in Nigeria for democracy will be, first of all, from the perspective of rule of law. It is, after all, from the rule of recognition (constitution) that the rule of law is created. It is difficult to underestimate this rule of law as far as liberal democracy is concerned. For democracy as Njoku defines it, is “a system of government where people organize and realize their wishes through the instrument of the law, they have made for themselves”⁷¹². As it is in universally, the simplest conception of the rule of law in Nigeria too is, “every Nigerian is equal before the law”⁷¹³. Once more, this conceptual framework of the rule of law is engrained in the first section of the 1999 Constitution that deals with the supremacy of the constitution: “this constitution is supreme, and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria”.⁷¹⁴ This provision of the constitution delineates it as the ultimate rule of recognition that incorporates the rule of law and promotes constitutional democracy in Nigeria. The case of *Ojukwu v A.G Lagos State*⁷¹⁵ is the locus classicus on the constitution as the bedrock for the existence and practice of the rule of law. The constitution as the rule of recognition, plays a critical role by ensuring that civil and political rights, as well as civil liberties, which are the hallmark of democracy and rule of law, are protected.⁷¹⁶ Also, the rules of recognition in Nigeria ensure that the equality and dignity of all Nigerians are carefully preserved.⁷¹⁷ Thus, from the above analysis, the rule of law is sagaciously enshrined in the Nigerian constitution.

⁷⁰⁸ A.V Dicey, *Introduction to the Study of the Law of the Constitution*, (Reprint. Indianapolis: Liberty Classics, 1982) 107

⁷⁰⁹ Yusuf O. Ali, “Democracy Today and the Rule of Law: Perspectives of Nigerian Democratic Systems”. http://www.yusufali.net/articles/democracy_today.pdf. Accessed on 10th July 2021.

⁷¹⁰ At least, this is what the constitution says; whether this claim is truly respected by officials and citizens, is a matter for the next sections to which I shall return below.

⁷¹¹ Itsay Sagay, *The Travails of Democracy and the Rule of Law*, (Ibadan: Spectrum Books Nig. Ltd., 2001) 2.

⁷¹² Njoku (693) 161

⁷¹³ Vincent. E Efebeh, ‘Democracy and the Rule of Law in Nigeria: 1999-2015’ (2015) 20 RHSS 5. 72

⁷¹⁴ Section 1 (1) CFRN 1999

⁷¹⁵ Supra

⁷¹⁶ Chapters II and IV of CFRN 1999 (as altered)

⁷¹⁷ Ibid

In fact, it is mandatory for public officials to openly swear and declare their loyalty to the constitution and other rules of recognition.

Definitely, the rule of law is the fulcrum for a sustainable liberal democracy, and the rules of recognition (constitution and precedents) is the vehicle that conveys the rule of law. So, where regard for the rule of law is lacking among the public officials in any ostensible democratic system, it implies a refusal to take internal point of view towards the rules of recognition, such a legal system can hardly be adjudged as a modern legal system and can adversely affect the sustainability of liberal democracy. It is needless reiterating the findings of this study in chapters three and four, but from the backdrop of several cases of officials' impunity and defiance of the constitution, disregard for court orders, suppression of citizens' rights and liberties among others exposed in those two chapters, the conclusion is that what we have in Nigeria is the rule of men rather than the rule of law. The case of *Shugaba vs Minister of Internal Affairs*⁷¹⁸ cited in the preceding chapter readily comes to mind as far as officials disregard for the rule of law is concerned. Recall this was the case of a leader of Borno parliament who was unduly deported from Nigeria to Niger on the reason that he was a Nigerien rather than a Nigerian. The courts not only levied the officials of the Federal Government in heavy damages, but also condemned their act as unconstitutional and a gross violation of the rule of law. It is egregious event like this one made Endicott to argue that the rule of law is merely an illusion of the senses because no political or legal system can avoid arbitrariness and impetuous decision making.⁷¹⁹ He supports this claim with the scandalous remark that the rule of law is postulated on the basis of its failure to be truly practiced in any legal system in the world.⁷²⁰

Notwithstanding Endicott's remark on the rule of law, the important question to ask is, what implications could modern adaptation of the rules of recognition have for the building of democracy in Nigeria? Succinctly, the benefit of the rules of recognition for democracy growth is in the sense that the rule of law is a fundamental principle expected of any genuine modern democracy. And the constitution of the Federal Republic of Nigeria encapsulates these fundamental principles of the rule of law. There are also precedents stating the implementation of these principles enshrined in the constitution. Thus, in *Tukur v The Governor of Gongola State & 2 Ors*⁷²¹, the court held that, the claims of the plaintiff were not contained in the

⁷¹⁸ *supra*

⁷¹⁹ Timothy Endicott, *Vagueness in Law* (OUP 2000) xii

⁷²⁰ *ibid* 213

⁷²¹ [1989] 4 NWLR (Pt. 117) p.517

constitution and on account of that, the government neither breached the rule of law nor violated the fundamental rights of the plaintiff. In *Attorney of Abia State & 35 Ors v Attorney General of the Federation*⁷²², the court held that all citizens of the Federal Republic are bound by the fundamental principles contained in the constitution. Therefore, the constitution does much more by merely establishing a government and spelling out the functions, the constitution ought to address democratic issues such as, electoral justice, economic and social inequalities, conflict of judgments, nepotism, corruption etc.

5.4.3 Separation of Power

The actual concept of separation of powers amongst various arms of government dates back to ancient Greece.⁷²³ In his politics, Aristotle Adumbrated:

There are elements in each constitution in respect of which every serious lawgiver must look for what is advantageous to it: if these are well arranged, the constitution is bound to be well arranged, and the differences in constitutions are bound to correspond to the differences between each of those elements. The three are first, the deliberative, which discusses everything of common importance; second, the officials....and third, the judicial element.⁷²⁴

However, the modern idea of “separation of powers” emanated from Baron de Montesquieu, a French modern enlightenment political philosopher.⁷²⁵ He based his argument in a manner he understood the British constitution of the first part of the eighteenth century. As a doctrine, it has been explained as “where a political actor occupies the position of both the executive and the legislature, there is danger of the legislature enacting oppressive laws which the executive will administer to achieve its ends”.⁷²⁶ Thus, Montesquieu in the process, outlined a tripartite division of powers in England amongst the King, the parliament, and the judges, notwithstanding such a division were not in existence at that time.⁷²⁷ In American jurisdiction, the framers of U.S Constitution decided to build the governmental system on this theory of separation of powers whereby the executive, legislative and courts will be distinct from one

⁷²² Supra

⁷²³ A. A. Appandorai, *The Substance of Politics* (OUP 2003) 2

⁷²⁴ Aristotle, *The Complete Works of Aristotle* (Jonathan Barnes ed. Princeton University Press, 1984).

⁷²⁵ See, C. L, Montesquieu, *The Spirit of Laws*, (Published by CreateSpace Independent Publishing Platform, USA, 2015)

⁷²⁶ Ibid

⁷²⁷ Ibid

another.⁷²⁸ Consequently, no one arm of government can gain exclusive power or abuse the power bestowed on them.

The separation of powers is a fundamental ingredient of Nigerian democracy, and it is also creation of the ultimate rule of recognition. Central to the doctrine of separation of power is the drive to stop a particular official or his agents from becoming the absolute possessor of the constituted power by splitting and sharing the constituted power among various officials and their agencies.⁷²⁹ Concerning the implications of the rule of recognition for separation of powers, this study argues that the rule of recognition plays a similar role complementary to other constitutional elements in the regulation of constituted power among officials. First, the rule of recognition assists in mending the loophole between constituted powerholders and constituent powerholders in order to improve the problems of the gaps between constituted power and constituent power as well as any shortcoming noticeable in democratic legitimacy. Secondly, the rule of recognition ensures a separation of power for Nigerian democracy by serving as the instrument that allows a constituted powerholder to ensure that other officials do exercise their power within the boundaries spelt out by the rule of recognition (constitution).⁷³⁰ This role is aimed at avoiding a situation of the Austinian notion of a sovereign that receives obedience but who does not habitually obey anyone.

