***Notes and comments***

# A Journey in Search of Sovereign

**Prof. (Dr.) Gangotri Chakraborty**[1]

**Prologue:**

A very important aspect of jurisprudence is its engagement with the concept of sovereign. The issue of law and authority revolves around the concept of sovereignty. It leads to the question of the proverbial egg first or the chick first. The question is whether the sovereign created by law or the sovereign created the law. If the sovereign was created by law and there was nothing before law then it appears that the law is *autopoietic*[2] and if the source of law was the sovereign and there was nothing before the sovereign then the sovereign is *autopoietic*. The search began a long time ago and continues to engage students jurisprudence even today.

The natural law thinkers begin with *a priory* 'IS' which is *autopoietic* which includes the laws of physics which existed at the beginning of the universe requiring no human agency for its creation and application. But the natural law thinker's attempt at understanding the concept of sovereign did not answer the puzzle convincingly. For them source of law remained divine. Human reason too was considered divine and natural yet the issue of sovereign remained unclear.

However **St. Thomas Aquinas** tried to address the concept of sovereignty by classifying law into a hierarchical order of ***Lex Aeterna, Lex Naturale, Lex Devina and Lex Humana***. Sovereign, according to St. Acquinas, is created and influenced by the first three categories of law which are not created or influenced by human beings and to that extent Sovereign is the creation of law that is autopoietic in nature.

However the natural law thinkers could not answer the question of what, if anything at all, binds the sovereign. Furthermore they had no answer to the question whether a sovereign which is so created by the autopoietic law can create bad laws and whether one should obey the bad law created by such a sovereign.

Some thinkers did grapple with the issue of creation of the sovereign and its nature.

## I. Sovereign in the Eyes of some Natural Law Thinkers:

**Hugo Grotius (1625):** In the early 17th century, Grotius (1583–1645) introduced the modern idea of *natural rights* of individuals. Grotius postulates that each individual has natural rights that enable self-preservation and employs this idea as a basis for moral consensus in the face of religious diversity and the rise of natural science**.** He seeks to find a parsimonious basis for

1 Professor and Head, Department of Law, University of North Bengal, Darjeeling (W.B.).
2 Autopoietic means self creating

a moral beginning for society, a kind of natural law that everyone could potentially accept. He goes so far as to say in his *On the Law of War and Peace* that even if we were to concede what we cannot concede without the utmost wickedness, that there is no God, these laws would still hold. The idea was considered incendiary since it suggested that power can ultimately go back to the individuals if the political society that they have set up forfeits the purpose for which it was originally established, which is to preserve themselves. In other words, the individual people are sovereign. Grotius says that the people are *sui juris* (under their own jurisdiction). People have rights as human beings but there is a delineation of those rights because of what is possible for everyone to accept morally; everyone has to accept that people as individuals are entitled to try to preserve themselves. Therefore, doing harm to or interfere with one another should be avoided. Any breach of these rights should be punished[3].

The problem with the notion of "the individual people, are sovereign... people are *Sui juris* ...under their own jurisdiction raises the question whether there was a law which bound the people together and would punish those who broke away from the group. If we agree that there was a law which united them in sui generis then who created that law? If not one then the law had to be autopoietic.

**Thomas Hobbes's *Leviathan* (1651)**: The first modern philosopher to articulate a detailed contract theory was Thomas Hobbes (1588–1679). According to Hobbes, the lives of individuals in the state of nature were "solitary, poor, nasty, brutish", a state where self-interest and the absence of rights and contracts prevented the 'social', or society. Life was 'anarchic'[4]. Individuals in the state of nature were apolitical and asocial. This state of nature is followed by the social contract.

The social contract was an 'occurrence' during which individuals came together and ceded some of their individual rights so that others would cede theirs[5]. This resulted in the establishment of society, and by extension, the state, a sovereign entity which was to protect these new rights which were now to regulate societal interactions. Society was thus no longer anarchic.

But the state system, which grew out of the social contract, was anarchic. Just like the individuals in the state of nature had been sovereigns and thus guided by self-interest and the absence of rights, so States now acted in their self-interest in competition with each other. Just like the state of nature, States were thus bound to be in conflict because there was no more powerful sovereign over and above the state capable of imposing social-contract laws[6].

