Relevance of Austin's Analytical Positivism juxtaposed with the International World Order

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Introduction

At the core of positive law is seeking to describe and conceptualize law by reference to formal rather than a moral criterion, as antithetical to natural law. The positivist theory does not aim at discrediting law's merits as being inconsequential to the philosophy, it simply expounds that it does not factor-in to validate a law.

Legal Positivism developed during the 18th and 19th centuries and then further came to the forefront during the latter half of the 20th century. The inception of this school of thought can be owed to **Jeremy Bentham**, who viewed analytical positive law with a utilitarian lens, and whose account was adopted and more often than not modified and critiqued by **John Austin**, who is also the subject of my research here. Bentham advocates limited sovereignty, as opposed to Austin.

The purpose of this paper is to study the pertinence and materiality of **positive law** by relegating focus on **Austin's conception of positive law**, his **'command theory'** in particular and to equate his thesis in a globalized contemporary world to test its efficacy.

Throughout the paper, questions like: *is the authority of the sovereign overarching with respect to Austin's command theory and how it plays out today*, and *how approved is the notion of only laws backed by sanctions being valid* will be explored to ultimately infer how the idea of "Absolute sovereignty" in Austin's command theory is thrown a direct challenge at by various new tenets within the realm of law like international law and the rise of a multidimensional globalized world system.

This will be understood by analyzing how efficacious is it to keep imperative subjects like **international law** outside the purview of **real laws** by Austin by stifling the sphere jurisprudential inquiry in terms of what would qualify as 'positive laws' especially in the contemporary world order. To define the scope of research, the paper is divided into the

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following segments: *a)* Core concepts of Austin's theory *b)* Has Globalization transcended Austin's "Command theory"? *c)* Problems with Austin's overemphasis on the importance of sanctions.

Austin on Positive law

Austin set to demarcate the province of 'law' as is from what it ought to be, thus conceptualizing the classification of his theory into Positive Law ('laws properly so called'), and Positive Morality ('laws improperly so called').

Simply put, a law "*properly so-called'* incepts from a *sovereign* authority who is a *political* superior at the top in the hierarchy of the chain of *command* and any disobedience/defiance from these commands construed as laws would trigger some form of *sanction*/penalization upon the defaulter. All other laws fall into the category of laws "*improperly so-called*", which are mere opinions that are not backed by sanctions and thus do not attract any obligation to comply.[2]

Thus, for Austin, law is an imposition of power. The person who is in a position to command these laws is also authorized with the responsibility to inflict punishment for non-compliance to ensure that these laws are not readily flouted, thus stressing on the significance of *sanctions* to the existence of *commands*, and in turn, *laws*. Contrariwise, Austin suggested that those laws that lacked sanctions wouldn't qualify for laws at all because their efficacy would diminish by default. For Austin, thus, positive law was a posited law commanded by a sovereign, judiciary (receptive to the idea of common law as opposed to Bentham), and by "*private persons onto other private persons in pursuance of legal rights*", the ultimate authority of which is also derived from the sovereign- all of these which one can construe as black letter laws in terms of legitimacy.

As far as laws "Improperly so called" are concerned, they can be said to be distinguished into laws by "*Analogical extension of the term*" and laws "*metaphorical* or *figurative*". The laws by "analogical extension" were classified as "positive morality" which would include customary laws, laws of households, other laws with respect to etiquette, socialization, honor, etc. which are not derived from any authority, rather are mere opinions of an indeterminate

[2] SURI RATNAPALA, JURISPRUDENCE 36-47 (Cambridge University Press, 2009).

body of people based on their moral quotients. Inversely, scientific laws and theories were categorized as being derived from *metaphors* or *figure of speech*.[3]

Taking this view further, **International law**, inter alia, was categorized under laws "improperly so-called" as Austin viewed them as mere treaties/agreements among nations in the international system which is guided by anarchy, with no set political sovereign/commanding authority or sanctions backing the system rendering them unenforceable.[4]

This theory lays the foundation for understanding how laws classified as mere "positive moralities" have gained a much wider connotation in today's globalized world order. Austin is of the opinion that a tenet like International law can only qualify for being identified as positive law if the international system is a single global empire in which a ruler (sovereign/political superior) commands the obedience of all subordinate states with which they comply. Austin's watertight compartmentalization of "proper" and "improper" laws poses a challenge to development and stifles the multidisciplinary jurisprudential scope. How will this classification harbor the ramifications of globalization or the increasing importance of disciplines like International law?

