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Participation and Law's Authority

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Abstract

This article argues that despite its claim to be most concerned with the nature of law in the generality of cases, legal positivism's almost exclusive focus on Anglo-American law has prevented the tradition from adequately answering the question of law's authority. This article argues that much positivist analysis either ignores, or takes for granted, the participation of the local population in the historical development of any given society's law and legal system. This failing means that positivism, and much of analytical jurisprudence, does not provide a truly general, non-circular explanation of authority that accounts as equally for post-colonial legal systems as it does for the Anglo-American systems with which positivism has been most concerned. I argue that the conceptual inadequacies in the explanations of law and legitimate authority offered by those such as H.L.A. Hart and Joseph Raz are most clearly exposed by post-colonial cases, such as Nigeria.

Keywords: *participation; authority; positivism; postcoloniality; analytical jurisprudence*

I. Introduction

In the year that H.L.A. Hart's *Concept of Law* was first published (1961), most African countries were just gaining their Independence.[1] Yet, Hart had already come to some of the most long-standing conclusions in common law jurisprudence. Confronting John Austin's coercion theory of law, Hart argued that if we wanted to know whether a legal system existed, we only needed to observe how officials of the legal system treated the system's rules. For Hart, the law existed when, and because, officials adhered to it and the people generally obeyed it.

Hart's understanding forms the basis of a long-standing positivist tradition that continues to have strong influence in Anglo-American analytical jurisprudence.[2] This accounting, however, neither corresponds to, nor explains, the experience of large parts of the world. In Nigeria, for example, we are faced

1. See H.L.A. Hart, *The Concept of Law*, 3rd ed (Oxford University Press, 2012).
2. In the introduction to the 3rd edition of Hart's *Concept of Law*, Leslie Green notes that the text is "one of the most influential works in modern legal philosophy." Leslie Green, "Introduction" in Hart, *supra* note 1 at xv. Green undersells it. As Scott Shapiro more aptly notes, Hart's conceptualization of legal system "provided the critical element missing from previous characterizations of the identity of law and hence set the terms on which all research in legal theory has since proceeded," including Shapiro's own. Scott J Shapiro, *Legality* (Belknap Press, 2011) at 86-87.

with a legal system that, despite its legal existence, fails to secure general adherence to its rules. It is not simply that positivism and mainstream jurisprudence cannot explain such cases. Such cases also make it clear that the source of the law's authority over what people do has a further, prior, explanation besides the descriptive understandings that seem to occupy much of positivist thought.

I argue that positivism's failure to adequately account for post-colonial systems like Nigeria's matters not only to these cases but to our collective understandings of law and legal system. These understandings have been hampered by positivism's general insistence on remaining within the legal framework for an explanation of that framework's existence and authority. They have also been hampered by positivism's preoccupation with legal systems of a distinctly Anglo-American historical experience. By maintaining explanations for these systems without reference to the historical circumstance of their making, or to those that have determined the legal systems of other places, positivism objectifies these systems. And yet, the systems of positivism's claims are ones whose historical development has been significantly informed by, *at least,* the participation of a locally composed elite. Positivism's silence regarding this aspect of how legal systems *come to be*, or ought to come to be, has, I believe, had a detrimental effect on jurisprudential understanding—including even of those Anglo-American systems with which the literature is most familiar. One of the implications of my argument is that even within these systems, it may be only a narrow part that positivism is accurately explaining—that part that concerns the behaviour of the culturally and ideologically dominant elite, and with which the positivist tradition itself can be strongly identified.[3] This is particularly clear in the case of former settler colonies where central legal systems that are the product of significant external imposition remain dominant over, and exist alongside, systems and communities whose forcible removal and subsummation has been a failure.[4]

Positivist understandings have been able to progress on at least one fundamental, unelaborated, assumption—that legal systems are established by the participation, to varying yet substantive degrees, of a representative elite or some relevant portion of the general society. This unelaborated assumption has, I argue, allowed positivist theories either to ignore, or view as irrelevant, a criterion that ought to substantively influence our understanding of the nonlegal source of law's authority—that is, local participation in the historical establishment and development of a legal system.

My focus on positivism is not simply a reaction to the fact that the tradition remains legal theory's "predominant" branch.[5] It is, more importantly, to do with the dominant claim the tradition makes to being most concerned with law's

3. See Michelle Chun, "The Anti-Democratic Origins of Analytical Jurisprudence" (2021) 12:3 Jurisprudence 361 at 361-76.

4. See Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836* (Harvard University Press, 2010).

5. Peter Fitzpatrick, *The Mythology of Modern Law* (Routledge, 1992) at 3. See also Chun, *supra* note 3 at 361.

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fundamental nature.[6] Regarding the question of this article's focus—law's authority—legal positivism views itself as being engaged in providing the most universal, or *general*, of answers.[7] Yet it has, with few older exceptions, remained largely in conversation with itself.[8] It is, I think, important that critical contributions on the issue be seen as relevant not to some more 'peculiar' branch of legal reasoning but substantively to the tradition itself, and to analytical jurisprudence in general.

This article is composed of four further sections. In the next section, I present the Nigerian case using primary archival research. This archival evidence, which I sourced from The National Archives of the UK, includes archival material of the colonial Legislative Council and covers the period of Nigeria's colonial history as it concerns the development of the country's legal infrastructure from 1900 to 1948. The evidence demonstrates the degree to which the substantive participation of, at minimum, a local Nigerian elite in defining and building the country's legal infrastructure is absent from that country's legal history. I argue that this lack of historical participation is crucial for understanding the way the Nigerian system functions in the modern day.

In Section III, I examine H.LA. Hart's arguments concerning legal validity and the existence of legal system. I demonstrate, referencing the contemporary Nigerian case reviews, how and why Hart's analysis cannot account for systems like Nigeria's. I argue that while Hart cannot account for how it is possible for a system to exist and yet fail to command authority over the behaviour of persons, the Nigerian system makes it clear that what accounts for a system's validity does not explain its authority over what people do. In the Nigerian case, this explanation is furnished by a foundational lack of local participation in the system's establishment and development. I argue that the case forces us to think not simply about its own explanation but about the explanations maintained in analytical jurisprudence about the generality of legal systems.

In Section IV, I advance a new normative understanding about the significance of participation for a fuller understanding of how law comes to have legitimate authority. My arguments are intended to apply generally, and I defend against a procedural reading of them. I lay out the minimal and maximal criteria for participation and explain what I believe to be participation's critical normative value as the foundational source of the authority that any legal system

6. See Shapiro, *supra* note 2 at 2-4.
7. See Hart, *supra* note 1 at 239-40.
8. For examples of arguments viewed as external to analytical jurisprudence, particularly from normative jurisprudence, but which positivism has taken seriously, see John Finnis, *Natural Law and Natural Rights*, 2d ed (Oxford University Press, 2011); Lon L Fuller, *The Morality of Law*, revised ed (Yale University Press, 1969); Lon L Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart" (1958) 71:4 Harv L Rev 630; Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978); Ronald Dworkin, *Law's Empire* (Belknap Press, 1986). Many of these interventions have attempted to argue the moral basis for justifying law's authority. While there is much of worth that has gone on in the long argument between positivism and Natural Law Theory or Legal Interpretivism, for example, it is not in this article's aim to extend that discussion.

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legitimately effects without resorting to coercion. This account, I believe, is adequate to explaining the Nigerian case, and cases like it, precisely because it is adequate, also, to explaining legal systems in general. In this section, I engage Joseph Raz's account of practical and legitimate authority, and I explain why, despite the sophistication of Raz's arguments, they also leave us with an incomplete understanding of authority.[9] Raz's arguments, I argue, are no less subject to the pitfalls of objectifying Anglo-American systems, such that for their explanation it is considered either unnecessary or irrelevant to address the historical record of their making, or to examine that which exists for a wider geography of cases.

Finally, in Section V, I conclude that local participation in the historical development of a legal system accounts for a legal system's ability to legitimately effect the demands it is legally justified in making. In other words, the criterion accounts for the source of law's legitimate authority.

Perhaps it will be suggested at the outset that since Hart, most especially, claims to be concerned with a non-normative understanding of legality, and not of authority, my arguments concerning the colonial history of Nigerian legality would seem a matter of 'contingent,' not 'universal,' jurisprudence. This would be a misunderstanding of my arguments. The Nigerian case instrumentally highlights that neither positivism's supposedly purely descriptive understanding of legality, nor its more wide-ranging normative understandings of authority, do the job of meeting the demands of *generality* to which they aspire. I argue that in ignoring the substantive significance of local participation to an understanding of authority, positivism—at both its 'descriptive' and normative ends—fails to capture cases like Nigeria precisely because it also misunderstands its own Anglo-American cases. Positivism is unable to account for cases like Nigeria, not because of a 'contingent' unfolding of a particular colonial history—positivism cannot account for Nigeria because it is not adequately accounting for 'behavioural existence' (in Hart), or for legitimate authority (in Raz), in any case of legal system *at all*.

An obvious objection to my use of the Nigerian case is that perhaps it is, like Hart's reliance on the United Kingdom, unrepresentative of wide-enough legal experience. The literature in post-colonial legal studies, however, documents the experience of many societies in which legal structures, erected by and for colonial imposition, remain at the root of the law's inability to faithfully direct large parts of society.[10] In Mozambique, the margin between what the law was and what it did was wide, for there

> the laws [had been] shipped out … like wine or wool. It was not only the laws that came from Lisbon but the lawyers. All … the legal profession consisted almost entirely of Portuguese persons who had gone out to the colony to make their

9. See James Sherman, "Unresolved Problems in the Service Conception of Authority" (2010) 30:3 Oxford J Leg Stud 419 at 419; Scott Hershovitz, "Legitimacy, Democracy, and Razian Authority" (2003) 9:2 Leg Theory 201 at 209.

10. See Fitzpatrick, *supra* note 5 at 106-07.

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> fortunes. No law school existed in Mozambique until the very eve of independence and the handful of Mozambicans who were able to think of becoming lawyers and who had the … moral courage to do so, had to bear the expense of going to Portugal for years of study. All decisions concerning the operation of the law in Mozambique, however great or however tiny, were ultimately taken in Lisbon.[11]

In post-colonial Ghana, Uganda, and Zambia, the case reviews document legal systems that regularly fail as reasonable indicators of what law officers will do—systems that, entrenched in a deep colonial heritage, have been all but written off by their respective populations.[12]

Further, this is not an 'African' problem. Brian Tamanaha has emphasised that the problem of legal systems that have simply been transplanted, for instance, "through colonial imposition … is a widespread phenomenon."[13] In places as far from West Africa as the island of Yap in the Federated States of Micronesia, legal systems exist that are not, and cannot be, explained by the supposedly general theories of law that continue to occupy mainstream jurisprudence.[14] Scholars such as Margaret Davies and Roberto M. Unger have also brought the law in post-colonial societies into critical conversation with mainstream jurisprudential accountings, roundly criticizing the latter for its narrow Eurocentricity.[15] The effect of which, as Davies notes, would be to have us withhold the title of 'law' from those societies that did not conform to formalist European ideals.[16] For critical theorists like Peter Fitzpatrick and Eve Darian-Smith, this unmasked ethnocentrism meant that European understandings would need to be separated from a proper understanding of law's function in non-European societies.[17]

While much of the scholarship in post-colonial legal studies and theory confirms the legal experience of countries like Nigeria as widespread, much of that literature has not, however, been focused on generating new *general* theory that can explain what post-colonial societies teach us both about themselves and about others.[18] While I am not suggesting that post-colonial legal

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11. Albie Sachs & Gita Honwana Welch, *Liberating the Law: Creating Popular Justice in Mozambique* (Zed, 1990) at 3.

