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Kinds of Sovereignty

The five different kinds of sovereignty are as follows: (1) Nominal arid Real Sovereignty (2) Legal Sovereignty (3) Political Sovereignty (4) Popular Sovereignty (5) Deo Facto and De Jure Sovereignty.

(1) Nominal arid Real Sovereignty:

In ancient times many states had monarchies and their rulers were monarchs. They wielded absolute power and their senates and parliaments were quite powerless. At that time they exercised real sovereignty. Therefore, they are regarded as real sovereigns. For example, Kings were sovereigns and hence they were all powerful in England before fifteenth century, in U.S.S.R. before eighteenth and nineteenth centuries and in France before 1789. The state of affairs changed in England after the Glorious Revolution in 1688.

Now the King is like a rubber- stamp. The British king has a right to encourage, warn and advise his Ministers or seek any information about the administration. Except these ordinary powers, all other powers of the British king are wielded by his Ministers.

Lowell has summed up the position of the British Sovereign in these words: “According to the early history of the constitution, the ministers were the counsellors of the king. It was for them to advise and for him to decide. Now the parts are almost reversed. The king is consulted but the ministers decide”.

(2) Legal Sovereignty:

Legal sovereignty is that authority of the state which has the legal power to issue final commands. It is the authority of the state to whose directions the law of the State attributes final legal force. In every independent and ordered state there are some laws which must be obeyed by the people and there must be a power to issue and enforce these laws. The power which has the legal authority to issue and enforce these laws’ is legal sovereignty.

In England, the King-in-Parliament is sovereign. According to Dicey, “The British Parliament is so omnipotent legally speaking…. that it can adjudge an infant of full age, it may attain a man of treason after death; it may legitimize an illegitimate child or if it sees fit, make a man a judge in his own case”.

The authority of the legal sovereign is absolute and law is simply the will of the sovereign. Since the authority of the sovereign is unrestrained, reserves the legal right to do whatever he desires. It is the legal sovereign who grants and enforces all the rights enjoyed by the citizens and, therefore, there cannot be any right against him. The legal sovereign is, thus, always definite and determinate.

(3) Political Sovereignty:

Dicey believes that “behind the sovereign which the lawyer recognises, there is another sovereign to whom the legal sovereign must bow. Such sovereign to whom the legal sovereign must bow is called political sovereign. In every Ordered state the legal sovereign has to pay due attention to the political sovereign.

According to Professor Gilchrist, “The political sovereign means the sum-total of influences in a State which lie behind the law. In modern representative government we might define it roughly as the power of the people”. In other words by political sovereign in the representative democracies, we mean the whole mass of the people or the electorate or the public opinion. But at the same time, it cannot be emphatically asserted that political sovereignty can definitely be identified with the whole mass of the people, the electorate or the public opinion. Political sovereignty is a vague and indeterminate term.

Political sovereignty rests in that class of people under whose influence the mass of the people is or the people are. Political sovereignty rests in the electorate, in the public opinion and in all other influences in the state which mould and shape the public opinion.

In the words of Professor R.N. Gilchrist, “Political sovereign manifests itself by voting, by the press, by speeches, and in many other ways not easy to describe or define. It is, however, not organised and it can becom6 effective only when organised. But the organisations of political sovereignty lead to legal sovereignty. The two are aspects of the one sovereignty of the state”. As a matter of fact, legal and political sovereignty are the two aspects of the one sovereignty of the state. But at the same time both the aspects stands poles apart.

Legal sovereign is a law-making authority in legal terms, whereas political sovereignty is behind the legal sovereign. The legal sovereign can express his will in legal terms. But the political sovereign cannot do so. Legal sovereign is determinate, definite and visible whereas political sovereign is not determinate and clear.

(4) Popular Sovereignty:

Popular sovereignty roughly means the power of the masses as contrasted with the Power of the individual ruler of the class. It implies manhood, suffrage, with each individual having only one vote and the control of the legislature by the representatives of the people. In popular sovereignty public is regarded as supreme. In the ancient times many writers on Political Science used popular sovereignty as a weapon to refute absolutism of the monarchs.

According to Dr. Garner, “Sovereignty of the people, therefore, can mean nothing more than the power of the majority of the electorate, in a country where a system of approximate universal suffrage prevails, acting through legally established channels to express their will and make it prevail”.

(5) Deo Facto and De Jure Sovereignty:

Sometimes a distinction is made between the De Facto (actual) sovereignty and De Jure (legal) sovereignty. A de jure sovereign is the legal sovereign whereas a de factor sovereign is a sovereign which is actually obeyed.

