

**FROM DICEYAN SOVEREIGNTY TO THE SUPREMACY OF THE  
CONSTITUTION: EVOLUTION OF CONSTITUTIONAL GOVERNANCE  
IN PERSPECTIVE**

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*“Parliament consists of the King, the House of Lords, and the House of Commons acting together. The principle, therefore, of parliamentary-sovereignty means neither more nor less than this, namely that “Parliament” has “the right to make or unmake any law whatever ; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.”*

*A.V.Dicey, Introduction to the Study of the Law of the Constitution, Eight ed., 1915, p.xviii.*

*“Parliament can do anything except make a man a woman and a woman a man”*

*Jean Louis De Lolme [The Rise and Process of the English Constitution (Rev. Ed.1838)]*

## **INTRODUCTION**

The Diceyan concept of parliamentary sovereignty originated in the womb of British Parliament: the Queen in Parliament has the absolute right to make or unmake any law and whatever it enacts as statute is law. The British constitutional tradition evolving from the good old days of Magna Carta and Simon de Montfort's parliament (1265) through the Glorious Revolution of 1688 to the accession into the European Community in 1972 and passage of the Human Rights Act in 1998, the omnipotent legislative powers of Parliamentary Lernaean Hydra were amputated in the course of a historical process painted with black letters and blood of the Lords and the People who were the great British Hercules.

Sovereignty in the Diceyan traditional sense has been transforming from curtailing the powers of the Monarch by the Parliament as the highest authority of democratic government to the stages of restricting the powers of the Parliament itself within the unwritten constitutional tradition of the United Kingdom, since late nineteenth century. The term “supremacy” has been used interchangeably with the term “sovereignty” in the legal jargon of a new generation of lawyers, jurists and academics to represent this phenomenon of curtailing Parliamentary

authority<sup>1</sup>. With the surge of the Republican Constitutions in many independent states of the former British Crown, this term has popularly represented an amputated Parliamentary system restricted by many evolving conditions<sup>2</sup>.

However, it is argued, in many Republican States, some of which have presidential system of administration, still the elements of classical Diceyan conception of Parliamentary Sovereignty can be identified in the guise of Supremacy of the Parliament, which claims to represent the will of the people in democratic governance. In this paper, sequel to an understanding of the British parliamentary sovereignty as at present, it is attempted to briefly examine the truthfulness of this contention drawing from the experiences of selected Republican jurisdictions.

### **Parliamentary Sovereignty in Britain Today:**

In the landmark case of *Factortame*<sup>3</sup> the Supreme Court of United Kingdom recognized the diminished status of the British Parliamentary sovereignty after a period of evolving challenges against its legislative power. While Dicey himself identified several intrinsic and extrinsic factors that limit the unlimited powers of the Parliament, new challenges have risen and the Common law tradition has given effect to the rule of recognition of popular sovereignty and commitment to European Union (up until Brexit becomes effective with the invocation of Article 50 of the Lisbon Treaty) etc.. Some significant instances in which the powers of the Parliament are systematically challenged *inter alia* are as follows:

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<sup>1</sup> A.W. Bradley & Kingdom. Ewing in their book Constitutional and Administrative Law use, in chapter 4, the word "supremacy", while Hilaire Barnett uses these two words in identical sense in her book Constitutional And Administrative Law (Chapter 6, 4th ed).

<sup>2</sup> David Kinley argues that sovereignty refers to absolute legislative supremacy where Parliament is subject to no legal limitations in its exercise of legislative power, while supremacy refers to something less than absolute legislative supremacy, where the Parliament is guaranteed only a superior claim against any other body claiming legislative competence, but subject to legal limitations: "Constitutional Brokerage in Australia: Constitutions and the Doctrines of Parliamentary Supremacy and the Rule of Law", 22 Fed. L. Rev. 194, 1993-1994.

