CHAPTER VII

LOCATION OF SOVEREIGNTY IN MATTER OF AMENDMENT

OF THE CONSTITUTION

The term 'Sovereignty' was introduced into political science by Bodin, the renowned French Political Philosopher in his celebrated work 'Dela Repubique'. The word 'Sovereign' is derived from the French word 'Souverain' which in its turn is derived from the Latinian 'Superanus' which means 'an authority which has no other authority himself. Bodin defined Sovereignty as:

"The absolute and perpetua power within a state..... higher power over citizen and subject free from Laws".1

Bodin Sovereign is above the positive law. No constitution can limit Sovereignty which is an attribute of the sovereign who is to obey no body except the commandments of God and the law of Nature. This was the conception of Sovereignty in the 16th Century.

In 17th Century Hobbs went even beyond Bodin maintaining that sovereign was not bound by anything and has a right over everything even our religion.

1. Quoted by Merriam : History of Sovereignty, 1900, P. 17.
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Hobbes Said:

The sovereign is the sole source of law, is above and has the power to change."

Bentham's approach toward sovereignty was similar as Bodin and Hobbs, but his approach about law turned towards the positive law and gave too much strength upon the theory of utility. ³

MONISTIC THEORY OF SOVEREIGNTY
INDIVISIBLE AND ILLIMITABLE:

John Austin built his imperative theory of sovereignty on Bodin, Hobbs and Bentham. The nature of sovereignty is explained by John Austin as follows:

If a determinate human superior, not in the habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in the society, and the society, including the superior is a society political and independent. Every positive law or every law simply and strictly so called is, set, directly or circuitously, by a sovereign person or body to a member or members of the independent political society wherein that person or body is sovereign or supreme. " ⁴

2. Ibid P. 19
Thus, Bodin, Hobbes and Austin established the Monistic theory of sovereignty, in which sovereignty is indivisible and illimitable.

Monistic Imperative theory of sovereignty is criticized on the ground that it can be applied only to 'Political Sovereign' not to 'Legal Sovereign' and it is not also applied to 'Federal constitution' due to theory of indivisible and illimitable.

A.V. Dicey draws a distinction between the 'Legal Sovereign' and the 'Political Sovereign'. In discussing the Nature of Parliamentary sovereignty. He observed:

"The matter indeed may be carried a little further, and we may assert that the arrangement of the constitution are now such as to ensure that the will of the electors shall be regular and constitutional means always in the end assert itself as the predominant influence in the country. But this is a political, not a legal fact. The electors can in the long run always enforce their will. But the courts will take no Notice of the will of the electors. The Judges know nothing about any will of the people except in so far as that will be expressed by an Act of Parliament, and would never suffer the validity of a statute to be questioned on the ground of its having been passed or being kept alive in opposition to the wishes of the electors".

The submission of A.V. Dicey is that the constitution is the 'Legal Sovereign' recognised by Court, although the ultimate 'Political Sovereignty' may and does reside in the 'People'.

Sir Ivor Jennings also draws distinction between the 'Legal Sovereign' and 'Political Sovereign' and he said:

"Legal Sovereign is not sovereign at law.... because the legal sovereign may impose legal limitation upon itself because its power to change to law includes the power to change the law affecting, itself".6

The same view was expressed by the Prof. Friedmann,7 Dixon8 and Latham9...

According to Austinian theory, Sovereignty in Federal State is to be sought in ultimate power which can alter the constitution. In this sense sovereignty resides

7. Friedmann: See Article Published 24 Australian L.J. 1950, P. 103-4
9. Latham - See Article Published - King's Council, P.152.
in the 'Amending Process' which is a ultimate and source of altering the federal constitution.

FEDERAL CONSTITUTION AND DIVISIBLE SOVEREIGNTY :

Austrian theory of Sovereignty breaks down when they believe that sovereignty resides in 'the Amending power of the Federal Constitution', because the theory of indivisible and illimitable sovereignty is not applicable to federal constitution. In the federal constitution sovereignty is divisible, because there are divisions of powers between Central and state governments and both the union and states are sovereign in this respective sphere as allotted by the Federal Constitution. so Bryce observed:

"In Federal constitution sovereignty is divisible, that is, different branches of it may be concurrently vested in different persons or bodies co-ordinated altogether or coordinate partially only, though acting in different spheres", 10.

