Oath-Practice as the Grundnorm in African Jurisprudence: A Critique of Kelsen's *Pure Law* Theory

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Abstract

Seriously, Hans Kelsen's pure law theory amounts to some positivist conception of law but rigorously excludes any ethical, historical, political or metaphysical considerations. The law, Kelsen holds, is a laid-down rule in 'black and white'— as written down; as simply a regulator of man's social conduct, systematically hierarchical and ultimately based on some basic rule: the Grundnorm, the basis of authority and obligation, replaceable only by political revolution. However, there is need to situate the Grundnorm. Apparently, Kelsen's theory does not recognize the reality and relevance of metaphysical forces as the basic supervening to human limitations. Two issues arise: Kelson's does not realize that by prescribing what constitutes as law and that law deals with the ought, his' is already being normative; and he fails to recognize that oath (as a solemn declaration or appeal to a sacred force that one would definitely do or refrain from doing certain act, and thus presupposes that man could be deceptive and, therefore, unreliable) is supreme; thus, that no human category can validate oath further as its *Grundnorm* nor form the basis of its authority, obligation to it and its efficacy. This article, consequently, points out the pitfalls in Kelsen's (positivist) theory and espoused the metaphysical bases of oath. Sufficiently relying on research into existing original literature (including commentaries), it discovers that, based on the deceptive/finite nature of man and the African experience, the very idea of a *Grundnorm* is extra-human and metaphysical; that among traditional Africa, efficacious oath is final arbiter and, therefore, the *Grundnorm.*

***Keywords*: Oath, Africa, Law/legal, Grundnorm, Normativism, Legal Positivism**

Introduction

Legal theory is replete with positivism and normativism; but positivism is realism. Realism affirms the existence of some kind of thing independent of another scheme or standard; it simply argues for that which there is. Hence realism has epistemological, logical, moral and legal implications. And positivism rejects any assumption that nature has some ultimate purpose, and it gives up any attempt to discover either the "essence" or the secret causes of things. Rather, it attempts to study facts by observing the constant relations between things and by formulating the laws of science simply as the law of constant relations among various phenomena. Seriously, Hans Kelsen's normative-positivist conception of law rigorously excludes any ethical, historical, political or metaphysical considerations. The law, Kelsen holds, is a laid-down rule in 'black and white'—as written down, simply a regulator of man's social conduct, systematically hierarchical and ultimately based on the basic rule: the Grundnorm—the basis of authority and obligation, replaceable only by political revolution. Apparently, Kelsen's theory does not recognize the reality and relevance of metaphysical forces as supervening to human limitations. Oath, as a solemn declaration or appeal to a sacred force that one would definitely do or refrain from doing certain act, presupposes that man could be deceptive and, therefore, unreliable; thus, that no human category can validate it further as its Grundnorm nor form the basis of its authority, obligation to it and its efficacy. Therefore, there is need to situate the Grundnorm. What follows, (and sufficiently relying on research into existing original literature—including commentaries on them—consequently, the pitfalls in Kelsen's (positivist) theory shall be pointed out. The method is adopted to accommodate a terse review of the positivist theory of law so as to situate the background to Kelson's. The article also shall argue/indicate (citing several stimulating analogies) that, based on the deceptive/finite nature of man and the African experience, the very idea of the Grundnorm is extra-human and metaphysical. It, thus shall indicate how and why in traditional Africa, oath is the final arbiter and, therefore, the Grundnorm.

The Background to the Study

From especially the modern times, there has been intense controversy about the relationship between law and morality: law as human, morality as extra-human. Rousseau had elevated nature and sentiments above civilization and intellect—distinguishing sex as simple ideal and love as artificial; claiming that "man is born free; but everywhere he is in chains" (Stumpf 1994, 295). All this has led to the ignition of issue between *is* and *ought*, between the artificial and the natural; in legal theory, between positivism and naturalism. Positivism confines itself to what is positively given, avoiding all speculation, but emphatic of all forms of knowledge descriptive of sensory phenomena. One the same hand, the normative school believes that laws are a consequent upon and part of a hierarchical relation of norms where some are a foundation for others, until we get to the most basic

norm which is the source and foundation of all other norms. The naturalists, on the other hand, insist that there is some essential moral foundation for all law. It is only necessary and appropriate to locate the Grundnorm in human positive and natural experience.

