CHAPTER - 5

IMPOSSIBILITY OF FORMATION OF MINISTRY AND DISSOLUTION OF THE HOUSE

A. PARLIAMENTARY CONVENTIONS IN BRITAIN BEFORE ENACTMENT OF THE FIXED-TERM PARLIAMENTS ACT, 2011.

One of the major functions of Parliament in a parliamentary form of democracy is to form a ministry that will govern the country. Fractured electoral mandate, sometimes, may present a situation where no single political party or a coalition of political parties is in a position to form the ministry. There may be a still-born House of Commons, where Parliament is fractured to such an extent that there is no possibility to form a ministry. There may be a situation where the incumbent government is defeated in the floor of the House either by defection by some of the members, or by withdrawal of support by some of the members or for some other reason and the House is not in a position to throw an alternative government. In such circumstances the only option left is to dissolve the House and call for fresh elections. There cannot be a situation where there is a Parliament but no Ministry. This is a constitutional necessity that there has to be a Council of Ministers to aid and advice the Crown (or the President) and the Council of the Ministers has to be collectively responsible to Parliament.

In Britain the power to dissolve the House of Commons, till the enactment of the Fixed-Term Parliaments Act, 2011, was one of the royal prerogative powers and the Crown, in normal circumstances, exercised this power as per the advice of the Prime Minister. In the absence of any written code as to exercise of this power, the Crown exercised this power at his complete discretion. However, over a period certain conventions developed, concerning some of the aspects of

dissolution. According to Jennings, in Britain it is a well-settled convention that the Crown would not dissolve the House *suo motu*, on his own initiative, without the advice of the Prime Minister. This is in accordance with the principle of responsible government according to which the Crown functions on Ministerial advice. The responsibility for dissolution rests with the Prime Minister though he may consult some of his colleagues if he so likes.[1] O. Hood Phillips[2] has explained that the conventions regarding the Crown's prerogative to dissolve the House of Commons in normal circumstances are as follows: (a) The Sovereign should dissolve the House of Commons when advised by the Prime Minister to do so; (b) The Sovereign should not dissolve the House of Commons unless advised by the Prime Minister to do so; (c) The Prime Minister has the power to choose the time of dissolution; and (d) If the government is defeated in the House on a question of policy, the government must either ask for dissolution or resign.

The question arises whether there are any exceptional circumstances in which the Crown may refuse dissolution of the House even if the Prime Minister advises for dissolution or grant dissolution even if the Prime Minister does not advise the Crown for dissolution. The question of dissolution has been widely discussed, but as de Smith says there is no consensus of opinion on the conventional power of the Monarch to require a dissolution of Parliament, or to refuse a request for dissolution.[3] While the general view is that it may be politically expedient for the Crown to accept the advice whenever tendered by the Prime Minister to dissolve the House, yet not a single constitutional lawyer appears to assert unequivocally that the Crown's discretion or prerogative to grant or refuse dissolution has been atrophied by disuse, or has been lost irrevocably.[4] Although, for over a hundred years, the Sovereign has never rejected, but has consistently acceded to, the Prime Minister's request to dissolve

1 Ivor Jennings, *Cabinet Government,* 3rd Ed., Cambridge University Press, 1969, p. 412-28.

2 O. Hood Phillips, *Constitutional and Administrative Law,* Sweet and Maxwell, 1987.

3 S.A. De Smith, *Constitutional and Administrative Law,* Penguin Books, 1977, pp. 51, 102-5.

4 David Lindsay Keir, *The Constitutional History of Modern Britain,* p. 489.

the House, nevertheless, there has been a persistent tradition, and the view is still propounded, that the Crown may refuse if the circumstances so demand.[5]

O. Hood Phillips also supports a "limited prerogative" to the Sovereign to dissolve the House. He says: "It is more in consonance with the traditions of British parliamentary government".[6] He mentions the following factors that would have to be taken into account before the Sovereign could properly refuse a dissolution: (i) the time that had elapsed since the last dissolution; (ii) whether the last dissolution took place at the instance of the present Opposition; (iii) whether the question in issue is of great political importance; (iv) the supply position; (v) whether Parliament is nearing the end of its maximum term; (vi) whether the Prime Minister is in a minority in the Cabinet; (vii) whether there is a minority government; (viii) and perhaps, whether there is a war on.[7]

The underlying idea in the approach of the scholars is that while the Crown, generally speaking, should act on the advice of his Prime Minister, taking into consideration the varied and diversified political situation, it may not be possible to foresee all the situations and be sure that a moment may never arise when the Crown may have to refuse dissolution in the interest of saving the democratic constitutional fabric. However, there are enormous difficulties in the way of the Crown to refuse dissolution when so advised by the Prime Minister. If the advice is refused, the Prime Minister would have no option but to resign, and the Crown would have no option but to turn to the opposition to form the government. This may involve the Crown in partisan party politics which may injure the Crown as an impartial institution, free from the current political controversies and manoeuvres. In sum, the position appears to be that in Britain

5 E.A. Forsey, *The Royal Power of Dissolution in the British Commonwealth*, OUP, London, 1943; Ivor Jennings, *Cabinet Government*, 3rd Ed., Cambridge University Press, 1969, p. 427.