12. See H Kwasi Prempeh, "Neither 'Timorous Souls' nor 'Bold Spirits': Courts and the Politics of Judicial Review in Post-Colonial Africa" (2012) 45:2 Verfassung und Recht in Übersee/Law & Politics in Africa, Asia and Latin America 157. See also Jennifer A Widner, *Building the Rule of Law* (WW Norton & Co, 2001).

13. Brian Z Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press, 2001) at xii.

14. See *ibid* at xi-xii.

15. See Margaret Davies, *Asking the Law Question: The Dissolution of Legal Theory* (Law Book Co, 2002); Roberto Mangabeira Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (Free Press, 1976).

16. See Davies, *supra* note 15 at 277.

17. See Peter Fitzpatrick & Eve Darian-Smith, "Laws of the Postcolonial: An Insistent Introduction" in Eve Darian-Smith & Peter Fitzpatrick, eds, *Laws of the Postcolonial,* (University of Michigan Press, 1999) 1 at 3-10.

18. As Tamanaha notes, many fields of legal inquiry have, thankfully, been concerned with revealing the ways in which uncountable societies are not reflected by mainstream understandings. Yet, these often fail to engage legal theory by producing "viable theories of their own." Tamanaha, *supra* note 13 at xii.

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scholarship ought to be concerned with more than either a critique of mainstream jurisprudence or with more than developing our understandings of post-colonial systems in particular, my belief is that societies like Nigeria have much of substantive value to add to furthering general jurisprudential understanding. While my argument is most clearly evidenced by non-settler post-colonial cases like Nigeria, it is no less pertinent to the legal systems of post-colonial settler societies and even to those of former colonial powers. In other words, post-colonial cases, like Nigeria, advance our conceptual understandings of law's authority in general.

II. Local Participation in the Historical Development of Nigeria's Legal System

Cases like Nigeria, in the extent of their external imposition, present us with the opportunity to look more clearly, and purposefully, at particular stages in the historical development of a legal system. Stages that are, perhaps, easily overlooked, or whose incorporation seems a forgone conclusion in those systems whose historical development appear to have been, *at least*, informed by the substantive participation of a critical elite.

On the 28th of February 1906, starting with the Lagos Colony, Nigeria was brought into legal existence by Letters Patent passed under the Great Seal of the United Kingdom of Great Britain and Ireland. The 1906 Letters Patent declared, by the power of King Edward VII, "the Colony of Southern Nigeria should comprise the Island of Lagos and such portions of the neighbouring territories as had been annexed to His Majesty's Dominions."[19] Subsequent to the Letters Patent of 1906, the boundaries of the Colony of Nigeria were given legal definition in an Order of the King in Council defining the Boundaries of the Colony of Nigeria, signed at the Court of Windsor Castle and dated 22nd November, 1913. The Order reads:

> The limits of this Order shall be the territories of Africa which are bounded by the following line, namely: —A line starting from Beacon No. 12 on the shore of the Bight of Benin in a northerly direction along the frontier of the Dahomey to the mouth of the Ajara River. . . . All such part of the territories within the limits aforesaid as have not heretofore been included in His Majesty's Dominions shall be . . . and the whole of the said territories are declared to be part and parcel of the Colony of Nigeria.
>
> As and from the date of the coming into operation of this Order, all Laws and Ordinances which shall at such date be in force in the territories heretofore known as the Colony of Southern Nigeria shall take effect within the limits of this Order, and shall remain in force therein until the same shall have been altered or repealed by the Governor of the Colony of Nigeria, by and with the advice and consent of the Legislative Council, or by His Majesty.[20]

19. The National Archives, "Order of the King in Council defining the Boundaries of the Colony of Nigeria, 22 November 1913" in File *CO 380: Letters Patent, Instructions, Commissions, Warrants etc 1906-1925, Nigeria* at 1.
20. *Ibid* at 2-4.

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The above is the legal source establishing the Nigerian territory and, in it, a norm of unitary legal system. In Hartian language, this is Nigeria's *original* ultimate rule of recognition from which all further legal rules have proceeded.[21] Upon colonization, many initial laws were simply brought in by colonial proclamation. The 1900-1906 proclamations instituted laws in an array of areas including, but not limited to, lunatics, evidence, lawsuits, property, due process, rules of court, marriage, criminal procedure, and the police.[22]

By the Supreme Court Proclamation 1900, enacted by Sir Ralph Denham Rayment Moor, the institution of the Supreme Court of Southern Nigeria, its Chief Justice, Puisne Judges, and Officers of the Court including the Police, were established.[23] The Proclamation also established rules of arrest, evidence, judgment, and so forth. Similar proclamations established rules of criminal law and procedure.[24] A parallel legal structure was also established by colonial proclamation in the Northern part of the Nigerian Protectorate.[25] On the amalgamation of Northern and Southern Nigeria in 1914, the Legislative Council began, from February of that year, enacting laws for the whole Nigerian Protectorate.[26] These laws remained in effect unless "repealed or revoked by or in pursuance of any law or ordinance passed by" the Legislative Council.[27]

The institutionalization and maintenance of this 'carted-in' legal structure was carried out through the Legislative and Executive Councils. The Legislative Council was responsible for deliberating, approving, recommending, and passing new laws and ordinances on the approval of the colonial Governor, and upon royal assent, usually via telegram.[28] Approved ordinances were then sent to the colonial Chief Justice of Nigeria by the colonial Governor before finally becoming law.[29]

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21. See Akintunde Olusegun Obilade, *The Nigerian Legal System* (Spectrum Books, 1979) at 20.

22. See The National Archives, *CO 588: Southern Nigeria Proclamations 1900-1906*. See also The National Archives, *CO 587: Northern Nigeria Proclamations 1900-1904*; The National Archives, *CO 587: Northern Nigerian Proclamations 1905-1913*.

23. See The National Archives, "A Proclamation enacted by Sir Ralph Denham Rayment Moor" in *CO 588*, *supra* note 22.

24. *Ibid* at 21.

25. See The National Archives, *CO 587: 1900-1904; CO 587: 1905-1913*, *supra* note 22.

26. The first laws enacted for Nigeria since amalgamation were done in the Legislative Council session of 20th February 1914. See The National Archives, Minutes of that session in *Document CO 657/29: Colonial Office Library*. See also The National Archives, "Order of the King in Council providing for the establishment of a Legislative Council for the Colony and Protectorate of Nigeria" in *CO 380*, *supra* note 19.

27. The National Archives, "Letters Patent passed under the Great Seal of the United Kingdom constituting the Office of Governor and Commander-in-Chief of the Colony of Nigeria and providing for the Government thereof" in *CO 380*, *supra* note 19 at 4.

28. *Ibid* at 4-5. See also The National Archives, "Instructions passed under the Royal Sign Manual and Signet to the Governor and Commander-in-Chief of the Colony of Nigeria" in *CO 380*, *supra* note 19 at 9-12.

29. See The National Archives, "Order of the King in Council providing for the establishment of a Legislative Council in the Colony and Protectorate of Nigeria, 21 November 1922" in File *CO 380*, *supra* note 19 at 6.

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The Legislative Council consisted of colonial Official Members including:

> The Governor as President . . . . The members of the Executive Council. The ten senior officials for the time being lawfully discharging the functions of Senior Resident in Nigeria, and the Officers lawfully discharging the functions of Deputy Chief Secretary to Government, of Secretary, Northern Provinces and of Secretary, Southern Provinces. [And the] General Manager of the Railway, Director of Public Works and Postmaster-General.[30]

Official members of the Legislative Council included the above ex-officio members, who composed its majority, and numbered some thirty Europeans.[31]

The Council's membership was completed by nominated unofficial members—these were to be African and European, subordinate to official members, and composed of "persons not holding [colonial] office in Nigeria."[32] Unofficial members included at least "four European members, nominated by the Governor, and representative as far as may be of the Commerce, Shipping, Mining, and Banking of Nigeria"[33] and at least a further three Europeans including "a member of the Lagos Chamber of Commerce, and a member of the Chamber of Mines . . . together with a member resident in Nigeria of any Chamber of Commerce which may hereafter be established at Calabar."[34] This information is verified by a January 1940 List of Unofficial Members of the Legislative Council.[35]

Twelve African Unofficial Members, nominated by the Governor, were supposed to complete the Legislative Council. Originally, the number of "native members" was intended to have totalled no more than six, nominated by the Governor, on the entire legislative body.[36] Laws were passed by majority vote of the Legislative Council.

In the archival materials that I examined, there were almost no instances in which the Council's African members (at many sessions there appeared to be far fewer than twelve) were able to sway enough of the remaining 37 or so European members to achieve a majority on their proposed bills. On matters of substantive law and administration, not only did the African members rarely

30. *Ibid* at 2. This is verified by a 1938 list of "Official Members of the Legislative Council of Nigeria" in The National Archives, *File CO 583/247/2: Legislative Council Appointments*.

31. See The National Archives, "Draft Legislative Council Amendment, Order in Council, 1940" in File *CO 583/247/*2, *supra* note 30. See also The National Archives, list of "Official Members of the Legislative Council of Nigeria" in File *CO 583/247/*2, *supra* note 30.

32. The National Archives, "Order in Council providing for the establishment of the Nigerian Council, 22 November, 1913" in CO 380, *supra* note 19 at 2.

33. Ibid at 2.

34. Ibid at 2-5.

35. See The National Archives, list of "Official Members in Legislative Council of Nigeria" in File *CO 583/247/2*, *supra* note 30.

36. The National Archives, "Order in Council providing for the establishment of the Nigerian Council" in *CO 380*, *supra* note 19 at 3.

