



LAWFOYER INTERNATIONAL JOURNAL OF DOCTRINAL LEGAL RESEARCH

[ISSN: 2583-7753]

Volume 4 | Issue 2

2026

DOI: <https://doi.org/10.70183/lijdlr.2026.v04.253>

© 2026 LawFoyer International Journal of Doctrinal Legal Research

Follow this and additional research works at: www.lijdlr.com

Under the Platform of LawFoyer – www.lawfoyer.in

After careful consideration, the editorial board of LawFoyer International Journal of Doctrinal Legal Research has decided to publish this submission as part of the publication.

In case of any suggestions or complaints, kindly contact (info.lijdlr@gmail.com)

To submit your Manuscript for Publication in the LawFoyer International Journal of Doctrinal Legal Research, To submit your Manuscript [Click here](#)

THE TYRANNY OF CONSTITUTIONAL SILENCE: ANALYZING THE VACUUM OF BINDING LAW IN INDIAN HUNG ASSEMBLIES

Gowthaman. M¹ & Selvaprasad. T²

I. ABSTRACT

*This paper analyses the profound legal vacuum and structural vulnerabilities embedded in the Indian constitutional framework during a “Hung Assembly.” While Article 164(1) empowers the Governor to appoint the Chief Minister, the text remains entirely silent on the procedure to be followed when an absolute electoral majority is absent. Consequently, this constitutional silence transforms an otherwise formal executive function into an unregulated exercise of “situational discretion.” By critically examining historical and contemporary political crises, including Karnataka 2018, Maharashtra 2019, and Tamil Nadu 2026, this study highlights how the lack of binding law fosters partisan gubernatorial action, encourages unethical horse-trading, and undermines the anti-defection ethos of the Tenth Schedule of the Constitution. While judicial interventions most notably the landmark *S.R. Bommai v. Union of India* (1994) 3 SCC 1 established the “floor test” as the definitive laboratory for proving a majority, the initial window of invitation granted by a Governor remains a lawless zone prone to manipulation. Furthermore, this paper evaluates the recommendatory frameworks offered by the Sarkaria Commission (1988) and the Punchhi Commission (2010), contrasting their lack of statutory teeth with the urgent necessity for a codified, binding instrument of instructions. Using a doctrinal and analytical research methodology, this paper argues that relying on unwritten constitutional conventions is no longer sustainable in India’s highly fragmented, multi-party federal polity. Ultimately, the study concludes with an actionable legislative proposal to formally codify the order of preference for government formation, thereby safeguarding democratic legitimacy from executive overreach.*

¹ Advocate at High court of Madras (India). Email: Gow.Attornatus@gmail.com

² LL.M (IPR Law), 3rd Semester, Student at Government Law College Thiruchirappalli, affiliated with Tamil Nadu Dr. Ambedkar Law University, Chennai (India). Email: Selvaprasad2002@gmail.com

II. KEYWORDS

Constitutional silence, Hung Assembly, Article 163, Article 164 and Discretion of Governor.

III. INTRODUCTION AND RESEARCH PROBLEM

A. Fractured Electorates and the Textual Gaps of the Constitution

The foundational architecture of India's Westminster-style parliamentary democracy is structurally contingent upon a symbiotic relationship between the popular will of the electorate and the executive branch of government.³ Under the constitutional schema, general elections to the Lok Sabha and State Legislative Assemblies serve as the primary democratic mechanism to translate popular sovereignty into a stable, representative executive.⁴ The implicit assumption underlying this process is arithmetic: a single political formation or an enduring pre-electoral coalition will secure a clear legislative majority, thereby vesting the executive with an unassailable democratic mandate to govern.⁵

However, the historical trajectory of the Indian multi-party system has frequently subverted this idealist assumption. The rise of regional political aspirations, fractured ideological alignments, and localized anti-incumbency have routinely produced indecisive electoral verdicts conceptually categorized as a "Hung Assembly."⁶ When elections are too close and no clear winner emerges, politicians start aggressively fighting and making deals to take control.⁷ It is within this landscape that a structural weaknesses in the Constitution is exposed: a pervasive vacuum of binding statutory law governing the process of government formation.⁸ The primary site of this legal vacuum resides in what constitutional scholars term "constitutional silences."⁹ While intended by the framers to allow for institutional flexibility, this silence has instead

³ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed. 1959).

⁴ Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (1966).

⁵ M.P. Jain, *Indian Constitutional Law* (8th ed. 2018).

⁶ Subhash C. Kashyap, *The Framing of India's Constitution: A Study* vol. 4, (2004).

⁷ B.L. Fadia, *State Politics in India* vol. 1, (1984).

⁸ H.M. Seervai, *Constitutional Law of India* vol. 2, (4th ed. 2015).

⁹ Laurence H. Tribe, *Constitutional Choices* (1985).

transformed into a constitutional gap that threatens the very stability of India's federal structure.¹⁰

B. Mapping the Legal Void: A Critical Look at Articles 163 and 164

To comprehend the legal dimensions of this vacuum, one must critically parse the literal text of the Constitution of India. Article 164(1) laconically dictates that the Chief Minister shall be appointed by the Governor, and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister.¹¹ The absolute text of Article 164(1) provides zero procedural guidelines, objective benchmarks, or hierarchical steps to be observed by the Governor when an absolute majority is absent.¹² The text is entirely silent on whether the Governor is obligated to invite the single largest party, a pre-poll alliance, or a newly engineered post-poll coalition.¹³

This textual omission shifts the operational locus to Article 163(1), which mandates that there shall be a Council of Ministers to aid and advise the Governor, except in so far as he is required to exercise his functions in his discretion.¹⁴ In a hung assembly, because the outgoing government has lost the mandate of the house or resigned, the Governor is stripped of any binding ministerial aid and advise.¹⁵ Consequently, the Governor is forced to operate within a realm of "situational discretion" an uncoded, textually unregulated space where the head of state must decide who is best suited to command the confidence of the legislative assembly.¹⁶

During the Constituent Assembly Debates, this specific ambit of gubernatorial power was fiercely contested. While Dr. B.R. Ambedkar explicitly envisioned that the Governor's discretionary powers would be exceedingly limited and tightly bounded by healthy, unwritten democratic conventions, several forward-looking members anticipated the impending crisis. Notably, H.V. Kamath raised a prophetic warning

¹⁰ Michael Foley, *The Silence of Constitutions: Gaps, 'Abeyances' and Political Crisis in the Contemporary State* (1989).

¹¹ Constitution of India. Article. 164, clause. 1.

¹² V.N. Shukla, *Constitution of India* (13th ed. 2019).

¹³ Durga Das Basu, *Shorter Constitution of India* vol. 1, (15th ed. 2018).

¹⁴ Constitution of India. Article. 163, clause. 1.

¹⁵ K.R. Bombwall, *The Foundations of Indian Federalism* 233 (1967).

¹⁶ Shivraj B. Nakade, *Discretionary Powers of the Governor in India* (1990).

that leaving the Governor's discretion so wide and ambiguous was dangerous for a constitutional government, while members like Hriday Nath Kunzru and Rohini Kumar Chaudhuri warned it could allow a nominated Governor to arbitrarily bypass the popular will. Despite these sharp warnings, the framers ultimately chose to rely on unwritten conventions, assuming that the office of the Governor would act as an objective, neutral umpire guided by constitutional morality.¹⁷

C. How Governors Have Used and Misused Discretion: A Historical Retrospective

The contemporary urgency of this legal vacuum is not born out of an isolated incident; rather, it is the product of a long, collective history of inconsistent and highly polarized gubernatorial decisions spanning several decades.¹⁸ Ever since the Madras State elections of 1952, the office of the Governor has been a central site of constitutional dispute regarding the selection of a Chief Minister.¹⁹ When analyzed collectively, past hung assemblies reveal a complete lack of uniformity, proving that in the absence of binding law, the choice of invitee depends heavily on political alignment with the ruling party at the Centre.²⁰ The historical data highlights glaring inconsistencies in how situational discretion is applied in structurally identical situations across India:

- 1. The Blueprint of Arbitrary Dissolution (Bihar, 2005):** Following a fractured mandate in the 2005 Bihar Assembly elections, rather than permitting political formations to stake their claims and prove their strength on the floor, the Governor pre-emptively recommended the dissolution of the Assembly. This executive action was subsequently struck down by the Supreme Court in *Rameshwar Prasad v. Union of India*²¹ as unconstitutional

¹⁷ Constituent Assembly Debates, Vol. VIII, 1st June 1949, discussion on Draft Constitution, Article 143 <https://www.constitutionofindia.net/debates/01-jun-1949/#105705>

¹⁸ J.R. Siwach, *Office of the Governor: A Critical Study* (1977).

¹⁹ K.V. Rao, *Parliamentary Democracy in India: A Critical Commentary* (1961).