6 O. Hood Phillips, *Constitutional and Administrative Law*, Sweet & Maxwell, 1987, p. 155.

7 O. Hood Phillips, *Constitutional and Administrative Law*, Sweet & Maxwell, 1987, p. 152.

the Crown would accept Ministerial advice to dissolve the House except, perhaps, in a very exceptional situation.[8]

It is indisputable that a Prime Minister may ask, and not demand, that the Sovereign will grant dissolution of the House, and that the Crown, if he chooses, may refuse to grant his request. The choice is entirely of the Crown. According to Rodney Brazier[9], it is beyond doubt that the Sovereign can refuse a request for dissolution of Parliament: the difficulty lies in identifying the situations in which such action would be constitutionally appropriate. That identification is made more awkward by the fact that no dissolution has been refused this century, something which could wrongly be seen as evidence that a refusal would become an acceptance if pressed. But this negative fact proves no more than that no Prime Minister has improperly requested a dissolution, and that therefore the Sovereign has had no reason to refuse. Brazier makes three propositions about dissolution:

- If a government continues in office as minority government after an inconclusive general election obtained by its Prime Minister and is immediately defeated on an amendment to the address in reply to the Queen's speech, there is no precedent for such a Prime Minister seeking a second dissolution, rather there is ample precedent for him to resign.

- If either a minority or a coalition government is formed from a hung House of Commons and the new Prime Minister had not obtained the first dissolution, then a request by him at any time for a general election should be granted.

- If a Prime Minister of either a minority or a coalition government in a hung Parliament were to ask for general election, even for his first time,

8 M.P. Jain, *Indian Constitutional Law,* Wadhwa, Nagpur, 2005, p. 58.

9 Rodney Brazier, *Constitutional Practice: The Foundation of the British Government, Clarendron, 1994.*

in order to forestall another majority and workable grouping supplanting his administration, then again refusal would be defensible if that alternative grouping in fact existed.

Robert Blackburn[10] has set out his own four key principles and procedures of dissolution as follows:

- A Prime Minister who has lost a general election cannot request a dissolution. "Lost" here includes the government being defeated on an amendment to the address (in reply to the Queen's speech) expressing no confidence in the government taking place at the first meeting of the newly elected House of Commons.

- In a hung Parliament, where the Prime Minister's government wins or survives the debate on the address, his advice to the Monarch on dissolution affairs will thereafter be followed during his tenure in office.

- A Prime Minister who loses a no confidence vote in the Commons must request a dissolution of Parliament from the Monarch, who will grant it. The Prime Minister is entitled to resign office (together with his government) instead, in which case the Monarch will appoint the leader of the opposition as the new premier, who will advise on dissolution matters thereafter.

- De-selection of a Prime Minister as leader in the governing party causes him to lose his political authority to advice the Monarch on dissolution affairs (or any other prerogative powers). The Monarch is duty bound to reject any request by a Prime Minister for dissolution during a leadership contest.

10 Robert Blackburn, "Monarchy and the Personal Prerogatives", *Public Law*, Spring 2004, p. 557.

Thus, the Crown can refuse dissolution in the following circumstances: (a) the existing House is still vital, viable and capable of doing its job; (b) a general election would be detrimental to the national economy; (c) the Crown could rely on finding another Prime Minister who could carry on his government, for a reasonable period, with a working majority in the House.

B. THE FIXED-TERM PARLIAMENTS ACT, 2011

Dissolution of the House of Commons, till the enactment of the Fixed-Term Parliaments Act, 2011 was one of the royal prerogative powers and the Crown exercised this power in accordance with well established conventions. The royal prerogative comprises residual powers and functions which were originally associated with the Monarch.[11] This means the powers that the Monarch still holds from the time that the monarchy was the true political power of the state. As per the convention, Parliament was dissolved by the Crown solely on the advice of the Prime Minister, through a Royal Proclamation. The ability to do this, as a residual power of the royal prerogative, meant that there need not be parliamentary advice or debate taken into account for when Parliament was to be dissolved. Indeed the Prime Minister makes his or her choice independently of Parliament, government, and often even their closest colleagues in the Cabinet.[12] In theory the Monarch could have exercised discretion over whether or not to grant the Prime Minister's request for dissolution. The Lascelles principle[13] states that the Crown may have been justified in refusing a request for dissolution where:(1) The existing Parliament was still vital, viable, and capable of doing its job; (2) a General Election would be detrimental to the national economy; and (3) he could rely on finding another Prime Minister who could carry on his

11 Peter Leyland, *The Constitution of the United Kingdom; A Contextual Analysis, Second Edn.*, Hart Publishing 2012, p.90.

12 Professor Robert Hazell, *Fixed Term Parliaments,* The Constitution Unit, University College London, 2010, p.6.

13 Sir Allan Lascelles, "Dissolution of Parliament: Factors in the Crown's Choice", published in The Times, London 2nd May 1950 quoted in Peter Hennessy, *The Prime Minister: The Office and Its Holders Since 1945,* Palgrave, New York, 2001, p.34.

Government, for a reasonable period, with a working majority in the House of Commons. This was the position before the Fixed-Term Parliaments Act 2011.

However, with the enactment of the Fixed-Term Parliaments Act, the state of things has changed considerably. Sec. 1(3) of the Act provides that parliamentary elections must be held every five years, beginning in 2015[14]. The Act also abolishes the prerogative power of the Crown to dissolve the House of Commons, and replaces it with two statutory events when the House of Commons may be dissolved; (a) a positive vote for an election by two-thirds of the membership of the House of Commons, and (b) a no-confidence resolution being passed in the House of Commons, and no new Prime Minister and government being formally endorsed by a vote of confidence in the House of Commons within 14 days. Section 2 of the Act provides for dissolution of the House of Commons: *first*, if the House of Commons resolves "That this House has no confidence in Her Majesty's Government", an early general election is held, unless the House of Commons subsequently resolves "That this House has confidence in Her Majesty's Government". This second resolution must be made within fourteen days of the first; and *secondly*, if the House of Commons, with the support of two-thirds of its total membership resolves "That there shall be an early parliamentary general election"[15]. In either of above cases, the Monarch

14 The UK Fixed-Term Parliaments Act, 2011

Sec. 1. Polling days for parliamentary general elections

(1) This section applies for the purposes of the Timetable in rule 1 in Schedule 1 to the Representation of the People Act 1983 and is subject to section 2.

(2) The polling day for the next parliamentary general election after the passing of this Act is to be 7 May 2015.

