
RESEARCH PAPER

Parliamentary Sovereignty: An Evolving Misnomer in Pakistan's Constitutional Framework

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ABSTRACT

This article on consideration makes available that sovereignty is an evolving phenomenon. It is not incorrect that when Parliament in the UK was associated with the attribute of sovereignty there was no other authority barring it in which legislative competence resided and the authority to override its legislation. Nevertheless, with the evolution in the UK's political and constitutional framework, the traditional role of Parliament and the courts has also changed whereby there are constitutional limitations on the legislative power of the former and the latter is to ensure the said limitations are not transcended by the former. In Parliament and the courts presently is resided the sovereignty which was once used to be only in Parliament. Under the Constitution of the Islamic Republic of Pakistan, 1973, each organ namely, Legislature, Executive, and Judiciary, operates independently within its own jurisdiction and carries out its functions within the defined parameters. Although Parliament holds the legislative authority in its specified subjects, the judiciary however has a role in validating these laws through judicial review. This allows judiciary to confer legitimacy on Parliament's legislation, ensuring that laws passed by Parliament are within the bounds of the Constitution. Therefore, in contrast to the traditional notions of parliamentary sovereignty, both Parliament and the judiciary have power in relation to legislation which is exercised in the performance of their respective functions.

Keywords: parliamentary sovereignty, judicial recognition, dual sovereignty, Pakistan judiciary.

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INTRODUCTION

Passing by Parliament of the 26th Amendment in the Constitution of the Islamic Republic of Pakistan, 1973 (Constitution) has been celebrated as a victory for parliamentary sovereignty. This Article therefore discusses that the expression parliamentary sovereignty is often employed in Pakistan without considering what it meant at that point in time when it was first used and why contrary to such time it has presently become untenable to keep persisting with the expression. In

this Article, it is argued that the traditional notions of parliamentary sovereignty have been supplanted by a transformed constitutional framework even in UK where there are now real and effective constraints upon the powers and actions of Parliament and the judiciary has been vested presently with a more constitutionally significant function of considering the question of enforceability of a law prior to its enforcement. This development refers to setting of a situation of institutional pragmatism where the judiciary as an inevitable reparative in performance of their judicial functions have a role in legislation. Thus, now in Parliament and the judiciary the sovereignties reside.

The Article proceeds as follows. Part I traced the contribution of various writers to the word sovereignty according to the political realities of their times and how it kept changing over the centuries, which makes it a dynamic and evolving phenomenon. It also explores the limitations the word sovereignty inheres in it which take away the notions of absoluteness. Part II analyzes that when Dicey asserted the doctrine of parliamentary sovereignty, he was less concerned with historical evidence granting sovereign any power, and more consumed with the situation which was fully recognized in England at that time. Part III explains the factors affected the traditional notions of parliamentary sovereignty in Britain resulting in the development of a new constitutional paradigm wherein the role of the judiciary was expanded and extended to a system of checks and balances to restrain the abuse of power.

Part IV argues that contrary to idea of parliamentary sovereignty, bipolar sovereignty acknowledges the relation Parliament, and the judiciary have under the new UK constitutional system in a preferable manner. Part V highlights that Pakistan has adopted the cabinet system (Article 91) and the principle of ministerial responsibility [Article 91(6)] under the parliamentary form of representative government in its written Constitution and unlike the absolute supremacy of English Parliament in connection with legislation, the Constitution describes and delineates powers and functions of legislature which makes an act of Parliament in Pakistan repugnant to the Constitution void, thus squaring the principle of parliamentary sovereignty placing next to the Constitution is per se not possible. Part VI concludes that notwithstanding the competence of Parliament to make law, in the absence of legitimacy by the judiciary, the existence of such law on the statute books would always remain a doubt. Therefore, the expression parliamentary sovereignty is but a misnomer and better not to be pressed into service. However, if one at all intends to persist, bipolar sovereignty be employed as it better represents the political landscape in Pakistan.

LITERATURE REVIEW

Sovereignty has been a subject of significant intellectual debate and evolution over centuries. The classical understanding of sovereignty, as put forth by Jean Bodin in his *Six Books of the Commonwealth* (1576), conceptualized it as absolute and indivisible. Bodin's theory emphasized that sovereignty resides in a single, undivided authority, a view that dominated European political thought for centuries. Similarly, Thomas Hobbes in *Leviathan* (1651) furthered this idea, asserting that absolute sovereignty was necessary to maintain peace and order in society. His vision of the sovereign was largely based on the need for a central, uncontested power to prevent anarchy. However, this view of sovereignty as absolute and unchallenged has faced

increasing scrutiny in modern political theory, particularly with the advent of constitutionalism and the rule of law.

