



IS AUSTIN'S THEORY INCONGRUENT WITH EXISTING CONCEPTS OF SOVEREIGN AND DISPUTE SETTLEMENT IN TREATIES AND INDIAN LEGISLATION?

Law

**Sanjith
Chandrashekar**

B.Com. LL.B (Hons.)

ABSTRACT

For his bold declaration that international law is not "true law" since there is no sovereign, John Austin has been extensively attacked and praised in equal measure. According to Austin, the concept of law is, "Law is a command of the sovereign backed by a sanction." This study investigates Austin's viewpoint and evaluates it in light of current legal systems, present international law, modern Indian laws, and the analysis of legal issues in the treaty law. While Austin's viewpoint was correct in terms of the legal systems of his day, it cannot be applied to the current international, and Indian legal system.

KEYWORDS

Sovereign, Austin, Indian law, treaty law.

INTRODUCTION

International law, according to British jurist John Austin, is not law since it is not lawfully obligatory on states. As per Austin, law is made up of commands issued by a sovereign and accompanied by threat of sanctions if they are violated. The sovereign, according to Austin, is a definitive or definable individual or group of people in an autonomous political society to whom the population overall has a practice of allegiance, yet who has no pattern of obedience to the politically superiors. The people that make up the sovereign state aren't just a nebulous in terms of positive morality. They should be able to be identified by name, residence, and social connections. In this respect, he claims that International Law will not exist as it is not derived from a sovereign's mandate. This argument is largely ignored because governments see international law as guidelines rather than commandments. A regulation should be legislated by a sovereign legislative body and implemented by sovereign power in right to be deemed a "proper law."

Austin makes a clear distinction between positive law and positive morality. Both are commands (orders backed by the threat of punishment) and thus obviously legal. The important distinction is who is in charge of command. Positive law, or the law of the state, is derived from the sovereign or the sovereign's authorities. Positive morality, but at the other side, is only promoted by the people on a whole or a community inside it, and the associated threats of punishment are often vague, varying from popular discontent to ostracism to more aggressive action. This term is used by Austin to argue that convention, no matter how widely accepted and practiced, is not law till it is pronounced by a legitimate power. As a result, he believes that neither constitutional nor international law exist. Constitutional law necessitates a power above the sovereign, which Austin believes is impossible. Similarly, with no international sovereign, there can be no international law. Positive morality, not positive law, is what these are.

This calls into issue the sustainability of international law as 'real-law,' especially because Austin claimed that international law was "merely positive international morality, comparable to the by-laws binding a members club," a stance which was roundly rejected by Hart. In effect, if international law is akin to the rules and regulations governing a members club, as Austin claims, this assumption might be incorporated into the concept of *pacta sunt servanda* established in The Vienna Convention on the Law of Treaties (VCLT).

The VCLT, which is widely regarded as the most authoritative source on treaty law and practice, alludes to *pacta sunt servanda* as a social norm in its Preamble and defines it in Article 26. It is also taken in concept from Article 2 (2) of the UN Charter, which states, that every member must perform in good conscience the obligations undertaken by the member in relation to the given Charter in order to safeguard to each of them the rights and advantages flowing from membership.

Although Austin's claim that only legislation arrive from the sovereign is theoretically correct, and regulations in our nation (at least statute-made regulations) are really the outcome of the democratically superlative proclamation of lawmakers, this is also not necessarily the

case basically because laws are not a representation of the superior officer will in the actuality. Although most regulations originate in parliament, they only represent these lawmakers' need to keep the assistance of the country's largest established organizations and to adequately suit their objectives. Only the sovereign might implement regulations, which could be appropriate in a socialist state like China, where the government could utilize its monopolies of legislative power and implementation authority to reshape laws without respect for democratic principles, but this is not viable in a democratic society like India.

The Concept Of Sovereign In Law Of Treaties And Dispute Settlement

International law, often known as the law of nations, is a collection of rules, laws, and conventions that govern interactions among Nations as well as other legal entities recognized as international actors. Furthermore, in international law, enforcement authority primarily emerges when parties intend to be bound by a contract; for example, treaties are deemed binding only between the parties who sign them. In effect, if international law is akin to the rules and regulations governing a members club, as Austin claims, this assumption might be incorporated into the concept of *pacta sunt servanda* established in The Vienna Convention on the Law of Treaties (VCLT). The VCLT, which is widely regarded as the most authoritative source on treaty law and practice, alludes to *pacta sunt servanda* as a social norm in its Preamble and defines it in Article 26. It is also taken in concept from Article 2 (2) of the UN Charter, which states, that every member must perform in good conscience the obligations undertaken by the member in relation to the given Charter in order to safeguard to each of them the rights and advantages flowing from membership.

