Page 2107 - 2116 **DOI:** *https://doij.org/10.10000/IJLMH.114303*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 1

2023

Law is a Command of the Sovereign Backed by Sanction: Austinian Command Theory of Law - Revisited

DR. RAJIB HASSAN[1]

ABSTRACT

The emergence of positivism in legal philosophy is the consequence of a shift in emphasis from metaphysical to empirical method in the study of theoretical philosophy. It was British philosopher David Hume and French philosopher Auguste Comte who initially devastatingly destroyed the basic assumptions of Natural Law philosophy with imperative view getting upper hand over all other variants of philosophical thought. Friedman classified positivism into Analytical and Pragmatic. Law according to Analytical positivism- is the command of a political authority. John Austin, the celebrated jurist is the classic representative of Analytical positivism. He was a 19th century British legal philosopher who formulated a systematic alternative to both natural law theories of law and utilitarian approaches to law. This approach was termed "Legal Positivism" because it tries to describe "law as it is" in terms of what humans posited or set. Austin's theory of law is a form of analytical jurisprudence because Austin used 'analysis' as the chief instrument for studying law. Austin's particular theory of law is often called the "command theory of law" because the concept of command lies at its core. Austin said, law is a command of the sovereign, backed by a threat of sanction in the event of non-compliance. Dr. Allen calls his school "Imperative School" for his emphasis on sanction as an important aspect of law.

Keywords: *Legal positivism, analytical method, command, sovereign, sanction, gun-man theory.*

I. INTRODUCTION

John Austin was born on 3rd March, 1790 at an early age of 16 he joined the Army and served as an Army Officer for five years till 1812 during Napoleonic wars and was posted at Malta and Sicily, Italy. After 1812 he studied law and got a call from the Bar in 1818. He practiced for seven years and acquired some knowledge in Equity-draftsmanship and legal practice. In 1819

[1] Author is an Assistant Professor under West Bengal Higher Education Department, Government Centre of Legal Education (Formerly PG Department of Law, Hooghly Mohsin College) Government of West Bengal, Chinsurah, Hooghly, West Bengal, India.

 [ISSN 2581-5369]

he married Sarah Taylor, a woman of great intelligence, energy and beauty. After their marriage Austin became neighbor of Bentham in London. In 1826, he was appointed to *"the Chair of Jurisprudence"* in the newly founded Benthamite College of Law (the University College, London). He spent the next two years preparing his lectures and before commencing to lecture he went to Germany to study law at Heidelberg and Bonn Universities. There Austin came in contact with Savigny and others. During this time, he acquired considerable knowledge of Ancient and Modern Roman Law as accepted in Germany. His opening lectures in 1828 were attended by John Stuart Mill, Romily and others. Austin died on December 1, 1859.

II. POSITION OF LAW IN ENGLAND BEFORE AUSTIN AND HIS INFLUENCE

Before Austin in England, it was not known exactly, what was law, whether politics was law, whether customs were laws, whether precedents were laws, whether verdicts given by the Pope were laws, whether morals were laws, what was law? It is generally said that *before Austin, English law was a codeless myriad of precedents*. Austin's theory of law, although it remained almost unnoticed during his lifetime, later gained a great influence on the development of English jurisprudence. **Prof Allen** says, *"for a systematic exposition of the methods of English jurisprudence we will have to turn to Austin."*[2] Austin had a significant impact on the well-known treatises on jurisprudence by jurists like **Holland, William Markby** and Sheldon Amos. Their writings were based on the analytical method advocated by Austin in legal science. Thomas Erskine Holland defined 'law' as "a general rule of human action, taking cognizance only of external acts, enforced by a determinate authority, which authority is human and among human authorities, is that which is paramount in a political society."[3] More briefly, "law is a general rule of external human action enforced by a sovereign political authority."[4] **William Markby** defined law as "the general body of rules which are addressed by the rulers of a political society to the members of that society and which are generally obeyed."[5] **George W Paton** in Australia and Sir **John Salmond** in New Zealand published texts which bear earmarks of the Austinian approach. In the United States, Sir **John Chipman Gray**, **Wesley N. Hohfeld** and **Albert Kocourek** made contributions to analytical jurisprudence.[6] Gray, in an influential work,[7] modified the Austinian theory by shifting the seat of sovereignty in lawmaking from the

