The Curious Case of Hung Assemblies and Its Plausible Remedy

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Abstract

The present article aims to address a question that penetrates deep into our democratic and Constitutional fabric. It has such ramifications that leaving it at abeyance would further indent the already damaged political ethos of India. The controversial issue being talked here is that where upon the declaration of results of any State's elections, no single party or pre-poll alliance touches the magical number and situation of hung assembly emerges, who should be called upon first in time to form the government – the single largest party or the post-poll alliance. Amidst determining the legitimate and safest method of resolving the aforesaid conundrum, the author comments upon the viability and legality of the "incalculable and unguided discretion" that the Governor enjoys in such occasions. To substantiate his claims, the author examines the Constitutional prerogative of the Governor, the arbitrary practice of calling one group over the others, and viewpoint of the Courts and other authorities in this regard. Further, the article provides for dynamic procedure that might be adopted to contain this endless battle, however at the same time, raises a pertinent apprehension of conflict in ethical conduct and law, and opines, in the alternative, to evolve no-party democracy in India as it is believed that the collective trust in the legislature is founded on the bedrock of the Constitutional trust.

I. INTRODUCTION

The uproar relating to the issue in hand is not something which the Indian politics has been unfamiliar with. It mired into controversy again with Goa State Assembly Elections in 2017 and Karnataka State Assembly Elections in 2018. In case of the former the post-poll alliance was first called upon by the Governor of the State to form the government, whereas the single largest party was provided with an early opportunity to prove their majority in case of the latter. One facet that was common in both the scenarios was that the respective decisions of the Governors were seen to be challenged in the Apex Court and it ordered to conduct a floor test within a reasonable time, with an objective to strengthen the democratic values and the constitutional norms. Apparently, for the Supreme Court the present dilemma seemed to be quite problematic so much so that it, in case of the latter, constituted a bench at mid-night as the Governor accepted letter from the single largest party and was ready to administer the oath the next morning.

Having said this, there must not be any confusion that such an irregular practice, which is completely based on the discretion exercised by the Governor of the states, is proving to be antithesis to the Constitutional goals and in a sense, casts aspersions on the prestigious Constitutional office like that of "Governor". Most importantly, it further leaves room by providing a breeding ground for horse trading (political defection of members with or without any gratification, also referred as 'floor crossing'), although the Governor is expected to be free from political bias, would seldom act in an unbiased manner, not to forget his political background or for that matter mere inclination towards a party.

The foregoing discussion shall remain concentrated on providing a best suitable method to the

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concern, and what the Constitutional courts in India have iterated on this conventional power of the Governor.

II. Legitimacy of the Discretion of the Governor

Prior to elaborating upon who ought to be called first in time and on what premise, and whether 'floor tests' might be the antidote to the prevailing menace, it is imperative to discuss what truly happens immediately after the results are declared for a State Assembly to highlight the indispensable play of the Governor. As a matter of practice, the party who believes that it has the capacity to prove the majority writes a letter to the Governor and upon being satisfied of the calculations and other material mentioned therein, the Governor decides as to whether it is fit to move ahead with the oath taking ceremony. Although, the power of the Governor to administer oath is Constitutional[2], but who has to be invited first is purely discretionary, based on the material produced by the leading member elected from a party. At this juncture, it becomes relevant to point out that such executive decisions of the Governor though can be challenged before the High Courts or the Supreme Court, but on very limited and strict grounds.[3] In case of a decision pertaining to the present question, absence of any written law or rule[4] further leaves no room for interference for the Courts. This in itself demands urgent need for the Supreme Court of India to step forward and settle the proposition for once and for all.

Subsequently, the Governor decides the relevant and necessary details of the oath ceremony such as the date and time. He then also prescribes the date for the newly appointed Chief Minister to prove the majority at the floor of the Assembly, to be conducted under the chairmanship of the Speaker of the Assembly. Interestingly, the date fixed for the floor test is nothing but the prerogative of the Governor which he is expected to discharge reasonably and justifiably. For e.g.: Recently, in Karnataka Assembly Elections, when the Governor of the State called upon the single largest party for administering the oath, the time provided to them to prove majority in the Assembly was initially fixed to fourteen days. This cannot under any circumstance be called as reasonable or prudent choice as the same could have resulted into a potential chance for them to prove the majority by adopting unfair means. It leads us to another question within the primary conundrum that what time should be considered as 'reasonable time' for this purpose.

First things first, it is noticeable that anything which plays a pivotal role in such occasions is the "discretion of the Governor". All those acts involving prerogative decision making shall come to the knowledge of the reader in the subsequent passages of this issue, but before that, it is quintessential to know the source of this power and test its legal viability.

