

Austin's Theory of Law: An Analysis

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Abstract

People come and go in this mortal world but some leave their immortal marks on the path to enlightenment such that whenever any new-comer wishes to get enlightened in the area, he cannot do so without passing through those marks. Such is the immortal theory of law propounded by Austin which cannot be avoided if we wish to study Jurisprudence. He proposed the theory of law way back in the 19th Century but its still relevant, most popular one and a guiding light for all jurists till date. Austin had an empirical approach which made him founder of Analytical School. He separated notions of ethics from the study of positive law which was praised by Sir Henry Maine. According to him, only positive law was law or what he termed as law properly so called as it was made by sovereign who is illimitable, indivisible and continuous and not in a habit of receiving commands from a like superior. He was the one who introduced the term positive morality and clarified that laws made by God were not subject matter of Jurisprudence thereby removing the ambiguities created by Natural Law School. He said that law is the command of sovereign backed by sanction, which still fits in. His theories are clear, consistent and simple. He systemized the English Law with his theoretical structure and precise analysis. That's why he is also known as the Father of English Jurisprudence. However, Austin's theories faced a lot of criticisms yet no theory could eliminate the necessity of studying his theories in order to understand Jurisprudence and Law. It was in this context that Hart said that even the shortcomings of the theories of Austin are a source of enlightenment. In fact, a Neo-Austinian School evolved as a reaction to criticisms of his theories.

Keywords: Command, sovereign, sanction, positive morality, non-command, non-prohibition

INTRODUCTION

John Austin was born in 1780 and joined Army at the age of 16. He served as a lieutenant in Malta and Sicily upto 1812 but then he resigned and started studying law. He practiced law for seven years. When University of London was founded, he was appointed as the Professor of Jurisprudence. He spent two years in preparing lectures. The first part of his lectures were published in 1832 titled, "The Province of Jurisprudence Determined" which is the most celebrated work of Austin till date.

John Austin is called the father of English Jurisprudence and founder of Analytical School of Jurisprudence because of his empirical approach. He was the first person who separated the ethical notions from the study of positive law. He dealt a fatal blow to the Natural School of thought and pioneered the systematic and scientific examination of law and the legal system. His approach to legal theory centers around the concepts of command, sovereignty, and sanction, which might have been influenced by his military experience. He asserted that Jurisprudence should exclusively focus on positive law. In fact, he introduced the term positive morality which were laws made by human not in capacity of sovereign and not backed by sanction. He put constitution, international law, etc. in this category.

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CLASSIFICATION OF LAW

John Austin defined law as, “a rule laid down for the guidance of an intelligent being by an intelligent being having power over him [1]. He means to say that law is based on the power of a superior instead of being based on justice. It is immaterial that whether a law is good or bad or incapable of delivering justice, it will be law for a simple reason that it has been pronounced by a political superior. He also classified law into two categories:

- i. Laws made by Humans
- ii. Laws made by God

Laws Made by Humans

It means laws made by men for men. It is again of two types-a) Laws properly so called or Strictly so called law and b) Laws improperly so called or Strictly not so called law. Laws properly so called are laws set by political superiors to their political subordinates. For examples, in India, statutes are the laws properly so called because they are made by Parliament (political superior) to their political subordinates (people). This category also includes laws made by private persons who act in pursuance of legal rights granted to them. Delegated legislation is the best example.

Laws of this type belong to this category because their legal character stems from the implied directive of a higher authority, bestowing these rights upon an individual. The second classification consists of laws that do not originate from a governmental superior, either in a direct or an indirect manner. They consist of laws by analogy like laws of fashion, rules of clubs, International Law etc. which Austin calls “Positive Morality”. Positive Morality means set of standards made by humans which are not enforceable in strict sense. This category also includes laws by metaphor like law of gravity. These are laws such as are ‘observed by the lower animals, or laws determining the movements of inanimate bodies’.

Laws Made by God

It means laws made by God for men. These are the divine laws. But Austin does not regard them as the subject matter of jurisprudence. It can only help justifying the utilitarian beliefs of Austin.

Even though Bentham is credited as the originator of the utilitarian principle, Austin's perspective differs. He acknowledges that there is limited direct evidence of God's directives. However, due to the belief in God's benevolence, he regards "general utility" as a compass for understanding these directives. Consequently, Austin aligns with utilitarian principles and seems to adopt the comprehensive interpretive legal theory outlined by Dworkin [2].

THEORY OF LAW

The most popular definition of law which was both appreciated and criticized was – “Law is the command of sovereign backed by sanction [3]”. According to Austin, the command, sovereign and sanction are the main elements of positive law or law properly so called. Let us examine each element one by one:

Command

Theory

Command means something mandatory. It is the central point of Austinian Theory of Law. It signifies a particular conception of law and legal system that it must be definite, precise, clear and systematic. Austin says that law is the command of sovereign. But he does not give much detail or definition of command. So, what one can infer by his statement is that anything which is not a command is not a law. Only commands can become law. Besides, a command to become a law must originate from the sovereign. One can also say that commands are the wishes of sovereign and imposes mandatory obligation on the part of individuals to follow. Commands can be general or particular.

