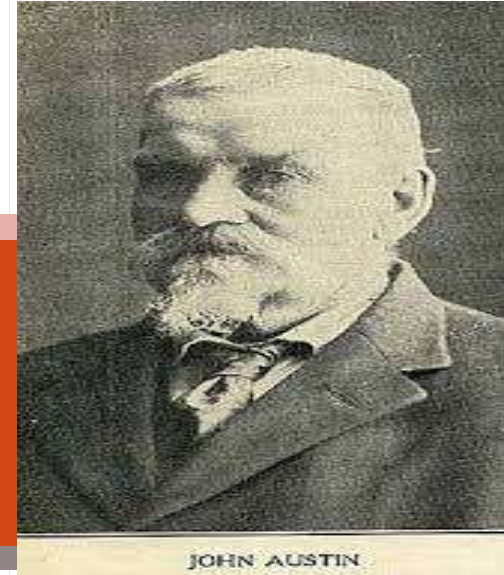




Austin's Theory of Law



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Introduction to Analytical School

Analytical school of jurisprudence deals with law as it exists in the present form. It seeks to analyse the first principles of law as they exist actually in a given legal system. This school considers that the most important aspect of law is its relation to the state.



Introduction to Analytical School

They treat law as a command emanating from the Sovereign, namely, the State. So, this school is called the Imperative school. This school is neither concerned with the past of the law nor the future of it, but this school study of law as it actually exists i.e. positus.



John Austin (1790-1859)

- John Austin was the greatest exponent of this School, who is the father of English Jurisprudence.
- He was born in 1790.
- At a very age he entered the army in which he served for five year.
- In 1826 he appointed to the Chair of jurisprudence in the University of London.



John Austin (1790-1859)

- His lectures delivered in London University were published under the volume entitled “The Province of Jurisprudence Determined”.
- In his lectures he discusses the nature of law and its proper bounds.
- He also discusses the sources of law and presented an analysis of English legal system.



Austin's Definition of Law

- Austin defined law as *“A rule laid down for the guidance of an intelligent being by an intelligent being having power over him”*.
- He also stated that *“Law is the command of the Sovereign”*.
- Austin believed that in the society, subjects are bound by the command issued by the sovereign from time to time.



Classification of law

According to Austin law are two type –

- 1) Laws properly so called
- 2) Laws improperly so called



1) Laws Properly so Called

- These laws are commands which are backed by sanctions of the state, are called law properly so called.
- Law properly so called is the positive law, which means law “as it is” rather than law “as it ought to be” with which he is not at all concerned.



1) Laws Properly so Called

- Laws Properly so Called are divided in two part-
 - A) Laws of God
 - B) Human laws



1) Laws Properly so Called

- A) Laws of God: -These are the laws which are made by God for men



1) Laws Properly so Called

- B) Human laws: -These are the laws which are made by one human being for other human beings.
- They may be further divided into two parts.
 - a) Positive Laws
 - b) Other Laws



1) Laws Properly so Called

- a) Positive Laws: - These are the 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, only these laws are the proper subject matter of jurisprudence



1) Laws Properly so Called

- b) Other Laws: - Other laws is known as positive Morality, other laws which are not set by political superiors or by men in pursuance of legal rights.



2) Laws Improperly so Called

- These laws are not commanding and thus, are not backed by sanctions. These laws are not obligatory



Positive Law has Four Element

- 1) Sovereign
- 2) Command
- 3) Sanction
- 4) Duty



1) Sovereign

- Law is the command of sovereign which obliges a person or persons to a course of conduct. Sovereign means ,such a person who is superior ,nobody can interfere. He is the supreme, irresistible, absolute and uncontrolled authority.



2) Command

- A command means a wish or desire conceived by a rational being to another rational being who shall do or forbear .it is an evil to proceed from the former to be incurred by the latter in case of non -compliance and it is an expression or intimation of will by word or otherwise Command are two type a) General Command b) Particular or specific Command



2) Command

- a) General Command: - A general command is a law or rule where it obliges generally to acts so forbearances of a class. All command is not law, it is only the general command.



2) Command

- b) Particular Command: -It is particular when it obliges to a specific individual act.



3) Sanction

- Sanction is an evil which will be incurred if a command is disobeyed and is the means by which a command or duty is enforced. It is wider sense of punishment. A reward for obeying the command can scarcely be called a sanction.



4) Duty

- When the party commanded and threatened is under an obligation to obey it. It is called duty. Thus, in Austin's theory duty and command are co-relative and fear of sanction is the motive for obedience of such command i.e law .The chief characteristics of positive law are Sovereign Command, Duty and Sanctions.



Criticism of Austin's Theory of Law

- Austin's theory has been criticized by a number of jurists and by some of them very bitterly. The main points of criticism against Austin's theory are as follows-



1. Imperative Theory of Law

- Allen prefers to call Austin's school as imperative school because law is treated as command of Sovereign. The Imperative Theory of law is based on an understanding of law which is free of moralistic notions and merely a collection of empirical rules



2. Gunman Theory

- Hart likens Austin's theory to the role of a gunman in a bank and tries to establish the differences between the gunman's orders and those made by law. (For instance, the gunman forces us to obey but we may not feel inclined to obey him. Presumably, obedience to the law comes with a different feeling.)



3. Customs Overlooked

- Law is the command of sovereign', as Austin says, is not warranted by historical facts. In the early times, not the command of any superior, but customs regulated the conduct of the people. Even after the coming of the state into existence, customs continue to regulate the conduct. Therefore, customs should also be included in the study of jurisprudence, but Austin ignored them.



4. Law Conferring Privileges

- The law which is purely of a permissive character and confers only privileges, as the Wills Act, which lays down the method of drawing a testamentary document so that it may have legal effect is not covered by Austin's definition of law.



5. No Place For Judge Made Law

- Austin ignored them. In Austin's theory there is no place for judge-made law. In the course of their duty judges make law. though an Austinian would say that judges act under the powers delegated to them by the sovereign, therefore, their acts are the commands of the sovereign, nobody, in modern times, will deny that judges perform a creative function and Austin's definition of law does not include it.



6. Conventions

- Conventions of the constitution, which operate imperatively, though not enforceable by court, shall not be called law, according to Austin's definition, although they are law and are subject matter of a study in jurisprudence. Austin does not treat international law as law because it lacks sanction. Instead, he regards international law as mere positive morality.



7. Sanction is not the Only Means to Induce Obedience

- According to Austin's view, it is the sanction alone which induces the man to obey law. It is submitted that it is not a correct view. Lord Bryce has summed up the motives as indolence, deference, sympathy, fear and reason that induces a man to obey law. The power of the state is ratio ultima-the force which is the last resort to secure obedience.



8. Command Over Emphasized

- The Swedish jurist Olivercrone has denounced Austin's theory of law because of its over-emphasis on command as an inevitable constituent of law. in modern progressive democracies law is nothing but an expression of the general will of the people. Therefore, a command aspect of law has lost its significance in the present democratic setup.



Thank You

By
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