In the words of Lord Bryce, de facto sovereign “is the person or a body of persons who can make his or their will prevail whether with the law or against the law; he or they, is the de facto ruler, the person to whom obedience is actually paid”. Thus, it is quite clear, that de jure is the legal sovereignty founded on law whereas dc facto is the actual sovereignty.

The person or the body of persons who actually exercise power is called the de facto sovereign. The de facto sovereign may not be a legal sovereign or he may be a usurping king, a dictator, a priest or a prophet, in either case sovereignty rests upon physical power or spiritual influence rather than legal right.

Parliament remained the legal sovereign but he was the actual or de facto sovereign. Hitler also did the same in Germany. He too became the de factor sovereign. He controlled the legal sovereign and became the de facto sovereign. Similarly, Stalin remained the actual sovereign in U.S.S.R. for about three decades.

After the Second World War and before the Egyptian Revolution King Farouk was the legal sovereign. General Naguib’s ‘coup de’etat’ in Egypt and the abdication of King Farouk is another example of de facto sovereignty. Nazib was expelled and Nasser succeeded him in de facto sovereign.

Austin’s Theory of Sovereignty

The Juristic analysis of **sovereignty** has a history stretching back to the Roman empire. The Roman jurists worked out a theory of Imperium and found the source of law in the will of the prince.

In modem times the development of the theory of sovereignty coincided roughly with the growth of the State in power, functions and prestige.

From Bodin, through Hobbes and Bentham, this juristic idea reached its climax in John Austin as contained in his lectures on Jurisprudence, published in 1832. Austin endeavoured to build up an exact juristic terminology and to present a clear outline of the organisation of a government’s legal power.

The theory of sovereignty, as enunciated by Austin, depends mainly upon his view of the nature of law. Law, according to Austin, is a “command given by a superior to an

inferior. From this definition of law he develops his theory of sovereignty in the following words:—

“If a determinate human superior, not in the habit of obedience to a like superior, receives habitual obedience, from the bulk of a given society, that determinate human superior is sovereign in that society, and that society (including the superior) is a society political and independent.”

Austin’s doctrine of ‘sovereign’ may be reduced to the following propositions:—

(i) That there is, in every political and independent community, some person or body of persons who exercise sovereign power. Sovereign power is as essential in every political society “as the centre of gravity in a mass of matter.”

(ii) That the sovereign is a determinate person or body of persons. “He is not necessarily a single person: in the modem western world he is very rarely so; but he must have so much of the attributes of a single person as to be determinate.”

The State for Austin is a legal order in which there is a determinate authority acting as the ultimate source of power. Sovereignty, therefore, neither resides in the general will as Rousseau conceived, nor in the mass of the people, nor in the electorate, as none of them is a determinate body.

Nor has the sovereignty of God or gods any significance in the business of the State. It is concerned with man and every State must have a determinate human superior who can issue commands and create laws. Hence human laws, and not divine laws, are the proper subject of State activity.

(iii) That such a determinate human superior must not himself obey any other higher authority. His will is supreme over all individuals and associations and he is subject to no control, direct or indirect. The determinate human superior may act unwisely, or dishonestly, or in an ethical sense, unjustly, but for the purpose of the legal theory the character of his action is unimportant. So long as laws emanate from the legal sovereign, they are commands which must be obeyed.

(iv) That the sovereign receives habitual obedience from the bulk of the community. That is to say, obedience must be a matter of habit and not merely occasional. Obedience rendered to an authority for a short time does not make it a sovereign. Austin’s thesis is that obedience to the sovereign authority must be continuous, regular, undisturbed and uninterrupted.

Moreover, obedience rendered to the sovereign must not necessarily be from the whole of the society. It is enough for purposes of the sovereign power if it comes from the bulk of the society its large majority. Where habitual obedience from the bulk of the society is not forthcoming there is no sovereign power. Thus, sovereignty involves not only the submission of the many but also its permanence.

(v) That command is the essence of law. Whatever the sovereign commands is law, and law prescribes to do certain things and not to do others. Failure to obey laws, as commanded, is visited by a penalty.

(vi) That the sovereign power is indivisible. It is a unity and is incapable of division. Division of sovereignty means destruction of sovereignty.

In brief, Austin's analysis of sovereignty embraces the existence of the supreme power which is determinate, absolute, illimitable, inalienable, indivisible, all-comprehensive and permanent. It is subject to no limitation or command by any other superior person.

But Austin's theory is a lawyer's view of sovereignty and it has been subjected to a searching criticism, particularly by Sir Henry Maine and other historical jurists. Sovereignty, according to Maine, does not reside in a determinate human superior. "A despot with a disturbed brain," he says, "is the sole conceivable example of such sovereignty."

