IS THE IDEA OF A SOVEREIGN AS THE SOURCE OF LAW USEFUL IN A REPRESENTATIVE DEMOCRACY?

Written by ***Aarnav Deshpande***

3rd year B.A., L.L.B (Hons.) Student, Jindal Global Law School, Sonipat, Haryana, India

John Austin published his work, 'The Province of Jurisprudence Determined' in 1832, wherein, he, agreeing with the likes of Hobbes and Bentham embraced the idea of law as a sovereign command.[i] They acknowledged that different perspectives and people might connote different meanings to law, but it would be in the general benefit of everyone to know the distinctions between the different kinds of law. It was in pursuance of this idea, of demarcating these distinctions that he laid down his 'Command Theory', prescribing the tenets of positive morality, positive law and those of commands, sanctions and the sovereign. Although we take a look at Austin's perspective on law and the sovereign later, it is to be understood that he gave paramount importance to the supremacy of the sovereign to make and prescribe the law in what he termed to be an 'independent political society'. This essay aims to take into deliberation, Austin's command theory and his understanding of what law and the sovereign is, arguing that a strict Austinian interpretation of the sovereign being the source of law in a representative democracy may not be useful, in today's more evolved jurisprudential environment, where it becomes exceedingly arduous to locate the seat of sovereignty.

In order to carefully scrutinise the role an Austinian sovereign might play in a representative democracy, it is imperative for one to delve deeper into the specifics of Austin's propositions in his command theory, while also considering the application of this theory in a representative democracy. For the purposes of this essay, it would be most useful to consider a representative democracy, like that of India, with a parliamentary and federal form of government in order to most intricately judge the feasibility of the sovereign as its source of law with the more specific challenges that such a democratic form may present.

Austin in theorising his understanding of what may be considered as 'law' aimed to provide a scientific and systematic account of law, by trying to explain what already existed as law. In its widest interpretation law is 'a rule laid for the guidance of an intelligent being by an intelligent being having power over him."[ii] He lays down the tenets of positive morality and positive law in order to "isolate what he thought was the proper subject of jurisprudence."[iii] Hereby, positive morality referred to all those things that Austin considered to not be law, rules that had been laid down by persons having power over others but not as political superiors, under this ambit came the likes of divine and customary law and the laws of nature. While on the other hand, he laid down the idea of positive law which according to him was made up of commands given by a political sovereign, or superior, to its political inferiors, backed by sanctions on anyone who were to disobey them. It was this position held by the sovereign of giving commands, as a political superior that accorded it the stature of being the source of law, according to Austin.

In being a political superior, able to command its inferiors, a sovereign need to possess certain essential features, failing which it may not conform with Austin's conception of a sovereign. Similarly, a strictly Austinian sovereign can be the source of law in a representative democracy only when it exhibits these attributes, which in my opinion is exceedingly difficult today, when democratic systems have evolved considerably as compared to when Austin laid down his Command Theory.

The first of these features would be that of the sovereign being a 'determinate human superior'[iv], consisting in the case of monarchies, a single person or a group of such persons as in the case of a parliamentary system. Secondly, the sovereign is to enjoy habitual obedience from those it seeks to govern, Ratnapala in his book states that "there is no Austinian positive law until the supremacy of one faction or the other is established." Further, the sovereign is not to be in the habit of obeying any other superior while also not being legally limited in so that the sovereign may not be constrained by any provisions of positive law, as this would be a paradox of a kind, displacing the sovereign from being explicitly supreme. Lastly, the sovereign is to be indivisible, in the sense that, the sovereign power is to be concentrated in one individual or group. In order to ascertain the functionality and existence of an Austinian

sovereignty in any state's system of governance, we need to apply these features to the source of law in such a state.

In doing so, we see that in a representative democracy, like that of India, where the legislators and governing officials are elected by those, they are supposed to govern i.e., the people, there is no one clearly identifiable sovereign that exhibits all the features of an Austinian sovereign. in a parliamentary form of democracy, the Parliament itself cannot be adduced to be the sovereign as it cannot be seen to be supreme in the strictest sense. The Parliament is formed of elected representatives who hold office only by the virtue of the fact that those they are to govern have put them there and also hold the power to vote these elected individuals out of office before the end of their term. Thus, raising the question of whether the people as electorates can be viewed as the sovereign, as the Parliament is no longer supreme nor unlimited by law. This too has to be viewed in the negative, despite Austin making the argument that the sovereignty rests with the "electoral body"[v], as he himself says that the sovereign cannot be in the habit of obeying any other political superior. Further, yet another seat of the sovereign in a representative democracy can be sought in the Constitution of a country, thought to be the highest law of the country, yet this too leads to no avail. The Constitution of a representative democracy in its prescriptions does not lay down commands for any inferiors to obey, neither do they prescribe any sanctions, explicit or implicit as in the case of transactional nullities, in case of disobedience, an essential most intrinsic feature of an Austinian sovereign. Furthermore, the amendable nature of Constitutions as well takes away any claim they might have to political supremacy. Considering these aspects, one cannot make a concrete deduction as to any one specific individual or branch of the Government forming the sovereign in a representative democracy, thus making it a futile effort to connote such an Austinian sovereign to be the source of law in such country or society.

Taking India as an example for the representative democracy in question, one can observe, not just in theory, the application of the aforementioned problems establishing a sovereign as a source of law. Adding to them would be the federal form of government that the country has adopted to distribute power between the central and the state governments, thus once again giving rise to ambiguity as to one clear political superior or sovereign. Even though Austin approached this predicament claiming that both these governments are jointly sovereign. This

interpretation yet again creates a conundrum as to where exactly the supremacy of power lies, along with the question as to who exactly forms the commanding body enforcing the sanctions.

The closest a representative democracy may get to having a purely Austinian sovereign that hails explicitly supreme in making commands of law to those politically inferior could be while in a state of emergency where all of the legislative power is vested in the parliament, more often than not with complete autonomy, without being answerable to anyone during such period. However, this too, to a large extent, may not satisfy Austin's tenet of the sovereign enjoying habitual obedience of those it governs.

As Suri Ratnapala says," Our search for the sovereign in representative democracy ends in hopeless circularity." A sovereign that complies with all the attributes prescribed by Austin is one that cannot exist in a representative democracy, such as that of India, as such system entails a number of dynamic elements that do not fall in consonance with the ideas conceived by Austin. Modern democracies aim to put into place safeguards that ensure individuals or groups on positions of power do not go unchecked in the arbitrary use of the same. Austin's tenets of the sovereign being legally illimitable and indivisible cannot be applied in more 'sophisticated' systems of representative democracies. Therefore, trying to conceptualise the sovereign as the source of law in a representative democracy would prove to be a rather futile attempt in so as the, the seat of the sovereign itself in such a system cannot be defined. Laws in modern democracies exist independent of those legislating and adjudicating them, staying constant till they may be amended in accordance with the prescribed procedures. Austin's theory, though an important contribution to legal philosophy, can be seen as outdated and applicable only in a theoretical sense

ENDNOTES

[i] Suri Ratnapala, Jurisprudence 36 (3 ed. 2017).
[ii] John Austin, Austin: The Province of Jurisprudence Determined (W. E. Rumble ed., Cambridge University Press) (1995)
[iii] Ratnapala, supra note 1, at 38.
[iv] Ratnapala, supra note 1, at 42.
[v] Austin, supra note 2.