It is a matter not unknown that ordinarily the Governor is obliged to exercise his powers on aid and advice of the Council of Ministers of that State.[5] However, while carving exception to this normalcy, the Supreme Court held that this power to act independently was only in regard to those situations which have been expressly mentioned in the Constitution itself.[6] Later in the

[2] The Constitution of India, 1950, art. 188.
[3]Rameshwar Prasad (VI) v. Union of India, (2006) 2 SCC 1.
[4]Supra note 2, art. 160.
[5]Id., art. 161.
[6]Samsher Singh v. State of Punjab & Anr., (1974) 2 SCC 831.

year 2004, the settled law took a sharp turn and the Apex Court sitting in a Constitutional Bench culled out a few circumstances, apart from what the Constitution already provided for, wherein the Governor's independent application of mind becomes inevitable to protect the ultimate values of the rule of law. The Court enumerated those instances as follows:

a) "Where bias is inherent and/or manifest in the advice, or rarely where the bias becomes apparent; or
b) Where the decision of Council of Ministers is shown to be irrational or based on non-consideration of relevant factors; or
c) Where Council of Ministers disables or disentitles itself; or
d) Where as a matter of propriety, the Governor may have to act in his own discretion."[7]

It needs no special attention to decipher that the final category is a general one giving endless power to the Constitutional seat of the Governor. The power exercised for the purpose of the issue in hand, though not specifically enumerated but finds its place in the residuary portion. The Court, at the same time, cautioned that the residuary power could be only exercised when there arise situations concerning complete breakdown or looming threat on the democratic principles enshrined in the Constitution. Interestingly, the Supreme Court in Nabam Rebia & Bamang Felix v. Deputy Speaker, Arunachal Pradesh Legislative Assembly &Ors.,[8] again a Constitutional Bench, recognized the Governor's discretionary power in matters of hung assemblies by referring and affirming the findings of the Sarkaria Commission report on "Centre-State Relations"[9]. Furthermore, the law pertaining to discretionary powers which stood in a vague manner was clarified by confining it into three ends, namely, 1) where the Constitution provides so expressly; 2) where any provision of the Constitution cannot be construed otherwise if it is legitimately interpreted; and 3) where the Court has held that such discretion is available to be exercised.

III. The Never-Ending Confusion of Calling One Over the Other

With no dubiety on the Governor's entitlement, the whole issue now rests upon the query as to who should be first called upon to form the government in cases of hung assemblies, the answer to which cannot be given without an elaborate discussion on the provisions of the law and judicial opinion on the issue.

As pointed out earlier, Article 160 of the Constitution states that the President has the power to frame rules to aid the Governor of a state for the discharge of any function not given under that Chapter. However, no rules have been framed by the President in this regard. This takes us directly to the judicial precedents that might be of some help. The Supreme Court elucidated the concept of floor tests initially in S.R. Bommai v. Union of India,[10]wherein the Court stated that testing the confidence of the Assembly on its floor seems to be the fittest method to prove the conscience of the members bestowed upon a group. However, this would be subject to a situation

[7]M.P. Special Police Establishment v. State of M.P. & Ors., 2005 SCC (Cri) 1.
[8] (2016) 8 SCC 1.
[9] See also: Justice M.M. Punchhi Commission's Report, "Constitutional Governance and management of Centre-State relations", (2010).
[10] (1994) 3 SCC 1.

where due to persisting violence in the Assembly, the Governor observes the same in writing in his conclusions that for such a reason, a fair call by each member is not possible. Pertinently, a word of caution ought of be mentioned here that the above quoted remark validating floor test was not made by the Court in case of hung assembly but for the purpose of Article 356 of the Constitution i.e. the President's rule or the Governor's rule. Thus, the law laid down in the present case lacks application in the present scenario. Moving ahead with a hope of deriving some concrete answer, the Sarkaria Commission's report[11] becomes material. It indicates the order of preference and suggests inviting the group which is able to prove the numbers on their side. This means that post-poll alliance, if crossing the magical number, should ideally be invited to form the government. Unfortunately, it is merely directive in nature and hence, is reduced to mean that this thought should cross the mind of the Governor while taking decision.

Examining the feasibility of calling single largest party, it must not be the first choice simply because of the reason that by any sort of imagination it is mathematically not possible for them to prove majority. In addition to this, it opens up the gate for 'horse trading', and that would certainly hit by anti-defection laws enshrined under Tenth Schedule of the Constitution.

One might say that single largest group; in essence, the post-poll alliance must be the quintessential choice without a second thought. The same is apparently supported by the Supreme Court in Rameshwar Prasad v. Union of India, wherein it observes that

> "Where a political party with the support of other political party or other MLAs stakes claim to form a Government and satisfies the Governor about its majority to form a stable Government, the Governor cannot refuse formation of the Government and override the majority claim because of his subjective assessment that the majority was cobbled by illegal and unethical means. No such power has been vested with the Governor. Such a power would be against the democratic principles of majority rule. The Governor is not an autocratic political ombudsman. If such a power is vested in the Governor and/or the President, the consequences can be horrendous."[12]

However, it is the view of the author that the above-quoted remark involves peril to a great extent, and thus raises significant doubt on blindly following this route. If the above-mentioned overlapping of defection laws and post-poll alliance is ignored, even otherwise there seems to be no concrete legal basis of calling the post-poll alliance merely upon presentation of a letter guaranteeing the claim mathematically. Such a claim could have been presented to tactically seek time and adopt malpractices to later show the actual number required for proving majority, which has been actually the action plan in most of the cases, thereby warranting immediate interference of the Supreme Court.

