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DETERMINING THE BASIS OF A LEGAL ORDER: JOHN AUSTIN'S IMPERATIVE THEORY AND HANS KELSEN'S PURE THEORY REVISITED.

*G. M. OLATOKUN

INTRODUCTION

Jurisprudence is as big as law and bigger.¹ This is so because, every jurist has his own notion of every subject matter. Each jurist is governed by his allegiance, or those of his society, by what is commonly referred to, nowadays as, his "ideology".² No doubt, such ideological factors are frequently implicit rather than openly avowed, thus, Holmes's description of them as "inarticulate major premises".³ Nonetheless, they are to be discerned in juristic theories both past and present. It has been said that "traditional theories in jurisprudence reflect the old "ideologies", as we may readily see in such theories as those of positive law, natural law or utilitarianism.

One of the "jobs" of jurisprudence is to supply an epistemology of law, a theory as to the possibility of genuine knowledge in the legal sphere. Hence, the accumulated wisdom of great thinkers of the past⁴ cannot be ignored. Names like John Austin and Hans Kelsen comes to mind and, it is not an overstatement to say that contemporary thinking and contemporary questions have often rekindled interest and throw new light upon classical writers. Thus, such questions as "determining the basis of a legal order", the theme of this paper will make a valuable analytical jurisprudence. To

determine the basis of a legal order will be to examine the foundation of a legal order in the guise of any regime be it civilian or military. In this wise, what gives support to the government of the day i.e. where the government can turn to any time its legality being challenged is the concern of this paper.

To view the basis of a legal order is thus seen as a step in the right direction, for if the basis of a legal order is not determined, one might be left in the dark and will not be able to figure out the re foundation of our legal order. Once the basis of a legal order determined, what gives a legal order its validity will come to limelight.

Consequently, this paper intends to revisit Hans Kelsen's pure theory of law and John Austin's Imperative theory as they relate determining the basis of a legal order. To do justice to this, the two theories will be considered and thereafter, the functional perspective of jurisprudence will be considered, based on what is common ground as it fits into the Nigerian society.

HANS KELSEN'S PURE THEORY OF LAW

The pure theory of law takes into consideration only norms created by acts of human beings. Thus, making the theory a variant of the positive school of jurisprudence. It does not take into consideration norms emanating from other "super human authority". The theory of law as laid down must be separated from the law as "it" ought to be. His pure theory of law, therefore, endeavours to answer the question, what is law, but not the question, what law ought to be. Thus, Kelsen states;

"As a theory it is exclusively concerned with the accurate definition of its subject matter. It endeavours to answer the question what is law? But not what it ought to be."

Kelsen obviously did not evolve his theory of law "in vacuo", but out of profound study of legal material as it was actually found.

* G. M. Olatokun is Lecturer, Dept. of Private and Property Law, University of Ilorin, Ilorin.

¹ K. Llewellyn, *Jurisprudence*, p. 37

² M. D. Freeman, *Lloyd's Introduction to Jurisprudence*, 7th edition, pg 1

³ *Ibid*

order and to demonstrate the pattern and shape into which it falls when looked at in the way he suggests.⁵ But the brilliance and organizing power of his concept can best be appreciated after the substance of the law and its problems have been studied. And has pointed out by Justice Kayode Eso,

"Kelsen's theory happens to be by common consent of jurists both of his time and past, the highest development of the analytical school"

A theory of law, according to Kelsen is characterized by the following:-

- (a) Uniformity i.e. a theory of law should be applicable at all times and in all places;
- (b) Ethics free;
- (c) Politics free;
- (d) Sociology and history free.

In short, a theory of law must be "pure" (rein). This is where Kelsen got the idea of theory of law. All the variables mentioned above must not be associated with a theory of law. Hence, norms created by acts of human beings, which deals only with law as it is, and not law as it ought to be must, as a matter of compliance, shorn all the variable factors as those mentioned.

Knowledge of law to Kelsen meant a knowledge of "norms", and a norm is a proposition in hypothetical form; "if "x" happens, then "y" should happen." Jurisprudence or science of law consists of the examination of the nature and organization of normative propositions. It includes all norms created in the process of applying some general norms to a specific action. To Kelsen, a dynamic system is one in which fresh norms are constantly being created on the authority of an original, or basic norms, a GRUNDNORM; a static system is one which is at rest in that, the basic norm i.e. the GRUNDNORM, determines the content of those other norms derived from it (this is in line with the natural law

theory) and in addition, it is also the GRUNDNORM that impart validity to them.

