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Austin's Relevance: Pensiveness of Modern Jurists Ferreting a Critique

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ABSTRACT

John Austin heralded an era of discussion and debate by propounding the Command theory in the Juristic Circles. Non-acceptance and search of its criticism became the goal of jurists who came later in history. He had been denied the appraisal by the majority but the truth is that he started the intelligent legal debates which can be called to be the source of English Positivism. This paper tries to analyse the causes of its rejection, the alternatives and the relevance of command theory as a source of jurisprudence.

Keywords: *Command, jurisprudence, Sanction.*

John Austin has been considered to be the father of English Positivism. His command theory is one of the most famous (or infamous) among the students of Jurisprudence. The reality is that the modern jurisprudence is much based on the criticism of John Austin's Command Theory. A student of Jurisprudence can love Austin or hate Austin but cannot ignore Austin. This paper is based on the hypothesis that John Austin's Command theory is not completely and correctly understood by the students of Jurisprudence. The need is to understand the theory completely in the same context in which it is propounded. For this a thorough analysis of his complete doctrine is required which can be done through the analysis of the '*Province of Jurisprudence determined.*'

In the introductory part we need to understand the basics of the theory which is propounded by Austin. Following are some integral traits of his philosophy:

1. His philosophy is based on the basic formula that *law is the command of sovereign backed by sanction.*
2. He has divided the law into positive law and positive morality.
3. He claimed that the law can be categorized as the law properly so called and the laws which cannot be called proper.

Other than these basic divisions John Austin has analysed various aspects of law as properly so called. He was the follower of Jeremy Bentham but he did not completely negate the concept

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of Natural Law as Jeremy Bentham. While Bentham believed that the Natural Law School is nothing but nonsense on stilts; Austin certainly differs from the views of Jeremy Bentham. John Austin has ever seen the Revealed law as the most proper Positive Law, because he was able to find the salient features of the command of the sovereign backed by sanction satisfied in the revealed law of God. The revealed law of God, according to Austin is the best example of positive law. The reason behind this observation is the comparison of the revealed law with the command of the sovereign. The sovereign in the case of the Divine Law is God and He has commanded the law in the form of written rules, in the case of revealed law. Those written rules should be followed by the people otherwise God has a complete Authority to punish and the sanction is integral part of the divine law. These are some of the very basic traits which Austin searches in any norm which can be categorized as positive law.

Hence like his predecessor he cannot be called to be the opposer of the natural law in the same sense in which Jeremy Bentham is called and criticised. At least he has recognised the revealed law as one of the best examples of the Positive Law and in this sense he has approved the existence of Positive Law I the natural Law. John Austin was not having the similar view about the Unrevealed Law of God or unrevealed Divine Law. In certainty it can be said that John Austin was not in complete denial of Natural Law.

The positive law also should be analysed from the perspective of John Austin. Positive Law according to him was the law which fulfils the basic requirements of the command theory. Positive Law is the norm or rule which originates from political superior to political inferior and which is backed by sanction. The positive law differs from positive morality which is the not the in true sense of the term but it is only a norm which is veiled as law. Laws of Fashion, rules of society are considered as positive morality and not positive laws. The rules of positive morality are not the commands of the sovereign. They are commands of the people which are not backed by sanction. Any norm to be categorized as the command should be coming from the political superior. The political superior is a person (or body) who is in the position of commanding and the political inferiors should be in habit of obedience of that commanding body.

What should be appreciated is the analysis of the procedure of the operation of law as analysed by Austin. Austin on one hand analysed the political superior who commands on the other hand the political inferior who is commanded and the command itself which is the core of the law. All entities which perform any part of the operation of the law are integral for the successful execution of the laws. The whole exercise of the analysis of the laws is done by the jurists for the purpose of the better creation and execution of the laws. Austin has been severally criticised

by the later jurists on the ground that he had disregarded all the other factors of the law other than command and its obedience. The reality is we should not judge Austin without completely knowing the context in which his theory is propounded. As a student leaves in many places the *obiter dicta* of any judgment and only reads and bases his opinion about the judgement on the *ratio decidendi* in the same way the *summum bonum* of the Austinian thought has been taken leaving at all the contexts in which it was propounded or by which the nucleus of the theory was backed.