(3) The polling day for each subsequent parliamentary general election is to be the first Thursday in May in the fifth calendar year following that in which the polling day for the previous parliamentary general election fell.

15 Early parliamentary general elections

(1) An early parliamentary general election is to take place if—

(a) the House of Commons passes a motion in the form set out in subsection (2), and

appoints the date of the new election by proclamation and Parliament is dissolved 17 working days before that date. Sec. 3(2) further provides that apart from the automatic dissolution or dissolution under Sec. 2, Parliament cannot otherwise be dissolved.[16] The act thus removes the traditional royal prerogative to dissolve Parliament and vests this power in the House of Commons itself.

C. PARLIAMENT : PRESIDENT'S POWER TO DISSOLVE THE HOUSE OF THE PEOPLE : ART 85(2)

The power to dissolve the House of the People (Lok Sabha) is vested in the President. Article 85, which deals with sessions of Parliament and its prorogation and dissolution, provides as follows:

(b) if the motion is passed on a division, the number of members who vote in favour of the motion is a number equal to or greater than two thirds of the number of seats in the House (including vacant seats).

(2) The form of motion for the purposes of subsection (1)(a) is—"That there shall be an early parliamentary general election."

(3) An early parliamentary general election is also to take place if—

(a) the House of Commons passes a motion in the form set out in subsection (4), and

(b) the period of 14 days after the day on which that motion is passed ends without the House passing a motion in the form set out in subsection (5).

(4) The form of motion for the purposes of subsection (3)(a) is—"That this House has no confidence in Her Majesty's Government."

(5) The form of motion for the purposes of subsection (3)(b) is—"That this House has confidence in Her Majesty's Government."

(6) Subsection (7) applies for the purposes of the Timetable in rule 1 in Schedule 1 to the Representation of the People Act 1983.

(7) If a parliamentary general election is to take place as provided for by subsection (1) or (3), the polling day for the election is to be the day appointed by Her Majesty by proclamation on the recommendation of the Prime Minister (and, accordingly, the appointed day replaces the day which would otherwise have been the polling day for the next election determined under section 1).

16 Sec. 3. Dissolution of Parliament

(1) The Parliament then in existence dissolves at the beginning of the 17th working day before the polling day for the next parliamentary general election as determined under section 1 or appointed under section 2(7).

(2) Parliament cannot otherwise be dissolved.

85. Sessions of Parliament, prorogation and dissolution.-

(1) The President shall from time to time summon each House of Parliament to meet at such time and place as he thinks fit, but six months shall not intervene between the last sitting in one session and the date appointed for its first sitting in the next session.

(2) The President may from time to time-

(a) prorogue the Houses or either House;

(b) dissolve the House of the People.

The Constitution only provides that the President may, from time to time, dissolve the House of the People. It is completely silent on when, in what manner and under what circumstances the President may exercise the power of dissolution. The Constitution lays down no guidance. The framers of the Constitution thought it better to leave the matter open and lay down no rigid rules so that, as and when the question of dissolution arises, it might be decided in accordance with the circumstances prevailing at the time and the constitutional conventions obtaining in other countries with the parliamentary form of government.

The intent of the framers of the Constitution on this matter, is reflected in Dr. Ambedkar's reply in the Constituent Assembly on the Amendment No. 1482 proposed by Prof. K.T. Shah. The amendment proposed by Prof. Shah suggested that provisions should be made to the effect that in the event of any request made by the Prime Minister to the President for dissolution of the House, reasons thereof should be recorded in writing. Dr. Ambedkar replied as follows:

"The King has a right to dissolve Parliament. He generally dissolves it on the advice of the Prime Minister, but at one time, certainly at the time when Macaulay wrote English History where he has propounded this doctrine of the right of dissolution of Parliament, the position was this: it was agreed by all politicians that, according to the

Convention then understood, the King was not necessarily bound to accept the advice of the Prime Minister who wanted a dissolution of Parliament. The King could, if he wanted, ask the leader of the opposition if he was prepared to come and form a government so that the Prime Minister who wanted to dissolve the House may be dismissed and the leader of the opposition could take charge of the affairs of the government and carry on the work with the same Parliament without being dissolved. The King also had the right to find some other member from the House if he was prepared to take the responsibility of carrying on the administration without the dissolution of the House. If the King failed either to induce the leader of opposition or any other member of Parliament to accept responsibility for governing and carrying on the administration, he was bound to dissolve the House.

"In the same way, the President of the Indian Union will test the feelings of the House whether the House agrees that there should be dissolution or whether the House agrees that the affairs should be carried on with some other leader without dissolution. If he finds that the feeling was that there was no other alternative except dissolution, he would, as a constitutional president, undoubtedly accept the advice of the Prime Minister to dissolve the House.

"There are other ways for the President to test the feeling of the House and to find out whether the Prime Minister was asking for dissolution of the House for bona fide reasons or for purely party purposes. I think we could trust the President to make a correct decision between the party leaders and the House as a whole".[17]

17 CAD, Vol. VIII (18th May, 1949), pp. 106-07, on Article 69 now Article 85 of the Constitution of India.

As such, the framers of the Constitution have left the matter – as to when, in what manner and under what circumstances the President may exercise the power of dissolution – to the absolute discretion of the President. The President has been given the discretion to decide the matter in accordance with the circumstances prevailing at the time and the constitutional conventions prevalent in other countries with the parliamentary form of government.

Certain aspects of the parliamentary system, that have significant bearing on the President's power to dissolve the House of the People, are substantially different in India as compared to that in Britain. In Britain, the Monarch is a hereditary office, while the President of the Indian Republic is an elected President. The President of India derives his powers from a written Constitution which is the supreme law of the land. This is in contra-distinction to the British concept of the sovereignty of Parliament. The principle of responsible government that the Crown functions only on Ministerial advice obtains in Britain. On the other hand, the President has certain discretionary powers which he may exercise without the aid and advice of the Council of Ministers.