Globalization and sovereignty

Since World War II, a significant number of supra-national and transnational regimes and orders have developed and are a very important part of the legal landscape.[5] With the onset of globalisation, the entire concept of an autonomous sovereign state started collapsing, diminishing the state's (and the people who run it by extension, which Austin identifies as the 'sovereign') capacity to act in isolation to the international system.

An essential link between 'Globalization' and the 'Nation State' is the concept of 'Sovereignty'. Sovereignty is the organizing principle of the state system.[6] The concept of sovereignty can be traced long back to John Locke's "State of nature" in which he elucidates that if a state exists in the absence of a sovereign leader, the intrinsic self-interested human nature might lead it into chaos and disorder. This can be linked with Austin's command theory,

[3] JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED, WEIDENFELD AND NICOLSON (1832).
[4] *Supra* note 2.
[5] WILLIAM TWINNING, GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE 13-18 (Cambridge University Press, 2009).
[6] Sheela C Reddy, *Globalisation and the Sovereignty of the Nation-State*, 16 WORLD AFFAIRS: THE JOURNAL OF INTERNATIONAL ISSUES 60, 62-67 (Oct-Dec, 2012) *JSTOR*, www.jstor.org/stable/48566255.

wherein the power vested in the political superior whose commands are backed by sanctions is also for the reasons of holding the state together to ensure that it does not plummet into chaos.

It is imperative to note here that Austin propounded this theory back in the 19th century when it was feasible to keep subjects like international law outside the purview of laws "properly so-called", however, in the present world order, states cannot be said to possess absolute sovereignty by any means. By an extension, the political sovereign's commands or the authority vested in him also comes under direct scrutiny and must meet a set criterion established by this globalized world order. The political superior in this sense is not just commanding his citizens, but the extent of his commands go way beyond the territorial sovereignty, attracting ramifications from other states, thus throwing a direct challenge at the concept of sovereignty.

Is Austin over-emphasising the importance of sanctions?

Austin's overemphasis on the importance given to sanctions also jeopardizes his theory as he inevitably side-tracks instances that go to show that these sanctions are not an essential, and in certain cases even an important element of a legal system.[7]

Rather than placing them at the core of legal systems, sanctions at best can be categorized as being peripheral to their sustenance. In other words, even if legal rules are backed by coercive sanctions, these legal obligations cannot be said to have emanated from sanctions. H.L.A. Hart, in critiquing Austin, argued that this concept that sanctions are the genesis of a legal obligation would imply that the impetus to follow a law only arises out of fearing an evil consequence in case of erring.[8]

Hart gives a basis to explain why Austin's obsession with sanctions is flawed. If sanctions are the sole reason behind performing a legal obligation, then the lack of it should be reason enough for anyone to shorn themselves of the obligation. For instance, if a person knows that they can get away with flouting a seemingly innocuous law, through bribery or clout, then by Austin's understanding, they would not have an obligation to abide by that law because the fear of 'sanction' is missing. Except, Hart points out that they would have an obligation regardless,

[7] Colin Tapper, *Austin on Sanctions*, 23 CAMBRIDGE L.J. 271, 272-278 (1965) *JSTOR, www.jstor.org/stable/4505043.*

[8] VIDYA DHAR MAHAJAN, JURISPRUDENCE AND LEGAL THEORY (Eastern Book Co., 2010).

and to say that it ceases to exist merely because they managed to escape punishment would be an oversimplication of the system.[9]

Is International law not 'real law'?