It is on the basis of these positions that Kelsen proceeds to build up his theory of law. He presents it as a hierarchy of norms. According to him, the norms of any legal system are always organized in a hierarchy in which the inferior norms derive their validity from higher norms. Kelsen posits that a legal norm can be valid only by reason or reference to another norm. Therefore, a valid norm can only be created if there is a higher norm, which confers power to create it. At each level of the hierarchy the content of norms may be developed of higher norms, and this, says Kelsen, is a "thoroughly dynamic principle".⁶

In every legal order, no matter with what proposition of law one begins, a hierarchy of "ought" is traceable back to some initial fundamental "ought", on which the validity of all others ultimately rests. This is the GRUNDNORM, the basic fundamental norm- the basis of the legal order itself. Kelsen recognized that the grundnorm need not be the same in every legal order, but a grundnorm of some kind there will always be, whether e.g. a written constitution or a will of a dictator.⁷ The grundnorm is not the constitution, it is simply the presupposition demanded by theory, that this constitution ought to be obeyed.⁸ Therefore, the grundnorm is always adapted to the prevailing state of affairs i.e. the legal order of the day. There is also no reason why there need be only one grundnorm, nor has it to be a written constitution.

In Great Britain for example, the entire legal order is traceable to the propositions that the enactments of the crown in parliament and judicial precedents ought to be treated as law, with immemoria custom as a possible third. This does not contradict Kelsen's theory for what he contended was that a system cannot be founded in two conflicting grundnorm.

⁶ *What is justice?* p280. See also *The Pure Theory of Law*, p. 198

⁷ *Op cit*, Dias, pg 493

⁸ *Pure Theory of Law*, pp 201 "Professor Stone and the theory of Law" (1965).

A rule is valid, not because it is, or is likely to be obeyed by those to whom it is addressed, but by virtue of another rule imparting validity to it. Thus, a legal norm is valid before it is effective, as is the case with a new statute before it has been applied. Yet, the validity of each individual rule does depend on the effectiveness of the legal order as a whole. In Kelsen's own words,

*"It cannot be maintained that, legally, men have to behave in conformity with certain norms, if the total legal order, of which that norm is an integral part, has lost its efficacy. The principle of legitimacy is restricted by the principle of effectiveness."*⁹

He later modified this somewhat to the extent of saying that the legal order has to be "by and large" effective. It will therefore be seen that, with reference to a given rule of law, its validity and its effectiveness have to be kept separate. Effectiveness of the order as a whole is a condition, not a reason of the validity of the grundnorm and of any individual norm; "a condition sine qua non, but not a condition per quem". At the level of the grundnorm, the question, why is it valid? is meaningless, but it is of utmost importance that the grundnorm should secure for itself a minimum of effectiveness i.e. a certain number of persons who are willing to abide by it.¹⁰

The fact that enactments of the crown in parliament are in fact disobeyed quite frequently does not render the proposition that the crown in parliament is law-constitutive any the less a Grundnorm of English law. There must not be a total disregard of the Grundnorm, but there need not be universal adherence to it. All that is necessary is that it should command a minimum of effectiveness. When a grundnorm ceases to derive a minimum of support, it ceases to be the basis of the legal order, and any other proposition which does obtain support will replace it. Such a change in the state of affairs is said to amount to a revolution in law. This is because as

pointed out, the Grundnorm is not itself the constitution but an assumption that this (effective) state of affairs ought to be obeyed and because, for that reason, the grundnorm is adapted to that state of affairs and not vice versa.

JOHN AUSTIN'S IMPERATIVE THEORY OF LAW

John Austin, like Hans Kelsen belongs to the positive school. It is believed in the imperative theory of law. According to him;

*"A law in the most general and comprehensive acceptance in which the term, in its literal meaning is employed may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him."*¹¹

For Austin, law is a command backed by sanction. Thus, it is postulated that, the ideal tests for identifying positive law are;

- (a) Law is a command
- (b) The command required to be backed by sanction,
- (c) The command together with its sanction emanates from sovereign.¹²

He divided law into "Law properly so called" and "Law improperly so called". His test for identifying positive law as enumerated above belongs to the "law properly so called". He further subdivided "law properly so called" into law of God and law set down by men. Positive laws are laws set by men as political superiors to other men who are political inferiors. One can say conveniently that, "law properly so called" are laws solely passed by political superiors, while "laws improperly so called" are laws by analogy and laws of metaphor e.g. laws of fashion. Austin recognizes that

⁹ *Op cit.* Dias, pg 495.