The other significant difference is that in Britain, in the event of fresh general elections to the House of the Commons, the Prime Minister from the previous House continues to hold the office in his own right and has the first stake in the newly constituted House. Only if he loses the vote in the newly constituted House that he vacates his office and thereafter the Crown appoints a person as Prime Minister who in the opinion of the Crown enjoys the confidence of the House. In India, in the event of fresh general elections to the House of the People, the Prime Minister from the previous House invariably has to vacate his office, though in most of the cases, he is asked by the President to remain in office as the care taker Prime Minister. Thus the Prime Minister continues in office only as a care taker Prime Minister and he has no say or first stake over the Prime-Ministership in the newly constituted House. The President appoints a person as the Prime Minister who in the opinion of the President enjoys the

confidence of the House and such person then assumes the office of Prime Minister.

In these circumstances, O. Hood Phillips' first three principles that (a) the sovereign should dissolve the House of Commons when advised by the Prime Minister to do so; (b) the Sovereign should not dissolve the House of Commons unless advised by the Prime Minister to do so; and (c) the Prime Minister has the power to choose the time of dissolution, has doubtful application in India. In India the power to dissolve the House of the People is one of the discretionary powers of the President and he has the discretion to exercise this powers according to his own assessment of the state of affairs in the House and he is not bound in the matter by the advice of the Prime Minister.

Blackburn's first principle - that a Prime Minister who has lost a general election cannot request a dissolution – also has little application in India. As stated above, unlike in Britain, the Prime Minister in India at the time of general election continues in office only as a care taker Prime Minister and he has no say or first stake over the Prime-Ministership in the newly constituted House. Thus there is no possibility of this situation arising in India and therefore there is no question of a Prime Minister who has lost a general election requesting the President for a dissolution of the House in India.

Blackburn's second principle – that in a hung Parliament, where the Prime Minister's government wins or survives the debate on the address, his advice to the monarch on dissolution affairs will thereafter be followed during his tenure in office – is also not a good proposition in India. The President in India is not bound by the advice of the Prime Minister in the matter of dissolution.

Blackburn's third proposition – that a Prime Minister who loses a no confidence vote in the Commons must request a dissolution of Parliament from the Monarch, who will grant it – is also not a good proposition in India. In Britain, if a ministry enjoying majority support in the House is defeated on any

major issue of policy, it can either resign or suggest dissolution of the House and holding of fresh elections so as to seek an endorsement of its policies from the electorate. In such a situation it seems to be a settled convention that the Crown will grant a dissolution even if it were possible to find an alternative Ministry. The justification for this convention is that in modern times a Ministry is the direct result of general elections and that its defeat in the House automatically entitles it to appeal once again to the people. There have been a number of constitutional precedents to this effect. In India, the President is not bound by the advice of the Prime Minister in the matter of dissolution, especially of a Prime Minister who has lost a no confidence vote in the House. In such circumstances the President has the power to remove the Prime Minister who has lost the vote of no confidence in the House and may appoint the leader of the opposition or any other person who in the opinion of the President enjoys the confidence of the House as the Prime Minister.

In view of the above, on the defeat of a ministry in Lok Sabha, two options are available to the Prime Minister – he may either tender resignation of his ministry or advise the President to dissolve the House of the People and order for fresh elections to the House of the People. However, it is President's absolute discretion and judgment whether to accept the advice and dissolve the House and seek a fresh mandate from the people or to give an opportunity to other party or group of parties in the House to form a ministry. The power and discretion of the President is obviously outside the advice of the Prime Minister and his Council of Ministers which has lost majority support.

In case of a still-born House also where no political party has a working majority so as to be able to form a ministry, it is the President's absolute discretion and judgment whether to dissolve the House and seek a fresh mandate from the people or to give an opportunity to other party or group of parties in the House to form a ministry. The President has to exercise his absolute discretion

especially since in such circumstances there is only a care taker Prime Minister in office who cannot advice the President on dissolution of the House.

The framers of the Constitution clearly intended to repose in the President, as head of the State, the discretion whether or not to dissolve the House of the People. The existence of this discretion was explicitly recognised in a concurring opinion of two judges in the *Shamsher Singh case*[18] wherein it was pointed out that the Constitution establishes a parliamentary system of government with a Council of Ministers (cabinet) and one may well keep in mind the conventions prevalent at the time the Constitution was framed. Although since that decision Article 74(1) has been amended, it may still be argued that the amendments clarify the position on the ordinary functioning of the government but do not abolish the foundational conventions of the parliamentary system of government such as the one relating to dissolution of Lok Sabha.[19]

The Constitution has given absolute discretion to the President and the discretion comes with the concomitant danger of misuse. The words of Dr. Ambedkar are significant,

> *"In the same way, the President of the Indian Union will test the feelings of the House whether the House agrees that there should be dissolution or whether the House agrees that the affairs should be carried on with some other leader without dissolution. If he finds that the feeling was that there was no other alternative except dissolution, he would, as a constitutional President, undoubtedly accept the advice of the Prime Minister to dissolve the House.*
>
> *"There are other ways for the President to test the feeling of the House and to find out whether the Prime Minister was asking for dissolution of the House for bona fide reasons or for purely party*

18 *Shamsher Singh* v. *State of Punjab,* (1974) 2 SCC 831: AIR 1974 SC 2192

19 *Ibid.* (per Krishna Iyer, J.)

purposes. I think we could trust the President to make a correct decision between the party leaders and the House as a whole".[20]

Eminent jurist Nani A. Palkhivala asserted that despite what the Constitution says, the President could safely ignore any advice from the Council of Ministers to dissolve the Lok Sabha if he is satisfied that it is clearly possible for a new Government to be formed which could function with the present House. In a lucid analysis of the situation, Mr. Palkhivala has advanced precise reasons in support of his assertion:

(a) The Constitution is not a structure of fossils like a coral reef. It is a living organism and should be construed as such. Constitutional fundamentalism is far more reprehensible than religious fundamentalism. Every Article is to be construed in harmony with, and in the context of the text of the Constitution. Article 74 is not to be construed in vacuum but as a part of a composite scheme which is meant to promote and perpetuate the living democratic process.