This raised the question of how the Sovereign/State can be controlled so that it did not abuse its power or be anarchical. According to Jeremy Bentham when the people entered into

3 De jure belli ac pacis (On the Law of War and Peace) - Paris, 1625 (2nd ed. Amsterdam 1631); The Rights of War and Peace, ed. Richard Tuck (Liberty Fund, 2005).
4 Without leadership. The concept of sovereignty.
5 E.g. person A gives up his/her right to kill person B if person B does the same.
6 Thomas Hobbes. Leviathan: Or the Matter, Forme, and Power of a Common-Wealth Ecclesiasticall and Civill, ed. by Ian Shapiro (Yale University Press; 2010).

a social contract which he calls ***Pacta Regalia*** there was a transcendent class of law which prescribed to the sovereign what it must do. Bentham calls such a law ***Lex in Principem*** and further mentions that the business of the ordinary sort of law created by the sovereign called ***Lex in Populem*** is to describe to the people what they shall do.[7] He then adds that if by accident a sovereign should in fact come to the throne with a determination not to adopt the covenant of his predecessor, he must be told that he has to adopt them notwithstanding. If the powers are so distributed, there is no one person or body of persons in whose hands the sovereignty is reposed. Thus Bentham's transcendent law stands on higher pedestal and does not emanate from any human source. It may be termed autopoietic even though not accepted by Bentham to be so.

**John Locke's *Second Treatise of Government* (1689):** John Locke's conception of the social contract differed from Hobbes' in several ways, but retained the central notion that persons in a state of nature would willingly come together to form a state. Locke believed that individuals in a state of nature would have stronger moral limits on their action than accepted by Hobbes, but recognized that people would still live in fear of one another. Locke argued that individuals would agree to form a State that would provide a "neutral judge", and that could therefore protect the lives, liberty, and property of those who lived within it. While Hobbes argued for near-absolute authority, Locke argued in his *Second Treatise of Government* that laws made by the sovereign made in this manner could only be legitimate if they sought to achieve the common good. Locke also believed that people will do the right thing as a group, and that all people have natural rights[8].

Rousseau was the only jurist who seriously explored the creation of sovereign

**Jean-Jacques Rousseau's *Du contrat social* (1762):** Jean-Jacques Rousseau (1712–1778), in his influential 1762 treatise *The Social Contract*, outlined a different version of social contract theory, based on popular sovereignty. Although Rousseau wrote that the British were perhaps at the time the freest people on earth, he did not approve of their representative government. Rousseau believed that liberty was possible only where there was direct rule by the people as a whole in lawmaking, where popular sovereignty was indivisible and inalienable. Citizens must, in at least some circumstances, be able to choose together the fundamental rules by which they would live, and be able to revise those rules on later occasions if they choose to do so - something the British people as a whole were unable to do.

Rousseau's political theory has some points in common with Locke's individualism, but departs from it in his development of the "luminous conception" general will. Rousseau argues a citizen can be an egoist and decide that his personal interest should override the collective interest. However, as part of a collective body, the individual citizen puts aside his

7 Jeremy Bentham, Of Laws in General, H. L. A. Hart [Ed], Thomson Reuters, 64-71
8 Ashcraft, Richard. Revolutionary Politics and Locke's "Two Treatises of Government". Princeton: Princeton University Press, 1986; Ashcraft, Richard. Locke's Two Treatises of Government. Boston: Unwin Hyman, 1987.

egoism to create a "general will", which is popular sovereignty itself. Popular sovereignty[9] thus decides what is good for society as a whole, and the individual (including the administrative head of state, who could be a monarch) must bow to it, or be forced to bow to it:

The social contract can be reduced to the following terms: ***Each of individual puts his person and all his power in common under the supreme direction of the general will; and in a body receives each member as an indivisible part of the whole***[10]

Rousseau's striking phrase that man must "be forced to be free"[11] should be understood this way: since the indivisible and inalienable popular sovereignty decides what is good for the whole, then if an individual lapses back into his ordinary egoism and breaks the law, he will be forced to listen to what they decided as a member of the collectivity. Thus, the law, inasmuch as it is voted by the people's representatives, is not a limitation of individual freedom, but its expression; and enforcement of law, is not a restriction on individual liberty, as the individual, as a citizen, explicitly agreed to be constrained if, as a private individual, he did not respect his own will as formulated in the general will. Because laws represent the restraints of civil freedom, they represent the leap made from humans in the state of nature into civil society. In this sense, the law is a civilizing force, and therefore Rousseau believed that the laws that govern a people helped to mold their character[12].

The social contract is an agreement of man with man; an agreement from which must result what we call society of “a people” is bound to obey the lawful authority known as the sovereign. King is not the sovereign because he has no power over “a people” unless the people give themselves to him. This means “a people” can also take themselves away from him. So to that extent “a people” are superior to the king. In the latter situation dissolution of State takes place andnatural freedoms are restored in “a people” and “a people” have no obligation to obey the king. So the concept of sovereign is superior to the king[13].

