

HUNG ASSEMBLY: THE CONTROVERSIES AND RELATED ASPECTS IN INDIA

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ABSTRACT

Hung Assembly is a very prevalent term now days because of Goa and Karnataka Assembly elections held in 2018 where neither party has obtained majority in the election to form a government in the state. Due to such situation lot of things has taken place like conflicts between the parties, question on the role of governor, sale and purchase of MLAs to form the government and the question on the meaning of the Democracy has been raised. Hung Assembly is a situation after election in a state in which neither political party gets majority to form the government. In this situation role of governor becomes most important because as per constitutional provisions Chief -Minister is appointed by the Governor, who gets majority to form the government after Assembly election result.

An author of this paper has taken this Topic keeping in mind the relevance. An author first discusses the various instances of Hung Assembly in India. Secondly the role of Governor in Hung Assembly and in Case of No confidence motion, recommending the president rule or giving or not giving opportunity to present government to prove majority on the floor of the Assembly. Thirdly, the judicial precedent in relation to the role of governor in hung Assembly and in case of no confidence motion. And Lastly the analysis of recommendations of various committee and commissions in relation to hung assembly and their impact.

Keywords: Hung Assembly, Majority, Democracy, judicial precedent, no confidence motion

INTRODUCTION

When one party secures majority in the election, the role of governor to appoint Chief- Minister is just formality. But where neither political party gets majority the discretion of the Governor plays a very important role because it is discretion of Governor to call leader of any party who contested election to come forward and prove majority to form the government. Such discretion of the Governor is unchallenged till now and also there are no set principles to guide such situation. But such discretion should not be used in unreasonable manner. As we came across with such situations, where discretion has been used differently at different times in similar situation.

Therefore, there should be some principles to guide Governor while he exercises his discretion. There were always question marks on the role of the governor because he is considered to be a representative or Agent of the central government to supervise the functioning of the state and to act in accordance with the wishes of the Central Government. Either it may be the imposition of President Rule on the report of the governor or invitation to leader of one party to form the government in hung Assembly situation irrespective of number of assembly Seats won by the parties.

Meaning of Hung Assembly

The Oxford dictionary defines Hung Assembly as “Assembly in which no party has clear majority”. In Parliamentary systems, a Hung Assembly or a minority government is one in which no one political party has an absolute majority, and means the house is less commonly known as balanced Assembly. In Strong National chambers with weak regional parties, it is a rarity, as in these circumstances one party will usually hold enough seats to form a majority. A Hung Assembly will force a coalition government, a minority government or dissolution of Assembly. In general, a minority government considered to be less stable than a majority government, because the opposition can always bring down the government with a simple vote of no confidence. Also, it is often argued that a minority government is less accountable because the leader can evade responsibility and shift blame to the opposition. However, a minority government tends to be less conceited because it often necessitates compromise between the different parties to ensure the passage of legislation.

Instances of Hung assembly in Indian State

There are many instances of hung assembly in history where the parties with fewer assembly seats were invited to form the government by the governor¹.

- In the assembly election in, 2018 in the state of Manipur, the BJP won 21 constituencies and the Congress won 28 constituencies out of 60 Constituencies. But BJP managed to form an alliance and Government.
- In the assembly election in, 2018 in the state of Goa, the BJP won 13 seats and the Congress won 17 seats out of 40 constituencies. Here also, But BJP managed to form an alliance and Government.
- In the assembly election in, 2013 in the state of Delhi, the BJP won 31 seats in Delhi in 2013, but the AAP who won 27 seats was invited to form the Government
- In the assembly election in, 2005 in the state of Jharkhand, the BJP had won 30 out of 81 seats in 2005. The Jharkhand Mukti Morcha (JMM) who won only 17 seats was invited to form the government by the Governor.
- In the assembly election in, 2002 in the state of In Jammu and Kashmir, the National Conference won 28 constituencies, but the governor invited the Congress and PDP who won 21 and 15 constituencies.
- In the assembly election in, 2018 in the state of Karnataka, the BJP won 104 constituencies and the Congress won 78 constituencies out of 224 Constituencies. But Janta Dal (Secular) which won 37 constituencies managed to form an alliance and Government with the support Congress.

