

# LEGALFOXES LAW TIMES

## Floor test: a check on discretion power of GOVERNORS

- Aayush Akar

Because of its strongly imbibed "Unity in Diversity" culture, the Indian constitutional system is unique. India is a "Union of States" outlined for political and cultural unity, the elimination of divisive forces, and the effective administration of the huge country. The Indian Constitution offers an excellent framework for a smooth relationship between the Union and the States, on one side, and the intergovernmental States, on the other.<sup>1</sup>

The legislative powers are distributed between the Centre and States keeping in mind the objectives of the Indian Union. Under Articles 245 and 246, the Union is given powers to make laws on matters of nature which are important for the unity and integrity of the nation listed in List I of the Seventh Schedule. According to those provisions the States are granted the power to make laws appropriate for the effective governance of the States in respect of the questions mentioned in List II of said Schedule. The Union and the States are authorized to legislate in the matters listed in List III, the Concurrent List, in order to ensure coordination and cooperation. The demarcation of power between the State and the Centre is the upshot of the detailed discussion in the Constituent Assembly.<sup>2</sup> There is a circumstance in which the Union can interfere in the dominion of the State i.e. under Article 356, Union can take over the jurisdiction of the State when there is a failure of the constitutional machinery of the State. The President of India who is the first citizen of India can take over the executive machinery of the State when the State Government is not running in accordance with the provisions of the Constitution. Article 356 is also used by the Centre when the political parties have not received

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<sup>1</sup>Wilfried Swenden, 'Centre-State Bargaining and Territorial Accommodation: Evidence from India' (2016) 22 Swiss Political Science Review 491.

<sup>2</sup>'Ambedkars-Book\_1.Pdf' <[http://cwc.gov.in/sites/default/files/ambedkars-book\\_1.pdf](http://cwc.gov.in/sites/default/files/ambedkars-book_1.pdf)> accessed 28 November 2019.

the majority in the State Assembly and are failed to form the Government. The Governor as a convention invites the largest political party to stake claim to form the Government.<sup>3</sup>

But since the Governors are appointed by the President who works on the advice of the Council of Ministers headed by the Prime Minister as per Article 74(2) of the Indian Constitution. The Governors hold office under the pleasure which is actually the discretion of the President who himself works on the advice of the Prime Minister. So, the executive head of the State Assembly works on the behalf of the ruling party at the centre and favors the ruling party of the centre in the state. There are instances where the Governor is favoring the ruling party in terms of the Government formation where that party itself has no majority which is per se unconstitutional. So the Supreme Court in various cases asking the largest party to prove the majority in the floor test.

### **ROLE OF THE GOVERNOR IN THE HUNG ASSEMBLY**

In a parliamentary government system, the Hung Parliament takes place without an absolute majority (legislature) of parliamentary seats by any single political party. Under no overall control, it is also the less common legislature.<sup>4</sup> If there is a Bicameral Legislator and the administration is only responsible for the lower house, then the "Hung Parliament" is only used for that house. The majority of the two-party general elections will lead to an absolute majority and thus rapidly to the formation of the new government. This pattern is an exception to the "Hung Parliament" that can be regarded as anomalous or unwanted. It is unusual for a party to gain a simple majority of seats in a multi-party system of representatives elected by proportional representation, so a "Hung Parliament" is the norm and the term is seldom used. This term can be used for defining an election in which no established Party coalition, such as the German election in 2005, obtains an outright majority.

This Hung Parliament is similar to the "Hung Legislative Assembly" where no coalition of political parties or the single largest party has no majority to proof in the house of the Legislative Assembly. The Karnataka Assembly Elections produced an inconclusive verdict as no single party won a simple majority to form the government. However, the BJP won 104 of the 222 constituencies and emerged as a single largest party. Congress and Janata Dal (Secular) won 78

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<sup>3</sup>Hung Assembly: Whom Should Governor Call First? (*Bar & Bench*, 28 May 2018) <<https://barandbench.com/hung-assembly-governor-call/>> accessed 28 November 2019.

<sup>4</sup>What Is a Hung Parliament and What Happens Now? | Politics | The Guardian' <<https://www.theguardian.com/politics/2017/jun/09/what-is-a-hung-parliament-and-what-happens-now>> accessed 28 November 2019.

seats and 37 seats respectively.<sup>5</sup> With the results of the Karnataka assembly election throwing up a hung house, the Governor's position has been based on whether to invite the new government to join the single largest party or the leader claiming majority with the post-poll coalition. A similar situation arose recently in the Maharashtra election where despite BJP being the largest party with 105 seats failed to form the government in the state. The other opposition parties Congress got 44 seats, Shiv Sena got 56 seats and the Nationalist Congress Party got 54 seats. They together formed an alliance known as "Maharashtra Vikas Aghadi".<sup>6</sup> So the similar Karnataka election arises here where the Governor's position has been based on whether to invite the new government to join the single largest party or the leader claiming the majority with the post-poll coalition.