While Bentham is recognized as the founder of the utilitarian principle, Austin holds a distinct viewpoint. He concedes the scarcity of explicit evidence regarding God's commands. Nonetheless, driven by the belief in God's goodwill, he considers "general utility" as a guiding tool for comprehending these commands. This leads Austin to associate himself with utilitarian principles and seemingly embrace the all-encompassing interpretive legal theory elucidated by Dworkin.

Criticism

- Austin says only commands can be law. Command generally means ask someone to do something compulsorily. But as rightly pointed out by Bentham, that it is only one form. There are four methods of enactment of law by which sovereign can express his will – a) Command, (b) Prohibition, (c) Non-Command and (d) Non-Prohibition. The first two are imperative, i.e., they ask the person to do or not to do something mandatorily. But the other two are permissive, i.e., they allow the person not to do or to do something on his own choice or discretion.

There may be laws prohibiting to do an act like Dowry Prohibition Act, 1961 in India. There may be laws allowing a person to do or not to do something at his own discretion. For example, we have been conferred fundamental right to speech and expression but it our choice. We can also choose not to speak. Other examples are – customary laws, procedural laws, etc.

- Austin says there can be no command without sovereign. But sovereign cannot be in perpetuity to give commands. Why are commands of former sovereign continued by his successor. Austin says its due to tacit command, i.e, successor does not change them so they are continued. However, it is criticized that the idea of tacit command is not pure or command in true sense but is artificial.

Sovereign Theory

The most important element in laws properly so called is the sovereign because he is the person who would give commands which would become laws and sanctions if his commands are disobeyed. In layman language, sovereign is one who is free from any external interference in one's affair. But Austin gives a very concise definition of the term sovereign. In his book, 'The Province of Jurisprudence Determined', he says, "If a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent [4]. It means that sovereign is a human being not God who is above all in a society where there is no one like him to give orders but rest all in that society obey him as their habit.

Although Bentham is acknowledged as the originator of the utilitarian principle, Austin maintains a unique perspective. He admits the limited presence of direct proof concerning God's mandates. However, guided by faith in God's benevolence, he regards "general utility" as a navigational instrument for understanding these mandates. As a result, Austin aligns with utilitarian principles and appears to welcome the all-inclusive interpretive legal theory expounded by Dworkin.

According to Austin, sovereign must be illimitable, indivisible and continuous. Illimitability can be inferred when Austin says sovereign is not in habit of obedience to like superior.

This implies that the sovereign cannot be subjected to any form of limitation or constraint. Austin's rationale behind making the sovereign illimitable is firstly that a sovereign cannot command himself and secondly that if there is someone who can order or claim over sovereign then, sovereign will no longer remain sovereign. This implies that Austin confers arbitrary powers on sovereign to pass any command. His sovereign sounds to be absolute.

Next, Austin states that sovereign must be indivisible. This means there can be only one source where sovereignty can rest or there can only be one sovereign. Finally, Austin says that sovereign must be

continuous. This means sovereign can never lose his sovereignty or there can never be termination of his sovereignty.

Criticism

- Austin says that law can only originate from the sovereign. But in ancient times, there was no sovereign, still laws existed to regulate the conduct of people. They were customs. In fact, they are in force even after creation of sovereign.
- Prof. Olivercrona aptly finds out that individuals who comprise the sovereign body, have attained their position by virtue of the rule of law. Who made those rules of law? It is senseless to say that the rules which brought sovereign into existence were his own commands. Secondly, if sovereign observed those rules of law, then he obeyed the person who made those rules of law.
- Austin also describes the sovereign to be illimitable. But, many instances can be found where sovereign is restricted by some special procedures or the constitution. For example, in India, Parliament is Sovereign but cannot amend the basic structure of Constitution.
- Austin's sovereign is indivisible. But Bentham has demonstrated the way sovereignty can be divided.
- As an illustration, one can consider instances such as the ancient Roman Assemblies, the United States of America, and the overlapping authorities of a colonial legislature alongside the British Parliament. Austin states that sovereign must be continuous. However, in UK he fails because at once he said that the House of Commons were sovereign but on being asked that who was sovereign on dissolution of Parliament, he said electorates were sovereign.

Sanction

Theory

The third element of positive law in Austin's understanding is the sanction. Austin prescribes infliction of sanction if the commands of sovereign are disobeyed. So, sanction can be described as an eventual obnoxious evil annexed to the command of the sovereign. It is the tool for enforcement of obedience. Austin is careful to exclude rewards from the ambit of sanctions [5].