On the point of fact, the findings of this study in chapter four suggests that Nigerian public officials have degenerated to the level of total contempt for separation of power as enshrined, even as they miss no opportunity to always advise the citizens that constitutional provisions on separation must be obeyed at all times. Of course, “what people say might be different from what they do”. Hence, the findings of this study in chapter four reveal that officials in the executive arm have a litany of cases where they show disregard for other arms of government contrary to the horizontal separation of powers contained in the constitution. For example, the recent strike action by the Judiciary Staff Union of Nigeria (hereafter referred to as JUSUN) was occasioned by the refusal of the 36 Governors to implement the constitutional provisions on financial autonomy for the judiciary. In the struggle to free the judiciary and the state legislative houses from the grip of the executive, the following cases were filed; *JUSUN v A.G Abia State & 36 Ors*⁷³¹, *Agbakoba v A.G Federation & Ors*⁷³², and *Agbakoba v A.G Ekiti State*

⁷²⁸ Ibid

⁷²⁹ O'Donoghue (n 707) 36-8

⁷³⁰ Ibid

⁷³¹ No. FHC/Abj/Cs/667/2013

⁷³² No. FHC/Abj/Cs/63/2013

& 2 *Ors*⁷³³. The judgements of the courts in all the three cases were the same: the provisions of section 83 (1), 121 (3) and 162 (9) of the constitution are to the effect that the judiciary and legislative arms are independent of the executive and as such deserve financial autonomy. Unfortunately, many of the governors refused to obey these judgments. This is a clear case of flagrant disregard for the democratic principle of separation enshrined in the constitution. Similarly, President Obasanjo's continuous withholding of the Lagos State Council Money despite the Supreme ruling otherwise, represents a breach of vertical separation of power as one of the pillars of democracy.⁷³⁴

Notwithstanding the implications of the findings in chapter four, there is a relatively simple question to be asked here: what is the significance of the rule of recognition, as a theoretical concept for separation of powers as an indispensable element of democracy? First of all, a theoretical concept like the rule of recognition can perform practical functions as long as it can be construed as normativity.⁷³⁵ Even in respect of officials taking internal point of view, the authority of the rule of recognition and equally, at least in part, their reasons for accepting the rule of recognition have every likelihood of normativity. The rule of recognition and taking internal point of view towards the rule of recognition can be adapted in modern times to describe and explain an actual legal system or to offer a practically important reasons for following the law.⁷³⁶ Thus, the constitution as the first rule of recognition in Nigeria has another important function to play in the life of Nigerian democracy; it sets limits on the power of all branches and agents of government. Dajovic claims that "Constitutionalism" gave rise to the movement for limiting the absolute power of the ruler".⁷³⁷ In a democracy like that of Nigeria where the officials, especially the executives, have the tendencies of acting like an absolute sovereign, this objective of the constitution as an adapted rule of recognition is likely to play a fundamental role of imposing limits on their powers.

⁷³³ Suit No. NAD/56/2013

⁷³⁴ See *A.G Lagos State v A.G Federation* (supra).

⁷³⁵ This particular claim preoccupied much of the arguments in chapter two of this study. The claim is that there must be reasons for accepting any law, it is this reason of acceptance that brings the rule of recognition unto the corridor of normativity. This explanation also holds for internal point of view.

⁷³⁶ I acknowledged in chapter two that the question of the normativity of rule of recognition and internal point of view is indeed much complicated than this thesis might suggest. I argued that the conclusion presented in the theoretical framework is the study's effort to construe Hart's theory through the lens of normativity. But even in such elementary form presented, it can be a helpful tool in the explanation of Nigerian legal system. For detailed explanation of legal normativity, see Andrei Marmor, 'Norms, Reasons, and the Law' (2016) Cornell Law School Research Paper. No.16-19. Brian Bix, 'Kelsen, Hart and Legal Normativity' [2018] 34 *J. for Constitutional Theory & Philosophy of Law*. See also, David Enoch, 'Is General Jurisprudence Interesting?' in D. Plunkett, S. Shapiro & K. Toh (eds.) *Dimensions of Normativity: New Essays on Metaethics & Jurisprudence* (OUP. 2019)

⁷³⁷ G Dajovic, 'The Rule of Recognition and the Written Constitution' [2010] 3 *Belgrade Law Rev.* 260

In respect of the findings of chapter three, the constitution is the ultimate rule of recognition. This means that one can refer to the fundamental provisions in the Nigerian constitution as ultimately playing the role of the rule of recognition. Also, it means that it is the case that every valid primary rule is valid on the basis of the provisions of the Nigerian constitutions. This is clearly the case with the elements of democracy, including separation of powers under consideration here. It is good to be prudent here: to admit that the rule of recognition is duty-imposing does not mean that the same rule of recognition cannot be equally power-conferring.⁷³⁸ An important example is the power of the Nigerian courts to invalidate every primary rule that violates the constitution and ensure the enduring supremacy and ultimacy of the constitution.⁷³⁹ In this regard, this study examines where the authority of the current constitution treats separation of powers as its fundamental principle. Accordingly, these constitutional provisions of the constitution put each of the fundamental powers of the state in separate arm. While sections 4 and 5 of the Constitution pertain to the powers of the executives and legislatures correspondingly, section 6 deals with the powers of the courts. Also, in the current 1999 constitution, there is a vertical separation of powers between the Federal Government and the State Governments. While the powers of the National Assembly which legislate for federal affairs are contained in section 4(2), (3), (4), the powers of the State Houses of Assembly's powers are contained in section 4(6) & (7). The detailed powers and duties of the two legislative houses could be found in the second schedule to the same 1999 Constitution. In a similar vein, section 5 (1) of the constitution provides for the federal executive powers, whereas section 5(2) of the same constitution spells out the powers of the state executives. Furthermore, the Local Government Councils which was defined as the third level of government as per Decree 17 of 1985, equally have their powers spelt out in section 7 (establishment) of the 4th schedule of the same constitution. It is worthy of note that these provisions were present in all the previous constitutions as well. For example, the cited constitutional provisions are in *pari materia* with sections 4, 5 and 6 of the 1979 Constitution of the Federal Republic of Nigeria. Hence, it can be argued that there is an obvious horizontal and vertical constitutional separation of power in Nigerian rule of recognition, and this strengthens the important elements of democracy.

⁷³⁸ On the power-conferring role of the rule of recognition, see Raz (n 1) 586. See also Philip Mullock, 'Power-Conferring Rules and the Rule of Recognition' (1975) 36 Univ. Pitt. Law Rev. 23. 23-28. M. Atienza and J. R. Manero, 'Power-Conferring Rules' in F. J. Laporta, A. Peczenik & F. Schauer (eds) *A Theory of Legal Sentences. Law and Philosophy* (Dordrecht: Springer 1998) 44-9. Mathew Kramer, 'Power-conferring Laws and the Rules of Recognition' (2019) 19 Jerusalem Rev. of Legal Stud. 1. 88-97

⁷³⁹ *A.G Lagos State v A.G Federation* (supra)

5.4.4 Fundamental Human Rights

Fundamental human rights are very sensitive and controversial issues in legal and political parlances. It is sensitive in that it is a democratic principle that explicitly touches the lives and dignities of members of the society. It is also controversial because it implicates international discourses, national sovereignty, and debates around individual liberty versus public safety. Safeguarding the fundamental human rights of all is one of the most important elements of democracy.⁷⁴⁰ Another fundamental function of the rule of recognition (constitution and precedent) is in creating limits within the boundary within which the government can infringe on the peoples' rights and liberties, and to ensure freedom of socio-political associations and rights of self-determination of the citizens of that country.⁷⁴¹ Whereas the other elements of democracy previously analysed are more procedural in nature, the preservation of fundamental human rights is a substantive part of the Nigerian constitution. This suggests that human right is the most important fundamental principle under the safeguard of the rule of recognition.⁷⁴² So, what function can the adaptation of the rule of recognition play in Nigeria as far as human right is concerned as a core democratic element?

I understand that majority rule is often taken by laymen to refer to democracy, but human rights are not always determined by majority rule, will or view; else, this could result to what Mill calls 'the tyranny of the majority'.⁷⁴³ On the contrary, majority might raise objection if issues of fundamental human rights were to be determined by minorities, there will certainly arise question of democratic legitimacy in that respect.⁷⁴⁴ What then should be the foundation for ascertaining fundamental human rights then? Although the views of the majority do prevail in democracy, Dean argues that those majority views must still operate within the framework of the ultimate rule of recognition (constitution or precedent) which provides for the maintenance of right of expression, thoughts and association.⁷⁴⁵ Rawls also makes case for the role of the rule of recognition (constitution) in democracy:

⁷⁴⁰ Rebecca Zahn, 'Human Rights in the Plural Legal System of Nigeria' [2010] 1 Edinburg Student Law Review. 67-8

⁷⁴¹ See, Bardo Fassbender, 'The United Nations Charter as Constitution of The International Community' [1998] 36 Columbia J. Transnational Law. 581. See also, Edwin Egede, 'Human Rights and the Environment: Is there a legally enforceable Right of a Clean and Healthy Environment for the 'Peoples' of the Niger Delta under the Framework of the 1999 Constitution of the Federal Republic of Nigeria?' [2007] 19 Sri Lanka J. Int'l Law. 53-9

⁷⁴² Obiajulu Nnamuchi, 'Kleptocracy and its many Faces: The Challenges of Justiciability of the Right to Healthcare in Nigeria' [2008] 52 Journal of African Law. 193

⁷⁴³ J.S. Mill, *On Liberty* (London: Penguin Books 1982) 14

⁷⁴⁴ Ben Saunders, 'Democracy, Political Equality, and Majority Rule' (2010) 121 Ethics 1. 161-3

⁷⁴⁵ H. E. Dean, *Judicial Review and Democracy* (New York: Randon House 1966) 45-46

In liberal democracy equal basic rights and liberties of citizenship that legislative majorities are to respect: such as the right to vote and to participate in politics, liberty of conscience, freedom of thought and of association, as well as the protections of the rule of law.⁷⁴⁶

In the view of Rawls, the principle of democratic legitimacy requires that fundamental rights deserve to be a core element of the constitution and available to all members of the society.⁷⁴⁷ Therefore, in a liberal democracy, the truly free and equal citizens are the ones who are conscious of the legal boundaries of their fundamental rights and freedoms with belief that others ought to be as free and equal as themselves.⁷⁴⁸ In such situation, liberal democracy demands minority rights as much as it requires majority rule. The protection and enforcement of this fundamental human rights for all depends on the existence of an ultimate authoritative rule which can exert control over the ruler and the ruled in order to ensure the safeguard of these fundamental rights. The Constitution as the ultimate rule of recognition can play this all-important function. Then looking at the implication of the rule of recognition for Nigerian democracy, I argue that both the rule of recognition and democracy have some common important element and one of them is the constitutional security of fundamental rights. Nigeria is equally a party to many international agreements, treaties, and conventions on human rights. It ratified or acceded to some of the instruments⁷⁴⁹ and some were by mere affixation of its signature.⁷⁵⁰ There are also some instruments or protocols in respect of which Nigeria was neutral or silent about.⁷⁵¹ In respect to civil and political rights, the legal documents consider the right to life, right to dignity of human person, right to personal liberty, right to fair hearing, right to privacy and family life, right to freedom of thought, conscience and religion, freedom of movement, freedom of expression, right to freedom from discrimination, freedom of

⁷⁴⁶ John Rawls, *Political Liberalism* (Columbia Univ. Press 2005) 226-8

⁷⁴⁷ Ibid

⁷⁴⁸ Ibid

⁷⁴⁹ For example, Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment; International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention on the Elimination of all forms of Discrimination against Women; Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women; International Convention on the Elimination of all Forms of Racial Discrimination; Convention on the Rights of the Child, among others.

