

**AIRSTRIKES: AN ANALYSIS THROUGH AUSTIN'S THEORY OF  
COMMAND**- Rishi Nandy<sup>1</sup>**Abstract**

This paper focuses on the regime of airstrikes and the analysis of the same in the view of John Austin's theory of Command. The legal aspect of airstrikes is also looked into with a special emphasis on international law and explanation of the very same using real life case fatalities across the whole world. Airstrikes in themselves play a very vital role and are a very integral part of a strategy in warfare. Airstrikes have the ability to bombard an area to the extent that every life present can vanish from existence in a mere matter of seconds. Just as it was seen in Hiroshima Nagasaki bombing, that within seconds the whole city of Hiroshima Nagasaki was flattened by an atomic bomb which claimed approximately 80 thousand lives and leaving around 35 thousand people injured.<sup>2</sup> So many innocent lives were lost due to that one airstrike which makes us question the legality of the whole regime of conducting an airstrike and with whom does the whole responsibility of the so-called collateral damage lie.

**Introduction**

John Austin's theory plays a very important role in explaining the jurisprudence in the modern-day world. He is the founder of the Analytical school of law and is also known as the father of English Jurisprudence. Austin built on the work of Jeremy Bentham which laid down the foundation of expository jurisprudence. Being a positivist, Austin showed it as a whole of what law actually is as opposed to natural or moral law of what it ought to be. According to him, the law is a command of the sovereign imposing a duty which is enforceable by the backing of a sanction.

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<sup>2</sup> <https://www.bbc.co.uk/newsround/33733410>

The legality and the situation with regard to airstrikes becomes really very important to be seen in the light of John Austin's theory as the whole regime of airstrikes hold so much power in warfare and otherwise that its very basic nature and accountability needs to be seen and be ascertained in the furtherance of humanity.

### **Austin's Theory of Command**

It was Austin's attempt to give the world a concrete positivist theory of Law. He believed that the main subject matter of jurisprudence is based on positive law. The whole idea of study and analysis of positive law is based upon the law which simply and strictly so called, that is, the law set by political superiors to political inferiors. He defined law as a rule laid for the guidance by a superior intelligent being of an inferior intelligent being with the superior intelligent being having power over the latter.<sup>3</sup>

After continuous research, it was concluded by Austin by the way of giving his conception of law in a reduced simple statement i.e. "Law is the command of the sovereign backed by sanctions." It was Austin's belief that every law strictly so called or positive law is a direct command of a sovereign who is a political superior to persons within a state. Hence, Austin's theory is thus backed by these four elements-

1. Command
2. Sanctions
3. Sovereign
4. Duty

The will of the Sovereign is expressed in the form of a command. It is a wish or desire by a rational being put forward by him which needs to be forborne by another rational being or, it can also be explained as an expression of wish or intimation of not complying with the wish by the means of words or signs. Hence, a command carries with itself a threat of sanction which may be imposed if the command is not being complied with. Austin argues that Command, duty and sanction are all logically equivalent to one another. It is believed that all three are linked and cannot be separated from one another. They also represent the basic elements which are needed to be present in an order. Every directive acts as a command; the

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<sup>3</sup> Austin, John. (1832) 1955. *The Province of Jurisprudence Determined*. London: Weidenfeld and Nicolson.

threat of evil is a sanction on non-compliance and the person commanded is under a duty to fulfil the obligation.

Austin also addresses in his approach, the law from superiors to inferiors. In his theory, the superiority or inferiority is not characterised by differences in rank, wealth or virtue etc. the main distinction lies in the powers held by them. Whosoever can oblige any other to comply with the wishes is considered to be the superior of the other and thus, the party who is vulnerable to the evil is considered to be inferior.<sup>4</sup>

A command is further divided into 2 segments which are 1.General Command and 2.Specific Command. General command is the basic rule of guidance which needs to be followed at all times until and unless the right to perform the task has been revoked. Hence, it needs to be followed at all times to come. Whereas Specific Command is considered to be specific act permitted to do for a particular period of time, i.e., the enjoyment or prohibition of the act is exhaustive,

Austin thinks of some cases as very minor and doesn't include them in his command theory, they are the legislative acts which explain the laws, repeal laws or which impose imperfect duties.

### **Criticism of Austin's Command Theory**

The whole idea of command in Austin's theory is a bit over emphasised as though only through its mechanism will a person be able to influence another, whereas the fact which remains is that now in the modern-day societies, law as a whole construct is a general will of the people living in it. Hence, the command aspect loses its importance in the modern setup.

It is also seen that for anything to act as a law, it needs the four key elements of command, sanction, duty and sovereign, but, in the case of international law, the backing of a law by sanction is thoroughly lacking. Hence, as per Austin, International law is not to be treated as a law but is to be treated as a part of morality.

One of the biggest flaws which remain in Austin's theory is that the relationship between law and morality is completely and utterly ignored. In short, according to him, law is not to be concerned with morals. In a progressive society, morals and ethics play a very important role

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<sup>4</sup> <http://carneades.pomona.edu/2018-Law/02.Austin.handout.pdf>

in framing laws. Morals and ethics can also be considered as the basic feature or elements on which a law is framed.

Lastly, the governing of the commission of an act wanted by the sovereign is only governed by the sanctions according to Austin's theory, but the real-world fact remains that the commission of an act is done due to various reasons as well other than just the threat of sanctions. It includes mutual respect, understanding etc. just to name a few. Hence, the guiding principle of a lay man following the law is subject to personal behaviour and will vary from person to person.

