

# Introduction

Jurisprudence has always been one of the most feared subjects in Law school. Due to multifaceted ideas by different legal philosophers simultaneously and cursorily taught, without justice being done to any, subject of jurisprudence has become very demanding and monotonous. By the way of this article, I look forward to discuss one of the most celebrated Legal philosophers, Austin's idea of "Law". I propose to do this without extravagant legal jargon so as to make it easier for the reader to sing along the complex ideas Austin presented.

John Austin (1790-1859) was a Legal Expert who greatly shaped Legal Systems all over the world through his **Analytical Approach to Jurisprudence** and **Theory of Legal Positivism**. The reader must not fret upon these hefty phrases as they will be discussed in coming paragraphs. In furtherance of his "Legal Positivism" theory was his notion "Law as a Command". Owing to his works he has been saluted as "**Father of English Jurisprudence**".

## What is analytical approach to jurisprudence?

**"Analysis"** is breaking down a problem into smaller problems so they can be solved individually. Analytical Approach in general parlance is a method through which a broad subject is broken down into smaller topics and subtopics in order to solve problems, conduct studies or resolve uncertainties.

In Austin's Analytical Approach, his effort is to gain a precise and in-depth understanding of Fundamental Concepts of legal reasoning. He chooses to exclude all external influence or even history and completely indulges in gaining

access to first principles of law as it is, regardless of its “goodness” or “badness” or “moral worthiness”. This approach leads to reading of **“Law as it is”** or **“Positum”** (and not the ideal law) also called “Positive Law”, advocated by Austin in his **Theory of Legal Positivism**. From now, we have a fair idea of what is Austin’s analytical approach which gives us the theory of legal positivism.

**Positive law** is basically human-made law. It includes statutes laid down by legislatures or rules and regulations by the human institution. Black’s law dictionary defines positive law as “Law actually and specifically enacted or adopted by proper authority for the government of an organized society.” This is principally how Austin frames his notion of Law, which fundamentally constitutes Positive Laws for him.

## What is “Law” For Austin?

**“Law is the aggregate of rules set by men as politically superior, or sovereign, to men as politically subject.”**

In other words, he says, laws are man-made rules by sovereign imposed upon the society it governs. He equates a law to a “command” by a body which is politically higher.

Thus we have following essentials

- Sovereign, which makes a
- Command, which imposes a
- Duty, which IF NOT followed calls for
- Legal sanction.

# “Sovereign”

According to Austin, every political set up has a sovereign power which is habitually obeyed by the people in the society. There is only one sovereign in the society and it can be a single person or a group. It is the sole source of power and creator of laws and thus there can be no legal limits or “de jure” limits to its power. There can, however, be “de facto” or physical limits since the extent of the coercive force of the commands and their obedience by people have practical limits.

A good example is a well-known quote of De Lolme- “British parliament can do anything but make a woman a man and a man a woman.”

The only boundaries of sovereign power are physical limits. If read into an existing situation, he refers to statutes, legislated by the parliament or any parallel body, which has to be obeyed by the people, regardless of how the statute is.

# “Command”

His definition is also called “Command theory” or “**Imperative theory**” of law.

“Imperative Law is a rule which prescribes a general course of action imposed by an authority which enforces it by superior power either by **physical force or any other form of compulsion.**”

# “Duty”

The command levies a “**legal duty**” on those who are politically subject to the “commander” who is sovereign. Every duty supposes a command by a sovereign by which it is created.

## “Legal sanction”

It is implied in the theory that this sovereign has with itself a power to punish or penalize for noncompliance of laws. This penalty or punishment imposed is called Legal Sanction. The dread of legal sanction, as an evil consequence in case of disobeying, is the motivation behind one's adherence of law and thus is a requisite part.

## How does it help us out?

By keeping law aloof from all external factors, Analytical Jurisprudence takes for granted, the history and development of the Legal system and concerns itself with basic concepts as the legal system is. It spares the reader from redundant information which might cloud his judgement.

It lays down a systematic explanation of actual facts of law and purely law. The first job is to lay down a scheme following which analysis is to be performed. Then the laws are broken down to fragments, each of which is separately explained. By keeping them isolated from ethical concerns, morality, and justice, an accurate meaning of the law is established.

The approach also helps in the establishment of the relationship between two or more concepts in a more lucid and fundamental manner.

This approach is often lauded for bringing precision, simplicity, and clarity in legal thinking. It gives clear, definite and scientific terminology. He removed many false notions which had obscured the meaning of legal terms.

He also made it very clear that the law is, after all, at the mercy of the all-powerful and condescending state and not the god or religion or even morality.

# Criticism

1. When Austin comments that sovereign is the creator of laws, he ignores the fact that foundation of law lies in common consciousness of the people which manifests themselves in customs and thus also overlooks **Customary law** which has always been widely respected and followed.

Personal laws like Hindu Law, Canon Law or Muslim law, existed long before a sovereign began to legislate, and yet, these laws were not only acknowledged but followed with immense devotion.

Secondly, Legal character of the law becomes obvious when it is applied by a Court of Law in the administration of Justice. Even Legal Sanctions, though created by the "sovereign" but are used through the courts. Courts may misinterpret a statute or reject a custom. In this process, the court often lays down Precedents or **Case-Laws** which are often religiously followed in future cases.

2. Austin's theory does not apply to Constitutional law. The sovereign, no matter how strong will always be subjected to the Constitution and the latter cannot be equated with a "command" of a state. It will be an absurd idea to say that Constitution, which is a command of the sovereign, will, in turn, direct the sovereign. Further, the Constitution is primarily the highest law and essentially comes before the state. It defeats Austin's preposition that Sovereign creates the law laid by the constitution.

3. The definition is majorly applicable on Monarchical Police State which authors the law and has the power to inflict evil on those who do not comply. In the modern era, there are empowering and enabling laws which confer privileges on the citizens. They are purely of permissive nature and give discretion to the individual himself. They cannot be called a command in their true sense.

For e.g. The law which gives me my right to vote does not command me to do so neither tells me who to vote.

The law which gives me a right to write a will does not penalize me if I don't.

There are laws based on the idea of protection like Laws against untouchability or bigamy.

4. Unlike what is believes, the sanction is not the only motivation behind adherence to the law. It is also respected out of prudence and morality. One does not normally enter into a second marital relationship during the lifetime of the first spouse because they are scared of being penalized but also because of love and respect. Also, if everyone decides to challenge the law given by sovereign, it is bound to collapse...legal sanctions have practical limitations.

5. Austin fails to recognize that International Law is not created by a sovereign and yet is recognized and appreciated by the majority of states as a law. There is no authority in International Arena which can enforce international obligations or sanction them. Yet, they are largely expected to be adhered to.

6. Law is not always "Generally" applicable to all. Many times, it is specially designed to address certain people or certain situations.

Divorce laws, for example, is only applicable to those who want a divorce.

There are laws which are corporate or position centric.

Austin fails to consider such specialized or particular laws in his definition.

7. Law, most importantly, is an instrument for the attainment of Justice. Any definition is incomplete if it fails to acknowledge that the end of law is justice.

8. Another limitation is the indifference towards ethical elements which determine the law. The ethics on which a law is construed are essential in order to truly understand the nature and requirement of Law.

It has to be borne in minds that despite the fair criticisms Austin's theory stands as one of the most important legal philosophies and some of its aspects still hold relevance.