[2] CK Allen, *Law in the Making,* Clarendon Press 1975 [Quoted by Dr. BN Mani, Tripathi in *An Introduction* to *Jurisprudence (Legal Theory),* p.21, 14th Edn. Rep. 2003, Allahabad Law Agency, Faridabad]
[3] Holland, *The Elements of Jurisprudence,* 13th ed. (Oxford:1924) p.41
[4] *Id.,* p.42
[5] Markby, *Elements of Law,* 6th ed. (Oxford: 1905) p.3
[6] E. Bodenheimer, *Jurisprudence: The Philosophy and Method of the Law,* p.99, 2nd Indian Rep. ed. 1997, Published by Universal Book Traders, Delhi 110054 under Special Arrangement with Harvard University Press, U.S.A.
[7] John C Gray, *The Nature and Sources of the Law,* p.84, 2nd ed. Macmillan New York 1921

 [ISSN 2581-5369]

legislative assemblies to the members of the judiciary. "The law of the State or of any organized body of men is composed of the rules which the courts, that is the judicial organs of that body, lay down for the determination of legal rights and duties."

III. AUSTIN'S CONTRIBUTION

The systematic application of Roman law in Germany made Austin aware of the chaotic condition of the law of his own country i.e., England. The knowledge of Roman law along with his masterly depth of English law demonstrated the successful concretization of his tools and techniques to analyze logically the legal concepts as they were found and existing in England. Moreover, the Army life of strict discipline and obedience to commands of the superiors and obedience to the orders of Friedrich the Great, the Prussian King by his German subjects which Austin witnessed while he was in Germany conditioned Austin's philosophy and attitude towards sovereignty and law to an unlimited extent. The *first six lectures* delivered by Austin on Jurisprudence in the UCL were published under the title *"Province of Jurisprudence Determined"* in 1832. Austin wrote with extreme difficulty between 1832 and 1859, he published only a couple of articles and a pamphlet titled *"A Plea for the Constitution".* The Second and Third editions of the Province of Jurisprudence Determined were published by his widow, Sarah Austin after his death respectively in 1861 and 1869. She also reconstructed from the notes of her husband "Lectures on Jurisprudence" or *"the Philosophy of Positive Law"* in 1864.

IV. AUSTIN'S METHOD

Austin's goal was to transform law into a true science. To do this, he believed it was necessary to purge human law of all moralistic notions and to define key legal concepts in strictly empirical terms. Austin avoided *'a priori'* method or metaphysical method of studying law and seeks to confine itself to the data of experience. Positivism is an approach which concentrates upon a description of law "as it is in a given time and place" by reference to formal rather than moral or ethical criteria of identification. He opposed the theory of Natural Law. Austin considered analysis as the chief instrument of Jurisprudence. According to him law should be carefully studied and analyzed and the principle underlying therein should be found out. Austin believed that the chief tool of jurisprudence was analysis. An analysis of the judicial method shows that law is not a static body of rules but is an organic body of principles with an inherent power of growth. The 'law' cannot be too sharply divided from the 'law that ought to be', because in the absence of authority the judges perpetually clothe themselves with the robe of positive law, the rule that they think ought to exist. In such cases the imperative school seems

 [ISSN 2581-5369]

to proceed on the assumption that all legal problems can be answered by the analysis of the rules that exist and deduction from them.

