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Theory of Sovereignty by John Austin

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In political theory, sovereignty is the ultimate controlling force or authority over the state's decision-making and the upkeep of law and order. Souverain is a French word that means the most powerful person in a given area. In a political sense, it is the highest form of authority or power that the state can exercise in order to make decisions and uphold the law. One of the most divisive concepts in political science and international law, it is claimed to be connected to the notions of state and government, independence, and democracy. It is understood in three ways: the sovereignty holder, the absoluteness of the sovereignty, and the internal and exterior aspects of the sovereignty. Any political institution contains the concept of sovereignty. And many states come together to build a system of independent states. The laws must be made by a group of citizens, and their chosen government must ensure that the laws are carried out on a daily basis. So, rather than defending an individual's desires, the people act as sovereign, promoting the welfare of everyone. Consequently, it is possible to assert that the fundamental principle of democratic administration is popular sovereignty. According to the conventional definition of democracy, everyone must have an equal voice and fair chances to participate in the process of enacting, amending, or repealing laws. The concept of popular sovereignty implies that the subjects of the state, or the people, must be equally represented in the body that makes laws; otherwise, it wouldn't be popular sovereignty but rather some kind of hybrid with majoritarianism. A community's whole administrative structure, as well as its constitutional form, legal system, and political identity, must be decided by the people themselves in order for them to be really sovereign.

Keywords: *sovereign, theory, state.*

INTRODUCTION

***Synopsis of John Austin's Life (1790–1859)*:**[1] The early nineteenth-century legal philosopher John Austin is well-known for being one of the founders of the "legal positivism" school. He did not include laws governing inanimate objects in his study since he concentrated on laws governing human behaviour (the laws of physics). He was born on March 3, 1790, at a mill in England. He was raised in a merchant-class household. Before beginning his law education, he briefly served in the military. In order to practise law, he received bar admission in 1818. However, he only took a few cases there before giving up law practice in 1825. But as a result of his painful life experiences, his analytical mind and intellectual integrity advanced, and in 1826 he was appointed the first professor of law at University College, London. Professor auction had a tight connection to Bentham and his social group during this time. The Province of Jurisprudence Determined, a collection of Austin's lectures, was published in the year 1832. Austin claimed in the collection of his lectures that every law he was concerned with comprised commands, obligations, and sanctions. He claimed that each of these names refers to the same idea—that of "law," yet they each refer to a different aspect of it and the leftovers of it (that is, each term brings with it by implication the other two). He participated in an 1838 commission that looked at management concerns in Malta, a British territory. The following ten years saw Austin serving his country outside of it while living abroad with his wife, Sarah Taylor Austin. They went back to England in 1848 and continued to visit frequently after that. Austin passed away on December 1st, 1859. Similar to this, the researcher has given this project his best effort in order to produce the necessary results. To create a better understanding of the project, he categorises each issue independently.

CONCEPT

The sovereignty theory of Austin. Theory: If a determined human superior does not routinely receive similar superior obedience but routinely receives habitual obedience from the majority

[1] Abhinav Thakur, 'Austin's concept of sovereignty and its relevance in Indian legal system & in Indian Judiciary' (*Legally India*, 24 May 2011) <https://www.legallyindia.com/views/entry/austins-concept-of-sovereignty-and-its-relevance-in-indian-legal-system-and-in-indian-judiciary> accessed 14 July 2022

of a given society, then that society is political and autonomous, and that sovereign is the determined human superior. This phrase comes from Roman law. "Sanction is the weapon of coercion by which any system of imperative law is enforced," claims Salmond. The punishment used by the state in the administration of justice is physical force.

Austin stated that "Law is a command of the sovereign backed by a sanction" was the definition of law.[2] By dissecting this definition into its simplest components: -

- If a sovereign's order is not followed, it will be sanctioned.
- Let's now explain these components succinctly and thoroughly so that you can comprehend Austin's notion of Legal Positivism.

A command is an expression of what will be given to a subordinate by a superior (sovereign) (general public). Austin separates laws from other commands based on how general they are. There are commands that are laws and commands that are not. Laws are broad orders, as opposed to orders given on parade grounds and carried out by the troops there. It is obvious from the definition above that Austin's concept of commands grants the sovereign authority the status of ultimate supreme and implies that the sovereign's authority is absolute, which is in a stark contest to the constitutional framework that exists in India and, for that matter, in any peaceful democracy. This concept implies that the sovereign, or whoever is in power, is politically superior, however, this is untrue in democracies. Each and every person is entitled to the same rights as the president, prime minister, and chief justice.

It also disregards other legal precedents, laws created by the administration in the form of legislative instruments, and laws made by judges-who are considered as mere deputies in the form of precedents. This hinders the growth of the country's legal system as well as society, public & private organizations, and the economy. Any person or group of people who receives the majority of the submission in a political society on a regular basis while not receiving such submission from other people or groups is referred to as a sovereign. John Austin believes that the Sovereign is above all others and that the entire realm must submit to his or her orders,

[2] Dr. N.V. Paranjape, *Studies in Jurisprudence & Legal theory* (9th Edition, Central Law Agency 2019) 31

which is in direct opposition to the notions of democracy and Indian federalism. The powers of the sovereign are unassignable, according to Austin's theory, which means that only the sovereign will have the authority to establish, carry out, and execute laws. This way of thinking is also in opposition to democratic norms and the Indian federal government.