¹ The Governor's Role In The Hung Assembly, <https://www.jagranjosh.com/current-affairs/the-governors-role-in-the-hung-assembly-1489729786-1>

ROLE OF GOVERNORS IN HUNG ASSEMBLY CASES

Governor's Discretion while Choosing Chief Minister²

A.V. Dicey who considers discretion as opposed to the rule of law, while other countries considers discretion as an indispensable part for successful administration of the system. A.V. Dicey said that wherever there is a discretion there shall always be misuse of discretion. Discretion granted to a person most probably unlocks the floodgates for partial decisions. We are talking about the office of the Governor in India. Ever since the Madras State elections in 1952, the office of the Governor has been controversial on several fronts. The Governor's discretion in choosing a chief minister has been a significant bone of contention. This article gives emphasis on the need to set standards to restrict the Governor from exercising his discretion in choosing a Chief Minister in an arbitrary and fanciful manner in hung assembly situation. For a better understanding, it is necessary to discuss the law pertaining to such situations and spontaneously we are guided to Article 164 of the Constitution.

Legal Basis of Governor's Discretion

The Chief Minister of state shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister, and the council of Ministers of state shall hold office during the pleasure of the Governor³. Article 164(1) does not provide any solution as to whom the Governor shall invite as the Chief Minister in case of hung assembly. At this point the much controversial circumstantial discretion of the Governor comes into picture. This is one of the instances as mentioned under the Indian Constitution where the Governor can exercise his discretion independently without consultation with cabinet. Dr. Ambedkar, Framers of the constitution too fingered that this sort of discretion is not contrary to the idea of responsible government.

But there could be safeguards checking the abuse of this discretion. The Sarkaria Commission (1988) opined that "the safeguards have mostly to be in the nature of conventions and practices". In the past decades, it has been seen that Governors had invited the leaders of the single largest party, pre-poll alliances and post-poll alliances. But there is no sense of uniformity in their practice in the selection of Chief Minister in hung assembly cases. Therefore, an attempts should be made at setting well-defined Criteria's for the Governor to exercise discretion in such situations.

Whether Discretion is absolute and unchallengeable

Discretion⁴ Denotes "a power or right conferred upon public representatives or officers by law of Country while acting officially in certain circumstances, As per their own judgment and conscience, unrestrained by the judgment or conscience of others. This discretion undoubtedly is to some extent regulated or controlled

² Governor's Discretion while Choosing CM: An Analysis of the Recent Karnataka Drama by M K Sanu, <https://www.livelaw.in/governors-discretion-while-choosing-cm-an-analysis-of-the-recent-karnataka-drama/>

³ Article 164(1) of the constitution of India 1949

⁴ According to Black's Law Dictionary

by custom or usage, or, by fixed principles". Thus, discretion requires the exercise of subjective reasoning by public authorities which of course should be articulated within the confines of accepted principles, for example, conventions and constitutional principles.

In **Nabam Rebia case**, the apex court held that ‘the appointment of the Chief Minister is based on the principle of a majority of Members of the Legislative Assembly. Therefore, it is not as if the Governor has untrammelled discretion to nominate anyone to be the Chief Minister of a State’. In the Karnataka episode, it was not even a hung assembly. The Congress-JD(S) combine had the sufficient numbers to form a stable government. Even with the addition of all independents, the BJP would not have secured the majority. Only available option before the BJP was to cause a break-up and encourage defections from other two parties. Such defection has been discouraged by the Constitution of India by 52nd amendment 1985 and by the Judicial Precedent, **In Kihoto Hollohan v. Zachillhu & Ors**⁵, while upholding the validity of the Tenth Schedule, the Supreme Court held and Observed that defections weaken the cherished values of democracy and Tenth Schedule was added to the Constitution to combat this evil. Unethical political defection was explained as “a canker eating into the vitals of those values that make democracy a living and worthwhile faith”.

The Karnataka Governor’s decision to invite the leader of the single largest party which did not have the support of enough elected representatives was an Indication of indulgence in poaching and horse trading. The Governor was supposed to act in Accordance with the spirit of the Constitution. The Governor can be accused of mala-fides, abusing the discretion he was bestowed with even if he has personal Immunity under Article 361. Despite this personal immunity, a Governor’s actions can be judicially challenged. The Supreme Court in **Rameshwar Prasad case** made the following observations. The personal immunity from answerability provided in Article 361 does not bar the challenge that may be made to their actions.

