Ministry of Education
Department of Higher Education
Yangon University of Distance Education

Yangon University of Distance Education Research Journal

Vol. 10, No. 1 December, 2019

Ministry of Education
Department of Higher Education
Yangon University of Distance Education

Yangon University of Distance Education Research Journal

Vol. 10, No. 1 December, 2019

Contents **Page**

Contents **Page**

A Study of Legal Thought of John Austin

Aye Aye Cho*

Abstracts

The main objective of this paper is to study of John Austin's legal thought of jurisprudence, the positive law and the sovereignty of sanctions. It is because that legal thought is very important for the legal theories and sovereign. The problem of this paper is "Why do sanctions play important role in John Austin's theory?" The solution is that Austin defines it as harm, evil, or pain that is conditional upon the failure to obey the command. The methods used in this paper are descriptive and evaluative. The contribution of this paper is that to provide comprehensive knowledge of legal theories and sovereign of power of a country.

Key Words: jurisprudenc, positive law, sovereignty, sanction

Introduction

John Austin (1790-1859), the English modern legal positivism, who is the founder of the Analytical School and he is considered as the Father of English Jurisprudence. He is noted for giving the wording important to investigate the interrelationship among morals and appropriate law that has developed into the cutting edge field of statute.

John Austin is the founder of modern legal positivism. He stressed that there is a big difference between what the law is, and what the law ought to be. According to the positive law, the law is different from other uses of the concept of law, such as law of morality and God's law. The central part of his theory of law is the notion of law as a command of the sovereign. So, Austin's theory about the law is sometimes called "command theory".

He is a friend of noted nineteenth-century Utilitarian thinkers Jeremy Bentham and John Stuart Mill and also a British attorney and educator. John Austin became well-known for his attempt to provide an easily understandable, ethical framework that could establish the rule of law as distinct from the rule of "God" and Christian morality.

Although they were little discussed during his own lifetime, Austin's writings in his work of '*The Province of Jurisprudence Determined',* paved the way for the more recent development of the school of analytical jurisprudence. As one of the foremost promoters of legal positivism, Austin argued that law, as opposed to moral imperatives, should be viewed simply as a form of command, made by an acknowledged and legitimate ruler, that gains adherence solely by means of an effective punishment.[1]

One of the standard reactions of John Austin's work is that his elucidation of law, as basically the direction of a sovereign to its subjects, doesn't fit well with the manner in which law is rehearsed or seen by attorneys, judges, and residents. The contention proceeds, that since the hypothesis "neglects to fit the realities," Austin's hypothesis must be dismissed for later speculations that have a superior fit. Consequently, in any event from the outset, it creates the impression that numerous contemporary lawful scholars wish to have it in two different ways: the first one is that they utilize the deviations from customary understandings and the second one is that justification for rejecting a few speculations, however, pardons or neglects similar deviations in their own hypotheses.

This paper explores what general principles can be learned or developed, regarding when or to what extent deviation from the way on law is practiced and perceived is appropriate in a theory of the nature of law. Additionally, this paper also considers whether in light of the proper approach to fit mistake in theory-construction, Austin's theory of law might be a more viable alternative than is conventionally assumed.

John Austin's Short Biography and the Works

Austin was conceived in Creeting Mill, Suffolk, England, in 1790, to guardians of normal methods. His father, a shipper, gave adequately to his family to empower his child to

*Lecturer, Department of Philosophy, Yangon University of Distance Education

[1]Encyclopedia of World Biography, COPYRIGHT 2004 The Gale Group Inc. https://www.encyclopedia.com

increase a commission in the military, where Austin stayed from 1807 to 1812. Austin's obvious interest in the analytical aspects of legal theory drew the attention of Jeremy Bentham,to promote his philosophical views. Austin undertook the study of the law of ancient Rome and he also became fascinated with the classification systems and methods of analysis developed by German scholars to organize civil laws then on the books in the continent. Thomas Hobbes, seventeenth-century English political philosopher, attempt to extend deductive reasoning to the study of man and society in his *Leviathan* (1651), Austin also reviewed mathematical theory to develop a clear framework for his subject.[2]