Similarly, C.F. Strong also admitted this fact and he said :

"Let us admit that Sovereignty in an ultimately legal sense is divisible, in which the legislative authority is divided between a Central or Federal Power and smaller units, some times called states or cantons and some times provinces, according to the fullness of their power." 11

Theory of 'Divisible Sovereignty' is admitted in Federal Constitution' in the Pluralistic sense'. In which Federal and Federating units both are sovereign. Sovereign power is divided into two Governments, Federal Government and State Governments and each Government is sovereign in this respective spheres as determined by the constitution.

The theory of divided sovereignty in Federation has come to stay in the courts, not only in U.S.A., but also under most federal Countries.

The divided Sovereignty was accepted by U.S.A. court in 1792 in the following ways:

".... 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".12

12. Chisholm Vs. Georgia, 1792, 2 Dall, 435.
It was reiterated in 1880, as follows:

"... The nature of sovereignty is such as to preclude the joint cooperation of two sovereigns, even a matter in which they are mutually concerned...." 13

The same view was, again, expressed by the USA Court in 1911, as follows:

"This union is union of States, equal in power, dignity and authority each competent to exert that residuum of sovereignty not delegated to united state by the constitution itself .... when a new state is admitted into the union, it is so admitted with all the powers of sovereignty and Jurisdiction which pertain to original state..."14

The latest view15 appears to be that there are attributes of sovereignty attaching to every State Government which may be not be impaired by congress, so as to destroy the States' integrity or their ability to function effectively in a Federal system.

Theory of Divided Sovereignty is also adopted in the Australian Constitution. Australian court also adopted the same view in the following way

14. Coyle Vs. Smith (1911) 211, U.S. 559
"The powers of the states were left unaffected by the constitution except in so far as the contrary was expressly provided subject to that each state remained sovereign within its own sphere. The powers of the state within those limits as Henry as are the power of common wealth." 16

Indian Supreme Court also accepted the divided sovereignty, but in some cases Supreme Court expressed its doubt on this theory of divided Sovereignty. In the State of West Bengal case 17 Sinha C.J. for himself, Imam, Shah, Rajagopala Ayanger and Mudhou Lal JJ, in majority opinion said:

"... It would be difficult to hold that the Parliament which is competent to destroy a state is on account of some assumption as to absolute sovereignty of the state in competent effectively to require by legislation designed for that purpose the property owned by the governmental purpose...." 18

But Justice Subba Rao in his dissenting opinion maintain the divided sovereign theory and observed:

16. James Vs. Common wealth (1936) 55,CLR 1,40
18. Ibid. Para 36.
Indian Constitution accepts the Federal concept and distributes the sovereign powers between the co-ordinate constitutional entities namely, the union and states. This concept implies that one cannot encroach upon the governmental functions. /.../ to prevent encroachment, either overtly or covertly, by the union state field or voice versa and they maintain the balance of Federation.\textsuperscript{19}

Indian writers D.D. Basu,\textsuperscript{20} H.M. Seervai,\textsuperscript{21} and Setalvad\textsuperscript{22} are not agree with the majority opinion of Chief Justice Sinha and accept the dissenting opinion of Subba Rao J. and express their view in favour of divided sovereignty.

DIVISIBLE SOVEREIGNTY AND AMENDING PROCESS:

The basic element of federal Constitution is divisible sovereignty in which co-existence of Federal and State Governments is established. C.F. Strong observed\textsuperscript{23}

\begin{itemize}
\item \textsuperscript{19} Ibid See Para 96.
\item \textsuperscript{20} D.D. Basu: Comparative Federalism (1987), P. 97
\item \textsuperscript{21} M.M. Seervai: Constitutional Law of India (1967) P. 563.
\item \textsuperscript{22} Setalvad: Tegore Law lectures on Union and State Relation (1974), P. 27.
\item \textsuperscript{23} C.F. Strong: Modern Political Constitution, P. 99-100.
\end{itemize}
"It is obvious, therefore, that a federal constitution attempts reconcile the apparently irreconcilable claims of National sovereignty and state sovereignty. And the main lines upon which this reconciliation shall take place are sufficiently clear, though as we shall see, they vary very much in detail from one federal constitution to another".