In the 20th century, scholars like Carl Schmitt and Hans Kelsen critiqued the idea of absolute sovereignty. Schmitt, in his work *Political Theology* (1922), argued that sovereignty resides in the authority that can decide in times of emergency, challenging the traditional notion of an all-encompassing sovereign. Hans Kelsen's *Pure Theory of Law* (1945) also questioned the centralization of sovereignty, arguing that legal systems are based on norms that restrict the absolute power of a sovereign. Kelsen's work laid the foundation for the modern understanding of sovereignty, emphasizing that it must be exercised within the boundaries set by constitutional norms and legal frameworks.

In the UK, A.V. Dicey's doctrine of parliamentary sovereignty, articulated in *Introduction to the Study of the Law of the Constitution* (1885), established the principle that Parliament is the supreme legal authority, capable of creating or ending any law. Dicey's view became the cornerstone of the British constitutional order, asserting that no body or individual, including the judiciary, could challenge the validity of parliamentary legislation. However, Dicey's theory has faced significant critique in light of developments such as the expansion of judicial review and the UK's relationship with European Union law. Scholars like K.C. Wheare and Ivor Jennings have pointed out that Dicey's formulation does not account for the evolving nature of British constitutional law, particularly the role of the judiciary in scrutinizing and interpreting legislation.

The role of the judiciary in limiting parliamentary sovereignty has become even more prominent in the modern era. Sir William Wade, in his work on constitutional law, highlighted that the UK's relationship with the European Union and the enactment of the Human Rights Act 1998 have imposed significant constraints on parliamentary sovereignty. The *Factortame* case, which challenged the supremacy of UK law over EU law, exemplified how parliamentary sovereignty can be overridden in certain legal contexts. Additionally, the increasing power of the judiciary, particularly through judicial review, has led many scholars to argue that the idea of parliamentary sovereignty in the UK is no longer absolute, but instead exists within a system of checks and balances.

In the case of Pakistan, the concept of parliamentary sovereignty has evolved in response to its own constitutional and political realities. The Constitution of Pakistan, 1973, sets out a system of governance that balances the powers of the legislature, executive, and judiciary. Although Parliament holds significant legislative authority, the judiciary plays a crucial role in reviewing and validating the constitutionality of laws passed by Parliament. Scholars such as Muhammad Munir and Shahid Javed Burki have explored how Pakistan's legal system reflects a departure from the notion of absolute parliamentary sovereignty. In particular, the judicial review mechanism, as established by the Constitution, has granted the judiciary the authority to declare laws that violate the Constitution void, which limits the unchecked power of Parliament. This has led many to argue that Pakistan's political and legal framework reflects a more complex model of sovereignty, one that involves both Parliament and the judiciary in the governance process.

The literature suggests that the traditional notion of parliamentary sovereignty, both in the UK and Pakistan, has become untenable in light of modern constitutional developments. While Parliament remains a key player in lawmaking, the expanding role of the judiciary in reviewing legislation reflects a shift toward a more balanced and nuanced understanding of sovereignty. This evolving relationship between Parliament and the judiciary in both countries highlights the necessity of adapting the concept of sovereignty to contemporary political realities.

CONCEPTUAL AND THEORETICAL FRAMEWORK

The conceptual and theoretical framework for this study draws upon the evolving notion of sovereignty, particularly in relation to parliamentary sovereignty, as understood within the constitutional contexts of the UK and Pakistan. It is grounded in the works of theorists such as Jean Bodin and Thomas Hobbes, who initially defined sovereignty as an absolute, indivisible power, and contrasts these classical theories with modern constitutional developments. This framework also incorporates A.V. Dicey's doctrine of parliamentary sovereignty, which asserts Parliament's supreme legislative authority, alongside critiques from scholars like K.C. Wheare and Ivor Jennings, who highlight the shifting balance between legislative and judicial powers. In light of these theoretical perspectives, the study adopts a framework that recognizes the emergence of a more nuanced, "bipolar" sovereignty, where both the legislature and judiciary play integral roles in shaping constitutional norms and ensuring the legitimacy of laws. This approach acknowledges the dynamic nature of sovereignty in the face of legal constraints and institutional checks, reflecting contemporary political realities in both the UK and Pakistan.

RESEARCH METHODOLOGY

The research methodology for this study is qualitative, primarily involving doctrinal legal research and comparative analysis. It will analyze primary sources, such as the Constitution of the Islamic Republic of Pakistan (1973), the UK Constitution, judicial decisions, and relevant legislation, to examine the theoretical and practical implications of parliamentary sovereignty in both jurisdictions. The study will also engage with secondary sources, including scholarly articles, books, and case law, to explore the evolution of sovereignty in constitutional law, with a focus on the interplay between parliamentary power and judicial review. Comparative analysis will be employed to contrast the constitutional frameworks of the UK and Pakistan, identifying similarities and differences in how sovereignty is conceived and exercised within each system. The research will also consider the role of the judiciary in limiting parliamentary sovereignty, emphasizing key cases and legal precedents that have shaped the current understanding of sovereignty in both countries. By combining doctrinal analysis with comparative methodology, the study aims to critically evaluate the contemporary relevance of parliamentary sovereignty and propose an alternative conceptualization of "bipolar sovereignty" as more fitting for modern legal systems.

