

7 CONCEPT OF SOVEREIGNTY

MEANING OF SOVEREIGNTY

What is regarded superior to other institutions?

Sovereignty is regarded as an essential element of the state. The term 'sovereignty' is derived from the Latin word *superanus* meaning supreme. Thus, sovereignty denotes supremacy or supreme power of the state. In what sense is the state regarded supreme or superior to other associations?

At the outset, it may be noted that sovereignty is primarily a legal concept. It denotes supremacy of the state primarily in the legal sphere. J.W. Garner, in his *Introduction to Political Science*, has defined sovereignty as that 'characteristic of the state in virtue of which it cannot be legally bound except by its own will or limited by any other power than itself. All classical definitions of sovereignty focus on supremacy of the state in the legal sense. All objections about sovereignty arise when this concept is shifted from the legal and juristic domain to other spheres such as moral, political, and sociological.

The basic idea is that the sovereign—be it a monarch, chief executive or an assembly—is able to declare law, issue commands and take political decisions (i.e. determining public goals and their priorities) which are binding on all individuals and associations within his jurisdiction. He commands physical force to punish those who ignore or disobey his orders or decisions. The sovereign issues laws, commands and decisions at his own will, not with the approval or consent of any other individual or association. Sovereignty, in its pure form, is more befitting a monarch than an assembly or constitutional set-up but it has to be applied to various systems so long as it is accepted as a universal characteristic of the state. Moreover, supreme legal authority of the state can best be established through the concept of sovereignty itself.

In fact, sovereignty arms the state with supreme legal authority in both internal and external spheres. Internally, it establishes supremacy of the state over all individuals and associations; externally it upholds independence of the state from the control or interference of any other state in the conduct of its international relations. Theoretically, each sovereign state is equal to every other in international law, regardless of its population, area or economic wealth. The United Nations

Charter states that the United Nations 'is based on the principle of the sovereign equality of all its Members' and recognizes a sphere of 'domestic jurisdiction' which is to be reserved to each member state.

Since the concept of sovereignty attributes supreme power to the will of the sovereign, it is by nature an absolute, unlimited and perpetual power. This may, however, not be interpreted as an arbitrary power. The absolute power implied by sovereignty is not intended to be exercised without reason or without invoking one's conscience or sense of justice or without regard to prevalent customs, social values, ideals or necessity of the common interest or public interest. Due regard to all these factors has to be given, otherwise the legitimacy and authority of the sovereign power will be rapidly eroded and sovereignty may eventually be lost. The idea behind the absolute nature of sovereignty is that, legally speaking, the sovereign is not obliged to consult or seek the approval of any other individual or group whether a particular decision, command or law is right or wrong. He is empowered to decide all such issues at his own will and discretion, and his decisions will be binding on all unless he himself chooses to revoke them!

Historical Development

In fact, the modern theory of the state was perfected only when the concept of sovereignty was introduced into it. Jean Bodin, a French writer of the sixteenth century, was the first to formulate the concept of sovereignty systematically. Although in ancient days Aristotle had talked of supreme power located in different bodies according to the form of government, he had not given the idea of sovereignty because, according to him, the power of the ruler or ruling body was limited by the law which existed above them. Conditions in the Middle Ages were not favourable to the development of the concept of sovereignty because the emperor's power was limited on the one side by the rights of the feudal lords, and on the other side by the claims of the Pope to superior authority. The idea of sovereignty made its appearance with the dawn of the modern period. Toward the end of the medieval period a number of causes combined to create new political ideas. The feudal nobles were weakened by the Crusades and by their own quarrels. Commerce and towns destroyed their monopoly of wealth; new methods of warfare destroyed their military supremacy. Taking advantage of their weakness, the king increased his power and importance until he became supreme in the state.

Besides, the ruling monarchs of national states like England and France had achieved a degree of unification and centralization of authority never attained before, so that they freed themselves from the control of the Pope as well. Thus, the ground had been prepared for the development of the theory of sovereignty. Jean Bodin, who held Henry III, King of France, in highest esteem, became an exponent of this theory.

Jean Bodin (1530-96)

Bodin defined sovereignty as 'the absolute and perpetual power of commanding in a state', as the 'supreme power over citizens and subjects unrestrained by law'. Thus, Bodin places the sovereign above law, because he himself is the source of

law. This view marked a significant departure from the medieval outlook. The medieval world conceived law as part of the universal and eternal order. Kings, councils and judges who enforced law were themselves under law. They were not empowered to create it. It could only be discovered by a study of custom and precedent. The idea of the state as a source of law was alien to medieval thought.

