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FACULTY OF JURIDICAL SCIENCES

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NAME OF FACULTY: Ms. Anjali Dixit

Assistant Professor

Lecture-13

Lecture- 13: John Austin

JOHN AUSTIN

Born in 1790 John Austin served as an army officer for five years until 1812, when he was called to the bar by the Inner temple in 1818. But ill health and inability to work efficiently and promptly prevented him from succeeding at the bar. He was elevated to the chair of jurisprudence in the University of London in 1826. Thereafter he went to Germany to study Roman law in Heidelberg and Born universities. He was much inspired by the scientific treatment of Roman law and drew inspiration to introduce the same method to the legal exposition of law in England. He, however, avoided metaphysical approach to law which was a peculiar character of law in Germany. His lectures delivered in London University were published under the title of "The province of Jurisprudence determined". In his lectures he deals with the nature of law and its proper bonds. He wrote another book "A Plea for the Constitution", it was rather an answer to an essay by Gray "on Parliamentary Government". But his main contribution to jurisprudence is his first book and on it rests his personality.

J.S. Mill, who heard his lectures, writes that his lectures left "an indelible impression on those who heard them.

The method which Austin applied is called analytical method and he confined his field of study only to the positive law. Therefore the school founded by him is called by various namesAnalytical; positivism, analytical positivism. Some have objected to all the three terms. They say that the word 'positivism' was started by Augste Comte to indicate a particular method of study. Though this positivism, later on, prepared the way for the 19th century, legal though, it does not convey exactly the same sense at both the places. Therefore, the word positivism alone will not give a complete idea of Austin's school. In the same way 'analysis' also did not remain confined only to the school, therefore, it alone cannot give a separate identity to the school. Analytical positivism too may create confusion. The Vienna School in its 'pure theory of law' also applies analytical positive although in many respects they vitally differ from Austin's

school. To avoid confusion and to give clarity which is the aim of classification, Professor Allen thinks it proper to call the Austin's school as 'imperative school'. This name he gave on the basis of Austin's conception of law 'law is command'

AUSTIN'S CONCEPTION OF LAW

Austin's most important contribution to the legal theory was the substitution of the command of the sovereign i.e., the state, for any ideal of justice in the definition of law. Law in the common use means and includes things which can't be properly called 'law'. Austin defined law as a rule laid down for the guidance of an intelligent being by an intelligent being having power over him.

The substitution of the command of the sovereign by Austin led him to write at a time when England was actually in dire need of vast legislative reforms. There was no school of jurisprudence which could share in the handiwork, whereas full confidence was reposed in the power and wisdom of parliament as a legislative assembly. In these circumstances, it was not strange that he should have adopted sovereignty as his principle to build on this a science of jurisprudence sufficient to subserve the requirements of the people. Law is thus, strictly divorced from justice and instead of being based on the ideas of good and bad, is based on the power of a superior. This inevitably associates Austin with Hobbes and other theorists of sovereignty, but it was left to Austin to follow up this conception into the ramifications of a modern legal system.

AUSTIN'S CLASSIFICATION OF LAW

Austin's classification of law falls under two heads, namely, laws set by God, and Laws set by men to men (human laws).

LAWS SET BY GOD: This category of laws is of no real juristic significance in Austin's system, compared, for example, with the scholastic teachings which establish an organic relation between divine and human law.

HUMAN LAWS: Human laws may be divided into two classes-

I. **Positive law (laws properly so called):-** These are the laws set by political superior as such or by men not acting as political superior but acting in pursuance of legal

rights conferred by political superiors. Only these laws are the proper subject-matter of jurisprudence.

II. **Other laws:** These laws which are not set by political superior or by men in pursuance of a legal right. In this category are multiple types of rules such as, rules of clubs, law of fashion, laws of natural science, and the rules of international law. Austin names all these ‘positive morality’.

Contrary to the above, laws properly so called are a species of commands. But being a command, every law properly so-called flows from a determinate source. Whenever a command is expressed or intimated, one party signifies a wish that another shall do or forbear; and the later is obnoxious to an evil which the former intends to inflict in case the wish be disregarded. Every sanction properly so called is an eventual evil annexed to a command. Every duty properly so called supposes a command by which it is created….and duty properly so called is obnoxious to evils of the kind.

The laws properly so-called, with laws improperly so called, may be aptly divided into the following four kinds-

The divine laws, or the laws of God; that is to say, the laws which are set by God to his human creatures.

- Positive laws, or the laws which are simply and strictly so called, and which from the appropriate matter of general and particular jurisprudence.
- Positive morality, rules of positive morality or positive moral rules.
- Laws metaphorical or figurative, or merely metaphorical or figurative.

The science of jurisprudence, according to Austin, is concerned with positive laws or with laws as considered without regard to their goodness or badness. All positive law is deduced from a clearly determinable law-giver as sovereign. In other words, every positive law, or every law simply and strictly so-called, is set by a sovereign or a

sovereign body of persons to a member or members of the independent political society wherein that person or body of persons is sovereign or supreme.

LAW EMANATES FROM SOVEREIGN

Austin’s most important contribution to legal theory according to Friedmann was his substitution of the command of sovereign for any ideal justice in the definition of law. The first jurist to make jurisprudence as a ‘science’ was John Austin who is often described as Father of jurisprudence. Sovereign defined and analyzed:- While defining a sovereign Austin said, “if a determinate human superior, not in a habit of obedience to alike superior, receives 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. According to Austin, the superior may be either an individual or a body or aggregate of individuals. Thus, English sovereign for him is merely the ‘person’ who has the last word in a particular connection.

