WHAT IS SOVEREIGN POWER

``Jherign – The sum total of compulsory rules which prevails in a state and the state is a sole source of law.''

`` Dargburg – That ordering of the relation of life which is upheld by the general will.''

What is meant by sovereign political authority. Let us now consider.

First question arises what the people is in the opinion of Holland, - ``a people is a large number of human beings united together by a common language and by similar customs and opinions resulting usually from common ancestry, religion and historical circumstances.'' Holland further thinks what the state is - `` State is a numerous assemblage of human being generally occupying a certain territory amongst whom the will of majority or of ascertainable class of persons is by strength of such a majority or class made to prevail against any of their numbers, who oppose it.'' Holland says a state may be co-extensive with one people as is now in case of French or may embrace several as in the case with Austria. But Aristotle denies that a state can be composed only of ten person or that one-lac persons can be comprised in a single state. One people may enter into the composition of several states, as do the poles and Jews. So, a people is truly said as a natural unit but a state is an artificial unit. There must doubtless have been people before there were states i.e. to say that there must have been group of human being united by similarity of language, custom and opinion before there arose amongst them an organization for enforcing the opinion of the majority or those of a government, acquiesced in by a majority upon an unwilling minority. It is impossible to affirm with savingy that a people which he calls `` An invisible natural whole'' never exists as such, never that is to say without its bodily form the state. Aristotle speaks of the Arcadiam as remaining in till (founding of Megalopolis) they became a)(o/\is nor we can follow savingy regarding the production of the state as the highest stage. In the procreation of law, morality may precede but law must follow, the organization of a political society.

Of such a society, the following definitions have been giving at various periods: -

Aristotle - `` The perfect community which arises from several villages is already a city, which achieves so to say, the fullness of complete self sufficientness. Brought into in the bare needs of life. But finding its true object in time promotion of a noble life.''

Hobbes – ``The common wealth is one person of whose acts a great multitude by ……. Covenant one with another have made themselves everyone the author to the end. He may use the strength and the means of them all, as he shall think expedient for their peace and common defense.''

S.C. of U.S.A. - `` a state is a body of free persons united together for the common benefit to enjoy peacefully what is their own and to do justice to others.''

Bluntscchli - ``A state is the politically organized impersonation of the people of a given country.''

Jhering - `` A state is a form of the regulated and assured exercised of the compulsory force of society.''

Welffs – ``Societies hominess communis boni coniunctis viribus premevendi cause contracta civitas est.''

The origin of states had been a favorite subject of speculation. To the Greeks-the organized city government in which they delightedly seemed the result of super human wisdom. It was a common place with their earlier poets and philosophers to ascribe a divine origin to states and to legislation; every law says – Demonthenes – is the gift of god and decision of sage's, Later speculators put their ignorance under pious allegory, have explained the rise of political society in the hypothesis of an origin contract, the covenants of which they have set out with vast, if misplaced ingenuity. The hypothesis is clearly though by no means for the first time stated by Grotius. Every state is divisible in two parts, one of which is sovereign-other is subject. The term sovereign seems only to

have come in to use in this sense in the time of Louis XIV and firstly it is used by Hobbes & Leviathan, the sovereign part, called by Bodin-``Maiestas'' is defined-by him ``summa in cives as subdites Legibusque soluta potestar'' Grotius calls it-summa protesters which he defines as being- illa cuius actus allerius iuri non subsunt it allerius voluntaris humane arbitiro irritic possient reddi'' Hobbes define it-what he is pleased to call a city as one person whose will by the compact of many men is tobe received for the will of them all. So as he may use all the power and faculties of each particular person the maintenance of peace and common defense.

The sovereignty of the ruling part has two aspects it is external-as independent of all control from without –II internal as paramount over all action within. Austin expresses – that its double character by saying that a sovereign power is not in habit of obedience to any determine human superior to which the bulk of a subject society in habit of obedience.

External Sovereignty: - Holland further says, without possession of which no state is qualified for membership of family of nations is injoyed most obviously by what is called and known as a simple state –i.e. y one which is not bound in a permanent manner to any foreign political body`` States which are not simple are members of system of states''- these may be protectorate, federation, incorporate union etc. These are not absolute sovereign in this sense.

The question which arises with reference to internal sovereignty relates to the proportion borne by the sovereign part of the state to the subject part, in other words to forms of Government-i.e. Democracy aristocracy, communistic, kingship etc. Whether the ruling power be as widely diffused as possible or be concentrated in the hands of a depot, makes but little difference for the purpose of our present enquiry, it is by the sovereign & that sovereign one individual or a aggregate of individual, that all law is enforced, so Hobbes says are not properly laws. But qualities that dispose men to peace and to obedience, when the common wealth is once settled, then actually laws and not before, as being thus the commands of the common wealth.