In 1828, Austin undertook jurisprudence as the philosophy of law as it relates to the restrictions imposed on the structure and actions of the court was a relatively new area of legal study.[3] Moreover, its roots can be found in the relatively new ideas of Utilitarian thinkers such as Mill and Bentham, particularly its concern over how to best determine the rule of law that will result in the greatest advantage to the greatest number in the community affected by the litigation in question. It is through the science of jurisprudence that courts formulate rules that determine the appropriate rules under which new cases or administrative matters with no established legal precedent should be handled. In addition to being a "new" science, Jurisprudence was not a required part of the law curriculum in the early 1800s, and its theoretical element made it less than more in need of strong oratory skills than theoretical understanding.

Austin had an aim to transform law into a true science. He believed it was necessary to purge human law of all moralistic notions and to define key legal concepts in strictly empirical terms. According to Austin, law is a social fact and reflects relations of power and obedience. There are twofold views, the first is law and morality are separate and the second is that all human-made the positive laws. Austin was the first legal thinker to work out a fully developed positivistic theory of law.

Austin argues that laws are rules, which he defines as a type of command. More precisely, laws are general commands issued by a sovereign to members of an independent political society, and backed up by credible threats of punishment or other adverse consequences ("sanctions") in the event of non-compliance. The sovereign in any legal system is that person, or group of persons, habitually obeyed by the bulk of the population, which does not habitually obey anyone else. A command is a declared wish that something should be done, issued by a superior, and accompanied by threats in the event of non-compliance. Such commands give rise to legal duties to obey. Note that all the key concepts in this account (law, sovereign, command, sanction, duty) are defined in terms of empirically verifiable social facts. No moral judgment, according to Austin, is ever necessary to determine what the law is-though of course morality must be consulted in determining what the law should be. As a utilitarian, Austin believed that laws should promote the greatest happiness of society.

John Austin, jurist, whose works *The Province of Jurisprudence Determined* (1832) and *Lectures on Jurisprudence: Or, the Philosophy of Positive Law* (published posthumously in 1863) exerted a profound and lasting influence on the development of jurisprudence and legal studies in England and in most English-speaking countries, was born in 1790, the eldest son of an East Anglian miller. After six years of service in the army, he practiced at the English bar, and on the foundation of the University of London in 1826 he became its first professor of jurisprudence. In 1833, discouraged by his dwindling audiences, he resigned his professorship and lived in retirement until his death in 1859.

---

[2] E. M Campbell(1959)***John Austin and Jurisprudence in Nineteenth-Century England***. London, Oxford University Press.

[3] Fred D. Miller, Jr. and Carrie-ann Biondi (Edited by)(2015) ***A History of the Philosophy of Law from the Ancient Greeks to the Scholastics***. U.S.A, Springer.P-256

Austin was a convinced utilitarian and a close friend and pupil of Jeremy Bentham, although he did not share Bentham's political radicalism. Much of his work consists in the lucid exposition, illustration, and elaboration of Bentham's ideas in a form more comprehensible and palatable to English lawyers than Bentham's own writings. Hobbes and Hume were important, although secondary, influences on Austin's theory of law and society, and he derived from his study of Roman and Benedict law, concerning the analysis, classification, and systematization of legal notions.

Austin's doctrines may best be viewed as the advocacy of three principal theses, which collectively make his work a prime example of what is now known as legal positivism. The first of these theses concerns the definition of law, the second the relationship between law and morals, and the third the nature and scope of a form of legal study which he termed "general jurisprudence."

Scope and nature of jurisprudence

Austin distinguished, as did Bentham in different terminology, between the science of legislation, concerned with the criticism and reform of law, and the science of jurisprudence, concerned with the exposition, analysis, and orderly arrangement of systems of law. He believed that there are fundamental distinctions and notions common to all mature systems of law and that general jurisprudence is concerned with their clarification and analysis. They include such distinctions as those between written and unwritten law and between torts and crimes and such notions as rights, obligations, injuries, persons, things, and acts. General jurisprudence is exclusively an analytical study concerned neither with the history nor with the evaluation of law, but solely with the clarification of meanings. Such a value-free analytical study is today usually referred to as analytical jurisprudence.