UNDERSTANDING SOVEREIGNTY

The idea of sovereignty as an institution has been described in relation to authority and power which encompass the governance process and ultimate decisions that are binding on the communities subject to the jurisdiction of such institutions. However, the type of institution has differed in various ways depending on whether they are led by an individual, a group of people, or

governed by the state. (Rodney, 2008) In constitutional law, the concept of State and sovereignty are closely associated. A State, as Max Weber defined, is an entity which possesses sovereignty. (Rosenfeld and Sajó, 2012) It therefore follows that since sovereignty is one of the State's essential constituents, an entity absence/deprived of it could not qualify to be a State. We now proceed towards multiple concepts the concept sovereignty encompasses owing to shift in use of the term over time.

Models of Sovereignty

Augustinus Triumphus

As claimed, Augustus Triumphus is said to have prefigured the initial indications of sovereignty. He advocated for absolute papal power which meant the centralization of the governance of the church. (Rodney, 2008) Whether secular rulers or the pope had supremacy over matters of temporal governance. It was within the foregoing context of the clash between church and empire he developed his ideas. The sovereignty he ascribed to the pope was absolute in terms of power, territorial scope and temporal duration, therefore he was believed to be a human manifestation of God's sovereignty. The pope's will be considered God's will manifesting in positive earthly laws that had to be obeyed as they represented latter's will. As a result, the pope did not have to answer to any higher authority on Earth, nor could people make claims against the pope, and it was important for everyone to obey the pope, thereby expanding papal sovereignty. (Rodney, 2008)

Dante

Similar to Triumphus' model, Dante also introduced the concept of universal and global governance which was prior to the establishment of governance within a state limited by territory. It also emerged as a result of the continuous conflicts over authority between the pope and the emperor from the 11th to the 14th century. Dante viewed man differently from Triumphus, as he believed that individuals had both temporal and spiritual aspects that existed at the same level. (Rodney, 2008) In his view, the emperor held authority over worldly affairs, while the pope was responsible for spiritual matters. This dual leadership structure was not considered to be in line with scriptural teachings but also seen as a divine separation of powers.

Treaty of Westphalia

The notion of state sovereignty can be traced back to the Treaty of Westphalia at the end of the Thirty Years' War (1618-1648). Parties involved in the treaty agreed to refrain from meddling in the internal affairs of other parties and to respect each other's territorial boundaries. This gave the States the authority to regulate and make decisions on various issues, including religion. It signified the start of States exerting their legislative power. Consequently, the ability to legislate became the primary attribute of sovereign entities, serving as the foundation for all other powers they possess.

Jean Bodin

The origins of the concept of sovereignty were first discussed systematically by Jean Bodin in France. (Merriam, 2001) His concept of sovereignty revolved around a centralized form of government within a defined territorial state. Amid civil unrest, his homeland was in the midst of transitioning from feudalism to a centralized state. In his definition, sovereignty was described as the absolute and enduring authority of a state, or the supreme power over citizens and subjects, not constrained or bound by laws. Bodin viewed sovereignty as unrestricted in power, function, or duration, characterized by absolute freedom from legal restrictions and devoid of any conditions or limitations. (Rodney, 2008) It could be vested in a single individual or a collective group who, if in possession of it, would not be bound by legal constraints except for those imposed by natural or divine law. (Merriam, 2001)

Hobbes

Hobbes formulated several laws aimed to uphold peace stipulating that individuals must surrender their autonomy in return for others doing the same. (Rodney, 2008) Without a central figure of authority, individuals were tasked with interpreting and implementing these laws independently. To address this, Hobbes advocated for the establishment of a sovereign through a social contract whereby individuals would relinquish their personal desires in favor of the sovereign's will. (Rodney, 2008) This would result in the formation of a nation state wherein the sovereign possesses the ultimate power to legislate and settle conflicts. Hobbes' writings differ from those of Dante and Augustinus in their perspective on the chain of authority, which is established through a social contract involving individuals as participants. (Rodney, 2008) The basis of the sovereign's authority in Hobbes' theory is the agreement that generates obligation, rather than being derived from God's natural law. He advocates for a sovereign which aligns with secular and positivist legal viewpoints and is not subject to limitations imposed by natural or higher law. According to Hobbes, sovereignty is not restricted to a particular institution, but rather depends on the existence of an autonomous political society within a specified territorial boundary.

