NOTES AND COMMENTS

OF SOVEREIGNTY – A FRESH LOOK

I Introduction

LAWFULNESS OF an authority demands a presence of the law before the creation of an authority on the touchstone of which the validity of created authority may be tested. Thus, if it is said that a particular authority is a lawful authority there is a presumption that there was a law before that authority was created. But, is it true to say that some law is always present when some authority is created? And, in the past also, was there always some law present when some authority was created? This leads to examine the chronological order in which law and authority come into existence. One needs to ask – 'which one of them predates the other?' and also – 'which one of them creates the other'? Does the law create the authority or the authority creates the law? Of course, when law creates the authority, the authority so created is lawful authority. But then in that case the question arises: 'who created the law which could create authority'? Alternatively, if one argues that between law and authority, it is the authority which existed even before the law and which created the law the question arises: 'who created the authority which could validly create the law'? In most of the social systems, in the present time-frame, the question does not present much difficulty because the law appears to be well-rooted in those social systems, and it appears that it is the law that creates the authorities. In most of the cases the authorities so created are, therefore, lawful authorities. But, this question becomes very difficult to answer if on the creation of an authority, to check the lawfulness of the same, one starts asking: 'who created the law that has created the authority?' and then, receiving the answer that, 'some pre-existing authority created that law which has created this authority', one may ask: 'who created that authority which created that law which has created this authority'? The answer would then point towards some other pre-existing law that created the authority in question. In this line of questioning it can be concluded that every law is created by some pre-existing authority, and every authority is created by some pre-existing law. Therefore, every authority is a lawful authority and people are bound to obey that. The day-to-day business of lawmaking and law enforcement is justified in this manner. But, this does not in any manner justify the existence of the entire legal system as a

whole. In order to justify the entire legal system as a whole one needs to trace the existence of law and of authority backwards and find out which gave birth to the other in the very beginning. To justify the legal system as a whole, one needs to start from the point when there was neither law nor authority in the society. The very first moment of creation of legal system – the 'Big Bang' of legal system. Legitimacy of the law can be established on either discovering that in the very beginning some law was *autopoietic*[1] which then gave birth to authority which then further created some other laws or that in the very beginning law was created by some authority which was *autopoietic* and competent to create the law.

If one investigates the question of lawful authority in this manner he may arrive at a more fundamental question: 'which one of the two was *autopoietic* - law or authority?' From here if one takes the line that law was *autopoietic*, then it could only be law of nature (including laws of physics etc.,) or divine law existing from the beginning of the universe, requiring no human agency for its creation or application. Since the extensive inquiry is related to positive laws and not laws of nature or divine law, this line comes to a dead end. There cannot be any positive law created or legitimized by itself. Every positive law is a creation of some human effort or contribution. This should be taken as true for all time frames – past, present and future. Therefore, the logical conclusion is that between law and authority it is not the law that was *autopoietic*.

Now, if one pursues the line that authority was *autopoietic* and it created the law, he may be faced with the question: 'what made the authority justified in creating the law?' Since the relevant point of time in this question is the time when there was no law, therefore, more precise question is: 'what made the authority justified in creating the law at the moment when it was about to create but had not actually created that?' That point of time is extremely important because as far as the time after the creation of the law is concerned, it can be assumed that the authority creating the law shall so create the law that such authority shall receive retrospective validity from the law and shall become a lawful authority

1 Autopoiesis literally means self-creation. This term has Greek origin wherein auto stands for self and poiesis stands for creation. The term 'autopoiesis' was first introduced by Chilean biologists Humberto Maturana and Francisco Varela in 1972. The term 'autopoiesis' was originally presented as a system description that was said to define and explain the nature of living systems. A canonical example of an autopoietic system is the biological cell. *See* http://en.wikipedia.org/wiki/Autopoiesis.

with the help of the law created by itself. Therefore, once the law is created it is not, at least theoretically, difficult for the authority to acquire and maintain lawfulness for itself. The question of lawfulness of the authority becomes settled after the law is once created. More interesting is the question of justification of the authority at the time when it was creating the law for the first time. Why it was justified at that time? What made it justifiable?

The answers can be discovered by understanding the true nature of that authority which creates the law for the first time in society. An understanding of the true nature of that authority gives us an understanding of its relationship with law and also of the validity of the legal systems as a whole. Therefore, one must investigate into the nature of the authority that first creates the law and subsequently receives validity from it. One needs to raise questions like: 'What is this thing that we call authority?', 'What is it made up of?', 'Who creates it in the very beginning?' etc.