John Austin's the Province of Jurisprudence Determined

The Province of Jurisprudence Determined, Austin's best known work, a version of part of his lectures, is published in 1832. Here, in order to clarify the distinction between law and morality, which he considered to be blurred by doctrines of Natural Law, he elaborated his definition of law as a species of command. According to Austin, commands are expressions of desire that another shall do or forbear from some act and are accompanied by a threat of punishment or the "sanction" for disobedience. Commands are laws as "simply and properly so-called" when they prescribe courses of conduct, not specific acts, and are "set" by the sovereign. This is the mark distinguishing positive law both from the fundamental principles of morality, which are the "law of God", and from "positive morality", or manmade rules of conduct, such as etiquette, conventional morality, and international law, which do not emanate from a sovereign. The Province also contains a version of Utilitarianism in which "utility" is regarded as the index of God's commands and the test of the moral quality of general rules of conduct rather than of particular actions.

Austin viewed the doctrines in *The Province* as "merely prefatory" to the study that he termed "general jurisprudence": the exposition and analysis of the fundamental notions forming the framework of all mature legal systems. He devoted the main part of his lectures that published in 1863 to an analysis of such "pervading notions" as those of right, duty, persons, status, delict, and sources of law. Austin distinguished this general, or analytical, jurisprudence from the criticism of legal institutions, which he called the "science of legislation"; he thought both were important parts of legal education.

The reaction to Austin's work at the turn of the century was severe. His command theory was condemned as a misidentification of all law with the product of legislation and a distortion of many types of legal rule. The severance of a purely analytical jurisprudence from moral criticism of law was criticized as sterile verbalism obscuring the social function of law and the judicial process. Some critics consider that Austin's doctrine of sovereignty confuses

the ideas of legal authority and political power; others hold "legal positivism" responsible for subservience to state tyranny or absolutism.

Some of these criticisms are well founded, but even so Austin's work is of permanent value. The rigour and clarity of his analysis have demonstrated the complexity of many important legal and political concepts and the perennial need for just such an analytical study as he proposed, and repeated efforts to show precisely where his simple distinctions between law and morality are wrong have increased the understanding of both.

Legal Positivism of John Austin

Austin's goal was to transform law into a true science. To do this, he believed it was necessary to purge human law of all moralistic notions and to define key legal concepts in strictly empirical terms. According to Austin, law is a social fact and reflects relations of power and obedience. There are twofold views, that one is that law and morality are separate and the second is that all human-made such as positive laws can be traced back to human lawmakers, is known as legal positivism. Drawing heavily on the thought of Jeremy Bentham, Austin was the first legal thinker to work out a fully developed positivistic theory of law.[4]

Austin argues that laws are rules, which he defines as a type of command. More precisely, laws are general commands issued by a sovereign to members of an independent political society, and backed up by credible threats of punishment or other adverse consequences such as sanctions in the event of non-compliance. The sovereign in any legal system is that person, or group of persons, habitually obeyed by the bulk of the population, which does not habitually obey anyone else. A command is a declared wish that something should be done, issued by a superior, and accompanied by threats in the event of non-compliance. Such commands give rise to legal duties to obey. Note that all the key concepts in this account such as law, sovereign, command, sanction, duty are defined in terms of empirically verifiable social facts. No moral judgment, according to Austin, is ever necessary to determine what the law is that though of course morality must be consulted in determining what the law should be? As a utilitarian, Austin believed that laws should promote the greatest happiness of society.

On the other hand, John Austin adopted some ideas of Thomas Hobbes in his legal philosophy about the nature of law. Additionally, he was known individually for his "dogma" of legal positivism which states that:

The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard is a different enquiry. A law which actually exists is a law though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation.

Austin defined law by saying that it is the "command of the sovereign". He expounds on this further by identifying the elements of the definition and distinguishing law from other concepts that are similar:

Commands involve an expressed wish that something be done, and "an evil" to be imposed if that wish is not complied with. Rules are general commands as contrasted with specific or individual commands.

Positive law consists of those commands laid down by a sovereign or its agents, to be contrasted to other law-givers, like God's general commands, and the general commands of an employer to an employee.