Austin

In Austin's view, sovereignty is held by a specific institution that most of the population in a politically autonomous community consistently follows and that should not regularly obey any other institution. (Rodney, 2008) Unlike Hobbes, Austin did not believe that authority stemmed from a social contract at the founding of society. Instead, he focused on the presence of positive law within an independent political society. Austin recognized the commands of the sovereign as part of positive law, emphasizing the importance of a legal hierarchy in society with a central authority to prevent anarchy.

De Malberg

He delineated three distinct meanings of the term 'sovereignty' in the French language to make available its authentic essence. (Rosenfeld and Sajó, 2012) In the original sense, the word 'sovereignty' refers to the supreme character of the State's power. In a second sense, it refers to the whole range of powers included in the State's authority, and it is therefore synonymous with that authority. Thirdly, it is used to characterize the position occupied within the State by the highest organ of the State's authority and in that sense, sovereignty is the same thing as the power

of that organ. Based on the foregoing distinctions, it is easy to clarify whether it is possible to divide sovereignty. As far as sovereignty in the second sense is concerned, it is perfectly divisible because the range of powers that can be exercised by the state can be divided into legislation, execution and adjudication, and the concept of separation of powers is precisely a division of sovereignty in this sense. (Rosenfeld and Sajó, 2012) However, the organs of the state exercising such powers in their respective subject matters make them the highest organs of the state in the third sense of sovereignty, which is invariably indivisible. In other words, the organ of the state would be the highest organ in the exercise of its sovereign power with respect to its subject matters.

Modern Ideal of Sovereignty

The separation of secular and spiritual authority, with the eventual dominance of the former over the latter, alongside the establishment of governance within defined territorial boundaries and the implementation of laws based solely on the ruler's will rather than natural law, laid the foundation for the evolution of contemporary sovereignty models centered on centralized forms of government with concentrated supreme authority. It therefore follows that concept of sovereignty entails the exclusive political authority to govern a specific geographical area encompassing powers related to legislation, judicial matters and executive decisions. (Tatar & Moisi, 2022)

Limitations

As is clear from the foregoing discussion that the concept of sovereignty is not devoid of limitations. The pope claims to be God's manifestation and can transcend physical existence while also taking on any physical form. This dual concept of existing in both spiritual and physical realms is both the strength and potential weakness of Triumphus' model. If these two aspects are seen as separate, the entire framework is severely weakened. In relation to Dante, since the purpose of appointment of the emperor was to maintain obedience to a single God's will, any division of the empire by the emperor exercising his powers was therefore prohibited. Not only that, another limitation under the Dante's model of sovereignty was the absence of any higher earthly body above the pope and the emperor in relation to resolution of disputes between the two.

Laws of God or nature were the constraints upon the absolute sovereignty of the ruler as stated by Bodin. The power of ruler was further limited as it was expected of him to adhere to laws that protect the rights of his subjects. Dicey criticized Austin for mixing up the location of legal and political sovereignty. Hart and Kelson argued that the idea that the sovereign was defined by obedience is weak since, Hart noted, the supreme legislative power in many societies around the world is constrained by a constitution.

WHAT IS PARLIAMENTARY SOVEREIGNTY?

Having discussed various perspectives surrounding the concept of sovereignty, we now turn to parliamentary sovereignty. Parliament used to consist of the King, the House of Lords and the House of Commons. (Jennings, 1943) When Dicey asserted his concept of parliamentary sovereignty, he meant not more than to explain the constitutional position prevalent in Britain at such point in time. (Dicey, 1885) This finds support from the use of words by him that the doctrine

of parliamentary sovereignty was *fully recognised* in England. It invariably follows that such doctrine was already an entrenched doctrine even prior to Dicey. Therefore, it is expedient to briefly made available here what was the status of parliament before him.

Sir Edward Coke

English jurists used to refer Coke for parliamentary supremacy. (MacKay, 1924) To support the theory of parliamentary sovereignty, the most quoted statement of Coke, i.e. *“Of the power and jurisdiction of the Parliament for making laws and proceeding by Bill, it is so transcendent and absolute that it cannot be confined either for causes or persons within any bounds”* was relied upon. The words “jurisdiction”, “causes”, and “persons” used therein point that Coke treated of Parliament as a court. The supremacy and absoluteness associated with Parliament in the said statement was not only in relation to its unconstrained jurisdiction and competence to make laws as far as persons or causes were concerned but also extended to change or revise any previous statute or any principle of common law. Its rulings or acts, since it happened to be a court of last resort from which there was no further appeal, were the last decision on any principle of law. (MacKay, 1924)

As is clear from the foregoing discussion that the above reference to court is to the High Court of Parliament which was separate and distinct from the standard/common law courts and acknowledged to have authority to change not only the common law, but also its own statutes. (Goldsworthy, 2004) Where there was a remedy at the common law courts, Parliament used to show restraint and remit the parties thereunto. (MacKay, 1924) The standard/lower courts were obliged to apply the law that Parliament had made and did not enjoy the same power as Parliament used to do in the field of legislation. Thus, the consequence would be no more than that no law could have been annulled except for an authority of Parliament. (MacKay, 1924) It leaves no manner of doubt that Parliament was conceived without limits with powers not only of legislation as well as adjudication.

