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Early parliamentary dissolutions and judicial review: lessons from comparative cases

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In this article, I explore some implications of judicial challenges to early dissolutions of national parliaments from a comparative perspective. I assess two cases where the constitutionality of the dissolution was upheld (Germany 1983 and 2005) and four where it was not (Czechia 2009, Nepal February 2021 and July 2021 and Pakistan 2022). The evidence suggests that judicial intervention in parliamentary dissolution disputes is often *inferred* rather than explicitly codified in legal statutes, underscoring the profound impact unwritten constitutional norms and democratic tradition can have on the political process. Predictably, judicial scrutiny of governmental actions enables courts to *oversee* and, when necessary, *rectify* breaches of constitutional limits and instances of executive overreach. The Nepalese and Pakistani cases further suggest that the judiciary can play an active role in safeguarding the cardinal principle of parliamentarism, dictating that the legislature must be able to subject governments to the test of confidence when required or if it so desires. A review of the history of judicial intervention in earlier cases of assembly dismissals in Pakistan, however, highlights how this process is not always consistent and unbiased. Gaining a deeper understanding of these interactions is important, given their highly consequential nature, as well as timely, given the increasing reliance on the judicial branch for the adjudication of disputes related to parliamentary dissolution in recent years.

Keywords: Early parliamentary dissolutions; judicial review; executive power; constitutional courts

I. Introduction

In 2022, the Dissolution and Calling of Parliament Act (DCPA) was ratified by the UK Parliament. The document repeals its predecessor, the Fixed-term Parliaments Act 2011 (FTPA), restoring the ability of British prime ministers (PMs) to unilaterally request that parliament be dissolved and call an early election through the exercise of royal prerogative powers. The DCPA thus reinstates the royal prerogative as the means to secure a parliamentary dissolution. It also features an 'ouster' clause, establishing that applications of the royal prerogative

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related to the summoning and dissolution of parliament may not be disputed or challenged in court. This implies a *de jure* exclusion of the House of Commons from any formal action or decision pertaining to its dismissal.[1] Modern English legal tradition is rooted in the notion of 'parliamentary sovereignty', postulating the supremacy of the legislature over the judicial branch. For over three centuries, the Bill of Rights has guaranteed that 'Debates or Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament',[2] where 'proceedings in parliament' are understood as 'some formal action, usually a decision, taken by the House in its collective capacity'.[3] However, courts have gradually asserted jurisdiction over matters involving the application of Crown prerogatives at least since the 1610 *Case of Proclamations*.[4]

The question of how feasibly a provision enshrined in an act of parliament could stop judges from scrutinising (or overturning) a parliamentary dissolution initiated by prime ministers relying on the royal prerogative has sparked a lively debate among legal scholars.[5] Yet, this article is not concerned with the *viability* of the non-justiciability clause per se.[6] It is, instead, concerned with a deeper question such a clause raises about the potential role of the judiciary in keeping tabs on the executive and the exercise of executive prerogatives *beyond* the Westminster systems where dissolving parliament is conventionally understood as a non-justiciable matter.[7] I delve into what courts could prevent or reverse in terms of actions undertaken by elected officials and, as a corollary, what actions might go unsanctioned if courts are obstructed or their authority restricted. I assess six cases of judicial challenge to an early dissolution of the national parliament in confidence-based political systems with a written constitution.[8] What these cases have in common is

[1]Francesco Bromo, 'Something Old, Something New? Votes of Confidence, Parliamentary Dissolution, Election Timing and Judicial Review Under the Dissolution and Calling of Parliament Act 2022' (2023) 43 Parliaments, Estates and Representation 194.
[2]Bill of Rights 1688 (1 Will and Mar sess 2 c 2).
[3]Mark Hutton and others, *Erskine May: Parliamentary Practice* (25th edn, LNUK 2019).
[4]*Case of Proclamations* [1610] EWHC KB J22.
[5]An overview of this debate is available in the report issued by the Joint Committee on the FTPA in March 2021 see Joint Committee on the Fixed-Term Parliaments Act, *Report of March 2021* (HL 41, HC 167).
[6]For a comparative analysis of ouster clauses in the legal frameworks of Britain and Singapore see Kenny Chng, 'Microcontextual Considerations in Ouster Clause Analysis: A Comparative Study of Parallel Trends in the United Kingdom and Singapore' (2022) 20 ICON 1257.
[7]Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (CUP 2018). There is however a recent precedent of judicial intervention following the 2019 prorogation controversy in the United Kingdom, which arguably prompted the introduction of the non-justiciability clause in the DCPA: *R (on the application of Miller) v The Prime Minister* [2019] EWHC 2381 (QB); *Cherry and others v Advocate General for Scotland* [2019] CSIH 49.
[8]'Confidence-based political systems' include democratic regimes where the cabinet is collectively responsible to and can be ousted by parliament.

that the judiciary was called to rule on the validity of a contested early dissolution of the national legislature, shaping *how far the will of the executive can go* (very evidently in the Nepalese and Pakistani cases) or *how far the will of the majority can go* (very evidently in the case of Czechia). I focus on the national level for comparison purposes, though it is worth noting that there are challenges involving subnational diets as well (eg India 1977).[9] In two of these cases (Germany 1983 and 2005), the legality of the dismissal was upheld, clearing both the chancellor and the head of state. In the remaining four (Czechia 2009, Nepal February 2021 and July 2021 and Pakistan 2022), the dismissal was deemed illegitimate and quashed by the Supreme (or Constitutional) Court, causing the 'unlawfully' dissolved parliament to resume its operations.

These cases highlight key implications for democratic institutions, particularly the role of judicial review in maintaining parliamentary accountability. The evidence indicates that the ability of the judicial branch to intervene in disputes involving a parliamentary dissolution is sometimes *implied* rather than spelt out in legal statutes, underscoring the profound impact unwritten constitutional norms and democratic tradition can have on the political process. Perhaps unsurprisingly, by questioning and trying actions carried out by the government (at least those within the realm of parliamentary dissolution), courts can *monitor* and potentially *reverse* the circumvention or breach of constitutional boundaries and executive overreach, both potential omens of democratic backsliding. In addition, the Nepalese and Pakistani cases suggest that judges can play an active role in safeguarding the cardinal principle of parliamentarism, dictating that the legislature must be able to subject governments to the test of confidence when legally required (vote of investiture) or when it so desires (no-confidence motion), though this process is not always consistent or unbiased.

Gaining a deeper understanding of these interactions between the executive, parliament and the judiciary is crucial and timely, given the increasing reliance on courts for the adjudication of matters related to parliamentary dissolution in recent times. At least eight relevant episodes can be identified in the last five years alone (Sri Lanka 2018, Moldova 2019, Nepal February 2021 and July 2021, Iraq 2022, Pakistan 2022, Vanuatu 2022 and Malaysia 2022-2023), highlighting the growing centrality and importance of the judicial branch in the mechanics and consequences of this procedure.[10] The article proceeds by reviewing the

[9] Alice Jacob and Rajeev Dhavan, 'The Dissolution Case: Politics at the Bar of the Supreme Court' (1977) 19 JILI 355-91. In general, judicial review of executive actions predates WWII see for example the *Preußen contra Reich* case of 1932 in Lars Vinx, *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (CUP 2015).