Such an authority is usually called sovereign and it is believed that it created the law in the very beginning and it continues creating or validating law in societies. In any legal system the validity of a law or an authority is established by referring to the sovereign. Sovereign is believed to be the ultimate authority from where law and other authorities derive their validity. Therefore, it must be clearly established as to who is the sovereign? Or, where lies the sovereignty? Or, what is the true nature of sovereignty? On this analysis of the nature of sovereignty an analysis of its effective functioning may not be an indispensable ingredient. There are two very prominent views regarding the real nature of sovereignty that shall be considered here. One is held by Jean-Jacques Rousseau[2] and the other by John Austin.[3]

II First approach - Rousseau's idea of 'a people'

Rousseau's idea of a sovereign is intrinsically linked with his idea of social contract. He refutes the right of the strongest, and advocates that

2 All references in this paper are taken from Maurice Cranston's translation of Rousseau, *The Social Contract* (Penguin Books, 1968).

3 All references in this paper are taken from John Austin, *The Province of Jurisprudence Determined* (Universal Law Publishing Co. Pvt. Ltd., 2008).

people are bound to obey none but lawful authorities.[4] Dealing with the question of sovereignty, Rousseau rejects the possibility of recognizing the king as a sovereign. This is so because in his theory the king has no power over *a people* unless *a people* give themselves to him. In fact it is *a people* that vest power in the king by gifting themselves to him.[5] Logically, if *a people* can give themselves to the king, they can take themselves back from the king as well. It is, therefore, apparent that in Rousseau's scheme of things *a people* are superior to the king. Such a superiority of *a people* over the king is also evident in his belief that the dissolution of the state takes place and the natural freedoms are restored in the people 'when the prince ceases to administer the state according to the law and usurps the sovereign power'.[6] Prince's moral right to get obedience and citizens' moral obligation to obey him is subject to the condition that he is acting in accordance with the law.

Two very important questions arise here: First, 'how *a people* are formed?' and second, 'what is the true nature of *a people*?' Rousseau recognizes that formation of *a people* is the real foundation of society.[7] He believes that at least once in the past there had been a unanimous agreement among all to surrender all their natural rights.[8] In that agreement each member of the society put into the community his person and all his

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4 Rousseau, I *The Social Contract* ch. 3 at 53.

5 Quoting Grotius with approval Rousseau says: "*A people* says Grotius, *may give itself to a king*". Rousseau, *id.* at 59.

6 In that case he states: 'a remarkable change occurs; for it is not the government but the state which contracts- by which I mean that the state as a whole is dissolved and another is formed inside it, one composed only of the members of the government and having no significance for the rest of the people except that of a master and a tyrant, so that the moment the government usurps sovereignty, the social pact is broken, and all the ordinary citizens, recovering by right their natural freedom, are compelled by force, but not morally obliged to obey'. Rousseau, III *The Social Contract* ch. 10 at 133.

7 'Before considering the act by which *a people* submits to a king, we ought to scrutinize the act by which people become *a people*, for that act, being necessarily antecedent to the other is the real foundation of the society'. Rousseau, I *The Social Contract* ch. 5 at 59.

8 'In fact if there were no earlier agreement, how, unless the election were unanimous, could there be any obligation on the minority to accept the decision of the majority? What right have the hundred who want to have a master to vote on behalf of the ten who do not? The law of majority voting itself rests on an agreement, and implies that there has been on at least one occasion unanimity.' Rousseau, *ibid.*

powers under the supreme direction of the general will; and as a body they incorporated every member as an indivisible part of the whole.[9] The effect of the agreement was that immediately, in place of the individual person of each contracting party an artificial and corporate body composed of as many members as there were voters was created.[10] By the same agreement that body acquired its unity, its common ego, its life and its will.[11] The entity so formed is known as the 'Republic'. In its passive role it is called the state, when it plays an active role it is the sovereign.[12] Those who are associated in it are collectively called *a people* and individually citizens.[13] He believes that after the formation of *a people* everyone gets greater freedom because no one is subject to any individual person. Everyone is subject to *a people* of which he himself is a part. Thus, in theory, everyone is ruled by himself. When everyone is ruled by himself he has maximum freedoms.[14] Such an agreement is called the social contract. It is the advent of all the laws and all the authorities. This social contract creates *a people* which has a general will and which, in its active role, is sovereign. Thus, answer to the first question in Rousseau's theory is that *a people* is created by a social contract. And, answer to the second question is that the true nature of *a people* is that it is a body of persons that carries the general will which is supreme in a society. Any act of the state has to be in accordance with the general will; and any reference to *a people* in his theory means a reference to the general will of *a people*. Thus, one may put Rousseau's views like this: In Rousseau's theory a metaphysical entity called general will is the sovereign which can be found in *a people*. This general will is not the will of all put together but the common

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9 *Supra* note 4 at 61.

10 *Ibid.*

11 *Ibid.*

12 *Id.* at 61-62.

13 *Id.* at 62.

14 '… since each man gives himself to all, he gives himself to none; and since there is no associate over whom he does not gain the same rights as others gain over him, each man recovers the equivalent of everything he loses, and in the bargain he acquires more power to preserve what he has'. *Id.* at 61.