It triggered a debate about the governor's role in forming the government when an assembly is hung. The Governor must first invite the largest party to establish the government as a matter of convention. But in order to provide for a stable government, the decision needs to be 'informed one' and 'on a sound basis'. In 2006, the President of India (then) Dr. A P J Abdul Kalam, addressing to the Governors, emphasized the importance of the Sarkaria Commission's recommendations and said, "While the Constitution provides for many checks and balances, the Governor's office has been granted independence in order to rise above day-to-day politics and circumvent compulsions whether arising from the center."<sup>7</sup> In the case of **Rameshwar Prasad v. Union of India**, 2006,<sup>8</sup> a five-judge Constitution Bench, specifically supported the suggestions made by the RS Sarkaria Commission in its Center-State Relations Study, which illustrated the impartiality of Governors and their position in maintaining the constitutional mandate.

Later, in a case of a hung assembly, the M M Punchhi Commission also explained that the governor should follow "constitutional conventions". The Punchhi Commission also prescribed in the case of a Hung Assembly:

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<sup>5</sup>'The Governor's Role in the Hung Assembly' (*Jagranjosh.com*, 16 May 2018)

<<https://www.jagranjosh.com/current-affairs/the-governors-role-in-the-hung-assembly-1489729786-1>> accessed 28 November 2019.

<sup>6</sup>'What Is Maha Vikas Aghadi? | What Is News, The Indian Express' <<https://indianexpress.com/article/what-is/what-is-maha-vikas-aghadi-shiv-sena-ncp-congress-alliance-maharashtra-6139167/>> accessed 28 November 2019.

<sup>7</sup>Agnidipto Tarafder, 'Governance and the Governor' *The Hindu* (5 June 2018)

<<https://www.thehindu.com/opinion/op-ed/governance-and-the-governor/article24082156.ece>> accessed 28 November 2019.

<sup>8</sup>*Rameshwar Prasad v. Union of India*, (2006) 2 SCC 1.

- The faction or parties in the Legislative Assembly which enjoy the broadest support should be called upon to form the government.
- It should be treated as one political party if there is a pre-poll coalition or alliance. And if such a coalition gets a majority, the governor will call the leader of such alliances to form the government.
- In the event that no pre-poll coalition or faction has a clear majority, the governor will appoint the chief minister in the order of priorities stated here:
  1. The group of parties with the largest pre-poll alliance.
  2. The largest single party which seeks to form a government with the support of others;
  3. A post-electoral coalition with all allies which join the regime;
  4. A post-electoral alliance in which factions enter the government and the remaining ones, including independents, support the government from outside.

In the case of **Nabam Rebia and Bamang Felix v. Deputy Speaker**,<sup>9</sup> the five-judge bench suggested the opinions of the Punchhi and Sarkaria commissions on granting the governor a unilateral right to take an appeal on the floor check when the government lost the legislature's confidence. In the case of **S.R. Bommai v. Union of India**,<sup>10</sup> a nine-judge bench had illustrated the importance of a floor test as two political groups say that the floor test must be done as soon as possible by the governor. A floor check is the House's conclusive evidence for figures. The Constitutional Bench referred to Article 164(2) which requires the "Council of Ministers to be collectively responsible to the State Legislative Assembly". The Bench understood that the actual majority test is taking place not in the Raj Bhavan, but on the House floor.

In 1993, in the case of **Supreme Court Advocates of Record Association v. Union of India**,<sup>11</sup> a case involving the weight of "constitutional convention", a seven-judge bench, held that "there is no difference between "constitutional law" and an existing "constitutional convention" and both are binding in the area of their action. The Supreme Court has noted that "Once a given convention occurs and works according to the interest of the Court, the convention is part of the constitutional law of the land and can be applied in the same way".

### **JUDICIAL REVIEW OF THE DISCRETIONARY POWERS OF THE GOVERNOR**

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<sup>9</sup>*Nabam Rebia and Bamang Felix v. Deputy Speaker* [2016 SCC SC 694](#).

<sup>10</sup>*S.R. Bommai v. Union of India* 1994 AIR 1918.