<sup>3</sup> R V. Secretary of State for Transport ex parte *Factortame* (No.2) (1991) 1 All ER 70

- a) The British parliament is no longer having continuing sovereignty. In H.L.A.Hart's terminology it's sovereignty is now self-embracing, where the parliament can bind its successors<sup>4</sup> and is bound by the predecessors.
- b) The Parliament is not able to impliedly repeal its own previous legislation<sup>5</sup>. However, where the judiciary is posited with two conflicting statutes, the latest statute will be given effect though the latter does not have an express provision of repeal of the earlier law.
- c) All legislations are not of similar force. Some, being constitutional statutes, are entrenched and simple majority is not suffice for repeal and cannot be impliedly repealed<sup>6</sup>.
- d) Parliament by redefining its composition, for example by introducing referendum as a step in the legislative procedure, may restrict its powers<sup>7</sup>.
- e) The political sovereignty of the electorate is greater than the *de jure* sovereignty of the Parliament<sup>8</sup>.
- f) Courts can question the validity of an Act of a subordinate Parliament, either before or after the royal assent is signified, on the grounds of composition and procedure and not on the substantive area of legislation<sup>9</sup>. Courts have jurisdiction to determine what is an act of Parliament<sup>10</sup>.

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<sup>4</sup> Alison L.Young, "Sovereignty: Demise, Afterlife, or Partial Resurrection? I.CON (2011), Vol.9 No.1, 163-171, p166

<sup>5</sup> Earlier it was possible and examples are, *Vauxhall Estates Ltd v Liverpool Corporation* (1932) and *Ellen Street Estates Ltd v Minister of Health*(1934)

<sup>6</sup> *R v Secretary of State for the Home Department ex parte Simms* (2000) and *Thoburn v Sunderland City Council* (2002), per Laws LJ.

<sup>7</sup> One instance is the European Union Act of 2011, which requires UK-wide referendum to further relinquish its legislative powers to the EU parliament and thus secures its own legislative sovereignty.

<sup>8</sup> According to Dicey the will of the electorate has no effect till its is expressed by an act of Parliament.

<sup>9</sup> Prof RVF Houston supported by Sir Ivor Jennings. *Attorney General for New South Wales v Trethowan* (1932)

<sup>10</sup> *Bowles v Bank of England*(1913)

- g) The legislations of the United Kingdom Parliament are suppressed by European Union laws, till Brexit is effected<sup>11</sup>.

The above parameters, among others, are necessary variables for an evaluation of any other jurisdiction having a parliamentary system.

### **Written Republican Constitutions**

The contention afore mentioned will be assessed by examining the unique constitutional experiences of the parliamentary systems in Ireland, India and Sri Lanka. The latter two have a colonial heritage and since independence from the British Raj have established written, republican constitutions. Those are testimony to the fact that while Independence constitutions stressed parliamentary sovereignty in the Diceyan sense as against the influence of the British parliament and the Crown, the Republican constitutions had the parliament's power curtailed by several considerations.

Though debates revolve around whether Ireland was a colony of the British crown, it gained its independent Bunreacht na hÉireann in 1937 and declared itself a Republic in 1949. The varying powers of the legislatures in these jurisdictions and their limitations provide for a better comparative analysis of contemporary validity of the Diceyan doctrine of Parliamentary sovereignty.

### **Indian Basic Structure: Diceyan Sovereignty or the Supremacy of the Constitution?**

Written constitutions often have a supremacy clause placing itself above all organs, whereby legislature too is subject to the powers vested to it by the Constitution. The independent and Republican constitutional tradition of India, during more than a half century, has evolved from the Westminster legacy of sovereign parliamentary system to embrace a tradition of liberal constitutionalism, thanks to judicial activism.

While the 1949 Constitution of India gives equality of status to the three organs of the government, the Indian Supreme Court as the ultimate interpreter of the constitution, has authoritatively established the supremacy of the Constitution and placed the constitution above

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<sup>11</sup> *Macarthys Ltd v Smith* [19 81 ] QB 180

the Parliament<sup>12</sup>. The Union parliament comprises of bicameral legislature and the President, who also can enact legislation in the form of Ordinances during recess of Parliament, so not being a rival legislative authority<sup>13</sup>. Matters in List II are for State Legislatures, which laws are void to the extent of conflict with Union laws, thus procedurally not limiting the Federal Parliament by manner and form<sup>14</sup>. The Parliament is limited substantially by the judiciary's invention of the basic structure doctrine<sup>15</sup> and as such its legislative powers are not untrammelled. Under Article 13 (2), the Union Parliament is prevented from passing laws taking away or that abridges the fundamental rights. Judicial Review of Legislation (JRL) is another mechanism to strike down unconstitutional legislation even after passage. In *Jharkhand Party vs State Of Jharkhand*<sup>16</sup> the Supreme Court directed the Speaker to discharge his duties under Xth schedule, though under Article 212 Courts cannot inquire into proceedings of Assembly. The Indian Parliament is thus deprived of enjoying absolute legislative supremacy.