15 'There is often a great difference between the will of all (what all individuals want) and the general will; the general will studies only the common interests while the will of all studies the private interest, and is indeed no more than the sum of individual desires. But if we take away from these same wills, the pluses and minuses which cancel each other out, the balance which remains is the general will. Rousseau, II *The Social Contract* ch. 3 at 72.

interest of all.[15] This metaphysical entity, the sovereignty, is inalienable,[16] indivisible,[17] and it can never err.[18] No law is binding on sovereign,[19] not even the social contract.[20] The sovereign by the mere fact that it is, is always all that it ought to be.[21] This metaphysical entity *i.e.* the sovereign makes the law.[22]

It must be noticed that the unanimity in creating the social contract gives rise to a theoretical difficulty that needs attention. Unless it is believed that there was a divine inspiration that made everyone think alike on a given day to surrender all their natural liberties to form a social contract, there has to be, in theory, some person who was instrumental in the creation of social contract. Who had great influence over all the people and who could convince all of them to surrender their natural liberties, perhaps in some cases against their wishes and surely in some cases against their natural instincts. It is important to pay attention to this person because the presence of this person indicates the presence of the authority that existed even before the creation of the social contract.

This theoretical difficulty can be better understood by paying attention to the status of individual will, before it was surrendered to constitute the general will. There are two possibilities regarding the status of individual will at that time. The first possibility is that at the time when the social contract was about to be entered into by the individuals they had the freedom to enter into or not to enter into such a contract. In such cases, people may say that their will *i.e.* their individual will was free. The second possibility is that they had no such choice to enter into or not to enter

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16 '…sovereignty being nothing other than the exercise of the general will, can never be alienated; and that the sovereign, which is simply a collective being, cannot be represented by anyone but itself- power may be delegated, but the will cannot be.' Rousseau, II *The Social Contract* ch. 1 at 69.

17 'Just as sovereignty is inalienable, it is for the same reason indivisible,' *id.* at 70.

18 '… general will is always rightful and always tends to the public good,' *id.* at 72.

19 '… it would be against the very nature of a political body for the sovereign to set over itself a law which it could not infringe.' Rousseau, I *The Social Contract* ch. 7 at 62.

20 '… there neither is, nor can be, any kind of fundamental law binding on the people as a body, not even the social contract itself.' *Ibid.*

21 *Id.* at 63.

22 '… it is immediately clear that we can no longer ask *who* is to make laws, because laws are acts of the general will'. Rousseau, II *The Social Contract* ch. 6 at 82.

into the social contract, and it was incumbent upon them to enter into the social contract. In such a case, one must admit that their individual will was not free even before the social contract was entered into. So, individual will at the time of entering into the social contract has to be, theoretically, either free or not free.

Exploring the first possibility of free individual will, one must admit that if all the individuals had a free will then unanimous vote to create a social contract, as conceived by Rousseau, is not realistically possible. If individual will is free, there has to be a divided opinion. No matter how small, there has to be a dissent. There has to be some minority. What is realistically possible is a majority vote and a minority vote, but not a unanimous vote. If the outcome of such a divided vote could create a social contract then there already was a rule that the majority vote shall be enough to create the social contract. As the sovereign was created by the social contract in Rousseau's analysis, the question that needs to be answered is: 'Who created the rule that a majority vote shall be enough to create the social contract?' Or, in other words, 'Who created the rule that the individual will of the people in minority shall be subjected to the individual will of the people in majority?' and, why such a rule was binding? The creator of such a rule is the creator of the social contract and also of the sovereign who is a product of the social contract in Rousseau's theory.

In order to explore the second possibility that the individual will was not free even before the social contract was entered into and people had no choice but to vote for the social contract, such an absence of choice, and perhaps *only* such an absence of choice, could procure a unanimous vote for the social contract. But, in this case the question that should be asked is: 'Who compelled all the individuals to vote in favour of social contract?' Or, in other words: 'Who took away the freedom of individual will even before the advent of social contract?' The authority that took away the freedom of individual will and forced all the individuals to necessarily vote in favour of the social contract is the real creator of the social contract and also of the sovereign who is a product of the social contract in Rousseau's theory. Therefore, both ways, whether an individual's will was free or not free, at the time of voting for the social contract there are strong indications of the presence of some authority.