[10] On the strategic employment of parliamentary dissolutions see Kaare Strøm and Stephen M Swindle, 'Strategic Parliamentary Dissolution' (2002) 96 AmPolScR 575; Petra Schleiter and Edward Morgan-Jones, 'Presidents, Assembly Dissolution and the Electoral Performance of Prime Ministers' (2018) 51 CompPolStud 730.

six aforementioned judicial challenges to an early dissolution of the national parliament: Germany 1983 and 2005 (*Vertrauensfrage* and *Vertrauensfrage II*), Czechia 2009 (*Kauza Melčák*), Nepal February 2021 and July 2021 and Pakistan 2022 (*Regarding Rejection of the Motion of No-Confidence Against the Prime Minister v*), followed by concluding remarks.

II. The 1983 and 2005 dissolutions in Germany: *Vertrauensfrage* and *Vertrauensfrage II*

Contrarily to the laxer Reich forefather, the 1949 Constitution of Germany presents a specific set of conditions that enable the Federal President [*Bundespräsident*] to execute a parliamentary dissolution.[11] Under the current German constitutional framework, the Federal Chancellor [*Bundeskanzler*] is – strictly speaking – excluded from the steps pertaining to the dissolution procedure. Moreover, unlike the state diets,[12] the Federal Parliament [*Bundestag*] is not granted the explicit right to self-dissolve. Two cases prescribe assembly dismissal as a possible stalemate or crisis resolution. If three ex-ante investiture votes fail in the process of selection of a new chancellor, the Federal President may rely on parliamentary dissolution to overcome the government formation impasse (Article 63). Furthermore, if a vote of confidence initiated by the chancellor is unsuccessful, the Federal President might dissolve the legislature upon the chancellor's proposal, within 21 days of the outcome of the vote (Article 68). Therefore, the ability to bring about a dissolution is always conditional on the will of a legislative majority and cannot be initiated unilaterally by the head of government or the head of state. It is the interpretation of Article 68 that led to the 1983 and 2005 court cases discussed below.

Heckötter and Spielmann suggest that a third possibility is dissolution following the resignation of the Federal Chancellor, implied by Article 69. To be clear, there is no direct link between Article 63 and Article 69, other than the fact that the resignation of the incumbent chancellor necessarily triggers the election of a new one. Heckötter and Spielmann argue that:

> the deliberate resignation of the Federal Chancellor, not expressly mentioned in the Basic Law but tacitly provided for by Article 69(2), is regarded as the most unobjectionable avenue to early elections by some parliamentarians – predominantly members of the opposition. It has never been used to bring about dissolution. This is presumably due to political reasons: resignation is rarely deemed to be statesmanlike, but rather a declaration of political bankruptcy.[13]

[11]Art 25 of the 1919 Weimar Constitution granted unilateral dissolution authority to the *Reichspräsident*, with the only restriction that parliament could not be dissolved more than once for the same cause.

[12]Werner Reutter, 'Vertrauensfrage und Parlamentsauflösung. Anmerkungen zur verfassungspolitischen Debatte und zur Verfassungspraxis in den Ländern' (2005) 46 PVS 655.

[13]Ulrike Heckötter and Christoph Spielmann, 'Schröder's Dissolution of the Bundestag Approved: An Expression of Faith in the German Public' (2006) 2 EuConst 5.

As of this writing, early dissolutions of the *bundestag* have only occurred on the basis of article 68.

A precedent had already been set in 1972 by Chancellor Willy Brandt, leader of a coalition between the Social Democratic Party (SPD) and the Free Democratic Party (FDP). Due to a number of legislators crossing the floor, the opposition called a constructive vote of no-confidence [*Mißtrauensvotum*] in April. The 'constructive' nature of the vote implied that, conditional on the confidence motion being carried, Rainer Barzel, leader of the Christian Democratic Union (CDU), would have become the new head of government. The motion, however, failed, falling just two votes short of the required absolute majority.[14] Shortly after, the executive did not succeed in securing a majority for the annual spending proposal. This situation generated tension vis-à-vis the basic confidence-and-supply idea of parliamentarism. On the one hand, the government still enjoyed the confidence of the assembly, given that the earlier no-confidence vote had proved unsuccessful. On the other, it did not manage to rack up a majority for the finance bill (loss of supply), making such a government de facto impotent. The gridlock was broken when Brandt tabled a confidence motion [*Vertrauensfrage*], a prerogative afforded to the Federal Chancellor by Article 68, in September without the federal ministers casting their vote, which was rejected by the legislature. This was later labelled a 'bogus' vote of confidence [*unechte Vertrauensfrage*],[15] as the chancellor expected to lose the vote and sought to instigate an early election to 'solve the dilemma'.[16] Invoking Article 68, the head of state, Gustav Heinemann, promptly dissolved the *Bundestag* through the Presidential Order of 22 September 1972.

In 1983, the political situation was somewhat different. In the case of the 1972 dissolution, while the government might have accommodated a negative outcome in the vote of confidence, there was still evidence of a lack of a working majority in parliament, considering the budget fiasco. In October 1982, CDU leader Helmut Kohl had been elected as a result of a successful constructive vote of no-confidence in his predecessor, Helmut Schmidt.[17] This move followed the breakup of the SPD-FDP coalition and the emergence of an alliance between the CDU and the FDP. Amidst the CDU-FDP negotiations, an election date had been set to offer voters the opportunity to provide electoral legitimacy to the new incumbent. As I anticipated, the German Constitution does not contemplate a *direct* channel for the chancellor to renew the assembly before the natural

[14]German Bundestag, *Plenarprotokoll* 6/183.
[15]Robert C van Ooyen, 'Parlamentsauflösung und unechte Vertrauensfrage' in Robert C van Ooyen (ed), *Politik und Verfassung: Beiträge zu einer politikwissenschaftlichen Verfassungslehre* (VS Verlag für Sozialwissenschaften Wiesbaden 2006).
[16]Herbert Döring and Christoph Hönnige, 'Vote of Confidence Procedure and *Gesetzgebungsnotstand*: Two Toothless Tigers of Governmental Agenda Control' (2006) 15 German Politics 1.
[17]German Bundestag, *Plenarprotokoll* 9/118.

expiration of its four-year mandate. As such, there was no avenue for Kohl to achieve a dissolution other than working around Articles 63 and 68. One option would have been for the newly-appointed head of government to resign and aim for the failure of three investiture votes, based on the stipulations of Article 63. Article 68 was arguably a less risky and laboured option, necessitating only one vote in parliament.[18] In December 1982, the leader put down a confidence motion that was rejected when the majority of CDU/CSU and FDP legislators abstained, and SDP members voted against Kohl.[19] A third option involving the introduction of an ad-hoc constitutional amendment was pondered but soon discarded. Backing an ad-hoc amendment could have potentially opened up a scenario comparable to the 2009 Czech case that I discuss next.