CRITICISM

The definition of law used by Austin is another issue with his idea. Law is described by Austin as "command delivered by a superior to inferior."[3] Additionally false is this. No sovereign can deny the existence of customary law, which has developed over time via application in every nation. Austin's idea might not be seen as being relevant to political philosophy, it appears. He condenses "the meaning of important concepts"[4] in his sovereign legal philosophy. However, this understanding of sovereignty's absolutely legal nature should be acknowledged. Austin has a reasonable and straightforward theory. Even Austin admitted that his views were highly objective and distinguished the law from morality, ethics, values, or any other social worm in his book province of jurisprudence. Austin believed that the law should be seen for what it is, not for what it should be. The same can be seen in his definition of law, where he has blatantly ignored the law's subjective but important components, which apply to humans who are also susceptible to subjectively (such as subjects' willingness to obey the law, the state, and subjects shared interpretation of the law, and subjects beliefs and disbelieve in the law and its application.

We can draw the conclusion that a penalty is the force or ill that befalls a person if they disobey the sovereign's orders. His incredibly autocratic beliefs and narcist per se, portray punishments as more of a physical force the state employs to repress the disobedient. Having a difference of opinion, which is essential for the social, political, and economic development of any nation, is also punishable under this definition, which forbids public engagement in government.

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[3] Dr. N.V. Paranjape (n 2) at 33

[4] Saikat Mukherjee, 'The command of the Sovereign: Relevance of Austin's theory of law in the Indian Legal system' (*Legal Service India*) <https://www.legalserviceindia.com/legal/article-7800-the-command-of-the-sovereign-relevance-of-austin-s-theory-of-law-in-the-indian-legal-system.html> accessed 14 July 2022

Austin's claim that all laws originate from the sovereign may be true in theory, and laws in our country (at least those enacted by statute) are the result of the political superiors, or legislators, acting on their behalf. However, in practice, laws are not a true reflection of the superiors' will. Although many laws originate in the parliament, they only represent the politicians' desire to keep the support of the largest organised groups in the nation and to satisfactorily further their interests. The current state of affairs allows any group to demand recognition and pass desired legislation thanks to the enormous combination of labour, capital, professional lobbyists, and large treasuries. Only the reality that these factions are vying for dominance among one another keeps the government from succumbing to their manipulation. Even so, maintaining their satisfaction and preventing their support withdrawal from the administration in the upcoming elections demands political cunning of the highest kind.

As a result, we can conclude that Austin's emphasis on the sovereign as the fundamental source of law is unjust. The government can use its monopoly on enacting laws and exercising executive authority to reshape laws in disregard of democratic processes in a totalitarian regime, which is fast becoming an uncommon phenomenon in the current global order, but this is not possible in a democratic nation like India.

Austin's argument that all legal power derives from the sovereign authority fails in both India and other common law nations. There are other additional, highly significant legal sources that must be taken into consideration. Only one aspect of law—the legislation passed by the legislative body—would be compatible with his idea. However, the word "law" has a far wider scope and encompasses not only actual laws but also bye-laws, notifications, and conventions that are not created by the government. In this era of judicial activism, where the judiciary not only interprets the law but also makes it, judge-made laws are another crucial category that Austin omits from his definition of law. This category is indispensable. While putting any law into effect, key values like justice, equity, and morality are constantly kept in mind.

Austin's idea of unbounded and indivisible sovereignty is also wholly unsuited for India or any democracy. There is no authority for the sovereign to impose its will on anybody or anything. It is just as subject to the norms and laws outlined in the constitution and other legislation as any

regular person. The constitution binds the legislature, and in almost all circumstances, a court has the authority to determine whether government action is constitutional and, therefore, legitimate or, in the alternative, should be invalidated. Thus, we can draw the conclusion that, as times change, Austin's opinions may no longer seem to be very relevant to the global political and legal system, but that his most important contribution—the development of law as a field that can be studied scientifically—has earned him a respected place in the jurisprudential canon.

CONCLUSION

The discussion that has been had thus far leads us to the conclusion that Austin's theory does not actually apply to India in the present day because it does not consider a number of things, such as which India has prospered over time, going from colonial British rule to having the largest democracy in the world. Additionally, due to India's significant cultural and religious background, as well as the country having the most youth in the world, not everything can be done in accordance with the approximately 150-year-old theory developed under strict regulatory conditions.

Following are the exact words used by C.J. Subba Rao in the case of ***Golak Nath v State of Punjab*** to establish that the constitution's provision on the separation of powers cannot be compromised.[5] "The three organs of the government have to exercise their functions keeping in mind certain encroachments assigned by the constitution. The constitution demarcates the jurisdiction of the three organs minutely and expects them to be exercised within their respective powers without overstepping their limits. All the organs must function within the spheres allotted to them by the constitution. No authority which is created by the constitution is supreme. The constitution of India is sovereign and all the authorities must function under the supreme law of the land i.e., the Constitution."

[5] *J.C. Golaknath & Ors v State of Punjab & Anrs.,* (1967), AIR 1643