Rousseau recognizes the presence of such an authority that was existing even before the time of social contract.[23] He calls this authority the 'lawgiver'. The lawgiver existed even before the social contract was entered into. True importance of this lawgiver can be seen in his ability to make men before the advent of law, that which they become as a result of law.[24] He is a very wise person who, in order to persuade people, may speak his own ideas in the name of God.[25] This 'lawgiver' is not a person appointed by *a people* to make laws for the society. He is also not mentioned anywhere in the constitution once constitution comes into existence.[26] As Rousseau maintained in his theory that all authority originate from the social contract he had to compulsorily say that, 'we find in the work of the lawgiver two things which look contradictory- a task which is beyond human powers and a non existent authority for its execution'.[27]

Here, in this theory, there is a person called 'lawgiver' who not only pre existed *a people* but also is the force behind the creation of *a people*; who has super human powers to mould the nature of man and make them before the advent of law, that which they become as a result of law, and who first gave constitution to the Republic. Despite all this Rousseau does not want to recognize such an authority as the sovereign. He insists that: 'The lawgiver is, in every respect, an extraordinary man in the State. Extraordinary not only because of his genius, but equally because of his office, which is neither that of the government nor that of the sovereign'.[28]

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23 'Whoever ventures on the enterprise of setting up *a people* must be ready, shall we say, to change human nature, to transform each individual, who by himself is entirely complete and solitary, into a part of a much greater whole, from which that same individual will then receive, in a sense, his life and his being. The founder of nations must weaken the structure of man in order to fortify it, to replace the physical and independent existence we have all received from nature with a moral and communal existence'. Rousseau, II *The Social Contract* ch. 7 at 84.

24 'For a newly formed people to understand wise principles of politics and to follow the basic rules of statecraft, the effect would have to become the cause; the social sprit which must be the product of social institutions would have to preside over the setting up of those institutions; men would have to become before the advent of law, that which they become as a result of law'. *Id.* at 86.

25 *Id.* at 87.

26 'This office which gives the republic its constitution has no place in that constitution.' *Id.* at 85.

27 *Id.* at 86.

28 *Id.* at 85.

Rousseau's hesitation in recognizing lawgiver as the sovereign despite such lawgiver's superiority over *a people* in creating the conditions for the advent of *a people* is understandable. It is due to his theoretical compulsion.

In his theory Rousseau wants nothing but the general will to be treated as sovereign. Simultaneously, he also wants, and naturally so, that lawmaking should be the sole prerogative of the sovereign.[29] Thus, logically, in his theory lawmaking cannot be done as a matter of right by anyone except *a people* in accordance with the general will. But, this is possible only after *a people* has come into existence. After the creation of *a people* there is not much difficulty in creating the authorities who shall be creating the laws, and creating the laws that shall be creating the authorities. Once *a people* is created a kind of a cycle shall be put in motion and creation of laws and of authorities shall start in tandem and shall be valid as long as it is done in the name of the general will.

The real difficulty is to maintain a logical consistency in the theory at the time of creating *a people*. At that time there is neither any law nor any authority, but clearly there is a requirement of someone who shall put everything in motion. Therefore, lawgiver is necessary in theory. Lawgiver puts everything in motion. But this person who is logically necessary in the theory creates a serious problem in the theory. Since he pre exists *a people*, he has not derived his authority from *a people* to form *a people*. The problem is, from where he has derived his authority? In explaining the real source of authority of the lawgiver, Rousseau's exalted intellectual powers failed him and he said that the lawgiver executed a non existent authority.[30] He does not explain in his theory how a non existent authority can be executed?

On the one hand, Rousseau wants to explain the creation of the general will, and on the other hand, he wants to establish the general will as sovereign. He does not want to admit that lawgiver, the creator of the general will is superior to the general will and he derived his authority from no one but himself; because if he declares such a man (who, by exercising his extra-constitutional and non-existent authority to make the law, sets up *a people*) as sovereign his entire theory of social contract collapses.

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29 *Supra* note 22 at 82.
30 *Supra* note 23 at 86.

Even otherwise the theory runs into difficulties if one asks: 'What is the true nature of such a lawgiver?' If such a lawgiver is not the sovereign then where does he stand *vis-à-vis* other members of the society? According to Rousseau, lawgiver's is a special and superior function which has nothing to do with empire over men; for just as he who has command over men must not have command over laws, neither must he who has command over laws have command over men; otherwise, the laws, being offspring of the legislator's passions, would often merely perpetuate his injustices, and partial judgments would inevitably vitiate the sanctity of his works.[31] Thus, in his scheme of things the lawgiver is not the administrator of the laws. But, is this enough, that he is not at the same time the lawgiver as well as the administrator of laws, to strip him off the status of a sovereign? Should it also not be examined whether the lawgiver is governed by the same laws that he makes for others? If lawgiver is not governed by the laws that he makes for the society then he has to be either God or a foreigner. Rousseau refers to the need that laws may be given by Gods.[32] He also refers to the practice of lawmaking by foreigners.[33] He, however, did not pursue both these ideas. In his scheme of things it is apparent that the lawgiver shall be governed by the same laws that he shall be making for the society. If he shall be governed by the same laws that he shall be making for the society, then in that case in all probabilities he shall be making such laws which shall advance his personal interest. If those laws also advance the interest of *a people* then that is a bonus. Realistically, he shall not be making any laws that may jeopardize his personal interest, though they may be advancing the interest of *a people*. That means, he shall be ruled by laws that satisfy his wishes, whereas society shall be ruled by laws that do not dissatisfy his wishes. His wishes shall be subject to no one's wishes, whereas society's wishes shall be subject to his wishes. Therefore, if the lawgiver is going to be governed by the same laws that he shall be making for the society, in all probability

31 *Id.* at 85.