V. AUSTIN'S CLASSIFICATION OF LAW

Austin divided law into two broad categories: laws properly so called and laws improperly so called. Laws properly so called can again be divided into two categories, laws of God- laws set by God for men, and human laws- laws set by men for men. These human laws can again be divided into two categories, positive law- laws set by political superiors as such or by men not acting as political superiors but acting in pursuance of legal rights conferred by political superiors, and other laws- laws not set by political superiors or men in pursuance of legal rights conferred by political superiors, For example- rules laid down by a master for his servant. Laws improperly so called can also be divided into two categories: Laws by metaphor- includes the laws of basic sciences, such as law of gravitation, law of optics and mechanics. Laws by analogy- it includes the laws which are not actually laws but they are called laws because they look like laws. For example, rules of association or international law. Austin said that rules and principles of International law should be looked upon merely as rules of "positive morality", a branch of norms regarded by him as "rules set or imposed by opinion."[8]

VI. AUSTIN'S DEFINITION AND ELEMENTS OF AUSTIN'S POSITIVE LAW

Austin said "law is a rule laid down for the guidance of an intelligent being by an intelligent being having power over him". Austin also said law is a command of the sovereign backed by sanction. **Prof. H.L.A. Hart**[9] describes Austin's definition of law as "trilogy of command sanction and sovereign". Austin said that the science of jurisprudence is concerned with positive laws or with laws strictly so called. Austin's positive law has three characteristic features or elements namely,

(A) Command:

Austin defines a 'command' as comprising: a wish.... by a rational being, that another shall do or forbear. An evil to proceed from the former and be incurred by the latter, in case of disobedience. An expression or intimation of the wish by words or other signs.[10] Requests and wishes are expressions of desire, while commands are expressions of desire given by superiors to inferiors. The relationship of superior and inferior consists in the power or ability of the superior to punish the inferior in case of disobedience of the commands. Conversely, the

[8] John Austin, *The Province of Jurisprudence Determined*, p.32
[9] Hart, *Separation of Law and Morals*, (1958) 71 H.L.R., p.593 at p.600
[10] John Austin, *The Province of Jurisprudence Determined*, London: Weidenfeld & Nicolson, 1955 p. 17

 [ISSN 2581-5369]

subjection of the inferior to superior consists in his liability to suffer a penalty for disobedience. The power and purpose to inflict penalty for disobedience are the very essence of a command. However, all commands are not laws. It is only the general command which obliges the subjects to a course of conduct, is law.

a. Exceptions: According to Austin there are three kinds of laws which though not commands, are still within the province of jurisprudence. They are:

i] Declaratory or Explanatory Laws: Austin does not regard them as commands because they are passed only to explain laws already in force.

ii] Repealing laws: These too are not commands but rather the revocation of commands.

iii] Laws of Imperfect Obligation: These are not commands because they do not have sanction attached to them. For example, law of contract, procedural laws etc.

(B) Sovereign:

Austin's source of command was a politically superior authority to elaborate this notion he evolved his theory of sovereignty. Sovereignty has a 'positive mark' and a 'negative mark'. The former is that a determinate human superior should receive 'habitual obedience from the bulk of a given society', and the latter is that the superior 'is not in the habit of obedience to a like superior'.[11] To Austin a sovereign is any person or body of persons whom the bulk of a society habitually obeys and who does not habitually obey some other person or persons. Austin said that the sovereign is not in the habit of paying obedience to a determinate human superior.[12] Austin's point is seemingly obvious that a person or entity which is sovereign is surely not subject to any other sovereign. Austin's key point is that, "every positive law is set by a sovereign person or a sovereign body of persons, to a member or members of independent political society wherein that person or body is sovereign or supreme".[13]

(C) Sanction:

The attachment of a sanction to a legal prescription as the motivation for compliance is an important aspect of the classical positivist definition of 'law'. It is the recognition of a characteristic of which H.L.A. Hart later wrote: the most important general feature of law at all times and places is that its existence means that certain kinds of human conduct are no longer optional, but in some sense obligatory.[14] A sovereign without the means of enforcing obedience