⁷⁵⁰ Examples of these include Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflict and Optional Protocol to the Convention on the Rights of the Child on the Sale of Children Child Prostitution and Child pornography. Ngochukwu (31),

⁷⁵¹ Those ones were: Optional Protocol to the Convention Against Torture and Cruel Inhuman or Degrading Treatment or Punishment; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; Optional Protocol to the International Covenant on Civil and Political Rights; and Optional Protocol to the International Covenant on Civil and Political Rights and Second Optional Protocol to the International Covenant on Civil and Political Rights

association and right to vote. All these rights are the core elements of democratic institutions, and it is upon them that constitutional democracy is institutionally strengthened.⁷⁵²

Upon the attainment of independence, provisions of fundamental human rights were sagaciously enshrined in chapter III of the 1960 Constitution of the Federal Republic of Nigeria. The provisions were still detained in the 1963, 1979, 1989, 1995 Constitutions and now the 1999 Constitution. The fundamental rights so guaranteed are part of human rights. It had earlier been argued that the guarantee of rights is a prominent element of Nigerian constitutional democracy.⁷⁵³ Thus, the 1999 Nigerian Constitution is a repository and the main source of fundamental human rights laws in Nigeria. In this respect, the 1999 Constitution is in *pari materia* with all the previous Constitutions (beginning from the 1960 independence constitution) of Nigeria as far as issues of fundamental human rights is concerned. In terms of the standards identified in chapter three as the rules of recognition, the one of the most vital roles of the 1999 constitution is in identifying the various fundamental rights available to Nigerians, which if they are disobeyed will result to a legitimate legal claim for redress as well as the procedure for pursuing such claims. Looking at the constitution, it is clear what rights are protected and when the violation of those rights could entitle the aggrieved victim to redress. There are equally some provisions as per the procedure the said injured party could adopt for presenting such a claim in court. Hence, Chapter four of the 1999 constitution comprising sections 33 to 46 guarantees specific human rights and freedoms, identifies the courts with jurisdiction over human rights cases, stipulates who may present a complaint of human rights violation, and provides for the manner in which rules of procedure for the enforcement of human rights are to be made.⁷⁵⁴ The rule of recognition has been recurrently explained as simply that social rule which is employed to identify, validate and unite primary rules that are valid as law in a legal system.⁷⁵⁵ On that note, the rule of recognition is topmost of a legal system's rules, and all other rules of the system ultimately owe their legal status to the rule of recognition.⁷⁵⁶ In the same vein, the constitution is the ultimate norm-creating and norm-validating source of fundamental human rights.⁷⁵⁷ Thus, all fundamental human rights' claims and enforcements are often brought under the Constitution, because all claims of breach

⁷⁵² See Femi Falana, *Fundamental Rights Enforcement* (Lagos: Legal Text Publishing 2004) 3-7. See also, Mathew .H Kukah, *Democracy and Civil Society in Nigeria* (Ibadan: Spectrum Books 2004).

⁷⁵³ Ibid. See Ugochukwu (n 31)

⁷⁵⁴ Sections 33-46 of CFRN 1999 deals with the principles and practices of fundamental rights of the citizens.

⁷⁵⁵ Hart (n 2) 225

⁷⁵⁶ Ibid

⁷⁵⁷ The ultimacy and supremacy character of the constitution as per section 1 (3) of CFRN, has been exhaustively treated in chapter three of this study.

of right has to be connected directly or impliedly to those rights safeguarded in Chapter four the Constitution.⁷⁵⁸ Evidently, all the adduced functions of the constitution as the ultimate rule of recognition in Nigeria are in a certain way intertwined. And they all, as a whole, make the rule of recognition as the legal mechanism that sets the foundational structures of the legal system which in turn institutionally strengthens the democratic system.

5.5 Internal Point of View and Civil Disobedience

I think that some of the themes I have explored in this thesis could have a bearing on the question of civil disobedience: an area which has for long been the source of puzzlement for legal and moral philosophers. In respect of citizens internal point of view, to what extent can civil disobedience in Nigeria be adjudged as a form of internal point of view? This section will explore the implications of internal point of view for civil disobedience and citizens' rights and liberties.

Hart claims that, internal point of view is the perspective of members who practically accept the general behaviour of the group as a standard of conduct and as a standard of criticism which gives legitimacy to their demands and different kinds of social pressure.⁷⁵⁹ This implies that the rules are taken as something which ought to be diligently followed and treated as rules which impose, obligate or confer rights on all members of the group.⁷⁶⁰ As observed in the preceding section, Hart recommends that only the officials need take the internal point of view towards the rules of recognition. The ordinary citizens just need to conform with the rules of the primary kind and may not have to take the internal point of view. Dworkin thinks that this kind of claim does not explain the normative essence of conventional rule because it does not include the justification upon which citizens act.⁷⁶¹ I argued to the contrary in chapter two of this thesis that it does actually explain normativity as a result of the descriptive manner in which Hart presented it. Hart never disputed that conventional norm can be morally accepted, nonetheless, it is not the only justification for legal obligation.⁷⁶² For instance, citizens who are subjects of Nigerian legal system may have obligation to obey an unlawful order or law, but

⁷⁵⁸ Section 46(1) CFRN 1999. See also, *National Electric Power Authority v Akinola Arobieke*, [2006] 7 NWLR 245

⁷⁵⁹ Hart (n 2) 255

⁷⁶⁰ Ibid

⁷⁶¹ Dworkin (n 154).

⁷⁶² Hart (n 2) 257

they do not have to obey it if it runs afoul of the constitution and other rules of recognition. Hart was more explicit about this in the separability thesis that, if a particular rule is detestable, citizens do not have to obey such rule.⁷⁶³ In that regard, the argument here is that internal point of view does not mean that there is an absolute duty to follow all laws, where there are good reasons not to conform, nonconformity in that regard becomes the internal point of view. The implication of this claim is that any reasonable citizen will accept and follow the laws conditionally: in so far as they are not immoral, unlawful, and incongruous with the identified rules of recognition of the legal system. Hence, in all normal situations Nigerians will be justified in accepting these ultimate rules of recognition because the rules contribute immensely to establishing a stable and functional legal system.

5.5.1 The Notion of Civil Disobedience

The term “civil disobedience” was first used by Henry Thoreau in his 1849 essay to describe his deliberate refusal to pay the state poll tax as his own form of disapproval of the Mexican War (1846–1848) and the Fugitive Slave Law.⁷⁶⁴ In justification of flouting the law, Thoreau claims that that he cannot partake in the same process he has been criticising.⁷⁶⁵ According to him, It is a heroic deed and a patriotic act to conscientiously resist the wrong policies and laws of the society.⁷⁶⁶ Other successive dissenters had their own unique ways to drive-home their deliberate conscientious breaking of the state laws as form of civil disobedience, albeit the legal and societal consequences for dissenting, their aim is generally to engineer societal change.⁷⁶⁷ Whether their acts of disobeying laws qualifies as “civil disobedience” is a further question that somewhat depends upon how succinctly I lay down the notion of civil disobedience here.

In its simplest form, civil disobedience means refusal by a group of people to obey particular laws or pay taxes, usually as a form of peaceful political protest. In other words, it is non-violent breaking of a law on moral grounds.⁷⁶⁸ Celikates argues that “civil disobedience can be a legitimate and effective act of protest, albeit only under clearly circumscribed conditions and

⁷⁶³ Hart (1969) 594

⁷⁶⁴ Kimberly Brownlee, ‘Conscientious Objection and Civil Disobedience’ in Andrei Marmor (ed.), *Companion to the Philosophy of Law* (Routledge 2012) 530-31

⁷⁶⁵ Ibid

⁷⁶⁶ Ibid

⁷⁶⁷ For example, the personal histories of Mahatma Gandhi, Emmeline Pankhurst, Martin Luther King Jr., Nelson Mandela, Aung San Suu Kyi, Liu Xiaobo etc. highlight their various unique acts of civil disobedience.