¹⁰ *See Austin's Criticism of Command Theory in Legal Theory.*

¹¹ *On Utilitarianism* no 222

premises that law of God is law of religion, and could not group law of God as "law improperly so called" as he recognizes the importance of religion dictates and its influence on English legal system. The laws made by this superior according to Austin are only laws properly so called because they emanate from the real source namely, "the fons et origo" (i.e. real source).

Hence, Austin in his book, the province of "Jurisprudence Determined" stated thus, "The rules established immediately by the supreme legislature are only the rules springing from the fons or source. The individuals or bodies legislating in subordination to the sovereign are more properly reservoirs fed from the source of all laws, the supreme legislature, and again equipping the borrowed wages which they received from that foundation of laws".

His understanding of the law is therefore based on the premises that, law is that made by man for other human beings, but the maker of the law is superior to other men and that is the sovereign. Law, to Austin can therefore be seen as a product of the sovereign. Positive law is the rules of command set as general rules of conduct by the sovereign. By the end of the middle-ages, two major factors gave rise to the expansion of the idea of sovereignty.

First, was the rise of nation states which intends to exercise their right to self determination and total independence separate from both feudal overlords and papal hegemony. Secondly, there was radical departure from the then notion of law as mere custom and legislation as a means of codifying same.¹³

Positivism probably represents the most widely held view about sovereignty. Thus, Austin postulated that, "the power of the sovereignty is illimitable, indivisible and continuous;- the attributes of sovereignty. A sovereign cannot be under a duty since this will imply that there is another sovereign over him.¹⁴ A sovereign, to Austin is not answerable to any superior authority and

¹³ C. U. Abugu Esq "The decline of Sovereignty as propounded by the Positivists", A Seminar paper presented to the 1996/97 LL. M. students of Obafemi Awolowo

neither is he bound by laws made by his predecessors. He receives habitual obedience within a political society but renders no habitual obedience to no one else.¹⁵ There is no legal limitation on the sovereign and neither are his powers divided.¹⁶ Sovereignty according to Austin have the following characteristics:-

- (a) The common superior, either the king, a supreme parliament or whatsoever is sovereign within a given state must be determined.
- (b) Members of the society must be in the habit of obedience to the sovereign. Where obedience is not habitual or permanent, the relationship of the sovereign is absent.
- (c) Habitual obedience must be rendered by every member of the society of the society to one and the same sovereign.
- (d) The sovereign who receives habitual obedience from the subject must not be under obligation to render obedience to a superior determinable authority.
- (e) The power of sovereign is incapable of legal limitations.

It must be noted however that, Austin was not forthcoming as to where sovereignty in a given state lies e.g. in Britain, parliament is the supreme law maker, while the Queen receives allegiance from the subjects. He was unable to confirm as to who is the custodian of sovereignty in a given society.

Considering all that have been said, one can say without hesitation that, the basis of a legal order according to the imperative theory of law propounded by Austin, is the sovereign. The entire legal order must be traceable to a sovereign.

SOVEREIGNTY AND GRUNDNORM RELATED CONCEPTS

Sovereignty and grundnorm are two concepts which have suffered from error of misapprehension and misapplication by even the most

¹⁵ "The Province of Jurisprudence Determined" pg. 193 195, in Austin's Sources Theistic no 71

renowned jurists. Having said much about both concepts, a step is taken further to buttress the fact that, though both concepts are postulated by different jurists, the two concepts are similar in terms of application, with slight variances noticeable.

Grundnorm is a postulate of Kelsen's pure theory of law¹⁶ as the ultimate reason for the validity of all laws that apply in a legal system. According to Kelsen, the entire legal order is a system of legal norms. A norm is a rule which prescribe a particular human behaviour and may be legal or non-legal. A legal norm to which the pure theory is concerned must be posited by an act of human being, thus making the theory a variant of the positive school of jurisprudence.

John Austin on the other hand gave us a picture of the power of a sovereign which is illimitable, indivisible and continuous. According to him, a sovereign cannot be under a duty since this will imply that there is another sovereign over him. A sovereign to him is not answerable to any superior authority, neither is he bound by laws made by his predecessors. He receives habitual obedience within a political society, but renders no habitual obedience to no one else.

As source of validity of all other norms of a legal order, the Grundnorm must command a minimum of effectiveness. Once this minimum of efficacy is lost, the Grundnorm ceases to be the font of origin of the validity of the legal order and another norm would take its position. Hence, the point is made that, the Grundnorm should secure for itself a minimum of effectiveness i.e. certain number of persons who are willing to abide by it.