Commission Recommendations in Relation to Hung Assembly

Sarkaria Commission Report (1983)⁶

The Sarkaria Commission formed in 1983 in order to analyse the role of the governor and came out with a detailed report. It suggested following mechanism in case of hung Assembly situation:

1. *the coalition of parties that was formed prior to the Elections.*
2. *The largest single party making a claim to form the government with the backing of others, including “independent Candidates.”*
3. *A post-electoral alliance of parties, with all the partners of the alliance joining the Government.*

⁵ AIR 1993 SC 412

⁶ Sarkaria Commission Report on Centre-State Relations (1988), <http://interstatecouncil.nic.in/report-of-the-sarkaria-commission/>

4. *the coalition of parties made after election, where some of the parties in the alliance are becoming the part of the Government and the rest of the parties, including “independents” giving support to the Government from outside.*

Punchhi Commission Report (2010)⁷

Another report in relation to Role of Governor is the Punchhi commission report of 2010, headed by former Chief Justice of India MM Punchhi and also comprising eminent academics like NR Madhava Menon, and submitted its report in 2010.

“On the question of Governor’s role in appointment of Chief Minister in the case of a hung assembly there have been judicial opinions and recommendations of expert commissions in the past. But these are not enough to guide the Governor, the Commission is of the view that it is necessary to lay down certain clear guidelines to be followed as Constitutional resolutions in this Context.” Such guidelines in case of Hung Assembly, are as follows:

(a) *The party or combination of parties which commands the widest support in the Legislative Assembly should be asked to form the government.*

(b) *If there is a pre-poll alliance or coalition, it should be considered as one political party and if such coalition gains a majority, the leader of such coalition shall be called by the Governor to form the Government.*

(c) *If, no party or pre-poll coalition has vibrant majority, the governor should choose the chief minister in the sequence provided below:*

1. *the set of parties which had pre-poll alliance having the largest number of members;*
2. *the largest single party making a claim to form the government with the support of others;*
3. *the coalition made after election, with all partners joining the government; and*
4. *the coalition of parties made after election, where some of the parties in the alliance are becoming the part of the Government and the rest of the parties, including “independents” giving support to the Government from outside.*



However, these guidelines only add to the ambiguity because guideline (a) and the order of invitation suggested in guideline (c) do not reconcile. Guideline (a) states that when there is a hung assembly the Governor shall call party or combination of parties which commands the widest support in the Legislative Assembly. The “combination of parties” referred to in guideline (a) does not specify whether it is a post-poll alliance or pre-poll alliance. Hence, it can be assumed that either of such alliances are covered by the said guideline. So, if a post-poll alliance “commands the widest support: in the Legislative Assembly, then it shall be called upon by the government to form government.

However, the Commission ends the debate by stating that if specific guidelines are not laid down with regard to determining the claims of a post-poll alliance, it would leads to ambiguity and the Governor would

⁷ Poonchy Commission Report on Centre-State Relations (2010), <http://interstatecouncil.nic.in/report-of-the-commission-on-centre-state-relations/>

follow the established practice of inviting the single largest party to form the Government (which is what is happening in Karnataka).

Judicial precedent and Hung Assembly

***SR Bommai v. Union of India*⁸**

This judgment was delivered in 1994 by a Constitution Bench of 7- judges. This case was dealing with the imposition of President's Rule under Article 356 and the exercise of powers of the Governor in relation to that. The Sarkaria Commission report was cited extensively in that judgment. Many of the recommendations of Sarkaria Commission are also endorsed in that judgment, but with respect to Article 356.

With regard to a situation arising after the election, the Court however held that the Governor has to invite the leader of the party commanding majority in the House or the single largest party/group to form the Government. The exact words in the judgment are as follows: "It was made very clear that above given solution is applicable in cases, where Chief Minister lost Majority and not in case of hung assembly situation. Given case was not dealing with the process to be followed by the Governor in case of a Hung Assembly. Hence, this observation is only an obiter and need not bind the Court in a fact situation similar to the Karnataka or Goa."

***Rameshwar Prasad v. Union of India*⁹**

This is another case in which Sarkaria Commission report was referred to extensively. This case was again in the context of imposition of President's rule in the State based on the report sent by the Governor that no party has majority in the house. The Apex Court categorically held that "If 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. It opposed the democratic principles of majority rule. The Governor is not an autocratic political ombudsman. This is not in context of hung Assembly but in case of non-confidence motion.

However, the judgment also refers in detail to the chapter in Sarkaria Commission report relating to role of Governors, particularly in dealing with the situation where no single party obtains absolute majority and the order of preference the Governor should follow in selecting a Chief Minister. However, once again the Court has not endorsed this in a fact situation similar to the current one.

⁸ AIR 1994 SC 1918

⁹ (2006) 2 SCC 1

Nabam Rebia v. Deputy Speaker¹⁰

This is the latest of the decisions in which Sarkaria and Punchhi Commission reports are cited extensively. Once again, the factual matrix of this case was different from the case at hand. The Court, in this case, discusses at length on the aspect of when a Governor can exercise his discretion, independent of the Council of Ministers. One of the instances, as stated in Sarkaria Commission and cited by the Supreme Court in this judgment, is when the advice of his Council of Ministers is not available, e.g. in the appointment of a Chief Minister soon after an election.