⁷⁶⁸ Robin Celikates, ‘Democratising Civil Disobedience’ (2016) 1 *Philosophy and Social Criticism* 1. 6

when it fulfils demanding normative requirements”.⁷⁶⁹In the view of Mahathma Gandhi, it is a "civil breach of immoral statutory enactments."⁷⁷⁰ One of most renowned notions of civil disobedience is that given by John Rawls in his ‘A Theory of Justice’. Rawls claims that “civil disobedience is a public, nonviolent, conscientious but political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government”.⁷⁷¹ Rawls’ further argue that his idea of civil disobedience is meant for application in what he refers to as “a nearly just society”.⁷⁷² There are three important elements identified by Rawls which defines civil disobedience; first, civil disobedience is public in nature and dissents ought to notify legal authorities in advance. Thus, civil disobedience should not by any stretch of imagination be carried out discreetly or secretly. Secondly, civil disobedience is a nonviolent act. By this, Rawls claims that any act likely to cause bodily injury cannot be said to be civil disobedience. Thirdly, dissents must be ready to accept the legal outcome of their actions, including punishment.⁷⁷³The combination of these conditions, according to Rawls, distinguishes civil disobedience from revolution, militancy, and other forms of resistance. It means civil disobedience actors are still within the boundary of law despite their disobedience.

However, these three conditions of Rawls’ conception of civil disobedience have raised debate and criticism. Starting with the notion that an act of civil disobedience must be public, Critics have argued that informing the legal authorities in advance may sometimes water down an act of civil disobedience, because forewarning the government can enable authorities and dissents to prevent the success of civil disobedience.⁷⁷⁴For example, on 29th September 2020, most Nigerians had gone to bed prepared that the Nigerian Labour Congress (NLC) strike against fuel hike, scheduled to begin at midnight, would be in full swing by daybreak. But this was not to be as labour leaders reached a compromise with government even before the strike commenced.⁷⁷⁵ Rawls’ view that civil disobedience is synonymous with nonviolence has also been objected to by Brownlee. According to the latter, what grounds would someone imagine that violent behaviours will render disobedience as an uncivil act? Brownlee further argues that, “what is crucial here is not so much violence as harm, of course, non-violent acts of dissent

⁷⁶⁹ Ibid

⁷⁷⁰ M.K. Gandhi quoted in K.C Sunny, ‘Right to Civil Disobedience: Is it Justification for Strike by Government Servants?’ (2008) 50 J. Indian Law Institute 4. 693

⁷⁷¹ John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 320

⁷⁷² Ibid 319

⁷⁷³ Ibid

⁷⁷⁴ See, B Smart, ‘Defining Civil Disobedience’ in Hugo A. Bedau (ed.) *Civil Disobedience in Focus* (Routledge 1991) See also, T. Milligan, ‘Animal Rescue as Civil Disobedience’ (2017) 23 Res Publica. 285-289

⁷⁷⁵ Available @ <https://www.vanguardngr.com/2020/09/29.html>. Accessed on 16th July 2021.

can be more harmful than violent ones.⁷⁷⁶ Joseph Raz had previously made a similar case against Rawls' nonviolent notion of civil disobedience earlier. According to him "a strike by ambulance workers causes more harm than minor property damages".⁷⁷⁷ Consequently, the above criticism and many more have caused scholars to view Rawls' notion of civil disobedience as parochial, and there are many secondary literatures available now that offer different notions of civil disobedience.

Notwithstanding these many views on civil disobedience, most notions of civil disobedience converge on some key characteristics: civil disobedience is an unlawful, conscientious action by some citizens driven by the intent to cause a systemic legal or political change. In other words, civil disobedience is mainly done with the aim of changing laws or legal system, policies, practice amongst other things. Knowing that civil disobedience includes at least these characteristics will do for the purposes of the present study, which is to examine when it is necessary to conscientiously flout the Nigerian law with the intent of engineering a socio-political and legal change.

5.5.2 Legal Justification for Civil Disobedience in Nigeria

The question to be asked here is, what is the legal validity of civil disobedience in Nigeria? The implications of the rule of recognition for civil disobedience is somewhat controversial because it will involve using the constitution or precedent to justify or criticise an act commonly considered as illegal (civil disobedience). Since the earliest Nigerian constitutions were products of freedom struggle, the drafters of the constitutions intentionally ensured that the fundamental freedoms of citizens, including such rights connected to dissent and protest, were inserted in the various constitutions (from the 1960 independence constitution to the present constitution). Hence, the right to freedom of speech and expression, right to form and partake in associations and unions, and right to peaceful assembly are various forms of civil disobedience guaranteed as fundamental human rights in chapter four of the present constitution. Olisah Agbakoba argues that the citizens' right to strike is a fundamental right implied in the constitutional right to form association and union because most strike actions are carried out by labour unions as a form of civil disobedience.⁷⁷⁸ However, relying on the

⁷⁷⁶ K. Brownlee, *Conscience and Conviction. The Case for Civil Disobedience* (OUP 2012) 22

⁷⁷⁷ Raz (n 87) 267

⁷⁷⁸ See *Agbakoba v A.G Ekiti State & 2 Ors* (Supra)

Supreme Court judgment in *Adams Oshiomole & NLC v A.G Federation & Anor*⁷⁷⁹, the A.G of Ekiti State argues that strikes are illegal and unconstitutional. Nonetheless, Agbakoba, on behalf of the civil servants, argued back that every one of the fundamental human rights enshrined in chapter four of the Nigerian constitution could be claimed by any union member, including the civil servants. As a worker willingly entered an employment, she would have been by that very act be considered to have consented to enter that employment in such reasonable belief that her constitutional rights to freedom of associations and unions (including their activities) will be guaranteed. Agbakoba argument agrees with Section 43 of The Trade Union Act Cap T14 LFN 2004 which makes it legal for any member or person acting on behalf of a trade union to embark on strike actions or protest.

The same conclusion can be drawn in respect of protest. This right to protest as civil disobedience is protected by the same constitution under section 40 as follows:

Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests.

The above provision is contrary to the Public Order Act 1979 which primarily was about the regulation of assemblies and protests in Nigeria. However, the Court of Appeal has nullified a substantial part of the POA on the grounds that it contradicts the above constitutional provision. Thus, in *ANPP v Inspector General of Police*⁷⁸⁰, Adekeye JCA held:

The Public Order Act should be promulgated to complement sections 39 and 40 of the Constitution in context and not to stifle or cripple it. A rally or placard carrying demonstration has become a form of expression of views on current issues affecting government and the governed in a sovereign state. It is a trend recognised and deeply entrenched in the system of governance in civilised countries- it will not only be primitive but also retrogressive if Nigerians continue to require a pass to hold a rally. We must borrow a leaf from those who have trekked the rugged path of democracy and are now reaping the dividend of their experience.

Relying on this judgment, advance notification is now inconsequential in order to hold an assembly (be it rally, protest or demonstrations) except the dissents need the protection of

⁷⁷⁹ [2007] 8 NWLR (Pt.1035) at page 58. In this case, the supreme court had gone a step further and declared that civil servants had not even the constitutional right to strike, especially where it sabotages the social and economic efforts of the Federal Government.

⁷⁸⁰ Supra

security agents during the assembly. From the foregoing, it is safe to conclude that the constitution as the rule of recognition safeguards the citizens' right to carry out any form of civil disobedience.

5.5.3 Civil Disobedience Practices in Nigeria and Internal Point of View

This study agrees with Hart's claim that law viewed from the perspective of the bad citizen is incapable of explaining normativity. Certainly, there must always be reasons why citizens obey law and that can be simply explained through normative statements like "ought", right, should, wrong, must etc.⁷⁸¹ Hart did not say much about the point of view that citizens should take towards the rule of recognition. However, it is clear, on Hart's explanation, that citizens may take the internal point of view, but he does not claim that it is compulsory for citizens to take the internal point of view. Of course, he says that "ordinary citizens may just obey each 'for his part only' and from any motive whatever."⁷⁸² I argued in chapters two, three and four that there was certainly more than Hart was willing to concede concerning the importance of citizens internal point of view. The act of behaving lawfully presupposes the thought that a citizen acts according to reasons that are general and practicable. If the citizens' behaviour is driven by the fear of sanction alone, then they cannot be said to have acted lawfully. In such situation, the question of acting lawfully will not even arise except they follow the law from an internal point of view.⁷⁸³

In the case of civil disobedience, disobedience is a reason for an appraisal of the society's (officials particularly) sense of justice from the point of view of the dissenters. The dissenters do not act based on fear of sanction, the reason for the dissenters' action is because they often think that the government or majority in the society have deviated from the generally accepted standard that ought to be followed by members of the group. Rawls supports this claim:

Civil disobedience is a public act which the dissenter believes to be justified by (the constitutional) conception of justice and for this reason it may be understood as addressing the sense of justice of the majority in order to urge reconsideration of the measures protected and to warn that, in the sincere opinion of the dissenters, the conditions of social cooperation are not being honoured.⁷⁸⁴

⁷⁸¹ Hart (n 2) 57

⁷⁸² Ibid 116

⁷⁸³ David Luban, 'The Lysistratian Prerogative: A Response to Stephen Pepper' (1986) 11 Am. Bar Foundation Res J. 4. 637-9.

⁷⁸⁴ See John Rawls, 'The Justification for Civil Disobedience' in William A. Edmundson (ed) *The Duty to Obey the Law: Selected Philosophical Readings*, (Rowman & Littlefield Publishers 1999) 55

Hence, Civil disobedience implies a reason-based refusal to accept an immoral law, policy, or practice of the state. By questioning the content of the law, policy or practice of government, the dissenter invariably fulfils the practical reason non-acceptance internal point of view, albeit not as the Holmesian bad man, but as a good man who's reason for nonacceptance is form of demand from those (government officials) who deviate from the general standard.⁷⁸⁵ Also, the dissenters, by the reason of disobedience, establishes the legitimacy of their demands from the government (deviants).⁷⁸⁶ A couple of instances in Nigeria are presented below to exemplify the situation of civil disobedience from a practical nonacceptance internal point of view.

