AUSTIN’S THEORY OF LAW

1. Also known as the imperative theory of law. According to Austin, positive law has three main features: it is a type of command. It is laid down by a political sovereign. It is enforceable to sanction.

2. The relationship of superior to inferior consist for Austin in the power which the former enjoy over the other i.e., his ability to punish him for disobedience. the idea of sanction is built in Austin in notion of command.

3. There are commands which are laws and commands which are not law. Austin distinguish law from other commands by their generality. laws are general commands. However there can be exceptions. There can exist laws such as acts of attainder which lack the character of generality.

4. According to Austin, law is law only if it is effective and it must be generally obeyed. Perfect obedience is not necessary without general obedience, the commands of law maker are empty as language which is no longer spoken. what is sufficient for a legal theorist is that obedience exists.

5. According to Austin laws are of two kinds –divine law and human law. divine law was given by god to men. human laws are set by men for men.

6. Human laws are two kinds: certain laws are set up political superiors and are positive law and there are other which are not set up political superiors. The second category covers voluntary association and clubs.

7. According to Austin, laws strictly so called are one particular species of set rules and consists of only those which are set by a sovereign power to a member of an independent political society wherein that person or body is sovereign or supreme.

8. A command is wish/desire to another so that he shall do a particular thing or refrain from doing a particular thing. in case of non-compliance with command, he has to for evil consequences. the sanction behind law is the evil which is to be influenced in case of disobedience.
JOHN AUSTIN:

1. John Austin was born in 1790. In 1818 he was called to the bar. For seven years, he practised law but without success. In 1819, he married Sarah Taylor, a woman of great intelligence, energy and beauty. When the university of London was founded, Austin was appointed as professor of jurisprudence and he spent the next two years in preparing his lectures.

2. His opening lectures were attended by John Stuart Mill, Romilly and others. After initial success, Austin failed to attract new students and he resigned the chair in 1831. Through the efforts of his wife, an expanded version of the first part of the lectures was published in 1831 under the title of “the province of jurisprudence determined.” Austin repeated the lectures in 1834 but without success. Hence he gave up teaching jurisprudence altogether.

3. Austin wrote with extreme difficulty. He imposed on himself the standards of precision and clarity that made work a torment. Between 1832 and 1859, he published only a couple of articles and a pamphlet—a plea for the constitution.

4. The second edition of the province of jurisprudence was published by his widow in 1861. She also reconstructed from the notes of her husband “lectures on jurisprudence” or philosophy of positive law” and published them in 1863.

5. Austin is called as the father of English jurisprudence and the founder of the analytical school. Allan prefers to call Austin’s school as the imperative school. It is contented that Austin does not fit exactly into any of the important schools.

AUSTIN THEORY OF LAW:

1. Austin most important contribution to Legal theory was substitution of the command of the sovereign for any ideal of justice in the definition of law.

2. He defined law as “a rule laid down for the guidance of intelligent being by an intelligent being having power over him” law is strictly diverged from justice. It is based on the power of a superior. This units Austin with Hobbes and other of sovereignty.
3. According to Austin laws are two kinds,

Law                 Law of God
                    Human laws

4. In Austin positivists of law, the law of god seems to fulfil too others function then that of serving As a respectable for Austin utilisation beliefs. The principle of utility is the law of god

Laws properly so called (positive law):

5. Human laws are divisible into

Laws improperly so called

6. Human laws are divisible into possible laws and laws improperly so called. The former are law set by political superiors to political subordinate or laws set by subjects as private person in prudence of legal rights granted to them.

7. Laws improperly so called are those laws which are not set directly or indirectly by a political superior. In this category are diverse type of rules, such a rules of clubs, law of fashion, laws of natural science, the rules of so called international law. Austin gave these the name of positive morality.

8. Laws improperly so called also included a final category called “laws by metaphor which covered expression of uniformities of nature.

9. According to Austin positive law has four elements

   - Command
   - Sanction
   - Duty
   - Sovereignty
10. According to Austin “law is a command of the sovereign “command implies duty and sanction law properly so called are species of commands. Every law properly so called flow from a determinate source or emanate from a determine author.

11. The power and purpose to inflict penalty for disobedience are the very essence of a command .the person liable to the eviler penalty is under a duty to obey it .the eviler penalty for disobedience is called sanction.

12. However all the command are not laws, it is only the general command which obliges to a course of conduct is law. 13. Austin provides some exceptions which though are not commands are still in the province of jurisprudence.

- Declaratory or explanatory laws
- Laws to repeal law
- Laws of imperfect obligation

13. Prof. Dias point out that distinction drawn by Austin was entirely arbitrary. He adds that the case of sanction is not the sole or even the principle motive for obedience. There are many objections to the association of duty with sanctions.

14. The view of Austin is that it is the sanction alone which induces men to obey law .This is not a corrective view. According to lord Bryce, the motives which induces a men to obey law are indolence, deference, sympathy, fear and reason. The last resort to secure obedience.

15. In the opinion of Duguit, the notion of command is not applicable to modern social legislation which binds the state rather than the individual. This view is also accepted by the supreme court of India.