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hold any substantive sway over their European counterparts,[37] they were in many instances, poorly treated. [38]

The February 1910 minutes of the Legislative Council report the following engagement: African Member Dr. Johnson proposed that it ought to be a law that a man convicted of manslaughter be disallowed from continuing in the government's employ. Despite the seeming sensibility of the proposal, colonial Governor Walter Egerton asked him to provide a concrete case justifying the motion. Several cases were presented to the Governor in which Europeans in the government's employ had been convicted of killing natives. The Governor, disputing the technicalities of the case, begs to leave the matter, saying,

> All I desire to say on this case is that I think it must be very well known to all honourable members that there is a very strict Government rule against employing in the Government Service persons convicted of serious offences, but to assent to a general motion that in no case shall a person convicted of manslaughter be further employed by the Government is, I submit, going very much too far.[39]

African Member Mr. Sapara Williams had noted during the previous discussion that "there [had] been several cases in which natives who [had] been tried and acquitted were [, nevertheless,] dismissed from Service,"[40] giving greater understanding to Dr. Johnson's comment that "we are always at a disadvantage in such matters."[41]

In 1916, the Honourable African Member Mr. Pearse suggested that the Bill regarding the Criminal Code be amended to take into consideration the fact that some of its provisions regarding what parties were considered lawfully married and, therefore, not subject to giving evidence against their spouses, were not sufficiently considerate of Nigerian society. The offending clause read:

> For the purposes of this section the terms 'husband' and 'wife' mean respectively husband and wife of a Christian marriage; and for the purposes of this and the following section the term 'Christian marriage' means a marriage which is recognised by the law of the place where it is contracted as the voluntary union for life of one man and one woman to the exclusion of all others.[42]

Mr. Pearse's objection "that these provisions are class legislation, because people in the country think that they impose certain disabilities upon marriages other than a Christian marriage" would seem astute in a country that, certainly at

37. See The National Archives, "Legislative Council Minutes, 8th October 1909" in File *CO 592/11: Southern Nigeria Legislative Council Proceedings 1909-1913* at 1-3; The National Archives "Legislative Council Minutes, 6th November 1909", *ibid* at 1-4.

38. The rebuffing of questions from African members happens at several points throughout the minutes of Legislative Council meetings between 1931 and 1939. See The National Archives, *CO 657/48: Legislative Council Minutes 1931-1939*.

39. The National Archives, "Legislative Council Minutes 15th February 1910" in File *CO 592/11*, *supra* note 37.

40. *Ibid*.

41. *Ibid*.

42. The National Archives, "Minutes of the Proceedings of a meeting of the Legislative Council, 27th April 1916" in *CO 657/29: Colonial Office Library* at 5.

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the time, could not, without a high degree of conceit, be called 'Christian.'[43] Acting Administrator Moorhouse responded that he was "not prepared to re-open discussion of a matter which has already received the most careful and thorough consideration of the Select Committee and the Council."[44]

Mr. Pearse moved to his next objection, which was that it be discussed whether the Criminal Code imposed too high a penalty of two-years imprisonment on public servants who, as the law would have it, failed "without lawful excuse" to discharge duties required by "any Order in Council, Ordinance or Statute."[45] The term "without lawful excuse," Mr. Pearse felt, was too much open to interpretation. Moorhouse, seemingly bored with the Unofficial Member's insouciance, again dismissed the objection as having been sufficiently dealt with. Mr. Pearse, himself apparently fed up with being repeatedly summarily dismissed, finally says: "I will not go any further with the objections that I had intended to raise at this meeting, seeing that the Committee are not prepared to re-open the discussion on them."[46]

Some twenty years later, not very much had changed in the level of influence the African members were able to wield over Nigeria's laws or in the body by which these laws were to be given legal authority. On 29th November 1937, the issue of marriage again arose.[47] Mr. S.B. Rhodes, Honourable African Member for the Rivers Division, brought it to the government's attention that the law brought in by the Marriage Ordinance was not being properly understood by natives who were continuing to have their marriages traditionally blessed according to native law and custom whilst believing that this would confer on their marriages a formal legal status. Mr. Rhodes suggested that the government make the promulgation of the Marriage Ordinance clearer to the general population. The short response from the government was that Missionary Societies had already been sent to explain to the single case of which the colonial government was itself aware, that religious blessings "in accordance with native law and custom has no effect upon the legality of marriage."[48] Accordingly, and evidently contrary to Mr. Rhodes' understanding, the government felt no further explanation to the wider public necessary.

Asked whether it was not "desirable for the government to introduce legislation to distinguish indictable offences in the Criminal Code from non-indictable offences" and whether "in order also to eliminate many trivial cases from the High Court . . . will Government introduce legislation to distinguish the offences triable by Magistrates (Full Powers) from offences triable by the High Court,"[49] the colonial government responds to these—as well as to the suggestion of giving

43. *Ibid* at 6.
44. *Ibid* at 6.
45. *Ibid* at 6.
46. *Ibid* at 7.
47. See The National Archives, "Legislative Council Minutes, 29th November 1937" in File *CO 657/48*, *supra* note 38.
48. *Ibid.*
49. The National Archives, "Legislative Council Minutes 28th November 1938" in File *CO 657/48*, *supra* note 38 at 11.

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Magistrates a higher status, including powers of imprisonment—that these matters are under consideration and no further input from the African members is welcomed on the subject.[50]

So much was the African contingent of the Legislative Council in the minority during most of that body's life that it regularly caused alarm among the more senior and vocal African members, who vigorously fought against instigations by the colonial government to further diminish their numbers.[51] But it was not only over the quantitative issue of their number that the African membership were at odds with the rest of the Legislative Council. Their own additional impression was that they were never viewed by the colonial government as being quite sophisticated or 'civilised' enough to know what was in their, or in Nigeria's, interest.

Within even the first few years of the Legislative Council's existence, this state of affairs was already the cause of much discontent. In a 1909 dissent by Honourable Unofficial Member C.A. Sapara Williams, on the issue of the 1910 expenditures, the African member writes:

> If the keen but always absolutely fair criticisms suggested by the Native Un-official Members are to be ridden over in such a deplorable and roughshod manner by the Official Members as depicted so very clearly in every line of this report, and without giving any indication of their opinion during the discussion in Committee, then I for one must record my extreme regret that I should have been called upon to make such useless sacrifice of my time.[52]

Of the handful of motions that were put forward by the Legislative Council's African members, even fewer appear to secure enough votes to be carried. This contrasted with the motions and resolutions put forward by the European members, which were often either carried unanimously or with a majority vote. In the very few cases where the Council minutes record resolutions or motions made by an African member, they are almost always lost.[53]

The above picture is further verified in a memorandum by one of the country's later colonial governors, Bernard Henry Bourdillon:

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50. *Ibid*.

51. See The National Archives, "Extract from Lagos Daily News of 16.2.31" in File *C0 583/177/2, Legislative Council Appointments*.

52. The National Archives, "Minutes of the Proceedings of the Legislative Council, 6th October 1909" in File *CO 592/11*, *supra* note 39 at 24.

53. The National Archives "Legislative Council Minutes, 3rd December 1935" in File *CO 657/48*, *supra* note 38 at 7. The motion by the Member for the River Division that a scholarship fund be created for "deserving Nigerian youths to complete their studies abroad" is lost by eight votes to eighteen (*ibid* at 7). All members voting for (with the possible exception of one) are African and all voting against, European. In another rare motion put forward, and seconded, by African Membership, it was proposed that action and legislation be introduced to tackle unemployment. The government stated it would give the measure consideration and that a committee be appointed to examine it. The motion was withdrawn. See The National Archives, "Legislative Council Minutes 6th March 1935" in File *CO 657/48*, *supra* note 38 at 14.

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> The third line of progress is that of increasing the importance of the part played by the African unofficial members of the central Legislature, with the object of making them feel that they are really part of the machine, and that their opinions and advice are given full weight. There can be no doubt whatever that my predecessor had the confidence of and the respect of the African members of the Legislative Council. . . . But he did not encourage lively debate in that body. . . . The result was that I found the debates in the Council completely lacking in life and the whole proceedings most unconvincing. The effect upon the unofficial members was to make them feel that no attention was paid to what they said and that the [colonial] Government had made up its mind before they spoke and . . . did not bother to answer their arguments.[54]

In the case of the Executive Council, whose role was to advise the colonial governors, the membership there was entirely European for the majority of that body's life.[55] There was an attempt, during the Second World War, to relieve the burden on the colonial government by expanding the Council's membership to include some temporary unofficial members, with some being Africans. However, telegrams between the colonial Governor of Nigeria and the then Secretary of State for the Colonies, Lord Lloyd, registered strong opposition from London. This was at least the third time that the inclusion of an African membership within the decision-making process of the Executive Council was rejected by London.[56]

Much of the archival material I studied supports the argument maintained in the literature that laws in many African countries have simply been 'imported.'[57] In Nigeria's case, this has been in the most literal of senses, so that even the most material parts of the legal structure—including the courts system, the production of law officers, and the penal code—were sent and brought in almost wholesale via colonial proclamation.[58] At least formally, it seems that ordinary Nigerians, by and large, participated neither in the design, nor in the founding of the most rudimentary, yet necessary, elements of the country's legal system. Even the foundational and historical training of lawyers, magistrates, judges, and other officers of the law did not take place according to any institutional infrastructure

54. The National Archives, "Memorandum on the Future Political Development of Nigeria by Bernard Bourdillon," in File *CO 583/244/22: Future Political Development of Nigeria* at 11.

55. See The National Archives, "Instructions passed under the Royal Sign Manual and Signet to the Governor and Commander-in Chief of the Colony of Nigeria" in File *CO 380*, *supra* note 19 at 15-16.

56. See The National Archives, File *CO 583/247/1: Executive Council Appointments*.

57. See Crawford Young, *The African Colonial State in Comparative Perspective* (Yale University Press, 1994); Basil Davidson, *The Black Man's Burden: Africa and the Curse of the Nation-State* (Three Rivers Press, 1992); Peter P Ekeh, "Colonialism and the Two Publics in Africa: A Theoretical Statement" (1975) 17:1 Comparative Studies in Society & History 91; Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press, 1996).

58. See The National Archives, File *CO 583/257/12: Protectorate Courts Legislation.* See also The National Archives, correspondence between an administrative officer of the Government of Nigeria and Downing Street dated 26 January 1937 in File *CO 583/213/21: Judicial System in Nigeria*. On amalgamation, see The National Archives, "Report by Sir F Lugard on the Amalgamation of Northern and Southern Nigeria" (October 1919) in *CO 879: African 1063-1082*. See also The National Archives, "A Proclamation enacted by Sir Ralph Denham Rayment Moor" in File *CO 588*, *supra* note 22.