Dicey

The Glorious Revolution of 1688 ended in yielding the Crown (monarchical power) to majority rule. (Ginsburg, 2003) It was marked as the start of evolution of parliamentary sovereignty in Britain. (Goldsworthy, 2004) The concepts such as legitimacy and democracy were in an embryonic stage at that time. So common were the political and legal debates in relation to them. Such political history of English constitutional law found to be prevalent in England which made the people recognized the existence of an entity that could make or unmake every law and at the same time could not be bound by any law. This moved Dicey to differentiate legal sovereignty from the political sovereignty. He explained that parliamentary sovereignty was not more than a legal conception where the legislative competence of Parliament under the British constitution was unconstrained and unlimited with the courts only to apply what the former had made. (Dicey, 1885) He nevertheless maintained that since the term had also been seen to be employed in a political sense sovereign power thus vested in such political body in a state the will of which is ultimately obeyed by the citizens of the state.

According to Dicey, Parliament had the legal authority to make laws on any subject it found necessary. It was not possible for any person to refuse to obey the orders of Parliament because they were not law. Nor was it possible for the courts to declare that an act of Parliament needed not to be obeyed because it was beyond the powers of Parliament. The judiciary was obligated to apply all laws passed by Parliament without exception. No attempt would be made by Parliament to bind its successors as to either the substance of legislation or the manner in which it is introduced. His model of parliamentary sovereignty therefore maintained that UK Parliament was sovereign and vested with unconstrained legislative competence and that the other major organs of government, the courts and the executive, were subordinate to Parliament. (Dicey, 1885)

After defining law as any rule which would be enforced by the courts, Dicey described the positive and negative sides of the principle of parliamentary sovereignty whereby unlimited legislative authority was vested in Parliament and the courts accepted no other source of authority. (Dicey, 1885) Not restricted by any law merely meant for Parliament to have the legal right to make or unmake any law whatever and for the courts its legal duty to obey it. It therefore follows that Dicey's formulation of sovereignty is not more than a form of legal expression employed to express relations between Parliament and the courts that the latter would recognize as law the rules the former makes.

Principles

Parliamentary sovereignty can best be illustrated by the correlated principles hereinafter stated. Being the highest law-making body, Parliament can legislate on any topic whatever because there is no defined list of subjects over which it exercises its legislative power, and its acts have the primacy over common law, judicial precedents, and other judge-made law. (Sauereisen, 2002) Secondly, the courts are obliged to administer the laws which Parliament has enacted, and they cannot overturn Parliament's legislation. Thirdly, Parliament is not bound by its predecessor and can repeal every former act as the next Parliament enjoys the same law-making power. In case of conflicts between two conflicting statutes, the principle of implied repeal guarantees that the latest expression of Parliament's will prevails.

FACTORS AFFECTED THE TRADITIONAL NOTIONS OF PARLIAMENTARY SOVEREIGNTY

Dicey's concept of parliamentary sovereignty was not more than a legal concept to express the relationship between Parliament and the courts wherein the former applied what the latter legislated. However, the foregoing relation between the two branches did not remain unaffected from the tripling effect of evolving nature of UK's constitutional and political framework. (Rodney, 2008) It will be made available in this part that with evolution in political landscape, presently into the UK's constitution there exists real and effective constraints upon the actions of Parliament and the role of the judiciary has been reduced to interstitial whereby legitimacy is given to an act of Parliament only through judicial recognition. (Joseph, 2004) This new relationship in UK's constitutional setting has not only demonstrated unsustainability but as well as supplanted Dicey's notions of parliamentary sovereignty.

Subsequent to glorious revolution, the Bill of Rights (1688-89) and the Act of Settlement (1700) recognized some important personal rights and liberties. (Limbach, 2001) However, the same remained unsuccessful in its attempt to establish a continuing democracy committed to fundamental values and the rule of law. The traditional role of the courts resultantly took a shift to providing practical solutions exercising judicial power of review to problems such as disregard of human rights, protection against anti majoritarian rule and dictatorship. (Limbach, 2001) The courts therefore emerged as an inevitable reparative providing a system of checks and balances against legislation as well as executive acts.