Bodin sought to reverse this position by making the sovereign himself the source of all law. Defining the state as an aggregation of families and their common possessions ruled by a sovereign power and by reason, Bodin argued that in every independent community governed by law there must be some authority, whether residing in one person or several, whereby the laws themselves are established and from which they proceed.

Bodin treated the sovereign above law but not above duty and moral responsibility. He imposed two important limitations on the powers of the sovereign: (a) firstly, there are some fundamental laws (such as, the Salic law of France, which excluded females from dynastic succession) and the sovereign could not lawfully abrogate such laws; and (b) secondly, private property, being granted by the law of nature, was inviolable; therefore, the sovereign could not tax his subjects without their consent.

Hugo Grotius (1583-1645) — father of int. law

After about half a century of Bodin's enunciation of the theory of sovereignty, Grotius, a Dutch jurist, widely known as the father of international law, made an important contribution to the concept of sovereignty. He brought out the implications of sovereignty of the state in the international sphere, i.e. independence of the sovereign state from foreign control. Grotius sought to build a system of international law on two distinct foundations: (a) Nations are subject to natural law or 'the dictate of right reason' in the same manner as citizens because the society of nations is formed on the same fundamental moral principles which guide the behaviour of men in society; and (b) Grotius recognized a 'voluntary' law of nations based upon their free consent, whether explicit, as expressed in treaties and conventions, or implicit, as expressed in usages and customs.

Thus, Grotius, like Bodin, attributed moral responsibility to sovereignty, but he extended it to the external sphere also. In the second place, he made it clear that nations respected international law not because it curtailed their sovereignty, but because they voluntarily chose to do so, of their free consent. In this way, Grotius introduced the idea of external sovereignty to the existing idea of internal sovereignty, and thus gave it a fuller shape.

Thomas Hobbes (1588-1679)

In the seventeenth century Hobbes, an English political thinker, further developed the concept of sovereignty. As an exponent of the theory of the social contract, Hobbes argued that the state was a product of the will of the people. Sovereignty is an attribute of the state; its character is determined by the terms of the social contract.

As men emerge from the state of nature—characterized by law of the jungle—and form a state to attain order, peace and security, they create a sovereign for this purpose. They surrender all their natural rights—the right of the stronger to oppress the weaker—to the sovereign. The surrender is complete, final and irrevocable. How can they ask for restoration of their natural rights once they have become civilized men! Defying the authority of the sovereign would mean reverting to the state of nature, the state of anarchy, law of the jungle, where the stronger will be free to oppress the weaker. Hobbes, therefore, places authority of the sovereign beyond challenge.

Hobbes's chief contribution to the theory of sovereignty consists in adding an element of legitimacy to authority of the sovereign, because he held: (a) that the sovereign is the product of the will of the people; and (b) that the sovereign enjoys his supreme authority for its functional value, that is, by virtue of providing order, peace and security in the place of anarchy and oppression.

John Locke (1632-1704), another English exponent of the theory of the social contract, did not concede absolute sovereignty of the state. He thought that the supreme power in society was held by the people which came into existence before the formation of the state. The natural rights of life, liberty and property, were retained by the people and the state was created for the protection of these vital rights. Ruler or government could not possess supreme power.

Jean Jacques Rousseau (1712-78) — French theocracy

In the eighteenth century, Rousseau, the French exponent of the theory of the social contract, made an important contribution to the theory of sovereignty, by introducing the doctrine of popular sovereignty. While another chief exponent of the social contract theory, viz. Hobbes had created a sovereign apart from the people, Rousseau made the people themselves sovereign. In his opinion, the social contract was concluded between the people in their individual capacity on the one hand, and the people in their corporate capacity on the other. According to this line of argument, sovereignty is retained by the people themselves in their corporate capacity, represented by the general will; while their actual will is subordinated to their real will. Rousseau, therefore, suggested that sovereignty belongs to the people; it could be exercised only in an assembly of the whole people. Government is but an agent of the general will which reigns supreme. In other words, a government cannot logically claim to hold sovereignty. Rousseau also maintained that sovereignty is absolute and unlimited because the supreme direction and control of the general will is accepted by the people unconditionally in the interests of their freedom. Rousseau went to the extent of saying that the people can be forced to be free.

GENERAL WILL

According to J.J. Rousseau (1712-78), the common denominator of the real will of the people which embodies not only their common interest but also everybody's real and long-term interest. Man realizes his freedom by submitting his particular will to the direction of the general will.

