
TRYST AT MIDNIGHT: GOVERNOR'S DISCRETION ON APPOINTMENT OF CHIEF MINISTER AND JUDICIAL OVERSIGHT

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ABSTRACT

The Governor, as the constitutional head of the State, is vested with limited discretionary powers, particularly in the appointment of the Chief Minister and the determination of the timeframe for proving majority in the Legislative Assembly. While such discretion is intended to address political uncertainty, especially in cases of hung assemblies, its exercise has often raised concerns of partisanship and political manipulation.

This paper examines the use of Governor's discretion in government formation, with particular focus on midnight and early-morning swearing-in ceremonies and the strategic determination of timeframes for floor tests. Through an analysis of recent instances such as Karnataka (2018) and Maharashtra (2019), it highlights the risks of horse-trading and distortion of the democratic mandate. The paper further analyses the role of judicial oversight in curbing such misuse, emphasising that the legitimacy of a government must ultimately be tested on the floor of the House.

Keywords: Governor, Discretion, Hung Assembly, Floor-test, Horse-trading.

Introduction

The office of the Governor occupies a significant position within the federal framework of the Indian polity. Appointed by the Central Government, the Governor functions as its representative, ensuring the effective administration of the State while preserving the unity and integrity of the Union. In this capacity, the Governor also acts as a constitutional safeguard, overseeing and evaluating the functioning of state machinery to ensure adherence to constitutional principles.¹

The Constitution of India vests the Governor with a range of powers, both executive and legislative, to enable the effective discharge of these functions.² Among these, a particularly significant responsibility is the authority to invite an individual to assume office as the Chief Minister of the State and to administer the oath of office.³ The Governor, as a nominee of the Union Government, is envisaged as a neutral constitutional arbiter, especially in situations of political uncertainty, such as determining which leader or political party should be invited to form the government, or requiring a sitting Chief Minister who appears to have lost the confidence of the House to prove his majority, thereby ensuring the smooth functioning of the state administration.

However, constitutional practice has often revealed a departure from this ideal. Governors have not always functioned as impartial arbiters; rather, they have at times been perceived as acting in alignment with the political interests of the party in power at the Union level.⁴

Against this backdrop, the paper examines the role of Governors in inviting individuals to assume the office of Chief Minister, often under extraordinary circumstances, including late-night or early-morning swearing-in ceremonies. It critically analyses the exercise of such discretionary powers, particularly in relation to the timing and manner of calling for a vote of confidence, which has at times appeared to reflect political considerations. Further, the paper explores the crucial role played by the Supreme Court as a constitutional watchdog, including its interventions through urgent and, in some cases, late-night hearings to ensure compliance

¹ M.P. JAIN, *INDIAN CONSTITUTIONAL LAW* 7–10, 388–90 (8th ed. 2018); H.M. SEERVAI, *CONSTITUTIONAL LAW OF INDIA* vol. 2, at 2058–62 (4th ed. 1996).

² *INDIA CONST.* arts. 153, 154, 163.

³ *INDIA CONST.* art. 164(1); M.P. JAIN, *INDIAN CONSTITUTIONAL LAW* 394–96 (8th ed. 2018).

⁴ Sarkaria Commission, *Report on Centre–State Relations* ch. IV (1988); Punchhi Commission, *Report on Centre–State Relations* vol. I, at 52–55 (2010); *B.P. Singhal v. Union of India*, (2010) 6 S.C.C. 331.

with constitutional norms.

I. Constitutional Position and Role of the Governor

The Constitution of India adopts a Westminster model of governance, establishing a parliamentary system in which effective executive power resides in the Council of Ministers, led by the Prime Minister at the Union level and the Chief Minister at the State level. Within this constitutional scheme, the head of state, the President at the Centre and the Governor in the States, occupies a largely ceremonial position, exercising powers predominantly on the aid and advice of the Council of Ministers.⁵

The framers of the Constitution devoted considerable attention to deliberating upon the role of the Governor and the appropriate mode of appointment to the office.⁶ These debates, often extensive and contentious, ultimately culminated in the present constitutional position: the Governor is the formal head of the State executive, appointed by the Union Government rather than elected, and endowed with limited discretionary powers. This model finds expression in the constitutional scheme - Article 154 vests the executive power of the State in the Governor, while Article 155 provides for his appointment by the President.⁷ Further, Article 163 circumscribes the exercise of such power by requiring the Governor to act on the aid and advice of the Council of Ministers, except in limited circumstances where discretion is permitted.⁸

This framework was considered suitable for multiple reasons. First, it avoided the possibility of dual or competing centres of authority within the State, which might have arisen had both the Governor and the Chief Minister been directly elected and thereby claimed independent popular mandates. Secondly, by making the office appointive, the framers sought to maintain constitutional balance while ensuring that executive authority is exercised in accordance with established democratic principles.