His conception of sovereignty asserts that in every human society where there is law, there is to be found latent beneath the variety of political forms, in a democracy as well as in an absolute monarchy, a relationship between subjects rendering habitual obedience and a sovereign who renders habitual obedience to none. Involved in this are two main points of special importance viz., the idea of obedience and due position occupied by the sovereign above the law. The expression obedience often suggests deference to authority and not merely compliance with orders backed by threats. The idea of obedience in-fact fails in two different though related ways, to account for the continuity to be observed in every normal legal system when one legislator succeeds another. An illustration of this kind is the change in law of incest made in Rome by the then emperor Claudius for his own private purposes. Desiring to marry Agrippina, the daughter of his brother, he procured a change in the law which permitted a marriage between a niece and her parental uncle, leaving the law unaltered as to other marriages between uncles and nieces or aunts and nephews, so that these remained incestuous. secondly, habitual obedience to the old law giver cannot by itself render probable, or find any presumption, that the new legislator’s orders will be obeyed. If

there is to be this right and this presumption at the movement of succession during the reign of the earlier legislators, there must have been the acceptance of the rule under which the new legislator is entitled to succeed.

The dictum, therefore, that English sovereign is merely the person who has the last word is not in the least true to any federation, where the legislatures are bound by the constitution and in most cases a court has the power to decide whether a particular statute is constitutional or not.

LAW AS A COMMAND

Austin defines command as "if you express or intimate a wish that I shall do or forbear from some act and if you will visit me with an evil, in case I comply with your wish-it is a command". A command is different from other significations of desire, not by the style in which the desire is signified but by the power and the purpose of the partly commanding to inflict an evil or pain in case the desire be disregarded. Thus, a command is significance of desire. But a command is distinguished from other significations of desire by this peculiarity that the party to whom it is directed is liable to evil from other, in case he complies not with the desire.

According to Austin law, therefore, signifies a command which obliges a person or persons to a course of conduct. The person who receives the command must realise that there is a possibility of incurring some evil in the event of disobedience. For Austin, every command does not create a law. A law determines acts of a class, a particular command determines merely a specific act. Austin, therefore suggests that a statute issued by Parliament that corn then shipped and import should not be a law, since it relates merely to a specific case but he hares that in popular speech it would be called a law. Generality is a normal mark of law because of the impossibility and undesirability of issuing particular commands for each specific act.
Now, if we regard a law as a command, then every act done must either be permitted or forbidden. Further, if we consider law as a command or an order, it must also be seen in the first sight to be orders given to the judges to do or abstain from doing

anything and there should, of course, be no choice why the law should not by special rules prohibit a judge under penalty from exceeding his jurisdiction or trying a case in which he has some financial interest. These rules imposing such legal duties would be conducive to those conferring judicial powers on him and defining his jurisdiction.

SANCTION

Austin said, “Sanction operate upon the desires and that men are obliged to do or forbear through the desires. For, he is necessarily averse from every evil whatsoever. That every sanction operates upon the will of the obliged is not true. If the duty be positive, and if he fulfills the duty out of regard to the sanction, it may be said with propriety that the sanction operates upon his will. For his desire of avoiding the evil which impends from the law, makes him do and therefore, will the act which is the object of the command and duty. But if the duty be negative and if he fulfills the duty out of regard to the sanction, it can scarcely be said with propriety that the sanction operates upon his will. His desire of avoiding the evil which impends from the law makes him forbear from the act which the law prohibits. But though he intends the forbearance, he does not will the act forborne, or he remains in a state of inaction which equally excludes it. In the former case he does not will the forbearance. In the later case he wills nothing.”

Only General Commands are law:

However, all the commands are not law, it is only the general commands, which obliges to a course of conduct, is law.

Exceptions:

The general commands are the proper subject of study of jurisprudence. But according to Austin, there are three kinds of laws which though not commands, are still within the province of jurisprudence. They are.-

- Declaratory or Explanatory Laws: - Austin does not regard them as commands, because they are passed only to explain laws already in force.
- Laws to repeal laws: - These too are not commands but are rather the revocation of a command.
- Laws of imperfect obligation: - These laws have no sanction attached to them.

CRITICISM AGAINST AUSTIN’S THEORY

Austin's theory has been criticised by a number of jurists and by some of them very bitterly.

Bryce went to the extent of saying that 'his contributions to juristic science are so scanty and so much entangled in error that his nook ought no longer to find a place among those prescribed for student.' However, this is an extreme view. The main points of criticism against Austin's theory are as follows;

a) 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.

b) 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.

c) 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.

d) 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.

e) RULES SET BY PRIVATE PERSONS:-

Austin's view that 'positive law' includes within itself rules set by private persons in pursuance of legal rights is an undue extension because their nature is very vague and indefinite.

f) 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.

g) 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.

SALIENT POINTS OF AUSTIN'S THEORY

Austin's theory prominently brings out the following four points;

- That every law is a species of command;
- That all positive laws are command of the sovereign either directly or indirectly;
- That every law prescribes a course of conduct; and
- That every law has for its sanction the physical force of the state

SELF-TEST QUESTIONS

S.NO	Question	Option (a)	Option (b)	Option (c)	Option (d)
1	Father of English Jurisprudence	Austin	Bentham	St. Thomas Acquinas	Socrates
2	Command Theory	Austin	Bentham	St. Thomas Acquinas	Socrates
3	Grundnorm Theory	Kelson	Bentham	St. Thomas Acquinas	Socrates
4	Normative theory	Kelson	Bentham	St. Thomas Acquinas	Socrates
5	Pure theory of law	Kelson	Bentham	St. Thomas Acquinas	Socrates

Answers: 1-(a),2-(a), 3-(a),4-(a), 5-(a)