Jeremy Bentham (1748–1832)

Bentham, the famous English Utilitarian, argued that sovereignty was not limited by law, but was subject to moral limitations. Bentham maintained that sovereignty was limited by the possibility of resistance, and there were conditions under which resistance was morally justified. He, therefore, insisted that the sovereign should justify his authority by useful legislation with the object of promoting the greatest happiness of the greatest numbers.

John Austin (1790–1859)

In the nineteenth century, the theory of sovereignty as a legal concept was perfected by Austin, an English jurist. He is regarded as the greatest exponent of the monistic theory of sovereignty. In his *Province of Jurisprudence Determined* (1832) Austin observed:

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 superior is sovereign in that society, and that society (including the superior) is a society political and independent.

Austin's theory of sovereignty was influenced by the then prevailing conditions in England. The early Utilitarians had sought to remove the anomalies of common law by subordinating it to a superior law which consisted in the universal and permanent dictates of natural reason; the state could neither ignore nor abrogate that superior law. Repudiating these arguments, Austin advanced his theory of positive law which expressed the will of the legal sovereign of the state and hence not bound by the dictates of natural law or any other superior law. Austin sought to define law as the command of the sovereign, obliging the subject to do or refrain from doing, certain acts, failure to obey the law being visited by penalty. Thus, he identified the following characteristics of law: (a) It must emanate from a determinate source, that is, the sovereign, to be clearly located in the state; (b) it must be the expression of the command of the sovereign; and (c) it must be backed by sanctions. In other words, disobedience to law must be punishable.

These characteristics are peculiar to the positive law of the state, not to be found in natural law, custom or religious commandments. Thus, natural law, or for that matter any superior law, is not law in the proper sense of the term. Accordingly, in case a positive law enforced by the state comes into conflict with the natural law or religious commandments, etc., the former must prevail. In this way Austin established supremacy of the power, authority and commands of the sovereign beyond doubt. He maintained that any rights of the citizens, including the right to property, were nothing but concessions granted by the sovereign. The subjects could have no legal right against the state.

By establishing a single source of all positive law Austin put forward a monistic view of law, state and sovereignty. It is significant that Austin's theory solely dwells on the legal character of sovereignty; it does not repudiate moral or social limitations on the power of the state. He does not declare the state as a 'perfect

embodiment of reason' as the idealist theory had maintained. Austin is an exponent of absolute and unlimited sovereignty purely from the legal or formal point of view. He admits that sovereign authority habitually observes fundamental moral principles though not legally bound by any external authority. He does not envisage an irresponsible sovereign, but holds that the sovereign cannot be formally made responsible to any authority similar to himself; his authority is legally superior to all individuals and groups within his jurisdiction.

II

CHARACTERISTICS OF SOVEREIGNTY

Viewed as a purely legal concept, it is customary to describe certain characteristics of sovereignty. They are: absoluteness, permanence, universality, inalienability and indivisibility.

Absoluteness

Jean Bodin, the first exponent of sovereignty, said: 'Sovereignty is the absolute and perpetual power . . . of commanding in a state'. Sovereignty is regarded as absolute because it cannot be limited or restricted by any superior power or authority. The will of the sovereign reigns supreme in the state. The sovereign may, of his own will, pay due regard to moral principles, customs and traditions or public opinion, but he is not responsible to any authority—individual or group—similar or superior to himself. Similarly, the sovereign may pay due regard to international law by his free consent, not because he is obliged to obey the commands of any superior state or international organization.

Absoluteness of sovereignty is the logical outcome of its legal character, which may not hold good in the political sphere, nor would it govern the non-legal actions of the individuals and groups within the state.

Permanence

Permanence of sovereignty is the corollary of its absoluteness. Bodin describes sovereignty as perpetual power because, 'if power be held only for a certain time (it does not matter how long a time), it is not sovereign power, and he who holds it for that time is not a sovereign.'

In order to understand the permanence of sovereignty, it is necessary to distinguish between the state and government. Theoretically, sovereignty belongs to the state. Governments may be formed and dissolved according to established procedure, but the continuity of the state will not be affected by such changes. As such, sovereignty endures as long as the state maintains its independence. The quality of permanence should not be interpreted to mean that sovereignty is eternal. On the other hand, if a state loses its independence and is placed under the suzerainty of another state, its sovereignty is also lost.

Universality

Sovereignty is a universal, all pervasive or all comprehensive quality in the sense that it extends to all individuals, groups, areas and things within the state. If a state grants immunity or ex-territoriality to any category of persons, especially foreign heads of states, U.N. officials, foreign envoys, ambassadors, their staff, residence and vehicles, etc. it is because of its free consent, not because of any external obligation or restriction. In other words, it is a matter of international courtesy, not of compulsion. This concession can be withdrawn at any moment at the will of the sovereign.