**WHO ARE “A PEOPLE”?** Formation of “a people” is the real foundation of a society. Once in the past there had been a unanimous agreement among all to surrender their **natural rights.** In that agreement each member of the society put into the community his person and all his powers under the supreme direction of the general will and every member became an indivisible member of the whole and as a result of this there was common ego, unity, life and will. The entity so formed was the republic. When it is passive it is a State and when it is active it is sovereign. Those who are associated are collectively called “a people” and individually they are called the citizen[14]. Since man is both “a people” and a citizen, he gets great freedom as “a people” because he is ruled by himself so he gives himself maximum

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9 the rule of law

10 Jean-Jacques Rousseau, Oeuvres complètes, ed. B. Gagnebin and M. Raymond (Paris, 1959–95), III, 361; The Collected Writings of Rousseau, ed. C. Kelley and R. Masters (Hanover, 1990- ), IV, 139.

11 Id.141

12 Id. 139

13 Id. 145

14 Id.140

freedoms. Such a contract is the social contract. It is a source of General Will. By entering into social contract human being become all powerful "a people" but powerless as an individual.

So the NATURE OF "A PEOPLE" emerges as body of persons that carries the GENERAL WILL of the society[15]and the act of the State has to be according to that WILL. Thus "a people" is equated with "GENERAL WILL" which is metaphysical in nature and abstract and is to be found in "a people" which is the SOVEREIGN.

A distinction has to be made between WILL OF ALL and GENERAL WILL. Will of all studies the private interest and is a sum of individual desires i.e. what all individuals want. General Will studies the common interest of the people. After the positives and the negatives within the will of all cancel each other out, the residue is the common interest and that is the General will. This General Will is the sovereign, metaphysical in nature.

Sovereignty in the form of exercise of general will inalienable and as a collective being cannot be represented by anyone but by itself. General Will cannot be delegated although some of its powers can be. So, sovereign is also indivisible. No law is binding on the sovereign, not even social contract is binding upon the sovereign. General Will is always rightful and always tends to the public good so it can do no wrong and the sovereign is in fact an "IS" and also all that it "OUGHT" to be. So this metaphysical entity called the sovereign makes the law[16].

**Does this mean there was a person or force which could unite the diverse sort of people or was the law of contract in existence at the time social contract was entered into?**

If all individuals had a free will to enter into a contract then a unanimous social contract does not seem possible because there is bound to be conflict of opinion and clash of interest and the people would have then formed groups, create minorities and majorities. If the social contract is will of the majority of the people, it should be preceded by a rule or law that the majority rule/opinion shall prevail. Was there an existence of such a rule?

If the individual did not have a free will, to enter into a contract then the people would, per force, enter into social contract and they would, then, not have a choice. In that case the question is **who was that authority that could force the people to enter into a social contract?**

Rousseau recognises such an authority and calls it the "LAW GIVER" who has the ability to unite persons before the advent of law but their unity is a result of law. Such a

15 .Kelson describes this as the Grundnorm.

16 Here too is the practical problem that all laws made by the sovereign may not be "Good" and may not serve the General Will or welfare of the people. The question of restraining the Sovereign arises again.

person speaks his own ideas in the name of GOD[17] and performs a task beyond human powers but without an authority to do so and yet he gives a constitution /code to the Republic. Rousseau neglects this law giver because of his commitment to general will and social contract and says that the law giver had an no-existant authority but does not explain how a non-existent authority can be executed for such an extraordinary task of setting up "a people" –General will- Sovereign.

What was then the NATURE OF THE LAWGIVER? According to Rousseau he is a special superior being who has nothing to do with the empire neither of man nor over the empire of laws. If he is himself not bound by any law he has to be GOD or a person bound by divine law. Rousseau agrees that to be so[18]. It then proceeds that such a lawgiver would then proceed to make laws which satisfy his own wishes as well as those of "a people"[19] .

So Rousseau's **SOVEREIGN HAS THE FOLLOWING CHARACTERESTICS**:

1. It is a metaphysical entity in the form of General Will
2. It is found in indeterminate group of persons called "a people"
3. Sovereign is not autopoietic
4. Sovereign makes laws

How can a metaphysical entity, in the form of general will, perform the task of law making? And if it does, it cannot be metaphysical. The role of the LAWGIVER is under stated by Rousseau.

## II. Sovereign in the Eyes of some Positivist Thinkers:

**JOHN AUSTIN:** Among the positivists John Austin of the Analytical school engaged himself with the concept of sovereignty.

"A determinate human superior not in the habit of obedience to a like superior, receives obedience from the bulk of a given society is a sovereign." - John Austin[20]

Such a society including the sovereign is political, independent society. Othermembers of the society are dependent on the superior/sovereign. The relationship may

17 One is reminded of the stories of John the Baptist and Moses in the Bible and Moosa and Prophet Mohammed in the Muslim scriptures where they united the people in the name of God and led them to form a society and a State.