However, since the case was not on this aspect, the Court did not go further into the aspect though it did endorse the recommendations made by Sarkaria Commission in this regard. Importantly, the order of preference set out by Sarkaria has not been adverted to in Nabam Rebia judgment as it had been in Rameshwar Prasad and Bommai. Hence, the question still remains. Has the order of preference set out by Sarkaria in case of Hung assembly been endorsed and settled by Supreme Court in the absence of any law to that effect?

This issue is no longer an untouched matter. IN *Chandrakant Kavlekar v. Union of India*¹¹, has upheld the action of the Governor in the context of hung assembly of the Goa Legislative Assembly. The said Assembly comprised of 40 elected members, and the Governor had invited the post poll alliance consisting of more than 21 members. The action of the Governor in inviting the post poll alliance consisting of smaller parties including the BJP was questioned by the single largest party i.e. the Congress. This Hon'ble Court upheld the decision of the Governor and made subject to an expeditious floor test. Therefore, it is submitted that the action of the Hon'ble Governor in this case to take a detour from the well settled Constitutional convention.

Dr. G Rameshwaram and Ors. V. Union of India.¹²

Both the BJP and JD(S)-Congress met the Governor and staked their claims. The Governor surprisingly invited BS Yeddyurappa, leader of the single largest party BJP, to form the government, though there was absolutely no evidence of him having a majority required to form government and Fifteen days were provided instead of (Yeddyurappa requested for one week) to prove majority on the floor of the house. The Congress-JD(s) challenged the Governor's decision before the Supreme Court in Their chief prayers were to set aside the Governor's invitation to Yeddyurappa as a CM Candidate, stay his swearing-in and advancement of the floor test and challenged the appointment of the Pro-tem Speaker by the Governor. On the ground that this decision is violative of article 14 of the Indian constitution because such decision is taken arbitrarily and not based on sound ground, or governor has exercised discretionary power arbitrarily in inviting single largest party to form government.

The Supreme Court of India refused to stay the swearing-in but ordered an immediate floor test. In the floor test BJP failed to prove the majority while Coalition of Congress and JD (secular) proved the majority and

¹⁰ <https://indiankanoon.org/doc/192490620/>

¹¹ (2017) 3 SCC 758, https://www.supremecourtindia.nic.in/pdf/cir/2017-03-14_1489484838.pdf

¹² <https://indiankanoon.org/doc/158842137/>

form government. After taking into account the above fact it can be concluded that governor's decision in inviting any party or group of Parties to form government is sole discretion of the governor.

CONCLUSION

Our Indian constitution give ultimate authority to will of the people of India in relation to formation of government which shall rule the country. Democracy is that system which secure the participation of the people in the governance of the country. In other word democracy denotes the government, of the people, for the people and by the people. People participate in the governance of the nation by casting a vote and electing a person as his representative to represent the will of the people. The person who receives the majority of vote of the people becomes the part of the government but some time such votes are divided in such a manner neither party secure the majority and situation of the hung assembly comes into existence.

When one party secures majority in the election, the role of governor to appoint Chief- Minister is just formality. But where neither political party gets majority the discretion of the Governor plays a very important role because it is discretion of Governor to call leader of any party who contested election to come forward and prove majority to form the government. There is no set principle in the constitution of India to which party or coalition, governor shall invite to form the government. Even there are some constitutional convention and recommendation of the Sarkaria and Punchhi commission relation to above question. But given constitutional convention and recommendation are not given binding value or force by the Judicial precedent. Even there are some judicial precedent which talks about the discretionary power of the governor but not in context of hung assembly.

Recent cases Chandrakant Kavlekar and Dr. G. Parmeshwara & Anr Case, which are related to discretionary power of the governor in case of hung Assembly. Supreme Court in these cases on challenges being made against the decision of the governor inviting some time single largest party or some time post coalition to form government was not reversed by the Supreme court and held that discretionary power of the governor in inviting the party or Group of parties is final. Although there is no binding principle which shall be followed by the governor in inviting the party or Group in hung assembly situation still governor should invite the party or group of parties which can give stable government to the state.

“Dr. Bhim Rao Ambedkar, In his speech on the constitutional role of Governors and use of discretion by the Governor should not be as “representative of a party” but as “the representative of the people for whole of the State”.

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