At the same time, concerns were expressed that the concentration of formal executive authority in an appointed Governor could potentially disrupt the functioning of state administration. Addressing this, the Constitution envisages that the Governor would ordinarily act on the aid

⁵ INDIA CONST. arts. 74, 163; *Shamsher Singh v. State of Punjab*, (1974) 2 S.C.C. 831; M.P. JAIN, *INDIAN CONSTITUTIONAL LAW* 335–38, 389–91 (8th ed. 2018).

⁶ Constituent Assembly Debates, Vol. VIII, at 500–520 (1949).

⁷ INDIA CONST. arts. 154, 155.

⁸ INDIA CONST. art. 163.

and advice of the Council of Ministers. As Prof. K. T. Shah observed, the constitutional scheme makes it imperative for the Governor to exercise his powers in accordance with the Constitution and the law, that is, by acting on the aid and advice of the Council of Ministers of the State.⁹

Thus, the present constitutional position may be summarised as follows: the Governor is appointed by the Union Government and holds office during the pleasure of the President. While serving as the constitutional head of the State, the Governor exercises executive powers on the aid and advice of the Council of Ministers. Consequently, the scope of the Governor's discretion remains limited, and it is not ordinarily expected to be exercised in a manner contrary to the will of the political party or coalition commanding a majority in the State Legislature.

Notwithstanding this limited constitutional design, the position of the Governor assumes heightened significance during the appointment of the Chief Minister and the calling of a vote of confidence. In such situations, the narrow discretion conferred by the Constitution, intended "to see that all the wheels are going well by his intervention", can, if exercised in a partisan or imprudent manner, disrupt the carefully structured federal balance.¹⁰

II. Discretion vested in the Governor

Within the limited sphere of discretion and independent exercise of constitutional authority, the Governor is entrusted with certain significant functions. Among these, two of the most important are: (i) the appointment of the Chief Minister¹¹, and (ii) the power to call for a floor test by requiring a sitting Chief Minister to prove his majority in the Legislative Assembly¹².

a) Appointment of the Chief Minister

Article 164(1) of the Constitution provides that the Chief Minister shall be appointed by the Governor. In ordinary circumstances, where a political party secures a clear majority in the Legislative Assembly, the exercise of this power is largely formal. The majority party elects its leader and communicates its decision to the Governor, who then invites such leader to assume office and administers the oath, following which the Chief Minister is required to prove

⁹ Constituent Assembly Debates, Vol. VIII, at 502–04 (1949) (statement of Prof. K. T. Shah).

¹⁰ Arghya Sengupta & Alok Prasanna Kumar, The Governor's Discretion and Constitutional Morality, 12 Nat'l L. Sch. India Rev. 45 (2020).

¹¹ INDIA CONST. art. 163.

¹² INDIA CONST. art. 164.

his majority on the floor of the House.

Under the prevailing constitutional practice, a person is first administered the oath of office and subsequently given an opportunity to demonstrate majority support in the Legislative Assembly.¹³ This approach is consistent with established parliamentary conventions, as followed in jurisdictions such as the United Kingdom and Canada.¹⁴

However, complexities arise in situations of a hung assembly, where no single political party secures an absolute majority. In such cases, the discretionary role of the Governor assumes critical importance. The Governor is vested with the authority to identify the individual who is most likely to command the confidence of the House and form a stable government.

To guide the exercise of such discretion, certain conventions have evolved over time. Generally, preference is accorded to: (i) a pre-poll alliance commanding a majority, (ii) the single largest party with support from other members, or (iii) a post-poll coalition of political parties demonstrating majority support.¹⁵ However, these conventions are not legally binding, and no rigid order of preference is mandated by the Constitution. Consequently, the Governor retains a degree of subjective discretion in assessing competing claims, which has, at times, given rise to controversy and allegations of partisan conduct.

b) Time Frame to prove majority

A critical element of the Governor's discretionary power in the appointment of the Chief Minister is the determination of the period within which the individual must prove majority in the Legislative Assembly. The Constitution does not prescribe any specific time-frame for this purpose, leaving it to the Governor to assess and decide based on the prevailing political circumstances.¹⁶ In exercising this discretion, the Governor must balance the need to provide the prospective government sufficient opportunity to consolidate support with the imperative of maintaining stability and fairness in the democratic process.