18 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 them, who had no affinity to 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, -Rousseau, The Social Contract, Translated by Morris Cransten, Penguin Books,[1986] p.84 [Asimilar statement is found in Bhagawatgita]

19 Such human beings would be inspired by the a priory "IS" or the Lex Aeterna, Lex Naturale, and Lex Divina as postulated by St Thomas Acquinas

20 John Austin, The Province of Jurisprudence Determined, Universal Law Publishing Co. Pvt. Ltd.[2008] p.37

be termed as sovereignty and subjection. Thus Austin is of the view that sovereignty cannot reside in the people[21]. So the society is not truly independent only the sovereign is independent[22] there is only one person or body of persons to whom habitual obedience is rendered by a bulk of the people. If this is not done then the society is either split into independent political societies or the society is in a state of nature. The Sovereign makes laws by issuing commands. Theoretically laws are made by the whole society through the legislators but in reality many laws are made according to the wishes of certain section of the society [23] Moreover the survival of any law depends on the acceptance of it by the society. Due to this fact it is difficult to accept that the sovereign has the sole prerogative of making law. This method of law making according to Austin a cause for lawmaking he ignores the compulsion such public opinion create on the law makers for making laws according to the wishes of the people. Moreover in modern democracies are also bound by the law they make.

Now if it is argued that the principle of body corporate works and the law makers make the laws in their sovereign capacity and are bound by the said law in their personal cacity then the sovereign gets located in the metaphysical which Austin does not accept and insists on locating lawmaking power on in a determinate sovereign who is not bound by its own law. Locating the sovereign in the metaphysics gives rise to problems in executing the law. Making the sovereign determinate gives rise to the problem of making laws according to the will of the people which makes the people superior to the sovereign.

## III. Sovereign in the Eyes of Hindu Thinkers - An Alternative Approach:

The Hindus believe in the non manifested latent energy resting in matter called the jada or the purusha and the manifested energy which resides in the consciousness called ***chit*** or ***chetana*** or ***prakriti***. The manifested energy is the driving force and without it the matter or the purusha cannot act or function. So there is duality in unity ***Prakriti*** and ***Purusha*** are the duality of oneness and they are complimentary to each other for consciousness cannot be expressed without matter or ***purusha*** and ***purusha*** cannot act without consciousness or ***chetana or prakriti***. The quality of this manifested energy is its driving force which may be termed the WILL and its perception of and desire for knowledge, understanding, satisfaction etc. So ***chetana*** or the consiousnes or the ***prakriti*** is metaphysical and supreme because it controls itself but cannot be controlled by other forces. It owes its existence to no one and so it is autopoietic. This consciousness or ***chetana*** is not the domain of law. Law controls the physical action of the people which is driven by their consciousness[24].

Such consciousness driven action of the people is never unanimous. Such action of the people may be in agreement with some but in conflict with others and yet some others may not have any concern at all.

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21 Id. 216
22 Id. 217
23 Id. 194-198
24 Kenoponishad, Brihadaryanaka upanishad

Emergence of law or the State is to resolve such conflicts of action among the people. The consciousness has various degrees of strength. On some issues a group of people may have very strong consciousness on some other issues a stronger consciousness and on another issue the strongest consciousness. According to its strength the consciousness may prevail over the consciousness of others or persuade them or absorb them or confront them but ultimately the strongest consciousness prevail **AND THAT IS THE SOVEREIGN**[25].

Such strongest consciousness is neither created nor validated by anyone it becomes the strongest through the process of persuasion subjugation absorption confrontation etc. It is self created and self validated and hence it is autopoietic. When two consciousnesses with same degree of strength confront each other the society may face continued conflict till one strong consciousness triumphs over the other. The Strongest consciousness is dynamic and its strength increases or decreases according to the issue and may be triggered by different groups of people in the society. So the strongest consciousness is not located in a fixed group of people or in the same issue at all times. Such strongest consciousness does not demand or make laws but if laws are made then it may validate or invalidate that law[26]. Such validation provides authority to law. Such consciousness is the sovereign-autopoietic.

The Natural law thinkers came very close to this perception with their concept of the a priory "is" and Austin too came very close to this thought when he said " 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"[27]

Ultimately the journey takes one closer to the autopoiesism of the a priory "IS".

25 Ihering and Roscoe Pound have come very close to this thought when they speak of resolving and prioritizing the conflicting interest of people with the instrumentation of law. In fact Roscoe Pound comes closest to this thought when he speaks of Jural postulates.

26 Kelsen, Hart, Savigny have all concerned themselves with what validates the law for that is the sovereign.

27 John Austin, The Province of Jurisprudence Determined, Universal Law Publishing Co. Pvt. Ltd.[2008] p.