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originally built in, or substantively sustained by, Nigeria and its peoples for that purpose.[59]

Take, for example, a 28 June 1948 letter, in which then colonial Chief Justice of Nigeria, John Verity, complains of the shortage of local men who could be appointed even as junior magistrates.[60] According to the letter, British officials felt that this shortage could only be stemmed after the many Nigerian natives wishing to be law officers had finished training in law schools in England. There was a similar issue where a stiflingly low number of persons were deemed qualified to practice as Supreme Court Judges, which meant that European judges, having spent "many years in tropical service," were having "almost complete breakdown[s],"[61] I believe from the Nigerian heat.[62] Again, the colonial Chief Justice complained to the Colonial Office in London requesting an increase from twelve to seventeen new judges.[63] London did not, however, believe that it would be able to fulfil the colonial Chief Justice's request due to the apparent paucity of local candidates. London did, however, acquiesce to fill one vacancy with the ex-Palestine Puisne Judge, P.C. Hubbard, as this was preferable to finding a local candidate.[64] These events occurred at least twelve years after the first recommendations I found from African members of the Legislative Council suggesting that there were, indeed, Africans qualified to be law officers.[65]

This lack of historical local participation, at all levels, in building even the legal system's most basic material parts must be seen to speak also to a lack of participation in the broad-ranging intellectual activity that often accompanies the development of something so deep and widely-tentacled as a legal infrastructure, and which in many cases serves to connect the representation by a small elite at the highest levels of the system's organization to the conceptual understandings that permeate the wider society through the efforts and assistance of ordinary people.

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59. The ordinance enabling Crown legal advisers to practice "ex-officio" in the Courts of Nigeria is further documented in a December 1936 correspondence between Government House of Nigeria and the Secretary of State for the Colonies, in The National Archives, *CO 583/222/3: Law Officers Legislation*. See also The National Archives, File *CO 583/222/1: Judicial System in Nigeria.*

60. See The National Archives, letter dated 28th June 1948 detailing discussions with Sir John Verity, Chief Justice, Nigeria in *CO 583/298/3: Supreme Court Establishment.*

61. The National Archives, letter dated 8th June 1948, from Governor Macpherson detailing the position of the Chief Justice to one A Creech Jones, Secretary for the Colonies, File *CO 583/298/3*, *supra* note 60 at 2.

62. *Ibid*.

63. *Ibid* at 1.

64. See The National Archives, "Outward Telegram from Secretary of State for the Colonies to Governor Macpherson Sent 17th November 1948" in File *CO 583/298/3*, *supra* note 60.

65. It was the persistent suggestion of African members such as CC Adeniyi-Jones and A Alakija that there were indeed many Africans sufficiently qualified to fill posts in the government's administration. See The National Archives, "Legislative Council Minutes 28 January 1931"; "Legislative Council Minutes 20th July 1931"; "Legislative Council Minutes 12th June 1934"; "Legislative Council Minutes 18th May 1936" in File *CO 657/48*, *supra* note 38.

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Today, the legal sources of Nigerian law are:

> (1) Nigerian legislation, … (2) received English law comprising (i) the common law; (ii) the doctrines of equity; (iii) statutes of general application in force in England on January 1, 1900; (iv) statutes and subsidiary legislation on specified matters. (b) English law made before October 1, 1960, and extending to Nigeria. (3) Customary law. (4) Judicial precedents.[66]

Of these, the received English law, unlike its 19th-century introduction, is now that law "introduced into Nigeria directly by Nigerian legislation."[67] However, as Akintunde Olusegun Obilade notes, "although the reception of English law was effected by local legislation … [that] legislation was passed not by a body of indigenous people but by the British Administration."[68] English law *extending* to Nigeria, further, "consists of statutes and subsidiary legislation made on or before October 1, 1960, and not yet repealed by an appropriate authority in Nigeria."[69]

I wonder if, when the Honourable Unofficial African Member of the Legislative Council stated in a 1909 session that "the Common Law of England, the doctrines of Equity and the Statutes of general application which were in force in England on the 1st January, 1900, were brought into force in this Colony by the Statute Law Revision Ordinance No. 3 of 1908,"[70] he could have imagined these would be of any relevance to an independent Nigeria over a hundred years later.[71] Had he so comprehended, perhaps he would have been even more circumspect of the peripheral degree to which he and the rest of the Nigerian contingent among the Legislative Council had been allowed to influence the long-standing decisions of that body.

One of the results of this deficiency of local participation in the historical development of Nigeria's legal system is that the practical, intellectual, and moral connection between the society and the legal structure is thin and shallow. These are connections for which the historical development outlined above ought to have laid a foundation whose replication by each subsequent generation would be, if not automatic, systemically reproducible.

The above examination ought not only to guide how we understand what is responsible for the contemporary function of the Nigerian system, which I outline below, and the extent to which the system is now able to wield an authority we tend to view as inherent to all legal systems that are, at least, legally justified in

66. Obilade, *supra* note 21 at 55-56.
67. *Ibid* at 81. See also BO Nwabueze, *The Machinery of Justice in Nigeria* (Butterworth, 1963) at 17-19.
68. Obilade, *supra* note 21 at 20.
69. *Ibid* at 81.
70. The National Archives, "Legislative Council Minutes of the 8th October 1909" in File *CO 592/11*, *supra* note 37 at 2.
71. It is a point of no small importance that, as Obilade notes, "One of the notable characteristics of the Nigerian legal system is the tremendous influence of English law upon its growth. The historical link of the country with England has left a seemingly indelible mark upon the system: English law forms a substantial part of Nigerian law." Obilade, *supra* note 21 at 4.

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being called such. It ought also to guide our assessments of some of the most prominent theories in general jurisprudence concerning the nature of law, and of authority.

III. Legal Validity and the Existence of a Legal System

Near the middle of H.L.A. Hart's *Concept of Law,* we arrive at perhaps its most famous part: "The union of primary and secondary rules is at the centre of a legal system."[72] "Supplementing the *primary* rules of obligation with *secondary* rules which are rules of a different kind … might … be considered a step from the pre-legal into the legal world."[73] All societies, Hart explains, have primary rules—for instance, against murder and stealing, but only legal systems have secondary rules additionally. It is by reference to the secondary rules that we determine the legal validity of the primary rules in any given coherent legal structure. It is by the secondary rules that we ascertain the procedure for amending or overturning the primary rules, and by the secondary rules that officials determine the correct procedure for dealing with offenders against the primary rules.

Such secondary rules, Hart tells us, will often contain a "rule of recognition," which gives the primary rules a "common mark," and by which those rules are known to *validly* belong to that legal system.[74] The system's rule of recognition is that by which the validity of all other rules is known; and it is, in that sense, an 'ultimate' rule. It is such a characteristic, Hart explains, that, for instance, defines the Constitution of the United States, or the Parliament of the United Kingdom, as the ultimate end point to which the validity of the individual laws within these respective systems is traced.[75]

That such primary and secondary rules *exist,* Hart maintains, is determined by the observation of their 'acceptance' and 'use.' This will be, on one hand, by the obedience paid to the primary rules by ordinary civilians and, on the other, by the adherence to the secondary rules of the legal system's officials.[76] This *behaviour* of officials and citizens towards the respective rules characterises—for Hart—the "situation which deserves, if anything does, to be called the foundations of a legal system."[77] Together they constitute the "two minimum conditions necessary and sufficient for the existence of a legal system."[78]

To put it simply, in Hart's analysis, to be able to say a legal system exists, we must first identify the existence of the system's rules. For this, Hart says, it is first sufficient to be able to point to the bulk of society as obeying the laws for whatever reason they may so choose—including, but by no means

72. Hart, *supra note* 1 at 99.
73. *Ibid* at 94 [emphasis added].
74. *Ibid* at 91, 99.
75. *Ibid* at 105-07.
76. This, as Shapiro describes, is the positivist method of determining the *fact* of the existence of a thing purely by the observation of the *social fact* of the thing. What *is,* is what people do *in fact* do. See Shapiro, *supra* note 2 at 27-28.
77. Hart, *supra* note 1 at 100.
78. *Ibid* at 116.

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necessarily—a heartfelt conviction that the law *ought* to be followed.[79] But it is *necessary*, however, that officials of the system adhere to its secondary rules, and in particular, to the ultimate rule of recognition, from an "*internal point of view* as a public, common standard of correct judicial decision."[80] In other words, we assess the existence of a legal system—which should also be understood to compose the terms of its legal validity—by the behaviours of persons (officials and the general public) towards its rules.

Hart's understanding, he tells us, aims at a purely *descriptive*[81] understanding of how the law comes to be legally valid—the law exists and is legally authoritative on the observation of adherence to the secondary rules by the legal system's officials and, less importantly, the obedience by ordinary citizens regarding the primary rules.[82] This does not mean that the intertwined relationship between primary and secondary rules will explain every aspect of any particular legal system or that if one examines the laws of a particular land, the only thing that may be worthy of comment and observation is the existence of primary and secondary rules.[83] Hart's point, however, is that their *existence*—by which is meant the observable behaviour towards the rules by officials and the population—forms the necessary and sufficient conditions not merely to prove but to *explain* the legally valid presence of any given legal system.[84] This understanding continues to inform broad contemporary positivist thought.[85] For instance, Scott Shapiro explains of his own positivist thesis, "if we want to discover the [authoritative] existence or content of the fundamental rules of a legal system, we must look … *only* to what officials think, intend, claim, and do around here."[86]

If Hart is right about what accounts for the existence of a legal system, then wherever we find an existing formal structure of common law, we ought, *necessarily,* to find there a generally adherent mode of behaviour among officials in reference to that system's secondary rules. For the same purpose, it will also be sufficient to observe, in that place, a general population that is, by and large, obedient to the system's primary rules.

In the modern Nigerian system, the 1999 Constitution serves as the ultimate rule of recognition. In Chapter I, Part I (1.1), the Constitution declares its own supremacy.[87] In being the country's ultimate rule of

79. *Ibid* at 113-15.
80. *Ibid* at 115-16 [emphasis added]. See also *ibid* at chapter VI.
81. *Ibid* at 239-40.
82. *Ibid* at 94.
83. Indeed, Hart is at pains to explain how it is that the rules in any legal system will be subject to judicial interpretation where the law, in its combination of primary and secondary rules, still gives much space for ambiguity. In these areas of undefined meaning, judges and legal officials will inevitably fulfil the function of supplementing the law. And in this area, there will be much that is interesting to scholars on what the law actually is. See *ibid* at 124-54.
84. *Ibid* at 116-17.
85. See John Gardner, "Legal Positivism: 5 ½ Myths" (2001) 46:1 Am J Juris 199.
86. Shapiro, *supra* note 2 at 177 [emphasis added].
87. Constitution of Nigeria (1999), § 1.