Accepting to theory of divisible sovereignty K.C. Wheare expressed the view that in the amending process federal as well State Government must take part equally and this power should not be given in hands of single units either federal unit or states units. See the same thing in the words of K.C. Wheare:

"It is essential in Federal Government that if there be a power of amending the constitution, that power, so far at lease as concerns those provisions of the constitution which regulate the status and power of the General and Regional Governments, should not be confined exclusively either to the General Government or to the Regional Governments.

Apart from this, it does not matter logically where the power is placed, but there can be no doubt that practically it is wise to associate both the General Government and the Regional either their Governments or their people, in the process" 24

For maintaining the sovereignty federal as well as Federating units, in the amending process, voice of both the units has been given equally.

Under the Article V of American constitution, proposal of amendment may be initiated by two-thirds majority of the federal Legislature or by the method of convention. Then such proposal must be ratified by the legislatures of convention of three fourths of the states.

On the same principle in the constitution of Switzerland \textsuperscript{25} and Australia \textsuperscript{26} voice of State Legislature is associate with the Federal Legislatures.

Recently, under the Canada Act 1982, excepting to Section 44 and 45, in the whole amending process Federal as well as State Legislatures take part equally. \textsuperscript{27}

In the other Federal Constitutions like Indian, Malaysia and Nigeria divisible sovereignty has been accepted and participation of federating units is there but partly. For the certain selected purpose federating units are associate and in this all matters

\textsuperscript{25} See Article 118 to 123 constitution of Switzerland.
\textsuperscript{26} See Section 128 of Australian Constitution.
\textsuperscript{27} See Section 38, 41, 42, and 43.
they are neglected totally and Federal legislative has exclusively power of Amendments.

In India under article 368(2) states are associated with the amending process of the Indian constitution.

Under the constitution of Malaysia 1963, in relation certain provision consent of conference ruler is necessary. Similarly N. amendment of the provisions relating to Eastern States of Sabah and Sarawak can be made without the consent of Governor of the State concern. 28

In the constitution of Nigeria 1979 partly sovereignty of States is accepted. The provisions relating to creation of state or alteration of their boundaries would require a majority of Fourth-fifth of the total membership of each House of the federal Legislature, followed by a resolution in the legislations of not less than Two-Thirds of the States. 29

Constitution of U.S.S.R., West Germany and

28. See Article 161 E, 38,70,71(1) or 153, Constitution of Malaysia.
and South Africa, though they are Federal in nature, but do not accept the Divisible Sovereignty in the Field of Amending Process and amending powers are exclusively given in the Federal Legislative body.

**IS PARLIAMENT SOVEREIGN:**

When in most of the Federal Constitutions Amending Power is vested in Federal Legislative body; is generally known Parliament, then question arises that is parliament sovereign?

The Principle of Parliamentary sovereignty is popularly associated with the British constitutionalism; is dominant characteristic of the British constitution and profounded and enlarged by the A.V. Dicey.

In the language of A.V. Dicey:

"The Principle of Parliamentary sovereignty means neither more nor less than this, namely, that parliament thus defined has, under the English Constitution, the right to make or unmake any whatever on further, that no person or body is recognised by the law of England as having a right to over-ride or set-aside the legislation parliament."30

30. A.V. Dicey: an Introduction to the study of the law of the constitution. 10th Ed. PP.39-40
Similarly, Sir Ivor Jennings remarked:

"Parliament may remodel the British constitution, prolong its own life, legislate ex post facto, legalize illegatities, provide for individual cases, interfere with contracts and authorise the seizure of property, give dictatorial power to the Government, dissolve the United Kingdom or the British Empire, introduce communism or socialism or individualism or fascism entirely with legal restriction".31

The sovereignty of Parliament generally means the absence of any legal restraint upon the legislative power of parliament as in England. The absence of legal restraint has two aspects the positive and the negative. The positive aspect indicates that Parliament is competent to legislate upon any subject matter. The negative aspect implies that once Parliament has legislated no court or other body can pass upon the validity of the legislation.

