

**INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES**
[ISSN 2581-5369]

Volume 9 | Issue 4

2026

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Constitutional Limits on the Governor's Discretion in Government Formation in a Hung Legislative Assembly

SADHASIVAM ALAGAPPAN* AND K. RAJESH KUMAR**

ABSTRACT

The formation of a government in a hung Legislative Assembly presents one of the most delicate constitutional situations in India's parliamentary system. Where no political party secures a clear majority, the Governor is required to determine whom to invite to form the government before the question of legislative confidence can ultimately be settled on the floor of the House. This exercise raises a fundamental constitutional question: whether the Governor's discretionary power under Articles 163 and 164 of the Constitution is an unfettered political discretion or a structured constitutional power subject to identifiable limitations. This paper critically examines the constitutional limits governing the Governor's discretion in such circumstances by analysing the constitutional text, parliamentary conventions, the recommendations of the Sarkaria and Punchhi Commissions, and the evolving jurisprudence of the Supreme Court of India. Particular attention is given to Shamsher Singh v. State of Punjab, S.R. Bommai v. Union of India, Rameshwar Prasad v. Union of India, Nabam Rebia v. Deputy Speaker, Shivraj Singh Chouhan v. Speaker, Madhya Pradesh Legislative Assembly and Subhash Desai v. Principal Secretary, Governor of Maharashtra. The study argues that although the Constitution recognises a limited area of gubernatorial discretion in the absence of a clear legislative majority, such discretion cannot be equated with personal or arbitrary choice. It is constrained by constitutional morality, democratic legitimacy, constitutional conventions, relevant judicial precedents and the requirement that competing claims to majority support ultimately be tested on the floor of the Legislative Assembly. The paper further examines the extent to which judicial review can operate as a constitutional safeguard against improper gubernatorial action. It concludes that the Governor's role in a hung Assembly is one of constitutional judgment rather than political preference, and that the exercise of discretion must remain directed towards facilitating the formation of a government capable of commanding the confidence of the elected House.

Keywords: Constitution, Governor, Discretion, Hung Legislative Assembly

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I. INTRODUCTION

The Governor occupies a distinctive position within the constitutional structure of an Indian State. Although appointed by the President and formally vested with the executive power of the State under Article 154 of the Constitution, the Governor functions within a parliamentary system in which the elected Council of Ministers ordinarily exercises political and executive authority. Article 163 establishes a Council of Ministers to aid and advise the Governor, while recognising a limited constitutional space in which the Governor may act in his discretion. Article 164 further provides that the Chief Minister shall be appointed by the Governor and that the other Ministers shall be appointed by the Governor on the advice of the Chief Minister. The constitutional position therefore requires a careful distinction between the Governor as a constitutional head and the Governor as an authority entrusted with limited discretionary responsibilities.

The constitutional difficulty becomes particularly pronounced when a Legislative Assembly election produces a hung Assembly, that is, a situation in which no political party or pre-poll alliance obtains an unequivocal majority sufficient to form the government. In such circumstances the Governor is required to make an initial constitutional assessment concerning the person or political formation most likely to command the confidence of the Legislative Assembly. That assessment may involve competing claims by the single largest party, a pre-poll alliance, a post-poll coalition, or a political group supported by independent members and by legislators belonging to other parties. The decision is consequently capable of affecting the formation and stability of the elected government and, if exercised improperly, may raise serious questions concerning democratic legitimacy and constitutional neutrality.

Against this background, the present study examines whether the Governor's discretionary power to invite a government in a hung Legislative Assembly is constitutionally limited and, if so, the nature and extent of those limitations. The study does not proceed on the assumption that the Governor possesses either absolute discretion or no discretion at all. It examines instead whether the discretion is better understood as a form of structured constitutional discretion governed by the constitutional text, democratic legitimacy, parliamentary conventions, the recommendations of constitutional commissions, judicial precedent and the requirement that the question of legislative majority ultimately be determined on the floor of the House.

The significance of this inquiry lies in the constitutional consequences of the Governor's initial decision. An invitation to form the government is not merely a ceremonial act, because the person invited may obtain the opportunity to exercise executive power and to influence the

subsequent functioning of the Legislature. At the same time, the Governor cannot conclusively determine legislative majority merely on the basis of personal satisfaction regarding the competing claims of political parties. The constitutional design therefore requires a balance between allowing the Governor sufficient discretion to respond to an uncertain electoral mandate and preventing that discretion from becoming arbitrary, partisan or inconsistent with the democratic character of the parliamentary system.

This paper argues that the Governor's discretion in a hung Legislative Assembly is constitutionally recognised but substantially structured. The Governor is required to exercise judgment where the electoral outcome does not produce a clear majority, but that judgment must be directed towards identifying the political formation most likely to command the confidence of the elected House rather than towards selecting a politically preferred government. Constitutional conventions and commission recommendations may guide the exercise of that discretion, while judicial precedent supplies enforceable constitutional principles against arbitrary or mala fide action. The ultimate democratic legitimacy of the government, however, rests upon its ability to demonstrate majority support on the floor of the Legislative Assembly.

The study therefore analyses the constitutional limits of gubernatorial discretion through a doctrinal examination of the constitutional provisions, the landmark decisions of the Supreme Court, constitutional conventions and the recommendations of the Sarkaria and Punchhi Commissions. It further evaluates the role of judicial review in maintaining constitutional discipline while respecting the separation of constitutional functions. By bringing these strands together, the paper seeks to determine whether the existing constitutional framework provides sufficient safeguards against arbitrary gubernatorial discretion, and whether clearer conventions or institutional guidelines are necessary to ensure that government formation following a fractured electoral mandate remains consistent with constitutional morality, democratic legitimacy and the parliamentary character of the Indian Constitution.

II. STATEMENT OF THE RESEARCH PROBLEM

The Constitution of India establishes a parliamentary form of government in the States, in which the Governor functions as the constitutional head while the elected Council of Ministers bears political responsibility to the Legislative Assembly. Article 163 provides the general framework governing the relationship between the Governor and the Council of Ministers, while Article 164 places the appointment of the Chief Minister within the constitutional functions of the Governor. Although these provisions recognise a limited sphere of gubernatorial discretion, the

Constitution does not prescribe an exhaustive formula governing the manner in which the Governor must identify the person or political formation to be invited to form the government when no party commands an absolute majority in the Legislative Assembly. This constitutional silence creates a significant area of institutional uncertainty.¹

The problem becomes particularly sensitive in a hung Legislative Assembly because the Governor may be required to choose between competing claims to form the government. Such claims may arise from a single largest party, a pre-poll alliance, a post-poll coalition, or a political formation supported by independent members and by legislators from other parties. The Governor must therefore assess which claimant is most likely to secure the confidence of the House. The difficulty lies in ensuring that this assessment remains a constitutional determination rather than an exercise of political preference. The absence of a detailed constitutional sequence has historically produced controversies concerning the timing and manner of invitations to form governments in different States.²

The constitutional problem is further complicated by the fact that the Governor's initial decision has significant consequences but does not itself establish legislative majority. A person invited to form the government must ultimately demonstrate that the ministry enjoys the confidence of the elected House. The jurisprudence of the Supreme Court has consequently developed the floor-test principle as an important democratic safeguard. In *S.R. Bommai v. Union of India*, the Court held that questions concerning majority should ordinarily be determined on the floor of the Legislature rather than through subjective assessments made outside the House. Subsequent decisions, including *Shivraj Singh Chouhan v. Speaker, Madhya Pradesh Legislative Assembly*, have reinforced the constitutional importance of establishing majority support through a floor test.³

The principal research problem, therefore, is not whether the Governor possesses any discretion at all, but the extent to which that discretion is constitutionally structured and legally limited. The existence of discretion under Article 163 does not by itself determine its permissible boundaries. Those boundaries must be understood by examining the constitutional text together with the principles of parliamentary government, constitutional conventions, the recommendations of the Sarkaria and Punchhi Commissions, and the judicial interpretation of gubernatorial powers. The absence of a constitutionally codified order of preference makes this

¹ INDIA CONST. arts. 163, 164; *Shamsher Singh v. State of Punjab*, (1974) 2 SCC 831 (India).

² SARKARIA COMMISSION ON CENTRE-STATE RELATIONS, REPORT ch. IV (1988).

³ *S.R. Bommai v. Union of India*, (1994) 3 SCC 1 (India). *Shivraj Singh Chouhan v. Speaker, Madhya Pradesh Legislative Assembly*, 2020 SCC OnLine SC 363 (India).

inquiry particularly important, because conventions and judicial principles may operate as safeguards against arbitrary or partisan government formation.⁴

The problem also raises an important question concerning judicial review. Decisions relating to the formation of a government necessarily involve political circumstances and assessments of legislative support, and courts have traditionally exercised caution in entering areas involving political questions. Nevertheless, constitutional discretion cannot be completely insulated from judicial scrutiny merely because it arises in a politically sensitive context. The decisions of the Supreme Court concerning gubernatorial action demonstrate that constitutional courts may examine whether the exercise of power has a legitimate constitutional basis and whether the constitutional process has been distorted.⁵

Accordingly, this research investigates whether the Governor's discretion in a hung Legislative Assembly should be understood as a constitutionally limited and structured discretion rather than an unfettered personal power. It examines the extent to which constitutional morality, democratic legitimacy, constitutional conventions, commission recommendations, judicial precedent and the floor-test requirement collectively constrain the Governor's decision. The study further considers whether the existing constitutional framework provides adequate safeguards against arbitrary government formation and whether clearer constitutional conventions or institutional guidelines are necessary to strengthen the neutrality and legitimacy of the gubernatorial office.

III. RESEARCH QUESTIONS

The present study is guided by the following research questions.

Whether the Governor's power to invite a government in a hung Legislative Assembly constitutes unfettered discretion or structured constitutional discretion.

What constitutional principles, conventions and judicial precedents govern the exercise of that discretion.

What is the constitutional significance of the Sarkaria and Punchhi Commission recommendations in regulating government formation.

To what extent the floor-test principle and judicial review constrain gubernatorial discretion.

⁴ SARKARIA COMMISSION REPORT, *supra* note 2; PUNCHHI COMMISSION ON CENTRE-STATE RELATIONS, REPORT (2010).

⁵ *Rameshwar Prasad v. Union of India*, (2006) 2 SCC 1 (India). *Nabam Rebia v. Deputy Speaker, Arunachal Pradesh Legislative Assembly*, (2016) 8 SCC 1 (India).

Whether the existing framework requires a structured constitutional standard to ensure neutrality, transparency and democratic legitimacy.

IV. OBJECTIVES OF THE STUDY

The primary objective of this research is to examine critically the constitutional limits governing the Governor's discretionary power to invite a government in a hung Legislative Assembly. The study seeks to determine whether such discretion is constitutionally structured and subject to identifiable legal and democratic constraints.

The specific objectives of the study are as follows.

To examine the constitutional framework governing the Governor's discretionary powers under Articles 163 and 164 of the Constitution of India.

To analyse the constitutional position of the Governor in relation to the parliamentary form of government and the principle of collective responsibility to the Legislative Assembly.

To examine the constitutional difficulties arising when no political party or alliance obtains a clear majority in a Legislative Assembly.

To analyse the recommendations of the Sarkaria Commission and the Punchhi Commission concerning the exercise of gubernatorial discretion and government formation.

To examine critically the evolution of judicial principles governing gubernatorial discretion through the landmark decisions of the Supreme Court of India.

To examine the constitutional significance of the floor test as the principal mechanism for determining legislative majority.

To analyse the relevance of constitutional morality and constitutional conventions in regulating the Governor's conduct where there are competing claims to form the government.

To examine the scope and limitations of judicial review over the Governor's exercise of discretion in matters concerning government formation.

To identify the constitutional safeguards necessary to prevent an arbitrary, partisan or politically motivated exercise of gubernatorial discretion.

To determine whether the existing constitutional framework sufficiently balances the Governor's need for discretion with the democratic requirement that the government ultimately command the confidence of the elected Legislative Assembly.

V. RESEARCH METHODOLOGY

A. Research design

The present study adopts a doctrinal legal research methodology to examine the constitutional limits governing the Governor's discretionary power to invite a government in a hung Legislative Assembly. Doctrinal research is appropriate for the present inquiry because the principal objective is to identify, interpret and analyse critically the constitutional provisions, judicial precedents, constitutional conventions and authoritative governmental reports governing the exercise of gubernatorial discretion. The study does not employ empirical surveys, interviews or statistical methods; it analyses existing legal rules and constitutional principles in order to determine the scope and limitations of the Governor's discretion.

B. Nature and approach of the study

The research follows a qualitative and analytical approach. The constitutional provisions relating to the Governor, particularly Articles 154, 163 and 164,⁶ are examined in conjunction with the broader principles of parliamentary government, collective responsibility and democratic legitimacy. Judicial decisions are analysed not merely for their outcomes but also for the constitutional principles developed by the Supreme Court concerning gubernatorial discretion, legislative majority and judicial review. The study further adopts a critical approach by comparing the constitutional text, judicial precedent and established recommendations concerning government formation in a hung Assembly.

C. Sources and materials

The research relies upon both primary and secondary legal sources. Primary sources include the Constitution of India, the judgments of the Supreme Court of India, the reports of constitutional commissions and other authoritative constitutional materials. Particular reliance is placed upon the judgments in *Shamsher Singh v. State of Punjab*,⁷ *S.R. Bommai v. Union of India*, *Rameshwar Prasad v. Union of India*, *Nabam Rebia v. Deputy Speaker, Arunachal Pradesh Legislative Assembly*, *Shivraj Singh Chouhan v. Speaker, Madhya Pradesh Legislative Assembly* and *Subhash Desai v. Principal Secretary, Governor of Maharashtra*.⁸ The report of the Sarkaria Commission on Centre-State Relations and the report of the Punchhi Commission

⁶ INDIA CONST. arts. 154, 163, 164.

⁷ *Shamsher Singh*, *supra* note 1; *Nabam Rebia*, *supra* note 5.

⁸ *S.R. Bommai*, *supra* note 3; *Rameshwar Prasad*, *supra* note 5; *Shivraj Singh Chouhan*, *supra* note 3; *Subhash Desai v. Principal Secretary, Governor of Maharashtra*, 2023 SCC OnLine SC 607 (India).

on Centre-State Relations⁹ are also examined as significant sources concerning the exercise of gubernatorial discretion.

Secondary sources include constitutional law textbooks, scholarly articles, academic commentaries, legal journals and other relevant literature concerning the Governor's constitutional position, parliamentary government, constitutional conventions, constitutional morality and judicial review. Wherever possible, primary legal materials and authoritative institutional sources are preferred over secondary commentary.

D. Method of legal analysis

The study employs doctrinal analysis by identifying the relevant constitutional provisions and examining how their meaning has developed through judicial interpretation. The relevant judgments of the Supreme Court are analysed chronologically and thematically in order to trace the evolution of the principles governing gubernatorial discretion. The research then compares those judicial principles with the recommendations of the Sarkaria and Punchhi Commissions and with constitutional conventions concerning government formation. Particular attention is given to the relationship between the Governor's initial assessment of a claimant's ability to form a government and the subsequent requirement that legislative majority be demonstrated on the floor of the House.

E. Scope of the study

The study is primarily concerned with the constitutional position in India. Limited comparative reference is made to selected Westminster jurisdictions, particularly the United Kingdom, Canada and Australia, solely to illuminate the role of constitutional conventions, responsible government and legislative confidence in the exercise of analogous constitutional functions.

F. Limitations of the study

The principal limitation of the study arises from the absence of a single, constitutionally codified procedure prescribing the precise order in which every possible claimant must be invited to form a government in a hung Legislative Assembly. Consequently, the analysis necessarily relies upon a combination of constitutional provisions, judicial precedents, constitutional conventions and the recommendations of expert commissions. While these sources provide substantial guidance, they do not eliminate every factual and constitutional difficulty that may arise in individual cases.

⁹ SARKARIA COMMISSION REPORT, *supra* note 2; PUNCHHI COMMISSION REPORT, *supra* note 4.

The study is also limited to doctrinal analysis and therefore does not attempt to measure empirically the political consequences of gubernatorial decisions, or the perceptions of political parties, legislators or citizens regarding the exercise of gubernatorial discretion. Its conclusions are consequently based upon the interpretation of authoritative legal materials and upon the principles emerging from constitutional practice and judicial decisions.

VI. CONCEPTUAL AND CONSTITUTIONAL FRAMEWORK

A. Constitutional position of the Governor

The Governor is the constitutional head of a State and occupies a position that combines formal executive authority with certain constitutionally recognised discretionary responsibilities. Article 154 vests the executive power of the State in the Governor, while Article 163 establishes a Council of Ministers with the Chief Minister at its head to aid and advise the Governor, except in so far as the Governor is by or under the Constitution required to exercise his functions in his discretion. Article 164 further provides that the Chief Minister is appointed by the Governor and that the other Ministers are appointed by the Governor on the advice of the Chief Minister. These provisions must be understood within the broader framework of India's parliamentary form of government, in which political executive authority is ordinarily exercised by the elected Council of Ministers rather than by the constitutional head acting independently.¹⁰

The decision of the Supreme Court in *Shamsher Singh v. State of Punjab* is the foundational authority on this constitutional position. A seven-Judge Constitution Bench held that the President and the Governor are constitutional or formal heads and ordinarily exercise their powers in accordance with the aid and advice of the Council of Ministers. The judgment nevertheless recognised that the Constitution may, expressly or by necessary implication, confer a limited area of discretion upon the Governor. The significance of *Shamsher Singh* lies in establishing that the existence of a gubernatorial power does not by itself imply an unrestricted personal discretion. The source and extent of any independent discretion must be traced to the constitutional scheme.¹¹

The distinction between constitutional authority and personal discretion is particularly significant in situations involving government formation. The Governor is not expected to act as a political decision-maker selecting a government according to personal preference. Where the Constitution leaves a matter to gubernatorial judgment, that judgment must nevertheless be exercised for the constitutional purpose for which the power exists. The Governor's

¹⁰ INDIA CONST. arts. 154, 163(1), 164(1).