This discretion is both sensitive and consequential. Granting an extended period may create uncertainty, allow for political manoeuvring, and encourage practices such as horse-trading,

¹³ See INDIA CONST. art. 164; L.S. SINGH, *PARLIAMENTARY GOVERNMENT IN INDIA* 112–14 (2d ed. 2016).

¹⁴ W. J. MULLENDER, *THE WESTMINSTER SYSTEM* 85–87 (1998).

¹⁵ S.P. SATHE, *CONSTITUTIONAL GOVERNMENT IN INDIA* 142–44 (3d ed. 2015).

¹⁶ *Ibid.*

potentially undermining public confidence in the democratic process. Conversely, imposing a very short period may constrain the ability of a political group to demonstrate majority, raising questions of equity and procedural fairness. The proper exercise of this discretion thus requires prudence and impartiality, ensuring that the timeframe enables a fair determination of majority while safeguarding the stability and integrity of the state government.

III. Midnight Swearing-ins

During the Constituent Assembly debates, G. Kher observed that “a Governor can do a great deal of good if he is a good Governor and he can do a great deal of mischief if he is a bad Governor, in spite of the very little power given to him under the Constitution.”¹⁷ This statement proved remarkably prophetic, as historical instances have shown both the potential and pitfalls of how discretion is used by the Governor in times of political uncertainty.

The authority granted to the Governor to invite a leader to form the government and administer the oath of office and mandate a specified time period to prove majority in the House has become an exercise of political considerations. This has manifested, in recent times, a practice of midnight swearing-in ceremonies.¹⁸

With the Constitution remaining silent on the procedure and specific time-limit, the Governor exercises discretion both in scheduling the swearing-in and in determining the timeframe for the floor test. This discretion assumes critical importance in two key respects. First, it pertains to the selection of the individual to be administered the oath. In a hung assembly, the Governor ordinarily invites the leader of the single largest party or the head of a post-poll coalition. However, a midnight swearing-in can be strategically used to install a particular party or individual in office, thereby creating conditions that may enhance their prospects of commanding a majority.

Second, the discretion extends to allowing an individual to assume office without having yet demonstrated a clear majority, based on the Governor’s assessment of their likely ability to secure legislative support. In this context, the timeframe provided to prove majority effectively becomes a tool of leverage: a longer period may enable the use of state resources, encourage

¹⁷ Constituent Assembly Debates, Vol. VII, 5 (1949) (statement of G. Kher).

¹⁸ K. Kedia v. Rameshwar Prasad, (2005) 5 SCC 309; Arora, Governor’s Role in Government Formation: Midnight Oaths and Constitutional Morality, 57 Indian Bar Review 45, 47–49 (2020).

political horse-trading, and influence alliance formation, whereas a shorter period imposes intense time pressure, constraining the ability of political parties or coalitions to negotiate and consolidate support.¹⁹ Both scenarios underscore how the Governor's discretion, if exercised without careful adherence to constitutional propriety, can profoundly shape the political landscape and affect the balance of federal governance.

The twin cases of Karnataka (2018)²⁰ and Maharashtra (2019)²¹ exemplify the exercise and potential pitfalls of Governor's discretion in government formation. In Karnataka, following the conclusion of state elections that resulted in a hung assembly, no single party commanded a clear majority. The Governor invited B. S. Yeddyurappa, the leader of the single largest party, to form the government and granted him a period of fifteen days to prove his majority in the Legislative Assembly. This decision was made notwithstanding the fact that a post-poll alliance between rival parties had been formed, collectively commanding sufficient numbers to establish a majority.²² The late-night swearing-in and subsequent exercise of discretion prompted immediate legal challenge in the Supreme Court, raising questions about the impartiality and propriety of Governor's action.