[11] RWM Dias, *Jurisprudence*, p.348, 5th Edn (Indian Rep) 1994, Aditya Books Pvt Ltd. New Delhi
[12] John Austin, *The Province of Jurisprudence Determined*, p.194
[13] Jethro Brown, *The Austinian Theory of Law*, p.96
[14] H.L.A. Hart, *The Concept of Law* Oxford: Clarendon Press 1961, p.6

 [ISSN 2581-5369]

to his commands would have little hope of continuing to rule. Law stands in need of sanctions. Sanction is the logical part of the concept of law, sanction consists of the penalty inflicted on the orders of the sovereign for the violation of law. As pointed out by Austin, positive law is the result of a sovereign's command. A command is an imperative that creates a duty by the presence of a sanction which would follow if there is an incidence of non-compliance.[15]

VII. CRITICISMS AGAINST AUSTIN'S THEORY

Austin's theory has been criticized on many grounds by many jurists from historical and sociological schools. Some of the major criticisms can be summarized as under:

(A) Criticism by Prof. HLA Hart:[16] Prof. Hart in his "The Concept of Law" has criticized Austin's theory. According to Hart, Austin's actual model is more like a case of 'gun-man' making a demand backed by a threat that a sergeant giving an order to a subordinator. Hart observes that law is not the 'gun-man' situation. Hart rejects Austin's trilogy of sovereign, command and sanction as key to the science of jurisprudence because this pattern is largely applicable to criminal pattern of law and is inapplicable to modern progressive systems.

(B) Criticism by Salmond:[17] According to Salmond, Austin's theory suffers from following defects:-

a] Austin unduly impressed upon the imperative aspect of law;

b] Austin completely ignored the object of law and the ethical aspect of law i.e., he did not pay any attention to the idea of justice, morality, equity and good conscience;

c] Austin ignored the idea of administration of justice and considered that the only purpose of law is the maintenance of law and order;

d] Austin considered law in a concrete sense and not in an abstract sense. In the concrete sense law means a statute or legislative enactment and not precedents or customs.

(C) Criticism by Lord Bryce:[18] According to Austin's view, it is the sanction alone which induces man to obey law. But Lord Bryce has summed up the motives as indolence, defense, sympathy, fear and reason that induce a man to obey law. Lord Bryce went to

[15] John Austin, Lectures on Jurisprudence (2002, Vol. 1, Bloomsbury Academic) 135
[16] Hart, *Separation of Law and Morals*, (1958) 71 H.L.R., p.603
[17] Dr. VD Mahajan, *Jurisprudence and Legal Theory*, pp.39-40, 5th Edn.1987 Rep. 2003, Eastern Book Company, Lucknow. [*Emphasis supplied*]
[18] James Bryce, *Studies in History and Jurisprudence*, p. 616, Vol II, (1901), Oxford University Press, New York, American Branch, 35 West 32nd Street. [Quoted by Wilfrid E. Rumble, *Doing Austin Justice: The Reception of John Austin's Philosophy of Law in Nineteenth-Century England*, p.201, Edn. 2005, Continuum Studies, The Tower Building, 11 York Road London, SE1, 7NX]

 [ISSN 2581-5369]

the extent of saying that "his contribution to juristic science is so scanty and so much entangled in error that his book ought no longer to find a place among those prescribed for students."

(D) Criticism by Roscoe Pound:[19] Pound has demonstrated the inadequacy of depicting law as a glorified system of policing and which overlooked the needs and interests of the people. Such a system has been labeled as 'mechanical jurisprudence' or 'slot machine jurisprudence'.

(E) Criticism by Dias:[20] Duty and sanction are correlative terms, the fear of sanction supplying motive for obedience, Dias criticizes this view. According to Dias fear of sanction is not the sole or even principal motive for obedience.