Relating to Nigeria, chapter four of this study reveals some instances of civil disobedience and the government officials' attitudes towards the dissenters. For example, the case of officials in the executive arm clamping down on journalists who were critical of the government⁷⁸⁷, restriction orders placed on protesters,⁷⁸⁸ killing of Indigenous People of Biafra (IPOB) during their rally for the release of their leader from unlawful imprisonment,⁷⁸⁹ among other things. In recent times, examples of citizens' civil disobedience abound. The biggest civil disobedience of late is the ENDSARS nationwide protest that took place in October 2020. Nigerians, comprising mainly of young people took to all the major streets in the nation, protesting against the notorious defunct Special Anti-Robbery Squad (SARS), a department of the Nigerian Police. The protest later escalated to an extent where the dissenters started demanding for the resignation of the President, end to bad governance, accountability from public officials, among other things. Nonetheless, the protest grew bigger and was hijacked by suspected government hoodlums resulting in serious violence and destruction of properties. In reaction to the violence, the government of Lagos State imposed a dusk to dawn curfew instructing all residents of Lagos to stay indoors until further notice from the government. The protesters were obstinate and refused to abide by the government's order. Incidentally, the protest was ended by the killing of many dissidents at Lekki Tollgate Lagos, by a group of Nigerian soldiers on 20th

⁷⁸⁵ In the explanation of Shapiro, the practical internal point of view involves two attitudes (acceptance and nonacceptance); the attitude of an insider who practically accepts the rules and the attitude of an insider (not a bad man who accepts for fear of sanction) who takes a practical, but non-accepting point of view. See Shapiro (n 223) 1160.

⁷⁸⁶ Ibid 1161

⁷⁸⁷ *Oyegbami v Attorney General* [1981] 1 NCLR 895.

⁷⁸⁸ *ANPP v Inspector General of Police* (supra)

⁷⁸⁹ *DSSS v Nnamdi Kanu* (Supra)

October 2020.⁷⁹⁰ There are two major issues with this illustration. First, there is a reason for the action of the ENDSARS protesters, the reason was the violation of their fundamental rights (right to life and dignity of person) as per chapter four of the constitution, by the police. The refusal to follow the directive of the government represents practical nonacceptance internal point of view of the unconstitutional behaviour of the police. Secondly, the protest signals a compelling reason to effect a change in the system, at least, the disobedience achieved some change in the police structure.

Another remarkable event relevant to this discussion is the case of twitter ban by the government of Nigeria. The facts are as follows: the Federal Government announced on 4th June 2021 that it was suspending twitter's operation in Nigeria. The action of the government comes after the management of twitter deleted a tweet of President Muhammadu Buhari for violating the community standard rules of Twitter. Some Nigerians the President's post, which was reminiscence of the 1967 civil war, as depicting of someone still nurturing genocidal intent towards the people of South-East who were the major victims of the civil war. In what follows, the President, by way of an Executive Order, suspended the operations of Twitter and banned the citizens from using it. In fact, the Attorney General of the Federation, Abubakar Malami affirms, "I have directed the DPP to swing into action and prosecute any offender of the federal government ban on Twitter". This message targeted both corporations and individual violators. The action of the government drew widespread international and local criticism.⁷⁹¹ Many critics consider it as an attempt to gag the media in order to muzzle Nigerians' freedom of expression contrary to section 39 (1) of the constitution.⁷⁹² Nonetheless, many Nigerians refused to obey the order of the federal government and continue to use their Twitter handle via the virtual private network (VPN)⁷⁹³ in order to get past the ban.

According to Hart, taking internal point of view means that the members of the group treat existence of the rules as the reason for their action and the justification for their claims, criticism, obedience, or disobedience.⁷⁹⁴ It was on the basis of this, that I argued in chapter two

⁷⁹⁰ "How the End Sars protests have changed Nigeria forever - BBC News." @ <https://www.bbc.co.uk/news/world-africa>. Accessed 14th June 2021.

⁷⁹¹ US, E.U, condemn Nigeria's Twitter Ban- <https://nilepost.co.ug/2021/06/07/us-eu-condemn-nigerias-twitter-ban/>. Accessed 12th June 2021.

⁷⁹² A. Ewang, "Nigeria's Twitter Ban Follows Pattern of Repression" @ <https://www.hrw.org/node/378902/>. Accessed 12th June 2021.

⁷⁹³ A VPN allows social media users to get around local blocking of websites by accessing the internet through a machine located in a different part of the world.

⁷⁹⁴ Hart (n 2) 90

that the internal point of view can explain normativity and invariably function as a moral point of view. Of course, to take the practical reason internal point of view, is to believe that the law in question is the legitimate standard for general behaviour.⁷⁹⁵ I had earlier argued that legitimacy in this kind of situation must be moral legitimacy. The most persuasive reason for a right to civil disobedience in Nigeria that this study has offered so far, is the people's inclination to struggle for human dignity. Indeed, Nigerians engaging in civil disobedience do so out of the belief that the fundamental human rights contained in the rule of recognition (constitution) places upon the civil dissenters the demands for conformity and the duty to protest against those (government and officials) who deviate. Some Hartian scholars like Joseph Raz and Jeremy Horder hold that this humanistic motivation provides a safeguard to private civil disobedience.⁷⁹⁶ Taking the cases of London-based Nigerian protesters and dissenter twitter users as an example, the reason and justification for dissenters to embark on this kind of protest lie in; first, their nonacceptance of the government's refusal to provide basic health amenities for the citizens as demanded by the constitution. Secondly, their nonacceptance of the government's violation of the rights of expression as per section 39 (1) constitution.

Nigerian citizens have the right to resist any attempt by the officials to deprive them of their rights through decrees, draconian or several other routes not validated by the rules of recognition. One of these human rights is the right to life, liberty and freedom wisely enshrined in the section 35 or chapter four of the constitution. Any public Act, Decree, Edit, Law and Court Order which is in contrast with the provisions of this section of the constitution does not deserve to be obeyed by the citizens. This is the ultimate justification for civil disobedience too. Any official in Nigeria, be him of the executive, legislative or courts, who makes a law that violates the provisions of the constitution, customary law and precedents has over-lapped the boundaries of his authority. The implication is that his purported law or order should be considered as unlawful, and so, unworthy of obedience. One of the important enquiries in chapter four of this thesis was in respect of whether officials maintained an internal point of view in circumstances in which, on political order, they are asked to do something unlawful by a colleague or higher official. Although slight, evidence of officials taking the internal point of view despite political pressure to do the unconstitutional or unlawful were still

⁷⁹⁵ Ibid 56

⁷⁹⁶ See Raz (n 112) 286. See also, J. Horder, *Excusing Crime* (OUP 2004).

available. For example, in *A.G Abia State & 35 Ors v A.G Federation*⁷⁹⁷ the officials of the court were happy to disregard Order 9 of the President, rather than violate the ultimate rule of recognition. This result agrees with empirical research conducted by Page on the reaction of officials when confronted with following an unlawful order. He reveals that only two out of the several officials interviewed was willing to follow the unlawful order.⁷⁹⁸ If officials can disregard unlawful or unconstitutional orders as a form of taking an internal point of view, it is only logical that citizens do the same too. According to Hart, “the assertion that a legal system exists is therefore a Janus-faced statement looking both towards obedience by ordinary citizens and to the acceptance by officials of secondary rules as critical common standards of official behaviour”⁷⁹⁹. If the citizens and officials can both have obligation of obedience towards the rules of recognition, then nothing should prevent them from sharing the obligation of nonconformity with laws or orders that are not validated by the rules of recognition.

5.6 Conclusion

Having resolved the problem of what standards constitute the rules of recognition in Nigerian jurisdiction in chapter three of this study, the subsequent important question is, how a modern adaptation of these standards can dissolve the problem of legal pluralism in Nigeria? In response to this query, I argue that the significance of the rule of recognition will be that all the primary rules work under a single unified legal system. I am not by this, absolutely endorsing legal centralism.⁸⁰⁰ At least, the controversy among officials and laws in Nigeria proves that Nigeria is not necessarily a site of legal monism. On the contrary, as illuminated by this study so far, competing and varieties of laws, most times, with equal standing can only dwell together through the instrumentality of a foundational rule. Thus, to demonstrate its significance for a pluralistic Nigerian legal system, this study finding is that the rule of recognition must do these two: first, since the validity of primary rules depends on their being identified or recognised as a member of a legal system as per the criteria laid down in the rule of recognition, any primary rule that may function within Nigerian jurisdiction must do so according to these system's ultimate criteria of validity. Secondly, since the same rule of recognition is responsible for the validity or identification of all the primary rules within the Nigerian jurisprudence, the

⁷⁹⁷ Supra

⁷⁹⁸ See Edward Page, *Governing by Numbers* (Oxford: Hart Publication 2001) 113-15

⁷⁹⁹ Hart (n 9) 113-14

⁸⁰⁰ Legal centralism can be understood as multiple classifications of legal systems, but its central purpose is that western jurisprudence is the overarching form of law. See S. E. Merry, ‘Legal Pluralism’ (1998) 22 Law & Society 5. 878

implication is that such adaption of the rule of recognition has the capacity of unifying all the primary rules to function harmoniously under a single legal system. That is, the ability to bring all the conflicting laws under a single umbrella that dictates the *modus operandi* of those laws. Therefore, this thesis fulfils the first task of this chapter by employing the rules of recognition to play the validating and constitutive roles for all laws and cultures within Nigerian jurisprudence. Regarding the second task, this study discovers that the relevance of Hart's theory for democracy is found in the core values of democracy, which include the rule of law, separation of powers and fundamental human rights. Lastly, this study finds out that the issue of civil disobedience which occupies Nigerian democratic space deserves the status of internal point of view, but a practical nonacceptance internal point of view.