Austin's conception of a determinate sovereign is also inconsistent with the well-accepted ideas of political and popular sovereignty. It ignores the power of public opinion and does not take into consideration the existence of political sovereignty, which is now believed as the ultimate sovereign power in a State. Sir Henry Maine, accordingly, concludes that it is a historical fact that the sovereign has never been determinate.

The Federal State presents another difficulty about vesting sovereignty in a determinate person or body. Sovereignty is indivisible and the sovereign body which has the power to amend the Constitution cannot be described as a determinate body.

In the United States, for example, the constitutional powers of government are divided between the federal government and governments of the 'states' as the constituent units are named there. No change can be made in the Constitution without amending it.

The Constitution amending body is Conventions or two-thirds majority of each House of Congress which may propose an amendment and State legislatures or State Conventions which ratify them by a prescribed majority.

In India, too, powers between the Central Government and the State Governments are divided and changes therein can be brought about by the process specified in the Constitution for amending it.

The Constitution amending authority is sovereign, but this sovereign authority is diffused. There are three methods of amending the Indian Constitution. In some cases it is a simple majority of both the Houses of Parliament, in others, which are specified in the Constitution.

It is the two-thirds majority of the members present and voting in each House of Parliament plus a majority of the total membership in each House, and ratified by the legislatures of one half of 'States,' constituent units, and for the rest it is a majority of the total membership in each House of Parliament and a majority of not less than two-thirds of the members present and voting in each House of Parliament.

But the Constitution may itself limit the Constitution amending authority. Carl J. Friedrich maintains that where the constitution amending power is vested in the Legislature, "limitations are usually imposed upon it."

Custom is not a deliberate statute; it is the outcome of ages and even an autocrat must be the guardian and servant of customs, if he desires to obviate the possibilities of a revolution. For, custom, "when attacked, attacks law in turn, attacks not only the particular law which opposes it, but what is more vital, the spirit of law-abidingness."

Austin himself was fully conscious of the force behind customs and maintained, "Whatever the sovereign permits, he commands." Austin argued that customs, unless enforced by courts of justice, are merely "positive morality"; rules enforced by opinions. But as soon as courts of justice enforce them, they become commands of the sovereign, conveyed through the judges who are his delegates or deputies.

The concept of law, prior to the Analytical School, conveyed the notion of order first and then the notion of force. The Analytical Jurists, on the other hand, lay down unhesitatingly that the notion of force has priority over the notion of order.

Austin lays too much emphasis on force and prescribes that disobedience of law is visited by a penalty. It means, in the words of the Analytical School, that people obey laws for fear of punishment.

The modern view is that we obey laws not because their disobedience is accompanied by punishment; we obey them because there is in us the spirit of law- abidingness. Laski says, "The notion of command" in law "is contingent and indirect and the idea of penalty is, again, save in the most circuitous way, notably absent". He holds that the individual conscience is the only true source of law.

Austin's theory is further criticised on the ground that it invests the sovereign with absolute and illimitable powers. The Pluralists maintain that the State is an association like various other associations and, therefore, the sovereign authority cannot be invested with unique sovereign powers.

They oppose the Austinian doctrine of a single and unified sovereignty, and emphasize the importance of associations, which are, for their purposes, as sovereign as the State is for its purpose. Sovereignty, accordingly, is neither unity nor absolute. It is diffused and hedged all around within and without the State.

Externally, Austin's sovereign power is limited by the prescription of International Law, and the concept of internationalism has made it still more incompatible. Austin's theory of sovereignty, therefore, is now regarded not only a legal fiction, but a baneful and dangerous dogma which should be expunged from the literature on international relations.

The problems of food, health, education, and population are in essence local problems, but their solutions are found in the deliberations of international organisations like the W.F.O., the W.H.O., the UNESCO, etc. all agencies of the United Nations. Even the restoration of order and establishment of lawful government within the country has become an international concern.

MCQ

The world 'sovereignty' derives its origin from superanus which belongs to language:

1. A. Green
   B. Latin
   C. English
   D. French
   E. Roman

2. Who is ancient past felt that sovereignty was the 'fullness of the state'?
   A. Romans
   B. Greek
   C. Muslims
   D. Arabs
   E. French

3. Who believed that sovereignty extended to all individuals and associations living in the state?
   A. St. Augustine
   B. Aristotle
   C. Bodin
   D. Rousseau

4. Who of the following distinguished between the sovereignty of the people and political sovereignty?
   A. Plato
   B. Aristotle
   C. Hobbes
   D. Locke
   E. Rousseau

5. Who believed that sovereignty vested in the 'general will'?
   A. Hobbes
   B. Locke
   C. Grotius
   D. Rousseau
   E. John Austin