Furthermore, treaty law is a self-contained framework that is not subject to a nation's legal orders. It is distinct in several aspects: For example, Article 26 states that the organization's fundamental goal is to create conditions for the exercise of respect and good faith in relation to commitments emanating from treaties and other sources of international law. The VCLT's, and UN charter's stated goal is implemented in a range of methods, including by courts, tribunals, and multilateral treaties that every member must perform in good conscience the obligations undertaken by the member in relation to the given Charter in order to safeguard to each of them the rights and advantages flowing from membership. In effect, the United Nations Charter serves as a model for international legislation. According to Chapter XVI, Article 103 of the United Nations Charter, the UN Charter's responsibilities take precedence over any other treaty's stipulations. Furthermore, the Preamble acknowledges the formation of treaty-based duties as a basis of international law. This is supported by the fact that international conventions are recognized as jurisdictions by Article 38 (1) of the ICJ Statute, and the UN Charter rightly comes within this category, rendering it a representation of international law itself. As a result, international law indeed exists, as anticipated by the ICJ Statute, and may be extrapolated from inside the international legal framework to justify its very own legitimacy.

Moreover, Austin's argument claiming international law isn't "real law" because there isn't a "sovereign" may be true to some extent, but a closer look is needed to evaluate the veracity of his claim. The basis of

international law as a framework for state responsibilities is the desire of the states. It is a principle which the Permanent Court of International Justice (PCIJ) had decided on the *S.S. Lotus* case. This is made clear for treaties that need States' assent to be bound, and it is expressed informally for conventional international law that States assent to be bound by contract. As described under Article 17 of VCLT, it provides for a state to give consent to a part of treaty or express choices of differing provisions. The parties can also either terminate or withdraw from a treaty under its provisions with their consent under Article 54(b) of VCLT. This attacks Austin's view on habitual obedience of the sovereign.

The United Nations General Assembly, which is made up of members from 193 countries, resembles a legislature in many ways, although it lacks the authority to pass binding laws but rather publishes resolutions that are just guidelines. Furthermore, international law, to a certain degree, lacks an implementation competence over disputes before it. In disputed cases, the ICJ's jurisdiction is contingent on the assent of just the relevant parties. There's really no worldwide police department or defined law enforcement apparatus, and that there is no supreme administrative power. The Security Council could seek military intervention to maintain peace and security, although this is contingent on an aggressive act, and consent of the states may not be expected. Here, international law, as analyzed, lacks a legitimate "sovereign" authority to enact it.

On the other side, specific features of "sovereign power" could be traced all the way back to UN Charter provisions. The International Law Commission (ILC) respected the equality of States and the concept of State consent by not favoring a certain type of dispute settlement and instead allowing the parties to choose. If an objection is lodged within three months, Article 65 para 3 of VCLT prevails, it states that the parties must seek a solution using the mechanisms set forth in Art 33 of the UN Charter. The terms "settlement of dispute" rather than "solution" will be preferred as "solution" is much more impartial and does not decide if a dispute exists. The Means mentioned in UN in Article 33 (para 3) the phrase "the means indicated in article 33 of the Charter of the United Nations" was adopted, as in contrast to Article 33 of UN Charter, Article 65 of VCLT does not settle a dispute that could affect international peace and security. So Austin's view that only one sovereign entity passed legislation is proven false in these instances. Negotiation, inquiry, mediation, conciliation, arbitration, and judicial settlement are among the numerous conflict resolution processes outlined in Article 33 (1) of the UN Charter. Article 94 (1) of the Charter also mandates that the State parties concerned in the case comply with the ICJ's judgements, as outlined in Article 59 of the ICJ's Statute.

It should also be mentioned that international law, not domestic law, is employed in the judicial resolution of conflicts. This backs up the claim that international law issues are always considered as legal issues by international judicial systems. In the case of *Prosecutor vs. Tihomir Blaskic*, the International Criminal Tribunal for the Former Yugoslavia (ICTY) held that domestic law could not be transferred into international law because it could result in unending confrontations among States and thus turn international courts into "domestic courts." As a result, the tribunal was establishing a line between domestic and international law, as well as the notion that disputes between States must be resolved through international law rather than domestic law. This is analogous to Article 27 of the VCLT, which states that no party may use elements of its domestic law as reason for failing to perform a treaty. This provision is in addition to article 46, which states that internal laws of vital importance are exempt. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia's ruling, as well as the VCLT articles, strike down Austin's claim that international law isn't true law. In reality, they were reaffirming the existence of international law.