CHAPTER SIX: SUMMARY AND CONCLUSION

6.1 Summary

The claim I set out to investigate in this thesis is whether Nigeria has a legal system, and if it does, whether such a legal system can be adjudged as a modern legal system. Therefore, I began this study by looking at the nature of the Nigerian legal system and the attendant challenges confronting it. When Nigeria gained independence from Britain, she proclaimed her commitment to common law legal system and established, if she did not inherit, a legal order that (in form at least) was expected to be characteristically modern. However, this inherited institution is modern in appearance only. Even if we accept that the relationship with Britain introduced some elements of a modern legal system (for instance, regard for the constitution and precedents as ultimate authoritative rules) into the Nigerian legal order, it was not long before such modern elements were orphaned by the indigenous Nigerian public officials. Although the Nigerian legal system possesses a functional judiciary with a full complement of judges, lawyers, law enforcers and public officials, the reality on ground does not allow me to conclude that this legal order exists as a modern legal system. This is so notwithstanding the fact that the forms of legal practices are properly “legal.” There seems to be an unending dislocation between the appearance of the indigenization of modern legal systems and the reality of repeated and deliberate failures on the side of the public officials meant to be the custodians of this system. Such failures are manifested in the executives and legislatures blatant disregard for the constitution, international law, and refusal to accept the rulings of the court. Also, the inability or unwillingness of judges to stay faithful to precedents. Concrete illustrations of the failures of this legal system are found in many constitutional and high-profile cases analysed in chapter four of this study. The diversity and multiplicity of laws and cultures in the legal system created another tension because a single authoritative rule was needed to provide an explanation concerning their validity. In placing the emphasis on the existence of modern legal system in Nigeria, I adopted Hart’s theory of law. Adopting Hart’s

philosophy as the theoretical working tool narrows my inquiry by way of juxtaposing the character of Nigerian legal order against the two minimum requirements for a modern municipal legal system created by Hart. This chapter concludes this study. In concluding it, I will first summarize the key findings contained in the previous chapters. Thereafter, I will use the findings identified to conclude whether the Nigerian legal system meets the requirements of a modern municipal legal system.

The first chapter is basically a preliminary consideration and the main thesis that guides this study is that 'Nigeria has not got a genuinely modern legal system.' The findings of chapter one happened at two levels. First, the crises with regard to the application of different laws and cultures show that Nigeria is not a simple legal system. The preliminary conclusion is that it is normal to have the problems of multiple and diverse laws/cultures in any legal system, albeit that of Nigeria is unique in that the West African nation is a melting pot of over three hundred cultures and languages, and a conglomeration of laws influenced by such cultures. Thus, the realities of legal pluralism and multiculturalism continue to pose great challenges for the legal system. On the second level, the normative quality of Nigerian legal system as a modern legal order is depreciated by the following factors: public officials overbearing attitudes towards public institutions and rules, penchant for outright disregard towards fundamental rules of the system, delivering of conflicting judgments by judges, among other issues.

The second chapter creates the basic structure that holds the entire study together. The aim of this chapter is to adopt a contemporary theory of law which explains the existential quality of a modern municipal legal system. In order to realise this, I interrogated several theories of law in general and theories around modern municipal legal systems in particular. More particularly, I drew up various theories of scholars that could be employed to explain jurisprudential framework on what a modern legal system should look like, especially for developing societies like Nigeria. I was mindful of the difficulties involved in fitting the entire Nigerian jurisprudence into a single theoretical framework for two important reasons. The first reason being the circular and transitional nature of the socio-political and legal structure of Nigeria; ours is an undulating landscape of democratic rule to military rule and again to democratic rule. The second reason was because of the complex and multicultural nature of Nigeria and its attendant problems of legal pluralism. To resolve the problem of the appropriate theory to use, first of all, I employed a historical research method in order to gain valuable insights concerning past theories of legal system that were catalytic to the development of the modern theories of

legal system this study relied upon. For example, notwithstanding its narrowness and in the inability to explain qualities of a modern legal system, the command or imperative theory of Jeremy Bentham and John Austin was still considered because of the historical role it played in the emergence of Hart's theory of legal system. A host of other contemporary theories were equally examined. Some were partly considered as relevant to this study because they contain some salient features that could be seen in a modern legal system. For example, Hans Kelsen's pure theory of law was accepted but subject to a condition, the condition that the grundnorm as a form of foundational rule has to possess an actual existence, rather than being a mere metaphysical presupposition which may have no existential value for a modern legal system. Ultimately, in respect of the application to overall legal system of Nigeria, this study adopted the Hartian theory of a modern legal system. According to this theory, law is precisely to be considered as a legal system in which secondary rules, especially the rule of recognition plays the roles of identifying and validating primary rules in the legal system. The frugality and plausibility of this theory makes it the most influential theory of a legal system in contemporary analytic jurisprudence. To determine whether a legal order exists and equally qualifies as a modern municipal legal system, one will have to assess whether primary rules of obligation are generally obeyed by the ordinary citizens, and whether secondary rules, particularly the rules of recognition serve for the identification, validation, and application of the primary rules by the officials of the legal system. These two minimum conditions for the identification of a legal system enable this study to evaluate whether Nigerian has truly got a legal system, and if it has, whether such legal system qualifies as a modern municipal legal system with a relatively small and precise set of tools. Therefore, in analysing these two criteria set by Hart, I argue that the first condition is analytically connected to the rule of recognition because general citizens' obedience is only permitted by the bindingness occasioned by ultimate rules of recognition. Thus, the existence of rule of recognition becomes the first condition for the existence of a legal system. The second minimum condition for the existence of a legal system as mentioned above concerns the attitudes of public officials towards the rule of recognition. This attitude of public officials is what Hart describes as the internal point of rules. Invariably, two variables are of utmost importance in this study: the rule of recognition and the internal point of view. In spite of the centrality of these two concepts in the Hartian minimum necessary and sufficient conditions for a legal system, Hart refuses to accept that the concepts have any practical application to an actual legal system, declaring instead his metaethical neutrality. Nonetheless, employing a hermeneutical approach, this study makes a significant contribution to knowledge by interrogating an aspect of Hart's theory that has practical application to an actual legal

system. As argued in chapter two, Hart's own metaethical ambivalence created the gap that allows this study to discover that there are two versions of internal point of view. The first version is norm-relative internal point of view which aligns with noncognitivism but cannot explain normativity of law. The second version involves practical reasoning internal point of view, and I argue that this version gives internal point of view away as a cognitivist account of acceptance which is naturally normative and pragmatic in terms of application to an actual legal system.

In the third chapter, this study sought to find out whether Nigerian legal system meets the first requirement of a modern municipal legal system. Here, this study responds to one of the most vital questions posed earlier in this research which is, what standards constitute rules of recognition and what propositions satisfy those standards within Nigerian jurisprudence? Indeed, the effort in chapter three was to investigate whether rules of recognition exist within the Nigerian legal system and also to find out if those standards referred to as rules of recognition really satisfy the basic requirements of a foundational rule. In order to achieve this, this study went mainly for some fundamental laws and standards within the Nigerian legal system which have the character of securing the existence and validity of other primary rules and could also exist on their own regardless of validation by any other rule. Notwithstanding that the rule of recognition is not outrightly specified in any part of the Nigerian legal order, this study was still able to extract some reliable results from the investigation. Hence, the major findings for chapter three reveals that the Constitution, the authoritative judgments of constitutional courts, and those accepted international laws, all form part of the rules of recognition within the Nigerian legal enclave. Of course, it is not enough to present the Constitution of the Federal Republic of Nigeria, Precedents, and international laws to serve as exhaustive lists of the rule of recognition in Nigeria, there have to be reasons to support these findings. In furtherance of these reasons, this study discovers among other things that while their main characteristics revolve around the fact that they are fundamental rules and autonomous sources of law, each of their main characteristics discovered in this study shows that they have at least in principle, been accepted as authoritative rules by Nigerian top public officials. The implication of this acceptance by Nigerian officials is that these identified rules of recognition do not only possess the character of ultimacy, but they also provide the criteria of validity for the primary rules in the system. Therefore, the first feature of the Nigerian Constitution, and perhaps the most important one which made this study to identify it as the ultimate rule of recognition is its normative supremacy. The finding of this study in this regard

was in respect of section 1 (1) of CFRN, which provides thus: ‘this Constitution is supreme, and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria’. Since Hart claims that the rule of recognition is a standard by which a rule does not derive from a higher rule but only from acceptance of it by officials, it suffices to say that the Constitution represents the first ultimate rule of recognition within Nigerian jurisprudence because it does not derive from any other higher law except from acceptance. The above article of the Constitution describes it as a fundamental and ultimate rule, and it is ultimate because if there is no legally superior legislation then there exist an ultimate rule of recognition. Thus, as an ultimate rule, the Constitution is an autonomous source of law. And as a fundamental rule, the Constitution serves as an important criterion for validating other rules laws and equally functions as normativity of law.⁸⁰¹ It is needless to repeat some of the court judgments upon which this finding was made in chapter three. However, the case of *ANPP v I. G*⁸⁰² strikes a constitutional chord as far as normative superiority was concerned. In that case, the Court of Appeal declared section 5 of the Public Order Act which provides that a Governor’s permit was needed for public assembly and protest as a gross violation of the citizens’ rights of freedom of expression and association contained in sections 39 and 40 of the Constitution and thus, invalid. This case among others, supports the finding of the study that the Constitution is an ultimate rule of recognition in Nigeria.