¹¹ *Shamsher Singh*, *supra* note 1.

constitutional position therefore requires neutrality, institutional restraint and fidelity to the democratic character of the Legislative Assembly.¹²

B. Article 163 and the scope of gubernatorial discretion

Article 163 is central to determining the legal character of the Governor's discretion. Article 163(1) establishes the general rule that there shall be a Council of Ministers to aid and advise the Governor, while the exception recognises those circumstances in which the Constitution requires the Governor to act in his discretion. Article 163(2) provides that if any question arises whether a matter is one in respect of which the Governor is required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion. The provision therefore creates a distinction between the general rule of ministerial advice and constitutionally recognised exceptions.¹³

The Supreme Court has repeatedly cautioned against treating Article 163 as a general source of independent gubernatorial authority. In *Nabam Rebia v. Deputy Speaker, Arunachal Pradesh Legislative Assembly*, the Constitution Bench examined the scope of Article 163 and held that the Governor's discretionary field is confined to situations expressly specified by or under the Constitution or arising by necessary implication. In reaching that conclusion the Court examined the Constituent Assembly Debates, constitutional practice, and the reports of the Sarkaria and Punchhi Commissions concerning the limited nature of gubernatorial discretion. The Court's analysis reinforces the principle that the Governor cannot claim discretion merely because a matter has political significance, or because the Governor considers independent intervention desirable.¹⁴

The constitutional significance of Article 163 is consequently twofold. First, it establishes ministerial advice as the ordinary rule governing gubernatorial action. Secondly, it recognises that certain constitutional situations may require the Governor to exercise independent judgment. The proper interpretation of the provision therefore requires a distinction between discretion expressly conferred by the Constitution, discretion arising by necessary implication from the constitutional scheme, and personal choice unsupported by constitutional authority. Only the first two categories can legitimately constitute constitutional discretion.¹⁵

¹² *Shamsher Singh*, *supra* note 1; *Rameshwar Prasad*, *supra* note 5.

¹³ INDIA CONST. arts. 163(1), 163(2).

¹⁴ *Nabam Rebia*, *supra* note 5.

¹⁵ *Nabam Rebia*, *supra* note 5.

More recent constitutional jurisprudence has continued along the same lines. In *State of Punjab v. Principal Secretary to the Governor of Punjab*, the Supreme Court observed that the Governor, as an unelected head of the State, is entrusted with certain constitutional powers but cannot use them to thwart the normal course of law-making by the State Legislature. The decision reinforces the understanding that whatever discretion exists operates within the constitutional structure and cannot be converted into an unrestricted personal power.¹⁶

C. Article 164 and appointment of the Chief Minister

Article 164 assumes particular importance when a Legislative Assembly election produces no clear majority. Article 164(1) provides that the Chief Minister shall be appointed by the Governor, while the other Ministers are appointed by the Governor on the advice of the Chief Minister. Although the provision expressly assigns the appointment of the Chief Minister to the Governor, it does not prescribe a detailed procedure for determining which claimant must be appointed where several political formations assert the ability to form the government.¹⁷

The constitutional responsibility arising under Article 164 must therefore be interpreted in conjunction with the fundamental principle of parliamentary government, namely that the Council of Ministers must enjoy the confidence of the Legislative Assembly. The Governor's task in a hung Assembly is consequently not to determine finally which political formation possesses a legislative majority, but to identify the claimant who, on the available constitutional material, is most likely to command such confidence and should therefore be given an opportunity to demonstrate it in the House.¹⁸

This distinction between an invitation to form a government and proof of legislative majority is critical. The Governor's decision operates at the initial stage of government formation, whereas the floor of the Legislative Assembly provides the democratic mechanism through which the government's actual majority can be tested. The Governor therefore exercises an important but preliminary constitutional function; the final determination of legislative confidence belongs to the elected House.¹⁹

D. Parliamentary government and democratic legitimacy

The Governor's discretionary power cannot be examined independently of the parliamentary system established by the Constitution. In a parliamentary form of government the executive derives democratic legitimacy from its ability to command the confidence of the elected

¹⁶ *State of Punjab v. Principal Secretary to the Governor of Punjab*, 2023 INSC 1017 (India).

¹⁷ INDIA CONST. art. 164(1).

¹⁸ *Rameshwar Prasad*, *supra* note 5; SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV, para. 4.11.04.

¹⁹ *S.R. Bommai*, *supra* note 3; *Shivraj Singh Chouhan*, *supra* note 3.

legislative chamber. The constitutional head is therefore expected to facilitate the formation and continuation of a government that enjoys legislative confidence rather than to substitute personal judgment for the decision of the elected House.

The principle was strongly reinforced by the Supreme Court in *S.R. Bommai v. Union of India*. The Court treated the floor of the House as the constitutionally appropriate forum for determining legislative majority and rejected the proposition that such questions should ordinarily be resolved conclusively on the basis of the Governor's subjective assessment. The floor-test principle is particularly relevant to a hung Assembly because competing claims to government formation can be tested objectively through legislative voting rather than through competing assertions made before the Governor.²⁰

The democratic significance of the floor test was subsequently reaffirmed in *Shivraj Singh Chouhan v. Speaker, Madhya Pradesh Legislative Assembly*, where the Supreme Court recognised the constitutional importance of determining whether the government continued to enjoy majority support in the Legislative Assembly. The Court's approach demonstrates that the Governor's constitutional discretion and the Legislature's democratic authority operate in complementary stages: the Governor may facilitate the formation of a government, but the Assembly determines whether that government possesses the confidence necessary to remain in office.²¹

E. Meaning and constitutional significance of a hung Legislative Assembly

A hung Legislative Assembly arises where the electoral outcome does not result in any single political party obtaining the number of seats necessary to command an absolute majority in the House. The situation may occur where the largest party falls short of the majority mark, where competing alliances obtain comparable strength, or where the eventual formation of a government depends upon support from parties, independent members or legislators outside the claimant's original political formation.

A hung Assembly does not itself create a constitutional vacuum. The Governor must attempt to facilitate the formation of a government capable of obtaining the confidence of the House. The difficulty lies in determining which claimant should receive the first opportunity to demonstrate such support. This is precisely the circumstance in which constitutional conventions and established principles concerning the order of preference become significant. The Sarkaria

²⁰ *S.R. Bommai*, *supra* note 3.

²¹ *Shivraj Singh Chouhan*, *supra* note 3.

Commission examined this situation and recommended an order of preference intended to guide the Governor where no party secures a clear majority.²²

The Supreme Court has subsequently engaged with these recommendations. In *Rameshwar Prasad v. Union of India*, the Court considered the Governor's role in the context of a fractured electoral mandate and set out the Sarkaria Commission's recommendations concerning government formation. The Court's treatment of those recommendations demonstrates that, although they do not possess the force of constitutional provisions, they have considerable constitutional relevance in identifying appropriate standards for the exercise of gubernatorial judgment.²³

The constitutional significance of a hung Assembly therefore lies in the interaction between discretion and democratic verification. The Governor requires sufficient discretion to respond to an uncertain electoral mandate, but that discretion must be exercised according to constitutional principles that minimise arbitrariness and maximise the possibility of establishing a government supported by the elected House. The constitutional framework consequently favours a process in which the Governor's initial judgment is followed, wherever necessary, by a prompt and genuine floor test.

F. Constitutional morality as a limiting principle

Constitutional morality provides an additional normative framework within which gubernatorial discretion must operate. It requires constitutional authorities to act consistently with the values, institutional arrangements and democratic purposes embodied in the Constitution, rather than merely relying upon the formal existence of constitutional power. In the context of government formation, constitutional morality requires the Governor to exercise discretion with institutional neutrality and to respect the representative character of the Legislative Assembly.

The concept is particularly relevant where the constitutional text leaves room for judgment. A power that is discretionary in form cannot be exercised according to partisan considerations, personal political preference or an objective inconsistent with parliamentary democracy. The Governor's discretion must remain directed towards facilitating constitutional government and towards ensuring that the person invited to form the government has a credible opportunity to demonstrate majority support in the House.²⁴

²² SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV, para. 4.11.04.

²³ *Rameshwar Prasad*, *supra* note 5.

²⁴ *S.R. Bommai*, *supra* note 3; *Nabam Rebia*, *supra* note 5.

Constitutional morality accordingly does not eliminate gubernatorial discretion; it provides a normative discipline within which that discretion must be exercised. It reinforces the distinction between legitimate constitutional judgment and arbitrary political choice, and thereby contributes to the broader constitutional limitation examined in this study.

VII. GOVERNMENT FORMATION IN A HUNG LEGISLATIVE ASSEMBLY

A. Constitutional position following an inconclusive electoral mandate

The Constitution of India does not expressly prescribe a detailed procedure for determining which political party or coalition must be invited to form the government where the electoral outcome does not produce a clear majority in the Legislative Assembly. Article 164(1) provides that the Chief Minister shall be appointed by the Governor, but it does not establish an exhaustive hierarchy among competing claimants in a hung Assembly. Consequently, the Governor is required to exercise constitutional judgment in determining which claimant has the greatest likelihood of securing the confidence of the House. This discretion, however, must be understood in the context of parliamentary government, under which the legitimacy of the executive ultimately depends upon the confidence of the elected Legislative Assembly.²⁵

A hung Assembly should not be regarded as conferring upon the Governor an unrestricted authority to choose a government. The constitutional purpose of the Governor's intervention is to facilitate the formation of a government capable of commanding legislative confidence, not to determine the political composition of the government according to personal preference. The Sarkaria Commission expressly recognised this distinction, stating that the Governor's task is to see that a government is formed and not to try to form a government which will pursue policies that the Governor approves.²⁶ This principle provides an important constitutional limitation upon the exercise of discretion because it separates the Governor's institutional responsibility from partisan political considerations.

The problem arises because the numerical composition of a hung Assembly may permit several competing claims. The single largest party may lack a majority but may claim support from independent members or other parties; a pre-poll alliance may have collectively secured a significant number of seats; or parties that contested separately may enter into a post-election coalition and jointly claim majority support. The Governor must therefore assess competing claims without converting the Raj Bhavan into a forum for determining the political legitimacy of competing alliances. The constitutional question is whether the claimant has a credible basis

²⁵ INDIA CONST. art. 164(1); *Shamsher Singh*, *supra* note 1.

²⁶ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV.

for demonstrating majority support in the House, rather than whether the Governor approves of the political arrangement through which such support has been assembled.²⁷

B. The Sarkaria Commission and the order of preference

The Sarkaria Commission on Centre-State Relations examined in detail the Governor's role in government formation where no political party obtains an absolute majority. The Commission recommended that the Governor should be guided by the principle that the party or combination of parties commanding the widest support in the Legislative Assembly should be called upon to form the government. It further stated that the Governor's task is to see that a government is formed and not to try to form a government which will pursue policies that the Governor approves.²⁸

Where no party possesses a clear majority, the Commission recommended that the Governor should consider the competing claimants in a specified order of preference. First, preference should be given to an alliance of parties formed prior to the elections. Secondly, the Governor should consider the largest single party staking a claim to form the government with the support of others, including independents. Thirdly, preference should be given to a post-electoral coalition of parties with all the partners in the coalition joining the government. Fourthly, a post-electoral alliance of parties in which some parties form the government while the remaining parties, including independents, support the government from outside may be considered.²⁹

The significance of this order lies in the distinction between an electoral mandate obtained before voting and an arrangement created after the election. A pre-poll alliance presents itself to the electorate as a political combination before the mandate is given, and therefore has a stronger claim to represent a collective electoral choice than an alliance assembled only after the results are known. At the same time, the Sarkaria framework does not treat the single largest party as automatically entitled to form the government. Its position in the order of preference is conditional upon its ability to stake a credible claim with the support necessary to demonstrate legislative confidence.³⁰

The Commission's recommendations therefore seek to balance two competing considerations: respect for the electoral mandate and the practical requirement of forming a government capable of obtaining majority support. The Governor is not expected to apply mechanically the number of seats won by an individual party without considering alliances and demonstrable support.

²⁷ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV; Rameshwar Prasad, *supra* note 5.

²⁸ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV.

²⁹ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV, para. 4.11.04.

³⁰ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV, para. 4.11.04.

Conversely, the Governor should not treat post-election political negotiations as inherently illegitimate merely because they were concluded after the election. The relevant consideration is whether the resulting political formation provides a credible basis for stable government and can establish its majority in the House.³¹

C. Pre-poll alliances and the electoral mandate

A pre-poll alliance occupies a distinctive constitutional position because its constituent parties enter the election with an arrangement known to the electorate. Where such an alliance secures a majority, treating its constituent parties as separate entities for the purposes of government formation would risk disregarding the electoral choice expressed through the alliance. The Sarkaria Commission therefore placed a pre-election alliance commanding majority support first in the recommended order of preference.³²

The principle does not, however, mean that the Governor is required to disregard subsequent political developments. The relevant inquiry remains whether the alliance continues to command the confidence necessary to form the government. The Governor's constitutional role is therefore directed towards identifying the claimant most capable of obtaining legislative confidence rather than merely reproducing the electoral arithmetic in isolation. Once the government is formed, the decisive constitutional test remains the floor of the Legislative Assembly.³³

D. The single largest party

The single largest party occupies an important but not an absolute position in a hung Assembly. Where no pre-poll alliance commands a majority, the Sarkaria Commission placed the largest single party, provided it stakes a claim with the support of others, second in the recommended order of preference. This is significant because it rejects the proposition that the single largest party automatically possesses an inherent constitutional right to be invited first merely by virtue of having won more seats than any other individual party. Its claim must be assessed in relation to its capacity to obtain legislative confidence.³⁴

The distinction is constitutionally important. The largest party may have the greatest number of seats while still falling substantially short of a majority. Conversely, another political formation may comprise several parties and possess greater demonstrable support in the House. The Governor's responsibility is therefore not simply to identify the party with the highest individual

³¹ *Rameshwar Prasad*, *supra* note 5.

³² SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV, para. 4.11.04.

³³ *S.R. Bommai*, *supra* note 3; *Shivraj Singh Chouhan*, *supra* note 3.

³⁴ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV, para. 4.11.04.

seat count, but to determine which claimant has the most credible constitutional basis for securing the confidence of the Assembly. This approach is consistent with the broader parliamentary principle that executive legitimacy derives from legislative confidence.³⁵

E. Post-electoral coalitions

A post-electoral coalition presents a more complex constitutional situation because its members did not necessarily seek the electoral mandate as a unified political formation. Nevertheless, the formation of a government through post-election cooperation cannot automatically be regarded as constitutionally illegitimate. The Sarkaria Commission expressly contemplated a post-electoral coalition in which all participating parties join the government and placed it after the single largest party staking a claim with support from others.³⁶

The constitutional relevance of a post-electoral coalition depends upon the credibility of the majority it claims. The Governor is not required to determine whether the political agreement is desirable, or whether the parties involved ought to have formed an alliance before the election. Rather, the Governor must assess whether the coalition provides a reasonable basis for forming a government and whether its claim can be verified through the Legislative Assembly. The floor test therefore serves as an important institutional mechanism for transforming a political claim of majority into constitutionally verified legislative confidence.³⁷

F. Outside support and the problem of stability

The fourth category identified by the Sarkaria Commission concerns a post-electoral arrangement in which some parties form the government while others, including independent members, provide support from outside. Such an arrangement is constitutionally possible, but it may involve greater uncertainty regarding the stability of the government because external supporters are not part of the Council of Ministers. The Governor may therefore need to consider the credibility and durability of the support claimed by the prospective government.³⁸

The question of stability, however, should not be converted into an independent political assessment by the Governor. A Governor cannot reasonably be expected to predict every future change in political alliances, or to determine whether legislators will remain loyal to a particular coalition. The constitutional system provides a mechanism for resolving such uncertainty: the government must demonstrate its majority on the floor of the House. Judicial insistence upon

³⁵ *S.R. Bommai*, *supra* note 3.

³⁶ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV, para. 4.11.04.

³⁷ *Rameshwar Prasad*, *supra* note 5; *S.R. Bommai*, *supra* note 3.

³⁸ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV, para. 4.11.04.

the floor test consequently limits the scope for subjective gubernatorial assessment of competing political claims.³⁹

G. *Rameshwar Prasad* and judicial engagement with the Sarkaria framework

The decision of the Supreme Court in *Rameshwar Prasad v. Union of India* is particularly significant in understanding the constitutional status of the Sarkaria Commission's recommendations. The case arose from the dissolution of the Bihar Legislative Assembly following an election that produced a fractured mandate. The Governor expressed apprehension concerning attempts to form a government through post-election political realignment, and the Assembly was dissolved by a proclamation dated 23 May 2005 before a government could be formed. A five-Judge Bench held the dissolution unconstitutional, although it declined to restore the dissolved Assembly because of the changed factual circumstances.⁴⁰

The importance of *Rameshwar Prasad* extends beyond the immediate facts of Bihar. The judgment set out, and treated as relevant, the Sarkaria Commission's recommendations concerning the order in which the Governor should consider competing claimants to form a government. It should be noted, however, that the Court did not hold that order of preference to be a binding constitutional rule. The proposition that the Sarkaria order of preference was "approved" in *Rameshwar Prasad* was advanced as a submission of counsel in *Subhash Desai v. Principal Secretary, Governor of Maharashtra*, and is recorded in that judgment as an argument rather than as a holding.⁴¹

The decision is also significant because it demonstrates that the Governor cannot presume that a post-election alliance is constitutionally illegitimate merely because it was formed after the electorate delivered a fractured mandate. Political parties are entitled to negotiate and realign within the constitutional framework, subject to applicable law. The Governor's role is to facilitate the formation of a government capable of commanding the confidence of the House, not to invalidate political combinations merely because they arise after the election.⁴²

H. The floor test as the constitutional verification mechanism

The order of preference recommended by the Sarkaria Commission cannot be understood as a substitute for the floor test. The Governor's decision to invite a claimant is necessarily based upon the information and circumstances available at the time of government formation. Whether

³⁹ *S.R. Bommai*, *supra* note 3; *Shivraj Singh Chouhan*, *supra* note 3.

⁴⁰ *Rameshwar Prasad*, *supra* note 5.