32 'To discover the rules of society that are best suited to nations, there would need to exist a superior intelligence, who could understand the passions of men without feeling any of them, who had no affinity with our nature but knew it to the full, whose happiness was independent of ours, but who would nevertheless make our happiness his concern, who would be content to wait in the fullness of time for a distant glory, and to labour in one age to enjoy the fruits in another. God would be needed to give men laws.' *Id.* at 84.

he shall be sovereign *vis-à-vis* other members of the society.[34] This line of argument is not examined by Rousseau. All that he could say was that the people itself cannot, even should it wish, strip itself of the untransferable right of lawmaking. Thus, the man who frames the laws has not nor ought to have any legislative right to make the laws.[35]

There are four features of sovereign that he wants to maintain in his theory. He wants to maintain that: (i) Sovereign is a metaphysical entity, the general will, (ii) Sovereign can be found in an indeterminate group of persons called *a people*, (iii) Sovereign is not *autopoietic*, (iv) Sovereign makes laws. Because of such characteristics, at pre contract stage sovereign requires some person for its creation and at the post contract stage it requires some person for executing the task of lawmaking. To solve this situation, in theory, he created a lawgiver for the purposes of creating general will and for lawmaking. But, finally the result in his theory is that: lawgiver makes the laws, laws are made by sovereign, but lawgiver is not a sovereign - a logical inconsistency.[36]

Apparently, attributing sovereignty to a metaphysical entity which resides in an indeterminate body of persons is not compatible with attributing the task of lawmaking to the sovereign. If sovereign is a metaphysical entity residing in an indeterminate body of persons then it cannot perform the task of lawmaking. Or, if the task of lawmaking is performed by the sovereign then it cannot be a metaphysical entity residing in an indeterminate body of persons. Moreover, if the creation of an entity is up to the wishes of some authority then the creator authority is more likely to be the sovereign rather than the created entity.

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33 'It was the habit of most Greek cities to confer on foreigners the task of framing their laws. The modern republics of Italy have often copied this custom; the republic of Geneva did so, and found that it worked well.' *Id.* at 85.

34 Same conclusion can be drawn regarding a foreigner if he makes laws for a society. In that case *a people* shall be subject to the rules made by him whereas he shall not be subject to the same rules. Thus, people shall be subject to his wishes but not vice versa, and the relation so established between them shall be that of the sovereign and the subject.

35 *Supra* note 23 at 86.

36 Some other difficulties may also be pointed out e.g. how to reconcile the will of those people who were added later in the society? Why they were bound by the pact made by their ancestors? Is no individual member who is subsequently added allowed to dissent or go against the general will? Or, is it assumed that no individual subsequently added to the society shall ever dissent?

III Second approach - Austin's idea of 'determinate human superior'

Of sovereignty Austin says- 'If a determinate human superior, not in a 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 the society (including the superior) is a society political and independent. To that determinate superior, the other members of the society are subject: or on that determinate superior the other members of the society are dependent. The position of its other members towards that determinate superior, is a state of subjection, or a state of dependence. The mutual relation which subsists between the superior and them, may be styled the relation of sovereign and subject, or the relation of sovereignty and subjection.'[37] Thus, in Austin's views, 'sovereignty can hardly reside in all the members of a society',[38] and 'every supreme government is a monarchy or an aristocracy'.[39] In Austin's theory the society is not truly independent. The mark of a determinate human superior (which he calls a negative mark) that it is not in a habit of obedience to a like superior logically drives him to observe that it is only through an ellipsis, or an abridged form of expression, that the society is styled independent. The party truly independent (independent, that is to say, of a determinate human superior), is not the society, but sovereign portion of the society:[40] that certain member of the society, or that certain body of its members, to whose commands, expressed or intimated, the generality or bulk of its members render habitual obedience. Upon that certain person, or certain body of persons, the other members of the society are dependent: or to that certain person, or certain body of persons, the other members of the society are subject.[41] Moreover, in his theory, there is only one such person or body of persons because he believes that unless habitual obedience be rendered by the bulk of its members to one and the same superior, the given society is either in a state of nature, or is split into two or more independent political societies.[42]

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37 *Supra* note 3 at 194.

38 *Id.* at 216.

39 *Id.* at 217.

40 Austin quotes Grotius with approval: 'Grotius believed that sovereign power is perfectly or completely independent of other human power; inasmuch that its acts cannot be annulled by any human will other than its own.' *Id.* at 214.

41 *Id.* at 194.

42 *Id.* at 198.