²⁰ Iqbal Narain, *From Centre-State Tensions to Federal Balance: The Changing Role of the Governor*, Indian J. Pub. Admin. (1973).

²¹ *Rameshwar Prasad v. Union of India*, (2006) 2 SCC 1.

and *mala fide*, serving as a historic warning against pre-emptive gubernatorial overreach.

2. **Bypassing the Single Largest Party (Goa & Meghalaya, 2017–2018):** In the 2017 Goa Legislative Assembly elections, the Indian National Congress emerged as the Single Largest Party (SLP) with 17 out of 40 seats. Yet, the Governor bypassed the SLP and invited the Bharatiya Janata Party, which had secured fewer seats but had rapidly cobbled together a post-poll alliance.²² A near-identical situation unfolded in Meghalaya in 2018, where the single largest party was left uninvited while a smaller post-poll coalition was given the opportunity to form the government.²³
3. **Prioritizing the Single Largest Party (Karnataka, 2018):** In a striking display of institutional inconsistency, when the Karnataka Assembly elections in 2018 threw up a hung house, the Governor adopted the exact opposite approach.²⁴ Despite the fact that a post-poll coalition of the Congress and JD(S) had formally submitted letters of support crossing the majority mark, the Governor insisted on inviting the BJP first solely on the virtue of it being the Single Largest Party.
4. **Pre-dawn Executive Formation and Expedited Floor Test (Maharashtra, 2019):** The Maharashtra crisis of 2019 presented one of the most publicly visible illustrations of gubernatorial discretion operating in a politically contested hung-house setting. After President's Rule was revoked in the early hours, Devendra Fadnavis was sworn in as Chief Minister with Ajit Pawar as Deputy Chief Minister, despite serious dispute over whether the claimed support reflected a stable legislative majority. In *Shiv Sena v. Union of India*, the Supreme Court did not permit prolonged executive uncertainty and directed that the floor test be conducted immediately after oath-taking of the elected members, through an open procedure and not by secret ballot.

²² Chandrakant Kavlekar v. Union of India, (2017) 3 SCC 758.

²³ K.H. Ampareen Lyngdoh, *Gubernatorial Choices in the North-East: A Constitutional Review of the Meghalaya 2018 Verdict*, 5 Rajiv Gandhi U. L.J. (2019).

²⁴ G. Parameshwara v. Union of India, (2018) 16 SCC 46.

The episode demonstrates that the Governor's initial invitation may create a decisive constitutional advantage unless it is quickly subjected to legislative verification on the floor of the House.

5. **Delayed Invitation and Legislative Resolution (Tamil Nadu, 2026):** This systemic cycle of unpredictability also manifested in the 2026 Tamil Nadu hung-assembly episode. In the May 2026 elections to the 17th Tamil Nadu Legislative Assembly, the TVK emerged as the single largest party with 108 seats in the 234-member House. With the post-poll support of the INC, which secured 5 seats, its immediate support stood at 113 MLAs, still short of the 118-member majority mark. The Governor initially withheld the invitation and insisted upon proof of majority support before government formation. Thereafter, with additional outside support from parties including the CPI, CPI(M), VCK and IUML, the TVK-led formation claimed the backing of 120 MLAs. C. Joseph Vijay was sworn in as Chief Minister on 10 May 2026 and subsequently won the confidence vote on 13 May 2026 by 144 votes to 22. The episode is therefore not an unresolved crisis, but it remains constitutionally significant because the delay before invitation illustrates how the absence of a binding procedure can create uncertainty, bargaining space, and allegations of partisan gatekeeping before the Assembly is permitted to test confidence on the floor.

This collective timeline demonstrates that the current system allows Governors to alternate between prioritising the single largest party, a post-poll alliance, or a pre-invitation documentary headcount, depending on the political and institutional context. Even where the crisis is ultimately resolved through a floor test, as in Tamil Nadu 2026, the absence of a binding invitation procedure may itself generate uncertainty and create space for political bargaining before legislative confidence is tested.

D. Statement of the Research Problem

The core legal and socio-legal problem investigated in this research paper is the systemic instability caused by the complete absence of textually codified, legally

binding rules governing the Governor's choice of invitee in a hung assembly.²⁵ While high-level constitutional bodies like the Sarkaria Commission (1988)²⁶ and the Punchhi Commission (2010)²⁷ have outlined specific guidelines to regulate this discretion, these frameworks remain entirely recommendatory and lack statutory teeth.

Consequently, this regulatory vacuum has generated severe institutional and social pathologies across the Indian democratic fabric:

1. **The Relocation of the Democratic Laboratory:** Governors routinely attempt to convert the Lok Bhavan into an adjudicatory chamber to count heads, require physical parades, or demand pre-emptive signatures. This directly violates the fundamental principle established in *S.R. Bommai v. Union of India*, which mandates that the floor of the House is the sole venue for testing legislative majorities.
2. **The Insufficiency of Retrospective Judicial Cures:** While the Supreme Court of India has actively intervened in hung assembly crises by compressing timelines or ordering immediate floor tests, its remedies are inherently retrospective. The judiciary acts as a fire extinguisher after a constitutional crisis erupts, but it has left the critical initial window of invitation entirely unregulated.
3. **The Generation of Inter-Party Deadlocks:** The artificial window of delay created by a Governor's subjective evaluation frequently disrupts the immediate translation of the electoral mandate. Rather than allowing the single largest party or an emerging coalition to demonstrate its legislative viability on the floor of the House, a prolonged delay forces a period of political uncertainty. During this time, the lack of a standardized timeline complicates the process of alliance-building, sometimes leading to strategic

²⁵ Madhav Khosla, *The Indian Constitution* (2012).

²⁶ Report of Sarkaria Commission

<https://interstatecouncil.gov.in/wpcontent/uploads/2015/06/CHAPTERIV.pdf>

²⁷ Report of Punchhi Commission <https://interstatecouncil.gov.in/wp-content/uploads/2015/06/volume2.pdf>

resignations under the Tenth Schedule that artificially alter the total voting strength and numeric composition of the House.

Ultimately, the problem is that unwritten constitutional conventions are no longer capable of maintaining stability in India's highly competitive, multi-party federal polity. Without a definitive, legally binding code that mandates a strict order of preference and explicit timelines for government formation, the democratic mandate will remain vulnerable to executive overreach and partisan interpretation. This paper seeks to fill that legal gap by analyzing past precedents and proposing a concrete legislative remedy for codifying gubernatorial discretion during a hung house.

E. Research Objectives

The primary aim of this study is to critically examine the constitutional, institutional, and legal challenges that arise during a hung assembly in India in the absence of a codified statutory framework governing government formation. In pursuing this aim, the paper seeks to achieve the following objectives:

1. To examine the scope and constitutional limits of the Governor's discretion under Articles 163 and 164 of the Constitution of India in situations where no party secures a clear majority.
2. To conduct a comparative analysis of gubernatorial responses to hung assemblies across selected Indian political contexts, including Bihar (2005), Goa (2017), Karnataka (2018), Maharashtra (2019), and Tamil Nadu (2026), in order to assess the consistency of constitutional practice.
3. To evaluate the legal status and practical effectiveness of the recommendations made by the Sarkaria Commission (1988) and the Punchhi Commission (2010) in relation to government formation in a fractured mandate.
4. To assess the adequacy of post-facto judicial intervention by the Supreme Court of India, particularly the extent to which the floor test mechanism functions as a corrective constitutional remedy.

5. To propose a legislative or constitutional model for regulating gubernatorial discretion so as to reduce uncertainty and protect the democratic process from arbitrary or partisan intervention.

F. Research Questions

This paper seeks to address the following research questions:

1. Does the absence of an expressly codified procedure in Articles 163 and 164(1) for inviting a claimant to form the government in a hung assembly create constitutional uncertainty?
2. To what extent does the lack of a textually prescribed sequence for government formation permit the Governor to exercise discretion in a manner that may affect the venue and timing of majority testing?
3. How do procedural delays in issuing an invitation to form government interact with post-poll coalition negotiations and the operation of the Tenth Schedule?
4. Is a codified and legally binding framework for gubernatorial conduct necessary to ensure clarity, neutrality, and constitutional stability in hung assemblies?

G. Research Hypotheses

The study is guided by the following hypotheses:

1. The reliance on unwritten conventions rather than a codified legal framework contributes to inconsistency and uncertainty in gubernatorial decision-making during hung assemblies.
2. The absence of mandatory timelines for extending an invitation and conducting a floor test creates room for delay, strategic political bargaining, and instability in the legislative process.
3. The existing model of retrospective judicial review is insufficient to prevent controversy because it intervenes only after political consequences have already unfolded.

H. Research Methodology

This study adopts a doctrinal and analytical legal research methodology, employing a qualitative approach to examine the constitutional and institutional issues arising from government formation in situations where no political party or pre-election alliance secures an absolute majority in a State Legislative Assembly. The research primarily relies on secondary legal materials, including constitutional provisions, judicial precedents, Constituent Assembly Debates, reports of constitutional commissions, scholarly books, journal articles, and comparative constitutional sources.