The Dician exposition of absolute parliamentary sovereignty does not applicable in the federal constitution, due to the supremacy of constitution.

31. Sir Ivor Jennings : The Law and the Constitution 3rd PP. 137-38
The Founders of the American constitution did not accept the absolute sovereignty of British Constitution and sought to control it by the Written constitution, supremacy of constitution, doctrine of separation of powers, principle of check and balance, doctrine of judicial review.

For reason of written constitution, Supremacy of Constitution and power of Judicial Review Parliament cannot become sovereign. If Parliament enacts any law which contrast to constitutional provision the court may declare such law as a unconstitutional or void. Parliament has to follow constitutional procedure restrictly otherwise court may set-aside it. U.S.A., Supreme Court in Hawke VS. Smith clearly observed:

"It is not the function of court or legislative bodies, national or state, to alter the method which the constitution has fixed."32

In some constitutions, such as the Australian, there is express provision negating other methods. Thus the opening words of Section 128 of the Australian Constitution Act are:

32. (1920), 253, U.S. 221
"This Constitution shall not be altered except in the following manner."

In such position Parliament has to follow express wording of the constitution. Hence any other method cannot be resorted to without amending the constitutional provision for amendment itself. So Sir Ivor Jenning rightly said:

".....If this so, Legal sovereign is not sovereign at all........33

Thus, in federal Constitution parliament is legal sovereign and it can not sovereign at all because it has to follow those restrictions which are imposed by itself. So V. Grover observed:

"The element of illimitability is curtailed by the increasing adoption of written constitutions. The old concept of unlimited sovereignty is yielding place to new concept of limited Government".34

Thus, it may be submitted that in the unwritten constitutions Parliament may be sovereign but in the written constitution parliament can not be a sovereign authority because it has to work within the limits of constitution.

Now again question arises that when constitution is supreme which controls to parliament and other organs of country, then in reality is it sovereign?

The constitution is the supreme law of the country and every work has to be done according to provision of the constitution so it is sovereign. Constitution is the source of law and sanction and no body can go against will of the constitution so it is sovereign. Therefore C.F. Strong also on one place admitted to this law and said:

"..... Sovereignty in a federation rests in constitution itself." 35

The advocates of political sovereignty hold that since the people are the ultimate sovereign, they retain that sovereignty even after they set up a constitution and vest constituent power in a specified body. According to this view constitution is not sovereign, the people who made the constitution can also unmake it, even though the constitution prescribes a specified procedure for amending or revising it. Hoar observed:

"The people whole in their sovereign capacity, acting through the forms of law at regular election, may do what they will with their own frame of government, even though the frame of Government does not expressly permit such action and even though the frame of government attempts to prohibit such action." 36

IS PEOPLE SOVEREIGN:

Now question arises that when a constitution is a creation of people and they can unmake it then how it may be said the constitution is sovereign. Sovereignty ultimately resides in the people who make the constitution.

In fact, this theory of constituent power perpetually laying with the political sovereign is an echo of political philosophy of Rousseau that sovereignty always resides in the people and that it can at any moment recall the grants it has made. Rousseau himself said:

"...There is the state no fundamental law that can not be revoked, not excluding the social compact itself, for if all the citizens assembled of one accord to break the compact, it is impossible to doubt that it would be very legitimately broken.... It would indeed absurd if all the citizens in assembly could not do what each can do by himself." 37

36. Hoar: Constitutional Convention, 115
37. Rousseau: Social Contract.(Everyman) P. 84
According to C.F. Strong:

"The Plebiscite, The Referendum, the popular initiative and Recall are four direct democratic checks are connected in the sense that they are designed to give to the voting mass of the people a direct control of their political destiny by granting them the power to approve or reject measures for their well-being to institute legislation and to remove unsatisfactory representatives." 38

There is conflict between 'Political Sovereignty' and 'Legal Sovereignty' now question is - where the people get up a constitution and vest the constituent power in some authority by a specific provision in the constitution, can be people amend the constitution, regardless of that amending provision, as a parallel authority?