International associations and multinational corporations operating within the territories of different states are also subject to the sovereignty of the respective states.

Inalienability

As an essential element of the state, sovereignty cannot be transferred or given away without destroying the state itself. As Lieber has put it: 'Sovereignty can no more be alienated than a tree can alienate its right to sprout or a man can transfer his life and personality without self-destruction.' When a state cedes a portion of its territory to another state, the ceding state is not wholly destroyed. But from the point of view of the ceded portion, the original state no longer exists, and sovereignty of a new state comes into existence. This also proves that the sovereignty of a state over any area is not transferred but replaced by another state.

According to Hobbes when people emerge from the state of nature, they create a sovereign. It is not a case of sovereignty being transferred from people to the sovereign, because in the state of nature sovereignty did not exist at all. When Locke postulate surrender of some of the natural rights of the people to the state on the condition that their fundamental natural rights to 'life, liberty, and property' shall be protected, it is not a question of transfer of sovereignty, because the people themselves remain supreme throughout, in spite of the formation of the state. In Rousseau's system of thought sovereignty is throughout held by the general will, although powers may be delegated to the government; hence, sovereignty proves to be inalienable.

Indivisibility

As sovereignty is an absolute power, it cannot be divided between or shared by different sets of individuals or groups. In every state, sovereignty must be vested in a single body, legally competent to issue the final commands. Division of sovereignty is bound to give rise to inconsistent, conflicting and ambiguous commands. This condition is not compatible with the very concept of sovereignty. In other words, a divided sovereignty is a contradiction in terms.

The principle of the federal state is usually cited as an exception to this characteristic of sovereignty. Federalism involves the allocation of powers between the federal (central or union) government and state governments which are regarded as independent and coordinate in their respective spheres. A.L. Lowell, an

American writer, argued that 'there can exist within the same territories two sovereigns issuing commands to the same subjects touching different matters'. The Supreme Court of America also declared in one case that 'the United States are sovereign as to all the powers of government actually surrendered by the states, while each state in the union is sovereign as to all powers reserved'. We in India are no less familiar with federal government. We have legislatures and cabinets in the states besides the Union Parliament and the Cabinet. The subjects of legislation are divided into the Union List, State List and Concurrent List. Unlike the USA, however, in India the Union and the states are governed by a single constitution and residuary subjects of legislation are assigned to the Union. The main features of federal states in other countries are more or less similar.

This paradox can be resolved by making a distinction between 'sovereignty' and 'power' in the legal sense. Power emanates from sovereignty. Sovereignty vests in the state, power is assigned to the government. Sovereignty is supposed to be exercised by the state; power is exercised by the different organs of government—legislative, executive and judicial. The pattern of exercise of power depends on the nature of organization of the government. We describe states as 'unitary' and 'federal' because of different patterns of organization of their governments. Properly speaking, these are forms of government, not the forms of state. In a unitary government, power is divided between a single set of legislature, executive and judiciary. On the other hand, a federal government evolves various sets of such organs. Thus, the federal system represents an extension of the principle of division of powers between the organs of the federal and state governments. All of them combined together constitute a single state with a single sovereignty—absolute, perpetual, all-pervasive, inalienable and indivisible. The division of powers can be evolved or altered from time to time but sovereignty remains intact so long as the state maintains its independent existence. In the international sphere, too, the state continues to be regarded as one entity—single and indivisible—whatever its form of government and consequent division of powers.

It is again important to note that all these characteristics are peculiar to the legal notion of sovereignty. They are best represented by an absolute monarchy. In the actual working of the state—especially in the case of a democratic, federal, pluralist and constitutional government—it becomes extremely difficult to discover the seat or real character of sovereignty.

ASPECTS OF SOVEREIGNTY

Sovereignty is primarily a legal concept. However, in actual practice, sovereignty may be ascribed to different types of conditions which are described as different forms or aspects of sovereignty.

Titular Sovereignty

In constitutional monarchies, such as, England and Japan, the queen, the king or the emperor is officially referred to as the sovereign. Such a ruler is only a

nominal or titular head of state, without any real powers which are vested in different organs of the government according to the constitution of the state. This form of sovereignty is, therefore, called titular sovereignty.