16. Critics point out that law is not an arbitrary command as conceived by Austin but growth of organic nature. Law has not growth due to blind force but due to conscious efforts for definite ends.
CRITICISM OF AUSTIN THEORY OF LAW:

LAW BEFORE STATE:

1. The definition of law in terms of state has been utilised by jurists belonging to the historical and sociological schools. According to the school law is prior to and independent of political authority and enforcement. A state enforces it because it is already law. It is nor correct that it become law before the state enforce it.

2. Although Salmon is not a supporter of the imperative theory, he does not accept the criticism of historical school. He point out that the rule which were in existence prior to the existence of a political state were not law in the real sense of the terms. They resembled laws. They were primitive substitutes for law but not laws.

3. Lord Bryce writes,” law cannot be always and everywhere the creation of state because instances can be ad descend where law existed in a community before there was any state”

4. Pollock observes “not only law ,but law with a good deal of compelling its observance and induced before there was and regular process of enforcement at all”

GENERALITY OF LAW:

1. According to Austin, law is a general rule of conduct, but that is got practical in every sphere of law. Law is the sense of legal system can be particular. The requirement that law should be general is extremely difficult to maintain.

2. There are degrees of generality. Some particular precepts may concern especially important person as king. (e.g.) abdication act. It has to be considered as a part of law.

PROMULGATION:

1. Law is a command and that has to be communicated to people by whom it is meant to be obeyed or followed. This view of Austin is not tenable.

2. Promulgation is usually resorted to but is not essential for the validity of rule of law.

3. Chinese maxim – “Let the people abide by, but not be appointed of the law”.

4. Till 1870, in Japan – no promulgation to people.
LAW AS COMMAND

1. According to Austin, all laws cannot be expressed in terms of command. The greater part of legal system, consists of laws empower people by certain means to achieve certain results. To regard a law conferring a power on one person as in fact an indirect to another is to distort in nature.

2. The term “command” suggests the existence of a personal commander. In modern legal system, it is impossible to identify any commander in this person sense.

3. Laws differ as they can and do continue in existence long after the extrinsic of the actual law giver. The notion of an implied or facet command is suspect. An implied command is no command.

4. The bulk of English law has been created neither by ordinary legislation nor by delegation legislation, but by the decision of the courts.

SANCTION

1. Austin’s definition cannot be applied to a Modern democratic country whose machinery is employed for the result of the people.

2. The sanction behind law is not the force of the state but the willingness of the people to obey the same.

3. Force can be used only against a few rebels and not against the whole society. If law is apposed by all the people, no force on earth can enforce the same.

4. Sanction is not essential of law. If we accept Austin’s definition, the whole of law will have to be excluded from the scope of positive law.

5. The writers of historical, sociological and philosophical school of law criticise the idea of sanction as international law and conventions are not backed by only authority, yet they are obeyed like any other law of state Pollock observes “ Law is enforced on account its validity. It does not become valid merely because it is enforced by the state”.
NOT APPLICABLE TO INTERNATIONAL AND CONSTITUTIONAL LAW

1. International law is not the command of any sovereign, yet it is considered to be law by all conserved.

2. It does not apply to constitutional law also. As a matter of fact, constitutional law of country defines the power of various organs of the state. Nobody can be said to command himself.

3. Austin’s definition cannot be applied for Hindu, Mohammed an and the Canon law. These laws came into existence long before the state began to perform legislative functions.

DISREGARD OF ETHICAL ELEMENTS

1. The main criticism of Salmond is that the theory disregards the moral or ethical elements of law. The end of law is justice. Any definition of law without reference to justice is inadequate.

2. The view of Salmond is that Austin’s definition of law refers to “a law” and not “the law”. The term “a law” is used in a concrete sense to denote a statute while the term “the law” is used in an abstract sense to denote legal principles. A good definition of law must deal with both aspects of law.

PURPOSE OF LAW IGNORED

1. Austin’s theory of sovereignty ignores the purpose of law.

2. Burkland writes “This at first right, looks like circular reasoning. Law is law since it is made by the sovereign. The sovereign is sovereign because he makes the law. But this is not circular meaning. It is not reasoning at all. It is definition. Sovereign and law have much the same relation as centre and circumference.

SALMOND ON AUSTIN’S THEORY OF LAW

1. Austin’s theory of law is one sided and inadequate; it does not contain the whole truth. It eliminates all elements except that of force. Austin has missed the ethical element in law or the idea of right or justice.
2. Law is the declaration of a principle of justice. As Austin’s theory of law does not take into consideration the purpose of law, it is not an adequate definition of law.

3. Austin’s theory not only misses the ethical aspect of law but over emphasises on in imperative aspect.

4. According to Salmond, “All legal principles are not commands of the state and those which are at the same thing and in their essential nature, something more, of which the imperative theory takes no account”.

5. Law in abstract sense is more comprehensive in its signification than law in the concrete sense. To quote Salmond “The central idea of juridical theory is not lex but Jus, in gestez and recht”.

**MERITS OF THEORY**

1. Austin gave a clear and simple definition of law.

2. By separating law from morality, Austin tried to avoid a lot of confusion.

3. His theory has an important and universal truth – Law is created and enforced by the state.