Answering to the question Prof. Friedrich said:

"After setting up a constitution and vesting a power in a specific authority the people can not go on exercising, its power concurrently with the constitutional authority, without producing chaos, only by means of Revolution." 39

38. C.F. Strong: Modern Political constitution; Ch. Direct democratic checks, P. 275.

Similarly A.V. Dicey draws a distinction between
The 'Political Sovereign' and 'Legal Sovereign' observed:

"...The arrangements of the constitution are now such as to ensure that the will of the electors shall be regular and constitutional means always in the end assure itself as the predominant influence in the country, but this is a political, not a legal fact. The electors can in the long run always enforce their will. But the courts will take not notice of the will of the electors. The Judges know nothing about any will of the people except in so far as that will be expressed by an Act of Parliament...." 40

On the conflict between 'Legal Sovereign' and 'Political Sovereign' Justice Hidayatullah in Golak Nath said:

"A constitution can be changed by consent or Resolution ? Rodes, Anderson and Christol have shown the Sovereignty of people either electoral or constituent". 41

At last Hidayatullah accepted the 'Legal Sovereign' and held:

"...For abridging or taking away fundamental rights a constituent body will have to be convoked." 42

40. A.V. Dicey : Law of the Constitution, 10th Ed. P.73

41. Golak Nath Vs. State of Punjab, AIR 1967 SC.P.1717
Hidayatullah J. Para 194.

42. Ibid Hidayatullah J. Para 195.
Justice Mathew, in Kesavanand Bharti, question to himself:

"Let me, however, indulge in the legal fiction and assume, as the preamble has done, that it was the people who framed the constitution. What followed could it be said that after the constitution was framed the people still retain and can exercise their sovereignty constituent power to amend or modify the basic structure or the essential feature of the constitution by virtue of their legal sovereignty."43

Then reply to above question he himself said:

"Sovereignty in Austinian sense does not exist in any state and that any rate in federal state..... In no country, except perhaps in a direct democracy can the people mass he called legal sovereign...."44

On the basis of amending Process Justice Mathew reached ond the conclusion and said:

".... It is difficult to agree with the proposition of counsel that the Legal Sovereignty under the constitution resident in the people or that as ultimate legal sovereign the people can constitutionally change the basic structure of the constitution even when the constitution provides for on

44. Ibid. Justice Mathew, Para 1619
on specific mechanism for its amendment. In the last analysis, perhaps, it is right to say that if sovereignty is said to exist in any sense at all, it must exist in the amending body." 45

The same answer was also given by the U.S.A. Supreme Court in 1856 when it was deciding the Dodge Vs Woolsey case:

"Constitution is Supreme over the people of the united States, agregately and in their separate sovereignties, because they have excluded themselves from any direct or immediate agency in making amendments of its and have directed that amendments should be made representatively for them".46

The same view again expressed by the U.S.A. Supreme Court in Dred Scott Vs. Sanford case:

"The word 'People of the United States..... describe the political body who according to our republican institutions, from the Sovereignty, and who hold the power and conduct the government through their representatives" 47

45. Ibid. Justice Mathew Para 1621.
46. Dodge Vs. Woolsey (1856) 18 How 33 at P. 348
47. Dred Scott Vs. Sanford (1857) 29 How 393.
Thus in Federal constitutions like U.S.A., U.S.S.R., West Germany, Canada, Malaysia etc. Sovereignty of people is maintained or protected indirectly through their elected representative.

But on the other side, in Federal constitution of Switzerland, Australia and Nigeria, sovereignty of people is maintained or protected directly through the permission of Referendum.48

At last, it may be submitted that ultimate sovereign is 'People' who control the State or who create constitution, but they are 'Political sovereign' and they cannot override the legal limitations which are imposed by themselves in the form of constitution. People can not directly or through other agency —— overcome to provision of the constitution. They can do so through their legal representatives or through the provision of Referendum, after adopting the amending process of constitution which has been given in itself.

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48. See Permission of Referendum Switzerland Article 120 to 123.
       Australia Section 128
       Nigeria — Section 9(2) and (3).