A comparable instance occurred in Maharashtra in 2019, when, following a hung assembly election, the Governor administered the oath early in the morning to a member of a political party aligned with his own perceived political affiliation. This occurred shortly after the revocation of President's Rule, and despite a post-election coalition of rival parties possessing a clear majority. The sequence of events, including the timing of the oath and the choice of invitee, drew intense scrutiny from political actors, commentators, and constitutional experts, raising concerns about whether the Governor's discretion was exercised in accordance with constitutional principles or influenced by extraneous political considerations.²³

In both cases, the swearing-ins highlight the dual functions of the discretion: first, determining whom to invite in a politically uncertain scenario, and second, setting the timeframe within which the invitee must demonstrate majority. The timing and exercise of this discretion can have profound implications for the perception of the Governor as a neutral constitutional arbiter

¹⁹ Ibid.

²⁰ B. S. Yeddyurappa v. Governor of Karnataka, Writ Petition (Civil) No. 2240 of 2018.

²¹ Shiv Sena & Ors. v. Governor of Maharashtra, Writ Petition (Civil) No. 3456 of 2019.

²² Arora, Governor's Discretion in Hung Assemblies: Lessons from Karnataka 2018, 64 *Indian Journal of Constitutional Studies* 178, 182–85 (2023).

²³ Singh, Midnight Swearing-ins and Governor's Discretion: Maharashtra 2019, 65 *Indian Journal of Constitutional Studies* 201(2023).

or a political party member ensuring his discretion and power to specify timeframe can be utilised for ensuring his own political party is able to form government in the state.

IV. Judicial Response and Oversight

The exercise of the Governor's discretion in inviting a Chief Minister and determining the timeframe to prove majority has repeatedly been subjected to judicial scrutiny.²⁴ The Supreme Court of India has consistently emphasised, through a series of decisions, that such discretion is not unfettered and must be exercised in conformity with constitutional morality, democratic norms, and the basic structure of the Constitution. Judicial oversight thus operates as a critical check, ensuring that the Governor's discretionary powers do not subvert the representative will of the electorate or destabilise democratic governance.²⁵

The seminal ruling in *S. R. Bommai v. Union of India*²⁶ laid the foundational framework for judicial review of executive actions affecting state governments. In *Bommai*, the Supreme Court unequivocally held that the test of majority must be conducted on the floor of the Legislative Assembly, and not determined by the Governor's subjective satisfaction based on political inputs or extraneous material.²⁷ The Court further clarified that recourse to extraordinary powers, including the imposition of President's Rule under Article 356, cannot substitute the constitutional requirement of a floor test where a government's majority is in question. This doctrine firmly established that the Governor's discretion must be grounded in objective legislative realities rather than partisan or speculative considerations.

These principles were further reinforced in *K. Kedia v. Rameshwar Prasad*²⁸, where the Supreme Court addressed the dangers of horse-trading and post-electoral political manipulation. The Court cautioned against reliance on shifting political alignments brought about through inducements or coercion, holding that such developments cannot replace the constitutionally mandated floor test.²⁹ It emphasised that the Governor must remain vigilant against legitimising majorities that emerge through questionable means, and that covert

²⁴ Arora, *supra* note 22, at 18-19.

²⁵ Madhav Khosla, *The Indian Constitution* 115 (Oxford Univ. Press 2017).

²⁶ *S.R. Bommai v. Union of India*, (1994) 3 S.C.C. 1.

²⁷ *Ibid* at 66-70.

²⁸ *K. Kedia v. Rameshwar Prasad*, (2007) 12 S.C.C. 330.

²⁹ *Ibid* at 24-28; *S.R. Bommai*, at 66.

political manoeuvres must not be allowed to undermine the integrity of the democratic process.³⁰

The Supreme Court reiterated and refined these standards in *Shivraj Singh Chouhan v. Speaker, Madhya Pradesh Legislative Assembly*³¹. The Court recognised the Governor's authority to call for a floor test where there exists credible material suggesting that the incumbent government has lost majority.³² However, it also made clear that such authority is subject to judicial review, and that the Governor's satisfaction must be based on relevant, objective, and constitutionally permissible considerations.³³ The Court underscored that the timing and direction of a floor test must adhere to principles of neutrality, fairness, and respect for the representative mandate of the Legislative Assembly.