After the formalisation of the dissolution by President Karl Carstens (through the Presidential Order of 6 January 1983), the matter of its constitutionality was brought to the Federal Constitutional Court [*Bundesverfassungsgerich*]. Although parliamentary dissolution is not explicitly named, Article 93 of the German Constitution lays out the competencies of the *Bundesverfassungsgerich*, including that: 'the Federal Constitutional Court shall rule … in the event of disagreements or doubts concerning the formal or substantive compatibility of federal law or land law with this Basic Law'. Moreover, the 1951 Act on the Federal Constitutional Court states that: 'the decisions of the Federal Constitutional Court shall be binding upon the constitutional organs of the Federation and of the Länder, as well as on all courts and those with public authority.'[20] Judges were tasked with determining two issues: whether the president's reliance on Article 68 to dissolve parliament was justiciable and whether Chancellor Kohl's actions complied with constitutional requirements. Second, to determine whether the chancellor made a lawful use of this article or his actions fell outside the circumstances under which a dissolution could occur based on the German constitutional setting. The *Bundesverfassungsgerich* concluded that the decision of the Federal President was an indisputable political judgment.[21] At the same time, it was indicated that the exercise of discretion would only be permitted if the judiciary found that Article 68 had not been misused by the head of government. In other words, provided that the legality of Kohl's use of a confidence motion to achieve a parliamentary dissolution was upheld, the head of state was authorised to make a calculated choice on whether to actually execute the dismissal or not.

[18]Mary Lovik, 'The Constitutional Court Reviews the Early Dissolution of the West German Parliament' (1983) 7 Hastings Intl & CompLRev 79.
[19]German Bundestag, *Plenarprotokoll* 9/141.
[20]Gesetz über das Bundesverfassungsgericht, s 31.
[21]The wording of Article 68, particularly the use of the word, *may* suggests that the *Bundespräsident* has discretion when deciding whether to dissolve the *Bundestag*. Article 68 states that the President may dissolve the Bundestag within 21 days if the *Bundeskanzler* proposes it. The key word *may* indicates that dissolution is not automatic or mandatory but rather left to the President's judgment: Grundgesetz für die Bundesrepublik Deutschland, art 68.

It was ultimately decided that Chancellor Kohl's vote of confidence met constitutional requirements 'both in wording and spirit'. With respect to the wording, the verdict maintained that Article 68 does not explicitly distinguish between a 'genuine' or an 'engineered' confidence motion. Technically, the motives for resorting to this procedural device are not subject to any legal requisite. The Court substantiated this argument by pointing to the difference between 'unwritten barriers' to Article 68 and the actual wording of the article. This is consistent with a 1966 precedent where the *Bundestag* passed a confidence request in the cabinet led by Ludwig Erhard, which had already highlighted the limited exhaustiveness of the provision. At the time, critics had come to the conclusion that such a request was constitutional because the article does not specify who should trigger a *Vertrauensfrage*, but only that the chancellor is the one who formally submits the confidence motion. Concurrently, since this 'request' is not a codified procedure, Erhard was under no obligation to raise the question of confidence, which he did not.[22] As for the spirit, the majority of judges made the proposition that the calling of a vote of confidence was justified to legitimise and ascertain parliament's trust in the new administration after the negotiations between the CDU and FDP. Voters' endorsement of the programme laid out by the newly-formed coalition could not be taken for granted, as the alliance had not sprung from a general election (an unprecedented situation). The Court drew a parallel between the 1972 and 1982 votes of confidence, validating Chancellor Brandt's decision to attain a parliamentary dissolution by relying on the Article 68 procedure to ensure that a clear legislative majority would emerge.

It was nonetheless reiterated that a cabinet that is appointed after a constructive no-confidence in the previous administration, without holding new elections, need not go down the confidence motion path as parliamentary investiture is already embedded in the constructive vote of no-confidence process (the so-called *Äquivalenzformel*: 'equivalence formula'), and that the legislature should not act as an accomplice of incumbents trying to interfere with the timing of elections. While a majority of judges upheld the legality of the 1972 and 1982 confidence motions (despite recognising their controversial nature), the Court's view was not unanimous. Three dissenting opinions were submitted, highlighting different interpretations of the German Constitution within the *Bundesverfassungsgerich*. Justice Hans-Justus Rinck (dissenting opinion 2), for instance, maintained that the dissolution under review was unconstitutional, as parliamentary dissolution under Articles 63 and 68 could take place only in the event that a functional government could not be formed.[23]

[22]Ingo von Münch, *Grundgesetz-Kommentar*, vol 2 (2nd edn, Verlag CH Beck 1983). This is equivalent to a censure motion [*Missbilligungsantrag*] that reprimands the executive but does not carry any legal consequences.

[23]BVerfG 2 BvE 1/83; 2 BvE 2/83; 2 BvE 3/83; 2 BvE 4/83. An important difference between the constructive vote of no-confidence procedure and the vote of confidence procedure is that the former requires a secret ballot, as per the *Bundestag*'s standing orders,

Notwithstanding the 1983 case, the Constitutional Court was again called to express an opinion on an early dissolution in 2005. The governing coalition between the SPD and the Greens [*Bündnis 90*/*Die Grünen*] had underperformed at the state (*Länder*) level, culminating with their ousting in the North Rhine-Westphalia election in May. Taking notice of these results, Chancellor Gerhard Schröder revealed his plans to hold an early federal election. The leader was not a stranger to the vote of confidence procedure. Once before, in November 2001, the chancellor had raised the question of confidence to obtain the green light from parliament for Germany to join the war in Afghanistan.[24] Like Helmut Kohl, Schröder resorted to Article 68 to achieve assembly dismissal. For this reason, in June 2005, the head of government advanced a confidence motion. During the debate, the chancellor made it clear that the motion had 'a single unmistakable purpose … To dissolve the 15th German Bundestag and arrange new elections'.[25] The constrained ability of the executive to act and intra-party dissent were the two reasons provided for the invocation of Article 68. The majority situation was no longer clear. The 1983 vote held by Kohl was also brought up as the legal background for the 2005 motion. Failing to reach the required majority, he was denied parliamentary confidence on 1 July. Upon Schröder's proposal, the Federal President, Horst Köhler, issued a dissolution order through the Presidential Order (21 July 2005).