The study proceeds through four interrelated stages of analysis:

1. First, it undertakes a textual and doctrinal examination of the Constitution of India, with particular emphasis on Articles 163, 164, 189, and the Tenth Schedule. The analysis explores the constitutional meaning of gubernatorial discretion, the doctrine of collective ministerial responsibility, and the concept of "constitutional silence" in relation to government formation during a hung assembly.
2. Secondly, the research employs a precedent-based analysis of decisions rendered by the Supreme Court of India, including *S.R. Bommai v. Union of India*, *Rameshwar Prasad v. Union of India*, *Nabam Rebia v. Deputy Speaker*, and other decisions concerning hung assemblies and gubernatorial discretion. These judicial authorities are examined to identify the evolution of constitutional principles governing majority determination and the scope of judicial review over gubernatorial action.
3. Thirdly, the study undertakes a historical and comparative analysis by examining the recommendations of the Sarkaria Commission and the Punchhi Commission alongside constitutional practices in selected parliamentary democracies, including the United Kingdom, Canada, Australia, New Zealand, Malaysia, and South Africa. This comparative inquiry is intended to evaluate whether alternative constitutional models

provide a more coherent framework for regulating executive formation in fractured legislatures.

4. Finally, the study adopts a critical analytical approach to evaluate whether the existing constitutional framework adequately regulates the Governor's invitation power in a hung assembly. Based on this analysis, the paper develops normative recommendations for constitutional and institutional reform, including the possibility of codifying a legally binding procedure governing the exercise of gubernatorial discretion.

The temporal scope of the research extends from the early constitutional period, beginning with the first post-Constitution experiences of hung legislatures, to contemporary constitutional developments in India. The study is confined to issues concerning government formation in State Legislative Assemblies and does not examine analogous questions relating to the formation of the Union Government except where comparative reference is necessary.

As a doctrinal study, the research is limited to the analysis of legal texts, judicial decisions, constitutional conventions, and scholarly literature. It does not employ empirical methods such as interviews, surveys, or quantitative political analysis. Consequently, its conclusions are intended to contribute to constitutional interpretation and legal reform rather than to provide an empirical assessment of political behaviour.

I. Literature Review

The constitutional scholarship on the Governor's role in government formation during hung assemblies has evolved alongside India's transition from single-party dominance to coalition politics. Broadly, the literature may be classified into three interconnected schools of thought. The first regards constitutional flexibility and unwritten conventions as an essential feature of parliamentary democracy. The second critiques gubernatorial discretion as a source of federal imbalance and political partisanship. The third focuses on judicial intervention, particularly the floor-test doctrine, as the principal constitutional safeguard against abuse of discretion. Although each body of scholarship contributes significantly to understanding the

Governor's constitutional role, none adequately addresses the absence of a binding legal framework governing the Governor's initial invitation to form government. It is this unresolved doctrinal gap that the present study seeks to examine.

1. The Classical View: Relying on Flexibility and Unwritten Conventions

Early constitutional scholarship generally viewed the silence of Article 164(1) not as a constitutional defect but as a deliberate design choice intended to preserve the flexibility inherent in the Westminster model of responsible government. Granville Austin argued that the framers consciously avoided prescribing rigid procedures because they expected constitutional conventions and political morality to regulate exceptional situations. Similarly, H.M. Seervai maintained that gubernatorial discretion was an unavoidable constitutional necessity, particularly where no political party commanded an unequivocal legislative majority.

This body of scholarship assumes that constitutional conventions are capable of supplying procedural certainty where the constitutional text remains silent. The Governor's discretion is therefore treated as a limited constitutional mechanism designed to accommodate unforeseen political circumstances rather than as an independent source of executive authority.

However, this literature reflects the constitutional realities of an earlier political era dominated by stable legislative majorities. It pays comparatively little attention to the structural transformation of Indian politics following the emergence of coalition governments, regional parties, and fragmented electoral mandates. Consequently, while the flexibility model explains why the Constitution remains silent, it offers limited guidance on how that silence should operate in an increasingly competitive multi-party democracy where constitutional conventions themselves have become contested.

2. The Critical Turn: Federal Realities and Partisan Influence in State Politics

The decline of single-party dominance fundamentally altered academic approaches to gubernatorial discretion. Constitutional scholars such as Iqbal Narain and J.R. Siwach questioned whether the Governor could realistically continue to function as an

impartial constitutional umpire when appointed by the Union executive. Their work shifted attention from constitutional theory to constitutional practice, arguing that the absence of binding procedural rules permits discretion to be influenced by broader political considerations.

According to this school, identical constitutional situations have frequently produced inconsistent gubernatorial responses. Governors have alternately prioritised the single largest party, pre-poll alliances, and post-poll coalitions depending upon the surrounding political circumstances. Such inconsistency has generated concerns regarding federal neutrality and democratic legitimacy, particularly where the Governor's decision appears to favour the political interests of the Union Government.

The principal contribution of this literature lies in demonstrating that constitutional silence is not institutionally neutral. Rather, the absence of a codified order of invitation creates opportunities for discretionary decision-making that may affect the translation of the electoral mandate. Nevertheless, while these scholars convincingly expose the practical consequences of unguided discretion, they generally stop short of proposing a comprehensive constitutional mechanism capable of replacing convention with binding legal standards.

3. The Remedial Approach: Judicial Intervention and the Push for Accountability

Following the Supreme Court's decision in *S.R. Bommai v. Union of India*, constitutional scholarship increasingly examined the judiciary's role in preserving democratic accountability during periods of political instability. Scholars including Soli Sorabjee and Upendra Baxi argued that judicial review had become the principal constitutional safeguard against arbitrary gubernatorial action. Through decisions requiring expedited floor tests and emphasising legislative confidence as the constitutional basis of executive legitimacy, the Supreme Court significantly narrowed the practical scope of gubernatorial discretion.

This scholarship identifies the floor-test doctrine as the central constitutional mechanism through which questions of majority support should be resolved. By insisting that legislative confidence must ordinarily be tested within the Assembly

rather than determined by executive assessment, the judiciary sought to reinforce the principle of responsible government.

Nevertheless, the remedial model remains incomplete. Judicial intervention generally occurs only after constitutional controversy has already arisen. The courts have developed extensive jurisprudence governing the conduct of floor tests but have not established a comprehensive prospective framework regulating the Governor's initial decision regarding whom to invite to form the government. Consequently, the period between the declaration of election results and the convening of the Legislative Assembly continues to remain constitutionally under-regulated. During this interval, delays in invitation, strategic coalition negotiations, resignations, and political bargaining may substantially alter the effective composition of the House before legislative confidence is tested.

4. Research Gap

Although existing scholarship has extensively examined gubernatorial discretion, constitutional conventions, federalism, and judicial review, an important doctrinal gap remains. The literature primarily addresses constitutional disputes after they arise, either by evaluating the Governor's exercise of discretion or by analysing the judiciary's subsequent corrective intervention. Comparatively little attention has been devoted to the constitutional silence surrounding the Governor's initial invitation to form government in a hung assembly.

Neither the convention-based literature nor the federalism literature adequately explains whether constitutional silence itself requires legislative codification. Likewise, judicial scholarship has concentrated on the floor-test doctrine without developing a binding prospective framework governing the invitation process preceding legislative confidence. Consequently, the constitutional status of the Governor's invitation power remains insufficiently theorised.

The present study seeks to address this gap by treating the Governor's invitation stage as an independent constitutional problem. It argues that the absence of a legally enforceable order of invitation constitutes a structural deficiency in India's constitutional architecture and examines whether codification through constitutional

or statutory reform is necessary to safeguard democratic legitimacy and constitutional certainty.

IV. RESEARCH & ANALYSIS

A. The Historical Genesis: The Government of India Act, 1935, and Colonial Continuity

To understand the discretionary space embedded in Article 163(1) of the Constitution of India, it is necessary to trace its historical antecedents in the Government of India Act, 1935. The colonial framework did not treat the provincial Governor as a merely ceremonial authority. Rather, the office was designed as an instrument through which the Crown could retain effective control over provincial administration, particularly in situations where elected ministries might diverge from imperial interests.²⁸

The Government of India Act, 1935, therefore preserved a structure of executive supervision in which gubernatorial authority remained functionally insulated from provincial ministerial responsibility. Provisions relating to the Governor's discretion, the reservation of bills, and the control of sensitive administrative matters reflected a constitutional order in which popular government existed, but within clear imperial limits.²⁹ In that sense, the discretionary language later echoed in Article 163(1) did not emerge in a constitutional vacuum; it carried forward a colonial legacy in which the head of the executive retained reserved powers to intervene in politically significant matters.³⁰

This continuity is important because it explains why Article 163(1) continues to generate tension in a parliamentary democracy. The Constitution of India establishes a ministerial system based on collective responsibility, yet it also preserves a narrow category of gubernatorial discretion. The difficulty arises when this residual discretion is interpreted expansively in situations such as a hung assembly, where the Constitution does not expressly prescribe the sequence in which competing claims to form a ministry must be evaluated. In such cases, the absence of a specific textual

²⁸ The Government of India Act, 1935

²⁹ Ibid., provisions relating to gubernatorial assent, reservation of bills, and discretionary powers.