In Austin's theory sovereign is an active performer of tasks[43] who makes laws by issuing commands.[44] Austin's insistence in locating sovereignty in a determinate individual person or a determinate body of persons is due to his belief that an indeterminate body is incapable of corporate conduct, inasmuch as the several persons of whom it consists cannot be known and indicated completely and correctly,[45] whereas a determinate body of persons is capable of corporate conduct, or is capable, as a body of positive or negative deportment,[46] and also because if the sovereign one or number were not determinate or certain, it could not command expressly or tacitly, and could not be an object of obedience to the subject members of the community.[47] Thus, if one conceptualizes sovereign as a determinate body that makes laws, one is in agreement with Austin.

Firstly, it is not difficult to observe that in modern democracies the lawmaking authorities cannot make laws as they choose. In theory, they

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43 He believes that, 'in most or many of the societies whose supreme governments are monarchical, or whose supreme governments are oligarchical, or whose supreme governments are aristrocratical many of the sovereign powers are exercised by the sovereign directly, or the sovereign performs directly much of the business of the government. Many of the sovereign powers are exercised by the sovereign directly, or the sovereign performs directly much of the business of government, even in some of the societies whose supreme governments are popular.' *Id.* at 227-228.

44 'Of the laws or rules set by men to men, some are established by political superiors, sovereign and subject: by persons exercising supreme and subordinate government, in independent nations, or independent political societies. The aggregate of rules thus established, or some aggregate forming a portion of that aggregate, is the appropriate matter of jurisprudence, general or particular. To the aggregate of the rules thus established, or to some aggregate forming a portion of that aggregate, the term law, as used simply and strictly, is exclusively applied.' *Supra* note 37 at 11, followed by 'Every law or rule (taken with the largest signification which can be given to the term properly) is a command. Or, rather, laws or rules, properly so called, are a species of commands.' *Supra* note 3 at 13.

45 *Id.* at 149.

46 'Whether it consists of persons determined by specific characters, or of persons determined or defined by a character or character generic, every person who belongs to it may be indicated by his specific character… consequently, the entire body, or any proportion of its members, is capable as a body, of positive or negative department'. *Ibid.*

47 *Id.* at 151.

make laws on behalf of the entire society. So, laws are, theoretically, made by the whole society through the instrument of legislators. And, in practice it can be easily observed that there are many laws made in accordance with the wishes of certain sections of the society. Moreover, even after the laws are once made their continuation in the statute books and also their implementation depends upon their acceptance by the whole society or at least by certain sections of the society. It is very evident that in many cases the wishes of the society or certain sections of the society may be so compelling that the lawmaking authorities are left with no choice but to make or repeal laws in accordance with them. Under such circumstances, following Austin's theory, if one wants to maintain that lawmaking is the sole prerogative of the sovereign and he is bound by no one's wishes but his own, one cannot maintain that the determinate lawmaking body is the sovereign.

Although Austin does not deny the possibility of a law imposed by general opinion becoming the cause of a law in the proper acceptance of the term; yet he believes that such a law is only an opinion or sentiment of an uncertain body of persons.[48] He does not explore the possibility of a compulsion on the lawmaker to follow the wishes of the whole or certain section of the society- something that regularly occurs in social systems.

Secondly, in modern democracies, the lawmaking authorities are themselves bound by the laws that they make. This is an impossibility in Austin's theory unless a recourse to the fiction of body corporate is taken and said: that the determinate body of lawmakers work in two capacities viz. sovereign capacity and personal capacity, and that they are bound in their personal capacity by what they do in their sovereign capacity. Such an argument would amount to locating sovereignty in a metaphysical entity- an undesired result in Austin's theory. Problem arises due to Austin's insistence in locating sovereignty in a determinate body only, and also due to treating lawmaking as a function of sovereignty. Such insistence produces unrealistic results.

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48 'A law imposed by general opinion may be the cause of a law in the proper acceptation of the term. But the law properly so called, which is the consequent or effect, utterly differs from the so called law which is the antecedent or cause. The one is an opinion or sentiment of an uncertain body of persons; of a body essentially incapable of joint or corporate conduct. The other is set or established by the positive or negative deportment of a certain individual or aggregate'. *Id.* at 150.

Thus, it may be summarized that if lawmaking is attributed to a sovereign which is a metaphysical entity, a problem of the execution of the task of lawmaking arises. Or, if lawmaking is attributed to a sovereign which is a human being, a problem of subjecting such human being to the laws made by him arises. Moreover, if metaphysical entity is the general will then presence of some authority creating such general will cannot be denied, in which case it becomes impossible to explain why the creator of the general will is not the real sovereign. Therefore, some other concept of sovereignty is required which is different from these two leading concepts and which may come closer to the reality by solving the problems not solved by these two concepts.

IV Third possibility - The idea of 'strongest will'

The difference between life and death stipulates that there are two components that combine to create life. Those two components are matter and consciousness. The life is a juxtaposition of matter and consciousness. In the absence of any one of them no life is possible. Matter is the physical force and consciousness is the metaphysical force. The relation between the physical force and the metaphysical force is such that physical force cannot operate on its own. Physical force gets its initial push from the metaphysical force and subsequently also it gets its continued drive and direction from the metaphysical force. Physical force works as metaphysical force make that work. Physical force takes shape as given by metaphysical force. The real master in this duality is the metaphysical force. The physical force is but the agent. That which seeks satisfaction is metaphysical component and that which provides satisfaction is physical component.