<sup>11</sup>*Supreme Court Advocates of Record Association v. Union of India* AIR 1994 SC 268.

India's constitution itself provides the Governors with some discretionary powers. Governors sometimes do not judiciously exercise their discretionary powers. Here the role of the judiciary begins and the Governors have been given valuable guidelines many times by the judiciary.

The judicial approach regarding the appointment of Chief Minister was highlighted in the case of **Mahabir Prasad v. Prafulla Chandra**<sup>12</sup> in which it was laid down that the power of Governor is absolute with regard to the appointment of Chief Minister and the Court cannot call in question the same since it is his sole discretion. In the case of **Pratap Singh Raojirao v. State of Goa and Ors**,<sup>13</sup> the Court ruled that the Governor acts at his sole discretion in order to appoint the Chief Minister and, at the discretion of the Governor, enjoys immunity in compliance with Article 361 of the Constitution, when making a decision.

In the case of **Jagdambika Pal v. State of UP**,<sup>14</sup> the Supreme Court held a special Assembly session and a composite floor check among the opposing sides to determine which among two had a majority in the House. With regard to the Governor's discretion in appointing or dismissing the Chief Minister, the Gauhati High Court discerned that the repository of the power to appoint or revoke the pleasure provided in Article 164 and/or dismissal of the ministry is the Governor's exclusive pleasure-cum-discretion. He has the absolute and exclusive power to appoint the Chief Minister.

### WHAT IS FLOOR TEST?

A floor test is conducted mainly to assess if the executive maintains the legislature's confidence. It is a statutory procedure that on the floor of the Legislative Assembly, a Chief Minister appointed by the Governor may be asked to prove support or a floor test is a way to decide whether the majority of MLAs support a government or a Chief Minister. With a yes or a no, the MLA-elect will vote to answer if they support the individual as the Chief Minister.<sup>15</sup>

Indian constitution under Article 356, provides that if Governor of a state feels that there has been a breakdown of constitutional machinery in a state, he can request the President of India to take direct control of the state, which is simply called President's Rule. Keep in mind that Governors are appointed by the President with the advice of the cabinet. So, technically the President's Rule is equivalent to the central government running the state government, which is

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<sup>12</sup>*Mahabir Prasad v. Prafulla Chandra* AIR 1969 Cal 198.

<sup>13</sup>*Pratap Singh Raojirao v. State of Goa and Ors* AIR 1999 Bom 53.

<sup>14</sup>*Jagdambika Pal v. State of UP* JT 1998 (4) SC 319.

<sup>15</sup>'What Is a Floor Test? | What Is News, The Indian Express' <<https://indianexpress.com/article/what-is/what-is-a-floor-test/>> accessed 28 November 2019.

against the federal structure. Dissatisfied with this blatant misuse of power, the Supreme Court of India in the **S.R. Bommai** case decided that the test of the Constitutional machinery has to be decided on the floor of Legislative Assembly of the state (by voting) and not as per the whim of governor. The purpose behind the floor test is to enquire the question of whether the claimant will be able to provide the people, a stable (in terms of unity) and consistent (in terms of the period i.e. 5 years) government.

According to the Constitution, the Governor appoints the Chief Minister. When the majority of seats in the house are won by a single party, the Governor appoints the party leader as the Chief Minister. If the majority is questioned, the party leader who claims the majority must move a vote of trust and prove the majority among those present and voting. If they fail to prove their majority in the house, the Chief Minister must resign. This is happening in the assemblies of both the Legislature and the Parliament.

The Governor's office is by far the most crucial of many of the institutions atrophied by the loss of credibility. Because many Governors have allowed themselves to be used as the centre's hatchet people, they can be easily besmirched. It gives the judiciary an opportunity to intervene even if it does not have jurisdiction. Political parties, when in opposition, are quite poignant about moving the Court, but decry it when in power.

In the case of **Jagdambika Pal v. Union of India and Ors**, 1998, the Supreme Court had ordered the composite floor test in the legislature of the state of Uttar Pradesh. The composite vote was taken to determine who commanded a majority among two claimants—newly sworn-in chief minister Jagdambika Pal or his rejected predecessor Kalyan Singh. Later on, Kalyan Singh who was once rejected by the Governor became the CM of the state. The Court was supposed to uphold or set aside the High Court's decision, but it preferred to keep mum on the main issue. It's not provided for. It was done, of course, in accordance with Article 142, which empowers the SC. But it is impossible to exercise this jurisdiction over constitutional provisions. The extracts of the historical case are—

- The special session of the Uttar Pradesh Assembly shall be called on February 26, 1998, at the beginning of the forenoon session.