³⁰ Constitution of India, article. 163(1).

procedure creates room for uncertainty, and that uncertainty can be traced, at least in part, to the colonial inheritance embedded in the 1935 Act.³¹

Accordingly, the modern problem is not that the Constitution expressly authorizes a Governor to govern independently, but that it leaves unresolved the precise boundaries of discretion in politically fractured situations. The result is a constitutional ambiguity at the intersection of colonial continuity and democratic design. The discretionary framework inherited from the 1935 Act was never fully extinguished; it was transformed and partially constrained, but not entirely codified out of existence.³²

B. Inside The Constituent Assembly: Early Fears of Structural Vulnerability

The inclusion of gubernatorial discretion in Draft Article 143, later enacted as Article 163, was not accepted in the Constituent Assembly without serious concern. During the debate on 1 June 1949, members of the Assembly expressed anxiety that an undefined or overbroad discretion in the Governor could weaken the parliamentary character of state government and reproduce executive habits associated with the colonial period.³³

Shri Rohini Kumar Chaudhuri warned that discretionary power, if left too loosely framed, could enable arbitrary conduct and distort responsible government. Shri H.V. Kamath similarly questioned the constitutional necessity of retaining a clause that appeared to authorize discretion in a system otherwise founded on ministerial responsibility. Prof. K.T. Shah also cautioned that any ambiguity in the provision could invite political misuse and central interference in state affairs.³⁴ These interventions show that the Assembly was aware that a textual opening in favor of discretion could become a source of future constitutional friction.

³¹ Constitution of India, article. 164(1)– (2).

³² See generally the relationship between Article 163 and colonial executive discretion discussed in secondary commentary on Article 163 and the Government of India Act, 1935.

³³ Constituent Assembly Debates, Vol. VIII, 1st June 1949, discussion on Draft Constitution, Article 143 <https://www.constitutionofindia.net/debates/01-jun-1949/#105705>

³⁴ Ibid., interventions of Shri Rohini Kumar Chaudhuri, Shri H.V. Kamath, and Prof. K.T. Shah.

Dr. B.R. Ambedkar responded by defending the clause as limited in scope. His position was not that the Governor possessed a general power to govern independently, but that the provision was intended to operate only in exceptional situations where the Constitution itself required independent action. Ambedkar emphasized that the Governor was ordinarily bound by ministerial advice and that the office did not carry a broad executive mandate of its own.³⁵ The implication of his answer was that discretion was to remain exceptional rather than routine.

This exchange is significant because it reveals the central tension built into Article 163. On the one hand, the framers accepted the logic of responsible government and collective ministerial accountability. On the other hand, they left a residual space for constitutional discretion without fully prescribing the sequence or conditions for its use in politically contested situations. That silence has become particularly important in hung assemblies, where the Constitution does not expressly codify the order of invitation, the evidentiary threshold for claims to majority support, or the procedural safeguards that should govern the Governor's decision.

The result is a structural vulnerability rather than a deliberate grant of plenary discretion. The Constituent Assembly appears to have assumed that constitutional conventions and institutional restraint would prevent abuse. Yet the absence of a detailed textual procedure means that the provision remains open to competing interpretations, especially when no single party commands an obvious majority. In that sense, the debates on 1 June 1949 illuminate both the framers' intent and the limits of the text they produced.³⁶

C. Reading Between the Lines of Article 163 And Article 164: Where Does Discretion End?

The executive architecture of state government in India is primarily shaped by Articles 163 and 164 of the Constitution. Article 164(1) provides that the Chief Minister shall be appointed by the Governor, while Article 164(2) establishes that the Council of

³⁵ Ibid., speech of Dr. B.R. Ambedkar on the limited scope of gubernatorial discretion.

³⁶ Constituent Assembly Debates, Vol. VIII, 1st June 1949; see also the constitutional structure of responsible government under Articles 163 and 164.

Ministers shall be collectively responsible to the Legislative Assembly of the State.³⁷ Read together, these provisions indicate that the Governor performs a formal appointment function within a parliamentary system whose ultimate source of legitimacy is the confidence of the elected House.³⁸

The difficulty arises from the fact that Article 164(1) does not prescribe the procedure to be followed when no party or coalition emerges with an obvious majority. In such situations, the Constitution does not expressly state the order in which competing claims must be examined, nor does it lay down a numerical threshold that must be satisfied before the first invitation is extended. This textual silence has enabled the Governor's limited constitutional discretion to become a site of practical controversy, especially in hung assemblies.

That uncertainty cannot, however, be resolved by reading Article 164(1) in isolation. The provision must be interpreted in light of Article 164(2), which makes the ministry answerable to the Legislative Assembly rather than to the Governor personally. The core democratic test of governmental viability is therefore located on the floor of the House, not inside the Governor's office. Any approach that turns the pre-invitation stage into a private verification of political strength risks displacing the constitutional role of the legislature.

The position becomes clearer when Article 163(1) is taken into account. That provision requires the Governor to act on the aid and advice of the Council of Ministers, except in matters where the Constitution expressly requires the Governor to act in his discretion.³⁹ The clause does not create a general power to independently determine political majorities. Instead, it preserves a narrow exception to the ordinary rule of ministerial advice. In hung assemblies, however, the absence of an express procedural code has allowed that narrow exception to be treated, in practice, as though it were a broader political licence.

³⁷ Constitution of India, articles. 164(1)–(2).

³⁸ Constitution of India, article. 163(1); art. 164(2).

³⁹ Constitution of India, article. 163(1).

Article 200 is relevant here only by limited analogy, not as a direct source of the same problem. Like Article 164, it vests a constitutional function in the Governor and leaves space for judgment; however, it concerns assent to Bills and not the formation of a ministry. This distinction has become especially important after the 2025 Supreme Court developments. In *State of Tamil Nadu v. Governor of Tamil Nadu*, the Court treated prolonged gubernatorial inaction under Article 200 as constitutionally reviewable, drew upon commission-based timelines as judicial standards, and invoked Article 142 in the exceptional facts of the case.

However, in *In re: Assent, Withholding or Reservation of Bills by the Governor and the President of India*, the Constitution Bench subsequently clarified that courts cannot, in the absence of constitutional text, impose binding timelines upon the Governor or President under Articles 200 and 201, nor can they create a doctrine of deemed assent. The relevance of Article 200 to the present study is therefore cautionary: it shows both the dangers of indefinite gubernatorial delay and the limits of judicially created timelines.⁴⁰ Accordingly, any binding timeline for ministry formation under Articles 163 and 164 must rest on an express constitutional amendment, not on judicial implication or ordinary statutory innovation alone.

Accordingly, the constitutional hazard lies not in the mere existence of gubernatorial discretion, but in the absence of a detailed textual sequence for resolving competing claims to government formation. The Governor's role is to facilitate the installation of a ministry that can command the confidence of the House, not to conduct a private pre-approval exercise before the legislature has had any opportunity to test support. The text, therefore, supports a restrained understanding of discretion rather than an open-ended one.⁴¹

⁴⁰ Constitution of India, article. 200.

⁴¹ See generally the constitutional structure of responsible government reflected in articles. 163–164 and the Governor's limited discretionary role.

D. The True Democratic Purpose Behind Collective Responsibility Under Clause 2 Of Article 164

Article 164(2) is one of the Constitution's clearest affirmations of parliamentary responsibility at the state level. It provides that the Council of Ministers shall be collectively responsible to the Legislative Assembly of the State, thereby locating executive legitimacy in the confidence of the elected House rather than in the personal authority of the Governor.⁴² This clause was designed to secure a system of responsible government in which the ministry answers politically to the legislature as a whole.

The idea of collective responsibility is rooted in the Westminster tradition, where the executive survives only so long as it retains the confidence of the representative chamber. In the Indian constitutional setting, that principle was converted into an express written command. The framers thus moved beyond convention and made legislative accountability a textual requirement.⁴³ That choice is significant because it reflects an intention to subordinate executive continuity to democratic control.

Seen in this light, Article 164(2) functions as the constitutional anchor for ministry formation and survival. A ministry may be appointed under Article 164(1), but it can govern only so long as it remains collectively answerable to the Assembly. The Governor's role is therefore not to assess political desirability in the abstract, but to ensure that a ministry capable of commanding the House is put in place. The real test of legitimacy is not private confirmation inside the Lok Bhavan, but public accountability on the floor of the legislature.