That does not mean to say that physical force is any less important. In this pair of forces the metaphysical component cannot even be experienced without the physical component. That the metaphysical component exists can be known only through the physical component. Whatever metaphysical component wants can be carried out only through the physical component. That there is any such existence of two forces can be known only through the physical force. That there is any relationship between them can be known only through the physical force. But, that which eventually *learns* all this through the physical force is metaphysical force. That which *discovers* and *understands* the physical component as well as the metaphysical component is metaphysical component. And, that

which is eventually *satisfied* or *dissatisfied* is metaphysical component only.[49]

Therefore, it is only the metaphysical that can ever be styled as truly supreme. Since it always controls and never gets controlled, it always drives and never gets driven, it always seeks satisfaction and never provides that, it always gives approval or disapproval but never seeks the same, therefore, in its relationship with the physical component it is the metaphysical component that is sovereign.[50] Whatever drive, control, direction, approval or disapproval that it gets, it gets from none other than itself. And, it owes its existence to no one. It is *autopoietic*.

For the purposes of the present analysis this metaphysical force herein above discussed is called the *will*. Will is not in the domain of law. Law can control the actions but not the will. The actions of human beings are initiated, driven and guided by their will. Since all human beings have their independent will, therefore the will of individuals is either in harmony or in conflict with each other. To resolve the conflicts and to maintain the greatest possible harmony political institutions like law, state etc. emerge. But, such institutions do not operate in accordance with the will of all. And, it is submitted, that they do not operate even in accordance with the will of the majority.

Regarding any one issue in the society, individual's will may not only be different from each other, it may also have a different level of strength. For example, on the issue whether a law that makes homosexuality a punishable offence should continue in the statute book or should be repealed, people may not only have different will but may also have different level of strength in their will. Some may have a very strong will that it should be repealed. Some may have a will, but not that strong, that it should be repealed. Some others may have a very strong will that such a law should continue. And, there may be some others in the society who may not have any will in this matter either ways; or, their will either ways may be so weak that neither they bother about what may happen in the issue, nor others bother about their will in the matter. On a political issue relatively strong wills in opposition with each other challenge each other

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49 The origin of this thought can be traced in *Upanishads*. See, for example, *Kenopanishada*.

50 Austin comes very close to this when he admits that, 'if perfect or complete independence be of the essence of sovereign power, there is not in fact the human power to which the epithet sovereign will apply with propriety'. However, he did not pursue this line of thought. *Supra* note 3 at 214.

and a sort of conflict or clash of wills take place. In such a conflict the stronger will prevails. The stronger will either silences the weaker will or moulds the weaker will. In a way, stronger will assimilates the weaker will with itself, thereby gaining more strength. Such stronger will then repeats the process with other weaker wills and over a period of time becomes the strongest will in the society on a particular issue. Although some opposing wills may still exist in the society yet, they are not sufficiently strong to shake the strongest will. Eventual outcome in the matter depends on such strongest will. Such strongest will on an issue, it is submitted, is the sovereign.

There are certain characteristics of the strongest will that must be noticed. Firstly, such strongest will is not created or validated by anyone. It is already stronger with respect to others; and by the process of persuasion, confrontation and assimilation it gains momentum and becomes the strongest will in the society. It already exists in the very beginning and because of its inherent strength it becomes the strongest over a period of time. There is no authority that stands above it to create it. And, there is no authority that stands beyond it to validate it. It creates itself and it is valid because it is the strongest. It depends upon no one but itself for its creation or validity. Thus, the strongest will is *autopoietic* and for validity it refers to nothing but itself.

Secondly, the strongest will may not be the will of all, or even the will of the majority. On an issue in the society, as herein above discussed, not all may have sufficiently strong will to matter. Therefore, the strongest will may be established by discounting the will of a large number of people in the society. So much so, in some matters the strongest will may be established within a handful of people. In some extreme cases it may even be the will of only one person in the society. Whether the strongest will is the will of a few or a large number of people depends upon the nature of issue with respect to which the strongest will is established. In those matters in which the bulk of the members of society have sufficiently strong will, the strongest will is, mostly, the will of the majority. But, since not every issue can be such in which the bulk of the members of the society can have sufficiently strong will to matter therefore not every time the strongest will is the will of the majority.

Thirdly, there is only one strongest will on an issue in a society. If there are two equally strong wills on an issue, or, in other words, if the strongest will is confronted by equally strong will which it cannot silence or assimilate with itself the society witnesses a continued conflict. Such

conflict continues unless one will bends before the other will. If none bends, the conflict grows; the problem of law and order may arise; and, may take a dangerous shape. There may be a loss of life and property in such conflict. The possibility of a division of the society is also not ruled out in such a situation. Eventually, there emerges only one strongest will in one society on an issue.