⁴¹ *Rameshwar Prasad*, *supra* note 5; *Subhash Desai*, *supra* note 8 (recording, at para. 40(f)(iii), the submission of counsel that the Sarkaria order of preference was approved in *Rameshwar Prasad*).

⁴² *Rameshwar Prasad*, *supra* note 5.

that claimant actually commands the confidence of the Assembly is a matter that can ultimately be established only through the legislative process.

The constitutional jurisprudence of the Supreme Court has consistently emphasised the importance of determining legislative majority on the floor of the House. In *S.R. Bommai v. Union of India*, the Court treated the floor of the House as the appropriate constitutional forum for determining whether a ministry enjoyed majority support. The principle was subsequently applied in cases involving gubernatorial directions for floor tests, including *Shivraj Singh Chouhan v. Speaker, Madhya Pradesh Legislative Assembly*.⁴³

The floor test therefore performs two constitutional functions. First, it protects the democratic authority of the elected Legislature by ensuring that the continuation of the executive depends upon legislative confidence. Secondly, it limits the possibility of the Governor's subjective assessment becoming the final determinant of political majority. The Governor may exercise judgment at the stage of inviting a claimant, but the Assembly remains the constitutionally authoritative forum for verifying whether the government actually commands majority support.⁴⁴

I. Constitutional assessment of the order of preference

The Sarkaria framework should not be treated as a rigid substitute for constitutional judgment. Its importance lies in providing principled guidance to the Governor in circumstances where the Constitution itself does not prescribe a detailed sequence. The order of preference creates a presumption in favour of certain categories of claimants while preserving the Governor's responsibility to assess the actual circumstances of the Assembly.

The framework also demonstrates why gubernatorial discretion in a hung Assembly should be described as structured rather than unfettered. The Governor is required to make an assessment, but the assessment is guided by identifiable constitutional considerations: the electoral mandate, the relative strength of competing political formations, the credibility of claimed support, the likelihood of obtaining legislative confidence and the requirement of a floor test. The discretion therefore operates within a constitutional field rather than in a legal vacuum.⁴⁵

The central constitutional limitation is consequently that the Governor must act to facilitate the formation of a government capable of commanding the confidence of the Legislative Assembly. The Governor's discretion cannot legitimately be used to promote a preferred political outcome,

⁴³ *S.R. Bommai*, *supra* note 3; *Shivraj Singh Chouhan*, *supra* note 3.

⁴⁴ *S.R. Bommai*, *supra* note 3.

⁴⁵ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV, para. 4.11.04; *Rameshwar Prasad*, *supra* note 5.

to prevent a constitutionally viable claimant from demonstrating majority support, or to replace the floor of the House with a subjective assessment of political legitimacy. The jurisprudence and the commission recommendations together indicate that the constitutional objective is not merely the formation of a government, but the formation of a government that derives its authority from the confidence of the elected House.⁴⁶

VIII. SARKARIA AND PUNCHHI COMMISSIONS: CONSTITUTIONAL GUIDANCE ON GUBERNATORIAL DISCRETION

A. The need for institutional guidelines

The Constitution establishes the Governor as a constitutional head while recognising limited circumstances in which gubernatorial judgment may be necessary. The constitutional text does not, however, prescribe a comprehensive code governing every situation in which competing political formations seek to establish a government. This is particularly evident in the context of a hung Legislative Assembly, where the Governor may have to choose between competing claimants before the question of majority can be conclusively determined on the floor of the House. The absence of a detailed constitutional formula has therefore made institutional guidelines and constitutional conventions important sources of guidance in regulating gubernatorial discretion.⁴⁷

The Sarkaria Commission and the Punchhi Commission constitute two significant institutional attempts to clarify the relationship between the Governor and the elected State government. Although neither Commission's recommendations possess the force of constitutional law, their significance lies in providing principled standards for the exercise of constitutional powers. The Supreme Court has itself referred to these recommendations when determining the constitutional limits of gubernatorial action.⁴⁸

B. The Sarkaria Commission's approach

The Sarkaria Commission was constituted in 1983 to examine the working of Centre-State relations and to recommend measures for strengthening the constitutional framework governing the Union and the States; it submitted its report in 1988. Its examination of the Governor's office was particularly concerned with reconciling the Governor's position as the constitutional

⁴⁶ *S.R. Bommai*, *supra* note 3; *Rameshwar Prasad*, *supra* note 5; *Shivraj Singh Chouhan*, *supra* note 3.

⁴⁷ INDIA CONST. arts. 163, 164; *Shamsher Singh*, *supra* note 1.

⁴⁸ *Rameshwar Prasad*, *supra* note 5; *Subhash Desai*, *supra* note 8.

head of the State with the possibility that the Governor might be required to exercise discretion in circumstances where political conditions make ordinary ministerial government difficult.⁴⁹

In relation to the appointment of a Chief Minister following an inconclusive electoral result, the Commission adopted the principle that the Governor should call upon the political party or combination of parties commanding the widest support in the Legislative Assembly to form the government. At the same time it expressly cautioned that the Governor's function is to see that a government is formed and not to try to form a government which will pursue policies that the Governor approves. This principle provides an important institutional limitation because it requires the Governor to remain politically neutral while exercising constitutional judgment.⁵⁰

The Commission further recommended a sequential order of preference where no political party obtained an absolute majority. The recommended sequence was: first, an alliance of parties formed prior to the elections; secondly, the largest single party staking a claim to form the government with the support of others, including independents; thirdly, a post-electoral coalition of parties with all the partners in the coalition joining the government; and fourthly, a post-electoral alliance of parties, with some of the parties forming the government and the remaining parties, including independents, supporting the government from outside.⁵¹

The significance of this sequence is that it provides the Governor with an objective framework for approaching competing claims. It does not transform the Governor into a mechanical administrator of electoral arithmetic, because the Governor must still assess the credibility of the claim. Nevertheless, it substantially reduces the scope for arbitrary selection by identifying recognised categories of claimants and establishing a principled order in which they should ordinarily be considered.⁵²

The Sarkaria Commission also emphasised that, where the Governor is required to assess competing claims, the decisive consideration should be the likelihood that the person invited to form the government will command a majority in the Assembly. The Commission thus linked the Governor's initial discretion directly to the constitutional requirement of legislative confidence. The Governor's discretion is consequently instrumental rather than substantive: it exists in order to facilitate the formation of a government capable of obtaining the confidence of the elected House.⁵³

⁴⁹ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV.

⁵⁰ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV.

⁵¹ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV, para. 4.11.04.

⁵² *Rameshwar Prasad*, *supra* note 5.

⁵³ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV; *Rameshwar Prasad*, *supra* note 5.

C. The Punchhi Commission's approach

The Commission on Centre-State Relations chaired by Justice M.M. Punchhi was constituted in 2007 and submitted its report in 2010. It revisited several questions concerning Centre-State relations and the constitutional role of the Governor in the light of developments that had occurred after the Sarkaria Commission. Its examination was significant because the political landscape had become increasingly characterised by coalition governments, regional parties and fragmented electoral mandates, thereby making questions concerning gubernatorial discretion more frequent and constitutionally sensitive.⁵⁴

The Punchhi Commission recognised that the Governor occupies a dual constitutional position: as the constitutional head of the State and as an appointee of the Union. This duality creates a potential tension between institutional neutrality within the State and the Governor's constitutional relationship with the Union. The Commission therefore considered it necessary to provide clearer principles governing the exercise of discretionary powers, so that gubernatorial action would remain consistent with the constitutional structure.⁵⁵

The Punchhi Commission's approach was particularly significant in recognising the need for clearer guidelines concerning the occasions on which the Governor may exercise discretion. It recorded that in cases of narrow majorities there are no uniformly accepted conventions, and recommended that this be remedied through appropriate constitutional provision. The recommendation reflected the concern that discretionary constitutional powers should not operate without sufficiently identifiable standards.⁵⁶

In relation to government formation, the Punchhi Commission broadly retained the principle that the Governor should identify the person most likely to command the confidence of the Legislative Assembly, and set out an order of preference substantially similar to that of the Sarkaria Commission. The emphasis therefore remained on legislative support rather than on the Governor's assessment of the political desirability of a particular government. The Commission's approach may consequently be understood as a development of the Sarkaria framework rather than a rejection of it.⁵⁷

D. Comparative significance of the two Commissions

The Sarkaria and Punchhi Commissions share a fundamental constitutional premise: gubernatorial discretion must be exercised for the purpose of facilitating constitutional

⁵⁴ PUNCHHI COMMISSION REPORT, *supra* note 4.

⁵⁵ PUNCHHI COMMISSION REPORT, *supra* note 4.

⁵⁶ PUNCHHI COMMISSION REPORT, *supra* note 4.

⁵⁷ PUNCHHI COMMISSION REPORT, *supra* note 4; Rameshwar Prasad, *supra* note 5.

government and not for advancing political preferences. Both frameworks recognise that the Governor may need to exercise judgment where an electoral outcome does not produce a clear majority, but neither treats such judgment as an unlimited personal power. The emphasis remains upon identifying a government capable of securing legislative confidence.⁵⁸

The principal contribution of the Sarkaria Commission is the articulation of a relatively specific order of preference for government formation in a hung Assembly. This provides a practical framework for distinguishing between a pre-election alliance, the largest single party with support, a post-election coalition and a post-election alliance relying upon outside support. The framework is particularly valuable because it attempts to reconcile electoral legitimacy with the practical necessity of forming a government.⁵⁹

The Punchhi Commission's contribution is broader. Rather than merely restating the sequence for government formation, it addressed the structural problem of gubernatorial discretion and the need for clearer guidelines governing its exercise. Its recommendations therefore strengthen the normative argument that discretion should be guided by objective constitutional standards rather than being left entirely to individual gubernatorial judgment.⁶⁰

The two reports should therefore be read together. Sarkaria provides a practical framework for the immediate problem of government formation, while Punchhi strengthens the institutional argument for principled guidelines governing the exercise of gubernatorial discretion more generally. Their combined significance is that they convert an otherwise uncertain constitutional space into one in which identifiable conventions and standards can guide the Governor's decision-making.⁶¹

E. Constitutional status of the Commission recommendations

The recommendations of the Sarkaria and Punchhi Commissions do not constitute constitutional provisions and cannot independently create binding legal obligations equivalent to those contained in the Constitution. Their constitutional significance is instead persuasive and interpretative. They provide institutional evidence concerning the manner in which constitutional authorities may appropriately exercise powers that are textually broad but structurally limited by parliamentary democracy.

⁵⁸ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV; PUNCHHI COMMISSION REPORT, *supra* note 4.

⁵⁹ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV, para. 4.11.04.

⁶⁰ PUNCHHI COMMISSION REPORT, *supra* note 4.

⁶¹ *Nabam Rebia*, *supra* note 5; SARKARIA COMMISSION REPORT, *supra* note 2; PUNCHHI COMMISSION REPORT, *supra* note 4.

The treatment of the Sarkaria recommendations in *Rameshwar Prasad v. Union of India* is particularly important. The Court examined the Governor's conduct in the context of the dissolution of the Bihar Legislative Assembly and set out the Commission's recommendations concerning the formation of a government following a fractured mandate. That treatment establishes the relevance of the recommendations to constitutional adjudication; it does not establish that they bind the Governor as a rule of law.⁶²

This judicial engagement does not convert every recommendation of the Commission into enforceable constitutional law. Rather, it demonstrates that constitutional courts may use such recommendations as persuasive standards when interpreting the scope and proper exercise of gubernatorial discretion. The distinction is important because it preserves the constitutional role of the judiciary while acknowledging the value of expert institutional guidance.⁶³

F. From guidelines to constitutional convention

The continued judicial and constitutional relevance of the Sarkaria framework raises the question whether its recommendations have developed into constitutional conventions. A constitutional convention is not merely a recommendation; it represents an accepted practice concerning the exercise of constitutional power that operates alongside the formal constitutional text. In the Indian context, conventions assume particular importance where the Constitution intentionally leaves certain matters to institutional judgment.

The order of preference recommended by Sarkaria has acquired considerable authority because it has been repeatedly invoked in constitutional discourse and in litigation concerning government formation. Its citation in *Rameshwar Prasad*, and the reliance placed upon it by the parties in *Subhash Desai v. Principal Secretary, Governor of Maharashtra*, demonstrate that the recommendations possess more than merely academic importance.⁶⁴

Nevertheless, it would be premature to treat the Sarkaria order as an inflexible constitutional rule applicable without regard to circumstances. The very nature of a hung Assembly means that political configurations may vary substantially. A pre-poll alliance may lose members after the election; a single largest party may demonstrate stronger post-election support than an alliance with a larger initial seat tally; or a post-election coalition may produce a clearer and more stable majority. The Governor must therefore retain a limited capacity to assess the particular facts while remaining guided by the established principles.⁶⁵

⁶² *Rameshwar Prasad*, *supra* note 5.

⁶³ *Rameshwar Prasad*, *supra* note 5.

⁶⁴ *Rameshwar Prasad*, *supra* note 5; *Subhash Desai*, *supra* note 8.

⁶⁵ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV, para. 4.11.04.

G. The floor test as the common constitutional safeguard

The most important common principle underlying both the Commission recommendations and the subsequent judicial approach is that the Governor's assessment should not become the final determination of legislative majority. The initial invitation to form a government and the subsequent verification of majority are constitutionally distinct stages. The Governor may exercise judgment at the first stage, but the elected Assembly must ordinarily determine whether the resulting government enjoys its confidence.⁶⁶

This principle substantially limits the practical scope of gubernatorial discretion. Even where the Governor must choose between competing claimants, the choice should ordinarily result in an opportunity for the claimant to demonstrate majority support within the Assembly. The floor test thereby acts as a constitutional corrective to the uncertainty inherent in the initial gubernatorial assessment.⁶⁷

The combined effect of the Sarkaria and Punchhi approaches is therefore to establish a model of structured discretion. The Governor is neither a purely ceremonial functionary incapable of independent judgment nor an unrestricted political authority. The Governor occupies an intermediate constitutional position in which discretion exists where necessary, but must be exercised according to objective principles, constitutional conventions, democratic legitimacy and the ultimate requirement of legislative confidence.⁶⁸

H. Critical evaluation of the Commission framework

The Commission recommendations nevertheless leave certain questions unresolved. Neither framework completely eliminates the possibility of disagreement concerning the relative strength of competing claimants. The numerical superiority of a single largest party may, for example, conflict with the greater collective strength of a post-poll coalition. Similarly, a pre-poll alliance may possess fewer seats than a post-election coalition but may claim a stronger electoral mandate. Such situations demonstrate that no fixed hierarchy can completely replace constitutional judgment.⁶⁹

The appropriate constitutional response is therefore not to eliminate gubernatorial discretion altogether but to constrain the manner in which it is exercised. The Governor should follow the established order of preference unless compelling circumstances justify a different course, record the constitutional basis for departing from the ordinary sequence where necessary, and

⁶⁶ *S.R. Bommai*, *supra* note 3; *Shivraj Singh Chouhan*, *supra* note 3.

⁶⁷ *S.R. Bommai*, *supra* note 3.

⁶⁸ *Shamsher Singh*, *supra* note 1; *Nabam Rebia*, *supra* note 5.

⁶⁹ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV, para. 4.11.04.

ensure that the person invited to form the government is required to demonstrate majority support within the Legislative Assembly within a reasonable period. Such safeguards would preserve the Governor's necessary constitutional flexibility while reducing the possibility of partisan or arbitrary decision-making.⁷⁰

The Sarkaria and Punchhi frameworks consequently support the central proposition of this research: the Governor's discretion in a hung Legislative Assembly is constitutionally recognised but cannot be characterised as unfettered. Its legitimate exercise is bounded by the objective of establishing a government capable of commanding legislative confidence, guided by established conventions and institutional recommendations, and subject to judicially enforceable constitutional limitations where the exercise of power departs from constitutional purpose.⁷¹

IX. JUDICIAL EVOLUTION OF THE GOVERNOR'S DISCRETION

A. Judicial interpretation as a constitutional limitation

The constitutional text does not provide an exhaustive code regulating every exercise of gubernatorial discretion. Consequently, the Supreme Court has played a significant role in defining the relationship between the Governor's constitutional position, ministerial advice, legislative confidence and judicial review. The judicial development of this area demonstrates a gradual movement away from viewing gubernatorial discretion as a matter of largely subjective constitutional judgment towards an understanding of discretion as a structured power governed by constitutional purpose, democratic legitimacy and judicially enforceable limitations.⁷²

The evolution may be traced through a series of Constitution Bench and other significant decisions. *Shamsher Singh v. State of Punjab* established the foundational principle concerning the Governor's position within the parliamentary system. *S.R. Bommai v. Union of India* strengthened the importance of legislative floor tests in determining majority. *Rameshwar Prasad v. Union of India* applied constitutional limitations to gubernatorial action in the context of a fractured electoral mandate. *Nabam Rebia v. Deputy Speaker* clarified the constitutional basis of gubernatorial discretion under Article 163. *Shivraj Singh Chouhan v. Speaker, Madhya Pradesh Legislative Assembly* developed the principle that gubernatorial decisions calling for floor tests are subject to judicial review. *Subhash Desai v. Principal Secretary, Governor of*

⁷⁰ *Rameshwar Prasad*, *supra* note 5; *S.R. Bommai*, *supra* note 3.

⁷¹ *Shamsher Singh*, *supra* note 1; *Rameshwar Prasad*, *supra* note 5; *Nabam Rebia*, *supra* note 5.

⁷² *Shamsher Singh*, *supra* note 1; *Nabam Rebia*, *supra* note 5.