John Austin by propounding his theory on positive law predicated that international law is not real law.[10] Austin opined that the lack of a determinate superior, or sovereign in international law is what renders it the status of an improper law. H.L.A. Hart went on to discredit Austin's infamous command theory and associated international law as we know it with real law. [11]

Since a legal system cannot function in the absence of a strict system of rules and principles that the members are to abide by, the foremost quest here is to establish that the international system is governed by international law, just like a municipal system is governed by municipal law and a national system is governed by national law which Austin unequivocally categorises as "positive law".

The United Nations (Hereinafter UN) is one such supranational organisation that binds the nation-states together by holding them accountable for their actions and ensuring the possibility of the existence of a self-sustaining international system. It is imperative to note that more development at the global level is coupled with more impediments of global nature, such that these problems cannot be resolved if states don't work collectively to mitigate their impact.

The United Nations Charter[12] is a quintessential document that functions as a 'Constitution' of sorts that holds the members to a set of duties and entitles them with rights. Article 2[13] of the said document lays down certain fundamental principles that the states are to conform to. That the organisation is founded on principles of equality and sovereignty of its members; [14]that the members must act in good faith in order to reap the benefits of the membership[15]; that the members must settle disputes in a way that does not endanger international peace and security, and justice[16]; that all members must refrain from using threat as a dispute settlement

[9] H.L.A. HART, THE CONCEPT OF LAW. (2nd ED) OXFORD: CLARENDON PRESS (1994).
[10] *Supra* note 3.
[11] *Supra* note 9.
[12] *Charter of the United Nations*, San Francisco (24 October 1945). Available at https://treaties.un.org/doc/publication/ctc/uncharter.pdf
[13] Charter of the United Nations, art. 2.
[14] Charter of the United Nations, art. 2, cl. 1.
[15] Charter of the United Nations, art. 2, cl. 2.

[16] Charter of the United Nations, art. 2, cl. 3.

mechanism;[17] that the members must owe their allegiance to the UN and not go against it in the international system[18]. All these objectives and principles categorically laid down apply to the 193 member states that the UN currently harbours.

Even though Austin asserts that these rules and laws have no binding force, it is pertinent to note that flouting a rule under international law does have repercussions, be it diplomatic or compensatory in character that one state may impose against the other. This is precisely what distinguished international 'law' from international 'comity'[19], and Austin seems to have confused the two. The international system is largely hegemonized by the principle of 'good faith'. Hence, states acquiesce to international law for reasons other than the fear of a sanction/penal action. This suggests that "*international law is not binding because it is enforced, but it is enforced because it is already binding".*[20]

One of the very many criticisms levelled against international law during the time that Austin was writing (middle ages) was the sincere dearth of codification that put the subject in an ambiguous category. Though Austin opines that the treaties and agreements entered into by states are merely an extension of morals and ethics, these very treaties and agreements have made it possible in the last couple of decades to give rise to stringent codified laws in the international realm. It is imperative to note that as opposed to the middle ages, today the procedure for formulation of rules of international law by means of international conferences or through existing international institutions is pragmatically as popular and efficacious as any State legislative procedure.[21] The treaties and agreements are testimonies to an enforcement mechanism in the international system, which helps bring the will/consent of states to the forefront, reiterating the idea that there can be other ways to enforce laws than *commands* by a determinate *superior* backed by *sanctions*.