Criticism

- Austin does not give an exact idea of the kind of evil which should be suffered on disobeying commands of sovereign. But, the use of words like command and sanction indicate imposition of an evil which is penal in nature.
- There are variety of laws where no sanction is there. The most obvious cases would be those laws which enable people to marry, to enter into contracts, or to make wills: no one is under a duty to do these things, yet they are obviously part of the law. Hart calls these 'power-conferring rules'.
- Austin's sanction covers only punishment. According to Lord Bryce, motives which induce a man to obey law are indolence, deference, sympathy, fear and reason. Force is last resort to secure obedience [6]. Whereas there are other ways like compensation, forfeiture of property, fine, etc. to ensure observance of laws.

EFFECTS AND APPRAISALS

Austin was influenced by Bentham to a great extent and consequently hated mysticism and unreality and was an ardent supporter of classification, legislation and codification. However, it is the credit of Austin that he restated every concept with new firmness, grasp of detail and precision. He even made the understanding of unsystematized English law a detailed one by using theoretical structure and precise analysis. In fact, Hart believes that even the shortcomings of Austin's theory is a source of enlightenment on the subject. Austin's achievement also lies in removing false notions which had made difficult the understanding of true meaning of law and legal terms. He separated ethical notion from the study of positive law. Sir, Henry Maine respects Austin for this. Austin is praised for the simplicity, consistency and clarity of exposition in his theory. The Austinian theory of law had great effect all over but less direct in US. However, Gray was inspired by him for bringing out the truth that

law was is at mercy of the State. Austin's theory stood as the standing point for every subsequent analytical theory and many future jurists build their theories on his ideas. In fact, a Neo-Austinian School evolved as a response to the criticism of Austin's theory by other schools.

APPLICABILITY OF THE THEORY IN INDIA

If one will examine the law and legal system in India in order to assess the applicability of the Austinian theory of law or to know how far India follows his theory, then one observe that Austin's theory is not applicable in India in strict sense but only to a very less extent. At the first instance, we can see that Parliament in India is the political sovereign which makes law but its power is restricted by the Constitution, i.e., sovereign in India is not illimitable. Besides, laws enacted by it cannot become law by virtue of the fact that they have been made by the Parliament but the Supreme Court's power of judicial review is a check on it. In fact, judiciary under Article 142 can also make laws. India has federal Constitution so its sovereignty is divisible. All laws in India are not commands. Some are prohibitions like Dowry Prohibition Act, 1961, Unlawful Activities (Prevention) Act, 1967 etc. Some are non-prohibitions like The Right of Children to Free and Compulsory Education Act, 2009, fundamental rights and duties in Constitution, etc. Also, there are procedural laws like CrPC, CPC, personal laws like Hindu Marriage Act, 1956 and other customary laws which are not commands. The custom to marry widow of brother in Jatt community has not been made by the sovereign, its not a command nor backed by sanction. So, the theory of law in India is not to be found in Austinian sense.

CONCLUSION

It can thus be concluded that Austinian theory of law concerns only with laws properly so called which has three elements-Command, Sovereign and Sanction. Austin defines law as the command of sovereign backed by sanction. Command means wishes of sovereign which are mandatory obligation on the part of individuals to follow. However, it has been criticized by Bentham on account of the presence of other modes like Prohibition, Non-Command and Non-Prohibition as the methods of enacting laws. Austin defines sovereign as the determinate human superior who is not in a habit of receiving commands from any other superior like him in a society where majority habitually obey him. He also describes his sovereign as illimitable, indivisible and continuous. But there are many legal systems where sovereign is also restricted by some special procedures. Sovereignty is divided in federation. Customary laws are such laws which have not been created by sovereign. Finally, according to Austin command by sovereign will not be a law if it is not backed by sanction. But there are many laws which are not backed by sanction like procedural laws, declaratory laws, customary laws, laws giving rights, etc. Moreover, despite criticisms, the Austinian theory of law is still relevant and most popular and proves to be a guiding light for future jurists.

OPINION

I believe that Austin actually right when he used the word 'command' for law because most of the laws are such that they require us to do or refrain from doing something compulsory except a few. For example, laws of contract are not directly asking us to do something. But we cannot make contract without consideration. In other words, we are commanded as – "if you want to make a contract, then you will have to give consideration." Laws where we are given rights can be exception but again, we are commanded the manner and extent to which we can exercise it if we want to exercise them.

But I do not agree with Austin that sovereign should be illimitable and indivisible because if there are no restrictions on sovereign, he will make arbitrary laws. Here, I praise our Indian Legal System for restricting sovereign by our Constitution. Also, I think indivisibility of Sovereign will result into concentration of power in one hand which will worsen the situation. Besides, I am of the opinion that the sovereign is not continuous but his seat his continuous until the State is not subjugated.

In my view Austin's sanction could had been more comprehensive if they included compensation, fine, forfeiture of property, etc. Most importantly, I would like to point out that Austin is right in not

including customary laws because only those customs are regarded as laws which have been accepted or enacted by the Sovereign. For, example, there are many customs in a Hindu Marriage but only Saptvadi is law because it has been enacted or accepted by Parliament in the Hindu Marriage Act, 1956. I, as the student of Jurisprudence really feel indebted to Austin.

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