

Extended Abstract

Current Applicability of Austinian Concept of Sovereignty – A Critical Analysis of the Sri Lankan Perspective

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Introduction

The positivists opine that law is literally the command of the sovereign. Most positivists emphasize that people follow laws because of the fear of sanctions that are imposed when laws are violated.¹ Austin's three prong positivism: existence of Political Sovereign, Command and sanction,² is referred to as 'Concept of Law of Austinian'. In constructing his concept of law, Austin attaches more weight to Political Sovereign. He propounds sovereignty is incomparable and superior³ to other concepts. In the modern context neither a superior sovereign nor its characteristics as described by Austin are visible. Sri Lanka uses the Executive Presidential system and the examination of the Austinian concept of Political Sovereign is important in this regard. This abstract focuses on discovering practicability and applicability of the Austinian concept of sovereignty in the present scenario and seeks to identify challenges posed to the concept of sovereignty. In order to find a more efficacious answer the author focuses on the applicability of the Austinian concept of sovereignty to the present Sri Lankan legal system.

Objective

The paper seeks to improve the importance of the legitimacy of law analyzing and applying the concept of sovereignty and seeks to develop Sri Lankan jurisprudence.

Method

This is a literature survey based on Textbooks, Journal articles, Constitutions, Law enactments and case law. In collecting secondary sources library and internet resources have been utilized.

¹ Freeman. MDA, *Lloyd's Introduction to Jurisprudence*, 6th Edition, ELBS with Sweet & Maxwell Ltd, 1994, p.222

² Ratnapala. S, *Jurisprudence*, 2nd Edition, Cambridge University Press, 2013, p 44

³ Rumble. E Wilfrid, *Legal Positivism of John Austin and the Realist Movement in American Jurisprudence*, Cornell Law Review, Vol 66, 5th of June 1981,

Discussion and Findings

This research focuses on the Austinian concept of Political Sovereignty. Austin states:

“The notion of sovereignty and independent political society may be expressed concisely thus. – If a determinate human superior, not in a habit of obedience to a like superior, receive 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”

According to the above definition five essential attributes of the sovereignty can be listed as follows: the analysis is extended in relation to Austinian claims that:

- the sovereign as a determinate human superior.
- the bulk of the people habitually obeys the sovereign.
- the sovereign is not in the habit of obedience to any other human superior.
- the Sovereign power cannot be legally limited.
- he sovereignty is indivisible.

The sovereign, as a determinate human superior

Austin emphasizes that the sovereign should be a human being or the sovereign may consist of a single person or a group of persons.⁴ However, in the legal context of Sri Lanka, it is difficult to ascertain if such a human superior exists in accordance in with Austin’s definition. However, a sovereign appears to be present not through an individual or an institution, but in the amalgamation of both. The Constitution of the Democratic Socialist Republic of Sri Lanka of 1978 (herein after referred as ‘The Constitution’) clearly stipulate that sovereignty is in the people⁵ and that people’s Legislative, Executive and Judicial power are respectively exercised by the Parliament⁶, Executive President⁷ and Parliament through Courts and any Institutions created and established by Law.⁸ The Executive President can exercise a limited legislative power as granted by the Constitution.⁹ Moreover, the Parliament also exercises a limited judicial power according to the standing orders.¹⁰ By implication the Supreme Court exercises limited law making power.¹¹ However, the Parliament of Sri Lanka exercises more sovereign power than the executive president by its legal capacity of initiating,

⁴ Austin, J 1995 (1832), *The province of jurisprudence determined*, Cambridge University Press, Cambridge, Chapter 1.