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recognition,[88] the Constitution not only determines in which bodies the authority to make Nigeria's laws are validly vested,[89] it further outlines their procedural and substantive criteria. It provides for the establishment of the courts and sets out the areas in which these may act.[90] The Constitution aside, intermediate secondary rules are also established, for instance, by the Evidence Act—section 14 of which "provides that an indigenous custom of any ethnic group in Nigeria could be adopted as part of the law governing a particular set of circumstances."[91] If a custom has only been acted upon once by a previous, though not higher, court, however, evidence must be provided that the custom exists. As Eche Adah notes:

> The Court may take judicial notice of a custom of the people when such has been established on other occasions before the courts. A solitary instance of the application of the custom to the facts of a particular case is not sufficient to make such a custom notorious.[92]

In the preceding manner does judicial precedent also form part of the system's secondary rules.[93] However, despite the fact that Nigeria's legal system is most assuredly there, Nigerian legality does not evince the counterpart behaviour on the part of both the ordinary population and the system's officials as Hart's formulations would have us expect. From a Hartian perspective, perhaps what is most damning is the extent to which the Nigerian system's own law officers, most especially judges, fail to be adequately directed by its rules.[94]

Take the 1982 case, *Abbas v Solomon*, where the appellants claimed "title to a piece of land at Akesan in Epe, Lagos State, possession, and general damages for trespass and injunction."[95] While the High Court dismissed their claim to the title, it upheld their claims for trespass and injunction. "The trial court awarded N10.00 as damages for trespass and made an injunction restraining the respondents from further trespass."[96] On 21 June 1983, the appellants returned to court claiming the respondents had disobeyed the court's orders and trespassed on their land.[97]

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88. See Jadesola O Akande, *The Constitution of the Federal Republic of Nigeria, 1999* (MIJ Professional Publishers, 2000) at 16.
89. See Constitution of Nigeria, *supra* note 87, § 4.
90. See *ibid* at ch VII; Akande, *supra* note 88 at 353-88.
91. Charles Mwalimu, *The Nigerian Legal System: Volume I: Public Law* (Peter Lang, 2005) at 21. See also C Eche Adah, *The Nigerian Law of Evidence* (Malthouse Press, 2000) at 35; Obilade, *supra* note 21 at 85.
92. Adah, *supra* note 91 at 35-36.
93. See Obilade, *supra* note 21 at 114.
94. As Okechukwu Oko notes, "more problematic for citizens who seek justice is the fact that judges, driven by lust for power and wealth, often align themselves with the rich and the powerful in society to frustrate the search for justice." Okechukwu Oko, "Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria" (2005) 31:1 Brook J Intl Law 9 at 9-10.
95. *Abbas v Solomon*, (2001) 15 NWLR 735 at 146 [*Abbas*]. For further cases of judges infringing their own rules of court and correct legal procedure, see *Ejembi v AG (Benue State)*, (2003) 16 NWLR 846 at 337-79; *Isyaku v Master*, (2003) 5 NWLR 814 at 443-74.
96. *Abbas*, *supra* note 95 at 147.
97. *Ibid* at 157-58.

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The respondents filed a counter-affidavit in which they denied trespassing on the appellants' land. "They maintained that they merely remained in their respective houses and had not trespassed further" on the appellants' land.[98]

Over two years later, on 15 July 1985, the respondents appeared in court as ordered and "were summarily ordered to be remanded in prison custody for contempt of court without an opportunity to showcase why they should not be committed to prison."[99] Further hearing was adjourned till over three months later. On 18 October 1985, appellants counsel applied for the respondents to be committed to prison:

> The trial court, following this application and, without hearing the respondents or inviting them to show cause why they should not be committed to prison for contempt ... as stipulated by law, proceeded summarily to find them guilty of contempt of court and sentenced them to a term of 6 months imprisonment in the first instance.[100]

On 31 July 1990, the Court of Appeal, Lagos Division, declared the High Court's contempt ruling a nullity, describing the "procedure adopted by the learned trial Judge in the committal proceedings as bizarre, a travesty of justice and consequently null and void."[101]

Given the centrality, in Hart, of a rule of recognition that identifies and determines the existence of all other rules,[102] perhaps more worrying—from Hart's viewpoint—would be the cases where lower court judges deliberately disregard Supreme Court judgements, as occurred after the 2002 Supreme Court case in which an Abuja High Court purposefully ignored the ruling of the Supreme Court and issued an injunction restraining the "Attorney-General of the Federation from investigating allegations of financial impropriety levelled against the former Speaker of the House of Representatives, Alhaji Ghali Na'Abba, pending the determination of the substantive suit. The injunction was granted based on an ex parte motion,"[103] which had been rampantly, often illegally, used by judges in Nigeria's system "in clear violation of both the law governing *ex parte* orders and the *Code of Conduct for Judicial Officials*."[104]

To be sure, judges who deviate not only from the Constitution but also from the internal rules of the judicial system, including refusals of the lower courts to abide by Supreme Court judgments, have been vehemently opposed by those seemingly more upstanding among the judiciary.[105] In the above Abuja High

98. *Ibid* at 158.
99. *Ibid*.
100. *Ibid*.
101. *Ibid* at 159, 164.
102. See Matthew Kramer, "The Rule of Misrecognition in the Hart of Jurisprudence" (1988) 8:3 Oxford J Leg Stud 401 at 406-07.
103. Osita Nnamani Ogbu, "Combating Corruption in Nigeria: A Critical Appraisal of the Laws, Institutions and the Political Will" (2008) 14:1 Ann Surv of Intl & Comparative Law 99 at 116. For other cases of judicial misuse of *ex parte* orders see Oko, *supra* note 94.
104. Oko, *supra* note 94 at 32-33.
105. See *ibid* at 31-33.

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Court case, the Chief Justice of Nigeria issued a warning that these injunctions contravened "the tenets of fairness, equity, transparency and responsibility."[106] But the incidence of judicial misuse of the system's rules is at such a rate that, rebuke notwithstanding, "citizens, lawyers and even eminent jurists now openly acknowledge that the judicial system is no longer a realistic forum for obtaining justice."[107]

It should be noted that it would, I think, be a mistake to interpret the above cases simply as instances of 'corruption' in a system which would, in general, not function in the above way if not for the 'debased-mindedness' among some of the system's judiciary. Certainly, examples of cases in which judges, most especially, are abrogating the system's rules for financial, political, or otherwise personal gain abound.[108] However, the extensiveness of the disregard with which the system's rules are treated, and often with no obvious incentive, means that the once easy explanation of 'corruption' seems no longer reasonable. This is, perhaps, made most clear when we look at the extent of wanton disregard among ordinary persons towards the system's rules even when these are handed down correctly by the courts. Indeed, the image of the contemporary Nigerian legal system as one that fails to guide the behaviour of its society is faithfully verified by far too many cases in the Nigerian Weekly Law Reports. So pervasive are the cases of abuse-of-court process, and refusals to comply with court orders, on the part of individuals, that it is questionable whether the judicial system has the time, or capacity, to justly deal with cases of more substantive law.[109]

Indeed, it may be argued that in Nigeria's case the propensity to 'corruption' within the system is itself the result of a more prior problem. And this is a problem into which Hart's analysis is, fundamentally, unable to give us insight. To be plain, we are left at a complete loss by Hart's supposedly 'universal' analysis in explaining how cases like Nigeria can exist. What we observe in Nigeria is a system that despite its legal validity does not display the *behavioural* characteristics, either on the part of officials or on that of wide parts of the population, that Hart tells us we ought to be able to witness of systems that validly exist.

The reason why Hartian analysis cannot explain systems like Nigeria is because Hart is not laying out the purely descriptive criteria for the merely factual existence of a legal system. He is, instead, painting the picture of a system that

106. Ogbu, *supra* note 103 at 145.
107. Oko, *supra* note 94 at 16.
108. See Ogbu, *supra* note 103; Oko, *supra* note 94; IO Agbede, "The rule of law: fact or fiction?" in John Ademola Yakubu, ed, *Administration of Justice in Nigeria* (Malthouse Press, 2000) at 143.
109. For examples of contempt cases, by which the courts are overrun, see *FCDA v Koripamo*, (2010) 14 NWLR 1213 at 364-97; *Odu v Jolaoso*, (2003) 8 NWLR at 823 at 547-64; *Odu v Jolaoso*, (2005) 16 NWLR 950 at 178-203; *FATB v Ezegbu*, (1992) 9 NWLR 264 at 132-55. See also Chief Gani Fawehinmi, *The Law of Contempt in Nigeria (Case Book),* (Nigerian Law, 1980). And for examples of abuse-of-court cases, which have come to almost outnumber cases of substantive law, see *Akintunde v Ojo*, (2002) 4 NWLR 757 at 284-317; *African Re Corp v JDP Const (Nig) Ltd*, (2003) 13 NWLR 838 at 609-36; *Agwasim v Ojichie*, (2004) 10 NWLR 882 at 613-25.

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enjoys *authority*—and an authority whose acceptance by the relevant population goes beyond the mere fact of the system's legally valid existence.[110] While Hart's conceptions would force us either to deny that systems like Nigeria's exist at all, or to find for them 'alternative' explanations, what really needs to be ascertained in the Nigerian case, as in every other case of legal system, is what accounts for law's authority. The problem is not simply that Hartian positivism cannot explain cases like Nigeria. Rather, its inability to explain such cases exposes that in attempting to account for law's 'behavioural existence'—in other words, its authority—we must go beyond positivism's supposed 'descriptions.'

If we are taking cases like Nigeria seriously—and we should—we must assess that what Hart is really aiming to get at—this '*behavioural* existence'—is not explained by legal validity, nor vice versa. Wherever we see a system in which persons behave towards the law's demands with a sense of obligation, we are not witnessing the means through which that system is made legally valid. We are witnessing, rather, the outward sign that the system's rules *have authority* over the behaviour of persons. In other words, the behaviour of persons towards the law is the *effect* of law's authority, and while this behaviour may *verify* the existence of authority, the latter's making precedes, and is distinguishable from, that behaviour.

Matthew Kramer has previously noted that there is a circularity problem in Hart's analysis—legal rules exist by the behaviour of officials, whose behaviour is only relevantly explained by the existence of legal rules.[111] The Nigerian case clarifies that one of the fundamental problems with Hart's 'descriptions' is that they confuse within what is supposedly as a basic, 'general', 'morally neutral,' definition of legality, further criteria that, in fact, belong to more ideal, normative understandings concerning authority—and which must be separated from the plain existence of a legal system.[112] In other words, the validity of a system is one thing, its *authority* over the behaviour of persons is quite another.

Indeed, the major assumption undergirding a Hartian understanding of legality is the notion that by the time a system *claims* the right to authority, usually evidenced in the writing down of its rules, it will, as a result, have already been *taken* or *accepted* as authoritative—as evidenced by the behaviour of officials and citizens. In Nigeria, the law makes legally valid claims to obligate persons, including its own law officers. However, this claim is not *taken* as authoritative, and it is as such not *voluntarily accepted* by the very population, including its own law officers, over whom the system is intended to govern.

Certainly, there is a deficiency in Nigeria's system—and it is an historical, foundational deficiency. For in the Nigerian case, we have a legal system that, even in its most basic material parts—substantive laws of court, police, and general sanction—have simply been transported in via telegram from London. The historical participation even of local elites, as a minimum standard of

110. See Kramer, *supra* note 102 at 407.
111. *Ibid* at 405-08.
112. See Hart, *supra* note 1 at 239-40.

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legitimising participatory activity, is deficient to such a degree that it cannot be pointed to as a source giving confidence that the Nigerian system contains, within its historical memory, the participation of those whose efforts are capable of making the society reasonably believe that the system aspires to the population's service or has, at heart, the best interests of those it is intended to guide and instruct.