In August 2005, two coalition MdBs challenged the constitutionality of the dismissal. Coherently with the 1983 verdict, the Court resolved that Chancellor Schröder was justified in calling a vote of confidence in light of the dubious majority status in the Bundestag. Article 68 was found to be an adequate means to ascertain the level of support enjoyed by the executive, given that the latter needs to rely on parliament's support to get things done. The *Bundesverfassungsgerich* ruled that the 2005 confidence motion satisfied the three constitutional conditions to dissolve parliament under Article 68, namely, that (1) the chancellor had failed to secure the support of at least 301 legislators, (2) that he promptly submitted a dissolution request to the head of state and (3) that the Bundestag had been dissolved by the Federal President within the 21-day window prescribed by constitution.[26]

A majority of judges raised two points of paramount significance for the constitutional framework of Germany. First, the government is not obliged to disclose

while the latter is conventionally decided via roll-call: German Bundestag, *Rules of Procedure of the German Bundestag and Rules of Procedure of the Mediation Committee* (Public Relations Division 2022). This mismatch has been described as an inconsistency by Hans Meyer, 'Die Stellung der Parlamente in der Verfassungsordnung des Grundgesetzes' in Hans-Peter Schneider and Wolfgang Zeh (eds), *Parlamentsrecht und Parlamentspraxis in der Bundesrepublik Deutschland: Ein Handbuch* (De Gruyter 1989).

[24]German Bundestag, *Plenarprotokoll* 14/202.

[25]German Bundestag, *Plenarprotokoll* 15/185.

[26]Legislators voted in favour of the motion, affirming confidence in the government. A total of 296 legislators opposed the motion, withdrawing confidence; while 148 legislators abstained: German Bundestag, *Plenarprotokoll* 15/185: 151.

'what is not discussed openly … to other constitutional bodies under the conditions of political competition'. Put simply, ulterior motives behind the use of the vote of confidence procedure do not have to be acknowledged by the invoking agents when it comes to political competition. This, in part, echoes the conclusion presented in 1983 that the intentions behind the employment of Article 68 are not subject to any legal requisite. In essence, a de facto identity is established between an *unechte* [bogus] confidence motion and an *echte* [genuine] one, allowing leaders to exploit this instrument more liberally as a resolution mechanism. Second, the judiciary examines applications of the confidence-related provisions only to the narrow extent covered by the constitution. In the end, 'it is on the Federal Chancellor, the German Bundestag and the Federal President to prevent a dissolution according to their free political judgment. This helps to ensure the reliability of the assumption that the federal government has lost its parliamentary capacity to act'. In layperson's terms, the *Bundesverfassungsgerich* restricted the scale of its jurisdiction over the issue of assembly dismissal, stating that the confidence principle makes it so that dissolution could be prevented without turning to the judicial branch insofar as the executive (still) enjoys plenitude of power. The Court indeed observed that the chancellor's actions were not the product of a unilateral decision to trigger a dissolution, but the expression of the desire of a majority of MdBs to go to the polls rather than elect a new head of government. Given that legislators are – strictly speaking – free to vote as they see fit, had the *Bundestag* not wanted to essentially dissolve itself, no majority would have emerged to withdraw confidence in the incumbent administration. Furthermore, even *after* the rejection of the vote of confidence initiated by Schröder, parliament had the option to elect another Federal Chancellor, causing the right of dissolution to lapse (Article 68), but this option was not pursued.

It is also clarified that this does not open the door to whimsical renewals, that is, it does not equate to unilateral dissolution authority. The incumbent government would not be allowed to hold an early election for specific issues, eg treat an early election as a popular referendum, as that would undermine the representative nature of the Bundestag.[27]

III. The 2009 dissolution in Czechia: *Kauza Melčák* [The Melčák Case]

Similar to the German setting, the constitution of Czechia amply restricts the avenues for parliamentary dissolution. Prior to 2009, the head of state [*Prezident republiky*] could dismiss the assembly in four clear-cut situations: if three ex-post investiture votes did not succeed in validating a new PM, if parliament did not reach a decision on a bill for which the executive raised the question of confidence within three months of the invocation of the vote of confidence procedure, if the legislature was adjourned for longer than permissible (120 days per year in total)

[27]BVerfG 2 BvE 4/05; 2 BvE 7/05.

or if the assembly failed to meet the quorum (one-third of members) for a period of more than three months while in session (Article 35).[28] As a result of the Melčák Case, a constitutional amendment was introduced in 2009 to allow for the possibility of self-dissolution by means of a resolution approved by three-fifths of MPs,[29] a slightly more lenient requirement compared to the two-thirds necessary under the Fixed-term Parliaments Act 2010 in the United Kingdom. This dissolution mode has since been exploited only once (2013).

Before the 2009 amendment, one cabinet had been denied parliamentary confidence upon appointment (Mirek Topolánek in 2006). Still, the event did not result in dissolution as the same prime minister was successfully reappointed in January 2007. There was, however, one precedent of early renewal of the assembly. In March 1998, a constitutional act [*ústavní zákon*] was passed that shortened the four-year electoral period of the lower chamber [the Chamber of Deputies: *Poslanecká sněmovna Parlamentu České republiky*], calling for an election to be held in June.[30] The term inaugurated by the June 2006 legislative elections had been politically turbulent from the very beginning. The minority government led by Topolánek was initially rejected in the investiture vote on 3 October. The leader later formed a coalition government that secured confidence on 19 January 2007. Since then, Topolánek faced five no-confidence motions, of which the last (March 2009) proved fatal to his government.[31] This was the first time in the history of independent Czechia that the legislature had withdrawn confidence in the executive. Article 35 did not offer a solution tailored to this particular scenario, a lacuna highlighted by Milos Brunclik.[32] Hence, in May 2009, on the basis of the aforementioned 1998 act, the Chamber of Deputies adopted an ad-hoc measure to cut its mandate short and hold new elections in October.[33] Much like Germany, this was a more straightforward alternative to aiming for three failed investitures (or forcing one of the other situations contemplated in Article 35).[34]

A few weeks later, non-partisan MP Miloš Melčák filed a complaint to the Constitutional Court, starting the landmark *Kauza Melčák* or the 'Melčák

[28]This represents a break from the 1920 Constitution of the Czechoslovak Republic, which – like Weimar – granted unilateral dissolution authority to the head of state with minor restrictions.
[29]Zákon č. 319/2009 Sb.
[30]Zákon č. 69/1998 Sb.
[31]Czech Chamber of Deputies *Stenoprotokol* (3 October 2006); *Stenoprotokol* (19 January 2007); *Stenoprotokol* (24 March 2009).
[32]Milos Brunclik, 'Problems of Early Elections and Dissolution Powers in the Czech Republic' (2013) 46 Communist and Post-Communist Studies 217.
[33]Act 195/2009 Sb.
[34]Another route could have been for the government to raise the question of confidence on the passage of a bill and have the assembly wait out the three-month window prescribed by the article. However, given that Topolánek had already lost parliamentary trust, he would have been unable to initiate a new vote of confidence.