De jure and De facto Sovereignty

In the case of revolutions, that is, a successful overthrow of the existing regime in a state through unconstitutional means—that is, not by the established procedure of replacing the existing government—a distinction arises between the formal and actual position. Thus, till such time as the new sovereign is legally established and recognized, there may exist two sovereigns—one in the legal sense who has lost his real powers; the other in the factual sense who has not yet been legally established. Under such circumstances, the legal or formal sovereign is said to retain de jure sovereignty while the actual sovereign is characterized by de facto sovereignty. This state of affairs can only continue temporarily because it is marked by uncertainty, confusion and irregularity. Some historical examples of the emergence of de facto sovereignty are: the authority exercised by Cromwell in England, by Napoleon in France, and the Bolshevik group in Russia after 1917. The military dictatorships of the present-day world, established after a coup d'état, also represent de facto sovereignty until they evolve suitable means to legitimize their authority. De facto sovereignty is so described because in actual practice its commands are obeyed by the people, either because of sheer force or a strong following among the people.

Some writers, including John Austin, refuse to draw a distinction between de jure and de facto sovereignty. They argue that adjectives like 'lawful' and 'unlawful' cannot be applied to the term sovereignty as it becomes meaningless without legal sanction. It would, therefore, be more logical if the terms de facto and de jure are applied only to government, not to sovereignty. The de jure sovereignty alone is sovereignty in the real sense of the term. The so-called de facto sovereignty remains inconsequential until it achieves the status of de jure sovereignty.

A Critical Appraisal

The concept of sovereignty was evolved to perfect the theory of the modern state. It sought to free the modern state from obligations towards other social institutions, particularly the authority of feudal lords and the papacy, and to establish the dignity of the state in the international sphere. Thus, the theory of sovereignty proclaimed the monopoly of the state in deciding public policy and declaring the law that binds all citizens in unequivocal terms. It instituted the nation-state as an independent entity in the international sphere, not bound by any organization superior to itself. In short, sovereignty armed the state with supreme authority in its internal as well as external affairs.

As a legal notion, sovereignty constitutes an essential element of the legal character of the state. In fact, the state cannot perform its function of regulating the life of its citizens unless it is equipped with supreme authority. The logic of the legal character of sovereignty postulates that it has to be absolute, permanent, universal, inalienable and indivisible. In the legal sphere, therefore, sovereignty

cannot be held responsible to any human superior. When we say that the sovereign is not bound by any moral principles or international obligations except at his own will, it is only intended to emphasize that the sovereign cannot be subordinated to any other human agency for interpretation of such obligations.

But in the sphere of actual practice, all authority postulates responsibility. Sovereignty, being supreme authority, postulates highest responsibility. Theoretically, we may evolve the image of a perfect sovereign and thus justify him exercising supreme authority. But in the real world, sovereignty has to be vested in human beings who, being mortals, are as imperfect as any other human beings. When the authority of a mortal human sovereign is proclaimed to be absolute, perpetual, beyond any responsibility or obligation, it leads to socially disastrous consequences—the most cruel and degenerate forms of autocracy, tyranny and authoritarianism, untold oppression inside the state and more destructive wars outside.

To straighten the issue, it is imperative to draw a distinction between the state and the government so that sovereignty is always regarded as an attribute of the state—conceived as an abstract idea—while the government consisting of human beings, whatever their wisdom or excellence of character, is only assigned definite powers, to be exercised through an established procedure with inbuilt checks and safeguards. This is necessary so that no organ of the government is able to become omnipotent. This would imply a departure from the original concept of sovereignty which sought to vest sovereignty in a 'determinate person or body of persons'. This would mean a constitutional government. Only this kind of government can be expected to function in a responsible manner and deliver the goods, especially in the present age of democracy when the people are claimed to be the real sovereign.

III

CONCEPT OF POPULAR SOVEREIGNTY

What is Popular Sovereignty?

Sovereignty is primarily a legal concept. The legal sovereign is supposed to be absolute and omnipotent, functioning solely according to his own judgment and will—right or wrong. He can ignore and override any other considerations—prescriptions of divine law or natural law, principles of morality, dictates of public opinion, etc. According to the classical theory, legal sovereignty is vested in the 'determinate person or body of persons'. It is definitely organized, precise and recognized as the source of law. It represents the will of the state and its commands are legally binding. Its disobedience is visited by penalties. It is the source of all rights in society. It is absolute, unlimited and supreme.

In the political sphere, legal sovereignty closely corresponds to absolute monarchy. It is significant that Jean Bodin and John Austin—the chief exponents of legal sovereignty—had built their theories in the context of absolute monarchies. This sort of situation does not create problems of inconsistency between theory and practice. However, as we move to other forms of government, we are faced