For Nigeria, this is also a history that means, in the contemporary age, and as Obilade notes, the "three classes of English law received during [the colonial] period ... are today, more than one century after the first reception, still sources of Nigerian law."[113] As a result, Nigerian judges still, in many instances, have to base their judgements on pre-Independence case law decided on by British judges.[114] If the corruption among Nigeria's judiciary has become widespread, this is not the fundamental cause of the way the system currently functions. It is itself the product of a prior, more foundational deficiency that prevents the law from reasonably compelling the respect of those who are supposed to operate in its service. In other words, it is a deficiency in the source of the law's *legitimate* authority. It is this deficiency that explains our failure to observe, in Nigeria, that *behaviour* among law officers that Hart takes to both explain, and be explained by, merely the system's factual existence.

Cases like Nigeria demonstrate that the behavioural existence of a legal system is not explained by that system's merely legally valid existence, and neither is the latter responsible for determining the behaviour either of officials, nor that of the general public towards the system's rules. If we are searching for an explanation of behaviour, and if—as much positivist thought has made at least implicitly clear—this explanation is crucial to any worthwhile understanding of law and legal system, then we are, *fundamentally*, in search of a normative explanation of the source of law's authority.

But what causes Hart to assume that a system's legal claim to validity suffices as an explanation of its behavioural acceptance? Certainly, an observation of legality in the Anglo-American examples that have been Hart's focus might serve to obscure the historical antecedents that are just as necessary for understanding the contemporary function of legality in Anglo-American systems as they are in Nigeria's. Nevertheless, the legal validity of Anglo-American systems cannot be thought to be the *cause* of their authority over the *behaviour* of persons within those societies. If Hart's analytical focus on Anglo-American law is at least partially to blame for the inadequacies of his general explanations of law, it is not a merely empirical error.

Indeed, cases like Nigeria make it apparent that Hart's focus on the central legal systems of countries like the United Kingdom and the United States has also been a focus on those parts of the formal legal structure whose historical

113. Obilade, *supra* note 21 at 20.
114. See *Ejembi v AG, Benue State*, (2003) 16 NWLR 846 at 337-79; *Odu v Jolaoso*, (2003) 16 NWLR 950 at 178-203.

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development, as those such as Michelle Chun have noted, has, at minimum, benefited from the participation and influence of a critical elite.[115]

This unstated assumption, embedded within positivist thought, that legal systems are first founded by some body of persons morally relevant to both the system they are founding and to the place in which they are founding it, has, I believe, allowed the tradition to rely on a hidden, inexplicit and, therefore, incompletely conceived understanding of authority. Yet, as cases like Nigeria highlight, such a criterion can hardly be assumed. Further, its assumption has not only left us unable to explain the function of law in numerous societies; it has, further, bereaved our collective understandings of a more complete explanation of authority, law, and legal system.

In Hart's case, it has made it impossible to separate out the presence of a system's rules from their behavioural adoption by officials. Further, it has hindered examination of the explanatory, normative root of the latter quite apart from the former's descriptive mechanics.

But Hart is not alone. In Scott Shapiro's conceptions of the law as 'shared plans,' for example, Shapiro rightly interprets that, under Hart, it is logically flawed to propose that we *ought* to undertake the actions specified under the law on the purely descriptive criteria that the law is legally valid.[116] But Shapiro's own conception of "planlike norms"[117]—under which whether or not "plans" (the law) authoritatively exist, simply requires that we "point to the fact of their adoption and acceptance"[118]—does not solve the problem that we still do not know *why,* or how they come to exist *with authority*, simply that they do *when* they do. Shapiro concludes that there is a kind of internal logic to the law that allows us to say that if the law commits a person to some action, from the legal point of view of the law, that person "has a moral obligation to perform that action. This statement may be understood to mean only that from the legal point of view one is (morally) obligated to perform that action."[119] This is still only an explanation of what is contained in, or meant by, the law *already having authority*.

Further, in Shapiro's framework, 'legality' and 'legal morality' come to mean the same thing—the latter being explained solely by the former, 'legal morality' has no *genuine* or distinctive explanatory characteristic beyond mere legality.

Part of the reason we are, by Shapiro's inquiry, no closer than we are with Hart's to an explanation of the law's authority that is separate, and separately discernible, from the observable effects of that authority, i.e., the outward

115. A 'critical elite' being those among the narrow, higher echelons of political society that have tended to be intimately involved with the major developments concerning the law and legal structure. See Chun, *supra* note 3 at 372-73.

116. See Shapiro, *supra* note 2 at 98-115. Shapiro further acknowledges that it is not theoretically possible to equate the behavior that rules dictate with the rules themselves. The two, in lying on different metaphysical planes, are not of a kind. As Shapiro says, "rules are standards that guide conduct, not the conduct itself." Shapiro, *supra* note 2 at 103.

117. *Ibid* at 120.

118. *Ibid* at 119.

119. *Ibid* at 184-85.

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behaviour of officials, is because Shapiro takes it for granted that those who develop a 'plan' will be formed by a substantive portion of those intending to carry out the plan. So that, between the plan-makers and the plan-doers, it may plausibly be said, 'this is *our* plan.' Maybe it will be suggested that within Shapiro's ideas is implied this 'taking part'—that not simply any sets of persons can have the responsibility for establishing the legal system of any place they desire. Maybe. "The fundamental rules of a legal system constitute a shared plan," Shapiro writes.[120] "A shared plan exists just in case the plan was designed with a group in mind so that they may engage in a joint activity, it is publicly accessible, and it is accepted by most members of the group in question."[121] If, in Shapiro's arguments, there is intended some tangible connection between such plans being designed *for* some set of people and the extent to which these latter constitute those *by whom* such plans are, or ought to be, designed, the connection's relevance is given neither descriptive nor normative substance. Indeed, to the extent that this 'implication' is there in Shapiro's accounting, it is hidden under the well-worn terrain of positivism's descriptions of legal validity.[122] As such, that aspect of authority—its more foundational source—that cannot be explained simply by describing the internal function of a particular set of systems, and for which we must not only exit a definition of legal authority but must further cast our analytical nets to include a wider generality of systems, is left mysterious and uncovered by much of mainstream jurisprudence.

My argument so far has been that in focusing almost exclusively on the historical development of Anglo-American legality, positivism has tended to either overlook the very beginning of how a legal system comes into existence such that its perpetual use by its own officers reinforces that very existence, or it has found this beginning to be an analytical irrelevance. The unfavourable consequences of this are borne not only by post-colonial cases like Nigeria, which mainstream jurisprudence excludes from its general descriptions, but further by our fundamental understandings of law and authority. The Nigerian case demonstrates that, in order to advance an adequate general understanding of law and legal system, we would do well to engage an explanation of what gives the law authority over the behaviours of persons.

IV. Legitimate Authority and the Significance of Participation

Joseph Raz recognises the problem that the concept of authority presents when he notes that "there is little surprise that the notion of authority is one of the most controversial concepts found in the armoury of legal and political philosophy."[123] Within perhaps the most sophisticated examination of authority modern jurisprudence offers, Raz lays out an explanation of practical authority that corrects the

120. *Ibid* at 177.
121. *Ibid*.
122. See Hart, *supra* note 1 at 107-17, 238-44; Shapiro, *supra* note 2 at 184-85.
123. Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2d ed (Oxford University Press, 2009) at 1.

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confusion that Hart does not fully identify between something *being* an authority and its *having* authority over what people *do*.[124] He explains:

> It is common to regard authority over persons as centrally involving a right to rule, where that is understood as correlated with an obligation to obey on the part of those subject to the authority. If that view is correct ... [i]t has to[, further,] focus on the conditions under which one person can bind another.[125]

For something to amount to an authority, Raz explains, it is not sufficient that it be merely *justified* (for simply any reason) in telling us what to do, it has further to be *accepted* as so justified by those it aims to instruct.[126]

While much of my concern in this section will be with Raz's explanations of 'practical' or 'effective' authority, it will be worth keeping in mind that unlike Hart, Raz's explanations are inextricably attached to a normative understanding of *legitimate* authority.[127] For this article's purposes, this means that to identify something or someone as an authority, it will not be sufficient merely to point to the existence of a power with coercive capacities.[128] In other words, authorities, properly called, impose *a duty to obey,* and they do so because those they direct *voluntarily accept* their directions as *normatively* justified. In other words, the directed accept that they *ought to do* as instructed.

As such, if we are to regard the law as a *de facto* authority, we must also account, in that definition, for the notion of its *de jure,* legitimate, authority. As Raz notes, legal authorities do not only exert coercive threats, which are, in any case, not the *source* of their authority. They "are de facto authorities because they claim a right to rule and because they succeed in establishing and maintaining their rule."[129] That is to say, legal authorities are authorities *proper,* because their de facto rule is "coupled with a claim that those people [the law aims to direct] are bound to obey."[130] The de facto rule of legal authorities must include the justified normative claim that their rule *ought* to be obeyed.[131] As such, the legitimacy of law and legal authorities is conditioned on whether or not they *sufficiently* act as reasons for others to act.[132]

Of practical authority, Raz explains that the law has effective—that is, practical and legitimate—authority when and because it acts as an "exclusionary" or "protected" reason for "conforming action and for excluding conflicting considerations."[133] Raz explains that authoritative reasons are those types of 'content-independent' reasons that, unlike other content-independent reasons,

124. *Ibid* at 7-13.
125. Joseph Raz, *The Morality of Freedom* (Clarendon Press, 1986) at 23.
126. *Ibid* at 24-28.
127. See Raz, *supra* note 123 at 29.
128. See Raz, *supra* note 125 at 24-25.
129. Joseph Raz, "Authority and Justification" (1985) 14:1 Philosophy & Public Affairs 3 at 5. See also Raz, *supra* note 123 at 28.
130. Raz, *supra* note 125 at 27-28.
131. See Raz, *supra* note 129 at 5-7.
132. See Raz, *supra* note 125 at 28-62.
133. Raz, *supra* note 123 at 29, 22-33.

