Office of Profit

The Constitution makers quite rightly wanted legislative office to be insulated from executive influence and manipulation.

Constitutional theory envisages that the elected legislature exercises oversight functions over the government. The making of laws, approval of the budget, and monitoring of all government actions are within the purview of the legislature. The executive branch of government should implement the laws, utilize the public money for the approved purposes, and be accountable to the legislature in its functioning. Therefore, if the legislators are beholden to the executive, the legislature can no longer retain its independence, and loses the ability to control the Council of Ministers and the army of officials and public servants. From this perspective, the Constitutional embargo on office of profit for legislators is both necessary and welcome.

But in India, both the Constitutional model of government and its actual practice in operation have completely reversed this logic. We accepted the Westminster model because of familiarity and historical association. In this model, the executive (Council of Ministers) is drawn from the legislature. While in theory, the legislature holds the government to account, in reality the government controls the legislature as long it has a majority in the House. The key issue for the government's survival is sustaining its majority. Much of the struggle for power, compromise on cabinet composition, and patronage are linked to this need to satisfy the majority of legislators. This is the reason why the size of Council of Ministers became unwieldy over the decades. At last, the 91st Amendment to the Constitution enacted in 2003 limited the size of Council of Ministers to 15% of the Lower House. Chairmanships of Corporations, Parliamentary Secretaryships of various ministries, and other offices of profit are often inducements to legislators to satisfy their aspirations for rank, status and privilege, and a way of buying peace for the government. This is undoubtedly a perversion of the theory of separation of powers. But as long as such perversion is integral to our model of democracy, it would be very inadequate if we limited this discussion only to technical and legal issues relating to office of profit.

Constitutionally, a person cannot be a Minister unless he is an MP/MLA. Even if a non-MP/MLA is made a Minister, he must become an MP/MLA within six months. Given this, executive and legislature are fused in our system. But in countries like Britain and Germany, such fusion is not leading to corruption or patronage. That is because a political culture has been evolved, in which public office is a means for promoting social good, and not for private or family again. In our culture, public office is an extension of one's property. That is why public office is a source of huge corruption and extortion, and is also often a heritable family property. And extending patronage to one's friends and relations comes naturally with public office.

Given this propensity to abuse office, and the compulsions under which any government functions, we need to reexamine the definition of office of profit. Articles 102 and 191 of the Constitution relating to office have profit have been violated in spirit over the years, even when the letter is adhered to. As a result, the Legislatures kept on expanding the list of exemptions from disqualification under Articles 102 and 191. For instance, the Act 10 of 1959 listed scores of offices in the exemptions from disqualification under Article 102, There does not appear to be a clear rationale to such a list, except the expediency to protect holders of certain offices from time to time. Similar laws have been enacted by state Legislatures under Article 191, exempting hundreds of offices from disqualification for state legislature. Each time a legislator is appointed by the executive to an office which might be classified an office of profit, a law is enacted including such an office in the list of exempted categories.

Often, the crude criterion applied is whether or not the office carries a remuneration. In the process, the real distinction of whether executive authority is exercised in terms of decision making or direct involvement in deployment of public funds is often lost sight of. The Supreme Court's clarification about the appointment and removal being in the hands of the executive branch of government does not help either, because many appointments made may be in advisory capacities.

Nor do the existing norms apply to Local Area Development Schemes under which legislators are empowered to sanction public works and authorize expenditure of funds granted under MPLADs and MLALADs schemes. These schemes continue, despite the prevalence of corruption in allotting public works under these schemes. Several party leaders and legislators feel the need for discretionary public funds at their disposal in order to quickly execute public works to satisfy the needs of their constituencies. However, these schemes do seriously erode the notion of separation of powers, as the legislator directly becomes the executive. The argument advanced that legislators do not directly handle public funds under these schemes, as they are under the control of the District Magistrate is flawed. In fact, no Minister directly handles public money. Even the officials do not personally handle cash, except the treasury officials and disbursing officers. Making decisions on expenditure is clearly a key executive function, no matter who physically handles money.

Therefore it seems necessary to sharply define office of profit to ensure clearer separation of powers. Legislators who are not Ministers often do have significant expertise from their own personal or professional background. In addition, their experience in public service gives them unique insights and understanding of public policy. Such expertise and insights would be valuable inputs to the executive in policy making. Therefore Committees and Commissions of a purely advisory nature can be constituted with legislators. The mere fact of such positions carrying certain remuneration and other perks does not make them executive offices. The Constitution recognized that holding of such offices in

expert and advisory bodies does not violate separation of powers, and left it to Parliament and State Legislatures to exempt such non-executive offices from disqualification. But appointment in statutory or non-statutory executive authorities with direct decision making powers and day to day control of field personnel, or positions on the governing boards of public sector undertakings or as government nominees in private enterprises clearly carry direct executive responsibilities and involve decision making powers. Such appointments would undoubtedly violate separation of powers. Giving discretionary powers to legislators to sanction or approve public works is clearly an exercise of executive function, whether or not the government appoints the legislators to a designated office. It is necessary to sharply distinguish executive functions and exercise of executive authority while defining office of profit, irrespective of whether such a role or office carries a remuneration and perks.

Given these circumstances, it would be appropriate to amend the law on the following lines:

- All offices in purely Advisory bodies where the experience and insights of a legislator would be inputs in governmental policy will not be treated as offices of profit, irrespective of the remuneration and perks associated with such an office.
- All offices involving executive decision making and control of public funds, including positions on the governing boards of public undertakings and statutory and non-statutory authorities directly deciding policy or managing institutions or authorizing or approving expenditure shall be treated as offices of profit, and no legislator shall hold such offices.
- If a serving minister, by virtue of office, is a member or head of certain organizations like Planning Commission, where close coordination and integration between the Council of Ministers and the organization or authority or committee is vital for the day-to-day functioning of government, it shall not be treated as office of profit.
- Discretionary funds at the disposal of legislators or the power to determine specific projects and schemes, or select the beneficiaries or authorize expenditure shall constitute discharge of executive functions and will invite disqualification under Articles 102 and 191, irrespective of whether or not a new office is notified and held.

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