

Greetings to Everyone

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In today's session , We are going to discuss module number 5 Which speaks about Imperative theory under unit 3, theories and Schools.

Today we're going to deal with module #5,

To give a brief outline,we're going to deal

- with the concept and definition of imperative theory of law.
- Characteristics of the positive theory,
- and the implication and criticism of Austin's Imperative theory of law.

At the end of the session,

- ❖ To explicate the concept and meaning of the Imperative Theory of Law.
- ❖ To evaluate and analyse the characteristic features of Austin's Imperative Theory of Law
- ❖ To elucidate and understand the application, implication and criticism of Austin's Imperative Theory of Law .

Coming to Austin's theory of law,

John Austin was an English legal theorist who strongly influenced British and American law with his analytical approach to jurisprudence and his theory of legal Positivism.

Austin is called the father of English jurisprudence and founder of analytical school.

Definition given by Austin is very simple, he says law is a command which obliges a person or persons to the course of conduct. It is laid by a political sovereign,enforceable by sanction or sanctions.

So to understand it more clearly,

he says Law is a command given by a political sovereign and this is backed by a sanction

coming to the characteristics of command.

He says there are some commands which are laws.

And there are those commands which are not.

In detail,

if you see the characteristics of command

only if sanction is attached with the orders of superior, and then they become laws.

But if sanction is not attached to the orders of political superiors, then they will not become laws

coming to this second element of Austin's theory.

He speaks about sovereign

According to Austin, Sovereign is a person or a body of persons, whom the bulk of political society habitually obeys, but who himself does not obey any other person or persons.

According to him, Characteristics of Sovereign:

Source of Law: Sovereign is a source of law. Every law is set by sovereign person or body.

Source of Power: In every state; there is an ultimate authority acting as an ultimate source of power.

Indivisible of power: The power of a sovereign is indivisible. The totality of sovereign is vested in one person or body of persons.

General Obedience of people: The chief characteristic of sovereign lies in the power that the bulk of members of society follow the laws made by the political superior.

Coming to sanction sanction is very important in Austin's theory,

Sanction: According to Austin imperative theory the term sanction is derived from "Roman Law".

"Sanction is conditional evil". According to Salmond, "it is the instrument of coercion to enforce imperative law". According to Roman Law sanction means that portion of statutes relating to penalties.

Physical force is the sanction applied by the state in the administration of justice.

When sanction is attached with the orders of superiors, their orders become law.

According to Austin, there are two kinds of laws,

- 1) human laws,
- 2) divine laws.

Divine laws are given by God to men, and human laws are set by men to men,

and when they're talking about human laws again,

he differentiates them into two categories,

one those which are set by political superiors and are called as positive laws,

and those which are not set by political superiors.

I can give examples here. Such as the rules of a club or any voluntary organization,

Austin says, although there are laws, they're not commands and they will not be considered as command with sanction attached to it. But nevertheless there are laws.

Coming to the first one,

1. the declaratory or explanatory laws next,
2. laws of repeal which speaks about revocation of command and then
3. laws of imperfect obligation.

Because there is no sanction attached to it.

Austin's theory was criticized numerous by many proponents

coming to criticism.

1. Not applicable to the customary law, international law, constitutional law, they are habitually obeyed, but do not fall within the Austinian definition.
2. There are certain rules they're called as power conferring rules.
3. According to Austin Law is a command of sovereign, but there are laws which are not command but only power conferring rules, which again do not fit into Austinian definition. For example, election rules law, property law, law of contract etc. They confer rights on the citizens to vote to hold and dispose of property.

Next,

4. Austin theory of command suggests a personal commander, but lawmaking is so complex and under modern legal system it is impossible to identify any commander.

5. Another interesting facet is that as to what happens on the extinction of lawmaker in such a case, law continues in existence even after the extinction of the lawgiver.
6. Judicial decisions do not fit into positivist theory. The bulk of English law is the result of judicial decisions, so they do not fit into positivist theory. The Austinians argue that since judges are appointed by government and removable by parliamentary procedures, they are really delegates of Parliament. But to describe judges as delegates is wholly misleading. Under Indian Constitution, the doctrine of separation of powers is recognized. Judges, for that matter, can never be considered as delegates of the Parliament. They have the power of judicial review over legislative and executive actions of the state. And the Constitution mandates that steps should be taken to keep judiciary independent from executive. They do not have lawmaking powers as such, but in the course of interpreting law it makes law only incidentally, and to the extent necessary for resolving cases in hand.

Coming to the next criticism,

7. Austin theory identifies sovereign before he issues command. In the case of rules of succession in England, they prescribe who shall inherit the throne and identify the sovereign even before he issues commands. But under Indian Constitution the people are Supreme. It is like people giving laws onto themselves and therefore there is no question of succession to the throne.
8. Basic rules are not created by Sovereign in every legal system. There are some basic rules that define sovereignty. But these rules are not themselves created by sovereign.
9. Statutes passed due to reasons other than sovereign will states that laws may be passed due to the lobbying by interested groups. Laws are passed or retained, not always because of sovereign wants them, but because this section of the people wanted them.
10. Austin also disregards the purpose of law-Austin theory is silent about the special relation between law and justice. The end of law is always justice, and therefore any definition of law without reference to justice is inadequate.
11. Laws before state-according to the historical school, laws prior to an independent of any political authority and a state enforces it because it is already a law. Already law it is not correct to say that it becomes the law because the state enforced it.
12. Dr. Goodhart also criticizes this theory by calling it a gunman theory. He says that there is no distinction between a command of a bank robber who points his gun at the bank clerk and orders him to give money. However, this criticism is answered by the 2nd requirement of law. That is command must emanate from the sovereign.

In spite of this criticism,

it cannot be denied that Austin Austin rendered a great service by giving a clear and simple definition of law.

By Separating law completely from morality, Austin tried to avoid a lot of confusion. Austin's theory of law contains an important element of universal & paramount truth. 'Law is created and enforced by the State'.

These are the books which I have referred to.

Thank you.