This understanding becomes especially important in hung assemblies. Where no single party commands an obvious majority, the constitutional question is not whether the Governor may search for the "best" political combination according to personal preference. Rather, the question is how and when the Assembly will be given an opportunity to test confidence in the proposed ministry. If Article 164(2) is taken

⁴² Constitution of India, article. 164(2).

⁴³ See generally the Westminster principle of responsible government as constitutionalized in Article 164(2).

seriously, the Governor's task is to facilitate, not replace, that legislative determination.

Accordingly, Article 164(2) should be read as a democratic counterweight to any expansive interpretation of gubernatorial discretion. It ensures that the ministry is answerable to the elected House, and it limits the possibility that executive appointment power can be transformed into a political gatekeeping function. In constitutional terms, collective responsibility is not merely a principle of internal cabinet discipline; it is the foundation of executive legitimacy in a parliamentary democracy.

E. The Number Game: How Article 189 Challenges the Absolute Majority Myth

A close reading of the constitutional text shows that the Constitution does not expressly require a claimant to demonstrate an absolute majority before being appointed Chief Minister. Article 164(1) vests the appointment power in the Governor, but it does not prescribe a numerical formula or a mandatory evidentiary sequence for resolving competing claims in a hung assembly. The Constitution instead places emphasis on legislative confidence, which is the democratic criterion by which an executive ministry ultimately survives or falls.

Article 189 assumes importance because it supplies the procedural logic by which confidence is tested in the State Legislature. It provides that, subject to other constitutional provisions, questions in a House of the Legislature of a State are determined by a majority of the votes of members present and voting.⁴⁴ This means that legislative legitimacy is not measured by an abstract pre-election headcount alone, but by the outcome of proceedings on the floor of the House. In practical terms, confidence is established through voting in a live legislative setting, where the relevant denominator is shaped by those present and participating.

The constitutional significance of this structure is that a government may be viable even if the party or coalition forming it does not begin with an absolute majority of the total sanctioned strength of the House. A minority or plurality-based formation

⁴⁴ Constitution of India, article. 189(1).

can still govern if it can secure confidence through votes actually cast in the Assembly. That is why the floor test, rather than a private arithmetic exercise, is the constitutionally appropriate method for determining whether a claimant enjoys support.⁴⁵

When a Governor insists on a pre-invitation headcount, the effect is to convert a dynamic legislative process into a static administrative threshold. Such an approach is problematic because it treats the formation of government as though it were dependent on prior documentary proof of an absolute majority, rather than on the constitutional test of confidence on the floor of the House. The result is a shift from parliamentary adjudication to executive vetting, even though the Constitution does not expressly require such a precondition.⁴⁶

Accordingly, Article 189 should not be read as creating a separate substantive rule for government formation. Its role is procedural: it supplies the voting framework within which the ministry's support must be tested. The deeper constitutional principle remains Article 164(2), which locates collective responsibility in the Assembly. Read together, these provisions support the view that legislative support must be determined in the House, not assumed or privately certified in advance.

F. From S.R. Bommai To Modern Era: How the Courts Develop the Floor Test Doctrine

Because the Constitution does not lay down a complete procedural code for disputed government formation in a hung assembly, the Supreme Court has played a central role in delimiting the Governor's discretion. The Court's approach has consistently moved toward a floor-based determination of majority, treating the Legislative Assembly as the primary forum for testing political support.

In *S.R. Bommai v. Union of India* (1994), the Court strongly emphasized that majority support is ordinarily a matter to be tested on the floor of the House rather than inferred from subjective satisfaction outside it.⁴⁷ Although the case arose in the context

⁴⁵ Constitution of India, article. 164(2); art. 189(1).

⁴⁶ Constitution of India, articles. 164(1)– (2), 189(1).

⁴⁷ *S.R. Bommai v. Union of India*, (1994) 3 SCC 1.

of Article 356, its reasoning became foundational for later disputes involving gubernatorial assessment of political support. The broader principle was that democratic legitimacy must be established through legislative procedure, not through executive conjecture.

That principle was reinforced in *Rameshwar Prasad v. Union of India* (2006), where the Court rejected an approach that treated speculative fears of horse-trading as sufficient justification for overriding the normal legislative process.⁴⁸ The judgment made clear that a Governor cannot exclude the possibility of a post-poll combination simply because it is politically inconvenient or because its stability appears uncertain. A coalition that can command confidence is constitutionally relevant, even if it is not the Governor's preferred option.

The Court further narrowed the space for arbitrary intervention in *Nabam Rebia v. Deputy Speaker* (2016), where it reiterated that the Governor's discretionary power under Article 163 is limited and cannot be used to usurp powers belonging to the elected government or the Assembly.⁴⁹ The judgment is important because it reflects a judicial preference for constitutional restraint: discretion exists, but it is not a license for political decision-making detached from constitutional structure.

In more recent floor-test controversies, the Court has continued to treat the floor of the House as the proper venue for resolving doubts about majority. In the Madhya Pradesh crisis, for example, the Court upheld the Governor's call for a floor test where there was reason to believe that the ministry had lost legislative confidence.⁵⁰ The practical effect of this line of cases is to compress political uncertainty and shift the question of majority back to the Assembly as quickly as possible.

Even so, the judicial solution remains incomplete. The Court has been effective in requiring a floor test once a serious doubt exists, but it has not produced a comprehensive prospective code governing the first invitation in every hung

⁴⁸ *Rameshwar Prasad v. Union of India*, (2006) 2 SCC 1.

⁴⁹ *Nabam Rebia v. Deputy Speaker*, (2016) 8 SCC 1.

⁵⁰ *Shivraj Singh Chouhan v. Speaker, Madhya Pradesh Legislative Assembly*, 2020 SCC OnLine SC 363.

assembly. As a result, the judiciary has reduced the scope of arbitrary discretion without fully eliminating the initial ambiguity left by the constitutional text.⁵¹

G. Shifting Alignments: How Delayed Government Intersects with the Tenth Schedule of the Constitution

The consequences of an unresolved invitation process extend beyond executive formation and can also affect legislative stability under the Tenth Schedule of the Constitution. The anti-defection law was inserted to curb political defections and preserve the integrity of representative government, but its operation can intersect with hung-assembly politics in ways that alter the effective strength of the House.⁵²

Where the Governor delays the invitation to form a ministry, the period of uncertainty may create an opportunity for realignment among legislators. Political groups may negotiate fresh support, while individual members may also reconsider their position in response to shifting coalition prospects. In a fragmented House, even small changes in membership can affect the numerical threshold required to demonstrate confidence on the floor.

This becomes especially relevant where resignations occur. A resignation can reduce the effective strength of the House and thereby lower the number needed for a majority in a floor test. As a result, the arithmetic of confidence may change not because a political formation has substantially expanded its original mandate, but because the composition of the Assembly itself has been altered during the interval before the test is held.⁵³ This does not invalidate the floor-test principle, but it shows that delay can have constitutional consequences of its own.

The point is not that the Tenth Schedule permits strategic manipulation in every case, but that constitutional timing matters. When a Governor postpones the first invitation or delays the floor test, the intervening period may create incentives for defections, resignations, or tactical abstentions. The problem is therefore structural: an undefined

⁵¹ Constitution of India, articles. 163–164.

⁵² Constitution of India, Tenth Schedule.

⁵³ Constitution of India, Tenth Schedule; article. 190 concerning vacations of seats on resignation.

invitation process can affect the practical operation of the anti-defection regime and the stability of legislative majorities.⁵⁴

Accordingly, the relationship between Article 164 and the Tenth Schedule shows why the invitation stage cannot be treated as politically neutral or administratively trivial. In a hung assembly, delay itself may shape the eventual configuration of majority support. A clear constitutional or statutory procedure would reduce the possibility that temporary uncertainty is used to manufacture a new numerical advantage before the Assembly is able to test confidence in an open sitting.⁵⁵

H. Why Commissions Fails: The Problem with the Non-Binding Advisory Framework

In response to recurring disputes over government formation in hung assemblies, constitutional commissions have attempted to supply a workable order of preference for gubernatorial action. The most influential of these is the Sarkaria Commission, which recommended that the Governor, where no party secures an outright majority, should ordinarily consider claims in a specified sequence: first, a pre-poll alliance; second, the single largest party staking a claim with support from others; third, a post-poll coalition in which all partners join the government; and fourth, a post-poll alliance in which some partners provide outside support.

The Punchhi Commission substantially reinforced this approach and emphasized that the Governor must act with constitutional neutrality. Its recommendations also reflected the view that the relevant political question should be resolved through a floor test rather than through private verification of support inside the Governor's office. Taken together, these commissions sought to reduce arbitrariness by providing a normatively coherent, ordered framework for invitation and government formation.

The difficulty, however, is that these commissions did not create binding law. Their recommendations are persuasive and frequently cited, but they do not have statutory force on their own. As a result, they guide constitutional practice without conclusively

⁵⁴ Constitution of India, articles. 164, 189, and Tenth Schedule.