Maharashtra provided significant contemporary guidance concerning the Governor's role in a politically divided Assembly.⁷³

B. *Shamsher Singh v. State of Punjab*: the foundational principle

The seven-Judge Constitution Bench decision in *Shamsher Singh v. State of Punjab* is the starting point for understanding the constitutional position of the Governor. The case concerned the exercise of powers by the President and the Governor under the constitutional scheme of parliamentary government. The Supreme Court rejected an interpretation under which the constitutional heads could ordinarily exercise executive powers according to their personal satisfaction. The Court held instead that the President and the Governor function as constitutional heads and ordinarily act on the aid and advice of the Council of Ministers.⁷⁴

The significance of *Shamsher Singh* extends beyond the immediate issue before the Court. It establishes that the Governor's constitutional authority cannot be equated with personal political authority. The Governor is part of a parliamentary constitutional structure in which democratic responsibility rests principally with the elected executive and the Legislature. Consequently, where the Constitution does not confer an independent discretion, the Governor is ordinarily bound by ministerial advice.⁷⁵

At the same time, *Shamsher Singh* did not eliminate the possibility of gubernatorial discretion. The judgment recognised that the Constitution may contemplate circumstances in which the Governor is required to exercise judgment independently. The important principle is therefore not that the Governor can never act independently, but that any departure from ministerial advice must have a constitutional foundation. This distinction becomes particularly significant in a hung Legislative Assembly, where the Governor may be required to determine which claimant should initially be invited to form the government.⁷⁶

C. *S.R. Bommai v. Union of India*: majority ordinarily to be tested on the floor

The decision in *S.R. Bommai v. Union of India* marked a major development in constitutional control over claims concerning legislative majority. The case principally concerned the exercise of power under Article 356 and the circumstances in which a State government could be treated as having lost the confidence of the Legislative Assembly. The Supreme Court held that questions concerning the majority enjoyed by a ministry are ordinarily capable of determination

⁷³ *S.R. Bommai*, *supra* note 3; *Rameshwar Prasad*, *supra* note 5; *Nabam Rebia*, *supra* note 5; *Shivraj Singh Chouhan*, *supra* note 3; *Subhash Desai*, *supra* note 8.

⁷⁴ *Shamsher Singh*, *supra* note 1.

⁷⁵ *Shamsher Singh*, *supra* note 1.

⁷⁶ *Shamsher Singh*, *supra* note 1; INDIA CONST. art. 163.

on the floor of the House and should not be decided conclusively merely on the basis of the Governor's subjective assessment.⁷⁷

The floor-test principle has direct implications for government formation following a hung Assembly. The Governor may initially evaluate competing claims and determine whom to invite, but that preliminary assessment cannot replace the constitutional authority of the Legislative Assembly to determine whether the government enjoys its confidence. The floor of the House therefore operates as the democratic mechanism through which an uncertain political claim is converted into an objectively verifiable legislative majority.⁷⁸

The constitutional significance of *Bommai* is consequently not confined to Article 356. Its broader principle is that legislative majority is fundamentally a question for the Legislature itself. Where a Governor's assessment concerns the existence or the likely existence of majority support, the constitutional preference is for that question to be tested through legislative proceedings rather than determined conclusively through gubernatorial satisfaction.⁷⁹

D. *Rameshwar Prasad v. Union of India*: gubernatorial discretion and a fractured mandate

Rameshwar Prasad v. Union of India is particularly important to the present research because it arose directly from the problem of government formation following a fractured electoral mandate. After the Bihar Legislative Assembly elections of February 2005 produced a situation in which no political party obtained a clear majority, the Governor came to apprehend that attempts were being made to form a government through defections and post-election political arrangements. The Assembly was dissolved by a proclamation dated 23 May 2005 before a government could be formed. The constitutional validity of the dissolution was challenged before the Supreme Court.⁸⁰

The Supreme Court held that the dissolution was unconstitutional. The Court examined whether the Governor had sufficient constitutional material to recommend dissolution on the apprehension that attempts would be made to form a government through unconstitutional means. The judgment emphasised that constitutional power cannot be exercised on the basis of mere conjecture or unverified political apprehension. The Governor's constitutional responsibilities must be exercised on relevant material and consistently with the constitutional

⁷⁷ *S.R. Bommai*, *supra* note 3.

⁷⁸ *S.R. Bommai*, *supra* note 3; *Shivraj Singh Chouhan*, *supra* note 3.

⁷⁹ *S.R. Bommai*, *supra* note 3.

⁸⁰ *Rameshwar Prasad*, *supra* note 5.

scheme. The Court nevertheless declined to restore the dissolved Assembly, since fresh elections had by then been set in motion.⁸¹

The decision is also significant because the Court set out the Sarkaria Commission's recommendations concerning the order of preference for government formation in a hung Assembly. The framework recognised a hierarchy beginning with a pre-election alliance, followed by the largest single party staking a claim with the support of others, a post-electoral coalition in which all partners join the government, and finally a post-electoral arrangement in which some parties form the government while others provide outside support.⁸²

The case therefore demonstrates that the Governor cannot treat political uncertainty as a justification for substituting subjective apprehension for constitutional process. Even where the electoral mandate is fragmented and political negotiations are taking place, the constitutional response must remain directed towards determining whether a viable government can be formed. The mere possibility of political realignment cannot by itself justify the premature termination of the constitutional process.⁸³

E. Nabam Rebia v. Deputy Speaker: the constitutional basis of discretion

In *Nabam Rebia v. Deputy Speaker, Arunachal Pradesh Legislative Assembly*, a Constitution Bench examined the scope of gubernatorial discretion under Article 163 in the context of an acute political and constitutional crisis in Arunachal Pradesh. The Governor had advanced the date of the Assembly session and issued a message concerning the legislative agenda. These actions were challenged as exceeding the constitutional authority of the Governor.⁸⁴

The Supreme Court examined the relationship between Article 163 and the Governor's discretionary powers and rejected the proposition that Article 163 constitutes a general reservoir of personal discretion. The Court held that the Governor's discretionary field is confined to those situations expressly specified by or under the Constitution, or arising by necessary implication, and that the exercise of the power to summon, prorogue or advance a session is not immune from judicial review. The judgment therefore reinforced the distinction between constitutional discretion and personal choice.⁸⁵

The relevance of *Nabam Rebia* to a hung Assembly is substantial. Although the case did not directly concern the initial appointment of a Chief Minister after an election, its reasoning

⁸¹ *Rameshwar Prasad*, *supra* note 5.

⁸² SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV, para. 4.11.04; *Rameshwar Prasad*, *supra* note 5.

⁸³ *Rameshwar Prasad*, *supra* note 5.

⁸⁴ *Nabam Rebia*, *supra* note 5.

⁸⁵ *Nabam Rebia*, *supra* note 5 (holding that the Governor's discretionary field is confined to matters specified by or under the Constitution, or arising by necessary implication).

establishes the constitutional methodology through which gubernatorial discretion must be understood. The Governor cannot rely upon the political significance of a situation as an independent source of discretion. The discretion must arise from the Constitution and must be exercised consistently with the constitutional purpose of the relevant power.⁸⁶

The decision therefore strengthens the proposition that Article 163 does not confer an unrestricted political mandate upon the Governor. Where the Governor exercises discretion, the action remains connected to constitutional purpose and is capable, where appropriate, of being examined by the constitutional courts. This provides an important doctrinal foundation for reviewing gubernatorial decisions concerning government formation.⁸⁷

F. *Shivraj Singh Chouhan v. Speaker, Madhya Pradesh Legislative Assembly*: objective material and the floor test

The decision in *Shivraj Singh Chouhan v. Speaker, Madhya Pradesh Legislative Assembly* provides an important modern articulation of the limits upon the Governor's power to call for a floor test. The case arose following the resignation of a number of Members of the Legislative Assembly, which created uncertainty as to whether the Council of Ministers continued to enjoy majority support. The Governor directed that a floor test be conducted, and the constitutional validity of that direction was challenged. By an order of 19 March 2020 the Supreme Court directed that a floor test be held the following day, and delivered its reasons on 13 April 2020.⁸⁸

The Supreme Court held that the Governor possesses the constitutional power to call for a trust vote in appropriate circumstances, including in a functioning Assembly. The exercise of that power is not, however, immune from judicial review. The Court held that the Governor's satisfaction must be founded upon objective material and relevant reasons rather than upon extraneous considerations, and emphasised that the power must not be used to destabilise or displace a democratically elected government.⁸⁹

The judgment is highly relevant to the present research because it converts the abstract concept of gubernatorial discretion into a standard capable of judicial scrutiny. The Governor may possess discretion, but the existence of discretion does not mean that every exercise of it is constitutionally valid. Courts may examine whether relevant material existed, whether the

⁸⁶ *Nabam Rebia*, *supra* note 5.

⁸⁷ *Nabam Rebia*, *supra* note 5; *Shamsher Singh*, *supra* note 1.

⁸⁸ *Shivraj Singh Chouhan*, *supra* note 3.

⁸⁹ *Shivraj Singh Chouhan*, *supra* note 3 (holding that the Governor's decision to call for a floor test must rest upon objective material and relevant reasons, and must not be used to destabilise or displace a democratically elected government).

Governor's decision had a rational constitutional basis and whether extraneous considerations influenced the exercise of power.⁹⁰

The principle has direct application to the initial formation of a government after a hung Assembly. If the Governor's decision to invite a particular claimant is challenged, the constitutional inquiry cannot stop at the assertion that the Governor possesses discretion. The more appropriate inquiry is whether the discretion was exercised on relevant constitutional material, whether the claimant had a credible basis for establishing majority support, and whether the Governor's decision was directed towards facilitating constitutional government rather than towards producing a predetermined political result.⁹¹

G. Subhash Desai v. Principal Secretary, Governor of Maharashtra: contemporary constitutional standards

The Constitution Bench decision in *Subhash Desai v. Principal Secretary, Governor of Maharashtra*, delivered on 11 May 2023, arose from the political crisis in Maharashtra in 2022 and involved questions concerning the Governor, the Speaker, disqualification proceedings and the formation of the government. The case gave the Supreme Court an opportunity to examine the constitutional significance of the Governor's decision-making in circumstances involving competing political claims and an internal division within a political party.⁹²

The Court held that the Governor was not justified in calling upon the incumbent Chief Minister to prove his majority on the floor of the House, because the material before the Governor did not objectively indicate that the government had lost the confidence of the Assembly. The communication relied upon expressed discontent with the leadership of a party but disclosed nothing to suggest that the Council of Ministers had lost the confidence of the House. The Court accordingly held that a Governor cannot use a floor test as a means of resolving an intra-party dispute, or as a mechanism for determining which faction is the legitimate representative of a party.⁹³

The Court nevertheless held that the Governor's subsequent decision to invite Mr Eknath Shinde to form the government could not be faulted, because the incumbent Chief Minister had resigned voluntarily without facing the floor test and the claimant had produced letters of support. For

⁹⁰ *Shivraj Singh Chouhan, supra* note 3.

⁹¹ *Shivraj Singh Chouhan, supra* note 3.

⁹² *Subhash Desai, supra* note 8.

⁹³ *Subhash Desai, supra* note 8.

the same reason the Court declined to restore the previous government, holding that it could not quash a resignation that had been tendered voluntarily.⁹⁴

The judgment is valuable for the present research because it confirms that the Governor's constitutional discretion must remain connected to the question of legislative confidence. Political disagreements within a party do not by themselves establish that the Council of Ministers has lost the confidence of the Assembly. The constitutional trigger for a floor test must therefore be distinguishable from ordinary political disagreement. The judgment also records the reliance placed by the parties upon the Sarkaria Commission's order of preference, which indicates the continuing constitutional salience of that framework even though the Court did not elevate it to the status of a binding rule.⁹⁵

H. The cumulative effect of the judicial decisions

The decisions considered above reveal a coherent constitutional trajectory. *Shamsher Singh* establishes that the Governor is ordinarily bound by the constitutional scheme of ministerial advice and is not an independent political executive. *S.R. Bommai* establishes the centrality of the legislative floor in determining majority. *Rameshwar Prasad* demonstrates that gubernatorial action in a fractured mandate must be based on relevant constitutional material rather than conjecture. *Nabam Rebia* confines the source and scope of gubernatorial discretion under Article 163. *Shivraj Singh Chouhan* establishes that gubernatorial decisions concerning floor tests are subject to judicial review where objective constitutional standards are alleged to have been violated. *Subhash Desai* reinforces the requirement that gubernatorial intervention be connected to genuine legislative confidence rather than to intra-party political disputes.⁹⁶

Taken collectively, these decisions support the conclusion that gubernatorial discretion is constitutionally limited, purpose-oriented and reviewable. The Governor possesses a necessary area of judgment, particularly in situations in which the electoral outcome does not produce a clear majority. That judgment must, however, be exercised within the constitutional architecture of parliamentary government. The Governor cannot substitute personal political preference for legislative confidence, cannot rely upon irrelevant or extraneous considerations, and cannot treat the existence of discretion as a shield against constitutional review.⁹⁷

⁹⁴ *Subhash Desai*, *supra* note 8.

⁹⁵ *Subhash Desai*, *supra* note 8.

⁹⁶ *Shamsher Singh*, *supra* note 1; *S.R. Bommai*, *supra* note 3; *Rameshwar Prasad*, *supra* note 5; *Nabam Rebia*, *supra* note 5; *Shivraj Singh Chouhan*, *supra* note 3; *Subhash Desai*, *supra* note 8.

⁹⁷ *Shamsher Singh*, *supra* note 1; *Nabam Rebia*, *supra* note 5; *Shivraj Singh Chouhan*, *supra* note 3.

The case law therefore supports a model of structured discretion in which the Governor performs an important constitutional function at the stage of government formation, while the Legislative Assembly remains the ultimate democratic forum for determining confidence. The judicial evolution does not eliminate gubernatorial discretion; it subjects that discretion to constitutional purpose, objective material, democratic legitimacy and judicially enforceable standards.⁹⁸

I. The emerging judicial standard

The emerging judicial standard may be formulated in four parts. First, the Governor must identify a genuine constitutional basis for exercising independent judgment. Secondly, the Governor's decision must be based upon relevant and objective material rather than upon political preference or conjecture. Thirdly, where the issue concerns legislative majority, the Governor should ordinarily facilitate a floor test instead of treating personal assessment as conclusive. Fourthly, gubernatorial action remains subject to judicial review to the extent necessary to determine whether constitutional limits have been breached.⁹⁹

These principles are particularly important in the context of a hung Legislative Assembly because the initial invitation to form the government necessarily precedes the floor test. The Governor must therefore make an informed constitutional assessment at the initial stage, but that assessment should be designed to identify the claimant most likely to command the confidence of the House rather than to determine conclusively who possesses the majority. The ultimate verification must remain within the Legislature.¹⁰⁰

The judicial evolution consequently provides substantial support for the proposition that the Governor's discretionary power to invite a government in a hung Legislative Assembly is not an unfettered constitutional prerogative. It is a limited constitutional function shaped by Articles 163 and 164, parliamentary democracy, the principle of legislative confidence, established conventions and judicial precedent. The precise boundaries of that discretion, however, require further examination through the doctrines of constitutional morality, judicial review and constitutional conventions.¹⁰¹

⁹⁸ *S.R. Bommai*, *supra* note 3; *Rameshwar Prasad*, *supra* note 5.

⁹⁹ *Shivraj Singh Chouhan*, *supra* note 3; *Nabam Rebia*, *supra* note 5.

¹⁰⁰ *S.R. Bommai*, *supra* note 3; *Rameshwar Prasad*, *supra* note 5.

¹⁰¹ *Shamsher Singh*, *supra* note 1; *Rameshwar Prasad*, *supra* note 5; *Nabam Rebia*, *supra* note 5; *Shivraj Singh Chouhan*, *supra* note 3.

X. CONSTITUTIONAL MORALITY, CONSTITUTIONAL CONVENTIONS AND GUBERNATORIAL DISCRETION

A. Constitutional morality as a limitation on discretion

Constitutional morality requires constitutional institutions and public authorities to exercise their powers consistently with the values, purposes and structural principles of the Constitution. It is particularly relevant where the constitutional text confers discretion without prescribing an exhaustive procedure for its exercise. In such circumstances the mere existence of power cannot determine the manner in which that power may legitimately be exercised. The exercise must remain faithful to constitutional democracy, the rule of law, institutional accountability and the representative character of the Legislature.¹⁰²

In the context of a hung Legislative Assembly, constitutional morality requires the Governor to act as a constitutional umpire rather than as a political participant. The Governor's objective is to facilitate the formation of a government that can command the confidence of the elected House, and not to determine which political party or ideological formation should govern according to personal preference. The Sarkaria Commission expressly recognised this principle in stating that the Governor's task is to see that a government is formed and not to try to form a government which will pursue policies that the Governor approves.¹⁰³

Constitutional morality consequently imposes a substantive discipline upon gubernatorial discretion. A decision may be formally traceable to a constitutional provision and yet be constitutionally problematic if the power is exercised for a purpose inconsistent with parliamentary democracy. The constitutional legitimacy of the Governor's action therefore depends not only upon the existence of discretion but also upon the purpose, the material and the manner of its exercise.¹⁰⁴

B. Political neutrality of the Governor

The Governor's constitutional position requires a high degree of institutional neutrality. Unlike a member of the elected executive, the Governor does not derive office from a political contest within the State Legislative Assembly. The Governor's function in government formation is consequently not to participate in political competition but to facilitate the operation of the parliamentary system following the electoral process.

¹⁰² *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (India). See also *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 (India).

¹⁰³ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV.

¹⁰⁴ *Nabam Rebia*, *supra* note 5.

This principle becomes particularly important in a hung Assembly because competing parties may attempt to persuade the Governor that they possess the strongest claim to form the government. The Governor must distinguish between political assertions and constitutionally demonstrable legislative support. The relevant question is not which claimant is politically preferable, but which claimant has a credible constitutional basis for securing the confidence of the House.¹⁰⁵

The jurisprudence of the Supreme Court reinforces this institutional neutrality. In *Shamsher Singh v. State of Punjab* the Court rejected the conception of the Governor as an independent political executive and situated the office within India's parliamentary system. In *Nabam Rebia v. Deputy Speaker* the Court further emphasised that the Governor's discretion must have a constitutional foundation and cannot be treated as a general power of independent political judgment.¹⁰⁶

C. Constitutional conventions and the exercise of discretion

Constitutional conventions are practices and principles that supplement the formal constitutional text by guiding the exercise of constitutional powers. They become particularly significant in parliamentary systems because not every constitutional contingency can be anticipated or reduced to detailed statutory rules. In the Indian constitutional context, conventions relating to government formation may therefore assist the Governor in exercising judgment where the Constitution does not provide an exhaustive procedure.