(F) Criticism by Prof. Olivecrona[21]**:** Prof. Olivecrona takes as his object of criticism a theory which maintains that the law consists of the commands of the state and which represents law as the will of the state. He emphasizes that a 'command' is something more than a mere declaration of will. "A command is an act through which one person seeks to influence the will of another." He says of the Imperative Theory of law that it is "tenable as an explanation of the law only if it can be shown that the rules of law are the commands of some person or persons, belonging to the State organization..... The State is an organization. But an organization cannot, as such, be said to command." Simply it can be pointed out that the individuals who comprise the sovereign body have attained their position by virtue of the rule of law. The question is who commanded those rules? There is no sense in saying that the rules which brought them to their position were their own commands.

(G) Criticism by Miller:[22] To quote Miller: "The machinery of law may include sanction or artificial motive, but in all societies the laws imposed or recognized are enforced and obeyed without any artificial sanction because if men are to live, they must act in some way and in society it is generally found that the path of law is the path of resistance."

(H) Criticism by Savigny:[23] Savigny the great Historical jurist said that law is not a command of the sovereign. Law is a matter of unconscious growth. He said, "law grows

[19] Dr SN Dhyani, *Fundamentals of Jurisprudence: The Indian Approach*, p. 201, 3rd Edn. 2004, Central Law Agency, Allahabad

[20] RWM Dias, *Jurisprudence*, p.345, 5th Edn (Indian Rep) 1994, Aditya Books Pvt Ltd. New Delhi

[21] Olivecrona, *Law as Fact*, p.30, 2 Edn., 1971, Stevens and Sons, London [Quoted by John D Finch, *Introduction to Legal Theory* at p.89, 2nd Edn., (Indian Rep.) 2009, Universal Law Publishing Co. Pvt. Ltd. Delhi]

[22] Dr. VD Mahajan, *Jurisprudence and Legal Theory*, p.37, 5th Edn.1987 Rep. 2003, Eastern Book Company, Lucknow.

[23] E. Bodenheimer, *Jurisprudence: The Philosophy and Method of the Law*, p.72, 2nd Indian Rep. ed. 1997,

 [ISSN 2581-5369]

with the growth and strengthens with the strength of the people and finally dies away as the nation loses its nationality". Other jurists of Historical School like Vinogradoff and Maine besides Savigny demonstrated that law can never be divorced from history and other cultural factors.

(I) Criticism by Henry Maine:[24] Sir Henry Maine challenged the validity of Austinian positivism especially in relation to primitive communities. He observes: "Bentham in his *'Fragment on Government'* and Austin in his *'Province of Jurisprudence Determined'* resolve every law into a command of the law-giver, an obligation imposed thereby on the citizen and a sanction threatened in the event of disobedience. The results of this separation of ingredients tally exactly with facts of mature jurisprudence……. but it is curious that, the further we penetrate into the primitive history of thought, the further we find ourselves from a conception of law which at all resembles a compound of the elements which Bentham determined. It is certain that in the infancy of mankind, no sort of legislature, nor even a distinct author of law is contemplated or conceived of. Law has scarcely reached the footing of custom; it is rather a habit."

(J) Criticism by Buckland:[25] Austin defines law with reference to sovereign and sovereign is defined with reference to law. Buckland writes, "this at first sight, looks like circular reasoning. Law is law since it is made by the sovereign. The sovereign is sovereign because he makes the law." Buckland says that this is no reasoning at all.

(K) Criticism by Lon Fuller:[26] Professor Lon Fuller of Harvard University rejects the distinction between *'is'* and *'ought'* as insisted by Austin. Professor Fuller says it is difficult to draw a sharp line between 'is' and 'ought' in any field, especially in legal theory. Both *'is'* and 'ought' are a part of human experience and the line between the two melts away in the common stream of common sense motivated towards a purposive activity. In his '*The Morality of Law'* Fuller maintains that the purpose of a legal system is 'to subject human conduct to the governance of rules'. The law therefore, cannot be devoid of moralities and without which it cannot be called law. Fuller's 'purposive' picture of law takes into account the 'internal' and 'external' moralities of law like

Published by Universal Book Traders, Delhi 110054 under Special Arrangement with Harvard University Press, U.S.A.