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such as threats or requests, also impose firm obligations to obey. "A reason is content-independent if there is no direct connection between the reason and the action for which it is a reason. . . . A certain authority may command me to leave the room or to stay in it. Either way, its command will be a reason" for conforming action.[134] The fact that something is a legitimate authority, however, is also what explains our acceptance of it. This, Raz argues, does not imply

> a surrender of judgement . . . on the merits of performing the actions required by . . . authority. . . . For an authority is legitimate only if there are sufficient reasons to accept it, i.e., sufficient reasons to follow its directives regardless of the balance of reasons on the merits of such action.[135]

In the case of law and legal systems, this will be the case where the latter are accepted not simply as 'ordinary reasons' but as special kinds of reasons that depend on, subsume, and indeed, cancel out pre-existing reasons.[136]

Let us say that we agree with Raz, which I do particularly if it is understood that Raz's account is intended as a normative ideal, which is to say that in the best of cases it will and *ought* to be this way—and so in many, it very well may not. Certainly, it is not so in the Nigerian case because while the law there certainly sees itself as constituting exclusionary, protected, and content-independent reasons for action, and most certainly believes itself to be imposing a duty to obedience, the formally or legally rightful claim does not automatically lead to the claim's acceptance. Perhaps the failure in the Nigerian case may be put down to that system's inability to effectively *coerce* that acceptance. I do not think so—neither would it suffice as an answer for our purposes, since I also agree with Raz that if we are to distinguish between mere power and authority then we ought not to estimate the nature of authority by the extent to which it may be capable of wielding coercive threats.[137]

The real problem with Raz's explanations is not whether they sufficiently reflect the inevitable imperfections of real legal systems. Likewise, the real challenge the Nigerian case poses is to highlight that even *theoretically* we cannot assume that simply in marking out the ideal identifying characteristics of legitimate authority we are, further, explaining what, more fully, determines its acceptance and not simply what that prior acceptance merely indicates about what is taken to be the character of legitimate authority. In other words, even in Raz's normative expositions, there remains a certain circularity. Raz seems to assume that our acceptance of legitimate authority is either the automatic result of that authority's characterizability as such or that, at the very least, nothing more than an exploration of what legitimate authority *looks like* is required to explain our

134. Raz, *supra* note 125 at 35-37.
135. *Ibid* at 38-40.
136. *Ibid* at 40-53.
137. See Raz, *supra* note 129 at 3-7.

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acceptance of it. This is, I think, what explains Raz's ability to note that "a person is an authority or has authority only if some of his utterances are authoritative."[138] Of course, as Raz goes on to explain, we can only judge or *identify* whether an authority is *taken* as legitimate on the basis of whether they act, for the doer, as special and specific types of reasons for actions.

It may be true that to be considered legitimately authoritative the law ought to act as an exclusionary and protected reason that obligates my action. The further assumption, however, that it does so, that the reason I accept, or ought to accept, what it claims is *because* it claims it—my own 'unsurrendered' judgements aside—is to collapse an explanation of how or why a thing *comes to be* authoritative, or be accepted as such, into one that merely identifies the characteristics of legitimate authority. To be sure, our acceptance of legitimate authority must serve to *indicate* the presence of authority's identifying characteristics, but the latter are not themselves an *explanation* of why we accept those persons, institutions, and systems that tend to bear legitimate authority's identifying marks.

If even the theoretical relationship between a rightful claim to rule and the voluntary acceptance of that claim by those so directed is neither automatic nor justifiably explained by coercion, then by what does it hang together? Scott Hershovitz has the question exactly right when he states, "what circumstances justify accepting someone else's order as a protected reason for action."[139] Raz's own answer is that the law is authoritative because first, it acts as a dependent reason for action—that is, a reason that is meant to be based on and subsumes other relevant reasons that independently apply to persons for taking the same action.[140] The law also acts as a pre-emptive reason, meaning that it comes to 'displace' the dependent reasons upon which it itself is meant to be based and is thus taken to stand alone to the exclusion of some of those other prior reasons.[141] As such, for Raz, in the ideal, the law has legitimate authority just so long as people would be better off following the directives of a claimed authority than independently figuring out what to do on their own.[142] Raz calls this the 'normal justification thesis'—which together with the dependence and pre-emptive theses makes up

> [the] service conception of the function of authorities, that is, the view that their role and primary normal function is to serve the governed. This ... does not mean that their only role must be to further the interest of each or of all of their subjects. It is to help them act on reasons which bind them.[143]

The above seems to me an explanation of an optimal *operation* or procedure when we are faced with laws that justifiably claim the right to impose duties

138. Raz, *supra* note 125 at 28.
139. Hershovitz, *supra* note 9 at 206.
140. See Raz, *supra* note 125 at 42-53.
141. See Raz, *supra* note 129 at 9-13, 22-24.
142. *Ibid* at 18-19; Raz, *supra* note 125 at 53.
143. Raz, *supra* note 129 at 20-21.

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and whose right is accepted by their duty bearers, rather than an explanation of what is to be credited with giving the law an authority that justifies this 'compliance calculation,' or rather justifies persons *not having* to make such calculations on the basis that they take the law to have done it for them *because* they *already* accept its authority. Raz himself notes, "ours is an attempt to … [describe] what one might call an ideal *exercise* of authority."[144] As such, I believe that Raz's explanations fail as one of how law *comes to have* authority, and is, rather, one that outlines the identifying normative characteristics we may attribute to legal systems whose authoritative function is already indicated by their behavioural acceptance.

While Raz's may be a sufficient explanation of what law looks like *when it has* legitimate authority, it fails to provide us with a non-circular explanation of how or why laws *come to be accepted* in this way. Indeed, Raz tells us that "a person has effective or *de facto* authority only if [a sufficient number of] the people over whom he has that authority regard him [also] as a legitimate authority."[145] Yet, by Raz's explanations, we do not have an account of what is responsible for bringing this sufficient number to this acceptance. And we do not, therefore, have a sufficient account of authority. To put it another way, I believe Raz's account is insufficient for an understanding of how a system comes *to be*—that is, *to be accepted as*—a legitimate authority such that the likelihood of that authority's effectiveness—that is, its successful exercise over a population capable of voluntarily accepting its authority claims—is made plausible.

To be clear, the issue here is not with the 'idealness' of Raz descriptions. In fact, Raz is correct when he says:

> Reality has a way of falling short of the ideal. … [N]ot even legitimate authorities always succeed, nor do they always try to live up to the ideal. It is nevertheless through their ideal functioning that they must be understood. For that is how they are supposed to function, that is how[, most importantly,] they publicly claim that they attempt to function.[146]

As such, the directives of authorities are binding even if, and when, they may be mistaken. Given that there is not some empirical limit on how many 'mistakes' any given system is allowed to make before we stop making the calculation in favour of accepting the duties to obedience they impose, it is clear that the service ideal carries with it the assumption of an already existing, or inherent, authority that enables the law, in its exercise, to justifiably lay claim to the ideal, which though it does not always meet or even try to meet, can be reliably supposed as the aim of its 'ideal' intention. Again, our reliable belief that a system has, or is meant to have, as its aim an ideal of service is the *product*, not the cause, of the system's *existing* authority. What then accounts for the authority that

144. *Ibid* at 15 [emphasis added].
145. Raz, *supra* note 123 at 28.
146. Raz, *supra* note 129 at 15.

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allows a legal system to make us reasonably believe that its exercise, even if it often misses the mark, means to have our service as its intention?[147]

But perhaps Raz's explanations fail to advance a complete understanding of authority not out of mere oversight. In fact, Raz states plainly, "the reasons for which the relevant population accepts the authority of a person [or system] vary and do not belong to the analysis of the concept of *de facto* authority."[148] Here, I believe Raz is wrong. Indeed, the very reason we are justified in practically assessing the extent of a legal system's fundamental authority by pointing to the degree to which that authority is accepted by a sufficient number of persons is precisely because the fundamental explanation for the former also determines the latter. We cannot hold that a fundamental, conceptual understanding and explanation of law's authority is necessary and possible and claim, also, that a conceptual understanding of how that authority comes *to be made one*—that is, *to be accepted* by a relevant population as a legitimate authority—is either not required or defies foundational explanation.

If Raz's is not an account intended, also, to advance conceptual understanding of *why*, in general, a given society *accepts* its law as having legitimate authority over it, then it is also an inadequate account of legitimate authority. It may be true enough that the proximate reasons that might explain why any person chooses to follow any given law, legal official, or body at any given time may vary. What, however, equips law (that is, the entire legal infrastructure) with a *general* authority over any given society and the fundamental reason why that society, understood as an historically continuing whole—independent of the immediate time and circumstance of its individual members—accepts the legitimacy of that authority is, I believe, traceable to a singular criterion. This criterion is participation.

To further the understanding of participation I aim to advance, it would be beneficial to step away from the law and come to the common example of parental authority. Accepting Raz's understanding of authority, Scott Hershovitz explains:

> As any parent who has ever uttered the words, "because I said so," will attest, parental edicts are reasons for their children to act independent of what the parent requires. This general truth is not without limits. . . . Nevertheless, within a great range of activities, the fact that a parent has ordered an act is a reason to perform it regardless of what the act is.[149]

It might help to further our understanding of why parents are, or ought to be able to exercise their authority in the preceding way by, first, acknowledging that not

147. Jeremy Waldron asks something of a similar question when he notes that "Raz's account must refer to a procedural element, for there must be something about [a law's] provenance or the procedure by which it was arrived at, that gives us greater confidence in our trying to follow [it] than in our trying to figure out for ourselves what is to be done about the matter that [the law] addresses." Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) at 96.
148. Raz, *supra* note 123 at 28.
149. Hershovitz, *supra* note 9 at 203.

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all parents are able, or *should be able*, to exercise their authority like this. For example, the absentee, abusive, or chronically drug-addicted parent does and cannot, in many cases, exercise authority in the way described. Nor, in many of those cases, would we advocate that they be able to. One of the crucial reasons most of us subscribe to the idea that parents, in the ideal, are or should be able to legitimately wield authority in the way Hershovitz describes is tied to the notion that parents hold, or ought to hold, a special place in our lives that makes it reasonable to assume that they have our best interests at heart. In other words, we have good reason to believe their authority is legitimate, and we cannot reasonably make the same assumption about strangers or even about those we know very well without adequate or explicit proof.

In the case of parents, the foundation that makes our assumptions about the legitimacy of parental authority reasonable is the fact that parents have, in many if not most cases, been with us from the very start of our lives or somewhere significantly close enough to it. Parents are assumed to have 'participated' in the very making of our lives to a degree with which even close family members cannot be credited. We assume that most parents have taken an intimate part in organising our very ability to lead successful lives from birth onwards. This, perhaps, is what explains the fact that in those cases where parents fall short of an assumed 'participation' criterion, they become unable to wield what ought to be their inherent authority until such a time as they have repaired that participation deficit. To put it another way, the deficiency in the source of their legitimate authority brings that legitimacy into question. The deficiency does not often stop such parents from *claiming*—given that they are *in fact* parents—the legitimate right to authoritatively direct their children. It explains, however—given that it is a deficiency in the source of what ought to be an inherent or legitimate parental authority—why the authority of those parents might not be accepted, and why their directives might be disobeyed.