The Central Issues

What is the ultimate source of all authority: the gods, minds or reason, or in the thing/act itself? Are truths, piety, and good things, true, pious, and good because man/reason or the gods/divine love them; or man/reason, or the gods/divine love them because they are true, pious and good? Is ultimate authority human, not divine? The concern in this paper affirms the existence of a Grundnorm as posited by Hans Kelson; canvasses the supremacy of the natural law over the positivist approach to law; and poses the question whether, in legal theory/jurisprudence, the Grundnorm is human-centered or metaphysical base. Yet one cannot access authentic justice without its authentic route.

The question arises because many philosophers of law and jurists have concerned themselves (with modicum of success) with the analysis of the relationship between law and morality. What is the ultimate morality? Positivist/normative approaches to this issues regards Bentham, Mill, Kelsen, Austin, and the many others; and naturalist approach involves the writings of Aristotle, Aquinas, Grutius, Blackstone, Hart, etc., who, however, were variously not specific enough to locate the final source of valid and sound legal order. This needs to be done.

Following Comte, positivism rejects the assumption that nature has some ultimate purpose, and it gives up any attempt to discover either the "essence" or the secret causes of things. Rather, it attempts to study facts by observing the constant relations between things and by formulating the laws of science simply as the laws of constant relations among various phenomena. Simply, "any proposition which does not admit of being ultimately reduced to a simple enunciation of fact, special or general, can have no real or intelligible sense". For Comte, ideas have passed through three stages—theological, in which people explain phenomena in reference to divine causal forces; metaphysical, which replaces human-centered concepts of divinity with impersonal and abstract forces; and positivism or scientific, in which only the constant relations between phenomena are considered and all attempts to explain things by references to beings beyond our experience are given up (Stumpf and Fieser, 2003: 350-351).

Mill, in the similar manner holds that the idea of law or of phenomena is all we know respecting them. Their essential natures, and their ultimate causes, either efficient or final, are unknown and inscrutable to us –even though this presupposes that there are essential

or ultimate causes (Stumpf and Fieser, 351). Bentham, Austin, and Mill also think along this line.

For Bentham, natural law and natural right confuse "is" with "ought', the descriptive and the prescriptive. An obligation or right is a legal one only if rule and penalty are duly constituted by a sovereign—that is, a person or body habitually obeyed and itself not habitually obedient to another. Without the command of such a sovereign, there is no law. (Bentham, 1843). Moreover, Bentham does not agree with Blackstone's view that actual law represented a God-given structure of rights and duties. He conceives law as "command of the sovereign backed by sanctions". To Bentham, "every man his own lawyer" and he was practically against the place of judges and administration of justice of his time (Sabine and Thorson, 1973: 620). Bentham tries to find out whether the law contributes to the "greatest happiness of the greatest number" (Rodee, 1983: 59); for he feels that "Nature has placed mankind under the governance of two sovereign masters, pain and pleasure" (Bentham, 1948: 1-20). Surprisingly, however, he rejects any natural law or metaphysical principles as the basis to ascertain whether or not a positive law is good, bad, or ultimate (Ndubuisi and Nathaniel, 2002: 124).

John Austin (1790-1859) culminated all previous legal positivism in his imperialist conception of law "as the command of the sovereign backed by sanctions"; that the sovereign is the person or institution whom the people have the habit of obeying. He knits a strong utilitarian relationship/unity between law and political power. Law is law as is (once) pronounced. He forgets that people could be forced to obedience (coercion). Hence, Austin does not account for the persistence of legal authority and for the role of the law in providing a framework that enable people to do things (moral basis of law). Austin does not see the need for historical inquiries into the origins or need or the moral criticisms of the workings of the law(s). For him, law is a frozen and closed system with its determinate logical structure, from which verdicts may be derived without reference to wider pragmatic, social, and moral issues; that moral judgements are themselves non-cognitive in nature, and for this reason no part of the essence of legal practice. To him, sovereignty relies in definite human superior, and is indivisible (Mukhi, 2011: 36). Obviously, for Bentham and Austin, the elements of sovereign, command, and sanction are essential to the status of a law; that law is a law no matter its repugnance. Truly, are all laws *commands*? Do *commands* not degenerate to authoritarianism? Both theorists do not regard the principle and reality of political change of guard.