The Sarkaria Commission recognised the importance of conventions in regulating the functioning of the Governor. It observed that many safeguards concerning the office cannot be reduced to precise rules of procedure and practice because of the nature of the constitutional office. Such safeguards therefore have to operate through conventions and established practices that are faithfully observed by constitutional actors and political parties.¹⁰⁷

The order of preference recommended by the Sarkaria Commission is especially significant in this regard. It provides an established framework for determining which category of claimant should ordinarily receive priority where no party obtains an absolute majority. The framework is not itself a constitutional provision, but its repeated recognition in constitutional discourse and in litigation gives it substantial normative significance.¹⁰⁸

¹⁰⁵ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV.

¹⁰⁶ *Shamsher Singh*, *supra* note 1; *Nabam Rebia*, *supra* note 5.

¹⁰⁷ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV; PUNCHHI COMMISSION REPORT, *supra* note 4.

¹⁰⁸ *Rameshwar Prasad*, *supra* note 5; *Subhash Desai*, *supra* note 8.

The existence of such conventions does not eliminate the Governor's discretion. Rather, conventions structure that discretion. They provide a starting point from which the Governor should ordinarily proceed and thereby reduce the possibility that individual political preferences will determine the outcome. Departure from an established convention may be constitutionally defensible where circumstances genuinely require it, but such departure should be supported by relevant constitutional considerations rather than by convenience or partisan preference.¹⁰⁹

D. The Sarkaria order of preference as a constitutional convention

The Sarkaria Commission's four-category order of preference has acquired particular importance in this context. Where no party commands an absolute majority, the Commission recommended consideration of an alliance of parties formed prior to the elections, followed by the largest single party staking a claim with the support of others, a post-electoral coalition in which all partners join the government, and finally a post-electoral arrangement in which some parties form the government while others provide outside support.¹¹⁰

The order reflects an attempt to reconcile two constitutional values: electoral legitimacy and legislative majority. A pre-election alliance has the advantage of having presented a political arrangement to the electorate before the mandate was given. A post-election coalition, however, may in certain circumstances command a clearer numerical majority in the House. The constitutional objective is therefore not simply to reproduce the number of seats won by an individual party, but to identify the claimant with the most credible ability to establish legislative confidence.¹¹¹

The judicial treatment of the Sarkaria recommendations strengthens their constitutional significance. In *Rameshwar Prasad v. Union of India* the Court set out the framework in the context of the Bihar political situation, and in *Subhash Desai* the recommendations formed the basis of substantial argument concerning the propriety of the Governor's conduct. Neither decision, however, holds that the order of preference operates as a rule of law binding upon the Governor.¹¹²

It would accordingly be inaccurate to describe the Sarkaria order as an inflexible constitutional command. The Constitution does not incorporate the Commission's hierarchy into Article 164, and political circumstances may produce situations in which strict mechanical application of

¹⁰⁹ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV, para. 4.11.04.

¹¹⁰ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV, para. 4.11.04.

¹¹¹ *Rameshwar Prasad*, *supra* note 5.

¹¹² *Rameshwar Prasad*, *supra* note 5; *Subhash Desai*, *supra* note 8.

the order does not adequately reflect the actual strength of competing claimants. The better constitutional understanding is that the Sarkaria framework operates as a highly persuasive convention or guideline that structures gubernatorial judgment while leaving a limited area for fact-sensitive constitutional assessment.¹¹³

E. Objective material and constitutional decision-making

The requirement of objective material is an important safeguard against arbitrary gubernatorial discretion. A Governor may have to assess letters of support, statements by political parties, the composition of alliances and the numerical strength of legislators before inviting a claimant to form the government. Such assessment necessarily involves judgment. The judgment must nevertheless be based upon relevant constitutional material rather than upon unsupported assumptions.

The decision in *Shivraj Singh Chouhan v. Speaker, Madhya Pradesh Legislative Assembly* provides significant guidance in this regard. The Court recognised that the Governor may call for a floor test where circumstances reasonably indicate that the government may have lost majority support, but emphasised that such action must be founded upon objective material and relevant reasons. The existence of discretion therefore does not exclude judicial examination of the constitutional basis of the decision.¹¹⁴

The same principle is relevant at the stage of inviting a government after a hung Assembly. The Governor may legitimately examine the available evidence of legislative support but cannot substitute personal belief for objective constitutional material. If one claimant has demonstrable support from a majority of legislators while another merely asserts that support may become available, the constitutional preference must ordinarily favour the claimant with the more credible and verifiable basis for establishing legislative confidence.¹¹⁵

F. The floor test as a limitation on gubernatorial judgment

The floor test represents the strongest institutional limitation upon the Governor's discretion in matters concerning legislative majority. The Governor may be required to make an initial assessment because a government must be appointed before it can seek confidence on the floor of the House. That preliminary assessment should not, however, become a substitute for legislative determination.

¹¹³ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV, para. 4.11.04; *Rameshwar Prasad*, *supra* note 5.

¹¹⁴ *Shivraj Singh Chouhan*, *supra* note 3.

¹¹⁵ *Rameshwar Prasad*, *supra* note 5.

The principle originates prominently in *S.R. Bommai v. Union of India*, where the Supreme Court recognised the floor of the House as the appropriate forum for determining whether a ministry enjoys majority support. The principle has subsequently been applied in circumstances where Governors have called upon governments to demonstrate their majority.¹¹⁶

The constitutional importance of the floor test lies in its objectivity. Whereas gubernatorial assessment may necessarily involve uncertainty at the initial stage, a vote in the Legislative Assembly provides an institutional mechanism through which the claim to majority can be verified. It therefore protects both sides of the constitutional equation: it gives the Governor sufficient flexibility to respond to an uncertain electoral mandate while preventing that discretion from becoming a permanent substitute for democratic determination.¹¹⁷

G. Judicial review of gubernatorial discretion

Article 163(2) provides that the decision of the Governor on whether a matter falls within his discretion shall be final and that the validity of anything done by the Governor shall not be called in question on that ground. That provision does not, however, create an absolute immunity from judicial review. The jurisprudence of the Supreme Court demonstrates that constitutional courts may examine whether the exercise of power falls within constitutional limits and whether the relevant constitutional requirements have been satisfied.

In *Nabam Rebia* the Supreme Court rejected an expansive understanding of Article 163 and held that the Governor's discretionary field is limited to situations in which the Constitution expressly, or by necessary implication, requires independent judgment.¹¹⁸ The Court's reasoning is important because it prevents Article 163 from becoming an independent constitutional source of unrestricted gubernatorial power.

Similarly, in *Shivraj Singh Chouhan* the Court recognised that the Governor's satisfaction leading to a floor test must have an objective constitutional basis. Judicial review is therefore concerned not with replacing the Governor's constitutional judgment with the Court's own political judgment, but with examining whether the constitutional conditions governing the exercise of that judgment have been satisfied.¹¹⁹

Judicial review thus operates as an external constitutional safeguard. It does not transform the judiciary into an alternative political decision-maker, nor does it require courts to determine which party should govern. Its purpose is narrower and constitutionally appropriate: to ensure

¹¹⁶ *S.R. Bommai*, *supra* note 3.

¹¹⁷ *S.R. Bommai*, *supra* note 3.

¹¹⁸ *Nabam Rebia*, *supra* note 5.

¹¹⁹ *Shivraj Singh Chouhan*, *supra* note 3.

that gubernatorial discretion is exercised within the limits of the Constitution and not converted into arbitrary political power.¹²⁰

H. Constitutional morality and the doctrine of institutional restraint

Constitutional morality must also operate alongside institutional restraint. The Governor is not the only constitutional actor involved in government formation. Political parties must respect democratic processes, legislators must act within constitutional and legal limitations, the Legislature must provide the forum for testing majority, and courts must intervene only to the extent necessary to enforce constitutional boundaries.

The Governor therefore should not attempt to resolve every political uncertainty through personal intervention. Where competing political claims can be tested through the Assembly, the constitutional preference should ordinarily be to allow that process to operate. Excessive gubernatorial intervention may undermine rather than protect parliamentary democracy by shifting the determination of political legitimacy from elected representatives to an unelected constitutional office.¹²¹

Conversely, institutional restraint does not mean that the Governor must remain passive in every political crisis. The constitutional office necessarily requires intervention at certain stages, particularly where no government exists or where a government may have lost majority support. The constitutional challenge is therefore to exercise sufficient discretion to preserve constitutional government without exercising so much discretion that the Governor effectively becomes the political arbiter of the State.¹²²

I. Constitutional discretion as structured discretion

The combined effect of the constitutional text, judicial precedent, Commission recommendations and constitutional conventions supports the characterisation of gubernatorial discretion as structured discretion. The Governor possesses genuine judgment in circumstances where the Constitution requires it, but the exercise of that judgment is bounded by identifiable principles.

In a hung Legislative Assembly those principles include the requirement to facilitate the formation of a government, respect for the electoral mandate, consideration of established conventions concerning the order of preference, reliance upon objective material, avoidance of

¹²⁰ *Nabam Rebia*, *supra* note 5; *Rameshwar Prasad*, *supra* note 5.

¹²¹ *S.R. Bommai*, *supra* note 3.

¹²² *Shivraj Singh Chouhan*, *supra* note 3.

partisan considerations, and the requirement that legislative majority ultimately be established on the floor of the House.¹²³

This concept of structured discretion provides a more accurate description of the Governor's constitutional position than either of two extreme propositions. The first extreme is that the Governor is merely a ceremonial head with no meaningful role in government formation. The second is that Article 163 permits the Governor to choose whichever political formation the Governor considers desirable. Neither proposition is consistent with the constitutional scheme. The Governor possesses a necessary constitutional discretion, but that discretion is structured by parliamentary democracy and subject to constitutional review.¹²⁴

J. The constitutional balance

The constitutional problem is therefore one of balance. Excessively restricting the Governor could make the office incapable of responding to genuinely uncertain electoral outcomes. Conversely, treating gubernatorial discretion as unrestricted could undermine the democratic authority of the Legislative Assembly. The constitutional structure seeks to reconcile these competing concerns by allowing the Governor to make an initial judgment while requiring that legislative confidence remain the ultimate foundation of executive legitimacy.

The most constitutionally appropriate model is consequently one in which the Governor identifies the claimant with the strongest credible basis for forming a government, guided by established conventions and objective material, and provides a reasonable opportunity for that claimant to establish majority support on the floor of the House. Any departure from established constitutional guidance should be supported by demonstrable constitutional reasons.¹²⁵

The foregoing analysis demonstrates that constitutional morality and constitutional conventions do not merely supply abstract ethical considerations. They perform a practical constitutional function by limiting the manner in which discretionary power is exercised. They ensure that the Governor's discretion remains directed towards constitutional government rather than political preference, and that the final source of democratic legitimacy remains the elected Legislative Assembly.¹²⁶

¹²³ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV, para. 4.11.04; *Rameshwar Prasad*, *supra* note 5; *Nabam Rebia*, *supra* note 5.

¹²⁴ *Shamsher Singh*, *supra* note 1; *Nabam Rebia*, *supra* note 5.

¹²⁵ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV, para. 4.11.04; *S.R. Bommai*, *supra* note 3.

¹²⁶ *Rameshwar Prasad*, *supra* note 5; *Nabam Rebia*, *supra* note 5; *Shivraj Singh Chouhan*, *supra* note 3.

XI. CRITICAL ANALYSIS OF THE GOVERNOR'S DISCRETION IN A HUNG LEGISLATIVE ASSEMBLY

A. The central constitutional problem

The principal difficulty in a hung Legislative Assembly is that the Constitution does not prescribe an exhaustive procedure for determining which political formation must first be invited to form the government. Article 164(1) provides that the Chief Minister shall be appointed by the Governor, but it does not establish a hierarchy between a pre-election alliance, the single largest party and a post-election coalition where none commands an absolute majority independently. The resulting constitutional space necessarily requires the Governor to exercise judgment.¹²⁷

The existence of such judgment does not, however, mean that the Governor possesses an unrestricted political choice. The constitutional objective is to facilitate the formation of a government capable of obtaining and retaining the confidence of the Legislative Assembly. The Governor's discretion must therefore be understood as a means of achieving constitutional government rather than as an independent political power to determine which party ought to govern. The Sarkaria Commission expressly distinguished between seeing that a government is formed and attempting to form one whose policies the Governor approves.¹²⁸

The central constitutional question is consequently not whether discretion exists, but how it must be exercised and what constitutional standards limit it. The answer emerges from the combined operation of Articles 163 and 164, parliamentary conventions, Commission recommendations and judicial precedent.¹²⁹

B. Single largest party against a pre-election alliance

One of the most difficult questions arises where the single largest party does not possess a majority but a pre-election alliance collectively commands a larger number of seats. Treating the single largest party as automatically entitled to form the government would give excessive importance to the numerical position of one party while potentially disregarding the electoral mandate expressed through a pre-election coalition.

The Sarkaria Commission places a pre-election alliance at the first level of preference, before the single largest party. This reflects the reasoning that an alliance formed before the election has presented a common political arrangement to the electorate and therefore possesses a

¹²⁷ INDIA CONST. arts. 163(1), 164(1).

¹²⁸ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV.

¹²⁹ *Shamsher Singh*, *supra* note 1; *Nabam Rebia*, *supra* note 5.

stronger claim to electoral legitimacy than a coalition constructed only after the result is declared.¹³⁰

The constitutional principle should therefore not be reduced to the proposition that the Governor must always invite the single largest party. The more defensible criterion is the strength and credibility of the claimant's support in the House, considered in the light of the electoral mandate and established conventions. Where a pre-election alliance has secured a clear majority, the Governor's discretion is correspondingly narrow because the legislative and electoral mandate is substantially established.¹³¹

C. Single largest party against a post-electoral coalition

A more difficult situation arises where the single largest party falls short of a majority but a post-electoral coalition can demonstrate support exceeding the single largest party's strength. The issue is whether the Governor should prefer the party with the largest individual seat tally or the coalition with the larger demonstrable legislative support.

The Sarkaria framework places the single largest party staking a claim with the support of others before a post-electoral coalition in which all partners join the government. This hierarchy recognises the significance of the electoral position of the largest party while simultaneously requiring it to demonstrate sufficient support to form a viable government.¹³²

The hierarchy should nevertheless not be treated as an absolute rule independent of constitutional circumstances. The ultimate constitutional purpose is the formation of a government capable of commanding the House. A post-election coalition that presents a stable and verifiable majority may possess a stronger immediate basis for constitutional government than a single largest party whose additional support is merely speculative. The Governor should therefore examine the credibility and verifiability of the competing claims rather than relying exclusively upon the number of seats secured by an individual party.¹³³

This approach is consistent with the principle that the Legislature, rather than the Governor, is the ultimate forum for testing majority. The Governor's function at the initial stage is to identify the claimant most likely to establish confidence; it is not to determine legislative majority conclusively through personal assessment.¹³⁴

¹³⁰ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV, para. 4.11.04.

¹³¹ Rameshwar Prasad, *supra* note 5.

¹³² SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV, para. 4.11.04.

¹³³ Rameshwar Prasad, *supra* note 5.

¹³⁴ S.R. Bommai, *supra* note 3.

D. The problem of post-poll alliances

Post-electoral alliances create an additional constitutional difficulty because they are formed after voters have cast their ballots. Critics argue that such arrangements undermine the electoral mandate, because parties that contested against one another subsequently join together to form a government. The Constitution does not, however, prohibit political parties from entering into post-election arrangements.

The jurisprudence of the Supreme Court does not support a general proposition that a post-election coalition is constitutionally illegitimate merely because the constituent parties contested against one another. In *Rameshwar Prasad* the Court's treatment of the Bihar situation demonstrated that apprehension regarding possible political realignment cannot substitute for constitutional evidence. The constitutional process cannot be terminated merely because political parties may enter into arrangements after an election.¹³⁵

The appropriate constitutional inquiry is therefore not whether the alliance was formed before or after the election, but whether the claimant can demonstrate credible legislative support and whether the proposed government can constitutionally function. The Governor may take the timing and nature of an alliance into account as part of the factual assessment but cannot treat post-election cooperation as inherently unconstitutional.¹³⁶

E. Whether the Governor may investigate the means by which majority is obtained

A related issue is whether the Governor may inquire into the manner in which political support has been obtained. In a fragmented Assembly, claims of majority may involve negotiations between political parties and independent legislators. If the Governor begins investigating whether every political arrangement is politically desirable or morally acceptable, the office risks becoming an arbiter of political conduct rather than a constitutional facilitator.

The constitutional role of the Governor is not to supervise ordinary political negotiations. Unless there is credible material indicating an actual constitutional or legal violation, the Governor's principal concern should be whether the claimant has sufficient support to face the Legislative Assembly. The legitimacy of legislative support is ultimately tested through the constitutional and legal mechanisms applicable to legislators and political parties rather than through an open-ended political inquiry by the Governor.¹³⁷

¹³⁵ *Rameshwar Prasad*, *supra* note 5.

¹³⁶ *Rameshwar Prasad*, *supra* note 5.

¹³⁷ *Rameshwar Prasad*, *supra* note 5; SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV.

This limitation is particularly important because excessive scrutiny of political negotiations may enable the Governor to reject a claimant on the basis of subjective assessments concerning political morality. Constitutional morality requires the Governor to distinguish between conduct that is politically controversial and conduct that is constitutionally unlawful. The former cannot automatically justify the rejection of an otherwise credible claim to form the government.¹³⁸

F. Letters of support and the reliability of majority claims

The Governor may necessarily rely upon documentary material such as letters of support, communications from political parties and declarations by legislators when determining which claimant should initially be invited. Such material should, however, be treated as evidence for the purpose of deciding whom to invite rather than as a permanent substitute for a floor test.

A letter of support can demonstrate an intention to support a government, but political circumstances may change between the submission of the letter and the commencement of legislative proceedings. Consequently, the constitutional value of such material lies primarily in establishing whether a claimant has a reasonable and credible basis for being invited to prove majority.¹³⁹

The Governor should therefore distinguish between evidence sufficient to justify an invitation and evidence sufficient to establish majority conclusively. The former may consist of letters, declarations and coalition agreements; the latter should ordinarily be determined by a vote in the Legislative Assembly. This distinction preserves both the practical necessity of gubernatorial judgment and the democratic authority of the House.¹⁴⁰

G. Time given for the floor test

Another significant area of gubernatorial discretion concerns the period within which the invited Chief Minister should demonstrate majority support. The Constitution does not establish a fixed number of days for conducting a floor test. Excessively long periods may, however, create opportunities for political instability, defections or attempts to alter legislative support before the Assembly determines confidence.