Considerable doubt has been thrown upon the doctrine that a part from the existence of state and of a sovereign power within it there can be no law because all laws are rules enforced by such power. Real difficulty in applying this doctrine is pointed by Henry Maine with the fertility of illustration and cogency of agreement for which writing are so conspicuous, he asks in what sense it is true that village customs of Punjab were enforced by Ranjeet Singh. He denies the oriental empires whose main function in the levying of armies and collection of taxes, busy themselves with making or enforcing legal rules nor will he concede that it is a serious answer to his objections to say that,`` what a Govt. does not forbid it allows, he would almost restrict to the Roman empire and the states which arose out of its ruins the full applicability of aussinian conception of law, as applied to other political societies. He works upon it as an idea or abstraction related to actual phenomenon as are the axioms of mathematics to the actual conclusion of matters or the postulates of political economy to the dealing of ordinary life.

Sir Henry Maine did good service by showing that the obligation of law rest everywhere and at all times as immediately and obviously upon a sovereign political authority as it does in England at the present day. In guarding against a crude application of doctrine of sovereignty. This great jurist has, however, perhaps hardly done justice to its essential truth, the reply, which we would venture to make to; his remarks upon this point would be to the following effect. With reference to the Western nations we would submit that dependence of law upon sovereignty was as obvious in Attica- and Lacedala as it ever was under Roman Empire. A law as carried by Pericles – or as imagined by Plato would confirm to Austin's definitions as completely as would constitution of Marcus Aurilius.

With reference to the relation of great oriental tax gathering empire of the village customs of its subjects or to the more distinctly formulated laws of conquered provinces, it is necessary to draw a distinction, disobedience to the village customs or provincial law may either be forcibly repressed or it may be acquiesced in by local authority. If it is habitually repressed by such local force it follows that local force must if only for the preservation of peace be supported by

whose strength of empire. In this sense, the humblest custom is being enforced by the sovereign. If on the other hand, disobedience be acquiesced in the rules which may be broken with impunity are no laws. It is convenient to recognize as laws only such rules as can reckon on the support of sovereign political authority. Although there are states in which it is difficult to ascertain what rules answer to this description.

Now, the question arises about the sovereignty. What it is. Pro. Keeton has described it as follows: - `` in dealing with formation of the modern state. It was noted that Hobbes declared that a modern state came in to existence when a number of individuals agreed together to surrender their rights of self government to some persons or group of persons to whom was entrusted the task of governing the whole community that individual or group of individuals is termed by Hobbes – the Leviathan or Mortal God, who must use the power entrusted to him for the common security. It is obvious that this power must be extensive and unquestioned within that community. What is the extent of power so conferred has provoked endless discussion. In the Middle Ages secular as distinct from religious power was never regarded as absolutely his exercise of power was stereotyped by the fixed condition of Lords & specifically Lords of manors may have considered himself entitled to resume full rights of possession over the land in villages on the death of possessor. But their powers were restricted and were regulated by feudal laws. This feudal law prescribed what aids are to be extracted from under tenants. If the king or duke wants more they must consent to the levy, if they refused it they are not bound so with legislation. Thus, in medieval Europe, various local governments existed with over- lapping authorities each limiting the authority of Magnate immediately below and each in turn being limited by the authority of magnate immediately above and all being limited by the law and every Christian was subject to the law of Church. Here was a further overlapping of secular and ecclesiastical jurisdiction.

The Renaissance finally destroyed this theory of society and number of nations states emerged each acknowledging no checks what ever upon its internal authority, with in those states existed Monarch or small group of persons having absolute authority and constantly altering the lives of their subjects to fit their national policies. Thus, in Germany the princes by policy of Cujus regio Ejus religion laid down in treatise with each other agreed that each prince had sole and unlimited authority within his domination to establish his own form of religion so in England the established Church came into being at the will of the monarch satisfied in the supreme deliberative body on the state. These new activities required a new theoretical basis of sovereignty to keep fit the changed facts of political life arose the modern doctrine of sovereignty between 1530 to 1597. Bodin made a complete and scientific survey of politics for present purpose. His theory is most needed. He takes the pride in the fact that he is the first tourist to attempt to define this term, as follows: - ``Majesta est summa in civics as subditos Legibus qne soluta protestas.'' As far as sovereign body (which Bodin used and envisaged as an absolute monarch. Since this was the contribution of the Renaissance to politics is concerned, it is the source of all law and its law making power is unfiltered. Nevertheless the law of nature), which has considerably modified operation in Bodin treatise should impel a sovereign to keep faith with another sovereign and to respect proprietary rights. Thus the distinction between the proper exercise of sovereign power and tyranny is one of natural and not positive law. It is of course, obvious that Bodin's position differs fundamentally from that of Machia Velli for which the latter can conceive of no moral or natural restraint upon the actions of his sovereign again (visualized as absolute monarch). Bodin on the other hand insist upon then and so delineates the scope of law of nations.