The "sovereign" is defined as a person who receives habitual obedience from the bulk of the population, but who does not habitually obey any other person or institution. Austin

[4]Fred D. Miller, Jr. and Carrie-ann Biondi (Edited by)(2015) ***A History of the Philosophy of Law from the Ancient Greeks to the Scholastics***. U.S.A, Springer. P-330

thought that all independent political societies, by their nature, have a sovereign. Positive law should also be contrasted with "laws by a close analogy" which includes positive morality, laws of honor, international law, customary law, and constitutional law and "laws by remote analogy" e.g., the laws of physics.

Austin's Theory of Sovereignty

John Austin had been an eminent English jurist in the nineteenth century. He stated his theory a little more than a century ago. His theory is explained in the famous book "Lectures on Jurisprudence". This book was published in 1832. Though he was much impressed by the views of Hobbes and Bentham, yet his theory of sovereignty is quite distinct.

He explained very clearly and precisely the legal or monistic theory of sovereignty in his famous book "Province of Jurisprudence Determined" (1832). In his another famous book "Lectures on Jurisprudence" he drew a line of difference between law and morality.

According to Austin, the theory of sovereignty is that if a determinate human superior, not in the habit of obedience to a like superior, receives habitual obedience from the bulk of given society that determinates human superior is the sovereign and that society in which including the superior is a political and independent society. Every positive law or every law simple or strictly so called, is set directly or circuitously by a sovereign person or body to a member or members of the independent political society wherein that person or body is sovereign or supreme".

Main themes of John Austin's theory of sovereignty

(a) Sovereignty always resides in the determinate person or in a body of persons. In determinate person or a body of persons cannot be called sovereign. Nor does it reside in the General Will or electorate or God.

(b) Sovereignty is absolute, indivisible and unlimited in both the cases: internal and external.

I A society without sovereignty cannot be called a state.

(d) The determinate human superior is the only law-maker. His commands are laws and without him the state can have no laws.

(e) The determinate human has no rival of equal status in the state and nor does he obey the order of anyone.

(f) The power of the determinate human superior is sovereignty.

(g) The determinate human superior is subject to none or any power. The bulk of the people obey the sovereign's command as a matter of habit.[5]

Criticism of Austin's Theory of Sovereignty

(8) This theory is against popular sovereignty

This theory is deadly against Rousseau's concept of the General Will which is the very basis of democracy. It conflicts with the basic ideas of democracy. Austin's sovereign is superior and everybody else is sub-ordinate to him.

The idea of popular sovereignty which lies at the basis of democracy has been ignored by Austin. In democracy supreme power resides in the people. On the contrary Austin's world is hierarchical. Thus, Austin's theory of sovereignty does not fit in with a democratic set-up.

(8) It ignores the power of public opinion and political sovereignty

Austin's concept of sovereignty ignores the claim of public opinion and political sovereignty. Austin's determinate human sovereign is superior to all. He wields the power and exercise sovereignty. Austin's theory ignores the massive influence of the electorate, public opinion and the political sovereignty. Sir Henry Maine believes that it is a historical fact that sovereignty has repeatedly been for a time in the hands of a number of persons indeterminate.

[5] Lord Bryce (1901)***Studies in the History and Jurisprudence***, Vol. II, Oxford University Press.p. 537.

(8) Law is not the command of the sovereign

Austin is of the opinion that the determinate human superior is the only law-maker and his commands are laws. But Sir Henry Maine with other historical jurists has vehemently criticized and condemned Austin's theory of Sovereignty. Sir Henry Maine believes that sovereignty does not reside in the determinate human superior. According to him "vast masses of influences, which we may call for shortness moral, that perpetually shapes, limits or forbids the actual direction of the forces by its sovereign".

Maine cites the example of Ranjit Singh whom he regards as an absolute despot possessing qualities of Austin's determinate human superior "Ranjit Singh", says Maine, "could have commanded anything; the smallest disobedience to his commands would have been followed by death or mutilation".