### **Forfeited Sovereignty-Ireland's Oireachtas and the European Union**

Unlike its predecessor prior to 1922 Constitution of the Irish Free State, the second independence constitution grants no sovereign powers to Ireland's bicameral Oireachtas (Dáil Éireann and Seanad Éireann). Article 15.2.1 of the Irish constitution enshrines the exclusive legislative power of the Oireachtas and no other legislative authority can make laws for the State. However, that power is only to legislate within the limits of the Constitution<sup>17</sup>. It is prevented from declaring infringement of law with retrospective effect<sup>18</sup>. As in other Parliaments, its internal functions and procedures are governed by its standing orders.

Though it has evolved into a self-restrained judiciary, JRL is constitutionally available with the Supreme Court under Article 26<sup>19</sup>. Once a Bill is passed by both houses, the President before

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<sup>12</sup> *Indira Nehru Ghandi vs. Raj Narain* (1976)2S.C.R347.

<sup>13</sup> Article 123(3)

<sup>14</sup> *In Dr. Yashpal vs. State of Chhattisgarh* (2005)5420S.C.C, the Rule of Federal Supremacy applied. *Calcutta gas Co. Vs. State of West Bengal*. AIR1962.SC.1044, the Rule of Harmonious Construction applied. See B.K.Sharma, Introduction to the Constitution of India, PHI Learning, Seventh edn(2009), p301

<sup>15</sup> *Keshavananda Bharati vs. State of Kerala*(1973)4SCC225, *Minera Mills Ltd vs. Union of India* AIR1980 SC1789

<sup>16</sup> 2005(2)BLJR1559

<sup>17</sup> Article15.4.

<sup>18</sup> Article15.5

<sup>19</sup> M.Forde, D.Leonard, Constitutional Law of Ireland, [Bloomsbury Publishing Plc.,(3rd ed., 2013)], Chapter 2.

signing it as law can refer it to Supreme Court to check Constitutionality within one week. The Supreme Court employs the test of proportionality<sup>20</sup>. Any litigant also can challenge a law during High Court proceedings, whether criminal or civil<sup>21</sup>. On the other hand, a significant provision that upholds the power of statutes passed by Parliament is Article 34.3.3 which provides that no statute that has gone under the Article 26 procedure can be challenged in any Court. Thus, it is possible in practical politics, that the ruling majority party in connivance with the President would convert legislation into unquestionable law through a self-restrained Court<sup>22</sup>. However, the Constitution is so entrenched that every amendment of the Constitution has to be approved by People by way of Referendum, thus limiting the authority of Oireachtas in manner and form of enactment.

The unique feature of Irish constitutional parameters is its subordination to European Union (EU) laws. Since Ireland became member of the European Commission (EC) in January 1973, as in all other member states including United Kingdom, legislative authority of Oireachtas has been taken over by EU laws including numerous treaties, agreements<sup>23</sup>. Under Article 29.7, the EU laws, acts done and measures adopted by Union institutions have force of law in Ireland notwithstanding any provision even in the Constitution. Simply, Ireland exemplifies how far a written constitution can incarcerate a State's own authority by subjugating its own law making powers in the name of Regional Corporation.

### **Epitome of Westminster model: the National State Assembly of Sri Lanka**

The study of the two Republican Constitutions of 1972 and 1978 of Sri Lanka would expose a contrasting experience of the legislative authority for a constitutional lawyer.