Bodin is thus the originator of all modern theories of the state. Succeeding generations have modified his original conception to substitute a body ultimately responsible to people as a whole for his absolute monarchy. But his attributes remain practically unaltered. Hobbes` indebtedness to Bodin is clear and following Hobbes we have Bentham and ultimately John Austin whose theory of sovereignty is still the starting point of juristic speculation.

Austin's definition of sovereignty is as follows: -`` If a determinate human superior, not in habit of obedience to alike superior, receives habitual obedience form the Bulk of a given society that determinate superior is sovereign in that society and the society including the superior is a society political and independent.'' According to Austin, sovereignty has two aspects. Firstly, external aspect implies that supreme political authority is not in habit of obedience to any political superior and secondly its internal aspect implies that supreme political authority habitually receives obedience from the Bulk of its subjects. It must be noticed that sovereignty as conceived by Hobbes and his successors have three main characteristics -:

1. That sovereignty within states is essential
2. That sovereignty is indivisible
3. That sovereignty is not unlimited and illimitable

Austin has not escaped criticisms-, which are as follows: -

1. **Essentiality**: - Until recently this characteristic has escaped unchallenged. It seems clear that within every community politically organized there must exist some persons or group of persons whose authority is unquestioned and whose will habitually prevail within that community. In his inaugural address as Dean, faculty of law of London University in 1924, Dr. Jenks attacked the idea that sovereignty is essential. The burden of his argument was that sovereignty is at bottom, merely organized force and that the monster which we have raised in our midst and closest with a plentitude of power. What Hobbes termed Leviathan is not necessary and permanent conditions of our political and legal existence. But a transitory of it is recorded in Chinese philosophy - `` The emperor said- Kaou-Tiao that of these ministers and people hardly is found to offend against the regulation of government is owing to your being the minister of crime and intelligent in the use of five punishment to assist in the in calculation of the five duties with the view of the perfection of my Govt. and that through punishment there may come to be no punishment. But the people accord with the path of mean continue to be strencious.'' Both this Jenk idea and Chinese philosophy give a plain hint of a law of nature or system of precepts of pure reason and not because which all men obey simply because they are precepts of pure reason and not because force compels obedience. But we are a long way yet from the time when the lion and lamb will lie down together and meanwhile sovereignty remains essential.
2. **Indivisibility**: - In each state it is asserted that there is one person or Group of person, which is politically supreme and one only. This seems obvious two equal and opposite conflicting will nullify each other. Critics view the matter from another angle. They consider the English constitution and come to the conclusion that legislative authority must be in the crown and parliament, whilst executed sovereignty resides in crown. Parliament is part sovereign in this field. From this it follows that parliament is supreme in its own sphere to some extent and crown is supreme and uncontrolled within its sphere. This view is held by two eminent authorities such as – Arson and Salmond. But it seems to be based on misconception of Austin's analysis. As far as English constitution, at least is considered is the right one. In the first place the division of the province of Govt. into self-contained non-overlapping sphere is largely illusory. The executive frequently exercises legislative function just as legislature frequently exercises executive functions. According to Arson and Salmond, therefore, we should be compelled to say that sovereign executive, in legislating, was subordinate to the sovereign legislature, just as the sovereign legislature in performing executive, acts, is subordinate to executive sovereign. I.e. a body can be sovereign or can set of purposes and subordinates for another set again assuming a conflict between the executive and legislature with respect to boundaries of their spheres, according to what principles will it be settled. In other words, whose will eventually prevail and assuming any decisive at all what becomes of the pretensions of sovereignty of the losing branch of the Govt. To regard both executive and legislative Supreme each within its own sphere, in England, seems to ignore the main lesson of constitutional history. That such views were formerly held in England with respect to sovereignty (i.e. The Staurt exaltation of the prerogatives) and that the issue has now been decided in favor of Parliament,

which alone is sovereign in England. To say that a body is sovereign with respect to with respect to certain acts and not with regard to others implies that the body may not perform the forbidden acts because some exterior authority will restrain it and so eventually that the exterior authority and not our original body, is sovereign. The point became clearer when English constitution is considered. The crown habitually perform certain acts with the necessary permission of parliament if it did them without permission parliament would restrain. It was one of reasons why the civil war was fought and the settlement of 1688 was necessary. On the other hand if parliament decides to abolish certain acts of it nothing could restrain it-certainly not also executive. Thus, the distinction between legislature and executive sovereignty is fallacious with respect to U.K. constitution. A further attempted elaboration of a possible judicial sovereign in England is in admissible for similar reasons. It is essential that a rule enunciated on the sovereign should not be subject to exterior contradictions, yet all decision of house of Lords (asserted judicial sovereign before 1911) were subject to immediate nullification by act of parliament, more difficult question arises under federal constitution which gives supreme control to all three wings and least interference is prohibited by each other-, so the problem is this whether sovereignty is divided here or not – and who is proper sovereign here, Keeton along with Eastwood `` speak about Austin ion theory of law and sovereignty and said that Indian states present a problem which is difficult for solution and which cannot be a reconciled with the Austionian theory of individual sovereignty. Sir Henry Maine-has said (1) that here is India sovereignty was divided between state and Indian Empire. But this view is altogether not free from difficulty.