Austin's definition of law as "a command given by a superior to an inferior" is not accepted by most of the political thinkers. Professor Laski believes that to think of law as simple a command is even for the jurist", "to strain definition to the verge of decency".

Many of the political thinkers believe that Austin's concept of sovereignty completely ignores the common law of Great Britain. John Austin attempted to defend this charge by saying that "whatever the Sovereignty permits that is also law. But this defence of Austin could not satisfy the critics. The critics argued that the development of the Common Law was a great political stir which could not be averted by the sovereign. Hence, the sovereign had no other alternative than to permit the Common Law to exist.

(8) Sovereign is not indivisible according to Pluralists

According to Pluralists, sovereignty is not indivisible. It can be divided. Laski said that, it is impossible to make the legal theory of sovereignty valid for political philosophy. It would be a lasting benefit to Political Science if the whole concept of sovereignty were surrendered.

Lindsay remarks that it is clear enough that the theory of the sovereign states has broken down. Barker is also of the opinion that no other principle of Political Silence is as useless as the theory of sovereignty. The Pluralists challenge the claims of the state to supremacy on the ground that society consists of many associations and the state is but one among them. Therefore, the state cannot be endowed with sovereign power of the community. Sovereignty is divisible and it must be divided between the state and various other associations of the individuals.

(8) Sovereignty does not reside with a determinate person in the federation

In a federal state sovereignty does not reside with a determinate person. It is impossible to discover sovereign in a federal state. It is very difficult to locate the sovereign in a federal state. For example, in the federal state of U.S.A. Sovereignty resides neither with the person of the president nor with his office nor with the Congress. It resides with the constitution. Similar is the situation in our country.

(8) Force is not the only sanction behind laws

The will of the public is also a sanction behind the law. Hence, Austin's concept of sovereignty is wrong. In modern times, laws are framed by the representatives of the people and not by the will of the sovereign.

(7) This theory makes the sovereign completely absolute

This theory makes the sovereign completely absolute, but in practice it is not possible to become completely absolute. In the ancient and middle ages, there had been many absolute monarchs. But the monarchs could not remain completely absolute in their action and 107ehavior. They were subject to the canons of morality, code of conduct and scruples of religion. If they tried to violate the establish moral, ethical and religious canons, they were in danger of facing the revolt.

(8) This Theory is not even applicable to Europe

Austin has asserted that the King-in-Parliament is the sovereign in England. But legally speaking, this assertion is not correct because neither the King nor the Parliament can go to the extent of becoming completely absolute. Always they have to pay due attention to the will of the public.

The reality is that the public is the ultimate source of power. It is public that empowers the Parliament. This is the reason why elections are conducted after every five years for the House of Commons. And the House of Lords is quite ineffective in the absence of the House of Commons.

Conclusion

The influence of Austin's work was small during his lifetime, although his writings were much admired by members of the Benthamite circle, including John Stuart Mill, Sir George Cornewall Lewis, and Sir Samuel Romilly. But after the posthumous publication of the whole of his work, his ideas came to dominate English jurisprudence, which for long remained primarily analytical in character. Austin's influence in the United States has been less considerable, although it can be distinctly traced in the works of John Chip man Gray and Oliver Wendell Holmes. On the continent of Europe, Austin's work was until recently recognized only by a few positivist thinkers, such as Karl Bergbohm in Germany, Ernest Roguin in France, and Hans Kelsen, whose "pure theory" of law has many similarities to Austin's doctrine.

Criticisms of Austin's works have ranged very widely. His definition of law has been attacked on the ground that in spite of obvious analogies between criminal statutes and commands, there are many sorts of law that are distorted by assimilation to a command. His conception of the sovereign has been criticized as a misrepresentation of the structure of anything but a very simple form of society, and especially inapplicable to those societies whose supreme legislature is subject to legal limitations imposed by a constitution.

Austin's insistence on the separation of law and morals has been criticized, notably in the United States, for obscuring the true character of the judicial process that is exhibited at those points where judges have a creative choice left open to them by legal rules and therefore have recourse to standards of morality and justice. Similarly, his insistence on the importance of a purely analytical jurisprudence has been criticized as an example of the vicious abstraction of law from its social setting and function, characteristic of English lawyers. Austin has even been criticized for encouraging subservience to tyranny and an uncritical attitude to bad laws. Some, but not all, of these criticisms are well founded. Their debate has usually advanced the understanding of law as a form of social control, and it is a great merit of Austin's lucid and penetrating work to have provoked it.