The objective of the UN Charter as mentioned is enforced in a number of ways: through courts, tribunals, multilateral treaties - and by the Security Council, which can approve peacekeeping missions, impose sanctions, or authorize the use of force when there is a threat to international

[17] Charter of the United Nations, art. 2, cl.4.
[18] Charter of the United Nations, art. 2, cl.5.
[19] Hans J. Morgenthau, *Positivism, Functionalism and International Law*, 34 AM. J. INT'L L. 260, 262-82 (1940). *JSTOR*. https://www.jstor.org/stable/2192998.
[20] G.G Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, 19 MOD. L. REV. 1-13 (1956).
[21] Knut Traisbach, *International Law*, E-IR FOUNDATIONS (Jan. 1, 2017), https://www.eir.info/2017/01/01/international-law/

peace and security[22]. In this sense, even though Austin is right in establishing that international law lacks a proper 'sovereign' authority to command and enforce laws, the system has evolved enough to trace this authority to not just a determinate superior but documents like the UN Charter that is the binding force among states. Article 5 of the UN Charter provides that the Security Council can suspend a member from the UN if preventive measures have been taken by the Council against such a member. Further, members that violate the obligations of the UN Charter may have non-military sanctions[23] imposed on them or military action enforced against them.[24]

Austin is naïve in iterating that the sovereign is not bound to obey but is only entitled to be obeyed. For any system, especially in the contemporary times, to work efficaciously without collapsing, such determinate superior must enforce law as well as abide by it. This view was liberally asserted by Hart in his opposition to Austin's command theory by categorising it as an "illusion". Hart opined that such a legal system that Austin propounds is idealistic and bound to failure. This is because in as much as for instance, legislators are tasked with the duty of creating laws, they are equally if not less bound to obey them. All in all, no one is above the law, even the 'sovereign' themselves, thus discrediting the sole grounding on which this idea of sovereign was established. By this logic, even the commands by sovereign that Austin specifies as 'laws' are not in fact 'positive laws' but merely an extension of 'improper laws.' Does this mean that there are then no positive laws at all?

This very concept is also applicable to international law. States are entrusted with the obligation to uphold their end of the bargain by honouring treaties and agreements but these are not merely courteous or performative in nature, even though 'good faith' is their guiding principle. These might not be binding in nature in the sense that the non-compliance does not result in evil threats or sanctions as specified by Austin, but as has been stated above, they do result in adverse consequences for the errant state.

With the popularisation of these supranational organisations, states have lost their 'absolute' sovereignty (both political and economic) because these organisations are potent enough to direct the governance in these states. The states are also bound to act in sync with these organizations because in a globalizing world, these organizations have taken up an important

[22] Charter of the United Nations, art. 41 and 42.
[23] Charter of the United Nations, art. 41.
[24] Charter of the United Nations, art. 42.

position and the states cannot defy it or act alone due to the ever-evolving challenges and threats in the international system. This suggests that the law governing this system, i.e., the international law has a bearing on the respective laws and rules within these states that constitute a part of a greater international community.

Conclusion

The purpose of this paper is not to pedestalize the UN by highlighting the positives to the existence of such an organisation that serves as a binding force of sorts in the international system. It is imperative to note that the UN is only as effective and powerful as its member states (especially the permanent members that contribute more and consequently reap more benefits than the developing/developed states) let it be, and is thus not devoid of the power dynamics. However, that does not outweigh the positives and is not enough to discredit the entire system and especially discredit the significance of 'international law' by placing it outside the purview of "proper laws".

It can be inferred that the system propounded by Austin may have been valid during the middle ages but can no longer be paralleled with the nuanced global world order in the contemporary times. Though sanctions may help in analyzing laws and their validity but the mere absence of sanctions cannot be a determining factor to invalidate a law. As is established in the paper, rules without sanctions should also fall within the ambit of "proper laws", provided that they prove to have their desired effect and people comply with such rules.

In summation, Austin's assertion is of significance to understand a political/legal system as it can be extended to firm up the understanding of international law that is grounded in a proper well-established system of law that is constantly evolving, as opposed to an antediluvian system with rules set in stone and no room for development. Thus, international law is not just a set of 'positive moralities', but has a well-designated set of laws with a commanding authority, and is the "law of nations" as is described by Jeremy Bentham, who coined it for the first time.