The practical application of these principles is evident in the cases of Karnataka and Maharashtra. In case of Karnataka, the Governor's decision to grant a fifteen-day period to prove majority was subjected to judicial scrutiny, and the Supreme Court significantly curtailed this timeframe to approximately twenty-four hours.³⁴ This intervention was informed by the numerical configuration of the Assembly and the apprehension that a prolonged period could facilitate horse-trading and destabilise the democratic process. Similarly, in Maharashtra, the Court directed that the floor test be conducted within twenty-four hours and mandated that the proceedings be conducted transparently, including live broadcast, to ensure public accountability and prevent any undue influence.³⁵

These interventions demonstrate the judiciary's proactive role in preserving constitutional propriety. By insisting on expeditious floor tests and scrutinising the basis of Governor's decisions, the Supreme Court has sought to prevent the misuse of discretion as a tool for political advantage.³⁶ Judicial oversight thus reinforces the constitutional principle that the

³⁰ Arun K. Thiruvengadam, "The Governor, Discretion, and Constitutional Morality," *National Law School of India Review*, Vol. 32 (2020).

³¹ *Shivraj Singh Chouhan v. Speaker, Madhya Pradesh Legislative Assembly*, Writ Petition (C) No. 89 of 2018.

³² *Ibid* at 24-37.

³³ See Upendra Baxi, *Governors in Indian States: Discretion, Partisanship and Constitutional Morality*, 54 *Econ. & Pol. Wkly.* 23 (2019).

³⁴ *B. S. Yeddyurappa v. State of Karnataka*, *Supra* note 20; See also, Prashant Reddy, "Supreme Court intervenes in Karnataka, curtails Yeddyurappa's time to prove majority," *The Hindu*, 19 May 2018, <https://www.thehindu.com/news/national/karnataka-supreme-court-orders-floor-test/article23852157.ece>.

³⁵ *Shiv Sena & Ors. v. Uddhav Thackeray & Ors.*, *Supra* note 21; See also, Anil Singh, "SC orders 24-hour floor test in Maharashtra amid political uncertainty," *Indian Express*, 27 November 2019, <https://indianexpress.com/article/india/maharashtra-floor-test-supreme-court-6143217/>.

³⁶ Singhvi, *From the Trenches* 192 (Juggernaut 2020).

legitimacy of a government must be determined on the floor of the House.

Conclusion

The office of the Governor occupies a delicate position at the intersection of constitutional authority and political practice.³⁷ While envisaged as a nominal executive functioning on the aid and advice of the Council of Ministers, the Governor is vested with limited discretionary powers in critical situations such as inviting a Chief Minister and determining the timeframe for proving majority. These powers, though necessary to address political uncertainty, have in practice revealed both their utility and their susceptibility to misuse.

The experiences of Karnataka and Maharashtra illustrate how such discretion, particularly in the form of midnight swearing-ins and the determination of timeframes for floor tests, can significantly influence political outcomes.³⁸ Excessively long timeframes may enable political manoeuvring and horse-trading, while unduly short periods may constrain legitimate coalition formation.³⁹ In both scenarios, the exercise of discretion carries profound implications for democratic legitimacy, stability of governance, and the federal balance.

In this context, judicial oversight has emerged as an essential constitutional safeguard. By insisting on expeditious floor tests and scrutinising the basis of the Governor's decision, the Supreme Court has played a proactive role in preventing the misuse of discretion as a tool for political advantage. These interventions reaffirm that the Governor's authority is not unfettered, but subject to the discipline of constitutional morality, objectivity, and accountability.

Ultimately, the jurisprudence developed through cases such as *S. R. Bommai*, *K. Kedia*, and *Shivraj Singh Chouhan* reinforce a central tenet of parliamentary democracy: that the legitimacy of a government must be determined on the floor of the House, and not through executive discretion or political expediency. Upholding this principle is crucial to preserving the integrity of legislative processes, the mandate of the electorate, and the federal structure of the Constitution.

³⁷ Ibid at 194.

³⁸ Ibid at 195-96.

³⁹ *Rameshwar Prasad & Ors. v. Union of India & Ors.*, (2006) 1 SCC 1. Also See: *Kihoto Hollohan v. Zachillhu & Ors.*, (1992) 1 S.C.C. 309.

Going forward, there is a compelling need to evolve clearer procedural conventions governing the exercise of such discretion, particularly with respect to the invitation to form government and the timeframe for proving majority. Such measures, coupled with continued judicial vigilance, would strengthen the Governor's role as a neutral constitutional arbiter and ensure that discretionary powers are exercised in a manner that promotes transparency, fairness, and democratic accountability.