### **Current Scenario and Legality of Airstrikes**

Airstrikes have been increasing every second each day. On 9<sup>th</sup> August 2018, a bus carrying children, who were under the age of 15 Years, was blown by an airstrike in Yemen, killing 29 kids and injuring a few, the attack was carried out by the US-backed Saudi coalition. That year itself, Yemen was bombarded with airstrikes approximately 258 times in the month of June, taking many innocent lives.<sup>5</sup>

On May 15<sup>th</sup> 2021, an airstrike by Israel in Gaza killed 42 people out of which 10 were children. The death toll due to these airstrikes keeps increasing every day. To this, the United Nations Secretary General Antonio Guterres addressed the Security Council and urged to settle the matter through mediation rather than being actively involved in the ceasefire activities. The reply to it was that the Israeli Prime Minister stated that it is only acting out of self-defence.

The law regarding airstrikes is quite vague and raises a lot of significant questions with regard to its legality. According to Article 2 (4) of the UN Charter, it prohibits the threat or use of force and calls on all Members to respect the sovereignty, territorial integrity and political independence of other States, hence stating that it cannot be an aggressor without the consent of the other state.<sup>6</sup>

The exception of the same is an act which is done in furtherance of self-defence given under Article 51 which states "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the

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<sup>5</sup> <https://www.theguardian.com/world/2018/aug/09/dozens-dead-in-yemen-as-bus-carrying-children-hit-by-airstrike-icrc>

<sup>6</sup> <https://www.un.org/securitycouncil/content/purposes-and-principles-un-chapter-i-un-charter>

United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”<sup>7</sup> Or acts which are prescribed and authorised by the Security Council under Article 42 which states “Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”<sup>8</sup> This proposition as a whole becomes very vague and questionable as most of the states resort that they acted in furtherance of self defence because for an act of self defence to be legal, the threat should be real and imminent on the face of it. The International Court of Justice continually maintains that alternative remedies should be looked for before taking any kind of serious action which possesses the ability to harm a large population.

The redressal mechanism of violation for the provisions is similar to when any of the provisions of international law are violated. The violation of any provisions of the UN charter may attract a motion in the United Nations General Assembly by the aggrieved parties and will be then subjected to debate. Individuals who have committed crimes of aggression can also be prosecuted by the International Criminal Court (ICC).

### **Airstrikes In Light Of Austin’s Theory**

Airstrikes is in itself a command which is given by a sovereign nation. The innocent lives lost due to the same have not committed any wrong but still they are subjected to such aggression which they do not deserve. As stated by Austin, a command is always backed by a threat of sanction but here, killing innocent people and taking innocent lives do not count and the oppressors roam free. An airstrike is to be treated as a specific command as its forbearance is for particular amount of time and is not general in nature. In reports, innocent lives are stated as collateral damage to achieving their target. The oppressors roam free until and unless they have a mass genocide on their hands.

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<sup>7</sup> <https://legal.un.org/repertory/art51.shtml>

<sup>8</sup> UN Charter

Austin treated International Law as a part of morality as it lacked backing by any form of sanction. This in its utmost practical aspect becomes very true as seen that the Trump administration had put travel sanctions for International Criminal Court personnel who were involved in investigating the U.S. troops and its allies for possible war crimes in Afghanistan and elsewhere.<sup>9</sup> The same was done by the U.S.A. for ICC personnel investigating war crimes by Israel in the Palestine region which came into light after the death of a number of people in the Palestine region due to the airstrikes conducted by Israel. Hence, it clearly is seen that backing international law with sanctions is very tough and is usually opposed to by the governments of the respective states as well as its allies.

One part where the concept and the act of airstrikes are in absolute sync with John Austin's theory is where Austin has completely ignored the relation between law and morality. Airstrikes done where a lot of innocent lives including the lives of small children are at stake cannot be termed as an act which is morally right. Innocent lives taken being termed as collateral damage for the one trying to achieve a larger goal is truly something which is utterly against the basic nature of humanity. It was clearly seen that the effect of the act is very devastating and the result of the same cannot be predicted, as it is established that the U.S was trying to kill 41 militants but ended up killing 1147 innocent lives just to achieve their target.<sup>10</sup> It was a command for them to kill the dangerous militants threatening the nation but to achieve the very same objective by killing and taking innocent lives who do not have anything to do with it is just on the face of it is either a gross negligence or just another classic case of turning a blind eye towards the truth.

### **Conclusion**

It can successfully be concluded that the situation regarding airstrikes is very vague and needs a lot of work. The legality of the same on an international level is not strong and needs proper guidance. The basic human rights as portrayed in the Universal Declaration of human rights are very important to be upheld on the international scale. Violating the basic right to life of an innocent person and then treating it as a collateral damage is highly against the basic elements on which the humanity stands. Being given such a great power to conduct an act such as an airstrike in itself attracts great responsibility and needs to be thoroughly accountable.

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<sup>9</sup> <https://www.aljazeera.com/news/2020/6/11/trump-authorises-sanctions-against-icc-officials>

<sup>10</sup> <https://www.theguardian.com/us-news/2014/nov/24/-sp-us-drone-strikes-kill-1147>

In an act where the act of airstrikes is widely violative of the law and is carried out in furtherance of a personal prejudice, just as it is done on the domestic scale, the person responsible for carrying out or the person giving the heinous order should be considered as a war criminal and be prosecuted under the international law in the International Criminal Court (ICC).

Austin's theory of Command is not suitable when it comes to the regime of airstrikes because the act in itself has the potential for mass destruction of life and property. Hence, it becomes very important to be wise and use morals while carrying out any of the activities which hold the power of such mass destruction. Only the law or a command as stated by Austin cannot be a guiding force to carry out such an act. With that said, Austin is regarded as one of the most influential jurists of all time. It might seem that Austin's theory is not applicable in the modern progressive society but it is by his virtue that the law that we know today has grown leaps and bounds.

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