**Positivist theories (Austin’s Imperative theory of law and Kelsen’s Pure theory of law)**

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**1. Introduction;**

Austin is called father of English jurisprudence and founder of imperative school. He popularized the **‘Imperative theory’** which was originated by **Thomas Hobbes** the central idea of the theory is law is **General command of sovereign enforceable** **with sanctions.** This theory got huge popularity. It was though criticized but the repose to criticism was very logical and appreciating. Because of the reason, it began to be followed practically in various forms of government. All the aspects of this theory have been Cleary and carefully elaborated below.

 **1) Imperative theory of law by Austin**

**1.1 Austin’s views about his theory**

Law is a command of which obliges a person or persons to a course of conduct. It was laid down by a political sovereign who is enforceable by sanction and people are obliged to follow it.

**1.2 Explanation of Imperative theory**

It does not relate to nature of law but with mechanism of enforcing law. Positive law consists of commands, setting out rules of conduct by a superior sovereign to the members of community where Author of law is supreme. Austin points out determinate and indivisible authority of a sovereign in his imperative theory. A sovereign runs the state with the power and authority. He acts as supreme legislature, executive and symbol of justice. He prescribes the rules and regulations to administer the state. Afterward, the enforcement of laws takes place with his power of sanction. All the people are bound to obey the order of the sovereign. Sanction can be activated against the rebellious elements.

**1.3 Peculiar Ingredients of Austin’s Theory**

Following are the key points of theory;

 **1) Sovereign**

 **2) Command**

 **3) Sanction**

 **1) Sovereign;**

Sovereign is a person habitually obeyed by the bulk of society but himself is answerable to no one. Austin places sovereign to be illimitable indivisible and continuous.

**Characteristic of a Sovereign**

 **A)** Sources of law

 **B**) Sources of power

 **C)** Indivisible power

 **A) Source of law**

A Sovereign is a source of law because he sets the rules and enforces them with sanction. Austin places sovereign as the highest legislative body. It is indeed, the sovereign who derives laws, sub-laws in order to maintain the law and order of the state. At the same time, Austin considers sovereign, an effective executive body who can enforce his laws with sanction. He believes that everyone in the state is habitually bound to obey the direction of sovereign.

**B) Source of power**

A Sovereign has determinate authority, acting as a ultimate source of power. So far as illimitability is concerned, Austin considers his sovereign without limits. He believes that sovereign is not under any duty. He commands duty and imposes sanctions

**C) Indivisible power**

A Sovereign power cannot be divided. He alones rules over the state. In the words of John Austin, another attribute of sovereign is indivisible. He alone rules the state. He cannot be dictated by anyone else. His words are considered prominent, effective and command rather than recommendation. There is none in the state to dominate or derive the power of sovereign. His power cannot be divided.

 **2) Command**

ASovereign should command in such a way;

A) **Order**

He must give an order. Austin believes that sovereign does not give recommendations or proposals. Since he is a determinate authority, he only gives order for the entire state of society which is obeyed by people.

B) **Superior to Inferior**

In command order must be given from Supreme to inferior. Austin believes that there should be hierarchy of offices, where order must flow from top to down. All the authorities must give the order as trust of sovereign.

C) **Not a wish list**

It should not merely a wish list or requisite.

 **General command**

According to Austin, command should not be limited to a specific group, but it should be applied on the entire society at large.

 **3) Sanction**

Command must be accompanied by sanction to enforce obedience. So, sanction means, to take strict action to enforce obedience. Austin further clarifies the situation that strict action should be taken against only offenders or violators of laws whereas the rest of people will habitually obey the order of sovereign.

1.4 **Crux of Theory**

 This theory can be concluded in these words;

A) Every law is a law of command.

B) All positive laws are general command of sovereign.

C) Every law has Stimulates code of conduct.

D) Every law has sanction in physical force of state.

1.5 **Merits of Imperative theory**

A) It is applicable to the modern society. It does not give relief to any religion. Law can only be enforced by threat of sanction.

B) Suitable for all system e.g. democracy, dictatorship due to its simplicity and consistency, applicable in entire society.

C) Clear definition of theory; Law can be obeyed in the state when it is applied with physical force.

**1.6 Criticism on imperative theory and reply on criticism**

Following question has been raised on Austin theory**.**

**A) Question;**

 This theory ignores customary law, religious rules and public opinion?

 **Reply;**

Customs, religious rules and public opinion are not law themselves but they are sources of law.

**B) Question;**

Theory fails to treat judicial precedents as law?

 **Reply;**

Judicial precedents (Judge made law) are also command of sovereign as he delegated his authority upon judges.

**C) Question;**

Sovereign dies politically or naturally but his laws remain alive, hence it cannot be called laws are command of sovereign?

 **Reply;**

The new sovereign who takes place of previous sovereign gives implied consent to the laws made by his predecessor. So laws remain commands of law.

**D) Question;**

Greater part of laws are not commands but rights liberties given to sovereign at large whereas imperative theory only concerns itself with command e.g. right to vote freedom of movement association and assembly?

 **Reply;**

 Lights and liberties are commands of sovereign in negative sense.

**E) Question;**

The imperative theory of law does not regard international law to be law, it is made with agreement and there are no sanctions associated with it but still it is law?

 **Reply;**

 International law is positive morality not law.

**F) Question;**

 **Constitutional law;** Constitutional law defines power and function of all orgasm of state and has no concept of sanction hence it does not come up to imperative theory’s definition of law.

 **Reply;**

True sanction behind law is not fear of punishment but the elements of public welfare and goodness behind it which makes bulk of people obey the law. Fear of punishment is driving force for few rebel elements while majority of the public obeys law because of its utility.

1.7 **Conclusion**

To conclude, the ‘Imperative theory’ of Austin seems quite close to the latest prevalent facts. Although this theory has been criticized by yet its followers have tried their best to respond the questions rise against the theory. Moreover, the utility of this theory in all forms of government which are being practiced in modern society overcomes the views of its critics. **Gray writes about Austin; “It was, indeed, a great blessing on jurisprudence conferred by Austin who brought up the idea of law as at the mercy of state.” Similarly ‘Professor Allen’ is of the views about theory in these words; “In order to analyze the systematic scheme of English jurisprudence, everyone is bound to see at Austin.”** Further, the subject matter of theory is being practiced in the almost all the state with different exposition. In U.K the Queen/King is determinate authority and all the orders are imposed after getting assent of sovereign. Queen/King enjoys privileges and immunities and she/he is not answerable to anyone. Similarly, the position of president in some states reflects on sovereign. His assent is required for most significant official functions. So, it can be summed up in these words that despite of having criticism, it is still accepted and practiced in huge bulk of societies in the world.