In the same vein, members of the society must be in the habit of obedience to the sovereign. Where obedience is not habitual or permanent, the relationship of the sovereign is absent. Viewed in the above light therefore, will it be an overstatement if we say that, the Grundnorm which is the last and final postulate standing at the top of hierarchy of all norms is the same thing as a sovereign who stands high at the top and issue out commands which people are

the affirmative.

We can safely conclude at this juncture that, while the Grundnorm is the ultimate reason (BASIS) for the validity of all laws within a legal order, sovereignty can also be used to determine the basis of laws within a particular legal system.

FUNCTIONAL PERSPECTIVE OF GRUNDNORM A SOVEREIGNTY; THE NIGERIAN EXPERIENCE

Under this caption, we are not concerned about the controversy the identity of the Nigerian Grundnorm, as this will be outside the scope of this work. Our concern lies in the determination of basis of the legal order in Nigeria at different stages of her history. In so doing, little or no attention will be paid on the controversy and debate by eminent jurists like, Kayode Esho, Akinola Ag Professor Abiola Ojo and their likes, in identifying where Nigerian Grundnorm lies.

As already mentioned earlier therefore, according to Kelsen, Grundnorm is the basis of a legal order, while to Austin determine the basis of a legal order, the concept of sovereignty to be looked into. Thus according to Kelsen, the norms of any legal system are always organized in a hierarchy in which the norms derive their validity from higher norms. Thus, for instance the order of a magistrate which imposes a fine on somebody failed to pay his property rates may be legally justified by a bye which in turn will be valid if made in accordance with provisions of the local Government Edict of that state. The Edict in turn will be valid in accordance with the provisions of constitution of the country GRUNDNORM.

The above signifies the functional perspective of the Grundnorm in Nigeria, although, Kelsen had proceeded to draw a distinction between the constitution and the Grundnorm in that, Grundnorm is the constitution in a positive legal sense. Thus, Grundnorm is not a norm of positive law having not been created

legal order as giving rise to valid norms. Expounding Kelsen's view, Dias said that,

*"the Grundnorm is not the constitution (in the material sense of positive law); it is only a pre-supposition required by the pure theory of law, that the constitution in the sense of positive law ought to be obeyed"*¹⁷

With regards to the question why the constitution itself is valid? In the words of Kelsen,

"If we ask for the reason of the validity of the constitution, we may perhaps discover an older constitution, that means the validity of the existing constitution is justified by the fact that it was created according to the rules of an earlier constitution by way of constitutional amendment. In this way, we eventually arrive at a historically first constitution that cannot have been created in this way and whose validity, therefore cannot be traced back to a positive norm created by a legal authority. We arrive, instead at a constitution which became valid in a revolutionary way"-----"

Immediately after the pronouncement of Ademola CJN'S judgement in the case of LAKANMI & ANOR VS. ATTORNEY GENERAL (WESTERN STATES) & ANOR¹⁸, the Federal Military Government, headed by General Gowon promulgated The Federal Military Government (Supremacy and Enforcement of Powers) Decree no 28 of 1970, with the intention to juxtapose their position as the Supreme Military Council which has both the executive and legislative powers vested in it, and to declare the

judgement in LAKANMI'S CASE, null and void. It could be seen that Decree no 13 of 1984 re-echoed the preamble of Decree NC OF 1970. Kayode Esho had noted that what took place on December, 1983, as on the 15th January, 1966 has been declared to be military revolution. Thus, there had been an effective abrogation of the existing legal order. That revolution was stated to involve abrupt political change which was not within the contemplation of the 1979 constitution. A constitution may succeed another in a lawful manner if the older one contains provision for its amendment (e.g. by a two-third majority in the legislature). If constitution is extensively amended following those provisions amendment, a lawful change of constitution will take place there will be no revolution between the older constitution and present one.

Furthermore, the validity of each individual rule does not depend on the effectiveness of the legal order as a whole. An individual rule stops being valid if the legal order to which it belongs ceases to be by and large effective e.g. after coup of 31st December, 1983, civilian regime lost effectiveness and became unable to enforce rules. Once this happened, each of the individual legal rules of the overthrown system stopped being a valid legal rule in Nigeria. The same can also be said of Austin's attributes of sovereignty. The members of the Nigerian society as at 31st December, 1983, shifted their obedience from the civilian to the military regime. Thus, the relationship of the sovereign is absent in the civilian regime.