(b) The President is not a mere robot or figurehead. As a general rule and in normal times, he is no doubt bound to act in accordance with the advice of the Council of Ministers. But this rule is not so inviolable and inflexible as to oblige him to observe it even when the result would be subverting the clear mandate of the Constitution. The President is the Head of the State and has to make his decision with non-partisan spirit when perspicacity and in a totally risk broods over the nation. A crisis is implicit in the advice to dissolve Lok Sabha within a year of its formation. It is virtually an admission of the failure of the democratic process. Upon entering office the President has to take an oath that he will to the best of his ability "preserve protect and defend the Constitution. If the President is asked to embark upon a course of action

20 CAD, Vol. VIII (18th May, 1949), pp. 106-07, on Article 69 now Article 85 of the Constitution of India.

which would involve breach of his oath, he is not bound to follow such advice.

(c) If a party or group comes together and satisfies the President that a stable government can be formed without the present Lok Sabha being dissolved, it would be not only President's right but his duty to allow such government to be formed. All over the world, it has been proved that a coalition or national government is not an unmitigated disaster. After all, the advice of the Council of Ministers is presumed to represent the majority view in Parliament. Therefore, if the President is satisfied that the majority opinion in the Lok Sabha is against dissolution, it is a factor he must take into account before deciding to follow the advice of a Council of who happen to be members of minority party.[21]

According to Mr. Palkhivala, the contrary view that the President can in no case refuse to follow the advice to dissolve the Lok Sabha, would result in unacceptable consequences, of which he has pointed out firstly, if a vote of no-confidence is scheduled to be moved against the Government soon, the democratic process could be effectively frustrated by the Council of Ministers advising the President to dissolve the House immediately and secondly, in the same Lok Sabha a new Government can never be formed in cases where the existing Government which has lost the confidence of the House advises the President to dissolve it. This would defeat the implicit scheme of the Constitution which envisages the possibility of two or more governments during the tenure of the same Lok Sabha.

[21] Quoted in H.M. Jain, "Indian Parliament and the President". *Journal of Constitutional and Parliamentary Studies,* Vol. XV, Nos. 1-4, (1981), p. 114 124.

D. STATE LEGISLATIVE ASSEMBLIES : GOVERNOR'S POWER TO DISSOLVE THE STATE LEGISLATIVE ASSEMBLY: ART. 174(2) AND PRESIDENT'S POWER TO DISSOLVE THE STATE LEGISLATIVE ASSEMBLY DURING PROCLAMATION OF EMERGENCY: ART. 356

The power to dissolve the Legislative Assembly of the State is vested in the Governor. Article 174, which deals with sessions of State Legislature and its prorogation and dissolution, provides as follows:

> ***174. Sessions of the State Legislature, prorogation and dissolution.-***
>
> *(1) The Governor shall from time to time summon the House or each House of the Legislature of the State to meet at such time and place as he thinks fit, but six months shall not intervene between the last sitting in one session and the date appointed for its first sitting in the next session.*
>
> *(2) The Governor may from time to time-*
>
> *(a) prorogue the House or either House;*
>
> *(b) dissolve the Legislative Assembly.*

Analogous to the President's power to dissolve Parliament, the Constitution also provides that the Governor may, from time to time, dissolve the Legislative Assembly. The Constitution is completely silent on when, in what manner and under what circumstances the Governor may exercise the power of dissolution. The Constitution lays down no guidance. The framers of the Constitution, like in the case of the President's power to dissolve the Lok Sabha, thought it better to leave the matter open and lay down no rigid rules so that, as and when the question of dissolution arises, it might be decided in accordance with the

circumstances prevailing at the time and the constitutional conventions obtaining in other countries with the parliamentary form of government.

Absence of clear guidance in the Constitution on dissolution of the Legislative Assembly by the Governor and vesting in Governor of complete discretion has also rendered this discretionary power susceptible to misuse.

In 1953, in Travancore-Cochin (now Kerala), the Governor dissolved the Legislative Assembly following the defeat of the Congress ministry. The ministry remained in office as a caretaker government till fresh elections were held. But this precedent was not followed in 1955. There was a minority PSP ministry in office. The Congress party supported it without participating in ministry. But when the Congress Party withdrew its support and the ministry was defeated in the House, the Chief Minister sought a dissolution, but it was refused.

Since the independence till the Fourth Lok Sabha elections, the Congress Party, by and large, had majority support in most of the State Legislative assemblies and as such not many difficulties arose in the working of the Constitution as most of the issues were mutually sorted out at party level. The state of affairs, however, underwent a sea change after the Fourth Lok Sabha elections., the Congress party lost its monopoly of power, and multi-party coalition governments were installed in many States was invited to form the ministry.

In case of the Legislative Assembly of a State, the Constitution also confers powers on the President under Art. 356[22], in case of failure of constitutional

22 **356. Provisions in case of failure of constitutional machinery in States. -**

(1) If the President, on receipt of a report from the Governor of a State or otherwise, is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation -

(a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the State other than the Legislature of the State;

(b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;

(c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State:

Provided that nothing in this clause shall authorise the President to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend in whole or in part the operation of any provision of this Constitution relating to High Courts.

(2) Any such Proclamation may be revoked or varied by a subsequent Proclamation.