Kelsen's Purist Legalism

Hans Kelsen is an Austrian born jurist and philosopher of law, known for the most rigorous development of a 'positivist' theory of law. His' is one that rigorously excludes

from his analysis any ethical, political, or historical considerations, and finds the essence of the legal order in the 'black letter' or laid down/written law. Kelsen believes that a system of law is based on a *Grundnorm* or *ground rule*, from which flows the validity of all other statements of law in the particular society or syste m. The ground rule might be that some particular dictates or propositions, such as those the sovereign, are to be obeyed. As absolute as the Grundnorm, it can only be changed by a revolution. Perhaps, Kelsen should realize that law is a system of coercion.

In an attempt to liberate a "science of law" from methodological dependence on some other "sciences of mind", and by developing a theory of law as an "ought," as a "science of mind", Kelsen formulated the idea of a basic norm. Hence he claims that:

> It is more than two decades since I undertook the development of a pure theory of law, that is, a theory of law purified of all political ideology and all natural-scientific elements and conscious of its particular character because conscious of the particular laws governing its object. Right from the start, therefore, my aim was to raise jurisprudence, which openly or covertly was almost completely wrapped up in legal-political argumentation, to the level of a genuine science, a science of mind (Kelsen, 1934).

The question, however, should be posed thus: Why does one want to develop a theory of law that is "purified" of all political ideology? I believe that what Kelsen tries to do is "rescue law" from its being just an adjunct of historical or descriptive study. And as Stewart says,

> The pure theory of law undertakes to delimit the cognition of law against these disciplines, not because it ingores or denies the connection, but because it wishes to avoid the uncritical mixture of methodologically different disciplines which obscures the essence of the science of law.

Nevertheless, it must be pointed out that law is a subset of intellectual culture and that, in order to understand legal developments, one must understand them in the context of larger philosophical accretions and social movements of the particular culture. As a "science of mind," therefore, law seeks the realm of the '*ought'*. Yet Kelsen is interested in a basic principle or norm, a basic *ought*, that will actually be both descriptive and prescriptive for legal discourse. It should, nevertheless, note that the term *norm* could be used in at least two senses: either descriptive regularity (as in a thing being fitted to existing or known standard/norm) or prescriptiveness (as in the admonishing to behave to some

standard/the social norms). Conveniently, Kelsen would use the word *norm* in the prescriptive sense. Therefore, when Kelsen uses the word *normative*, he means something that is prescriptive, something that ought to be done. Kelsen wants to identify a basic legal principle which will ultimately include or define the legal structures of all cultures. The Grundnorm or Basic Norm is a statement against which all other duty statements can, ultimately, be validated. The Basic Norm is ultimately a sort of act of faith--it is the belief in a principle beyond which one cannot go and which ends up being the foundational principle for all subsequent legal statements. You cannot "go beyond" the Grundnorm because it is an unprovable first step (sort of like the "democracy is best because it is democracy" approach of 1930s-1950s American jurisprudence). However, this definition begs the question. Ultimately it appears that the Grundnorm for Kelsen is a belief that one's respective legal system ought to be complied with. Consequently, lots of other principles can then flow from this basic realization.

As a legal positivist, Kelsen objected to the reduction of the validity of law to morality. How, then, are we to account for the source of legal validity? Kelsen claims that law is a system of norms. Each lower-level norm derives its authority from norms at a higher level…. This chain of validation will eventually lead to an ultimate norm, that is, a basic norm (German *Grundnorm*) which, at the historical starting-point of norm creation conferred legislative power on the fathers of the first constitution. A basic norm is a presupposition that must be assumed by anyone who seeks to explain our knowledge of positive law. As the ultimate power-conferring source, the basic norm corresponds to Austin's command of the sovereign and Hart's rule of recognition. "Coercive acts ought to be carried out only under the conditions and in the way determined by the 'fathers' of the constitution or the organs delegated by them. This is, schematically formulated, the basic norm of the legal order of a single state" (Kelsen, 1945).