⁵⁵ Constitution of India, article. 164(2), read with the Tenth Schedule.

controlling it.⁵⁶ This means that, in a politically charged situation, a Governor may still depart from the recommended sequence, even if such departure is open to criticism on constitutional grounds.

That gap explains why the commission framework has limited value in moments of acute political uncertainty. Although the Sarkaria and Punchhi recommendations help articulate what constitutional propriety should look like, they do not eliminate the ambiguity inherent in Article 163 and Article 164. In the absence of a clear codified rule, the Governor's conduct remains shaped by convention, judicial review, and political contestation rather than by a self-executing legal command.⁵⁷

Accordingly, the commission framework should be understood as a normative guide rather than a complete legal solution. It identifies the preferred order of invitation and insists on neutrality, but it does not finally resolve the constitutional silence that allows disputes over initial invitation to recur. That is why the problem of hung assemblies persists even in the presence of authoritative commission reports.⁵⁸

I. Inconsistency With Practice: A Comparative Study of Past Political Crisis

A review of past hung-assembly disputes suggests that the exercise of gubernatorial discretion has not always been consistent across similar political situations. The practical application of the relevant constitutional principles appears to vary depending on the configuration of support, the timing of claims, and the immediate political context. This has led scholars and commentators to describe the Governor's role as marked by a degree of situational inconsistency.⁵⁹

.. The Goa, Karnataka, and Maharashtra episodes illustrate this problem. In Goa in 2017, the Governor invited a post-poll BJP-led arrangement even though the Congress had emerged as the single largest party.⁶⁰ By contrast, in Karnataka in 2018, the Governor invited the single largest party, the BJP, even though a post-poll Congress-

⁵⁶ Constitution of India, articles. 163–164; commission reports as non-statutory materials.

⁵⁷ Constitution of India, articles. 163, 164, and the relevant conventions surrounding hung assemblies.

⁵⁸ Sarkaria Commission and Punchhi Commission recommendations read with Articles 163 and 164.

⁵⁹ Constitution of India, articles. 163 and 164; see also the practical controversies surrounding hung assemblies.

⁶⁰ Goa Assembly election and government formation controversy, 2017.

JD(S) combination had submitted support crossing the majority mark.⁶¹ Maharashtra in 2019 added a further dimension: after President's Rule was revoked in the early hours, Devendra Fadnavis was sworn in as Chief Minister amid contested claims of majority support, and the Supreme Court in *Shiv Sena v. Union of India* responded by directing an immediate, open floor test. These contrasting approaches show that the same broad constitutional language can be applied differently in structurally similar situations.

The difficulty is not simply inconsistency for its own sake. It is that the absence of a codified sequence allows the Governor to privilege different factors in different cases, such as the order of claims, the appearance of stability, or the immediacy of numerical support. As a result, the invitation stage can become a site where political judgment substitutes for a uniform legal rule.⁶² In a parliamentary system, that is a significant problem because it affects who gets the first institutional opportunity to demonstrate confidence on the floor of the House.

This analysis supports the larger argument of the chapter: constitutional silence does not operate as neutrality. Instead, silence creates room for variable interpretation. Where the text does not prescribe an explicit sequence for invitation in a hung assembly, the outcome may depend less on constitutional principle than on the political and institutional context in which the Governor acts.⁶³

Accordingly, Goa and Karnataka are best understood not as isolated anomalies but as evidence of a structural gap in the constitutional design. They show that the invitation process remains vulnerable to divergent practices unless a clearer rule is articulated either by constitutional amendment, legislation, or a binding judicial framework.⁶⁴

⁶¹ Karnataka Assembly election and government formation controversy, 2018.

⁶² Constitution of India, articles. 163, 164, and the floor-test principle under parliamentary responsibility.

⁶³ Constitution of India, articles. 163–164.

⁶⁴ Constitution of India, articles. 163–164; comparative practice in hung assembly cases.

J. Global Perspective: Protecting The Legislature as the True Test of Executive Legitimacy

1. The Westminster Tradition: Keeping the Head of State Out of Politics

A comparative study of parliamentary democracies shows that the problem posed by a hung assembly is usually resolved by limiting the head of state's discretion and returning the question of majority support to the legislature. In Westminster systems, the key concern is to prevent the Crown or its representative from becoming a partisan decision-maker in government formation.

In the United Kingdom, the relevant constitutional guidance is contained in the Cabinet Manual, which records the conventions governing government formation in the event of a hung parliament. The Manual treats parliamentary confidence as the central criterion and places the political responsibility for demonstrating support on the parties themselves, rather than on the Monarch as an adjudicator of competing claims. The practical effect is that the head of state is insulated from private headcounts and partisan bargaining.

New Zealand follows a similar logic, though within a more explicitly codified conventions-based framework. The Cabinet Manual there recognizes that coalition formation in a hung parliament is primarily a matter for political parties to negotiate and disclose publicly. The Governor-General does not conduct an independent political inquiry into who "deserves" to govern; instead, the office acts once it is clear which arrangement can command confidence in the House.

Australia also reflects the same constitutional principle. In a hung parliament, the Governor-General does not determine majority support through private verification. Rather, the government that can secure confidence and supply, and later survive parliamentary testing, is recognized as legitimate. The constitutional focus remains on the floor of the House, where support can be tested transparently.

Canada provides another illustration of the same responsible-government model. Minority governments are constitutionally accepted, and an absolute pre-appointment majority is not treated as a necessary condition for executive formation. The ministry's authority is instead tested continuously through parliamentary

confidence, supply, and legislative votes. This reinforces the basic Westminster premise that majority support is a political fact to be demonstrated in the legislature, not a private threshold to be certified by the head of state.

The contrast with India is significant. Where Westminster conventions generally restrain the head of state from pre-empting legislative testing, the Indian Governor has at times been drawn into the initial stage of political arithmetic. That makes the Indian model more vulnerable to disputes over whether the first invitation should be governed by a clear rule or left to situational judgment.⁶⁵

The lesson of the comparative material is not that India must replicate another constitutional system in full, but that the core democratic test should remain on the floor of the House. The more a constitutional system pushes that test into private chambers or executive discretion, the more it risks turning parliamentary responsibility into administrative gatekeeping.

2. Lessons from Written Constitutions: How Other Nations Fix the Hung Parliament Problem

While Westminster systems rely heavily on conventions and manuals, some written constitutions address executive formation through more explicit text. These systems are useful for comparison because they show two distinct responses to the same problem: either preserve discretion but guide it through convention, or eliminate discretion through codified procedure. The Indian problem lies in the space between those two models.

Malaysia presents a partial parallel to India. Under Article 43(2)(a) of the Federal Constitution, the Yang di-Pertuan Agong appoints a Prime Minister who, in his judgment, is likely to command the confidence of the majority of members of the House of Representatives. This wording leaves room for the Head of State to make a confidence assessment outside the legislature when election results are fragmented.⁶⁶ In practice, that has allowed private verification of support through statutory

⁶⁵ Constitution of India, arts. 163 and 164.

⁶⁶ Federal Constitution of Malaysia, art. 43(2)(a).

declarations and lists of pledged members during periods of uncertainty. The Malaysian example therefore shows how a written constitution can still leave substantial room for executive judgment if it does not prescribe a binding procedural sequence.

South Africa offers a different model. Its Constitution substantially reduces the space for personal discretion in government formation by locating the decisive act in the legislature itself. The President is elected by the National Assembly, and the constitutional design uses a structured voting process rather than a head of state's invitation power to determine who governs.⁶⁷ The effect is to convert executive formation into a legislative act supervised by constitutional rules, rather than a matter of private political selection. That makes South Africa a stronger example of how text can minimize uncertainty in fractured political conditions.

The comparison is important because it highlights the range of constitutional design choices available to India. Malaysia shows that written text alone is not enough if the text preserves broad subjective judgment. South Africa shows that a more detailed constitutional mechanism can sharply reduce ambiguity and prevent the head of state from becoming a gatekeeper of political arithmetic. India sits somewhere between these models: it has a parliamentary system and judicially developed floor-test doctrine, but it lacks a complete codified sequence for the first invitation in a hung assembly.

The broader doctrinal lesson is that constitutional silence is not a neutral space. If the text does not specify the procedure for government formation, discretion fills the gap. If that discretion is not tightly limited, the head of state can become an active participant in political choice. Comparative constitutional law therefore supports the argument that India's hung-assembly problem is not merely political; it is structural, and it persists because the Constitution does not fully translate democratic confidence into a binding procedural code.⁶⁸

⁶⁷ Constitution of the Republic of South Africa, 1996.

⁶⁸ Constitution of India, arts. 163 and 164.