Because a British dominions have many characteristic of state personality. Yet there are not independent being unit of British Empire. From the stand point of jurisprudence this legal system can be considered as a separate unit and thus it would seem from the legal point of view, at any rate the characteristic of freedom from control, in the regulation of external affairs is no more important than that of immunity from external control.

3) **Illimitability:** - It is implied that the authority of the sovereign is free and uncontrolled and indefinite, in extents. Thus, everything may legislatively be made as object of sovereign power even though for the moment it is not subject to regulation issued by sovereign. Nevertheless this assertion of illimitability must be understood to accept certain limits inherent in the nature of the sovereign person or groups and which are limitations in fact and not of law. Thus, an 18th century sovereign could not legislate with regard to Television since such an object of legislation was beyond the sphere of his experience. This is a limitation dependant upon the limitation of the intellect of the sovereign himself, again there are some laws which the sovereign does not frame because they would meet with general condemnation from the community subject to them. Thirdly, certain rules are not adopted because they would conflict with the International Security of state. Lastly, it is impossible for the sovereign to legislate with the object of changing the natural order of universe. But it has only been done in one time when Joshnia commended the sun and stands till and the circumstances were exceptional and hardly likely to reoccur. It was formerly held that those were rules, which the sovereign could not make because they conflicted with some higher law. Thus, Coke held that an act of parliament is void which conflicted natural law.

On occasions, the sovereignty has ever attempted to limit its own authority by removing certain topics from its sphere of future action. A more serious criticism of Austin's] sovereignty is based upon fact that Austin draws no distinction between legal and political sovereignty. This point is developed by Pro. Dicey with extreme lucidity. The power of parliament to regulate the life of the community by means of laws it frames is complete and untrammeled. Parliament is therefore the legal, sovereignty in England on the other hand that body is politically sovereign or supreme in a state the will of which is ultimately availed by the citizen of state. In this sense, in U.K. people exercise political sovereignty. But this political sovereignty is just a state conception as legal sovereignty.

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1. Minutes in Kathiywar (Report from India state committed)

It describes only a state of affairs found to exist in England at the present moment. Assuming a small party of military, organized persons coerced the electorate, and eventually dominated the constitution that party would be actual political sovereignty and it will be open for that party to acquire legal sovereignty as well by lacking necessary constitutional changes. It is, therefore, clear that existence of political sovereignty is itself a limitation of legal sovereignty. Political sovereignty is the fact of unlimited dominating conscious force within community. Legal sovereignty is a legal conception. The lawyer's explanation of the method in which that physical force transmits itself into legal consequences.

Now, we must see the position of U.S.A, where all the three wings of the government are free from control of each other. The state as well as federal cannot trespass within the jurisdiction of other. Judiciary is independent also. The existence of all these limited authority is derived from written constitution which can only be modified by rather complicated body comprising 2/3 majority in both houses plus 3/4 majority (as in India) or consent of states. This body has proposed a score of amendments where therefore is legal sovereignty in federal constitution as in U.S.A. It is not state government not federal or union government nor executive nor administration nor judicial etc. because authorities of all are limited. Sovereignty can hardly be said to reside in constitution for this inanimate can, therefore, exist no power is its amending body, since the authority of it is absolute and uncontrollable. This seems to be only tenable explanation according to all conceptions of sovereignty so far expounded. There exists, however, a different theory of sovereignty enunciated by Brown. Briefly it regards the state itself, as a corporate entity with an organized will. The members of this entity are the citizens of state and this body is sovereign. It expresses through definite organs to each of which is delegated some governmental power. According to this hypothesis the constitution of U.S.A. would constitute the terms on which members of the Corporate State Associate and these can only be altered by the expression of the will of members in prescribed form. The state, however, differs from other corporations. In that there are no limits to its authority. Legal sovereignty implies ``absolute power within the realm of law i.e. and unfettered power of promulgating and enforcing legal rules.'' Political sovereignty implies `` the practical power of dominating a political society.'' In jurisprudence we consider only the former. But both operate completely within the orbit of sovereign state.

Hence, it may be said that the real sovereign power is that individual or body of individual which govern the state or a particular territory. That body or individual is supreme in the governance of the state or particular territory.

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