Kelsen believes that law is a normative order for the regulation of man/s social conduct. Laws are, therefore, aspects of norms which also are hierarchical—each giving the next its validity—until we arrive at the supreme law, which is the extra-legal norm (basic, Grundnorm) validating all other norms. Effective laws are a mark of conformity with the Grundnorm. This is why I have termed his 'normative positivism'. Thus for Kelsen, a legal system exists where: one, if that supports of the effectiveness of the principle; and two, if and only if there is a Grundnorm that provides the necessary validity to all other rules and norms. The implication of this is that there seems to people's role in their attitudes and other psychological dimensions to the recognition of the validity of a law. Hence the Grundnorm could be the constitution, the people themselves, divine or metaphysical. My simple problem with Kelsen is that he does not stipulate an all-time Grundnorm, even across cultural settings. His view generates the questions: What is the nature, content, and

function of the basic norm? Fortunately, Kelsen believes that the basic norm is not posited by any act of 'norm creation' (Unah, 1993: 92).

But Kelsen ignores the fact that whatever the law is not monopolistic; there other principles and schemes which help in the process of justiciation: the Judge and his possible establishment of perjury is one; the ultimate role of oath practice is another. How do we select the basic from other competing norms? And Kelsen fails to recognize that law also regulates man's personal conduct as a social being, the haziness and the deceptive nature of man, the contingency or improbability of perjury, and the ultimacy of an efficacious oath—an ultimacy that is a mark of finality, basic norm. Again, happily, Kelsen recognizes that "efficacy is the only test for legal recognition" (Unah, 94); but fails to recognize that the law is a complement to or is an aspect of public morality (Asekhauno, 2011a). This could be demonstrated.

Invariably, the view that no moral judgment need be involved in determining what the law should be, is historically contrasted with natural law theory. It is especially associated with John Austin who spoke of law as the command of a sovereign so that the sovereign's subjects are prompted to obedience by a threat of sanction if otherwise. However, modern legal positivism speaks of the acceptance of law by a community rather than the command of a sovereign. Hence, historically too, several philosophers have argued for the foundational role played by natural moral law to all other forms of law.

For Aristotle, there exists some kind of law/justice beyond man's intuitive idea of law. This overriding law is inviolate, demands compelling obedience, intrinsic efficacy**.** Even at that, man may still refuse to key in to the tenets of the overriding law; what then, is to be done? This is where oath practice comes in—to test his willful adherence to the laws of nature and natural justice than even the statesman and as such cannot be. For Aristotle, "law is greater than statesman and as such cannot be exacted by them… it cannot be vested among the people because law is responsible for producing right spirit among them" (Mukhi, 204). Thus the existence of a sovereign human or grundnorm is non-existent in Aristotle's view. Only social principles are sufficient; and law itself is sovereign. However, Aristotle's was a precursor or foundation for Aquinas' and modern natural law theorists.

The standard for authority, for Aquinas, is formed by God's nature, as distinct from any will. Outright, the validity/justice of any law must reflect man's basic end of happiness—in marriage, self-preservation, and security as common good. The common good are inviolate and self-evident, requiring no further proof as first principles of human reason. In human apprehension, law, says Aquinas, is the ordinance of reason for the common good of all and sundry and promulgated by those who have the care of the community at

heart. But the validity of such promulgation conforms with the expectations of other superior law—hierarchically, eternal (God's laws at creation); natural (the participation of rational creatures in the eternal law); divine (revealed laws driving man towards his supernatural end); and then human/positive (stipulated by man in accordance situational needs and bound by laws of nature. Importantly, Aquinas, like Augustine before him involved vivid metaphysical and theocratic underpinning for all law—the domineering nature of the natural/moral law "founded upon human nature, upon the natural inclinations…."; and that of eternal law, the divine reason governing all of the community of the universe (Stumpf and Fieser, 178).