The traditional perception regarding the courts' province was to expand the law only the written from the statutes, but English judges did not always subscribe to the principle that Parliament's legislation must not be challenged. (Rodney, 2008) Coke's Reports and Institutes are associated with many of the principles underlying his explanation for the supremacy of the common law. There was an infamous *Dr. Bonham* case in which the question as to whether the college had exceeded its authority was answered in affirmative. The concept of limited authority was recognized in *Dr. Bonham* case by Coke according to which an act of Parliament was to be adjudged void being against common right or reason, or repugnant or impossible to be performed, when placed next to common law. The said concept was affirmed by Sir Henry Hobart CJ, Coke's successor, in *Day v Savage* and *Lord Sheffield v Ratcliffe*, which was further supported by Vaughan CJ in *Thomas v Sorrell* and endorsed by Holt CJ in more explicit words in *City of London v Wood*. It is thus evident from *Dr. Bonham* case that Coke was not merely interpreting a statute, he was nevertheless enforcing a rule of higher law deemed to him to be binding on Parliament and the ordinary courts alike. (Yeo, 1999) It would also appear that the principles of judicial review were sourced in the common law and American jurists turned to Coke as the legal father of judicial review. (MacKay, 1924)

Now the factors that have influenced changes in the judicial function and how these changes do not accurately reflect Dicey's ideas of parliamentary sovereignty in Britain presently.

Manner and Form Theory

The term manner and form is derived from the provisions of the Colonial Laws Validity Act 1865. Parliament is bound to comply with a set of rules before it can make a law. In order to be considered as law by the courts, the compliance of the manner and form requirement for an act of Parliament is a condition precedent. It is indeed correct the courts had no jurisdiction to adjudge the act of Parliament on the basis of subjects for legislation. Nevertheless, the validity of such act could be questioned on accounts of Parliament's composition and the process of legislation. (Jennings, 1943) Since the Government failed to comply with the manner and form requirement demanded by the preceding legislation, the New South Wales Supreme Court granted an injunction against the government presenting the Bills to the Governor which was upheld by all the courts up to the Privy Council. (*Attorney-General for New South Wales v. Trethowan*) A legislature had no power to ignore the conditions of law-making that were imposed by the instrument which itself regulated its power to make law. (*McCawley v. King*) Similarly, a British court recognized that the powers of a sovereign legislature may be legally limited by manner and form requirements,

which was a delimitation of the legal doctrine of parliamentary sovereignty. (*Bribery Commissioner v. Pedrick Ranasinphe*)

Rule of Recognition

It is one of those different rules that determines the criteria which settle the validity of the rules of a particular legal system and as such forms the foundation of all legal systems. The existence of these different rules delimit its authority and may, thus, render an act, contrary to their provisions, void. (Yeo, 1999) The rule provides that acts of Parliament constitute the highest form of domestic law and if any subsequent Act of Parliament has the effect of repealing the provisions of any former Act inconsistent with the provisions of the subsequent then the courts declare what the law is but also determine the content of the rule of recognition through their interpretation of the meaning of Acts of Parliament. (Yeo, 1999) In a case it was held that the courts had been empowered to recognize and declare what was and what was not valid law. (*Harris v. Minister of the Interior*) Hence, Dicey's parliamentary sovereignty no longer serves the purpose of explaining the reality and should be disregarded.

Supremacy of Community Law

The Treaty of Rome was not only the foundational basis of the European Community but also constituted a new legal order. By creating a community having its own institutions, its own personality and capacity in law, the member states, albeit within limited spheres, had restricted their sovereign rights and they acknowledged that Community law had an authority which could be invoked by their nationals before those courts and tribunals. (Yeo, 1999) The primacy and precedence of the Community Law was acknowledged by the European Court of Justice (ECJ) when it held that the member states could not override Community Law by domestic legal provisions and the law stemming from the Treaty which happened to an independent source of law for the member states was to prevail in case of inconsistency. (*Costa v. E.N.E.L*)

Membership of the European Communities by UK through European Community Act, 1972 (Act of 1972) has brought about the inroad into the doctrine of parliamentary sovereignty inasmuch as that the legislative and executive competence vested in the governing bodies of the European Union has constrained the actions of UK's Parliament. (Yeo, 1999) The government is now subject to an authority that can dictate policy and issue directions that are enforceable before domestic and European courts. The UK's judiciary is now bound to interpret the domestic legislation in accordance with the Community Law and in the event of an inconsistency to disregard the former and apply the latter. In its celebrated decision after UK gained membership of the Communities, the ECJ asserted the principle of the precedence of Community law and held that there existed two distinct legal orders, one based on Community Law and the other being the municipal law, and every national court must within its jurisdiction apply Community law in its entirety and set aside any provision of validly adopted national law to the extent of its incompatibility with Community provisions. (*Simmenthal SpA case*)