Also, Hart’s explanation of the ultimate rule of recognition includes an account of a ‘supreme criterion’, which is all or part of the ultimate rule. However, as already explained in chapter three, the rule of recognition may be multiple in a complex legal system. Therefore, this study discovers that in a legal system like Nigeria where there are several sources of law, those sources of law will usually be considered as the rule of recognition as it has power to give validity to the primary rules derived from those sources. Relying on this finding, I indicated in chapter three that international law resonates with the Constitution, nevertheless it is an autonomous source of law under Nigerian jurisprudence. One difficulty in putting international law forward as part of the rules of recognition is owing to the fact that Hart does not consider it as a law or legal system. Hart thinks that international law could be at best, a pre-legal kind of law and not law capable of forming a part of modern legal system. I tersely presented Hart’s account of international law, advocating an interpretation of international law as an ultimately

⁸⁰¹ Normativity of law has been explained several times in this work as the reasonableness behind the acceptance and obeying of law.

⁸⁰² *supra*

foundational rule by its nature. I argue that Hart underestimated the normative viability of contemporary international law, and that ultimately, determining whether international law satisfies Hart's conditions for a legal system speaks to its acceptance by public officials. This reconsideration of Hart's conception of international law enjoys a huge theoretical support in the works of Carmen Pavel, Leslie Green, Jeremy Waldron, Payandeh Mehrdad, among others. These scholars all agree that the core characters of international law- systematicity, acceptance by state officials, source of validity, etc. are sufficient test to describe any modern legal system. This claim is also congruous to the preamble of the of VCLT which mandates all parties who have accepted international law to ensure its functionality as a foundational rule. Relating this to Nigeria, the finding of this study is that international law is a foundational rule by the virtue of top Nigerian officials signing or ratifying it as a form of acceptance. Of course, when public officials accept international conventions and treaties as law, the courts have the authority to apply that international law as a foundational rule or a rule of recognition because it has satisfied the most important criterion (acceptance by public officials) for the existence of rule of recognition stipulated by Hart. Therefore, relying on the above extracted result, this study discovers that international law forms part of the rules of recognition.

Regarding judicial precedents existing as part of the rules of recognition in Nigeria, two reliable results obtained by this study support this finding in chapter three: first, the study discovers that it is possible for the courts to establish judgments concerning the validity of primary rules in the legal system outside the provisions of the constitution, especially in penumbra cases. Secondly, this study discovers that the court has the power to give life or ignore certain provisions of the constitution in the interest of public morality. For instance, in the case of *A.G Ondo State v A.G Federation & Ors*, notwithstanding the fact that item II of the Concurrent Legislative List and section 7 (6) of the Constitution empowers the State and Local Governments to own a joint account for the purpose of statutory allocation and revenue, the Supreme Court consider allowing that as a breach of the fundamental principle of true federalism.⁸⁰³ This finding agrees with Hart's original theory on the rule of recognition as a rule that can be established by reference to actual practice among the judges. The practice is that the judges or officials of the court apply precedents in identifying the valid law that will be part of the legal system. Thus, the finding that precedent is part of the rules of recognition in Nigeria is based on the fact that it is always applied as such in the daily practice of Nigerian court officials. The Nigerian constitutional courts consider all of the case laws they follow as

⁸⁰³ supra

legally binding, irrespective of whether those decisions have any basis in other sources of law such as the Constitution or Acts of the parliament. Thus, this study unravelled through some decided supreme court cases in chapter three that no legislative text creates the law that the courts rely on to practice and enforce case laws. It is also discovered that the power of precedents to validate or invalidate a primary legislation is not outrightly derivable from the Constitution.

Chapter four fulfils the second task of this study. In the conceptual framework, this study has proposed a reconstruction of Hart's account of internal point of view along the lines of practical reasoning or moral internal point of view so that it can explain normativity of law. At the surface level, this kind of task may appear to have already been done by McCormick, Holton, Toh, Perry, among many others. It must be emphasized, however, that there are significant differences between this study and theirs, the full extent of which I had already demonstrated in chapter two of this thesis. It is equally important to note that the gap in the literatures of the above moral attitude legal philosophers were both: of approach and of outcome. Toh and Perry, for example, approached Hart's internal point of view from a moral perspective but with an outcome of non-cognitivism. They both agreed that internal point of view is a moral point of view but did refuse to treat Hart's internal statement as moral statements expressing the speaker's attitude of approval towards the law. I argued that such understanding of internal legal statements was because they saw the internal point of view as merely an insider perspective, internal point of view is not just an insider's point of view, rather it is an internalised perspective.⁸⁰⁴ So, the hypothesis this study sets out to ultimately investigate is whether Nigerian public and judicial officials take internal point of view towards the Nigerian rules of recognition from a practical reasoning perspective. That means; first, having a common perspective or understanding of what those rules are. Secondly, taking shared or uniform internal point of view towards the rules. Both issues require critical serious discussions and interpretations. It is not as though the rule of recognition must be explained by all the officials in a single way in order to demonstrate that they take a uniform internal point of view toward it. In a similar manner, a distinctive articulation of some rules of recognition does not mean that their contents are distinct from one another. Furthermore, in testing internal point of view against the behaviour of officials in Nigeria, this study was not seeking for the results that officials must reach a consensus on particular formulation of the rules of recognition in Nigeria,

⁸⁰⁴ Shapiro (n 223) 1158-59

rather the study was looking out for how the officials individually hold the rules of recognition as foundational rules worthy of practical acceptance.

Hence, the issue for determination in the fourth chapter is whether the Nigerian public officials take internal point of view towards the various rules of recognition so identified in chapter three. In chapter four, this study went primarily for some leading constitutional and international law cases. The study was able to obtain some reliable results from a thorough and comprehensive analysis that was carried out on these high-profile cases. The major finding in this chapter is that, not only do Nigerian public officials disparage the Constitution, but they also disregard judicial precedents and most often international laws as foundational rules. The cases analysed in this chapter consisted of past and recent instances of how top Nigerian public officials treat the system's foundational rules. This study equally explored some particular actual instances of out-of-court constitutional and international law issues, rather than to treat these problems abstractly. The cases and events were both comprehensively and exhaustively drawn from high-profile ones in a manner that precludes the risk of the findings of this research entering the pitfalls of fallacy of hasty generalisation. Even at that, this is qualitative philosophical research, sample size is not too consequential. What was important was the accuracy and probity of the decided cases considered. The central question that follows is, to what extent do Nigerian officials take internal point of view towards these rules of recognition? The criterion formulated to determine whether Nigerian officials really took an internal point of view towards the rules of recognition was investigating if there were situations in which, on socio-political, religious, and personal grounds, these officials would refuse to comply deliberately with what they knew to be the rule of recognition within the Nigerian legal system. At least, Hart's claim on this has been consistent; acceptance and not merely obedience of the rule of recognition for the survival of the legal system is his position. I clarified this point earlier in the same chapter four and argued that it is not implausible to derive attitudes from disobedience as much as it will be from obedience. I gave the reasons for adopting this kind of approach as rooted in normativity. At the risk of rehearsing the arguments made there, the reasons for obeying rules may not include acceptance of the authority of the legal system, but the reasons for disobeying rules must imply the refusal of the legal system's ultimate authority. Among the constitutional cases analysed in chapter four, some circumstances exist where public officials, especially judges needed to disobey or reject conformity with the rule because they were asked to do something illegal or unlawful. In such cases, I consider officials to have taken the internal point of view. Nonetheless, while all the Nigerian officials agree that the

Constitution, judicial precedent, and international law form part of the ultimate criteria for legal validity, evidence of officials taking uniform internal point of view towards these foundational rules was not found at all. The major results obtained in chapter four reveal several cases in which officials consciously disregarded the ultimate rules of recognition in Nigerian legal system. Hence, the conclusion drawn from chapter four is that first, Nigerian officials do not take internal point of view towards the rules of recognition. Secondly, there is a complete absence of any form of uniform internal point of view taken by public officials towards the system's ultimate rules of recognition.

In chapter five, this study resolves three vital questions that were offshoots of the findings in chapter three and chapter four. The first issue was, how a modern adaptation of the rules of recognition could resolve the challenges of legal pluralism and multiculturalism in Nigerian jurisprudence? Secondly, this study sought to evaluate the significance of the identified rules of recognition for Nigerian nascent democracy. Thirdly, the study sought to investigate how civil disobedience can be construed as a form of practical reasoning or moral attitude internal point of view? In resolving these issues, the main findings of the previous chapters were structured according to the objectives stated in chapter one. In respect of the first question, I was mindful of the fact that there are multiple and conflicting rules/cultures within the Nigerian legal system, so I explored the problem of legal pluralism and multiculturalism and proposed that the rule of recognition has the capacity to play two vital roles: first, a validating role that demands recognition for which primary rule is qualified to function in Nigerian legal order. Secondly, a constitutive role which demands unity and compatibility with the pluralistic structure of Nigerian system. On the second question, the study proposed that the significance of rule of recognition will be found in the essential elements of democracy. Lastly, I concluded that this study has great significance for civil disobedience in Nigeria, and I proposed that this significance could be best appreciated when dissident behaviours are interpreted along the line of normativity as a form of practical non-acceptance internal point of view towards the rule of recognition.