Since Aquinas, some jurists and philosophers of law have tried to argue the moral basis of positive laws. Hugo Grutius (1583-1645), the Dutch founder of modern international law and order, is a quasi natural law theorist. Grutius things that natural law is founded on reason rather than some divine order or element; it is a law so immutable that it cannot even be changed by God himself. He claims that even without God as source, there are universalizable principles, of practical reasonableness, that concerns human nature. Mukhi (2011, 404) refers to Grutius to depict law as the "result of proper reasoning and reasonable will. It is a regulating force and required not only in a civilized but also in an uncivilized and brute society". Consequently, his positivism rests in: one, that "international law …regulates the affairs of the emerging nation state…and government rests on social contract"; that the people "lack the right of repudiating the sovereign, however unjust the laws he makes" (Freeman, 1999, 101); and two, his conversion of the actual fact of self interest and self-preservation into the foundation of morals, a natural right whose service provided the rationale for civil society, influencing future thinkers as Finnis and Hart to claim that evil is to be avoided and good pursued—especially following the issues surrounding the Nuremberg and other post-war trials of the 20th century pursuant to the new conviction that any law must reflect the principle of natural justice. However, Grutius tried to remove any metaphysical and theocratic underpinning for all law as was for the medieval thinkers. Even though Grutius' is extreme veneration of natural law, he fails to indicate the source of such law itself.

In his *The concept of law*, Hart (1961) held and adapted concepts from linguistic philosophy to a sophisticated defence of the view that law consists essentially in a system of rules located in some social practices—this asserts some legal positivism. But in his *The morality of the criminal law (1965),* he instituted a liberal defense of the limit of law in moral matters. He believes that there are certain truisms, axioms, and the "minimum content" of natural law which requires that any positive law must reflect human condition: human vulnerability, approximate equality/inequality, and scarcity/limited natural resource vis-à-vis man's seeming insatiability. All law must reflect these frailties. Hart thinks that a

legal system is a system of rules predicated on other rules, where primary rules (standard setting ones) may not be sufficient but must be fused with power-conferring rules to deal with the vagaries of modern society. Thus the primary is the basis for secondary rules. And both are based on the 'rule of recognition' (Austin's *Sovereign* and Kelsen's *Grundnorm*) which develop from the judge's critical apprehension, application and acceptance of its content as the making, interpretation, and application of law. Hence the judge must internalize the letter rather than the spirit of the law after such careful approach.

Even though Sartre and Holmes have differently held that the idea of natural law should be dispassionate, demystified, and not mythical, but should be pragmatic and real, it is reasonable to believe the contrary in that judges, in the judicial process, still appeal to and employ the precepts of natural law: the "Bill of Rights", the principle of "beyond reasonable doubt", etc. All these are marks of the inadequacy of positivist legal theory and the need for stipulating the standard for a normative legal order.

Efficacious Oath as the *Grundnorm* in African Jurisprudence

In the light of the foregoing discussion, this essay believes: that since law is system of rules that justify demand for conformity, and the idea of legal duty is one of being bound by a rule, whether or not it is likely that suffering will follow upon failure to comply, there ought not to be separation between law as it is and law as it ought to be; that the ultimate source of law is morality; that morality is superhuman/divine; that, therefore, the grundnorm is superhuman/divine; and that, finally, following from the interaction between the levels of law and morality, the Grundnorm is oath-practice—as against Kelsen's stipulation of simple pronouncement of a sovereign. It is within the scope of philosophical inquiry to articulate this claim.

Kwame Gyekye (1997) indicates this role of philosophy when he says that it is a "critical and systematic inquiry into the fundamental ideas or principles underlying human thought, conduct, and experience" which include beliefs and cherished presuppositions, including a clarification of concepts, even though such might involve emotional attachment. Emotion is attached to symbol. Oath involves some symbolism. Hence Evans Pritchard (1937) believes that certain mystical powers and actions "transcend experience". To him, evidence and accuracy is promised to a symbol. Truly, this claim can easily be affirmed, following the use of symbols (such as iron, tree, water, cowry, blood, grave, and so on) in traditional Africa; and the use of Bible, Koran, and the self among Western and Eastern practices of oath, respectively. Pritchard notes that for oracles (oaths) to be effective, there needs to be some other worship, exaltation, and propitiation on the symbol of the oath to ignite/invoke its spirit-force. Also in this sense, Aniagwu (1991) holds that justice is full of religious and moral rectitude. It is conformity with a legal norm and