The constitutional preference should therefore be for a floor test within a reasonable period, having regard to the circumstances of the particular Assembly. The Governor should avoid both unnecessary delay and an artificially compressed timetable that prevents legislators from

¹³⁸ *Nabam Rebia*, *supra* note 5.

¹³⁹ *Shivraj Singh Chouhan*, *supra* note 3.

¹⁴⁰ *S.R. Bommai*, *supra* note 3; *Shivraj Singh Chouhan*, *supra* note 3.

exercising their constitutional functions effectively. The underlying objective must be to ensure that the question of majority is resolved promptly through the Legislature.¹⁴¹

This consideration further demonstrates why gubernatorial discretion should be structured rather than eliminated. Some flexibility is necessary because political circumstances differ, but the discretion must remain directed towards an early and genuine legislative determination of confidence.

H. Whether the Governor may reject a claimant who has more support

The Governor's power to reject a claimant presenting a numerical majority should be extremely limited. If a political formation can credibly demonstrate that it commands the confidence of the Legislative Assembly, rejecting it merely because the Governor considers another political formation more desirable would be incompatible with parliamentary democracy.

The constitutional office cannot become an alternative forum for deciding the political merits of competing governments. The Governor's personal assessment of stability, ideology, policy or political preference cannot override demonstrable legislative support unless there exists a genuine constitutional reason affecting the claimant's ability to constitute a lawful government.¹⁴²

This principle follows directly from the Sarkaria Commission's statement that the Governor's task is to see that a government is formed and not to try to form a government which will pursue policies that the Governor approves. The limitation is therefore not merely political etiquette; it is a structural requirement of the parliamentary Constitution.¹⁴³

I. The risk of political abuse

The principal danger associated with gubernatorial discretion is the possibility that a constitutionally neutral office may be perceived as acting in favour of one political formation. Commentators have long argued that this concern becomes especially acute where the Governor's own appointment is seen to carry a political connection with the Union Government while the State government is controlled by a different political party.

The constitutional problem is not resolved simply by asserting that the Governor acts in constitutional discretion. The exercise of discretion must inspire confidence that the decision was reached through relevant constitutional considerations. Where decisions consistently depart

¹⁴¹ *S.R. Bommai*, *supra* note 3; *Shivraj Singh Chouhan*, *supra* note 3.

¹⁴² *Rameshwar Prasad*, *supra* note 5.

¹⁴³ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV.

from established conventions without adequate reasons, the legitimacy of the office itself may be weakened.¹⁴⁴

The jurisprudence of the Supreme Court demonstrates that constitutional powers are not insulated from review merely because their exercise involves political consequences. In *Rameshwar Prasad* and *Shivraj Singh Chouhan* the Court examined gubernatorial action against constitutional standards rather than accepting the existence of discretion as conclusive.¹⁴⁵

J. The appropriate standard of likelihood to command confidence

The most constitutionally appropriate standard for the Governor in a hung Assembly is therefore whether the claimant is most likely to command the confidence of the Legislative Assembly. This formulation is preferable to a “single largest party” test because it focuses on legislative support, and preferable to a “most popular party” test because popularity is measured through the electoral process rather than through gubernatorial preference.

The standard also accommodates the constitutional reality that electoral mandates may produce different combinations of political strength. A pre-election alliance, a single largest party supported by other legislators, or a post-election coalition may each satisfy the standard, depending upon the facts.¹⁴⁶

The Governor should accordingly evaluate the competing claims according to a structured sequence: identify the relevant electoral alliances; determine the available legislative numbers; examine credible evidence of support; apply the established order of preference; and, where necessary, invite the claimant with the strongest constitutional basis to form the government subject to an early floor test.¹⁴⁷

K. Scope of judicial review

Judicial review should operate as a constitutional safeguard without converting courts into political decision-makers. Courts should not ordinarily determine which party should have been invited simply because another political arrangement appears preferable in hindsight. Judicial review should instead focus upon whether the Governor acted within constitutional limits, relied upon relevant material, ignored established constitutional principles without justification, or exercised power for an extraneous or unconstitutional purpose.¹⁴⁸

¹⁴⁴ *Shamsher Singh*, *supra* note 1; *Rameshwar Prasad*, *supra* note 5.

¹⁴⁵ *Rameshwar Prasad*, *supra* note 5; *Shivraj Singh Chouhan*, *supra* note 3.

¹⁴⁶ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV, para. 4.11.04.

¹⁴⁷ *Rameshwar Prasad*, *supra* note 5; SARKARIA COMMISSION REPORT, *supra* note 2.

¹⁴⁸ *Nabam Rebia*, *supra* note 5; *Shivraj Singh Chouhan*, *supra* note 3.

This distinction is essential to maintaining institutional balance. If courts routinely replace the Governor's initial assessment with their own political assessment, the judiciary could itself become involved in questions constitutionally entrusted to political institutions. Conversely, if courts refuse to examine gubernatorial action altogether, Article 163 could become a shield for arbitrary constitutional conduct. The appropriate approach lies between these extremes: judicial review should enforce constitutional boundaries without assuming the political role of the Governor.¹⁴⁹

L. The unresolved grey area

Despite the development of judicial principles and institutional guidelines, an important grey area remains. The Constitution does not codify the Sarkaria order of preference, nor does it establish a mandatory evidentiary procedure through which competing claimants must prove their support before the Governor. As a result, two Governors could apply the same constitutional principles differently to substantially similar political circumstances.

This uncertainty creates a risk of inconsistent constitutional practice. It also increases the importance of conventions, because conventions can provide continuity where formal constitutional rules are incomplete. Conventions are effective, however, only when constitutional actors consistently respect them. A convention that is repeatedly ignored may lose its practical force even if it remains normatively persuasive.¹⁵⁰

The preferable solution is therefore not necessarily to convert every convention into a rigid statutory rule. Excessive codification may deprive the Governor of the flexibility required to respond to unusual political configurations. A combination of established conventions, transparent reasoning, objective evidence and prompt floor testing can instead provide sufficient structure while preserving necessary constitutional flexibility.¹⁵¹

M. A proposed five-stage constitutional framework

On the basis of the constitutional provisions, judicial precedents and Commission recommendations examined in this research, the following five-stage test may be proposed for the exercise of gubernatorial discretion in a hung Legislative Assembly.

First, the Governor should identify whether any pre-election alliance commands a clear majority.

¹⁴⁹ Rameshwar Prasad, *supra* note 5.

¹⁵⁰ SARKARIA COMMISSION REPORT, *supra* note 2; PUNCHHI COMMISSION REPORT, *supra* note 4.

¹⁵¹ PUNCHHI COMMISSION REPORT, *supra* note 4.

Secondly, where no such alliance exists, the Governor should identify the claimant with the strongest credible basis for obtaining legislative confidence, having regard to the Sarkaria order of preference.

Thirdly, the Governor should rely upon objective and verifiable material rather than upon political preference, speculation or unsubstantiated allegations.

Fourthly, the invitation to form the government should be understood as provisional and should be followed by a floor test within a reasonable period.

Fifthly, any substantial departure from established constitutional conventions should be supported by demonstrable constitutional reasons and remain subject to judicial review on recognised constitutional grounds. On this understanding, the Sarkaria order operates as a persuasive constitutional convention and guideline rather than as a binding rule.¹⁵²

This proposed framework does not eliminate discretion. It converts discretion from an essentially subjective political choice into a structured constitutional judgment. Such an approach is more consistent with parliamentary democracy, constitutional morality and the rule of law.

N. Critical finding

The critical finding of this research is that the Governor's discretionary power in a hung Legislative Assembly is constitutionally limited but not constitutionally eliminated. The Governor possesses a genuine role because the Constitution requires an authority to initiate government formation where no clear majority exists. The Governor does not, however, possess an unfettered power to select the government according to personal assessment.

The limits arise from multiple constitutional sources. Article 164 establishes the Governor's role in appointing the Chief Minister; Article 163 confines discretionary action to constitutionally recognised circumstances; parliamentary democracy requires the government ultimately to enjoy legislative confidence; Sarkaria and Punchhi provide institutional guidance; judicial precedent requires objective constitutional material and recognises the floor test as the appropriate mechanism for determining majority; and constitutional morality requires neutrality, institutional restraint and fidelity to democratic values.¹⁵³

¹⁵² SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV, para. 4.11.04; *S.R. Bommai*, *supra* note 3; *Rameshwar Prasad*, *supra* note 5; *Shivraj Singh Chouhan*, *supra* note 3.

¹⁵³ INDIA CONST. arts. 163, 164; *Shamsher Singh*, *supra* note 1; *S.R. Bommai*, *supra* note 3; *Rameshwar Prasad*, *supra* note 5; *Nabam Rebia*, *supra* note 5.

The Governor's discretion should therefore be understood as facilitative rather than determinative. The Governor facilitates the emergence of a government, but the Legislative Assembly determines whether that government possesses democratic confidence. This distinction provides the most coherent constitutional answer to the research question.¹⁵⁴

XII. COMPARATIVE CONSTITUTIONAL PERSPECTIVES ON GOVERNMENT FORMATION AND CONVENTIONS

A. Relevance of comparative constitutional analysis

The constitutional position of the Governor in India is influenced by the Westminster model of parliamentary government. A comparative examination of other Westminster jurisdictions is therefore useful in determining how constitutional systems respond when an election does not produce an obvious governing majority. The United Kingdom, Canada and Australia demonstrate that government formation is frequently regulated not through exhaustive constitutional provisions but through conventions, established practices and the overriding principle that the executive must retain the confidence of the elected chamber.¹⁵⁵

The comparative experience is particularly relevant to India because the Indian Constitution leaves certain aspects of government formation to constitutional practice. While the constitutional structures of these jurisdictions differ from India's written Constitution, their experience demonstrates that discretion vested in a constitutional head can remain subject to conventions designed to preserve democratic legitimacy and political neutrality.¹⁵⁶

B. United Kingdom: the Prime Minister who commands the confidence of the House

The United Kingdom provides the classical Westminster example of government formation through constitutional convention. Unlike India, the United Kingdom does not possess a single codified constitutional document establishing a detailed procedure for the appointment of the Prime Minister. The Prime Minister is appointed by the Sovereign, and constitutional convention requires the appointment of the person who is best placed to command the confidence of the House of Commons.¹⁵⁷

The principle is particularly important where no political party obtains an overall majority. In such circumstances the constitutional focus is not simply upon identifying the party with the

¹⁵⁴ *S.R. Bommai*, *supra* note 3; *Rameshwar Prasad*, *supra* note 5.

¹⁵⁵ CABINET OFFICE, *THE CABINET MANUAL* (1st ed. 2011) (U.K.). GOVERNMENT OF CANADA, *DEMOCRACY IN CANADA*. DEPARTMENT OF THE PRIME MINISTER AND CABINET, *GUIDANCE ON CARETAKER CONVENTIONS* (Austl. 2024).

¹⁵⁶ VERNON BOGDANOR, *THE NEW BRITISH CONSTITUTION* (2009). H.W.R. WADE & C.F. FORSYTH, *ADMINISTRATIVE LAW* (11th ed. 2014).

¹⁵⁷ *THE CABINET MANUAL*, *supra* note 155, ch. 2.

greatest number of seats but upon determining which individual is best placed to command the confidence of the elected House. The emphasis upon parliamentary confidence therefore resembles the Indian constitutional principle that the Chief Minister must ultimately enjoy the confidence of the Legislative Assembly.¹⁵⁸

The Cabinet Manual, first published by the Cabinet Office in 2011, records the principal laws, rules and conventions governing the operation of government, and its second chapter deals specifically with elections and government formation. Although the Manual is not itself a constitutional statute, it provides an important source of guidance concerning constitutional practice.¹⁵⁹

The British experience therefore demonstrates the constitutional value of conventions. A lack of detailed codification does not necessarily imply an absence of constitutional limitation. Established practices can regulate the exercise of prerogative powers and provide predictable standards for constitutional actors.¹⁶⁰

C. The United Kingdom experience of 2010

The formation of the United Kingdom Government following the general election of May 2010 illustrates the difficulties created by a hung Parliament. No party obtained an overall majority in the House of Commons, and the constitutional process consequently required the political parties to negotiate concerning possible arrangements for government.

The significance of the 2010 experience lies in the fact that government formation was determined by parliamentary arithmetic and political negotiation rather than by a unilateral personal choice of the Sovereign. The Cabinet Manual records the convention that where an election does not result in a clear majority the incumbent Government remains in office unless and until the Prime Minister tenders a resignation, and that the incumbent should resign when it becomes clear that he cannot command the confidence of the House and that there is a clear alternative.¹⁶¹

This experience illustrates a principle relevant to India: where an election produces uncertainty, the constitutional head should facilitate the political process rather than attempt to determine the political outcome personally. The role of the constitutional head is principally to ensure continuity of government until parliamentary confidence can be established.¹⁶²

¹⁵⁸ *Shamsher Singh*, *supra* note 1; INDIA CONST. arts. 163, 164.

¹⁵⁹ THE CABINET MANUAL, *supra* note 155.

¹⁶⁰ *Bogdanor*, *supra* note 156.

¹⁶¹ THE CABINET MANUAL, *supra* note 155, ch. 2.

¹⁶² THE CABINET MANUAL, *supra* note 155, ch. 2.

D. Canada: confidence as the foundation of government

Canada provides another important Westminster example. The Canadian constitutional system formally vests executive authority in the Crown, exercised federally through the Governor General, while responsible government operates through constitutional conventions. The Governor General has authority to name the Prime Minister, but convention requires the appointment of the person able to command the confidence of the House of Commons.¹⁶³

The Government of Canada itself records that a fundamental characteristic of parliamentary government is that the Prime Minister and Cabinet are accountable to the House of Commons and must enjoy its support and confidence in order to remain in office. The Canadian system therefore places legislative confidence at the centre of executive legitimacy.¹⁶⁴

The Canadian experience is particularly instructive because the office of Governor General possesses formal constitutional powers that are substantially broader than the circumstances in which those powers are ordinarily exercised. Convention acts as the principal mechanism through which potentially broad constitutional powers are restrained. Official Canadian guidance records that, in all but the most exceptional circumstances, convention and the democratic process make it unnecessary and inappropriate for a Governor General to use personal initiative and discretion in the exercise of these powers.¹⁶⁵

This provides a useful comparative insight for India. Article 163 should not be understood in isolation from the broader parliamentary structure. Just as Canadian convention constrains the formal powers of the Governor General, Indian constitutional conventions can similarly structure the Governor's discretion where the Constitution does not prescribe an exhaustive procedure.

E. The Canadian principle of the incumbent government

An important feature of Canadian constitutional practice is that the incumbent Prime Minister generally continues in office until it becomes clear that another political leader can command the confidence of the House. The constitutional objective is to avoid creating a vacuum in executive authority while allowing the parliamentary process to determine the eventual government.¹⁶⁶

¹⁶³ DEMOCRACY IN CANADA, *supra* note 155; PRIVY COUNCIL OFFICE, GOVERNMENT OF CANADA, CABINET FORMATION, BRIEFING BOOK FOR THE PRIME MINISTER OF CANADA.

¹⁶⁴ CABINET FORMATION, *supra* note 163.

¹⁶⁵ DEMOCRACY IN CANADA, *supra* note 155; CABINET FORMATION, *supra* note 163.

¹⁶⁶ CABINET FORMATION, *supra* note 163.

The principle demonstrates the importance of distinguishing between the appointment of a government and the determination of political legitimacy. The Governor General facilitates the transition, but the House ultimately determines whether the government can continue through the confidence convention.¹⁶⁷

The Indian constitutional framework differs because the Governor is expressly empowered by Article 164(1) to appoint the Chief Minister. The underlying constitutional logic is nevertheless comparable: executive legitimacy ultimately depends upon the confidence of the elected chamber. The Governor's initial choice should therefore be understood as facilitating the emergence of a government capable of securing that confidence rather than as conclusively determining the political winner.¹⁶⁸

F. Australia: constitutional convention and caretaker principles

Australia provides another relevant example of a Westminster-derived constitutional system in which conventions play a significant role in regulating executive power. The Australian Government formally recognises caretaker conventions that apply during the period between the dissolution of the House of Representatives and the emergence of a clear election result or the appointment of a new government.¹⁶⁹

The Australian caretaker framework demonstrates that constitutional conventions may be sufficiently established to guide governmental conduct even where they do not operate as statutory rules. During the caretaker period the government continues to function, but conventions restrict major policy decisions, significant appointments and major contractual undertakings that could bind an incoming government.¹⁷⁰

The significance of the Australian experience for India lies in its demonstration of how conventions can impose practical limits upon constitutional power without eliminating the flexibility necessary for effective government. The conventions preserve continuity while simultaneously protecting the freedom of the incoming government and maintaining political neutrality.¹⁷¹

¹⁶⁷ CABINET FORMATION, *supra* note 163.

¹⁶⁸ INDIA CONST. arts. 163, 164; *S.R. Bommai*, *supra* note 3.

¹⁶⁹ GUIDANCE ON CARETAKER CONVENTIONS, *supra* note 155.

¹⁷⁰ GUIDANCE ON CARETAKER CONVENTIONS, *supra* note 155 (restricting major policy decisions, significant appointments and major contracts during the caretaker period).

¹⁷¹ DEPARTMENT OF THE PRIME MINISTER AND CABINET, CABINET HANDBOOK (15th ed. 2024) (Austl.).

G. The Australian Governor-General and constitutional discretion

The Australian constitutional structure also demonstrates that the existence of formal discretionary powers in a constitutional head does not necessarily imply unrestricted personal authority. The Governor-General possesses formal constitutional powers, but their exercise is heavily influenced by established conventions concerning responsible government and parliamentary confidence.