Case'. That the judiciary would take up the MP's challenge was not obvious. In a 2002 case, the Court itself had declared that 'justices of the Constitutional Court are bound by constitutional acts, so the Constitutional Court is not authorised to review (let alone abolish) the provisions contained in constitutional acts; its task is only – in concrete cases – to interpret them'.[35] At the same time, similar to the German framework, Article 89 of the constitution establishes that '*enforceable* decisions of the Constitutional Court are binding on all authorities and persons'.[36] Melčák's petition revolved around four main points. First, the early dissolution violated the legislators' right to complete their term, given that the dismissal had not taken place according to the stipulations of Article 35. Second, while the constitutional act used to call an early election formally met the legal requirements to amend the Czech Constitution (three-fifth majority in both chambers), it infringed its 'constitutional order', namely a set of fundamental and indefeasible provisions (Article 3) by altering 'the essential requirements for a democratic state governed by the rule of law', which is prohibited by Article 9. Third, the act raised the issue of retroactivity because it curtailed the *ongoing* electoral term, ie it changed the rules of the game while the game was being played, giving an unfair advantage to the actors pursuing the dissolution. Finally, Melčák expressed objections to the existence of a 'constitutional custom', that is, the 2009 events combined with the 1998 act did not constitute a legal convention related to parliamentary dismissal within the constitutional framework of Czechia.

In September 2009, the Constitutional Court placed a temporary hold on the directive issued by the head of state, Václav Klaus, back in June that rubber-stamped the assembly renewal. Like in Germany, while no explicit reference is made to parliamentary dissolution, Article 87 of the Czech Constitution lists the competencies of the Constitutional Court, including that 'the Constitutional Court has jurisdiction … to annul other legal enactments or individual provisions thereof if they are in conflict with the constitutional order'. Moreover, unless otherwise specified, 'decisions of the Constitutional Court are enforceable as soon as they are announced' (Article 89). On 10 September, a majority of judges settled for the annulment of the constitutional act, cancelling the upcoming legislative elections. The verdict presented two main reasons for voiding the dissolution, largely reflecting Melčák's claims. The 2009 measure was found to be legally compliant with the formal procedure to introduce a constitutional act but normatively contradicting the 'substantive core' of the constitution. Several examples were brought up by the Court to defend the importance of looking after a set of basic, inalienable values with particular reference to the Weimar

[35]Kieran Williams, 'When a Constitutional Amendment Violates the "Substantive Core": The Czech Constitutional Court's September 2009 Early Elections Decision' (2011) 36 Rev of Central and Eastern Eur L 33.
[36]*Ústavní zákon č.* 1/1993 Sb, *Ústava České republiky* art 89.

and Soviet experiences. According to the judicial branch, the substantive core of the Czech Constitution was violated due to the non-retroactivity and lack of generality of the 2009 act. With respect to the former, it was argued that the document could not function retroactively as the members of the public participating in the last election (2006) did not vote in the knowledge that the electoral term could have been cut short for reasons other than those contemplated in Article 35. As for the latter, the Court sustained that the idea of generality was 'an essential requirement of the rule of law'. An ad-hoc constitutional law that does not represent a permanent addition to the Constitution and only addresses specific and transitory circumstances is not general in its content. Generality helps ensure the prevention of the transgression of constitutional boundaries. The judges pointed to cases like the Weimar Republic 'characterised by regular breaching of the constitution by way of special constitutional laws'.[37] The following election was held in May 2010, after the introduction of a 'permanent' constitutional amendment granting MPs the right of self-dissolution.

Finally, it is worth noting that this judgement has been met with criticism by some. The criticism centres around claiming that the Court's decision overstates the danger to constitutional democracy posed by the early dissolution and overemphasises the similarities with the Weimar Republic For example, in reference to this decision, Kieran Williams talks about the fear-ridden attitudes of the judiciary in 'Weimar-syndrome countries'[38] where the rise of authoritarianism was facilitated by the existing institutions. Given that the amendment was supported by a majority, a perspective to be acknowledged is that this was not an instance of attempting to subvert parliamentary politics but to overcome a procedure that was burdensome and inadequate. In addition, the fact that the judgement focused on building the substantive core doctrine, as opposed to focusing on the petitioner's individual rights claims could be perceived as 'self-aggrandisement' on the part of the judicial branch.

IV. The 2020 and 2021 dissolutions in Nepal

The current constitution of Nepal was introduced in 2015 after the abolition of the monarchy and the election of a constituent assembly in 2008 (and again in 2013).[39] The new constitution replaced the figure of the monarch as head of state with a president indirectly elected by parliament. Given the recentness of

[37]Pl ÚS 27/09.
[38]Williams (n 35).
[39]For an overview of the constitutional history and judicial interventions in Nepal see Mara Malagodi, 'Limiting Constituent Power? Unconstitutional Constitutional Amendments and Time-Bound Constitution Making in Nepal' in Rehan Abeyratne and Ngoc S Bui (eds), *The Law and Politics of Unconstitutional Constitutional Amendments in Asia* (Routledge 2021); Renée Jeffery and Bikram Timilsina, 'Re-democratisting Nepal: Transitional Justice and the Erosion of Judicial Independence' (2021) 27 Contemporary Politics 550.

the document, many of its mechanisms have yet to be exhaustively tested.[40] The provisions referring to the power to dismiss the legislature are somewhat opaque. Strictly speaking, the only explicitly contemplated channel for parliamentary dissolution is embedded in Article 76, which sets out the government formation steps. The judicial review of the assembly renewals that occurred in February and July 2021 can only be understood if situated in the context of the cabinet formation process. Following a general election, (1) the head of state (President: *Nēpālakō Rāṣṭrapati*) appoints 'the parliamentary party leader of the political party with the majority in the House of Representatives as a Prime Minister'. However, (2) 'if there is not a clear majority of any party … the President shall appoint as Prime Minister the member of the House of Representatives who can have the majority with the support of two or more political parties represented in the House of Representatives'. (3) If this attempt fails 'within 30 days of the final result of the election of the House of Representatives or if the appointed Prime Minister … fails to receive a vote of confidence, the President shall appoint the leader of the party with the highest number of members in the House of Representatives as the Prime Minister.' (4) If the appointed leader cannot secure parliamentary confidence, 'the President shall appoint a member as Prime Minister who produces bases [support] that he/she may win the vote of confidence of the House of Representatives', in other words, one who can show to have the numbers to potentially win the vote of confidence. Finally, (5) if confidence is negated in this last scenario, the President can dissolve parliament and call new elections upon the PM's recommendation.[41] Importantly, only the governments formed according to (2), (3), and (4) face an ex-post investiture vote. Other parts of the constitution hint at the possibility of dismissing the assembly (eg Article 85, which regulates the duration of the legislative term), but none name a direct avenue like Article 76.