6.2 Conclusion

To conclude, this thesis answers the overarching research question; has Nigeria got a legal system? In other words, based on the Hartian conditions for the existence of a modern municipal legal system analysed in previous chapters, can Nigerian legal order qualify as a modern legal system? On their face, the answer to this question will be largely based on the

findings from chapter three and chapter four of this study. A major contribution of this thesis to general jurisprudence was not only in the interpretation of internal point of view along the lines of moral commitments, but practically testing its workability in a complex jurisprudence like that of Nigeria. In doing this, this study examined what public officials merely say as distinct from what they actually do. This is against the backdrop of MacCormick's observation of Hart's treatment of internal point of view. According to MacCormick, 'Any theory of law worth the name must give considerable attention not only to what public officials say they do in respect of acceptance of the law, but also to what they are in fact at the same time actually doing in the legal system.'⁸⁰⁵

The first condition for the existence of a legal system is the presence of foundational rules or ultimate rules of recognition which authoritatively anchors the citizens obedience. As already stated above, this study discovers amongst other things that the constitution, judicial precedent, and international law form part of the rules of recognition. In this sense, it appears as though the first condition for the existence of a modern legal system has been met by Nigeria. However, it has been argued in chapter three that the acceptance upon which the existence of Nigerian rules of recognition are founded is merely 'what people say' kind of acceptance, rather than what people really do. This means that in principle, Nigerian public officials say or claim to accept the Constitution, precedents, and international law, but in reality, the behaviour of officials do not reflect this acceptance that they profess. Hence, to some extent, there might be scepticism regarding whether this first criterion has been met by Nigerian system. Similarly, the second minimum condition is in a way linked to the first condition. There is no need to recast some of the earlier points canvassed in this regard, the conclusion drawn from the findings in chapter four is that the attitudes of officials show that they do not take internal point of view towards the rules of recognition. This study also relied on some empirical studies conducted by Okafor with regard to the conduct of officials toward the rule of recognition.⁸⁰⁶ His intention was to find out whether the attitude of Nigerian officials have any impact on the national constitutions in respect of political and civil rights. According to Okafor, what this literature on the behaviour of Nigerian officials produce are of two consequences: poor understanding of the rule of law in the Constitution and lack of commitment to it.⁸⁰⁷ The result of this research indicates that, most often than not, the understanding and attitude of

⁸⁰⁵ N. MacCormick 'Hart's Legal Theory' (1983) 31 American Journal of Comparative Law 3. 487

⁸⁰⁶ Obiora (n 556) 259-64

⁸⁰⁷ Ibid

successive Nigerian civil officials (executives, lawmakers, and judges) runs contrary to the system's rules of recognition. Based on real significant constitutional events and major decided constitutional cases analysed in chapter four, the occasions when Nigerian officials disregarded and disparaged the constitution, international law and precedents were evidently higher than the instances where they followed them. Therefore, this study derived its conclusion from the results obtained in chapter three and chapter four; the results which seem to suggest that Nigerian legal system is at least incomplete. If one concedes that Nigeria does have a complete modern municipal legal system, then he seems to need more than Hart's account of rules of recognition and internal point of view to explain such existence.

Hence, the major factor that deprives Nigerian legal order meeting the criteria of a modern municipal legal system is the attitudes of public officials as revealed in chapter four. Indeed, the attitudes of the citizens do have as much impact on the legal system as much as the attitudes of the officials do. The citizens may fail to take the internal point of view towards the rules of recognition without serious consequences for the legal system as the rules of the system will be considered as still in existence. In the view of Hart, such a legal system might still be efficient. But when the officials fail to take the internal point of view towards the rules of recognition, the legal system becomes uncertain, chaotic, unstable, and deplorable. Indeed, the attitudes of officials have grave consequences on the entire legal system. Thus, the sustainability, functionality and stability of a legal system depends largely on the attitudes of the officials toward the rules of recognition in that legal system. It is obligatory on officials to demonstrate responsiveness and responsibility by linking their acts to the general standard of behaviours created by the rules of recognition within the legal system. In a situation like that of Nigeria where the officials do not take a uniform internal point of view towards the rules of recognition, the resultant effect is an unstable and incomplete legal system. There are really no issues as regard the constitution, international law and judicial precedents being the rules of recognition within the Nigerian legal system. The main problem is the outright disregard shown to the constitution, international law and court orders by Nigerian public officials who had sworn to preserve and follow them. Based on the many decided constitutional cases and events involving arbitrary suspension and modification of the constitution, unconstitutional incarceration of citizens, extra-judicial killings, deprivation of the rights and freedom of journalists and other Nigerians, conflicting judgments by judges, legislative highhandedness by lawmakers, among others, the results of this study prove that Nigerian public officials, for most of the time, do not take uniform internal point of view towards the rules of recognition in

Nigeria. Hence, the conclusion is that Nigerian has a legal system with features akin to the Hartian pre-legal system because it has been subjected to the Hartian second condition (which is the most important condition) for a modern legal system but failed to meet the requirements. So, the conclusion is that the Nigerian legal system has basic validity rules; however, there exist certain problems in the current structure of the Nigerian legal system that makes it difficult to be considered as a modern legal system. Furthermore, on a general note, legal pluralism and its attendant conflicts of law seemed to have constituted major obstacles for the Nigerian legal system. Hence, the thesis also includes suggestions on how to further tackle these issues and improve the normative quality of Nigerian jurisprudence. I examined the important roles foundational rules play in the existence and sustainability of a modern legal system. I also examined what it meant for Nigerian public officials to take a uniform internal point of view towards those rules of recognition in the system.

6.3 Recommendations: Peering into the Future

The themes and positions I canvassed in this study could potentially be expanded and developed in many ways in the future. I will only suggest a few of them here, because a more detailed interrogation with these themes completely exceeds my current capacities. First, the traditional categorisation of legal theory into natural law and legal positivists' philosophies has been shown to be jurisprudentially irrelevant in this thesis. As we saw in chapters two and four, I proposed that the core propositions of legal positivism are to a large extent consistent with the notion that internal point of view involves practical reasoning which invariably makes it a moral point of view. I did not see any reason why a person who views internal point of view in this way cannot be a positivist. When faced with examples such as that of Nigeria, scholars of jurisprudence must reorient their research lenses. As Richard Holton and Gerald Postema correctly point out, it is impossible to explain rule's acceptance in a manner Hart wants without embracing the concept as a moral point of view. Internal point of view as presented by Hart involves legitimacy of demands for conformity and justification of the criticisms of deviating members, it becomes hard to believe that acceptance in this sense is not a moral acceptance. In fact, this argument equally explains internal point of view as normativity. Thus, internal point of view as proposed in this study can illumine a new inquiry that students of jurisprudence may productively undertake. Constructing internal point of view as moral attitude constraint will assist future researchers to avoid the unnecessary interminable struggle among earlier legal philosophers who were preoccupied with looking for the dividing line between positivism and natural law. In the light of this contribution, legal positivists will acknowledge that a case of

taking internal point of view of the rule of recognition can involve normativity (normativity here refers to moral normativity, I have argued several times in this thesis that I do not believe there is a thing like legal normativity).

The existence of rule of recognition as playing sacrosanct role for democracy is also valuable for constitutional law students and academic lawyers. By accepting the possibility of the rules of recognition playing the foundational role for core democratic elements, these scholars will benefit from a new point of view for explaining legal (constitutional) collaboration with the political system (democracy) within a state. Constitutional law researchers may also be concerned about the conflicting changes that could result in accepting Islamic law, customary law, and common law, together with their authorities in a single legal system. Nevertheless, as examined in my thesis, the friction deriving from competing laws and authorities could be resolvable by the validating power of the rules of recognition. I also proposed that a harmonic collaboration of the conflicting rules and authorities through the constitutive power of the rule of recognition is possible. The difficulty that constitutional law researchers will possibly face is how to make public officials take a shared internal point of view towards the rules of recognition. Some constitutional cases such *Ojukwu v A.G Lagos State and Lakanmi v Minister of Internal Affairs* have already shown that such attitude by public officials is possible in Nigeria. Nigerian constitutional law scholars now have the opportunity to understand and advance further discussions on what the basic requirements of a modern legal system are.

If the case of civil disobedience as a form of internal point of view is a phenomenon worth studying, what can guide researchers and students in finding future cases to study? Constant disobedience of unlawful and unconstitutional orders by state institutions is an important signal that civil disobedience is worth studying as a legal theme. As the Nigerian example highlights, civil disobedience or conscientious objection is a form of practical attitude of rule acceptance. I proposed in the previous chapter that although orders of state authorities are quite easier to identify in any legal system, but acceptance of such orders is always profoundly problematic. Consequently, it will be complicated for scholars to identify cases of acceptance of rules of recognition, and this is why the objective of chapter four employed disobedience as the tool to determine whether officials take the internal point of view. In a similar vein, the same method could be employed in studying civil disobedience. Thus, attitude of dissenters towards unconstitutional laws such as the ENDSARS protest against police violation of the human rights of the citizens as per the provisions of the constitution and also the London protest against the Nigerian president for his undermining of chapter two of the constitution, are worth

studying as a practical nonacceptance internal point of view towards the rules of recognition. Civil disobedience or conscientious objection can be so notorious that scholars will easily find signs which suggest the existence of civil disobedience as citizens' practical attitude towards acceptance or upholding of the rules.

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