Austin's views have a profound influence on the study of English and American law. His book *"The Province of Jurisprudence Determined"* is a model of rigorous and clear analysis on the study of law. Austin brought order to the disparate elements of a legal profession that his time was largely unsystematic. Therefore, the analysis of Austin legal thought became the focal point for strong disagreements over the nature of law, the definition of law as a form of command with implied sanctions, and the problem of differentiating legal authority, political power, and morality.

Acknowledgements

I would like to thank Rector, Dr. Tin Maung Hla and Pro- Rector Dr. Khin Thant Sin for their kind permission to perform this research. I extend my whole hearted thanks to Dr. Thawda Myint, Professor and Head of Department, Department of Philosophy, Yangon University of Distance Education, for her kind and valuable advice and help.

References

1. Austin, John (1832) ***The Province of Jurisprudence Determined***, W. Rumble (ed.), Cambridge: Cambridge University Press, 1995.
2. Bryce, Lord. (1901) ***Studies in the History and Jurisprudence***, Vol. II,London, Oxford University Press.
3. Campbell, E. M (1959) ***John Austin and Jurisprudence in Nineteenth-Century England***. London, OxfordUniversity Press.
4. Fred D. Miller, Jr. and Carrie-ann Biondi (Edited by)(2015) ***A History of the Philosophy of Law from theAncient Greeks to the Scholastics***. U.S.A, Springer.
5. P. J Fitzgerald (2002) ***Salmond on Jurisprudence***,Delhi, Universal Law Publishing.
6. Martin P. Golding and William A. Edmundson (edit) (2005) ***Philosophy of Law and Legal Theory***, U.S.A, Blackwell Publishing.

Internet References

1. Encyclopedia of World Biography, COPYRIGHT 2004 The Gale Group Inc.https://www.encyclopedia.com
2.

****

A STUDY OF THE CONCEPT OF "GOOD WILL" IN KANTIAN PHILOSOPHY FROM THE MYANMAR PHILOSOPHICAL THUOGHT

Moe Aye Theint*

ABSTRACT

This paper is an attempt to prove "Why the concept of Good Will can be applied as the basis of Myanmar Philosophical Thought?[1] It is because that the concept of Good Will in Kantian philosophy can replace as categorical discipline with the concept of *Cetenā* in Myanmar Philosophical Thought.[2] The research methods used are the descriptive and evaluative method.[3] This study will contribute to some scholars to know the Myanmar Philosophical Thought.[4]

Key words: Duty, Good will, *Cetanā*

INTRODUCTION

Ethics is the study of what is right or good in human conduct. Ethics is one branch of philosophy and as a science "deals with human conduct in so far as it is considered right or wrong, good or bad." A Greek word, 'ethos' is said to be the basis of the term of ethics. Ethos means customs and usages belonging to some social group. Used in this scene, ethics has acquired great significance with the evolution of human civilization and with the increasing complexity of human society.

The purpose of ethics is to enable to distinguish between right and wrong actions. Ethics is great importance because questions of right or wrong, proper or improper, are involved in all spheres of human activity. Ethics as a discipline is occupied with the problem of the ideals of human conduct, with what ought to be. When conduct rises from fact to an ideal, it becomes ethical. The subject of ethics is the study of values aimed to evaluate human conduct in terms of good or bad, right or wrong under the standards of society.

As compared to philosophy, ethics is a more familiar term and is used by even those who have no conception of philosophy. In common usage human beings are familiar with practical ethics rather than with ethical theory. Ethical commands are a part of every culture. But as a discipline, ethics seeks to investigate all aspects of human conduct, theoretical as well as practical. Ethics is concerned with the concepts of morality like rightness, goodness, duty,

*Assistant Lecturer, Dr, Department of Philosophy, Yangon University of Distance Education

[1]Research problem

[2] Research finding

[3] Research method

[4] Contribution