On 20 December 2020, the cabinet headed by KP Sharma Oli, chairman of the Communist Party (Unified Marxist-Leninist), turned to President Bidya Devi Bhandari for an early renewal of the lower house of the Nepalese national legislature [*Pratinidhi sabhā*]. The move followed internal disputes within the ruling party and Oli's refusal to withdraw an ordinance on the Constitutional Council Act, despite committing to do so, as well as the prospect of a no-confidence motion to be registered by rivals in his party.[42] Later that day, the head of state

[40]As of this writing only two elections have taken place under the new constitutional setting: one in 2017 and another in 2022.
[41]The Constitution of Nepal 2015 art 76.
[42]'Oli Government Recommends House Dissolution' *The Kathmandu Post* (Kathmandu, 20 December 2020) <https://kathmandupost.com/national/2020/12/20/oli-government-recommends-house-dissolution> accessed 30 September 2024; 'President Dissolves House, Declares Elections for April 30 and May 10' *The Kathmandu Post* (Kathmandu, 20 December 2020) <https://kathmandupost.com/2/2020/12/20/president-dissolves-house-declares-elections-for-april-30-and-may-10> accessed 30 September 2024;

formalised the dissolution, citing Articles 76 and 85 as sources of legal authority and 'the spirit and value of the parliamentary system and the practice within our parliamentary system and in the different countries'.[43] Several petitions were readily submitted to the Supreme Court of Nepal, questioning the constitutionality of the dismissal. Similar to the German and the Czech, the Nepalese Constitution provides that 'the Supreme Court shall have the final power to interpret the Constitution and law' and that 'the interpretation of the Constitution and law or the legal principles propounded by the Supreme Court in relation to court cases must be followed by all' (Article 128).[44] In February 2021, the judiciary issued a verdict declaring the early dissolution unlawful and ordering that the House of Representatives reconvene within two weeks.[45] The Court provided two main reasons for the judgment. First, it condemned Oli's decision as the monetary burden of fresh elections would fall on the people of Nepal. Second, it resolved that parliament had been dissolved without exploring the alternatives proposed by the Constitution.[46]

'Recommendation of House Dissolution is Unconstitutional, Says Nepali Congress' *The Kathmandu Post* (Kathmandu, 20 December 2020) <https://kathmandupost.com/national/2020/12/20/recommendation-of-house-dissolution-is-unconstitutional-says-nepali-congress> accessed 29 September 2024; 'What Does the Constitution Say on House Dissolution' *The Kathmandu Post* (Kathmandu, 20 December 2020) <https://kathmandupost.com/national/2020/12/20/what-does-the-constitution-say-on-house-dissolution> accessed 29 September 2024; 'Nepal Communist Party Standing Committee Decides to Propose Disciplinary Action Against Oli' *The Kathmandu Post* (Kathmandu, 20 December 2020) <https://kathmandupost.com/politics/2020/12/20/nepal-communist-party-standing-committee-decides-to-propose-disciplinary-action-against-oli> accessed 30 September 2024 ; Bhadra Sharma, 'Nepal's Supreme Court Rules Dissolved Parliament Must Be Reinstated' *The New York Times* (New York, 23 February 2021) <https://www.nytimes.com/2021/02/23/world/asia/nepal-parliament-dissolved.html> accessed 30 September 2024.

[43]Binod Ghimire, 'House Dissolution: Whether It's Lawful is Now for Supreme Court to Decide' *The Kathmandu Post* (Kathmandu, 22 December 2020) <https://kathmandupost.com/national/2020/12/22/house-dissolution-whether-it-s-lawful-is-now-for-supreme-court-to-decide> accessed 29 September 2024; Anil Giri, 'Oli's Address to the Nation Didn't Validate Dissolution of House, Observers Say' *The Kathmandu Post* (Kathmandu, 22 December 2020) <https://kathmandupost.com/politics/2020/12/22/oli-s-address-to-the-nation-didn-t-validate-dissolution-of-house-observers-say> accessed 29 September 2024; Tika R Pradhan, 'Oli's Move of Dissolving the House Has Brought Nepal Communist Party to a Moment of Truth' *The Kathmandu Post* (Kathmandu, 22 December 2020) <https://kathmandupost.com/politics/2020/12/22/oli-s-move-of-dissolving-the-house-has-brought-nepal-communist-party-to-a-moment-of-truth> accessed 29 September 2024.

[44]The Constitution of Nepal art 128.

[45]Sharma (n 42).

[46]SCN 077-WC-0028; 'Supreme Court Overturns Oli's House Dissolution' *The Kathmandu Post* (Kathmandu, 23 February 2021) <https://kathmandupost.com/national/2021/02/23/supreme-court-overturns-oli-s-house-dissolution> accessed 29 September 2024; Tika R Pradhan and Anil Giri, 'House Reinstated' *The Kathmandu Post* (Kathmandu, 24 February 2021) <https://kathmandupost.com/national/2021/02/24/house-reinstated>

Article 85 states that 'except when dissolved earlier, the term of House of Representatives shall be five years'.[47] The provision does not imply the existence of a statutory power that allows for the renewal of parliament in cases other than the one covered by Article 76. Prime Minister Oli was appointed in 2018 under the conditions of 76(2). Due to the unclear majority, the leader formed an executive with the support of the Communist Party of Nepal (Maoist Centre), winning an investiture vote in March. When the cabinet solicited a dissolution in 2020, the stipulations of Article 76 could not back up such a request because no government formation attempt had taken place and no PM had been appointed according to 76(4-5). Only an incumbent who is denied parliamentary confidence after a failed attempt at steps 1 through 3 would have been able to activate the dismissal clause. Oli's lawyers were unable to justify his actions by maintaining that the government head possesses an inherent (and unwritten) Westminster-style power to call early elections, regardless of what is stated in the constitution.[48] As a result of the Court's verdict, the House promptly reconvened.

In March 2021, following a Supreme Court case that reversed the prior merger between the two factions of the Nepal Communist Party (Unified Marxist-Leninist and Maoist Centre), the Maoist Centre withdrew its support from the officeholder, turning Oli's cabinet into a minority administration. On 10 May 2021, the prime minister tabled a motion of confidence but failed to secure the required majority, causing the government to transition to caretaker capacity. Shortly after, Oli was reappointed as the head of a minority executive based on 76(3), eg the leader of the party with the highest number of seats. While formally appointed by the president, this cabinet never gained plenitude of power as it did not undergo the constitutionally mandated investiture vote. Instead, the incumbent recommended a parliamentary dissolution that was executed by the President on 22 May with elections to be held in November, asserting that neither he nor the opposition leader, Sher Bahadur Deuba (Nepali Congress), had succeeded in forming a majority government.[49] The matter of the constitutionality of the dissolution was once again brought before the Supreme Court. In July, the judiciary ruled that Oli's dismissal solicitation was illegitimate and ordered that parliament be reconvened within a

accessed 29 September 2024; Hari B Jha, 'Nepal: Supreme Court's Verdict on Dissolution of Parliament and the Emerging Situation' *Observer Research Foundation* (New Delhi, 26 February 2021) <https://www.orfonline.org/expert-speak/nepal-supreme-court-verdict-dissolution-parliament-emerging-situation> accessed 29 September 2024; Kristine Eck, 'Nepal in 2021: From Bad to Worse' (2022) 62 Asian Survey 193.