[24] Henry Sumner Maine, *Ancient Law,* p.7, 12th Edn. 1888, Published by John Murray, Albemarle Street, London

[25] Dr. VD Mahajan, *Jurisprudence and Legal Theory,* p.39, 5th Edn.1987 Rep. 2003, Eastern Book Company, Lucknow.

[26] Dr SN Dhyani, *Fundamentals of Jurisprudence: The Indian Approach,* p. 202, 3rd Edn. 2004, Central Law Agency, Allahabad

 [ISSN 2581-5369]

values, ideals, natural law and justice. Accordingly, in law, Professor Fuller says, both 'is' and 'ought' merge for 'law is a pre-condition of good law'.

(L) Criticism by Paton:[27] Paton writes "it cannot be explained psychologically as to how laws are obeyed on account of the sanction. Sanction can be applied only if there are only a few to oppose the law. However, if everyone decides to challenge law, it is bound to fail in its objective and no sanction can enforce the same."

(M) Criticism by Jethro Brown:[28] According to Austin, sovereign cannot be under a duty, since to be under a duty implies that there is another sovereign above the first who commands the duty and imposes a sanction.... Jethro Brown argued that the sovereign could well be bound by a duty.

(N) Criticism by Pollock:[29] Pollock observes: "Law is enforced on account of its validity. It does not become valid merely because it is enforced by the State."

VIII. SOME OTHER CRITICISMS:[30]

(A) Ignorance of Constitutional Law: Constitutional law is the basic or supreme law of a country but it is not included within the Austinian definition of law.

(B) Ignorance of International Law: Austin has ignored International law and has considered it as a mere positive morality. The basis of ignorance being lack of sovereign authority and sanction in International law. But nowadays, it is accepted all over the world that International law is a law in true sense.

(C) Ignorance of Judge-made law: In Austin's theory there is no place for the Judge-made law. In course of their duty judges also make law by applying the precedents and interpreting the law.

(D) Ignorance of Customs: In the early times not the command of any superior but the custom regulated the conduct of the people. Even after the state came into existence, customs continued to regulate the conduct of the people. Therefore, customs should also be included in the study of jurisprudence but Austin ignored it.

---

[27] Dr. VD Mahajan, *Jurisprudence and Legal Theory*, p.37, 5th Edn.1987 Rep. 2003, Eastern Book Company, Lucknow.

[28] Brown, *The Austinian Theory of Law*, p.194 [Quoted by Dias *Jurisprudence*, p.349, 5th Edn (Indian Rep) 1994, Aditya Books Pvt Ltd. New Delhi]

[29] Dr. VD Mahajan, *Jurisprudence and Legal Theory*, p.37, 5th Edn.1987 Rep. 2003, Eastern Book Company, Lucknow.

[30] Dr NV Paranjape, *Studies in Jurisprudence and Legal Theory*, pp 23-24, 3rd Edn., 2001, Central Law Agency Allahabad [Emphasis Supplied]. See also Dr. VD Mahajan, *Jurisprudence and Legal Theory*, pp.37-38, 5th Edn.1987 Rep. 2003, Eastern Book Company, Lucknow.[Emphasis supplied]

 [ISSN 2581-5369]

(E) Ignorance of Morals: Austin ignored the moral and ethical aspect of law. It is true that the law is not completely devoid of moral and ethical elements. Therefore, Austin should have included morals in his study.

(F) Existence of Personal Laws without being commands of the Sovereign: Personal laws i.e., Muslim Laws and Hindu Laws are not the commands of any political superior yet they are valid laws.

*****

 [ISSN 2581-5369]