It was then in *Factortame* case which finally laid to rest the issue of parliamentary sovereignty and its relationship with the primacy of the Community Law. The House of Lords held that where the Communities were deemed to be competent to make laws UK's Parliament lacked

the legislative competence in those areas which was in accordance with the notion of a higher law voluntarily recognized and accepted by it in the Act of 1972. Since Parliament, the Court continued, in terms of changed constitutional framework was under obligation to abide by Community decisions and obey Community laws, it could not enact domestic legislation incompatible with community law provisions and in case of its failure to discharge its duty the outcome of which is the inconsistency between the two legislations the courts would apply Community law and disregard domestic legislation. This represents but a departure from the traditional interpretation where the courts were bound to interpret what Parliament legislated. It became the precedent which the House of Lords also followed in *Equal Opportunities Commission*. Thus as is clear from the foregoing that there has been a limitation of parliamentary sovereignty as a result of membership of the Communities.

Human Rights Act, 1998

Human rights protection is designed to protect individuals from the state and prevents legislation and executive action from acting as barriers to fundamental rights. So it will be seen that if Parliament is sovereign to make any law, how it can be constrained by human rights principles. UK enacted Human Rights Act 1998 (Act of 98) to incorporate in its domestic legal framework the European Convention on Human Rights (ECHR) which is an international treaty providing in case of breach of fundamental rights and freedoms a right to individuals to take their grievance petitions to national courts without the need to go to Strasbourg. (Donald, et al)

The Act of 98 mandates for all public authorities to act compatibly with the ECHR. Under section 3 of the Act of 98, UK law must be interpreted in a way that is compatible with ECHR rights. However, the higher courts under Section 4 in case of incompatibility of national legislation with ECHR rights can pass the declaration of incompatibility. It appears the power to legislate on whatever subject which Parliament used to have can now be questioned before the courts. Unlike Parliament and the executive, the courts will be required to interpret legislation as to whether the legislation upholds the rights enumerated in ECHR. As a necessary corollary there can be little doubt that the incorporation of the ECHR into Act of 98 has re-defined the positioning and constitutional function of Parliament and the courts in Britain which amounts to abrogation of idea of parliamentary sovereignty.

BI-POLAR SOVEREIGNTY

The new legal relation between the courts and Parliament where the validity of legislation can be reviewed by the courts can be best termed as bi-polar sovereignty. It was used by Sir Stephen Sedley to refer a new UK's constitutional paradigm. (Sedley, 1995) Nevertheless, it was Rees who relied upon the concept of dual sovereignty to assert that there was a transfer of a marked degree of sovereignty whereby Parliament as a legal sovereign enacts a law by legislation and the court as enforcement sovereign prior to giving give effect to such law also reviews what constitutes a valid law. (Rees, 1950) Since the two important functions, that is, legislative and judicial, are performed by Parliament and the courts, respectively, therefore the sovereignty of the State is confined in not only one rather both of them. (Knight, 2009) Politically, members of Parliament

are still held responsible to Parliament, they however are legally accountable before the courts. (Sedley, 1995)

Both Parliament and the courts being the political and judicial branches are committed to the business of government where neither branch is sovereign, nor should they seek to supplant each other. (Cooke, 2004) In another writing, Lord Cooke used the word distortion to associate the notion of sovereignty for any single branch. (Cooke, 2004) This new idea of legal relation is also not devoid of judicial support. “The rule of law”, as Lord Bridge of Harwish stated, “rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen’s courts in interpreting the law.” (X Ltd v Morgan-Grampian (Publishers) Ltd.) Lord Woolf of Barnes also designated in Queen-in-Parliament and the superior courts of Justice the idea of twin sovereignties. (Hamilton v Al Fayed)

Traditionally, in the context of legal and enforcement sovereign Parliament was the only institution. However, presently on account of changed UK’s constitutional framework, now exists in Parliament and the courts, with the former the legal sovereignty to make laws and the latter exercising enforcement sovereignty to determine the enforceability of the law prior to its enforcement. Whether or not the law is to be enforced it is for the courts to adjudge and confer the legitimacy. Therefore, the best way to understand sovereignty in UK is to recognize the dual sovereignty of Parliament and the courts where the latter now have power in connection with legislation that is only exercised in performance of their judicial functions.

INTERPLAY BETWEEN PARLIAMENT AND THE JUDICIARY IN PAKISTAN

Article 7 of the Constitution defines the State which means the Federal Government, Parliament (Majlis-e-Shoora), a Provincial Government, a Provincial Assembly, and such local or other authorities in Pakistan as are by law empowered to impose tax or cess. It is not only a negative duty but also a positive duty. The former refers to respecting and non-interference in the individuals’ rights while the latter denotes protecting and securing the practical and effective realization of such rights. These are found in Article 8 which provides for the State not to make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall be void to the extent of such contravention. The use of the word ‘means’ in Article 7 makes the definition of the State exhaustive barring the inclusion of another institution in it. The conspicuous absence of the institution of the judiciary in the foregoing definition upholds the mandate of the Preamble to the Constitution which reckons for the independence of the judiciary to be fully secured. Since the judicial power exercised by the judiciary involves interpreting the law and deciding the controversies of not only citizens inter se but also the State and the citizens and the State and provinces, it therefore has been kept out of the State’s realm of influence and finds its establishment in Article 175 of the Constitution. Access to justice has been recognized as one of the fundamental rights in Pakistan which has been safeguarded by ensuring the judiciary to remain independent.