[47]The Constitution of Nepal art 85.

[48]'Is Oli Right to Say He Dissolved the House, Just the Way UK Prime Minister Did?' *The Kathmandu Post* (Kathmandu, 10 February 2021) <https://kathmandupost.com/politics/2021/02/10/is-oli-right-to-say-he-dissolved-the-house-just-the-way-uk-prime-minister-did> accessed 29 September 2024.

[49]'Nepal's Parliament Is Dissolved, Deepening a Political Crisis as Covid Rages' *The New York Times* (New York, 22 May 2021) <https://www.nytimes.com/2021/05/22/world/asia/nepal-parliament-coronavirus.html> accessed 18 March 2025.

week and Deuba appointed PM. Compliant with the judges' resolution, President Bhandari asked the opposition leader to form an executive that gained confidence on 18 July. The newly appointed prime minister declared: 'the Court [had saved] democracy'.[50] The rationale for this outcome is analogous to the February case: not only had Oli been removed by the parliament he tried to dissolve, but his minority administration also did not follow the steps laid out in Article 76, as an investiture vote never took place. Only the rejection of said investiture would have paved the way for the scenario prescribed by 76(4-5), which allows the government head to turn to early elections to resolve a formation impasse, provided that all the constitutional alternatives have been exhausted.

V. The 2022 dissolution in Pakistan: regarding rejection of the motion of no–confidence against the prime minister v and other precedents (S M C 1/2022)

In April 2022, Pakistan experienced a political crisis culminating with the dissolution of the National Assembly [*Aiwān-e-Zairīñ*] at the request of PM Imran Khan (Pakistan Tehreek-e-Insaf). In terms of the prerogative to dismiss the legislature, the 1973 Pakistani Constitution borrows from the Westminster system. Article 58 establishes that the head of state executes a parliamentary dissolution if so advised by the prime minister or:

> in his discretion where, a vote of no-confidence having been passed against the Prime Minister, no other member of the National Assembly command the confidence of the majority of the members of the National Assembly in accordance with the provisions of the Constitution, as ascertained in a session of the National Assembly summoned for the purpose.[51]

At least since the Constitution (Eighth Amendment) Act 1985, the provision has been accompanied by an explanatory clause that clarifies that the power does not extend to PMs against whom a 'notice of a resolution for a vote of no-confidence has been given'. This detail is important for understanding the 2022 Supreme Court case.[52]

In February, Fazal-ur-Rehman, leader of the Pakistani Democratic Movement (PDM), manifested the intention to initiate a vote of no-confidence in the

[50]Gopal Sharma, 'Nepal's Supreme Court Reinstates Parliament; Orders New PM to Be Appointed' *Reuters* (Kathmandu, 12 July 2021) <https://www.reuters.com/world/asia-pacific/nepals-supreme-court-reinstates-parliament-orders-new-pm-be-appointed-2021-07-12/> accessed 18 March 2025.

[51]Pak Const 1973 art 58. On the evolution of parliamentary institutions in Pakistan see Mariam Mufti, 'The Parliament of Pakistan' in Po J Yap and Rehan Abeyratne (eds), *Routledge Handbook of Asian Parliaments* (Routledge 2023).

[52]Constitution (Eight Amendment) Act 1985. An earlier version of the constitution required that the motion of no-confidence had been *moved* by parliament rather than announced.

incumbent. The Constitution of Pakistan clearly contemplates the possibility of removal by means of a no-confidence motion (Article 95). However, up until that point, no government had been successfully ousted by the assembly, and the procedure had only been attempted twice (1989, 2006). Opposition parties, including opposition leader Shehbaz Sharif (Pakistan Muslim League), sought help from a number of MPs supporting Khan. The following month, the PDM alliance filed a motion of no-confidence in the ruling administration. Concomitantly, the PM alleged the existence of proof of foreign threats on the part of the United States of America to unseat his government.[53] Parliament was scheduled to vote on the confidence resolution on 3 April. Like Westminster, the speaker of the National Assembly has the authority to put a motion to a vote. Deputy Speaker Qasim Khan Suri dismissed the motion, denouncing its incompatibility with Article 5 of the Pakistani Constitution (loyalty to state and obedience to the Constitution and law) due to the alleged interference of foreign powers. Shortly after, the prime minister advised the head of state (President Arif Alvi) that the National Assembly be dissolved under Article 58, which he quickly did, entrusting Khan with the conduct of ordinary business.

That same day, the Supreme Court of Pakistan took *suo moto* initiative to review the constitutionality of the dismissal. Although the first review of an early dissolution in Pakistan took place in the 1950s, the Court established that the exercise of dissolution powers could be scrutinised by judges according to the *Federation of Pakistan v Haji Muhammad Saifullah Khan* decision in the late 1980s.[54] The case was heard the following day, along with several petitions submitted by opposition parties. On 7 April, judges decided unanimously that the dissolution was illegitimate and thus null, ordering that the assembly reconvene to vote on the no-confidence motion two days later, in addition to terminating the caretaker status of the PM.[55] On 9 April, the National Assembly resumed its operations, but the motion was filibustered by the speaker with three adjournments. Later that night, following the speaker's resignation and the intervention of former speaker Ayaz Sadiq stepping in as chairman, the motion was voted on and approved by the required absolute majority, making Khan the first leader to be ousted with a vote of no-confidence in Pakistani history. Soon after, opposition leader Sharif was successfully invested by the legislature. In the same vein as the UK ouster clause, Article 48 of the Constitution of Pakistan provides that, except for the restrictions contemplated in Article 58, 'any court, tribunal or other authority' may not scrutinise 'the question whether any, and if so what, advice was

[53]Shah M Baloch, 'Imran Khan Claims US Threatened Him and Wants Him Ousted as Pakistan PM' *The Guardian* (London, 31 March 2022) <https://www.theguardian.com/world/2022/mar/31/imran-khan-address-pakistan-faces-no-confidence-vote> accessed 18 March 2025.

[54]Muhammad F Amin, 'Constitutionalism and Judicialization of Politics in Pakistan' (2023) 5 JL & Soc Stud 211.

[55]PLD 2022 SC 139; PLD 2022 SC 144; PLD 2022 SC 217; PLD 2022 SC 218.

tendered to the President by the Cabinet, the Prime Minister, a Minister or Minister of State' (including advice concerning parliamentary dissolution).[56]

Before examining the 2022 Supreme Court decision, it is important to review the judiciary's historical role in assembly dissolutions in Pakistan. This reveals that the Court's stance on parliamentary dissolution has been inconsistent and, as suggested by Osama Siddique, 'not fully devoid of bias and partiality',[57] often situated in the context of turbulent political times and democratic instability and characterised by 'arbitrary jurisprudence'.[58] The 2022 case is indeed not the first time the judicial branch was called to settle a dissolution controversy: five times before the Supreme Court (Federal Court until 1956) ruled on the legitimacy of dismissals involving mainly the head of state.