The Australian experience therefore reinforces a broader Westminster principle: constitutional discretion must operate within a framework of political responsibility and established practice. Where the elected chamber is capable of determining confidence, the constitutional head should ordinarily respect that democratic process rather than substitute personal judgment for parliamentary determination.¹⁷²

The significance of this principle becomes particularly clear in situations involving uncertainty concerning government formation. The constitutional head may have to determine which political leader should be given an opportunity to establish parliamentary confidence, but that determination should be directed towards securing responsible government rather than towards selecting the political programme that the constitutional head considers desirable.

H. Comparison with the Indian position

The Indian constitutional framework shares important characteristics with these Westminster systems but differs in one crucial respect: India possesses a substantially written constitutional framework that expressly addresses the Governor's office through Articles 153 to 167 and specifically recognises discretionary functions under Article 163.¹⁷³

Unlike the United Kingdom, where constitutional conventions play an exceptionally significant role because of the uncodified nature of the constitutional system, India has a written constitutional text that provides a formal foundation for gubernatorial authority. The Indian Constitution cannot and does not attempt, however, to codify every political contingency that may arise during government formation. Conventions and judicial interpretation therefore remain important supplementary sources of constitutional guidance.¹⁷⁴

The comparative experience supports the proposition that the Governor's discretion should be understood within the larger principle of parliamentary confidence. The common feature across the Westminster systems is that the constitutional head facilitates the appointment or

¹⁷² CABINET HANDBOOK, *supra* note 171; GUIDANCE ON CARETAKER CONVENTIONS, *supra* note 155.

¹⁷³ INDIA CONST. arts. 153 to 167.

¹⁷⁴ *Nabam Rebia*, *supra* note 5; SARKARIA COMMISSION REPORT, *supra* note 2.

continuation of a government, while the elected chamber provides the ultimate democratic foundation for its authority.¹⁷⁵

I. Comparative lessons for India

Three principal lessons emerge from the comparative analysis.

First, legislative confidence is the central criterion of executive legitimacy. The United Kingdom, Canada and Australia all demonstrate, in different forms, that the government must ultimately be capable of functioning with the confidence of the elected chamber.¹⁷⁶

Secondly, constitutional conventions can effectively structure formal constitutional powers. The Canadian and Australian experiences demonstrate that the existence of formal powers in the Governor General does not necessarily translate into unrestricted personal discretion. Conventions establish boundaries within which those powers are ordinarily exercised.¹⁷⁷

Thirdly, constitutional heads should facilitate rather than determine political outcomes. The role of the constitutional head is to ensure that a government capable of commanding legislative confidence is established. The constitutional head should not become an alternative political decision-maker.¹⁷⁸

These principles substantially reinforce the Indian approach developed through the Sarkaria Commission and the jurisprudence of the Supreme Court. The Governor's role in a hung Assembly should similarly be understood as one of facilitating constitutional government while preserving the authority of the Legislative Assembly to determine confidence.

J. Whether India requires greater codification

The comparative experience nevertheless raises an important question: should India formally codify the procedure governing the Governor's choice in a hung Legislative Assembly?

A case for codification can be made on the ground of certainty. A clearly defined hierarchy could reduce inconsistent gubernatorial decisions, minimise allegations of political bias and provide political parties with predictable expectations concerning government formation. It could also reduce the frequency with which courts are required to intervene after a political crisis has already developed.

¹⁷⁵ *S.R. Bommai*, *supra* note 3; *DEMOCRACY IN CANADA*, *supra* note 155.

¹⁷⁶ *DEMOCRACY IN CANADA*, *supra* note 155; *THE CABINET MANUAL*, *supra* note 155; *GUIDANCE ON CARETAKER CONVENTIONS*, *supra* note 155.

¹⁷⁷ *DEMOCRACY IN CANADA*, *supra* note 155; *CABINET FORMATION*, *supra* note 163.

¹⁷⁸ *THE CABINET MANUAL*, *supra* note 155; *DEMOCRACY IN CANADA*, *supra* note 155.

Excessive codification may, however, itself create constitutional difficulties. Political configurations cannot always be reduced to numerical formulas. A pre-election alliance, a single largest party and a post-election coalition may present different claims depending upon the reliability and stability of their legislative support. A rigid hierarchy could therefore produce results inconsistent with the broader constitutional objective of establishing a government capable of commanding the House.¹⁷⁹

The preferable approach may therefore be structured rather than exhaustive codification. Parliament or an appropriate constitutional authority could establish broad procedural principles while preserving a limited area of gubernatorial judgment for exceptional circumstances. Such principles could include the Sarkaria order of preference, mandatory disclosure of relevant material, written reasons for substantial departures from established conventions and an early floor test.¹⁸⁰

K. Comparative constitutional convergence

Despite differences in constitutional structure, the United Kingdom, Canada, Australia and India demonstrate a significant degree of constitutional convergence. The common principle is that the executive must ultimately derive its legitimacy from the confidence of the elected legislative chamber, while the constitutional head must exercise formal powers in a manner consistent with responsible government.

The comparative analysis therefore strengthens the central proposition of this research. The Governor's discretion in India should not be regarded as an exceptional personal power detached from parliamentary principles. It forms part of a broader constitutional tradition in which discretion is exercised to preserve responsible government and is constrained by conventions, institutional neutrality and legislative confidence.¹⁸¹

The comparative experience also demonstrates that constitutional conventions can be powerful instruments of constitutional governance even where they are not directly enforceable by courts. Their effectiveness depends upon constitutional actors respecting them consistently and treating departure from established practice as an exceptional rather than an ordinary occurrence.¹⁸²

L. Implications for the Indian constitutional framework

India should therefore draw from, but not mechanically reproduce, the experience of other Westminster systems. The Indian Constitution has its own textual structure, federal

¹⁷⁹ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV; *Rameshwar Prasad*, *supra* note 5.

¹⁸⁰ SARKARIA COMMISSION REPORT, *supra* note 2; PUNCHHI COMMISSION REPORT, *supra* note 4.

¹⁸¹ *Shamsher Singh*, *supra* note 1; *S.R. Bommai*, *supra* note 3.

¹⁸² DEMOCRACY IN CANADA, *supra* note 155; GUIDANCE ON CARETAKER CONVENTIONS, *supra* note 155.

arrangements, judicial review mechanisms and political conditions. The appropriate lesson is not that foreign conventions should automatically become Indian constitutional rules, but that constitutional discretion is most legitimate when exercised within a stable framework of recognised conventions and democratic accountability.

The Sarkaria and Punchhi Commission recommendations already provide India with an indigenous institutional framework. The comparative experience confirms the value of strengthening that framework through consistent practice, transparent constitutional reasoning and adherence to the principle that legislative confidence is ultimately decisive.

Accordingly, the Governor should ordinarily act upon the basis that the person or political formation most likely to command the confidence of the Legislative Assembly should receive the opportunity to form the government. The invitation should remain subject to prompt verification through the floor of the House. Where the Governor departs from established conventions, the departure should be supported by compelling constitutional circumstances rather than by political preference.¹⁸³

M. Comparative conclusion

The comparative constitutional experience demonstrates that the absence of an exhaustive written formula does not necessarily produce unlimited discretion. The United Kingdom relies heavily upon convention; Canada combines formal constitutional powers with conventions governing responsible government; and Australia demonstrates how established conventions can structure executive power while preserving necessary flexibility.¹⁸⁴

For India the lesson is particularly significant. The Governor's discretion in a hung Legislative Assembly should be understood as part of a constitutional system in which discretion exists to facilitate democratic government, while parliamentary confidence determines its legitimacy. Constitutional conventions should not, therefore, be regarded as merely political customs. When consistently recognised and supported by judicial precedent and institutional practice, they can operate as important constitutional restraints upon the exercise of gubernatorial discretion.

The comparative analysis consequently supports the conclusion already reached in this research: the Governor's discretion is neither purely ceremonial nor unfettered. It is a limited constitutional discretion structured by parliamentary democracy, legislative confidence, constitutional conventions, institutional neutrality and judicial review. The Indian constitutional

¹⁸³ SARKARIA COMMISSION REPORT, *supra* note 2; Rameshwar Prasad, *supra* note 5.

¹⁸⁴ THE CABINET MANUAL, *supra* note 155; DEMOCRACY IN CANADA, *supra* note 155; GUIDANCE ON CARETAKER CONVENTIONS, *supra* note 155.

framework can therefore be strengthened not by eliminating gubernatorial discretion, but by ensuring that its exercise remains transparent, principled, predictable and subordinate to the democratic authority of the Legislative Assembly.¹⁸⁵

XIII. FINDINGS AND PROPOSED CONSTITUTIONAL FRAMEWORK

A. Principal findings of the research

The preceding analysis establishes that the Governor's discretionary power to invite a political party or coalition to form the government in a hung Legislative Assembly is neither unrestricted nor entirely mechanical. The Constitution necessarily leaves a limited area of judgment to the Governor because electoral outcomes may produce multiple competing claims to government formation. That judgment is nevertheless exercised within the larger constitutional framework of parliamentary democracy, legislative confidence, constitutional conventions, judicial review and institutional neutrality.¹⁸⁶

The research therefore finds that the expression "Governor's discretion" should not be interpreted as equivalent to "Governor's personal choice". Article 163 does not create an independent political mandate for the Governor. The discretion exists in order to perform a constitutional function and must consequently be exercised for a constitutionally legitimate purpose. The jurisprudence of the Supreme Court in *Shamsher Singh* and *Nabam Rebia* supports the principle that gubernatorial discretion is confined to situations in which the Constitution expressly or necessarily requires independent judgment.¹⁸⁷

The second major finding is that the ultimate constitutional criterion is not the identity of the largest political party in isolation, but the likelihood that the claimant will command the confidence of the Legislative Assembly. The Sarkaria Commission expressly recommended that the party or combination of parties commanding the widest support in the Assembly should be called upon to form the government.¹⁸⁸

The third finding is that the Governor's decision at the stage of invitation should be regarded as provisional rather than conclusive. The Governor identifies the claimant most likely to establish legislative confidence; the Assembly subsequently determines whether that confidence actually

¹⁸⁵ *Nabam Rebia*, *supra* note 5; *Rameshwar Prasad*, *supra* note 5; *Shivraj Singh Chouhan*, *supra* note 3.

¹⁸⁶ INDIA CONST. arts. 163, 164; *Shamsher Singh*, *supra* note 1; *Nabam Rebia*, *supra* note 5.

¹⁸⁷ *Shamsher Singh*, *supra* note 1; *Nabam Rebia*, *supra* note 5.

¹⁸⁸ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV (recommending that the party or combination of parties commanding the widest support in the Legislative Assembly be called upon to form the government).

exists. This distinction is constitutionally significant because it prevents the Governor from becoming the final arbiter of legislative majority.¹⁸⁹

B. The need for a structured constitutional test

The existing constitutional framework contains sufficient principles to limit gubernatorial discretion, but those principles are dispersed across constitutional provisions, judicial decisions, Commission reports and conventions. This creates the possibility of inconsistent application. A more structured framework would improve constitutional certainty without eliminating the flexibility required in exceptional political circumstances.

The research proposes that the Governor should apply a five-stage constitutional test when faced with a hung Legislative Assembly. The test should operate as a constitutional guideline rather than as an inflexible statutory formula.

i. Determining whether a clear majority exists

The first question should be whether any political party or pre-election alliance has secured a clear majority in the Legislative Assembly. Where such a majority exists, the Governor's discretion is at its narrowest. The leader of the majority party or the recognised leader of the majority alliance should ordinarily be invited to form the government.¹⁹⁰

This approach reflects the basic principle of representative democracy: where the electoral result itself establishes a clear legislative majority, there is ordinarily no constitutional justification for substituting gubernatorial preference for the expressed electoral mandate.

ii. Applying the established order of preference

Where no party has an absolute majority, the Governor should apply the established constitutional conventions concerning the order in which competing claimants are considered.

The Sarkaria Commission recommends the following sequence:

an alliance of parties formed prior to the elections;

the largest single party staking a claim to form the government with the support of others, including independents;

a post-electoral coalition of parties, with all the partners in the coalition joining the government; and

¹⁸⁹ *S.R. Bommai*, *supra* note 3; *Shivraj Singh Chouhan*, *supra* note 3.

¹⁹⁰ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV, para. 4.11.04.

a post-electoral alliance of parties, with some parties forming the government while the remaining parties, including independents, support the government from outside.¹⁹¹

The order provides an important presumption in favour of consistency and predictability. It should ordinarily be followed unless the circumstances demonstrate that doing so would not reasonably identify the claimant most likely to command legislative confidence.

iii. Verifying objective evidence of support

The Governor should require sufficient objective material to establish that the claimant has a credible basis for seeking to form the government. Relevant material may include letters of support, resolutions of political parties, coalition agreements, declarations by legislators and other verifiable evidence of legislative numbers.

The Governor should not, however, conduct an open-ended investigation into political negotiations. The purpose of examining the material is to determine whether the claimant has a reasonable basis for being invited to establish majority, not to decide the political legitimacy of every arrangement between legislators.¹⁹²

This distinction is essential because an invitation to form a government and a determination of majority are constitutionally different functions. Documentary evidence may justify an invitation, but legislative confidence should ordinarily be determined by the House itself.

iv. Requiring a prompt floor test

Once a government is formed in circumstances where legislative majority is uncertain, the Governor should require the Chief Minister to establish majority support on the floor of the Legislative Assembly within a reasonable period.

The floor test is the most constitutionally legitimate mechanism for converting an uncertain political claim into an objective legislative determination. The Supreme Court has repeatedly recognised the central importance of the floor of the House in determining majority. In *S.R. Bommai* and subsequent cases the Court has emphasised that legislative confidence is ordinarily a matter for the elected House rather than for subjective assessment by constitutional authorities.¹⁹³

The decision in *Subhash Desai v. Principal Secretary, Governor of Maharashtra* illustrates the limits of this power. The Court held that the Governor was not justified in calling for a floor test on the material then available, because a communication expressing discontent with the

¹⁹¹ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV, para. 4.11.04.

¹⁹² *Rameshwar Prasad*, *supra* note 5.

¹⁹³ *S.R. Bommai*, *supra* note 3; *Shivraj Singh Chouhan*, *supra* note 3.

leadership of a political party did not indicate that the Council of Ministers had lost the confidence of the House. A floor test may therefore be directed only where objective material genuinely raises a question as to the government's majority, and not in order to resolve a dispute internal to a political party.¹⁹⁴

v. Providing constitutional reasons for exceptional departure

The Governor should ordinarily follow established conventions. Where the Governor departs from the Sarkaria order of preference, the departure should be supported by identifiable constitutional reasons based upon objective circumstances.

This requirement does not mean that the Governor must issue a lengthy public judgment. It means that the decision should be capable of being constitutionally explained and defended if challenged before a court. A departure based merely on political preference, personal assessment or unsupported apprehension should not satisfy this standard.¹⁹⁵

C. The proposed constitutional confidence standard

The research proposes that the appropriate guiding principle be described as the constitutional confidence standard.

Under this standard the Governor should invite the political party or coalition that, on the basis of available objective material and established constitutional conventions, appears most likely to command the confidence of the Legislative Assembly, subject to prompt verification through a floor test.

The standard contains three interconnected requirements.

First, numerical credibility: the claimant should have a demonstrable basis for obtaining the required legislative support.

Secondly, constitutional legitimacy: the claim should arise within the framework of constitutional and parliamentary government.

Thirdly, legislative verification: the claim should ultimately be tested on the floor of the House.

This standard avoids two competing errors. It prevents the Governor from automatically preferring the single largest party irrespective of its actual ability to secure confidence, while also preventing the Governor from accepting an unverified post-election coalition merely because it asserts a numerical majority.¹⁹⁶

¹⁹⁴ *Subhash Desai, supra* note 8.

¹⁹⁵ *Nabam Rebia, supra* note 5; *Rameshwar Prasad, supra* note 5.

¹⁹⁶ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV, para. 4.11.04; *S.R. Bommai, supra* note 3.

D. Why the single largest party should not be the sole criterion

The research finds that treating the single largest party as automatically entitled to form the government would be constitutionally over-simplistic. The purpose of government formation is not to reward the party with the largest individual seat tally but to establish an executive capable of commanding the Legislature.

If, for example, Party A wins 100 seats, Party B wins 90 and Party C wins 45 in an Assembly of 235 seats requiring 118 for a majority, Party A is the single largest party but does not possess a majority. If Parties B and C enter into a credible coalition with 135 legislators, the constitutional question cannot be answered merely by stating that Party A is the largest party. The Governor must assess which claimant is more likely to command the confidence of the House.

The Sarkaria Commission's order of preference provides guidance in this situation, but the underlying constitutional objective remains legislative confidence.¹⁹⁷

E. Why a post-electoral coalition should not be automatically rejected

At the opposite extreme, a post-election coalition should not automatically be considered constitutionally illegitimate. Elections determine the composition of the Legislature; they do not necessarily determine the precise coalition that will subsequently form the executive. Political parties may constitutionally negotiate after the election, provided that their conduct complies with applicable law.

The relevant question for the Governor should therefore be whether the coalition presents credible and verifiable legislative support. The timing of its formation may be relevant to assessing credibility, but it should not constitute an automatic constitutional disqualification.¹⁹⁸

This approach is consistent with the principle that the Assembly itself is the proper institution for determining whether the proposed government enjoys majority support.

F. Written reasons and transparency

A further reform proposed by this research is the maintenance of a written constitutional record of the Governor's decision. The Governor should record the material considered, the competing claims presented and the constitutional basis for selecting one claimant over another.

¹⁹⁷ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV, para. 4.11.04.

¹⁹⁸ Rameshwar Prasad, *supra* note 5.

Such a requirement would improve institutional accountability without necessarily requiring the immediate publication of confidential political communications. It would also facilitate meaningful judicial review if the decision were subsequently challenged.

Transparency is particularly important because gubernatorial decisions frequently have immediate political consequences. A written record can demonstrate that the decision was based upon constitutional considerations rather than partisan preference. It would also strengthen public confidence in the neutrality of the office.¹⁹⁹

G. Limits on intervention before the floor test

The Governor should avoid making determinations that properly belong to the Legislative Assembly before the floor test. Questions concerning whether a government actually commands majority support should ordinarily be resolved through voting in the House.