- The Assembly's only agenda would be to have a composite floor test between the contesting parties to see which of the two contesting chief ministership claimants has a majority in the House.
- It is important to ensure that the procedures in the Assembly are entirely peaceful and that the disruption created, if any, is seriously considered.
- The Speaker must diligently and truthfully report the outcome of the standardized floor test

Likewise in the case of Jharkhand in the case of **Anil Kumar Jha v. Union of India, 2005**,<sup>16</sup> the Supreme Court gave instructions as to how the floor check would be performed in the Jharkhand Assembly if it had no jurisdiction. It was a decision of the game-changer that shifted the dynamic for good between the judiciary and the legislature. It had ordered a floor test to decide whether Arjun Munda or Shibu Soren had a majority in the assembly. The 3-judge bench, which passed the order on the row of a previous apex Court order for a composite floor test in Uttar Pradesh in 1998, also instructed the Chief Secretary and the Police Director General to "see that all elected MLAs freely, safely and securely attended the assembly's proceedings without anyone interfering with it". This comment opened a floodgate of remarks as the bench said "if it's true, then it's a total fraud on the Constitution. We're passing this interim directive not to encourage more fraud on the Constitution to be committed".

The decade later in the case of **Harish Chandra Singh Rawat v. Union of India and Another, 2016**,<sup>17</sup> the Governor set a date for the Chief Minister to request a vote of confidence, but the Assembly was suspended in accordance with Article 356 a day before that date. Harish Rawat, whose government was sacked on the grounds of "breakdown of Constitutional machinery", had moved the Uttarakhand High Court calling the centre's decision as "arbitrary" and demanded it's quashing. The High Court ordered the floor test in the Assembly which provided relief to the petitioner and declared the President rule in the state unconstitutional. The order of the Uttarakhand High Court that the State Assembly holds a floor test to ascertain the majority of ousted Chief Minister Harish Rawat may be the rarest instance of such an interim relief being granted while the legislature is under suspended animation. The Court's key precedent is that of a 1998 Supreme Court directive for a "composite vote" in the Uttar Pradesh Assembly. Another

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<sup>16</sup>*Anil Kumar Jha v. Union of India 2005 (3) SCC 150.*

<sup>17</sup>*Harish Chandra Singh Rawat v. Union of India and Another 2016 SCC Ut 654.*

reason cited by the Court is that its interim order is “non-invasive and non-prejudicial” (to either party). It allowed participation of 9 disqualified MLAs to participate in the floor test. The Union Government appealed this decision in the Supreme Court. In the case of **Union of India v. Harish Chandra Singh Rawat**, 2016,<sup>18</sup> adjudicating the legality of the President's rule, the Supreme Court created a three-hour constitutional void by asking the Center to lift it for three hours to conduct the floor test whether the unseated Harish Rawat government enjoyed the House's confidence. It prohibited the Speaker from chairing the proceedings. Alternatively, for the intent, it named Chief Secretary, Legislative and Parliamentary Affairs, Uttarakhand State and Speaker, Legislative Assembly. There was no government in the state for this period, as neither the state government nor the central government existed. Therefore, President Rule has been translated into curfew, which has been removed for some time to allow people to purchase essential items.

In the case of **Nabam Rebia and Etc. v. Deputy Speaker and Ors**, 2016, Article 163 does not, as is often mistaken, grant Governors a general discretionary power. The area where his (Governor) discretion is exercised is limited. Even this limited area should not be arbitrary or fanciful in his choice of action. It must be a choice dictated by reason, driven by good faith and tempered by prudence. When its successor government is still in place, it used its judicial review powers to restore a government. The Governor is not an elected representative, but only an executive nominee whose powers are derived from the Cabinet's assistance and advice. It's not within the Governor's domain to embroil in any electoral thicket. Within individual political factions, the governor must stay aloof from any conflict, strife, disharmony, resentment or disagreement. Activities within a political party are beyond the Governor's concern, confirming turbulence or unrest within its ranks. The Governor will remain clear of any public horse-trading and even unethical political manipulations, regardless of the degree of their moral repulsion.

In the case of **Chandrakant Kavlekar v. Union of India through its Secretary and another**, 2017,<sup>19</sup> the Apex Court heard the issue of inviting the governor to BJP legislature party leader Manohar Parrikar to form the government, based on assistance provided by smaller parties, although the BJP had secured just 13 of the 40 Goa assembly seats. The

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<sup>18</sup>*Union of India v. Harish Chandra Singh Rawat* MANU/SC/0611/2016.

