Following the recommendation of the Election Commission (EC), the President disqualified 20 MLAs of the Delhi Legislative Assembly last month for holding an 'office of profit'. The legislators in question were appointed as parliamentary secretaries to various ministries in the Delhi government. The Delhi High Court is currently hearing a petition filed by the disqualified MLAs against the EC's recommendation. There have been reports of parliamentary secretaries being appointed in 20 states in the past with court judgments striking down these appointments in several cases. In this context, we discuss the law on holding an 'office of profit'.

What is the concept of 'office of profit'?

MPs and MLAs, as members of the legislature, hold the government accountable for its work. The essence of disqualification under the office of profit law is if legislators holds an 'office of profit' under the government, they might be susceptible to government influence, and may not discharge their constitutional mandate fairly. The intent is that there should be no conflict between the duties and interests of an elected member. Hence, the office of profit law simply seeks to enforce a basic feature of the Constitution- the principle of separation of power between the legislature and the executive.

According to the definition, what constitutes an 'office of profit'?

The law does not clearly define what constitutes an office of profit but the definition has evolved over the years with interpretations made in various court judgments. An office of profit has been interpreted to be a position that brings to the office-holder some financial gain, or advantage, or benefit. The amount of such profit is immaterial.

In 1964, the Supreme Court ruled that the test for determining whether a person holds an office of profit is the test of appointment. Several factors are considered in this determination including factors such as: (i) whether the government is the appointing authority, (ii) whether the government has the power to terminate the appointment, (iii) whether the government determines the remuneration, (iv) what is the source of remuneration, and (v) the power that comes with the position.

What does the Constitution say about holding an 'office of profit'? Can exemptions be granted under the law?

Under the provisions of Article 102 (1) and Article 191 (1) of the Constitution, an MP or an MLA (or an MLC) is barred from holding any office of profit under the central or state government. The articles clarify that *"a person shall not be deemed to hold an office of profit under the government of India or the government of any state by reason only that he is a minister"*. The Constitution specifies that the number of ministers including the Chief Minister has to be within 15% of the total number of members of the assembly (10% in the case of Delhi, which is a union territory with legislature).

Provisions of Articles 102 and 191 also protect a legislator occupying a government position if the office in question has been made immune to disqualification by law. In the recent past, several state legislatures have enacted laws exempting certain offices from the purview of office of profit. Parliament has also enacted the Parliament (Prevention of Disqualification) Act, 1959, which has been amended several times to expand the exempted list.

Is there a bar on how many offices can be exempted from the purview of the law?

There is no bar on how many offices can be exempted from the purview of the law.

It was reported in 2015 that all 60 MLAs of the Nagaland Assembly had joined the ruling alliance. The Nagaland Chief Minister appointed 26 legislators as parliamentary secretaries in July 2017. Goa, an assembly of 40 MLAs, exempted more than 50 offices by means of an ordinance issued in June last year. Puducherry, an assembly of 33 MLAs, exempted more than 60 offices by passing an amendment bill in 2009. In Delhi, the 21 parliamentary secretaries added to the seven ministerial posts would constitute 40% of the 70-member legislature. In all, 20 states have similar provisions.

This raises an important concern. If a large number of legislators are appointed to such offices, their role in scrutinising the work of the government may be impaired. Thus, this could contravene the spirit of Articles 102 and 191 of the Constitution.

What is the debate around making appointments to the office of parliamentary secretaries?

Interestingly, the appointment of legislators as parliamentary secretaries, in spite of the office being exempted from purview of the office of profit law, has been struck down by courts in several states.

Why has the appointment as a parliamentary secretary been struck down while other offices are allowed to be exempt from the purview of the law? If legislators can be accommodated in positions other than 'parliamentary secretary', why do state governments continue to appoint legislators as parliamentary secretaries instead of appointing them to other offices?

These questions have been answered in a Calcutta High Court judgment in 2015 which held that since the position may confer the rank of a junior minister on the legislator, the appointment of MLAs as parliamentary secretaries was an attempt by state governments to bypass the constitutional ceiling on the number of ministers. In 2009, the Bombay High Court also held that appointing parliamentary secretaries of the rank and status of a Cabinet Minister is in violation of Article 164 (1A) of the Constitution. The Article specifies that the number of ministers including the Chief Minister should not exceed 15% of the total number of members in the assembly.

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