⁵ Article 4, *The Constitution Democratic Socialist Republic of Sri Lanka 1978*

⁶ Article 4 (a), *The Constitution Democratic Socialist Republic of Sri Lanka 1978*

⁷ Article 4 (b), *The Constitution Democratic Socialist Republic of Sri Lanka 1978*

⁸ Article 4 (c), *The Constitution Democratic Socialist Republic of Sri Lanka 1978*

⁹ Article 155(3), *The Constitution Democratic Socialist Republic of Sri Lanka 1978*

¹⁰ 78(A) Standing Order

¹¹ Gunaratnam Vs. Register General (2002) 2 SLR 302, Sugathapala Mendis Vs. Chandrika Bandaranaike Kumaratunga SCFR 352/2007

adopting, amending and abolishing laws theoretically. According to dualism too the parliament supremacy is visible in that mere signature of the executive is insufficient as an enabling legislation is required for international law implementation within Sri Lanka.¹² Nonetheless, in the practical situation, people assume that the Executive President bears utmost authority over the country: The war victory was believed to be a result of the existence of the strong executive president. This is due to the Executive President bearing a large number of powers with an immunity including the power to make emergency regulations.¹³ Therefore, the first characteristics of the concept of sovereignty appears to be exercised by the Parliament and the Executive President.

The bulk of the people habitually obeys the sovereign

Obedience to laws is in the core of the Austinian concept of sovereignty. Commanding the obedience of the bulk of the people in the Sri Lankan legal system just and fair elections are utilized to enhance the foundation of Law's legitimacy. On the other hand, the Parliament, Executive President and Judiciary usually receive the obedience of the bulk of the people. Ex: after enacting laws, majority of citizens will obey such laws, except a minority convicted before courts as defaulters. The most recent incident is the bus strike¹⁴ and prisoner's hunger strike¹⁵ which were postponed due to the interference of the Executive President. The monarchical '*Rajakari Kramaya*' (the process of duty for King)¹⁶ also reflected the habitual obedience of the ancient people. After the victory of war with LTTE a large number of paeans were made for the former president Mahinda Rajapakse and some people were known to have equated him to King Dutugemunu.¹⁷ Therefore, former president Mahinda Rajapakse had tried to maintain his status as a king to receive obedience of the Sri Lankan people. However, it should be noted that the habitual obedience of the bulk of the people is only received only for the position of the executive presidency and not by any person for instance, after the most recent presidential election held on 08 January 2015, current president Maithripala Sirisena received people's obedience as former president without any doubt. It is contented that habitual obedience is for the position rather than persons. The Social Contract Theory; the voluntary agreement among individuals by which, according to which various theories, as of Hobbes, Locke or Rousseau, organized society is brought into being and invested with the right to secure mutual protection and

¹² CJ Asoka De Silva at *Nallaratnam Sinharasa Vs. AG*, SC Spl (LA) No 182/99 (Official Case No)ILDC 518 (LK 2006)

¹³ Article 35(1), 155 (1) (c), The Constitution Democratic Socialist Republic of Sri Lanka 1978

¹⁴ <http://www.asianmirror.lk/news/item/17541-private-bus-strike-called-off-after-discussions-with-president>, Accessed on 06/07/2016

¹⁵ <http://adaderana.lk/news/32726/president-assures-solution-to-tamil-prisoners-on-hunger-strike>, Accessed on 06/07/2016

¹⁶ Chandima Daskan, Tony Binns. "Culture, tradition and sustainable livelihoods: exploring the culture-development interface in Kandy, Sri Lanka." *Oxford community development Journal* (Oxford journals), 2009.

¹⁷ <http://www.asiantribune.com/news/2010/11/20/president-mahinda-rajapaksa-will-change-history-our-world-sri-lankan-people-opine>, Accessed on 06/07/2016

welfare or to regulate the relations among its members.¹⁸ The Social Contract Theory has been recognized by the Constitution.¹⁹ In elections individuals are elected for positions and institutions based on majority opinion. This however, clashes with the presentation of 'People' as conceptualized by the Social Contract Theory, which focuses on all people in general.

The sovereign is not in the habit of obedience to any other human superior.

Thirteenth Amendment to the Constitution sought to delegate power to the Provincial Councils which are headed by Governors.²⁰ However, these Governors are appointed by the Executive President proving that the sovereign is not in the habit of obedience to any other human superior. Essentially, no other person or institution is vested with rival executive powers. This is indicated by power struggles between the center and the provinces in which the center supersedes the authority of provinces.