A parliamentary system of government based on political parties is envisaged in the Constitution. As a result, the executive branch is closely intertwined with the legislative branch. Parliament is competent to make laws under Articles 141 and 142 with respect to any subject

enumerated in the Federal Legislative List of Fourth Schedule of the Constitution. Nevertheless, simply passing a law is not enough to make it valid. The law must also meet certain criteria, such as being in line with the Constitution and within the powers of legislature. In addition to being passed by Parliament, a law must also meet constitutional requirements and be within the legal authority of the Federal and Provincial legislatures. The judiciary has the power of determining the legality of laws, declaring them valid, incompatible, or beyond the scope of authority. Such power is extended only to the expressly provided constraints in the Constitution itself to the exclusion of all implied limitations. Therefore, if a law passed by Parliament is against the fundamental rights (Article 8), absence of legislative competence (Articles 141 & 142), otherwise than the prescribed procedure (Articles 238 & 239), the Supreme Court of Pakistan and the High courts under Article 184(3) and Article 199 of the Constitution respectively can declare it invalid and void.

In Pakistan, Dicey's idea of parliamentary sovereignty cannot be directly applied because the country operates under a written constitution. It structures a government through the creation of Legislature, Executive, and Judiciary and specifies the powers and responsibilities of these organs, providing clear boundaries for them. Each organ operates independently within its own jurisdiction and carries out its functions within the defined parameters. (*Liaqat Hussain v. Federation of Pakistan*) This means that Parliament holds the legislative authority within the limits set by the constitution. While Parliament has the authority to pass laws, it is important to understand that this authority is not unlimited and must be exercised within the boundaries defined by the Constitution. (*Govt. of Balochistan v. Azizullah Memon*) Judges have a duty to uphold, defend and protect the Constitution. It is their responsibility to ensure that all branches of government operate within the limits outlined by the Constitution. (*Masroor Ahsan v. Ardeshir Cowasjee*)

If any branch oversteps its boundaries, it is the duty of the courts to review such actions, even if it means suspending or invalidating laws. (*Watan Party v. Federation of Pakistan*) Constitutional amendments or statutes are not immune from judicial review, as courts have the authority to strike down any law that goes against the Constitution. (*FGEHF v Malik Ghulam Mustafa*) This is not about elevating the courts above Parliament or going against the will of the people, but rather about ensuring that the boundaries set by the Constitution are always maintained. (*State v. Zia-ur-Rehman*) If any law is found to conflict with the Constitution, it is the duty of the courts to declare it unconstitutional. Despite Parliament's authority to create legislation, without approval from the courts, the validity of any law passed by Parliament would be constantly questioned. In such a process of approval, the courts have power in connection with legislation which is exercised by them only through judicial functions in contrast to Parliament's legislative functions.

CONCLUSION

Since the sovereign powers of the State are divided into legislation and adjudication, their exercise by Parliament and the courts respectively entitles both the said organs of the State to be held as sovereigns. Because of limitations on the legislative power of Parliament with the courts to enforce those constraints, Dicey's traditional notion of parliamentary sovereignty has been

supplanted. In the words of Lord Steyn writing in the House of Lords, “the classic account given by Dicey of the doctrine of supremacy of Parliament, pure and absolute it was, can now be seen to be out of place in the modern United Kingdom.” (Jackson & others v. Her Majesty’s Attorney General) Similarly, as far as Pakistan is concerned, Parliament’s legislation is subject to judicial review by the constitutional courts placing it next to the Constitution. The courts in performing such judicial function have power in connection with legislation representing the setting of an institutional pragmatism in the country.

To conclude with the observations on Dicey’s concept of parliamentary supremacy by Jawwad S. Khawaja, J., that there is no justification in our dispensation for muddying the crystal and undefiled waters of our constitutional stream with alien and antiquated 19th century Diceyan concepts of parliamentary supremacy as these concepts have currency even in their own native lands. (Azhar Siddique v. Federation of Pakistan) Therefore, the incantations relating to sovereignty of Parliament in Pakistan should not be pressed into service and since legislative and judicial sovereignties of the State are resided into two distinct institutions that is Parliament and the courts, bi-polar sovereignty be employed as it represents the underlying scheme of the Constitution in a preferable manner. This is where the matter must now end.

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