(3) Every Proclamation under this article shall be laid before each House of Parliament and shall, except where it is a Proclamation revoking a previous Proclamation, cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament:

Provided that if any such Proclamation (not being a Proclamation revoking a previous Proclamation) is issued at a time when the House of the People is dissolved or the dissolution of the House of the People takes place during the period of two months referred to in this clause, and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

(4) A Proclamation so approved shall, unless revoked, cease to operate on the expiration of a period of six months from the date of issue of the Proclamation:

Provided that if and so often as a resolution approving the continuance in force of such a Proclamation is passed by both Houses of Parliament, the Proclamation shall, unless revoked, continue in force for a further period of six months from the date on which under this clause it would otherwise have ceased to operate, but no such Proclamation shall in any case remain in force for more than three years:

Provided further that if the dissolution of the House of the People takes place during any such period of six months and a resolution approving the continuance in force of such Proclamation has been passed by the Council of States, but no resolution with respect to the continuance in force of such Proclamation has been passed by the House of the People during the said period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the continuance in force of the Proclamation has been also passed by the House of the People:

Provided also that in the case of the Proclamation issued under clause (1) on the 11th day of May, 1987 with respect to the State of Punjab, the reference in the first proviso to this clause to "three years" shall be construed as a reference to five years.

(5) Notwithstanding anything contained in clause (4), a resolution with respect to the continuance in force of a Proclamation approved under clause (3) for any period beyond the expiration of one year from the date of issue of such Proclamation shall not be passed by either House of Parliament unless –

machinery in the State, to dissolve the Legislative Assembly. This power is not conferred in express terms. Art. 356 only provides that the President on being satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution may by Proclamation assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the State other than the Legislature of the State and declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament. Since, under proclamation under Art. 356, the President assumes to himself the powers of the Governor, the power of the Governor under Art. 174(2)(b) to dissolve the Legislative Assembly also stands transferred to the President and therefore during proclamation under Art. 356 the power to dissolve the Legislative Assembly vests with the President.

The power to dissolve the Legislative Assembly of a State is a power of the Governor under Article 174(2)(b). When, therefore, this power is assumed by the President by a proclamation under Art. 356(1)(a), the power to dissolve a State Assembly may be exercised by the President, on the advice of the Union Council of Ministers. Although, ordinarily, the power under Art. 174(2) is exercisable by the Governor on the advice of the Council of Ministers of the State, when the President assumes to himself the powers of the Governor under Art. 356(1)(a), the power to dissolve the State Assembly would automatically come over to the Union Government.[23] In which case the President need not consult the State Government and a dissolution made by the President on the advice of his Council

(a) a Proclamation of Emergency is in operation, in the whole of India or, as the case may be, in the whole or any part of the State, at the time of the passing of such resolution, and

(b) the Election Commission certifies that the continuance in force of Proclamation approved under clause (3) during the period specified in such resolution is necessary on account of difficulties in holding general elections to the Legislative Assembly of the State concerned:

Provided that nothing in this clause shall apply to the Proclamation issued under clause (1) on the 11th day of May, 1987 with respect to the State of Punjab.

23 *State of Rajasthan* vs. *Union of India*, AIR 1977 SC 1361 (per Beg., CJ, Chandrachud, Bhagawati, Gupta and Fazl Ali, JJ.)

of Ministers would be as good as a dissolution of the Assembly by the Governor of the State whose powers are taken over by the President.[24]

There are no limitations upon this power of the President in Art. 356(1)(a) or any other provisions of the Constitution. Hence, the power to dissolve a State Assembly may be exercised by the President immediately after the Proclamation under Art. 356(1)(a) is issued, and before it is approved by the Houses of Parliament under Clause (3) of the Article. It follows that the dissolution so ordered by the President would continue to have effect for the full two-months referred to in Clause (3) even if Proclamation is eventually disapproved by Parliament. In fact, Sarkaria, J. has recommended suitable amendments of Article 356 to ensure that the State Legislature is not dissolved before the proclamation has been laid before Parliament and considered by it and safeguards similar to those under Cls. (7) and (8) of Art. 352 should be incorporated in Art. 356 providing for review of the continuance of proclamation.

It was held in *S.R. Bommai*[25] that though on the proclamation under Art. 356 (1), a State Government has to go, the State Assembly should be dissolved only after Parliament approved such proclamation. In case Parliament fails to approve it, the Assembly should get reactivated. The Court held that disapproval or non-approval means that the Houses of Parliament are saying that President's action was not justified or warranted and it shall no longer continue. In such a case, the proclamation lapses so that it ceases to be in operation at the end of two months and the necessary consequence of this is that the *status quo ante* revives. The Government which was dismissed revives. The Legislative Assembly, which may have been kept in suspended animation, gets reactivated.

In case of judicial review, if the Court finds that proclamation was not validly issued, what will be the consequences? The Supreme Court in *State of*

24 *Ibid.*

25 *S.R. Bommai* vs. *Union of India,* AIR 1994 SC 1918.

Rajasthan vs. *Union of India*[26] held that though there is scope of judicial review in Presidential proclamation, but the scope is narrow and minimal. The scope was further widened in *S.R. Bommai* wherein it was held that the issue of proclamation is subject to judicial review at least to the extent of examining whether the condition precedent to the issuance of proclamation have been satisfied or not. This examination will necessarily involve the scrutiny whether there existed material for the satisfaction of the President that a situation has arisen in which the Government of the State could not be run in accordance with the provisions of the Constitution. It is not the personal whim, wish, view or opinion or the *ipse dixit* of the President *de hors* the material but a legitimate inference drawn from the material placed before him which is relevant for the purpose. There must be sufficient proof of information about the state of things indicating that the situation in question has arisen. Though the sufficiency or otherwise of the material cannot be questioned, the legitimacy of inference drawn from such material is certainly open to judicial rteview. The said principle has again been reaffirmed in *Rameshwar Prasad*[27].