As a matter of fact, in 1955, 1992 and 1998, the Supreme Court upheld the validity of a contested dissolution of the National Assembly. In 1955, following Governor-General Ghulam Muhammad's dismissal of the Constituent Assembly on 24 October 1954, the Federal Court validated the dissolution on technical grounds, resulting in the creation of a new Constituent Assembly.[59] In 1988, after General Zia's military regime incorporated a provision granting the power to unilaterally dissolve parliament to the President in Article 58 of the 1973 Constitution, the Supreme Court was called to settle another case related to presidential dismissal of the legislature. The Court declared the dissolution order unlawful but did not reinstate the dissolved assembly (*Federation of Pakistan v Haji Muhammad Saifullah Khan*).[60] In 1990, the National Assembly was dismissed again, resulting in the removal of the cabinet led by PM Benazir Bhutto. The dissolution order was challenged in the Supreme Court (*Khawaja Ahmad Tariq Rahim v the Federation of Pakistan*), which, unlike the 1988 precedent, ruled that the order was justified.[61] In 1993, following the dissolution of parliament and dismissal of Nawaz Sharif's government, the Court reverted to the *Haji Muhammad Saifullah Khan* judgement and invalidated the presidential order, restoring the dissolved assembly (*Muhammad Nawaz Sharif v the President of Pakistan*).[62] Finally, judges departed once again from the *Haji Muhammad Saifullah Khan* precedent by upholding the presidential dissolution of the National

[56]Pak Const 1973 art 58.
[57]Osama Siddique, 'The Jurisprudence of Dissolutions: Presidential Power to Dissolve Assemblies Under the Pakistani Constitution and Its Discontents' (2006) 23 ArizJIntl & CompL 615.
[58]Amin (n 54); Moeen H Cheema, 'Two Steps Forward One Step Back: The Non-Linear Expansion of Judicial Power in Pakistan' (2018) 16 ICON 503.
[59]'Section H: Pakistan' (2014) 46 RHS Camden Fifth Series 129; Amin (n 54); PLD 1955 FC 240.
[60]*Federation of Pakistan v Haji Muhammad Saifullah Khan* (PLD 1989 SC 166).
[61]*Khawaja Ahmad Tariq Rahim v the Federation of Pakistan* (PLD 1992 SCC 646).
[62]*Muhammad Nawaz Sharif v the President of Pakistan* (PLD 1993 SC 473).

Assembly and termination of another government led by Benazir Bhutto in 1996 (*Benazir Bhutto v President of Pakistan*).[63]

Overall, these precedents – mostly related to assembly dismissals initiated by the President under Article 58 – show that no clear or established doctrine exists in Pakistan when it comes to judicial reviews of early parliamentary dissolutions. Between the late 1980s and mid-1990s alone, two dissolutions were found to be lawful and two were not, however, only in one case did parliament resume its operations. The 2022 Supreme Court's judgment was centred around two major points. First, the judiciary recognised that the judicial branch should exercise caution in intervening in matters related to national security. However, the executive could not undertake unconstitutional actions on the premises of unsubstantiated allegations. Second, the Supreme Court resolved that the deputy speaker's dismissal of the motion was the product of a unilateral decision taken by the deputy speaker at the behest of the Law Minister rather than the outcome of a vote in the assembly and, therefore, was illegitimate: that is, the deputy speaker was not authorised by any constitutional provisions to halt the no-confidence proceedings. As the results of the vote of no-confidence were upheld by the Court, the prime minister could not rely on the prerogatives granted by Article 58 to renew the legislature.[64]

VI. Conclusion

As mentioned earlier, the modern English legal tradition, building on the Bill of Rights, encompasses the notion of parliamentary sovereignty. In Dicey's words: 'no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament' (xxxvi). As far as I am aware, to date, there is only one litigation (*Factortame*, decided between 1989 and 2000) where the judiciary restrained and eventually disapplied an act of parliament requiring UK-registered fishing vessels to have a majority of British owners (Merchant Shipping Act 1988) by declaring it to be incompatible with EU (Community) law.[65] The principle of parliamentary sovereignty does not extend to all confidence-based regimes. According to Pasquale Pasquino, as paraphrased by Przeworski, one explanation for this discrepancy is rooted in history:

> party governance was a negative term, connoting conflicts … It required a remedy in the form of some neutral, moderating power, such as the Emperor in the 1825 Brazilian Constitution or the President in the Weimar Constitution … And when this

[63] *Benazir Bhutto v President of Pakistan PLD 1998* (PLD 1998 SC 388).
[64] Tariq Ahmad, 'Pakistan: Supreme Court Issues Detailed Judgment on Dismissal of Resolution of No-Confidence Motion Against Then-PM Imran Khan' *The Library of Congress* (7 August 2022); PLD 2022 SC 139; PLD 2022 SC 144; PLD 2022 SC 217; PLD 2022 SC 218.
[65] Albert V Dicey, *Introduction to the Study of Law of the Constitution* (8th edn, The Macmillan Company 1915).

> solution failed, constitutional review by independent courts emerged to constrain party government.[66]

Prompted by the introduction of an ouster clause seeking to preclude the judicial review of assembly dismissal in the United Kingdom, the purpose of this article was to explore some implications of restricting courts' jurisdiction over actions carried out by the executive in the realm of parliamentary dissolution beyond the Westminster systems. To this end, I assessed six cases of judicial challenges to an early renewal of the national legislature solicited by petitions or complaints submitted by legislators or members of the public or initiated *suo moto*, as in the case of Pakistan.

We do not yet know the extent to which the non-justiciability provision will be able to shield incumbents seeking to dissolve the British parliament through the exercise of the royal prerogative from scrutiny on the part of the judiciary, as the mechanism has not been interpreted or tested. Comparatively, three broad trends emerge. First, the ability of the judicial branch to intervene in disputes involving a parliamentary dissolution is sometimes implied rather than spelt out in legal statutes, as the relevant provisions are often vague, generic or completely silent on the specific matter of dissolution. This underscores the profound impact unwritten constitutional norms and democratic tradition can have on the political process. Second, by being able to inquire into the legality of early assembly renewals, courts can monitor, prevent or reverse the circumvention or breach of constitutional boundaries and, ultimately, executive overreach, which is implied if the right of legislators to convene and their ability to carry out the functions for which they were elected is unlawfully curtailed. Third, and perhaps less conspicuous, judges can play an active role in monitoring the chains of delegation and accountability that are embedded in parliamentarism. As the Nepalese and Pakistani cases suggest, the judicial branch can ensure that the assembly's prerogative to subject governments to the test of confidence when required by the Constitution or when it so desires remains unviolated. A review of the history of judicial intervention in earlier cases of assembly dismissals in Pakistan, however, highlights how this process is not always consistent and unbiased.

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[66] Adam Przeworski, 'Self-Government in Our Times' (2009) 12 Annual Rev of Pol Sci 71.

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