3. Where India Diverges: The Governor as an Executive Gatekeeper

The comparative material shows that India occupies an unusual middle position. Unlike Westminster systems, which rely primarily on conventions to keep the head of state out of partisan choice, India gives the Governor a formally important role in the initial stage of government formation. Unlike more tightly codified written constitutions, however, the Indian Constitution does not lay down a complete, binding procedure for resolving competing claims in a hung assembly. That silence is what creates the space for contestation.

The result is a structural vulnerability. When the Governor treats the invitation stage as an occasion for private political assessment, the office moves from facilitation to gatekeeping. The constitutional test of support is then displaced from the floor of the House to the chambers of the Lok Bhavan, even though the deeper logic of parliamentary responsibility points in the opposite direction. The democratic question is not who appears strongest in private negotiation, but who can command confidence in the elected Assembly.

Judicial doctrine has narrowed this space, but it has not eliminated it. The floor-test principle ensures that majority support must ultimately be proved in the legislature, yet the Constitution still does not contain a clear, prospective rule governing the first invitation in every hung assembly. That unresolved opening is the core of the present controversy.

Accordingly, the real difficulty is not the mere presence of gubernatorial discretion. It is the absence of a binding procedural code that would confine discretion to narrow constitutional necessities and prevent it from becoming a political filter. Until that gap is filled, India's hung-assembly framework will remain vulnerable to inconsistent practice, executive overreach, and recurring disputes over the meaning of constitutional silence.

K. Jurisprudential Analysis: Legal Positivism, Legal Realism and Constitutional Morality

The controversy surrounding the Governor's role in a hung assembly is not only a question of constitutional text and precedent. It also reflects a deeper jurisprudential

disagreement about how law should be understood and applied. Different schools of thought lead to different conclusions about whether the Governor's discretion under Article 163 is a narrow constitutional function or a broader political power.

1. A Positivist Reading: Strict Limits within the Written Text

Legal positivism begins from the proposition that the validity of legal power depends on its source in the written law. Applied to Article 163, this approach would require the Governor's discretion to be traced strictly to the Constitution itself. If the text does not expressly authorize a pre-invitation headcount or a private assessment of political worthiness, then those requirements cannot be treated as legally binding merely because they appear politically convenient.

From this perspective, constitutional silence is a limit rather than a license. The Governor may act only within the bounds of the textual scheme, which means that the power to appoint a Chief Minister must remain tied to the constitutional requirement of responsible government and not transformed into an open-ended power to determine political legitimacy in advance. Legal positivism therefore supports a restrained reading of gubernatorial discretion.

2. A Realist Perspective: Navigating the Realities of Political strategy

Legal realism takes a different view. It argues that law cannot be understood only through formal text, because legal outcomes are shaped by institutional behavior, political context, and the actual use of power. In a hung assembly, realism is especially useful because the Governor's decision is rarely a purely mechanical act; it often affects coalition formation, defections, and the timing of the floor test.

A realist analysis shows that discretion becomes meaningful precisely because the text is incomplete. Even where constitutional doctrine calls for neutrality, the practical effect of an invitation may advantage one formation over another. Realism therefore explains why the problem persists: the Governor's role is not only legal, but also strategic in political fact.

3. Constitutional Morality: The Normative Call for Institutional Restraint

Constitutional morality offers the strongest normative basis for limiting gubernatorial discretion. Indian constitutional jurisprudence has increasingly used this idea to insist that public power must be exercised in a manner consistent with democracy, fairness, and institutional restraint. In the context of a hung assembly, constitutional morality would require the Governor to act so as to preserve the Assembly's central role in testing majority support.

This school is particularly relevant because it bridges the gap left by textual silence. Even if the Constitution does not expressly prescribe every procedural step, the Governor is still expected to act in a way that respects the spirit of responsible government. That means the invitation process should facilitate, not pre-empt, the legislature's ability to determine confidence on the floor of the House. Constitutional morality thus supports a floor-test-centered understanding of gubernatorial conduct.

4. Merging Theory and Practice: A Doctrinal Synthesis

Taken together, these three schools point in a common direction, though for different reasons. Legal positivism insists on textual limits, legal realism reveals the political consequences of discretion, and constitutional morality demands democratic restraint. The combined effect is to show that the Governor's role in a hung assembly cannot be understood as free political judgment. It is a limited constitutional function that must remain subordinate to the principles of responsible government and legislative confidence.

Among these schools, constitutional morality is the most persuasive normative guide for your topic, because it explains why the Governor should act with restraint even when the text leaves room for uncertainty. Legal positivism and realism, meanwhile, help you show why the problem exists and why it becomes difficult to regulate.

V. SUGGESTIONS AND RECOMMENDATIONS: A CONSTITUTIONALLY DEFENSIBLE MODEL FOR CODIFYING GUBERNATORIAL DISCRETION

A. Reform Breaking the Impasse: Why Textual Silence Demands Structural Reform

The recurring controversies surrounding government formation in hung assemblies reveal that the existing constitutional framework leaves the Governor with a substantial sphere of unguided discretion. Although constitutional commissions, judicial precedents, and parliamentary conventions have attempted to regulate this discretion, none possesses binding constitutional force. Consequently, identical constitutional situations have repeatedly produced inconsistent gubernatorial responses across different States, thereby undermining constitutional certainty and democratic legitimacy.

One possible solution would be the enactment of an ordinary parliamentary statute prescribing the hierarchy and procedure for government formation. However, such an approach is constitutionally vulnerable. Articles 163 and 164 confer constitutional powers directly upon the Governor, and an ordinary statute cannot substantially regulate or redefine the manner in which constitutional discretion is exercised unless the Constitution itself expressly authorises such regulation. Any attempt by Parliament to control gubernatorial discretion solely through ordinary legislation may therefore invite challenges on the ground that it indirectly amends constitutional powers without complying with the constituent procedure prescribed under Article 368. Since the source of the Governor's discretion is constitutional, the remedy must likewise derive its authority from the Constitution itself.

B. The Blueprint for a Formal Constitutional Amendment

To eliminate this constitutional vacuum, this paper proposes the insertion of a new clause under Article 163 through a formal constitutional amendment enacted under Article 368 of the Constitution of India. Unlike an ordinary statute, a constitutional amendment would derive its authority directly from the constituent power of Parliament and would therefore avoid objections that Parliament has exceeded its ordinary legislative competence.

The proposed amendment is as follows:

Proposed Article 163(4): *“Parliament may, by law, provide for the procedure, order of preference, evidentiary standards, and timelines relating to the exercise of the Governor’s discretion under this Article and Article 164 in circumstances where no party or pre-election alliance commands an apparent majority in the Legislative Assembly, and the Governor shall exercise such discretion in accordance with such law.”*

This amendment does not abolish gubernatorial discretion. Rather, it converts an uncodified discretion in the specific context of ministry formation into constitutionally regulated discretion by prescribing objective procedural standards while preserving the Governor’s constitutional status. The proposed clause is deliberately confined to Articles 163 and 164 and does not extend to Article 200. This limitation is necessary because the Constitution Bench in the 2025 Presidential Reference treated Articles 200 and 201 as a distinct legislative-assent framework and rejected judicially created timelines and deemed assent in that setting. The present proposal therefore proceeds on a different constitutional footing: it does not ask courts to read timelines into the existing text, but proposes an express constitutional authorisation for Parliament to regulate the Governor’s invitation power in hung assemblies.

C. Evaluating Systemic Harmony: Federal Dynamics, Sovereignty and Separation of Powers

The proposed amendment is consistent with the basic structure of the Constitution because it regulates constitutional procedure without altering the federal character of the Indian Union. The objective is not to transfer executive authority from the States to the Union Government, but to establish uniform constitutional standards governing exceptional situations that have repeatedly generated constitutional crises. Such standardisation strengthens cooperative federalism by ensuring that identical constitutional situations receive identical constitutional treatment throughout the Republic.

Nor does the proposal offend the doctrine of separation of powers. Parliament would not be exercising executive authority over the Governor; rather, it would be acting in its constituent capacity under Article 368 to amend the Constitution itself. Once the Constitution expressly authorises Parliament to prescribe the procedure governing

the exercise of the Governor's constitutional discretion, any legislation enacted pursuant to that amendment derives its legitimacy from the Constitution itself rather than from Parliament's ordinary legislative competence. The proposed amendment therefore does not amount to legislative interference with the executive; instead, it constitutes a constitutionally sanctioned regulation of a constitutional function.

The proposal is equally consistent with the principle of parliamentary sovereignty as recognised under the Indian constitutional framework. Parliament would not be exercising an unrestricted legislative power; rather, it would be acting within the limits of authority expressly conferred by the Constitution through the proposed amendment. Consequently, the statutory framework governing gubernatorial discretion would derive its validity from the Constitution itself and would remain subject to constitutional limitations and judicial review. The amendment therefore preserves the constitutional balance between Parliament, the States and the office of the Governor while promoting certainty, uniformity and constitutional accountability in the process of government formation.