Fourthly, the strongest will is dynamic. The strongest will in the society regarding one issue may not be the strongest will in the same society regarding another issue. Therefore, if there are various issues in the society like- 'whether there should be a law permitting same sex marriages or not?'; 'whether there should be a law permitting euthanasia or not?'; 'whether plea bargaining should be allowed or not?' etc., the strongest will on one issue may not coincide with the strongest will in the other issue. Different people have different level of strength in their will with respect to different issues. Thus, some group of people may have a very strong will against same sex marriages but they may have a very weak will against plea bargaining. At the same time other group of people may have a weak will in favour of same sex marriages but very strong will in favour of plea bargaining. Now, if strong wills against same sex marriages gather momentum and become the strongest will the strongest will in that issue shall be located nearer to the first group. At the same time if strong wills in favour of plea bargaining gather momentum and become the strongest will, the strongest will for that issue shall be located nearer to the other. Or, in other words, the first group of persons shall be the part of the strongest will in first issue but they shall not be the part of the strongest will in the second issue. The second group of persons shall be the part of the strongest will in the second issue but they shall not be the part of the strongest will in the first issue. There may be a third group of persons, consisting of some members from the first group and some members from the second group, and, may be, some members neither from first group nor from second group which form part of the strongest will in the third issue regarding euthanasia. Thus, it is not always just one group that forms or represents the strongest will in the society. From issue to issue the strongest will shifts in the society. In that sense the strongest will is dynamic. It is not located for all purposes and forever in any one or group of persons. Depending upon the number of people concerned in the issue and the intensity of their concern the strongest will in continually relocated in the society. One can witness at the same point of time as many strongest wills as there are issues in the society. Such multiple

strongest wills do not divide the society as long as they are with respect to different issues.

Fifthly, the strongest will is not the actor. It does not do or create anything. It merely seeks satisfaction. Of the things that are not existing, it merely desires their creation; and, to the things that already exist it merely gives its approval or disapproval. For its satisfaction various institutions including law and state take shape. Thus, the strongest will is not the lawmaker. It desires the creation or repealing of legal systems and laws. Laws are created or repealed for its satisfaction. It may, as it please, desire the repeal of created laws and recreation of repealed laws. It is not bound by any creation or repeal of laws. If dissatisfied, it may desire the change of lawmakers also. Extent and form of implementation of laws is also in accordance with the desire of the strongest will. Thus, in a society a law is valid or an authority is lawful authority because the strongest will desires it to be so. It is also not bound by what it desired earlier. In that sense the strongest will is above all the laws and all the authorities.

Thus, the idea of sovereignty herein above proposed may be summarized in the following words:

In a society the strongest will-an *autopoietic*, metaphysical and dynamic entity which does not create anything but perpetually seeks satisfaction- is sovereign.

V Conclusion

From the above discussion, it can be observed that the idea of sovereignty is essential for providing legitimacy to the laws and also to the authorities functioning in the society. It is also essential to establish the legitimacy of the legal system as a whole. It was also observed that in theory sovereign can be taken as an indeterminate metaphysical entity or a determinate person or group of persons. However, in theory, if the indeterminate entity that is to be treated as sovereign is taken to be the general will the theory runs into difficulties and fails to explain why the creator of the general will is not superior to the general will. Therefore, if the sovereign has to be a metaphysical entity it has to be such that no one creates it. Moreover, if the task of lawmaking is attributed to the sovereign then, in case the sovereign is taken to be a metaphysical entity such task cannot be performed; and, in case the sovereign is taken to be a determinate person or group of persons such person or group becomes superior to the law. Therefore, the task of lawmaking should be disassociated from

the idea of sovereignty and sovereignty should be identified in the metaphysical entity. Lastly, the idea of locating sovereignty in a fixed entity, be that a metaphysical entity or a determinate person or group of persons, does not explain why that fixed entity has to, at least in some cases, necessarily concede to the demands of various groups in the society. Therefore, the sovereignty should be viewed not as a static thing but as a dynamic thing which can be seen at various locations within one society even at one point of time.

By introducing the notion of *autopoiesis* in sovereignty the present proposal attempts to solve the problems associated with the creation of a sovereign while at the same time subjecting all the members of the society to the desires of the sovereign. By disassociating the task of lawmaking from the notion of sovereignty it also attempts to solve some problems associated with the functions of lawmaking by explaining why the lawmaker is himself bound by the laws that it makes. And by explaining sovereign as a dynamic entity this proposal attempts to solve the practical problem of various pressure groups always existing in most of the socio-legal systems.

It is submitted that the proposed idea of locating sovereignty in the strongest will- an *autopoietic*, metaphysical and dynamic entity- which does not create anything but only perpetually seeks satisfaction, solves some theoretical difficulties and brings theory closer to reality.

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