We do find that the other theories also recognise that at least law should have some normative character and the recognition and derecognition of the law comes from the authority of the sovereign. Revealed law is considered at par with the command theory by Austin because it satisfies other features such as codification of law and publication of law as well. Jeremy Bentham also argued in his theory of law that these are the basic requirements of law. Bentham has always been considered as the champion of the codification of the laws. He has emphasised on the points of codification and publication of the laws as the basic tenants of law without which laws should not be implemented. Although he did not believe in natural law philosophy at all but his disciple Austin used some of his given ingredients of law in his philosophy and even went onto taking the revealed Divine law as an example of the Positive Law.

The major contribution of John Austin is the categorical separation between the Positive Law and Positive Morality. The reality is that this division paved way of further development of Jurisprudence. The analytical categorisation of Jurisprudence is the major contribution of John Austin, and this is the reason he was later called to be the father of English Jurisprudence. Ironically the book authored by John Austin, 'Province of Jurisprudence determined' is not the part of syllabus of any of the modern day universities neither in England nor anywhere else. His distribution of the law properly so called and law not properly called, Positive law and Positive Morality paved way for the discussions on contemporary jurisprudence. While some jurists appreciated his divisions and categorisations most of them criticised and even condemned it. 'Love him or hate him, but you cannot ignore him' is perhaps the best suited quote for Austin's theory.

Austin believed that the most pragmatic approach of enforcement of law is that we need to see that it has the element of command in it. It should be commanded from political superior of the system and it should have been commanded towards the political inferiors who are in habit of obedience (or who are in sphere of non-commanding political majority upon whom the commands are served). Various thinkers and jurists have sourced law from various metaphysical factors but John Austin was perhaps the first Jurists who argued that the source

of Law can only be the Command of the Sovereign. The command is the will of the sovereign which is imposed on political inferiors and which is supported by sanctions in cases of non-obedience of it. According to him law does not come from history society economy or any other source, but it comes from the sheer will of the sovereign of the State.

Jurisprudence have taken birth then died and then have taken rebirth and John Austin had a major role to play in the rebirth of Jurisprudence. With the advent of natural law or the divine law it has taken birth and it continued as sourced from the revealed and unrevealed natural law. The Greek and Roman thinkers furthered it and it started to grow further. Thinkers such as St. Thomas Aquinas and St. Augustine further developed it on logic. Modifications and changes continued in renaissance too and many philosophers came in the sixteenth, seventeenth and eighteenth centuries. That was the time which can be considered that the growth (even after many philosophers gave their theories and modified and harnessed many schools in that era) can be considered when the growth of jurisprudence became very low and to an extent stagnant. Thinkers such as Jeremy Bentham finally nailed the coffin of the classical school of natural thought by saying that it is nothing but the 'nonsense on stilts'. John Austin, after Bentham, gave the theory of command and started the basic discussions on modern day jurisprudence. Although, most of those discussions started only to criticise Austin, but the credit of provocation of thought on modern jurisprudence can only be given to John Austin.

The undeniable role of John Austin in modern day jurisprudence is that in criticising Austin; whole modern western jurisprudence developed. If he had not given the command theory then perhaps there would not be numerous theories which developed in response to Command theory or in criticism of the Command Theory. Most of the modern philosophies in jurisprudence starts discussion on the subject from the point of view that since Austin is wrong to say law is Command of Sovereign, hence that should be the correct approach or this should be the correct approach for analysing the jurisprudence. It can be said that analysis of Austin might have opened more doors for the analysis and application of the subject instead his of unwitting criticism.