IV. The Plausible Remedy

In absence of any legally sound choice, a possible resolution lies in holding mandatory

[11] Justice Sarkaria Commission's Report, "Centre-State Relations", (1988).
[12] Supra note 2.

"Composite Floor Test".[13] A question may be posed challenging such a practice that how any majority-proving exercises in the nature of floor test may be held when the assembly is kept in suspended animation. The Supreme Court has thoughtfully considered this concern and stated that an assembly is constituted and starts breathing, the moment notification under section 73 of the Representation of People Act, 1951, is issued. Now, the assembly can be brought back into animation by a supervening proclamation issued merely for the purpose of such a floor test, the hurdle of Article 188 and 189 can definitely be surmounted. These provisions require oath or affirmation having been administered before an MLA could cast his vote in the assembly. Notably, to preserve the purity of democracy and relieve the exchequer from burden of fresh elections, the administration of oath to MLAs should be done for the purpose of holding preliminary floor test.[14]

We all are aware that the Supreme Court had been ordering to hold composite majority proving test for over a considerable period of time. The same was ordered at the time of Goa and Karnataka conundrum[15] as the circumstances demanded effective attention of the Court. After carefully examining the legal viability of such an exercise, it becomes pertinent to lay down a procedure so as to reduce the chances of adoption of any malpractice. It may be brought into effect either by enacting a suitable piece of legislation regulating the issue or judicial pro-activeness in form of confining the bounds of discretion of the Governor. In times when political race for power in the states is at its peak, the former choice seems to be a mere dream, however, all yearning eyes would be on the judiciary. Whatever happens, it is the view of the author that in order to eliminate the ills, the convention of presenting letter to the Governor should be done away with. In addition to it, whenever such situations occur, the Governor should mandatorily issue an order for holding a composite floor test within a reasonable time frame. The term "reasonable time frame" must be defined and should not exceed 48 hours from the declaration of results. In continuation to the process, the Governor should appoint a *pro-tem* or *ad-hoc* speaker and in appointing the same, seniority of the member should be the paramount consideration, if not the sole criteria. The job of the interim speaker in the impugned matter should be limited to hold the voting in a free and fair manner, and thereafter, submit the outcome to the Governor in form of a brief report. Subsequently, the Governor, on being satisfied with the result of voting in the assembly, should call upon the majority group to form government. To further make the *pro-tem* speaker accountable, live telecast of the same may also be held wherever the Governor orders to that effect.[16] Moreover, if a member absents himself, for no reasonable cause shown beforehand, he should be deemed to be disqualified as "voluntarily given up his membership" under paragraph 2 of the Anti-defection law.[17]

The procedure laid down above would reduce the threat of floor crossing and the parties adopting unethical ploys to reach that magical number. Moreover, the discretionary powers of the Governor would then be guided and exercised in a transparent manner and not merely on surmises.

[13]Jagdambika Pal v. Union of India, (1999) 9 SCC 95; [This was the first time Supreme Court directed to hold Composite Floor Test].
[14]Supra note 2.
[15]Chandrakant Kavlekar v. Union of India, AIR 2017 SC 1435 and G. Parmeshwara v. Union of India, (2018) 16 SCC 46.
[16]G Parmeshwara v. Union of India, (2018) 16 SCC 46; [Live Telecast of the voting in the assembly was ordered].
[17]Supra note 1, Tenth Schedule, Provision as to disqualification on ground of defection, 1985.

V. Conclusion

Despite taking much care of keeping the process free from limitations, it seems nearly impossible to make it foolproof. A probable threat that remains active is floor crossing of both, the independent members and the members associated with any party. Besides all, it attaches to itself the risk of incalculable loss of not having any group claiming majority which renders the whole process of elections nugatory and eventually, re-elections may be held. However, it may be noted that the same clouds also loom over the process of conventional floor test being followed till date.

In the alternative, it is opined by the author that an answer to the same lies in emergence of "no party democracy". It may, at the offset, be processed that this ostensibly complicated technique ought to be initially experimented just in case of State assembly elections. All the members along ought to run the state and delineation to the Council of Ministers ought to be created in accordance with the quantity of votes in favour of a faction and also the Chief Minister ought to be from the single largest party. To conclude, it may be clearly stated that the preceding paragraph is merely an idea intended to protect the Constitutional values in true sense. It may seem to be illogical or a passionate idea of utopian world at first but it is high time that the proposition "floor test at the whims of the Governor is the penultimate test" in such cases should be revisited to get rid of the unhealthy political collusions leading to defections.