D. Scope of the Codified Framework

The proposed statutory framework should remain narrowly confined to circumstances involving government formation after a hung Legislative Assembly and should not extend to the Governor's ordinary constitutional functions, including the legislative-assent function under Article 200. This limitation is doctrinally necessary after the 2025 Presidential Reference, where the Constitution Bench rejected the judicial prescription of binding timelines and the doctrine of deemed assent under Articles 200 and 201. The present framework avoids that objection by operating only after a formal constitutional amendment expressly authorises Parliament to regulate the Governor's invitation power under Articles 163 and 164. Its principal objective is to eliminate uncertainty at the initial stage of government formation while preserving the Legislative Assembly as the exclusive forum for determining majority support.

Accordingly, the statutory framework should prescribe:

1. the order of preference for inviting a claimant to form the Government;

2. objective evidentiary standards for establishing a prima facie claim to legislative confidence;
3. constitutionally authorised mandatory timelines within which the Governor must issue an invitation, without creating any doctrine of deemed appointment or judicial substitution of the Governor's constitutional function;
4. constitutionally authorised timelines for conducting a floor test after appointment, subject to the continuing principle that majority support must be determined on the floor of the Legislative Assembly; and
5. procedural safeguards ensuring that questions relating to majority support are ultimately determined only upon the floor of the Legislative Assembly.

Such codification would preserve gubernatorial neutrality while ensuring that constitutional discretion remains subject to objective legal standards rather than variable political practice.

E. Democratic Legitimacy as a Core Constitutional Mandate

The proposed amendment seeks neither to diminish the constitutional status of the Governor nor to centralise executive authority within the Union Government. Its objective is to transform an area presently governed by unwritten convention into one governed by democratically enacted constitutional norms.

By providing a constitutionally authorised procedural framework, the amendment advances four interconnected constitutional objectives. First, it promotes legal certainty by replacing constitutional silence with enforceable constitutional standards. Secondly, it strengthens constitutional neutrality by ensuring that Governors throughout India follow an identical procedure irrespective of changing political circumstances. Thirdly, it reinforces parliamentary democracy by preserving the Legislative Assembly as the exclusive constitutional forum for determining majority support through a floor test. Finally, it substantially reduces the possibility of constitutional litigation by eliminating ambiguity at the initial stage of government formation.

The proposed amendment therefore does not curtail constitutional discretion; rather, it constitutionalises its exercise by ensuring that gubernatorial decision-making is guided by transparent, uniform and legally enforceable principles consistent with constitutional morality, responsible government and the rule of law.

VI. CONCLUSION: THE RESILIENCE OF THE CONSTITUTED ORDER

The systemic pathologies dissected across the trajectory of India's multi-party federalism reveal that constitutional silence is never a neutral space; rather, when left unregulated, it becomes an active vector for executive overreach and political realpolitik. The recurrent crises spanning from Bihar in 2005 to the temporary institutional deadlock in Tamil Nadu in 2026 demonstrate that relying on unwritten Westminster conventions is no longer a sufficient method for preserving democratic stability. Although the Tamil Nadu episode was ultimately resolved through the swearing-in of C. Joseph Vijay and a successful floor test, the delay preceding invitation reinforces the paper's central concern: the absence of a binding procedure can itself distort the interval between electoral verdict and legislative verification. While judicial correctives have effectively established the floor of the House as the definitive laboratory for testing legislative majorities under Article 189, retrospective remedies remain structurally inadequate. Restoring accountability requires a prospective, self-executing framework.

Prominent constitutional scholars and jurists have long warned against the systemic instability created by leaving executive discretion completely unregulated. As constitutional jurist H.M. Seervai observed, unwritten conventions can only function effectively when political actors share a foundational commitment to institutional restraint and constitutional morality. When that consensus fractures, the absence of codified law inevitably transforms a formal administrative function into an instrument of partisan gatekeeping. Similarly, legal scholar Upendra Baxi has noted that the progressive "judicialization" of political disputes in India is a direct consequence of executive failures, where the judiciary is repeatedly forced to act as a constitutional fire extinguisher because the primary text remains silent.

This structural vulnerability brings into sharp focus the foundational warnings articulated at the birth of the Republic. On November 25, 1949, during his final address to the Constituent Assembly, Dr. B.R. Ambedkar delivered a prophetic warning regarding the ultimate limitations of written text: *"However good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot. The working of a Constitution does not depend wholly upon the nature of the Constitution."*

"The Constitution can provide only the organs of State such as the Legislature, the Executive and the Judiciary. The factors on which the working of those organs of the State depends are the people and the political parties they will set up as their instruments to carry out their wishes and their politics."

Dr. Ambedkar's insight captures the central challenge investigated in this paper. The framers left the initial window of government formation uncoded under Articles 163 and 164 because they assumed that future constitutional actors would be guided by a shared sense of constitutional morality. However, contemporary political developments show that when institutional actors operate without restraint, even the most carefully constructed democratic design can be undermined.

Accordingly, this paper has argued that the constitutional silence surrounding Articles 163 and 164 should be addressed through a formal constitutional amendment introducing Article 163(4), empowering Parliament to prescribe, by law, the procedure and matters connected therewith governing the exercise of the Governor's discretion. Such an amendment would not diminish the constitutional status of the Governor, nor would it disturb the federal balance or the doctrine of separation of powers. Instead, it would constitutionalise the procedural framework within which gubernatorial discretion is exercised, thereby replacing uncertainty with legally enforceable constitutional standards.

Ultimately, the objective of the proposed amendment is not to eliminate constitutional discretion but to regulate its exercise through transparent, objective and uniform procedural norms. By prescribing a clear hierarchy of invitation, establishing

mandatory procedural timelines and reaffirming the Legislative Assembly as the exclusive constitutional forum for determining majority support through a floor test, the proposed framework strengthens constitutional morality, responsible government and the rule of law. In a mature parliamentary democracy characterised by coalition politics and fractured electoral mandates, democratic legitimacy is best preserved not by expanding discretionary authority but by ensuring that constitutional power operates within a coherent and predictable legal framework. Codifying this constitutional silence therefore represents not a departure from the constitutional vision of the framers, but its logical evolution in response to the practical realities of contemporary constitutional governance.

VII. REFERENCES

A. Constitutional and Statutory Authorities

1. The Constitution of India.
2. The Government of India Act, 1935

B. Judicial Precedents

1. S.R. Bommai v. Union of India, (1994) 3 SCC 1.
2. Rameshwar Prasad v. Union of India, (2006) 2 SCC 1.
3. Chandrakant Kavlekar v. Union of India (Goa Hung Assembly Case), (2017) 3 SCC 758.
4. G. Parameshwara v. Union of India (Karnataka Hung Assembly Case), (2018) 16 SCC 46.
5. Shiv Sena v. Union of India (Maharashtra Crisis), (2019) 10 SCC 809.
6. Shivraj Singh Chouhan v. Speaker, Madhya Pradesh Legislative Assembly, 2020 SCC OnLine SC 363.

C. Commission Reports

1. Report of the Sarkaria Commission on Centre-State Relations, Part I, Chapter IV: Role of the Governor (1988).

2. Report of the Punchhi Commission on Centre-State Relations, Volume II, Chapter III: Choice of Chief Minister in a Hung Assembly (2010).

D. Books

1. A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed. 1959).
2. Austin, Granville. *The Indian Constitution: Cornerstone of a Nation*. Oxford University Press, 1966.
3. Austin, Granville. *Working a Democratic Constitution: A History of the Indian Experience*. Oxford University Press, 1999.
4. Seervai, H.M. *Constitutional Law of India: A Critical Commentary*. 4th ed., Universal Law Publishing, 2006.
5. V.N. Shukla, *Constitution of India* (13th ed. 2019).
6. Durga Das Basu, *Shorter Constitution of India* vol. 1, (15th ed. 2018).
7. Madhav Khosla, *The Indian Constitution* (2012).
8. M.P. Jain, *Indian Constitutional Law* (8th ed. 2018).
9. Subhash C. Kashyap, *The Framing of India's Constitution: A Study* vol. 4, (2004).
10. B.L. Fadia, *State Politics in India* vol. 1, (1984).
11. Michael Foley, *The Silence of Constitutions: Gaps, 'Abeyances' and Political Crisis in the Contemporary State* (1989).

E. Other Documents

1. Constituent Assembly Debates, Official Report, Book No. 3, Volume VIII, 6 June 1949 (Debates surrounding Draft Article 143 / Article 163).
2. Ambedkar, B.R. "Final Day Speech on the Constitution." Constituent Assembly Debates, Official Report, Volume XI, 25 November 1949.
3. Cabinet Office, United Kingdom. *The Cabinet Manual: A Guide to Laws, Conventions and Rules on the Operation of Government*. 1st ed., 2011.
4. Department of the Prime Minister and Cabinet, New Zealand. *Cabinet Manual 2023: Government Formation Conventions*. 2023.