The Supreme Court in *Rameshwar Prasad* held that when proclamation under At. 356 is found to be unconstitutional, the Supreme Court has the power to order *status quo ante* as prevailing before the dissolution of the Assembly. But before granting such relief, keeping in view the larger public interest, the ground realities are to be considered. Where subsequent to the dissolution, the Election Commission had not only made preparation for fresh election and has also issued notification and nominations have been received, in such circumstances, *status quo ante* will not be restored. The facts in *Rameshwar Prasad* were that three political leaders were in fray for appointment as the Chief Minister after the elections held in 2005. Lalu Prasad Yadav of the Rasthtriya Janata Dal, with 75 seats in the Assembly and also claiming support of 10 MLAs of the Congress Party, Nitish Kumar of the Janata Dal (United) with his own 55 MLAs and

26 *State of Rajasthan* vs. *Union of India*, AIR 1977 SC 1361; (1977) 3 SCC 592.

27 *Rameshwar Prasad* vs. *Union of India*, AIR 2006 SC 980.

having support of 37 MLAs of the BJP, and Ram Vilas Paswan of Lok Janasakti Party with 29 seats. There were 37 independent MLAs in the Legislative Assembly of 243 members, Nitish Kumar would have needed support of 30 other to have a majority. Given that no party had the majority, the constitutionally proper thing for the Governor Shri Buta Singh would have been to either invite the single largest majority party (RJD in this case) and ask it to prove that it could muster enough strength to run the government, or allow some time to enable cobbling together of a coalition government. Notably, no one approached the Governor staking any claim to form a government. While how much time should be provided to enable formation of a government under either of the above scenarios is a matter of debate, the Governor waited no more than a week, and sent letters to the President of India on 6 March 2005, saying the following:

> *"I explored all the possibilities and from the facts ..., I am fully satisfied that no political party or coalition of parties of groups is able to substantiate a claim of majority in the Legislative Assembly, and having explored the alternatives with all the political parties and groups and Independent M.L.As and the alternatives with all the political parties and groups and Independent M.L.As, a situation has emerged in which no political party or groups appear to be able to form a Government commanding a majority in the House,,, This is a case of failure of constitutional machinery .,,, I therefore recommend that the present newly constituted Assembly be kept under suspended animation for the present and the President of India is requested to take such appropriate action/decision, as required."*

The Union Cabinet decided to invoke the emergency provision and impose President's rule in the State on the 8th March 2005, and Parliament approved the same on the 21st March. The Governor followed up with another letter on 27th April stating that he was aware of several horse-trading efforts that were being made in an effort to cobble up a coalition, and said:

"The present situation is fast approaching a scenario wherein if the trend is not arrested immediately, the consequent political instability will further give rise to horse trading being practised by various political parties/groups trying to allure elected MLAs. Consequently it may not be possible to contain the situation without giving the people another opportunity to give their mandate through fresh poll. "

And finally, on 21 May, the Governor wrote again to the President thus:

"I am of considered view that ... a situation has arisen in the State wherein it would be desirable in the interests of the State that the Assembly presently kept in suspended animation is dissolved ..."

Accordingly, the Union government on 23rd May 2005 decided to dissolve the newly elected Assembly. This decision was made in the middle of the night by the Central Cabinet. This proclamation was challenged, and the Supreme Court was faced with the issues of whether a Legislative Assembly could be dismissed even before it was convened, and was the dissolution of Bihar Assembly constitutional? The petitioners contended that as the new Assembly was not even given its oath of office, it could not be dissolved under the argument that 'what does not exist cannot be dissolved'. Hence the need to restore status quo ante (i.e. restore the Assembly). The Court held that there is no restriction stipulating that the power to dissolve the Legislative Assembly can be exercised only after its first meeting under the governing Article 174(2)(b). However, on 7 October 2005, the Court had issued an interim order saying that the dissolution of the Assembly was indeed unconstitutional. But keeping in view of the fast paced political developments and the Election Commission's order calling for fresh elections in October and November 2005, the Court declined to restore the Assembly. It posted the case for further decision later.

Challenging the petition against the dismissal of the Bihar legislature, the Centre presented to the Court two major arguments: (a) Under Article 361, the President and Governors are immune for their actions while performing their duties, and (b) the Presidential Proclamation imposing an Emergency is a political matter which should not be subjected to judicial review, as even if the Court were to step in, it could not provide 'judicially manageable standards' to govern the President's action. The Court rejected similar arguments in two cases in the past, first in 1977 (in *State of Rajasthan*) and later in 1994 (in *S.R. Bommai*, which in fact widened the scope of Court intervention in such cases.) In its majority decision, the Supreme Court held that the Bihar case was the first of its kind raising the question whether it is legal to dissolve an Assembly claiming that some illegal means were being used, thus preventing even any attempt of putting together a coalition of parties to form a government. Its observations in this regard[28] deserve to be quoted in detail. In asserting its rights, the Court emphatically said: 'It is open to the Court, in exercise of judicial review, to examine the question whether the Governor's report is based upon relevant material or not; whether it is made bona fide or not; and whether the facts have been duly verified or not'. Having checked the facts, the Court concluded that the Governor did not even give a chance to any political party to come up with a government. Instead, they said, that 'the action of the Governor was a mere pretence, the real object being to keep away a political party from staking a claim to form the Government'. The Court also took note of the fact that there were no facts, other than those provided by the Governor, to decide whether there was indeed a possibility or not to form a government. The Court said:

> *"In the absence of the relevant material much less due verification, the report of the Governor has to be treated as the personal ipse dixit of the Governor. The drastic and extreme action under Article 356 cannot be justified on mere ipse dixit, suspicion, whims and fancies of the Governor. This Court*

28 Para 140, 155

> *cannot remain a silent spectator watching the subversion of the Constitution. It is to be remembered that this Court is the sentinel on the qui vive. In the facts and circumstances of this case, the Governor may be the main player, but the Council of Ministers should have verified the facts stated in the report of the Governor before hurriedly accepting it as a gospel truth as to what the Governor stated. Clearly, the Governor has misled the Council of Ministers which led to aid and advice being given by the Council of Ministers to the President, leading to the issue of the impugned proclamation.*[29]

Thus the Court ruled that the Proclamation of Emergency in Bihar was unconstitutional, but they did not restore the dismissed Assembly, and new elections ensued.