Parliamentary sovereignty, which the British parliament had to acquire during centuries of conflict with Monarchy, the then United Front Government, in 1972, could bestow upon the National State Assembly (NSA), as an epitome of Westminster Parliament, in writing, through

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<sup>20</sup> This test was used to declare constitutional a bill which lays down exception to right to silence in *Heaney vs. Ireland* (1994) 3 IR 593; *Rock vs. Ireland* (1997) 3 IR 484.

<sup>21</sup> Article 34.3.2

<sup>22</sup> This was one of the issues in a recent controversy around whether President Michael D Higgins should refer the International Protection Bill (Act No. 66 of 2015) to Supreme Court.

<sup>23</sup> Article 29.3, 4, 5.

the first autochthonous Republican Constitution of Sri Lanka<sup>24</sup>.The legislative power of NSA was supreme<sup>25</sup> and no rival authority could challenge whatever laws it passes<sup>26</sup>, compliant with proviso of Article 44. Constitutional amendment or repeal did not require a referendum as under the second Republican constitution.The primary challenge to supremacy, JRL, had been expressly removed by Article 48 (2) read with Art.54 (4). NSA was not bound by legislative predecessors<sup>27</sup>.

### **The Sri Lankan Hybrid system: Presidentialism and Parliamentarianism**

Contrastingly, parliamentary sovereignty is no more the predominant characteristic of the second Republican Constitution.The overarching feature that differently characterizes Sri Lankan Parliamentary tradition under the second Republican constitution of 1978 is its omnipotent executive presidency<sup>28</sup>.

While presidential system challenges ultimate authority of Parliament from the stages of composition, emergency and dissolution, absence of provisions in the Constitution for JRL at the post-passage stage remains the primary safeguard of Parliamentary supremacy<sup>29</sup>.Parliament also exercises judicial power through the courts. It recognizes no rival legislative authority<sup>30</sup>, though President is empowered to make emergency regulations by Proclamation suspending all laws except the Constitution<sup>31</sup>.It can pass legislation with retrospective effect<sup>32</sup> and those inconsistent with the Constitution<sup>33</sup>,subject to Article 157<sup>34</sup>, if Parliament is so resolved to be

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<sup>24</sup>C.Saunders & A.Dziedzic, "Parliamentary Sovereignty and Written Constitutions in comparative Perspective", Sri Lankan Republic at 40:Reflections on Constitutional History, Theory and Practice, A.Welikala (ed), [Center for Policy Alternatives,(2012)],p501

<sup>25</sup> Articles 44,45 (1)

<sup>26</sup> Wanasundera J.,in *Walker and Sons vs. Gunatilake and Others* [SC1/79]

<sup>27</sup> article12(1)

<sup>28</sup> C.Saunders,ibid 24,p502

<sup>29</sup> Article80(3)

<sup>30</sup> Article76(1),76 (3).

<sup>31</sup> However, such proclamations, once made, have to be approved by Parliament within fourteen days and will last for one month, till renewed. Thus this phenomenon can be viewed as a temporary suspension of parliamentary supremacy. Court upheld such powers in *Yasapala vs. Ranil Wickramasinghe* [SCFR103/1980]

<sup>32</sup> Article 75.

<sup>33</sup> Articles 84(1),15 (7)

<sup>34</sup> J.A.L.Coaray, Constitutional and Administrative law of Sri Lanka,[Sumathi Publishers, 1995], p237.

bound by an Agreement or Treaty with a foreign party. Thus parliament binds its future incarnations. On the other hand, entrenched provisions of the constitution also require endorsement by the people in a referendum<sup>35</sup>, which redefines the composition of the Parliament.

### **Conclusion**

The above analysis of the experiences of the three jurisdictions shows that Parliamentary sovereignty, in the Diceyan absolute sense is unavailable today in the written constitutions of Ireland, India and Sri Lanka, as with British Parliament. It was once available in second Republican constitution of Sri Lanka, which was aimed at asserting its sovereignty as against its predecessor Parliament under 1946 Soulbury Constitution. Similar studies would show that throughout the world the new phenomenon is liberal constitutionalism, that asserts constitutional supremacy, in which government including the legislative powers of the majority is limited, JRL provided for and the substantive text of the constitution is based on protection of human rights.

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<sup>35</sup> Articles 4(a), 83. *Ratnasiri Wickremanayake vs. The State* (SC58/79)