<sup>19</sup>*Chandrakant Kavlekar v. Union of India* through its Secretary and Another AIR 2107 SC 1435.



*Congress, which had emerged as the assembly's largest single party, had criticized the conduct of the governor. The bench held in its order: "The holding of the floor test would remove any ambiguities and give the necessary credibility to the democratic process." It was requested that the Governor of the State of Goa ensure that a floor test is possible as soon as possible. It would also be the only agenda for the day to assess if the chief minister administered the oath of office enjoys the majority support. The order also emphasizes that the floor test should be carried out as soon as possible.*

*In the case of **Dr. [G. Parmeshwara v. Union of India](#) Ministry of Home**,<sup>20</sup> where similar instructions were given for the creation of a government in the State of Karnataka to check whether the named chief minister had the majority of the House's support. The Floor Test shall be administered by the Pro-tem Speaker to assess the majority and shall not be performed by secret ballot and shall be conducted in accordance with the law. The Court ordered the live telecast of the floor test the next day, limiting the Governor's 15-day window to demonstrate his majority to BJP Chief Minister B S Yeddyurappa. The insistence of the Court for an urgent floor check was attributed to the nod provided by a governor to a group or coalition to form the government on a prima facie assessment based on the letters of support. Until naming a chief minister under Article 164 of the Constitution, a governor cannot "collect faces" or embark on a "fishing or roving investigation." Sufficient and adequate security arrangements shall be made and the Director-General of Police, State of Karnataka shall supervise the said arrangements himself in such a way that there is no delay of any such count*

*In the case of **Shiv Sena and Ors. v. Union of India and Ors**, 2019,<sup>21</sup> the most recent case where the writ petition filed by the Shiv Sena, the Nationalist Congress Party, and the Indian National Congress attempts to quash the intervention of the Maharashtra Governor by inviting Devendra Fadnavis to form the government on the grounds that it was unlawful, unilateral, illegitimate, void ab initio, and infringing Article 14 of the Constitution. The petition also seeks an acceptable direction from the governor to invite the Maha Vikas Aghadi coalition of these three parties to form the government under Uddhav Thackeray's leadership, citing support from more than 144 MLAs. Lastly, the petitioners want the Court to pass any other order or direction*

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<sup>20</sup>*Dr. [G. Parmeshwara v. Union of India](#) Ministry of Home* (2018) 16 SCC 46.

<sup>21</sup>*Shiv Sena and Ors. v. Union of India and Ors* 2019 SCC SC 1502.

as it considers fit in the facts of this case and in the interests of justice. The Apex ordered the live telecast of the floor test the next day. The Bench observed that the questions of maintainability, degree of judicial review, and legitimacy of the approval of the Governor presented by the counsel participating in the case are important constitutional concerns that needed subsequent adjudication. The Court did not, however, see any justification for suspending the floor check for the time being. Implicit in the bench's decision was the acknowledgment that any delay in holding the floor test could distort the mandate of the people by giving an opportunity to the leader with minority support in the assembly to use the time available to cobble up a majority – through the engineering of defections. The Court also noted that the elected members did not receive oath even though a month has passed since the election results were declared. In such conditions, the Fadnavis-led government had to request a floor test to prove its support. The Supreme Court relied on its previous cases of **Jagdambika Pal v. Union of India**, **Union of India v. Harish Chandra Rawat** (Uttarakhand case), **Chandrakant Kavlekar v. Union of India** (Goa case), and most recently in **G Parmeshwara v. Union of India** (Karnataka case) in this case.

Following many judicial pronouncements and guidelines from the commissions of Justice RS Sarkaria and Justice Punchhi, Governors are reported to have behaved separately with constitutional consequences in apparently similar circumstances. Ultimately, restoring balance and upholding the principles enshrined in our Constitution was left to the Supreme Court. To which, of course, it could always be added that constitutional authorities, such as the governor, must also respect constitutional property so that such a situation does not arise in the first place. The apex Court has intervened over the years to order floor tests to overcome deadlocks in different states. From time to time, incidents have come to notice where the guidelines laid down in the Bommai judgment have not been pursued by Governors and, as such, wherever and whenever needed, notwithstanding the terms of Article 212, where the Courts are not to examine the legislature's proceedings, the Supreme Court has adopted a constructive position in maintaining the Constitution's dignity.