Apart from Art. 356(1)(a), the power under Art 174(2) to dissolve a State Assembly belongs to the Governor of the State on the advice of his Council of Ministers, so that the Union Government cannot interfere with the exercise of this power of the Governor, by issuing any directive under Art. 256 or 257.[30]

The more important question, from the perspective of government formation in hung parliaments is that who has the effective power to dissolve Parliament. Whether it is retained as a prerogative power of the Head of State, or whether the Head of State exercises this power as per the aid and advice of his Prime Minister or his Council of Ministers or whether this power is vested effectively in Parliament itself, who, by a resolution in Parliament recommend dissolution of Parliament and the Head of State is bound by such parliamentary recommendation.

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29 *Ibid,* per, Sabharwal, C.J., B.N. Agarwal and Ashok Bhan, JJ.

30 *S.R. Bommai* vs. *Union of India*, AIR 1994 SC 1918.

E. DISSOLUTION OF PARLIAMENT IN OTHER PARLIAMENTARY SYSTEMS

DISSOLUTION OF PARLIAMENT IN HUNGARY

Under the Constitution of Hungary, the power of dissolution of Parliament is vested in Parliament which may proclaim its dissolution before the expiry of its term. The power of dissolution can also be exercised by the President after consultation with the Prime Minister, the Speaker of Parliament and with the heads of the factions of the parties in the eventualities that (a) Parliament has at least four times within twelve months during its own mandate withdrawn its confidence from the Government, or (b) in case the mandate of the Government had ended, Parliament failed to elect within forty days after the date of the first nomination, the candidate Prime-Minister put up for the office by the President of the Republic.[31]

DISSOLUTION OF PARLIAMENT IN BELGIUM

The power to dissolve Parliament, in normal circumstances, is vested with the King. Article 46 of the Constitution of Belgium provides that the King has the right to dissolve the House of Representatives only if the House of

31 Constitution of Hungary:
Article 28.-
(1) The mandate of Parliament commences with its constituent meeting.
(2) Parliament may proclaim its dissolution even before the expiry of its mandate.
(3) The President of the Republic may dissolve Parliament simultaneously with setting the dates for the new election if
(a) Parliament has at least four times within twelve months during its own mandate withdrawn its confidence from the Government, or
(b) in case the mandate of the Government had ended, Parliament failed to elect within forty days after the date of the first nomination, the candidate Prime-Minister put up for the office by the President of the Republic.
(4) Before dissolving Parliament, the president of the Republic is bound to consult with the Prime Minister, the Speaker of Parliament and with the heads of the factions of the parties that have representatives in Parliament.
(5) Within three months after the expiry of the term of parliament, its dissolution or its being dissolved, a new Parliament has to be elected. Parliament operates until the constituent meeting of the new Parliament.

Representatives, with the absolute majority of its members, (a) either rejects a motion of confidence in the Federal Government and does not propose to the King, within three days of the day of the rejection of the motion, the appointment of a successor to the Prime Minister; or (b) adopts a motion of no confidence with regard to the Federal Government and does not simultaneously propose to the King the appointment of a successor to the Prime Minister. The King may also dissolve the House of Representatives, in case of resignation of the incumbent government and if the King receives an agreement from the members of the House of Representatives expressed by the absolute majority of its members.[32]

DISSOLUTION OF PARLIAMENT IN SOUTH AFRICA

Under the South African Constitution, the effective power to dissolve National Assembly is vested in National Assembly itself, although the formal power is vested in the President, who otherwise also is both the Head of State as well the Head of Government. The power of dissolving the National Assembly is vested in the President and when there is no President, in the Acting President. Art.

32 Constitution of Belgium

Article 46

The King has the right to dissolve the House of Representatives only if the latter, with the absolute majority of its members:

1° either rejects a motion of confidence in the Federal Government and does not propose to the King, within three days of the day of the rejection of the motion, the appointment of a successor to the Prime Minister;

2° or adopts a motion of no confidence with regard to the Federal Government and does not simultaneously propose to the King the appointment of a successor to the Prime Minister;

The motions of confidence and no confidence can only be voted on forty-eight hours after the tabling of the motion.

Moreover, the King may, in the event of the resignation of the Federal Government, dissolve the House of Representatives after having received its agreement expressed by the absolute majority of its members.

The dissolution of the House of Representatives entails the dissolution of the Senate.

The act of dissolution convenes the electorate within forty days and the Houses within two months.

50(1) provides that the President must dissolve the National Assembly if the Assembly adopts a resolution to dissolve with a supporting vote of a majority of its members and three years have expired since the Assembly was elected. Art. 50(2) provides that the Acting President must dissolve the National Assembly if there is a vacancy in the office of President and the Assembly fails to elect a new President within 30 days after the vacancy occurred. The relevant constitutional provisions in the Constitution of South Africa are as follows:

> *Section 50 Dissolution of National Assembly before expiry of its term*
>
> *(1) The President must dissolve the National Assembly if -*
>
> *(a) the Assembly has adopted a resolution to dissolve with a supporting vote of a majority of its members; and*
>
> *(b) three years have passed since the Assembly was elected.*
>
> *(2) The Acting President must dissolve the National Assembly if –*
>
> *(a) there is a vacancy in the office of President; and*
>
> *(b) the Assembly fails to elect a new President within 30 days after the vacancy occurred.*