Dr Aguda states that,

*"Before the military seized power on December 30th 1983, the undoubted and incontrovertible grundnorm of the Nigerian legal order was the 1979 constitution"*¹⁹

That is to say that, the basis of a legal order during the civilian regime is the constitution. In the same vein, it can be said that, the basis of a legal order i.e. the Grundnorm of the military regime of General Ibrahim Babangida, according to Hon. Justice Niki Tobi, in an extra-judicial capacity, will consist of the constitution (Suspension and Modification) Decree 1984; Decree No. 17 of 1985, the unsuspended provisions of the 1979 constitution and any other Decree which directly relates to the above in their total package. Under the present democratic dispensation headed by President Musa Yaradua, the basis of the Nigerian legal order i.e. the foundation of the civilian administration, the Grundnorm of the civilian administration is the 1999 constitution as amended.

In view of the above, one could recognize the fact that the Grundnorm need not be the same in every legal order, as we have seen the different Grundnorm existing in different legal orders within Nigeria. It is pertinent to note too that notable scholars and jurists in Nigeria have also identified the Grundnorm in institutions and also, the Grundnorm have been split to exist in two or three institutions at the same time. All these bore down to Kelsen's theory that, the Nigerian legal system is the set of norms whose creation is authorized by the Nigerian Grundnorm.

According to John Austin, the basis of a legal order for that matter is sovereignty. Put in another way, the reason why any legal order is valid is that its rules emanates from a sovereign who is determined. In the Nigerian context therefore, Austin is talking about a determined common superior, either a king, a supreme parliament within a given state. If we say the legislature is sovereign in Nigeria, since they make laws, can we then say that the bulk of all Nigerians are in the habit of obedience to the legislature? If this is the case, can it be said that the legislature is not under any obligation to render habitual obedience to a superior determinable authority?

To answer this question, we cannot say that the legislature is sovereign; neither can we say the executive is sovereign. Thus in Nigeria, like the United States of America, sovereignty is vested in the three arms of government i.e. the executive, the legislature and

the judiciary. Thus to determine the basis of a legal order, using Austin's view, is to say that, in any legal order, the rules must be made by the legislature, executed by the executive, and adjudicated upon by the judiciary. That the entire legal order is valid is predicated upon this premise. Once there is no sovereign, the entire legal order will be in a shamble. It is therefore the duty of the law to prescribe to the people what they should do as well as prescribe to the sovereign what he should do. In this line, we will be agreeing with BENTHAM'S view on divided and partial sovereignty.

Be that as it may, one can say that, despite the fact, Austin's view was dictated by the reality of his time, most of his concept of sovereignty has become obsolete and untenable in the most modern world generally and in Nigeria, particularly e.g. sovereign states are bound by the international obligations, treaties or conventions they have willingly subscribe to, thus, his postulation that a sovereign does not pay habitual obedience to anyone does not hold water.

Viewed in the above light, one could recognize the fact that, since we say that, sovereignty lies in the three arms of government, and for any legal order to be valid, its rules must emanate from the sovereign, we can then say that the sovereign's activities is backed upon by the constitution i.e. the Grundnorm since the three arms of the government is a creation of the constitution so to say.

SUMMARY AND CONCLUSION

In trying to determine the basis of a legal order, we have identified the Grundnorm and Sovereignty as the basis of a valid legal order. We have also tried to identify what constitute the Grundnorm and Sovereignty at various stages of Nigerian history. It would be appreciated that, doing this is not an easy task as the two concepts "Grundnorm and Sovereignty" has remained elusive due to widespread misapprehension of what Kelsen and Austin meant.

We can therefore conclude that, the Grundnorm is a positivist term and that, to positivists, for any law to be valid, it must be a command of a sovereign. It should also be noted that, the basic law of every

order. Imagine the inter-relations. Therefore, the extra legal juristic pre-supposition of the validity of the command of the sovereign i.e. the Grundnorm, must be formulated with reference to the sovereign. Similarly, a sovereign may rule under a military or democratic government and his will may be manifested in a constitution, Decree or even oral declaration. The most important thing is that, his will prevails in the legal system.

We may therefore, hazard the Nigerian Grundnorm in the following words,

*"The expressed will of the sovereign in
Nigeria ought to be obeyed"*

This proposition accommodates the change of the Grundnorm as the sovereign changes and agrees with Kelsen's formulation of Grundnorm as well as Austin's idea of sovereignty. It remains to point out that, while the sovereign is an institution, the Grundnorm is not. It is the Grundnorm that provide the basis for the legality of all sovereignty's activities.