Article 5 of the UN Charter states that the Security Council has the authority to exclude a member from the UN if the Council has taken sensible precautions against that member. Members who breach the UN Charter's duties may also face non-military sanctions or military action. The Security Council's power can be interpreted as implying "sovereign" sanctions, contradicting Austin's claim that international law lacks a proper "sovereign" that could impose sanctions. As H.L.A Hart has correctly described it, a legislator has two personalities: his legislative personality, that is involved with issuing commands, and his ordinary personality, as just a citizen, that is obligated to follow those

commands. Moreover as described in Article 53 and 64 of VCLT which talks about Jus Cogens that are peremptory norms, treaties conflicting them are deemed invalid. So the law of treaties should itself abide the principle of Jus Cogens, backing up Hart's assertion. States that voluntarily become members of the United Nations possess similar personalities in this case: the legislative personality, which creates non-binding agreements in international conferences, and the ordinary personality, which is required to follow the UN Charter's purpose of maintaining peace and security. As a result, Austin's emphasis on 'Sovereign,' as described before, cannot be explained by any contemporary legislation. Municipal legal systems do have a sovereign in the form of the executive, yet also this so-called sovereign is constrained by the laws which it passes, and thus should follow those. If indeed States are similarly sovereign, they should adhere by the United Nations' purposes when they become members, while the same holds true for non-members. Members should abide by the regulations in good conscience, failing which the 'Sovereign' authorized to do so could inflict sanctions on them. Members of the Security Council are also members of the United Nations and are bound by the UN Charter's purposes.

The Incongruence Of Austin's Theory In Indian Laws

According to Austin's concept of command, the sovereign authority is the utmost superior and has ultimate control. It means that this philosophy is in constant competition with the Indian Framework, that stresses the supremacy of the Constitution. Democracy is at the heart of the Indian Constitution, which ensures citizens' rights and freedom. The power is asserted by a sovereign authority in John Austin's idea, however India's System provides rights and privileges to the people, equivalent with those of the President, Prime Minister, or Chief Justice. Other sources of law, such as precedents, customs, and laws enacted as statutory frameworks, are likewise ignored by the approach. This phenomenon significantly disrupts the country's jurisprudence. Numerous new laws and judgments are based on legal sources, which are widely respected in India's court system.

The sovereign is not made responsible to anybody else, as per John Austin's Theory of Sovereignty, however the citizens should obey whatever that enforces on them. The powers are inseparable and non-negotiable, according to the doctrine. The sovereign is the one who proposes, implements, and maintains the laws. This is an outright strike on India's democracy and federal system. However, the entire domain must obey whichever the sovereign commands, that is in direct opposition to the concept of democracy and Indian federalism. In the event of noncompliance, both the people and the government are brought to justice. Furthermore, powers are split among the several levels of government, allowing for responsibility and effectiveness. It is apparent that the sanction is a negative force that will result in negative repercussions if the person does not follow it. The punishment of individuals who violate the sanction is prioritized in the ideology. As a result, the theory appears to be a despotic force. It makes it impossible for anyone to express themselves or engage. Participation in politics and the liberty to express oneself are critical components of India's democratic structure. The research has drawn the accompanying conclusions from a careful examination of Austin's theory of sovereignty and legal positivism, and has attempted to prove its relevance to contemporary India's political and legal system. Austin's theory of sovereignty assumes that everyone would follow the sovereign's orders to the letter, which may not be the case in India's current political scenario. In a political society, Austin proposes a political superior who is routinely obeyed by the majority of the populace. This means that in a political system, the sovereign is the highest and most powerful authority. However, how does one determine the 'highest authority' in a democratic country like India? Determining the strongest power would necessitate an investigation of numerous legal and non-legal forces that determine how a state operates. Austin's argument also implies that citizens have a good understanding of politics.

However, in today's world, this is not the case. Critics, protesters, and opponents of the government's policies include those who believe the government is unfit. Even though dowry is illegal, it is nevertheless practiced, indicating that sovereign order is not the primary factor in determining people's conduct. Furthermore, assuming that the majority of the population is politically informed will be dangerous and unjust in a country like India, where 25.96% of the population is illiterate and where people can kill one another due to fake news and propaganda. As a result, one can argue that Austin's sovereign theory,

which is based on the assumption of habitual obedience, cannot retain sway in today's Indian legal and political framework.

