



RAMA UNIVERSITY

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Lecture-8



Lecture – 8- Analytical school or Imperative school Introduction:

Analytical school or Imperative school Introduction: - Analytical school of jurisprudence is deals with law as it exists in the present form It seeks to analyses. the first principles of law as they actually in a given legal system. This school consider that the most important aspect of law is its relation to the state. 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. This school has become started during the 19th century. The main jurist of this school is • Jeremy Bentham (1748 -1832) • John Austin (1790-1859) • Erskine Holland (1835 -1928) • Sir John Salmond (1862 – 1924) L P a g e | 2 • H.L.A, Hart Hans Kelson (1881 1973)

Analytical Positivism: - Legal positivism is one of the most influential school of thought in jurisprudence. the start of the nineteenth century might be taken as marking the beginning of the positivist movement. legal positivism at birth was part of the wider 18th century intellectual movement known as the enlightenment, which turned away traditions, superstitions and irrationality to embrace empiricism and science .it was developed by Bentham and Austin. Jeremy Bentham (1748-1832) Jeremy Bentham was born in 1748 in Landon. He was the son of a wealthy London Attorney. His genius was of rarest quality. He was a talented person having the capacity and acumen of a jurist and a logician. He started a new era in the history of legal thought in England. He is considered to be the founder of positivism in the modern sense of the term. John Austin is regarded as the father of analytical or positive school. however, it was actually Jeremy Bentham who was true founder of this school. Austin was inspired by Bentham, and on many points, his arguments are just a para-phrasing of Bentham’s theory. Dicey described Bentham ‘s ideas about individualism, law and legal reforms in his book “Law and Public Opinion in 19th Century. Bentham was opposed to natural theory of law and he co-related law with sovereignty and utility. In this theory of Legislation Bentham define the main functions of law as being:

- a) To provide subsistence
- b) To aim at abundance
- c) To encourage equality
- d) To maintain security

There are some books: - •The limits of jurisprudence defined 1782, •Introduction to the principles, morals and legislation. Theory of punishment and rewards 1811, •A treatise on jurisprudence evidence 1813, Paper on codification and public instruction 1817. Bentham’ **Analytical Positivism:-**Bentham came in England the advent

of positivism, sovereignty, command, duty and sanction. This is the basic elements of Analytical jurisprudence which were subsequently borrowed by John Austin. It was Jeremy Bentham who defined law as a command of the sovereign, an idea which he had taken from Hobbes. Bentham was a reformer and he was a strong believer in social progress. He was the staunch critic of the natural law. He believed in logical and scientific principle of Utility. He defined utility as the hedonistic calculus of pleasure and pain, which can measure the efficacy of every law, like other measurable things. The doctrine of pleasure and pain acquired highest place in his theory of legal and social reforms so Bentham's theory is called Utilitarian School. Bentham's Utilitarianism Bentham's legal philosophy is called utilitarian individualism. He was an individualist. He said that the function of law is to emancipate individual from the bondage and restraint upon his freedom. He supported the economic principle of "Laissez-faire", which meant minimum interference of the State in the economic activities of individuals. Bentham propounded the principle of utilitarianism. According to this theory, that the main object of legislation is the carrying out of the principle of utility, in other words the proper end of every law is the promotion of the greatest happiness of the greatest number. Bentham defined utility as the property or tendency of a thing to prevent some evil or procure some good. According to him, the consequences of good and evil are respectively pleasure and pain.

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 years. In 1826 he was appointed to the Chair of jurisprudence in the University of London. 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. Some important books: - The Province of Jurisprudence Determined, • A Plea for the Constitution, • Lectures on jurisprudence or Philosophy of positive law 1863, •

On Parliamentary Government Austin's Analytical Positivism Austin's definition of law: - Austin is the father of English jurisprudence. He confined his only to the positive 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 types –

- 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. It is divided into two parts.

- A) Laws of God
- B) Human laws

A) **Laws of God:** -these are the laws which are made by God for men.

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**

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.

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. This class includes International Law.

2) **Laws improperly so called:** -These laws are not commanding and thus, are not backed by sanctions. These laws are not obligatory. Austin's Imperative Theory of Law or Analytical Positivism: -This theory is known as Positive theory of law, Command theory, Imperative theory of law. Austin opined that only positive law is the proper subject matter of the study of jurisprudence. He defined" the jurisprudence is the philosophy of positive law.

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. There are some importance salient features of sovereignty :- a) Indivisibility b) Illimitability c) Essentiality d) Inalienability.

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

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

general 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 Imperative Theory of law:-

- 1) Sovereign is not the only source of law).
- 2) Law is older than state.
- 3) Customs overlooked.
- 4) No place for judge -made law.
- 5) Law is not always shaped in the form of a command.
- 6) All command are not laws.
- 7) International law is not a law.
- 8) Over Emphasis on logic.
- 9) This theory is Artificial.
- 10) Conventions is not law.

Contribution of Austin s theory:-In spite of the various criticism Austin" s theory, Salmond says that his theory of law contains an important element of truth in as much as it rightly recognizes the essential fact that civil law is the product of the state and depends for its existence on the physical force of the state exercised through the agency of judicial tribunals. the credit goes to Austin for opening an era of new approach to law .Austin was intimate with great thinkers and philosophers of his time like Bentham and Mill .Austin told true meaning of law and legal terms .his stand was to expel from the mind all ethical notions while considering the nature of "positive law". He gave a new life of theory of natural law. He is the father of English jurisprudence. Austin was first who distinguished between law and justice. Salmond and Gray further improved upon his theory and considerable modified the analytical positivist approach. Gray remarked: if Austin went too far in considering the law as always proceed in from the state he conferred a great benefit on jurisprudence by bringing out clearly that the law is at the mercy of the state.

Conclusion: - Austin, s theory proved as a guide for latter jurist. Therefore, we can say that Austin made a very significant to jurisprudence. His theory was very practical and logical basis. The merit of Austin “s theory of law lies in its simplicity, consistency and clarity of exposition.