This principle also protects the Governor from becoming involved in political controversies concerning individual legislators. Unless there is a clear constitutional or statutory basis requiring intervention, the Governor should not attempt to determine the validity of political alliances, defections or internal party disputes through an independent political inquiry. The constitutional mechanism for determining confidence should remain the Legislature itself.²⁰⁰

The decision in *Subhash Desai* is significant in this regard. The Court held that the Governor should not have entered upon the question of which faction represented the political party, and distinguished the Governor's limited role in relation to a floor test from the constitutional questions falling to be decided by the Speaker and by the courts.²⁰¹

H. Judicial review as a corrective mechanism

The proposed framework does not require courts to review every gubernatorial decision. Judicial review should arise where there is a credible allegation that the Governor acted outside constitutional limits, ignored relevant material, relied upon irrelevant considerations, substantially departed from established constitutional conventions without justification, or acted for an unconstitutional purpose.

The appropriate judicial remedy will depend upon the circumstances. Where a floor test can still meaningfully determine legislative confidence, judicial intervention should ordinarily preserve that democratic process. Where unconstitutional action has already altered the political situation, however, the Court may have to consider more substantial constitutional remedies.

¹⁹⁹ *Nabam Rebia*, *supra* note 5; *Rameshwar Prasad*, *supra* note 5.

²⁰⁰ *S.R. Bommai*, *supra* note 3; *Shivraj Singh Chouhan*, *supra* note 3.

²⁰¹ *Subhash Desai*, *supra* note 8.

This approach is consistent with the broader jurisprudence of the Supreme Court that constitutional review should protect the constitutional scheme without unnecessarily converting courts into political forums.²⁰²

I. Constitutional convention should be strengthened, not ignored

The research does not recommend eliminating gubernatorial discretion through a rigid statutory hierarchy. The political circumstances of every hung Assembly cannot be predicted in advance. A mechanical rule may itself create constitutional injustice where unusual electoral combinations arise.

Constitutional conventions should instead be strengthened through consistent practice. The Sarkaria order of preference should ordinarily guide the Governor; departure should be exceptional; objective material should support the decision; and the claimant should be required to demonstrate legislative confidence promptly.

Such an approach preserves the flexibility of the Constitution while reducing the possibility of arbitrary decision-making. It also reflects the experience of other Westminster systems in which conventions have successfully structured constitutional powers without eliminating discretion altogether.²⁰³

J. Proposed institutional safeguards

Based upon the findings of this research, the following safeguards are proposed.

Recognition of the Sarkaria order as the primary guiding framework: the order of preference should be treated as the starting point for government formation in every hung Assembly.

Objective-material requirement: the Governor should base the invitation upon verifiable evidence of legislative support.

Written constitutional reasons: the Governor should maintain a record explaining the constitutional basis of the decision, particularly where established conventions are departed from.

Prompt floor test: where majority is uncertain, the invited government should establish confidence on the floor of the House within a reasonable period.

No political preference: the Governor should not evaluate political parties according to personal ideological or policy preferences.

²⁰² *Rameshwar Prasad*, *supra* note 5; *Nabam Rebia*, *supra* note 5.

²⁰³ THE CABINET MANUAL, *supra* note 155; DEMOCRACY IN CANADA, *supra* note 155; GUIDANCE ON CARETAKER CONVENTIONS, *supra* note 155.

Limited judicial review: courts should examine constitutional legality, the relevance of material and improper exercise of discretion without substituting their own political preference.

Exceptional departure from convention: any departure from the established order should be justified by objective constitutional circumstances.

These safeguards would not transform the Governor into a purely ceremonial authority. They would ensure that necessary discretion operates within predictable constitutional boundaries.²⁰⁴

K. The proposed model of facilitator rather than arbiter

The central normative proposition emerging from this research is that the Governor should function as a facilitator of government formation and not as an arbiter of political legitimacy.

The facilitator model recognises that the Governor must act when an election produces no clear majority. The Governor must identify a claimant, appoint the Chief Minister and ensure that the constitutional process moves towards the formation of a functioning government.

The arbiter model, by contrast, would permit the Governor to make substantive political judgments concerning which party deserves to govern. Such a role would be inconsistent with parliamentary democracy because the Constitution assigns political legitimacy ultimately to the elected Legislature.

The distinction is therefore fundamental: **the Governor selects the claimant who should receive the opportunity to prove majority; the Legislative Assembly determines whether that claimant actually possesses majority support.**²⁰⁵

L. Original contribution of the research

The principal contribution of this research lies in bringing together constitutional text, judicial precedent, institutional recommendations and comparative constitutional practice into a single framework for evaluating gubernatorial discretion.

Existing constitutional principles demonstrate that discretion is limited, but the practical standards governing the initial invitation to form a government remain dispersed. The proposed constitutional confidence standard seeks to provide a coherent analytical framework by connecting the Governor's initial decision with the subsequent constitutional requirement of legislative confidence.

The proposed framework therefore does not seek to abolish discretion. It seeks to make discretion structured, evidence-based, convention-guided and ultimately answerable to the

²⁰⁴ SARKARIA COMMISSION REPORT, *supra* note 2; PUNCHHI COMMISSION REPORT, *supra* note 4.

²⁰⁵ *S.R. Bommai*, *supra* note 3; *Rameshwar Prasad*, *supra* note 5.

Legislative Assembly. This provides a middle path between unrestricted gubernatorial choice and an excessively rigid constitutional formula.

M. Answer to the research question

The research question asks whether the Governor's discretionary power to invite a political party to form the government in a hung Legislative Assembly is constitutionally limited.

The answer is that it is.

The Governor possesses genuine discretion because the Constitution does not prescribe an exhaustive mechanism for every possible electoral configuration. The discretion is nevertheless limited by the constitutional purpose for which it exists. The Governor must act to facilitate the formation of a government capable of commanding legislative confidence and cannot use the office to determine which political party should govern according to personal preference.

The limits are derived from the constitutional scheme, particularly Articles 163 and 164; the parliamentary principle of legislative confidence; the recommendations of the Sarkaria and Punchhi Commissions; the decisions of the Supreme Court in *Shamsher Singh*, *S.R. Bommai*, *Rameshwar Prasad*, *Nabam Rebia*, *Shivraj Singh Chouhan* and *Subhash Desai*; and established constitutional conventions.²⁰⁶

The discretion is therefore constitutional but structured, genuine but limited, and necessary but reviewable.

Most importantly, the Governor's decision to invite a claimant does not determine the ultimate democratic legitimacy of the government. That legitimacy must be established through the confidence of the elected Legislative Assembly. The constitutional boundary is consequently clear: **the Governor may facilitate the formation of the government, but cannot substitute gubernatorial judgment for legislative confidence.**²⁰⁷

XIV. CONCLUSION

The constitutional position of the Governor in a hung Legislative Assembly represents one of the most delicate intersections between constitutional discretion and parliamentary democracy in India. The Constitution necessarily entrusts the Governor with a limited degree of judgment because an election may produce no political formation capable of independently establishing

²⁰⁶ *Shamsher Singh*, *supra* note 1; *S.R. Bommai*, *supra* note 3; *Rameshwar Prasad*, *supra* note 5; *Nabam Rebia*, *supra* note 5; *Shivraj Singh Chouhan*, *supra* note 3; *Subhash Desai*, *supra* note 8.

²⁰⁷ INDIA CONST. arts. 163, 164; *S.R. Bommai*, *supra* note 3; *Rameshwar Prasad*, *supra* note 5.

a majority. The existence of such discretion cannot, however, be understood as conferring upon the Governor an unrestricted political power to determine which party should govern.²⁰⁸

The analysis undertaken in this research demonstrates that the Governor's discretion is constitutionally structured by Articles 163 and 164, the principle of responsible government, legislative confidence, constitutional conventions, judicial precedent and the recommendations of the Sarkaria and Punchhi Commissions. These sources collectively establish that the Governor's primary responsibility is to facilitate the formation of a government capable of commanding the confidence of the Legislative Assembly.²⁰⁹

The research further establishes that the single largest party cannot invariably be treated as constitutionally entitled to form the government merely because it has obtained the highest number of seats. Equally, a post-election coalition cannot automatically be rejected merely because it was formed after the election. The decisive constitutional consideration is whether the claimant possesses a credible and demonstrable basis for obtaining the confidence of the House, considered in accordance with established conventions and the particular circumstances of the election.²¹⁰

The Sarkaria Commission's order of preference provides an important framework for resolving competing claims. A pre-election alliance occupies the strongest position, followed by the single largest party staking a claim with the support of others, a post-election coalition in which all partners join the government and, finally, an arrangement in which some parties form the government with outside support. This framework promotes predictability while retaining sufficient flexibility to accommodate exceptional political circumstances.²¹¹

Judicial precedent has further strengthened the constitutional limits upon gubernatorial discretion. The decisions of the Supreme Court in *S.R. Bommai*, *Rameshwar Prasad*, *Nabam Rebia*, *Shivraj Singh Chouhan* and *Subhash Desai* demonstrate that constitutional authorities cannot treat political discretion as wholly immune from constitutional scrutiny. The Court's repeated emphasis upon legislative confidence and the floor test reinforces the principle that the elected Assembly, rather than the Governor, is the ultimate institution for determining whether a government possesses majority support.²¹²

²⁰⁸ INDIA CONST. arts. 163, 164; *Shamsher Singh*, *supra* note 1.

²⁰⁹ *Shamsher Singh*, *supra* note 1; SARKARIA COMMISSION REPORT, *supra* note 2; PUNCHHI COMMISSION REPORT, *supra* note 4.

²¹⁰ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV, para. 4.11.04; *Rameshwar Prasad*, *supra* note 5.

²¹¹ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV, para. 4.11.04.

²¹² *S.R. Bommai*, *supra* note 3; *Rameshwar Prasad*, *supra* note 5; *Nabam Rebia*, *supra* note 5; *Shivraj Singh Chouhan*, *supra* note 3; *Subhash Desai*, *supra* note 8.

The comparative analysis of the United Kingdom, Canada and Australia further demonstrates that constitutional discretion can coexist with strong constitutional limitations. Westminster systems rely substantially upon constitutional conventions to ensure that constitutional heads facilitate responsible government rather than exercise personal political choice. India's written Constitution differs from these systems, but the underlying principle remains relevant: formal constitutional power must operate consistently with democratic legitimacy and parliamentary confidence.²¹³

The research therefore concludes that the Governor's discretionary power is constitutionally limited but not constitutionally eliminated. Some discretion is indispensable because political circumstances cannot always be reduced to predetermined numerical formulas. That discretion must, however, be structured by objective material, constitutional conventions, institutional neutrality and the requirement of an early floor test.²¹⁴

The proposed constitutional confidence standard provides a framework through which this balance can be maintained. Under this standard the Governor should invite the political formation that, on the basis of objective evidence and established constitutional conventions, appears most likely to command the confidence of the Legislative Assembly. The invitation should be regarded as an opportunity to establish majority rather than as a final determination of political legitimacy. Where majority is uncertain, the issue should be resolved promptly on the floor of the House.²¹⁵

The constitutional significance of this distinction is considerable. The Governor's role is to facilitate the formation of government; the Legislature's role is to determine its democratic legitimacy. Any exercise of gubernatorial discretion that reverses these roles risks weakening the parliamentary character of the Constitution.

Constitutional morality ultimately requires the Governor to act with neutrality, restraint and fidelity to the constitutional scheme. The office must neither become an instrument for frustrating a legitimate legislative majority nor an alternative political centre capable of selecting governments according to subjective preference. The legitimacy of gubernatorial discretion therefore depends not merely upon the existence of constitutional power but upon the manner in which that power is exercised.

²¹³ THE CABINET MANUAL, *supra* note 155; DEMOCRACY IN CANADA, *supra* note 155; GUIDANCE ON CARETAKER CONVENTIONS, *supra* note 155.

²¹⁴ *Rameshwar Prasad*, *supra* note 5; *Nabam Rebia*, *supra* note 5.

²¹⁵ *S.R. Bommai*, *supra* note 3; *Shivraj Singh Chouhan*, *supra* note 3.

Accordingly, the answer to the research question is affirmative: the Governor's discretionary power to invite a political party or coalition to form the government in a hung Legislative Assembly is constitutionally limited by the constitutional text, parliamentary principles, judicial precedent, constitutional conventions and the requirement of legislative confidence. The enduring constitutional solution is not the complete abolition of gubernatorial discretion, but its transformation into a transparent, convention-guided and objectively exercised constitutional function that remains subordinate to the democratic confidence of the Legislative Assembly.²¹⁶

XV. POLICY SUGGESTIONS AND RECOMMENDATIONS

The constitutional framework governing the Governor's discretion in a hung Legislative Assembly would benefit from greater institutional clarity. The following recommendations are proposed on the basis of the findings of this research.

A. Institutional recognition of the Sarkaria order of preference

The Sarkaria Commission's recommended order of preference should be consistently recognised as the primary constitutional convention governing government formation in a hung Assembly. Although the recommendations are not statutory rules, their consistent application would reduce uncertainty and minimise the possibility of arbitrary gubernatorial choices.²¹⁷

B. Objective verification of legislative support

The Governor should require credible and verifiable material from competing claimants before inviting a political formation to form the government. Letters of support, resolutions of political parties, coalition agreements and declarations of legislators may be considered, provided that they are capable of reasonable verification. The process should remain focused upon determining which claimant is most likely to command legislative confidence rather than upon evaluating political preferences.²¹⁸

C. Mandatory prompt floor test

Where the majority position is uncertain, the Governor should require the Chief Minister to establish confidence on the floor of the Legislative Assembly within a reasonable period. The floor test should be treated as the principal constitutional mechanism for resolving competing claims concerning legislative majority.²¹⁹

²¹⁶ INDIA CONST. arts. 163, 164; SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV; Rameshwar Prasad, *supra* note 5.

²¹⁷ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV, para. 4.11.04.

²¹⁸ Rameshwar Prasad, *supra* note 5; SARKARIA COMMISSION REPORT, *supra* note 2.

²¹⁹ S.R. Bommai, *supra* note 3; Shivraj Singh Chouhan, *supra* note 3.

D. Written record of the Governor's decision

The Governor should maintain a written constitutional record identifying the competing claims, the relevant legislative numbers, the material considered and the reasons for the decision to invite a particular claimant. Such a record would strengthen transparency and facilitate meaningful judicial review where necessary.

The recommendation does not require every aspect of the Governor's constitutional deliberation to be publicly disclosed. It seeks rather to ensure that the exercise of discretion remains reasoned, accountable and capable of constitutional examination.²²⁰

E. Exceptional nature of departure from convention

A departure from the established Sarkaria order should be treated as exceptional. Where departure is considered necessary, the Governor should be able to identify objective constitutional circumstances justifying it. Political preference, ideological considerations or speculative assumptions concerning the future conduct of legislators should not constitute sufficient grounds.²²¹

F. Protection of institutional neutrality

The constitutional position of the Governor requires strict institutional neutrality. The Governor should avoid statements, conduct or decisions that create a reasonable perception that the office is favouring one political party or coalition. Institutional neutrality is particularly important during government formation because the Governor's decision may determine which political formation receives the first opportunity to govern.²²²

G. Clear separation between invitation and determination of majority

The constitutional process should maintain a clear distinction between the Governor's decision to invite a claimant and the Legislative Assembly's determination of majority. The Governor should not attempt to establish legislative confidence conclusively through private consultations or political assessments where that question can appropriately be resolved through a floor test.²²³

H. Strengthening constitutional conventions

Rather than relying exclusively upon statutory codification, India should strengthen constitutional conventions through consistent institutional practice. The Sarkaria and Punchhi

²²⁰ *Nabam Rebia*, *supra* note 5; *Rameshwar Prasad*, *supra* note 5.

²²¹ SARKARIA COMMISSION REPORT, *supra* note 2, ch. IV; *Rameshwar Prasad*, *supra* note 5.

²²² *Shamsher Singh*, *supra* note 1; *Nabam Rebia*, *supra* note 5.

²²³ *S.R. Bommai*, *supra* note 3; *Shivraj Singh Chouhan*, *supra* note 3.

Commission recommendations should be treated as important constitutional guidance, particularly concerning government formation, floor tests and relations between constitutional authorities.²²⁴

I. Development of a standard constitutional protocol

A standard protocol could be developed for Governors dealing with hung Assemblies. The protocol may prescribe the information to be sought from claimants, the order in which claimants should ordinarily be considered, the circumstances in which a floor test should be directed and the factors that may justify departure from the established convention.

Such a protocol would not eliminate discretion. It would ensure that discretion is exercised within a predictable constitutional framework.

J. Judicial review without judicial substitution

Courts should continue to exercise judicial review where gubernatorial action raises genuine constitutional concerns. Judicial review should, however, primarily examine constitutional legality, the relevance of material, arbitrariness, improper purpose and substantial deviation from constitutional norms. Courts should avoid replacing the Governor's limited constitutional assessment with their own political assessment unless the circumstances require effective constitutional relief.²²⁵

K. Periodic review of constitutional practice

The Union Government, State Governments, constitutional institutions and academic bodies should periodically review developments concerning government formation in hung Assemblies. Such review would enable constitutional conventions to evolve in response to changing political circumstances while preserving the fundamental principles of parliamentary democracy.

L. Final recommendation

The most appropriate reform is therefore not the abolition of gubernatorial discretion but its constitutional standardisation. The Governor should operate within a clearly recognised framework based upon the Sarkaria order of preference, objective verification of support, prompt floor testing, institutional neutrality, written constitutional reasoning and judicial accountability.

²²⁴ SARKARIA COMMISSION REPORT, *supra* note 2; PUNCHHI COMMISSION REPORT, *supra* note 4.

²²⁵ Rameshwar Prasad, *supra* note 5; Nabam Rebia, *supra* note 5.

Such a framework would preserve the flexibility necessary for constitutional government while reducing the possibility of a partisan or arbitrary exercise of gubernatorial power. It would also strengthen public confidence that government formation following an inconclusive electoral mandate is determined through constitutional principles rather than through political preference.

XVI. REFERENCES

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