

A path to executive power

On January 21, [President Ram Nath Kovind approved the recommendation of the Election Commission](#) (EC) to disqualify 20 Members of the Legislative Assembly (MLAs) of the Aam Aadmi Party (AAP). They were deemed to have been holding offices of profit as they were parliamentary secretaries to ministers in the Delhi government. The party protested the move saying the EC had acted in a unilateral manner as its MLAs had not been given a hearing.

There is a lot at stake here since disqualification necessitates by-elections. However, due to the comfortable majority the AAP enjoys, the move will not bring down the Delhi government.

Office of profit debate

There are multiple questions this issue raises. Did the EC act in a fair manner and was its decision to disqualify the MLAs legally sound? The appointment of parliamentary secretaries also raises broader concerns about the nature of executive power in a parliamentary system.

The concept of office of profit originates from Britain where, during the conflicts between the Crown and the Parliament in the 16th century, the House of Commons disqualified members from holding executive appointments under the Monarch. The underlying principle behind this is the doctrine of separation of powers. The office of profit rule seeks to ensure that legislators act independently and are not lured by offers from the executive. India's Constitution makers adopted this idea under Articles 102(1)(a) and 191(1)(a) which state that a lawmaker will be disqualified if he or she occupies "any office of profit" under the Central or State governments, other than those offices exempted by law. While the term "office of profit" is not defined in the Constitution, the Supreme Court, in multiple decisions, has laid out its contours.

Disqualified AAP MLAs confident of reclaiming seats with a wider margin

Chief Minister Arvind Kejriwal had appointed 21 MLAs as parliamentary secretaries soon after the AAP government assumed office in 2015. When this decision was challenged before the High Court, the Delhi government sought to retrospectively amend the Delhi Members of Legislative Assembly (Removal of Disqualification) Act, 1997 to exempt parliamentary secretaries from the definition of "office of profit". However, the Lieutenant Governor reserved the matter for the President, who refused to give his assent to the Bill. Thus the position of the parliamentary secretaries became precarious.

The Delhi High Court, in September 2016, set aside the appointment of parliamentary secretaries since it lacked the approval of the Lieutenant Governor. Citing this, the AAP claimed that since the appointment was anyway void, the MLAs could not be said to have been occupying an office of profit. However, the EC said that the MLAs "de facto" held the office of parliamentary secretaries. The AAP now alleges that the EC is acting in a partisan manner, as in other States, the striking down of the office of parliamentary secretaries has not resulted in the disqualification of MLAs. While the legality of the decision in the instance in Delhi will be decided in court, it is also critical to examine what the practice of appointing parliamentary secretaries reveals.

Rewarding loyalists

The trend of appointing MLAs as parliamentary secretaries is done across the political spectrum. Many of these have been legally challenged and struck down by the judiciary. Recently, the Supreme Court struck down the Assam Parliamentary Secretaries (Appointment, Salaries, Allowances and Miscellaneous Provisions) Act, 2004, calling it unconstitutional. Hence, the issue

has a chequered legal past.

AAP MLAs disqualification: truth will prevail, Kejriwal says

So why do State governments create such posts in the first place? Such posts are mainly to reward MLAs who do find a place in the cabinet. One of the major constraints in cabinet formation is Article 164 (1-A) of the Constitution which limits the number of Ministers in State cabinets — including the Chief Minister — to 15% of the total number of MLAs of the State; for Delhi it is 10% of the total seats. It is to get round this constitutional cap that State governments create such posts.

Article 164 (1-A) was inserted by the 91st Constitutional Amendment in 2003 on the recommendation of the M.N. Venkatachaliah-headed National Commission to Review the Working of the Constitution. While it can be debated whether the prescribed cap is too harsh, constitutional constraints and office of profit restrictions seek to prevent the creation of multiple executive posts to reward loyal legislators.

In India's parliamentary system, contesting elections to the legislature is primarily seen as a path to exercise executive power. It is often ignored that holding the government to account is not only the Opposition's role but also that of the entire legislature. Rewarding MLAs with executive posts can restrict them from performing their primary role.

The creation of such posts can also be attributed to the larger institutional malaise facing the legislatures. Lawmakers have been enfeebled over the years through measures such as binding party whips and a purely executive-driven legislative agenda. In such an institutional milieu, lawmakers increasingly seek positions with perks to exercise influence. Unless legislatures are truly strengthened and the disproportionate power of the executive in the legislature curtailed, the demand for creating such posts will continue to persist.

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