This parental analogy helps to illustrate what is missing from examinations of authority that ignore the concept of participation—they not only ignore a foundational explanation of legitimate authority, they also, consequently, abandon conceptual inquiry into the necessarily attached determinants of legitimate authority's *general* acceptance, irrespective of law's content. For example, the explanation that parental orders to wash the dishes are authoritative because they are orders with the power to change, exclude, and replace any other reasons a child may have had to do the dishes or anything else, prior to the order's issuance, might work as one of how parental authority *performs* or operates.[150] I hope to have illustrated, however, that such explanations do not suffice as explanations of *why* parents have that authority *in the first place*—in other words, legitimate authority's source.

150. *Ibid* at 204-05.

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Still, there is something a little different about the law. While the authority of parents is engendered by the latter's own participation, that of the law comes through the participation, not of itself, but of others, whether entirely on our behalf or additionally to our own participatory efforts, or both. In any case, the authority of the law differs from that of parents in at least one crucial respect—contrary to the long-standing positivist claim, the law is not responsible for the fundamental source of its own authority. By participation, people are.

However, just as with parents—and despite what the omission of such considerations in much of general jurisprudence suggests—*who* participates in establishing and developing any case of legal system is of the utmost significance.[151]

Perhaps with this question of 'who participates' in mind, Hershovitz has argued that one of the problems with Raz's service conception of authority is that it does not fully apprehend the nature of law as it obtains in the particular circumstance of democratic societies.[152] Hershovitz argues that the nature of a distinctly 'democratic' political authority makes it so that, in assessing the wider legitimacy of authority, we must also consider the extent of the deliberative procedure through which decisions are reached.[153] First, this more extensive 'deliberative' understanding of participation is much beyond this article's remit. I am focused on an understanding of legitimate authority in the narrow sense of a legal system that has the right to claim authority and impose duties on the basis of its legally valid existence and whose right is voluntarily accepted by the wider population. While I have argued that the population's acceptance must, logically, be traced to an understanding besides a system's mere legality, this understanding must also be identifiable across the generality of legal systems; and, indeed, traced to a fundamental explanation of legitimate authority itself. What I am suggesting, therefore, is that Raz's conception of authority is not sufficient for a full understanding of legitimate authority in the narrower sense in which Hershovitz rightly interprets Raz himself to mean it,[154] and as it applies to the general case of legal system.[155]

Second, it would be a mistake to understand the argument I am advancing here to be, simply, a procedural one. Rather, I am offering an ideal understanding of

151. *Ibid* at 209.
152. *Ibid* at 209-10.
153. *Ibid* at 211-13.
154. *Ibid* at 209-10.
155. If we are looking at legal systems that fit a deliberative democratic standard, then there are very few in the modern experience that could be said to be legitimate authorities at all. As Hershovitz himself notes, his is an exploration of an ideal that does not yet obtain. *Ibid* at 210-11. Neither does an insistence on a democratic ideal of participation necessarily incorporate the deeper notion of participation from an historical perspective as is evidenced by some of Jeremy Waldron's arguments on participation as majority vote. See Waldron, supra note 147 at 232-43; Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press, 1999). Indeed, accounts of participation's relevance to authority that do not incorporate deeper historical formulations may only promise to provide normative justification for perpetuating, by majority vote, structural and historical injustice. See Catherine Lu, *Justice and Reconciliation in World Politics* (Cambridge University Press, 2017) at 35.

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participation that I believe ought to form part of a *substantive* general theory of legitimate authority. The significance of participation to my argument is not merely to act as a mechanism for deciding upon law's immediate content. My major claim here is that it is by way of a thorough, continuous, multi-faceted, and foundational participatory engagement in the development of any given society's law and legal system that a people *invest* in that structure the authority it comes to have legitimately over the society in which those persons are, and will for many generations be, continuously attached and embedded. In this investiture, each participant leaves a substantive effort that, in total, substantiates that society's historical ownership over, and acceptance of, its system. This is an effort that is to be identified with no lesser meaning than that the legal structure contains within its historical memory and foundations the intellectual and physical enterprise of those about whom each subsequent generation's moral assurance is a reasonable calculation.

I believe this is the source of law's legitimate authority in any given case of legal system. If cases like Nigeria are unable to display the hallmarks of effective authority, it is not because they operate legal structures requiring 'alternative' explanations to be searched for outside of general understanding. Rather, 'general' understanding has so far failed to be sufficiently general and incorporative of examinations beyond a narrow historical experience. If we expand our theoretical engagements to include the historical record of post-colonial cases like Nigeria, where the assumption must be laid to rest that a society builds a legal infrastructure for itself (though it ought to), it ought, also, to become clear that the seemingly more obvious 'effectiveness' of those Anglo-American legal systems on which Raz and Hart are focused should not be viewed as some objective class of case whose existence is explicable only by descriptive reference to itself. Rather, while the course of history has made it appear otherwise, like Nigeria such cases also sit on a spectrum of legitimate authority, the source for which I hope to have contributed as much to demystifying as I have in demonstrating the historical cause of that source's deficiency for post-colonial cases like Nigeria.

Finally, the understanding of participation I have been advancing here should not be conceived as dependent on a static set of criteria. Minimally, participation includes the understanding that, at the very least, some set of local elites has been intimately involved in the substantive historical development of the legal system. This is minimal because it is a degree of participation that, I believe, ought to be found in the histories of all legal systems. And where it is found either to varying degrees or not at all, such as in former non-settler colonial settings like Nigeria's, we will find a severe deficiency in those systems.

At the maximal end, participation includes the understanding that a significant proportion of the wider local population ought to be actively involved in the historical development of the legal system—be this through agitations on specific laws, the development of a founding Constitution, or in the basic nuts and bolts of the practical legal framework. This will include participation in the development of a courts system, of the institutions of the police and general sanction, of the

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institutions of legal training, and of the educational production of lawyers and other law officers. In the ideal, the law and legal infrastructure will be always traceable, by each generation, to the practical and intellectual influence of the widest parts among the ordinary population of the generations preceding. This is a more maximal degree of participation because while it may be found in some societies, it will not be found in most, and where it is found it will only be to highly varying degrees of substance. Further, where its substance is especially lacking, as in the Nigerian and Mozambican cases, this is the result of undesirable historical circumstances—for example, a persistent and structured colonial enforcement, an extensive dictatorship, and so on.

In the Nigerian case, even that minimal level of participation that includes the substantive influence of local elites in the formal system's historical conception and maintenance was peripheral. Further, in the Nigerian case, evidence of a more maximal understanding of participation is detrimentally absent. As such, despite the system's legal justification in its claims to authority, the degree of the deficit of participation explains, also, the deficiency in the fundamental source of the system's legitimate authority. The system is, therefore, unable to supply citizens with the reasonable belief that it aspires to an ideal in their interests which, though it may often not meet, is enough to compel their voluntary obedience. As such, the authority of law in Nigeria is regularly questioned by a society that cannot point to the substance required for accepting the fundamental legitimacy of the system's claims—and this includes the system's own law officers.

The understanding of participation I have laid out also encourages us to understand authority itself as existing to degrees, and not—as much of analytical jurisprudence suggests—absolutely. We should, therefore, envisage that even—at what may appear the other extreme of local participatory involvement—in the historical development of the legal systems of former colonial powers like the United Kingdom, and where the legal system purports by its marks of internal recognition, to be unitary, we may only be able to speak of the *extent* of a legal system's legitimate authority.[156] This is an extent which—because the territory includes multiple communities with varying degrees of historical influence over the law—cannot be thought of as uniform. This understanding, perhaps, also gives further substance to Brian Tamanaha's meaning when he notes that mainstream understandings of law are "inadequate even with regard to the Western contexts in which [they have] … been produced, as would be evident following an examination of the immigrant communities" of those societies, and in which the law fails, in many instances, to guide voluntary behaviour.[157] This minimized range to the law's legitimate authority may be understood to be even more so the case in settler colonies like Australia, Canada, New Zealand, and the United States, where the pretence to unitary authority of formal centralised legal systems can, as Lisa Ford convincingly argues, be barely maintained over indigenous communities

156. See Hart, *supra* note 1 at 91-99.
157. Tamanaha, *supra* note 13 at xii.

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who continue in centuries-long resistance to the settler colonial "establishment of formal bureaucratic tyrannies."[158]

Looking at the historical development of non-settler post-colonial systems like Nigeria's demonstrates most plainly that we cannot, and ought not to, take for granted either the local identity of those who design, develop, and build the legal system of any given society, nor should the substantive extent of their participatory involvement in the historical establishment and maintenance of the system be assumed. As such, this criterion—local participation—ought to form an explicit part of any substantive general explanation of authority.

V. Conclusion

By shedding light on the substantive importance of local participation to the authority of law, the Nigerian case presents an historical experience that is useful for understanding many other non-settler post-colonial cases like itself, as well as for understanding the systems of former settler-colonies, and indeed those of former colonial powers. So peripheral was the level of participation even of local elites, not to mention that of ordinary persons, to the development of Nigeria's legal system that the country's contemporary system is still unable to supply the foundational source of an authority it is legally justified in claiming. As such, the duties to compliance that it attempts to impose go ill-effected over a citizenry—especially the system's own law officers—that is unable to locate the true source of the guarantee that the system has, or intends to have, its best interests at heart. A further result is that the Nigerian legal system, and the society intended to bend to it, has little locally sourced and locally sustained historical memory, both physical and intellectual, of its own making and development. The reason why the criterion of local participation in the historical founding and development of a legal system is pertinent to the Nigerian case is that it is pertinent as the source of the legitimate authority any given legal system effectively wields. In other words, it is pertinent to the nature of law and legal system in general.

This article's three major claims have been, first—at least as a partial result of focusing on the historical experience of Anglo-American legal systems—legal positivism has tended to mistake the effect of the law's authority for its cause. On one hand, this has clouded its attempt to provide any description of law that could be truly general. On the other, it has also prevented a more complete understanding of authority that is cognizant of the more fundamental source of law beyond merely what makes it legally valid. Second, I have argued that including a broader historical spectrum in our analytical examinations enables us to more concretely see the non-legal roots of law's authority, and

158. Lisa Ford, "Locating indigenous self-determination in the margins of settler sovereignty: an introduction" in Lisa Ford & Tim Rowse, eds, *Between Indigenous and Settler Governance* (Routledge, 2013) 1 at 2. See also Heather Douglas & Mark Finnane, *Indigenous Crime and Settler Law: White Sovereignty after Empire* (Palgrave Macmillan, 2012); Ford, *supra* note 4; Adam Dahl, "Nullifying Settler Democracy: William Apess and the Paradox of Settler Sovereignty" (2016) 48:2 Polity 279.

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to see what a system actually looks like when it is legally justified in its claim to authority, the prior—more fundamental—source of which is not present for the case. My third and most major claim has been that local participation accounts for both the extent and the legitimate nature of authority that *any* legal system is able to wield effectively, without coercion. I have argued that in failing to account for participation's significance, mainstream jurisprudence fails to provide a general account of authority that is adequate to the task of explaining post-colonial cases like Nigeria precisely because it also fails to adequately explain the very Anglo-American examples with which it has been most preoccupied.

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