"rectitude in the mutual relationships of men". Hence, Ehianu (2005) contends that justice (retributive, legal, et cetera.) could be gotten through shrine (oath)—but he did not explain the effective-force behind the efficacy of such mode. Appiah (1992), reflects that it is the belief and use of symbols in miracles, oath practice, and magic that impels people to believe "that traditional religious belief should be interpreted as having the same purposes as those of the modern natural science, which are summarized in the slogan 'explanation, prediction, and control'." Our investigation of oath-taking in *Etsako* (traditional Africa) lends credence to this view that it is not the mere validity or proof, but the control, or effect of the activity that matters. Similarly, Robin Horton (1938) espouses this fact about African practice of oath. He claims that the practices (of oath, magic, and divinity, et cetera.) arises in the literal belief in the powers of invisible agents, and that spirits or other forces function in the explanation, prediction and control, much as do other theoretical entities, of human affairs. He avers that the logic of their explanation is the same.

C. S. Momoh (1991: 16), posits that good law/justice could only obtain via the efficacy of oath as 'juju'—a kind of magical/sacred symbol with the capability to visit some calamity on an offender. But one must say that 'juju' is rather a colloquial term, which therefore, demeans the idea of oath. Despite this interpretation, it is clear that what Momoh describes by the term, 'juju' is a kind of oath practice based on native forms of concoctions such as charm and other efficacious magical symbols; he tried to demonstrate the end or essence of oath rather than as a formal or mere 'pronouncement' or simply promise as is the case of its modern form/practice. However, even though Momoh sees 'a new past in an old future' in the application of 'juju' as an active oath-form, he failed to indicate what it is that makes 'juju' efficacious, i. e., its effective force or constituent. By careful analysis, it would be discovered that the effective force behind an 'active' oath practice is embedded in the metaphysical—hence, tendered 'evidence' is to both humans and spirits (Isokun, 1998). Notably, these theorists (just reviewed) simply referred to, without stipulating the basis of, law. This accounts for why we must go back to Comte's theological stage, the need to go beyond a judge's by "the evidence before me"—to application of conscience and other modes of securing justice.

In the first place, as against Rousseau's belief on man's natural goodness "which is a development of man's natural capacities and passions that enhance his vitality and sense of well-being...to be benevolent and just in all relationship with others" (Ndubuisi and Nathaniel, 2002: 72), man is naturally more inclined to be selfish and egotistic, only to be moderated by conscience. Thus some rules/laws bind *in foro in terno* (by conscience). The grundnorm, therefore, must be such that inclines the individual to be subservient to his conscience; such must be beyond each man and humanity. If we go by Rousseau's arrogation to conscience as "indestructible" (Plamenatz, 1981: 383), it means that

conscience is not experience but something innate. Accordingly, consciences vary, and thus must be guided by some 'universal conscience'. That which adjudges the guilt or truth status of all consciences must be a force beyond one individual conscience—and it is called oath-practice, the grund conscience, through which man has a sense of justice. But he is less reliable, more deceptive, and has a propensity to make promise—the obligation to fulfil which is both legal/logical and moral (the involvement of an oath, with an ultimate efficacy).

The law is the codified or strictly enforceable aspect of the penal system of morality. Kelsen does not appreciate that the law is a complement to public morality. To offend against the law is criminal and punishable; to offend against moral rule attracts praise or blame. Both are committed to the peaceable social order. The law, therefore, is inferior to the moral base. The law is ordered by man and moderated by some metaphysical force.

More importantly, and as against Kelsen, the grundnorm is provable. Now, it is a requirement that before the law maker begins to work, he takes an oath. Today, all nations of the world and any association of leadership impute some articles expressive of some allegiance, and most times more obvious in stipulating oath. For example, by virtue of the Seventh schedule of the Nigerian 1999 Constitution, oath-taking/oath of allegiance is provided for, and once sworn to any, it is a promise not to act contrary. In orthodox practice, once the Court establishes perjury, appropriate reprisals could be put on the culprit. Such oath then seems to have only legal implication. Thus for our present research, we shall employ the term, oath, ancient or modern, to mean allegiance, promise, swearing, covenant, using any symbol of faith for sakes of telling the truth, in other words, to be under some swearing. Going against this is perjury and is punishable under the law (and, in Africa by the gods). Succinctly put, the history of oath is various in several ancient cultures and religions. The essence of this is that every society is ultimately committed to the determination of truth to assure justice, to make just laws amid man's deceptive nature. Hence, beyond the family, village/clan/inter-clan councils, oath practice represents the highest level of the hierarchical structure of traditional African legal system (Asekhauno, 2011b).

