AUSTIN’S THEORY OF SOVEREIGNTY

Austin: “If a determinate human superior, not the habit of obedience a like superior, receives habitual obedience from the bulk of the society, the determinate superior is sovereign in that society and the society, includes the superior, is a society political and independent. To that determinant superior, the other members of the society are dependent. The position of its other members towards the determinate superior is a state of subjection and dependence. The mutual relation which subsists between them and superior may be styled the relation of sovereign and subject or the relation of sovereignty and subjection”.

SOVEREIGNTY IS ESSENTIAL IN THE STATE

1. In every political society, there is always a supreme power whose will ultimately prevails. This supreme power vests in a single individual or a group of individual.
2. Sovereignty is a source of law. Every law is so directly or circuitously, by a sovereign person or body to a member or members of the independent political society wherein sovereign is supreme.
3. It is not necessary that sovereignty should be always within the state. It may be partly or wholly external to the state.
4. Sir Henry Maine was very critical of this theory. His view is that sovereignty did not reside in a determinate human superior. He said “A despot with a disturbed is the sole conceivable example of such sovereignty”.
5. Maine emphasised the existence of “Vast masses of influence, which we may call, for shortness, moral, that perpetually shapes, limits or forbids the actual direction of the fours by its sovereign”.
6. The entire history of the community, the mass of its historical ascendant which in each community determine how the sovereign shall exercise or forebear from excursing his irresistible coercive power.

SOVEREIGNTY IS INDIVISIBLE

1. In every state a person or group has the supreme power in state.
2. The power is indivisible, even in cases where it vests in a group.
3. The group, as British parliaments, hold the power jointly as a unit and not in severalty. In England, the parliament a sovereign and all power vests in it. It can
change the executive and the judiciary and it is the power of the parliament that ultimately prevails all over them.

4. Austin’s theory of indivisible sovereignty breaks down in the case of federal states, sovereignty is divided into legislative, executive and judicial sovereignty. This division is taken as axiomatic in a federal constitution. These three branches are independent of one another in federal states.

5. Lord Bryce – “Legislative sovereignty is divisible, that is different branches of it maybe concurrently vested in different persons, co-ordinate altogether or co-ordinate partially only, though acting in different spheres”.

6. Dr. Jethro Braon says that state itself, as a corporation, should be considered as the sovereign. Though this theory removes the difficulties which we have describe above, this is not the same concept of sovereign as envisaged by Austin. Austin’s theory as such is never applicable on most of the states.

SOVEREIGNTY IS UNLIMITED AND ILLIMITABLE

1. “It follows from the essential difference of a positive law and from the nature of sovereignty and independent politically society that the power of monarch property so called as or the power of the sovereign authority in its collegiate and sovereign capacity, is incapable of legal limitation ……supreme pore limited by positive law is a flat contradiction in terms”

2. “Austin admits that the sovereign power may have defacto limitations. The effective power of the sovereign is dependent on two factors.”

3. The first factor is the coercive force which the sovereign has at is command.

4. The second factor is the docile disposition of the people.

5. As these two things have practical limits, sovereignty is also limited de –facto. What Austin denies is that sovereign power can be limited de jure. As sovereign is the source of law, the view of Austin is that there can be no legal limits on the power of the sovereign.

6. According to Austin, sovereign possess unlimited powers. But experience shows that there is no power on earth which wield unlimited powers.

7. The reason is that state or sovereign acts through law which can regulate only the external action of human beings and is helpless to regulate their internal actions.
8. Bluntschli writes “the state as a whole is not almighty, for it is limited externally by the rights or other states and internally by its own nature and by rights of individual members”.

9. Professor Laski has criticized the theory of unlimited sovereignty on many grounds. He points out that “no sovereign has anywhere possessed unlimited power and the attempt to exert it has always resulted in the establishment of safeguard”

10. Critics point out that “legally an autocratic Tsar may shoot down his subjects before the winter palace at Petrograd, but morale it is condemnation that we utter. Therefore, there is a vast difference between what Dean Pound has admirably called ‘Law in Books’ and Law in Action”.

11. It is not only impossible to exercise unlimited powers, but it is also undesirable to give unlimited powers to anybody, the conclusive is that Austin’s view is not applied to state in modern times.

DICEY’S THEORY

1. Theory of popular sovereignty.
2. There are two kinds of sovereigns – the political and the legal.
3. Legislature is the legal sovereign because it has the supreme power of law making. Behind the legal sovereign there is the political sovereign. The legal sovereign acts in accordance with the wishes of the political sovereign.
4. For a stable government, it is necessary that there must be a harmony in the views of legal and political sovereign.
5. It is submitted that this theory is neither very logical nor convincing.

JETHRO BROWN’S THEORY

1. His approach is sociological and he takes into account the changed concept of the state while propounding his theory.
2. He says that state, as a corporation, is sovereign.
3. The sovereign is not a person or group of persons distinct and separate from community.
4. It acts through organs and agents for the achievement of its corporate purpose.
5. This theory solves a number of problems which the earlier theories failed to solve and as such it has universal application.
KELSON’S THEORY
1. Pure theory of law.
2. No corrupt of sovereignty distinct and separate from and above the law. The state is simply a legal order.
3. The only meaning that can be given to state sovereignty is that legal order is a unity distinct from and independent of other similar legal orders.

DUGUIT’S THEORY
1. Rejects the ideas of state sovereignty.
2. Social solidarity is the end of all human institutions, including the state. The state has no absolute and unlimited powers. It is bound by rule of social solidarity.
3. Duguit’s theory is more concerned with, what state ought to be than what is and his theory does not find any support.

PLURALIST THEORY
1. Rejected the ideas of state SOVEREIGNTY – Prof. Laski.
2. Pluralism means individual is the member of state as well as of a number of other associations. The state is essentially an association or group.
3. These associations compete among themselves for the allegiance a human beings. There is no reason on why the individual must vow exclusive allegiance only to the state. The allegiance of the individual is not single but plural in nature.
4. This theory considers the state as a federation of associations. Though the state is comprehensive and central association, the other associations are not subordinate to it.
5. This theory of sovereignty is a very progressive theory. It keeps in view the growing demand and impotence of the individual freedom and the freedom of associations.

MARXIST’S VIEW
1. State simply reflects the dominance of one class over the other class of the society.
2. The powers of the state are exercised to protect the interests of the class which has its instruments of production in its hand. They the state power of sovereignty is only for the protection of that class.
3. In classless society the state shall “wither away” and consequently where can be no question of state sovereign.
4. But the Marxist governments instead of withering away has become very powerful and sovereignty has been demonstrated in a naked form.

**SALMOND’S FORM**

1. Every political society involves the presence of sovereign authority.
2. An authority may be sovereign within its sphere and in its sphere its power is uncontrolled.
3. The authority confided to a particular organ should be regard as sovereign if within its own sphere it acknowledges no higher power though its authority may not extend to other spheres.
4. A sovereign within its power is not a contradiction in terms. Province of sovereignty may have legally determined bounds.
5. Legislative power itself may be divided between two coordinated legislatures, each dealing exclusively with certain topics of legislative power.