Customs, by his definition, are not a source of law and hence are irrelevant. None of these, including several personal and customary laws such as Hindu law, Muslim law, and those that have existed for centuries before this theory, even if not recognized, and regulate the majority of people's daily behavior and are regulated by the government, would be considered legislation under Austin's definition. As a result, Austin was uninformed of the common law, which is the foundation of many legal systems around the world. Austin's notion of unlimited and indivisible sovereignty is completely unsuited in any democracy, including India. Because India is considered a quasi-federal state, federalism is a significant feature of our Indian Constitution. It allows the Union and the States to have separate polities. They are given sovereign powers that must be exercised in accordance with the Constitution. The core concept of federalism, which is the distribution of powers, is provided by our constitution, which is the ultimate law of the land. Then as consequence, we could deduce that Austin's theory is incongruent with India's current political and social situation since it overlooks basic ideas such as democracy, constitutionalism, decentralization, and power separation.

According to Austin, the sovereign is exempt from all legal restrictions, and hence no such sanctions could've been imposed on it. The sovereign lacks the authority to compel whatever he or she wishes. It is subject to the same rules and regulations as the general public, as enshrined in the constitution and other legislation. The legislature is bound by the constitution, and in almost all circumstances, a court has the authority to determine whether a government act is constitutional and thus legal, or whether it should be struck down. Article 13 (2) ensures that citizens' fundamental rights are safeguarded. Parliament and state legislatures are expressly forbidden from enacting legislation that restricts or restricts citizens' fundamental rights. They claimed that any change to the Constitution has the status of a law within Article 13 of the Constitution (2). The arguments were overruled by the Supreme Court in 1952 (Sankari Prasad Singh Deo vs. Union of India), which supported Parliament's jurisdiction to change any provision of the Constitution, including those that impact individuals' fundamental rights. Seven of the thirteen judges in the Keshavananda Bharti case, including chief justice Sikri, asserted that parliament's constituent power was limited by nature. The underlying structure or framework of the constitution can not be damaged, emasculated, destroyed, changed, or altered by Parliament's amending power under Article 368.

Furthermore, according to Austin's view, the sovereign's powers are inseparable, i.e., the sovereign shall propose laws, the sovereign would implement the laws, and the sovereign would alone maintain the laws. This worldview is also incompatible with the Indian federal structure and the concept of democracy. As a result of the foregoing findings, we may conclude that all of Austin's theories are unsuitable for the present Indian political and legal situation, as they lead to political upheaval, disorder, and societal catastrophe.

CONCLUSION

In his work, 'The Province of Jurisprudence Determined,' John Austin takes through considerable efforts to explain the 'command theory,' which states that a law is only true law if it is enforced by a true 'sovereign,' who is not bound by the law. Austin's claim has a lot of acceptance, which is hard to dismiss. Hart, but at the other end, came out and said that the 'command theory' is a ruse. He said that, contrary to Austin's assertion, that there's no legal system. That was since, while lawmakers are assigned with the work of making laws, they are also required to follow them. In essence, nobody is above the law, including the so-called "sovereign."

The law, like we perceive it, is part of a continuous framework. That is a steady, and otherwise revoked, it will remain even though the 'sovereign' passes. The idea of the 'sovereign' establishing the law and not following it in its entirety was misguided, as this might imply that the laws will have to modify with the arrival of a different 'sovereign,' which is not always the situation in any law system. Austin's claim was furthermore disproved by the observation that no systems follows his "command theory." Hart proceeded further to investigate the use of sanctions as a "sovereign" weapon for enforcing the law. Sanctions have their origins in both international and domestic law, and international law is not enforced because it is binding; it is enforced because it is binding. Democracy is at the heart of the Indian

Constitution, which ensures citizens' rights and freedom. The power is asserted by a sovereign authority in John Austin's idea, however India's System provides rights and privileges to the people, equivalent with those of the President, Prime Minister, or Chief Justice. Other sources of law, such as precedents, customs, and laws enacted as statutory frameworks, are likewise ignored by the approach. This phenomenon significantly disrupts the country's jurisprudence.

In addition, the researcher has also argued in this study that Austin's argument was already outpaced by time in present contemporary systems of law. It may have been prevalent in the ancient periods. However, this has evolved throughout the years, and the 'sovereign' is now bound to follow the laws that they implement. Nobody is exempt from the law. In treaty law, for example, states have an obligation to fulfil treaties in good faith and maintain adherence with their international obligations underneath the VCLT, and any infringement of these obligations might result in consequences by international law. In essentially, this demonstrates that domestic and international laws really aren't dissimilar in any aspect; both are identical in every manner except for their subjects.

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