Oath-practice is a norm; an efficacious oath is the *grundnorm* (Asekhauno, 2011b). Oath is both a promise and evidence; it is thus expletive. By evidence, it is meant "the information used in court to try to prove something"—which sometimes might contain some details that strongly suggest that such thing is true thought it may not prove it (Oshio, 2009, 2). Law specifies the necessity and tenability of any evidence—not its plausibility. The importance of evidence in a jurist's pronouncement of judgment is manifest in the clause: *By the evidence before me….* By such evidence, it is meant evidence that has been given (by

witnesses, exhibits, and other proofs), which content (proposition) are deemed true, and their interrelationship logically coherent/valid. So a case succeeds depending on the nature of evidence as in: *if the evidence supports the claim, then…*, which is hypothetical, a condition yet to be fulfilled; and a jurist must rest his conclusion on this. But there are two important issues here. First is the apparent susceptibility of some or all of the evidences to be fictitious, spurious and misleading; and we have pointed out that in such case, at best we can only be led to a valid conclusion devoid of soundness and truth. Second and more importantly is the logical implication of the clause, *by the evidence before me*, which means that the condition/antecedent has been turned from futuristic to a fulfilled state. But then how much evidence suffices? Moreover, the clause is an indication that there could much more (untendered) evidences, but *of all possible evidences, my judgment is based on these set…*; this is experiential truth. A further implication of this is that it raises the not too common question: what if the untenable, inadmissible, invalid and/or untendered evidence is the truth, the real truth? How do we ascertain such evidence; and is it not of any use? It is inconsideration of these questions that the idea of oath-taking becomes relevant; that since man as man can only access logical truth, it is the onus of the force of oath to affirm the evidence given and determine all other evidence *not before the court*. Therefore, oath is not mere promise, otherwise it would be administered without a symbol (such as Bible, iron, Qur'an, etc.). The symbol by which any oath is taken is an invitation of the force behind that symbol to help in the ultimate enhancement of this role. Thus an oath is efficacious to the extent it performs this role, no matter how soon or late. In a situation where truth rests on validity, this role is downplayed; but in Africa it is emphatic.

Some analogies, of the game of football for example—which is rule govern and refereed game of two opposing sides of initial equal participants—could buttress the preceding point. While the game lasts, the central referee (assisted by two or three others) is the judge and executor of the rules and his decision on the pitch is final; and the Football Association, (F.A.) the ultimate supervisor. In the end of the game, while the spectators go away with the final scores, the referee presents the results to the F.A.; also with whom team "A" (one of the participating teams) has lodged a complaint of the referee's biases in the handling of the match. On the strength of this complaint, the F.A. (though also watched the live match) takes a second, teleological screening of the referee's handling in other to determine whether the alleged offences were committed and reprisals merited. The referee, like a judge, spots infringements and award penalties instantly (though some infringements may never be spotted or be ignored by the central referee). Yes, rightly or wrongly, the referee officiates the game but some of his decisions could be overturned by the Association on closer examination; and this could radically affect the rating of the match much to the effect that it is cancelled. The Board then is like an oath; and the decision of the Board is uppermost. This is a good example of oath efficacy, and following this analogy, *oath* needs

to be efficacious. Soon or late, in traditional cultural society (African), oath is the final arbiter and the ultimate validation of truth; an efficacious oath is the affirmation/source of soundness of claims. And from the foregoing analogy, it is clear that an oath, like video-technology that assists a referee in carrying out his officiating at a football competition, ought to be of immediate and/or ultimate assistance to a jurist or judge.