The Sovereign power cannot be legally limited.

Although Austin argues that sovereign power cannot be legally limited. This contention is proven incorrect due to the Sri Lankan Supreme Court's power of judicial review.²¹ However, The review power is not applied to the committee stage amendments made to laws, thus restricting the scope of the review to pre-enactment review of the court. The Constitution provides limitation to time periods of Executive Presidency²² and the Parliament²³ and this provision directly limits the power of the institution which bears it. The decisions and actions taken by previous government cannot be rejected or dismissed by the present government arbitrarily. This is also a limit on sovereign power through the law. Ex: Present Good Governance the Port City project.²⁴ However, legal bonds and other limitations did not facilitate the cancellation of the entire project. This incident reflects present government cannot exercise their sovereign power as a result of the previous government agreement.

Austin asserts that sovereignty is indivisible. However it is divisible: Constitutionalism²⁵ emphasizes the Supremacy of the Constitution and government should exercise their sovereign power as described by the Constitution. The separation of power divided sovereignty of the government into three main institutions referred to as the Legislature, Executive and Judiciary as mentioned by the Constitution.²⁶ The Parliament can eliminate Executive president through an impeachment.²⁷ The Executive president

¹⁸ <http://www.dictionary.com/browse/social-contract> , Accessed on 06/07/2016

¹⁹ Article 3 and 4, The Constitution Democratic Socialist Republic of Sri Lanka 1978

²⁰ Article 154(B), The Constitution Democratic Socialist Republic of Sri Lanka 1978

²¹ Article 118(a) and 120, The Constitution Democratic Socialist Republic of Sri Lanka 1978

²² Article 31, The Constitution Democratic Socialist Republic of Sri Lanka 1978

²³ Article 62(2), The Constitution Democratic Socialist Republic of Sri Lanka 1978

²⁴ <http://lankanewsweb.net/news/item/2072-why-the-port-city-project-is-started-again>, Accessed on 06/07/2016

²⁵ www.constitution.org/constitutionalism.htm , Accessed on 06/07/2016

²⁶ Article 4, The Constitution of Democratic Socialist and Republic of Sri Lanka 1978

²⁷ Article 38(2), The Constitution Democratic Socialist Republic of Sri Lanka 1978

can dissolve the Parliament according to executive power.²⁸ The parliament and Executive President can impeach Supreme Court judges including Chief Justice through an impeachment against them.²⁹ On the other hand Supreme Court can delay or advice any legislation which are unconstitutional.³⁰ This power is reffered to as ‘The Doctrine of Check and Balance’³¹ and this also controls and regulates arbitrary use of sovereign power in the Sri Lankan legal context.

Outcome and Conclusion

The characteristics of sovereign power described by Austin are not literally practical in the Sri Lankan legal system. Under Constitutionalism, sovereignty is definitely limited by the Constitution. However, Austin’s concept of Sovereignty cannot be dismissed completely because of the legitimacy of law based on the concept of sovereignty. The Concept of sovereignty plays a vital role as described by Austin himself in protecting and promoting the legitimacy of the law making process and origin of law. However, the world focuses on promoting Constitutionalism and thereby eliminating monarchism. Therefore, Sri Lanka should rethink to modernize its political culture rather than loyally adhering to certain characteristics of the Austinian concept of political sovereign, to enhance the real value of the sovereignty that lies with the people.

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²⁸ Article 33(2)(C), The Constitution Democratic Socialist Republic of Sri Lanka 1978

²⁹ Article 107 (2),(3), The Constitution Democratic Socialist Republic of Sri Lanka 1978

³⁰ Article 120, The Constitution Democratic Socialist Republic of Sri Lanka 1978

³¹ <http://legal-dictionary.thefreedictionary.com/Checks+%26+balances> , Accessed on 06/07/2016

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