Another analogy is found on the susceptibility or otherwise of persons and issues (out of fear or respect) to the force of oath and which thereby attest to the fact of an efficacious oath. This is found in the folk story of God's mission to garner and determine which religion/belief system on earth has more authenticity. And so, He sent a single male Angel emissary, on temporary permission to indulge in adultery, to validate the truth of the claims of each religion; first, to the spouse of a Bishop, next to that of the Imam, and finally to the spouse of the Oracle priest. The story holds that the first call was the wife of the Bishop, who on the belief that since her husband was away no one was there to see her commit adultery; and on similar grounds, the wife of the Imam did the same. But the reception at the home of the Traditional priest was different for the wife held that her husband, wherever he is will always watch her doings and dealings, and so could not indulge in act of unfaithfulness or infidelity. On similar ground of allegiance and loyalty, God affirmed the genuiness of trust on the faith of the wife, family and religion of the traditional oracle Priest. And such is efficacy of an oath.

Again, we can reaffirm this conviction by further drawing an analogy from the use of modern technology and human's relentless quest for ultimate justice. In highly developed society, it has become a norm, acceptable and common to use highly complex, sophisticated and specialized gadgets to extract information and truth from unwilling by *reading his mind and thought pattern*—mind detectors, psycho-analysis, speech recognitors, and other artificial mechanisms to elicit or force truth (or the ideal/desired) from man. What must be said however is that any form of artificial mind-control mechanism/devise is human-made and therefore may not be devoid of some idiosyncrasies and subject to rational manipulations—they can be teleological. What is made by man cannot be superior to him. But whatever else, this is an indication that man can be committed to definitive securing and certification of truth. If such desire for truth is a desideratum, then seeking such accomplishment in cultural accretion as in the practice of oath (since it has some super-human force) is also a desideratum.

Furthermore, and because every meaningful social interaction thrives on truth and trust, we must seek to determine the truth and soundness of every claim. This is perhaps the sense behind the institution and administration of oath—that the jurist can only determine (even at the susceptibility to some incongruence) the validity or otherwise of some

evidence on promise, and the rest of the truth left for posterity. Where and when is this posterity? In orthodox practice, that posterity may never be determined (because people even on oath wilfully deceive and lie to the courts for it is perceived that such oath is mere promise and inefficacious); in Africa and traditional cultural practice, that posterity still is determinate, gotten by the force of an oath, which ultimacy of sanction is assured and dreaded—a dread that causes one to say the truth and a useful deterrent from mislead.

The wrath of oath is also very instructive indicator to the claim that every oath involves with the metaphysical. It is the fact that an ineffective oath could attract some wrath on the taker; but an effective oath vilifies and vests its wrath on the culpable or the culprit. But whether on the taker or the target, the oath has its wrath and is effective. This is especially true of traditional oath practice among African cultures. For example, the wrath of an oath among the Etsako, therefore, can be discussed under the following headings.

Nevertheless, the proposal is in consonance with the essential claim of the natural law theory—to which obedience is achieved via man's share animal instinct and human sense of justice. Some of man's actions are objectively right and others objectively wrong; hence there needs to be a standard for adjudging human actions. Put differently, there are basic general principles of nature/natural laws which all humans share; consequently, the correspondence to natural law is natural right and natural justice. These features ignite the question of justness or otherwise, and ip so facto, the source, nature and essence/force of law. Positive laws are derivable from natural standards indicative of man's imperfections and inefficiency, even though they are necessary to uphold natural laws.

Conclusion

Both positivists and naturalists believe in the indispensible need for law in the operation of society. This means that law is a means to an end—such must be natural end. But if man, to Hobbes lived in the state of nature, there must have been laws of nature before human's teleological;/contrived ones. The positivists were ignited by the degenerations in Britain of Bentham, Austin, Hart, etc and they came up with various versions of legal utility. As adequately stated by Ndubuisi and Nathaniel (2002, 30) "Legal positivism is characterized by marked formality and consequently culminates in the dogmatization of law and eventually becomes a mist, covering the broad horizon of man's extra-legal experience". Fortunately, Kelsen expects every law, including the grundnorm to possess, "by and large...minimum effectively". Hence we need to go beyond him to the limit of public morality—with oath as final arbiter, with its boundless effectiveness (far and above Kelsen's requirement) as the Grundnorm. This is why Nagel thinks that "No institution and certainly not the law, is exempt from moral criticism." This means that law itself is not justice; but justice resides in the devolution, basis, and application of law; that an

efficacious oath is ultimate justice; that an efficacious oath, therefore, represents the grundnorm. For modern Africa, the efficacious oath should be exhumed and restored as the future in our past.

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