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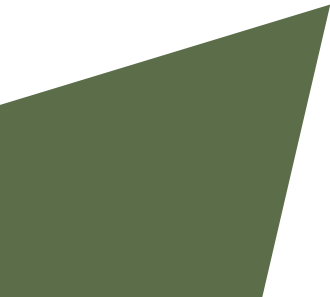
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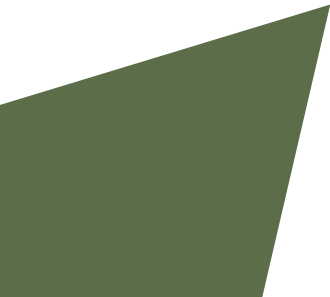
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**Rationality of Office of Profit**

**Vaneet Kaur Sokhi**

## ABSTRACT

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Parliaments around the globe, require certain general qualifications, regarding particular categories of persons as ineligible or because of the posts they hold, are inconsistent with the office of member of parliament. Down the ages certain qualifications and disqualifications have become the inherent and integral part for the selection of the members of parliament (Legislative Wing). These conditions of membership reflect legitimate concern of the people to select the member democratically. The extent of eligibility and ineligibility relating to holding of an office has to be determined. According to Article 102(1)(a) of the constitution of India, holding any office of profit other than the membership of the parliament renders the candidate completely ineligible to be a member of parliament. The *rationale* behind this complete legal bar on the membership of the parliament is to maintain neutrality, impartiality in the public services. The member of parliament must be an independent individual who shall not be under any kind of influence or prejudice of the executive government. He must be free from the control of the executive. Thus, upholding the essence of separation of powers and doctrine of checks and balance in the working of three wings. These wings, no doubt, cannot work in water tight compartment, but they must have trust in and deference to the actions of one another.

This provision of disqualification is very important if one *looks through the prism of democratic model*. It reflects a country which is safe from being corrupted by the executive patronage. It secures the independence of members of parliament from the government, thereby upholding the epitome of separation of powers as one of the prime elements of democracy in the state and thus, protecting the fabric of democracy. It also avoids the conflict between duty and interest of the elected member of the parliament. Therefore, members of parliament are able to discharge their functions without fear or favour. The provision is undoubtedly designed to protect independence of Members of Parliament. The object of article 102(1) (a) is to disqualify a person from the membership of Parliament if he is obliged to the government for an office which carries profit or benefit and thus compromising his independence.

## ORIGIN OF OFFICE OF PROFIT

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The disqualification of office of profit owes its origin in the English Act of Settlement 1700. The act was re-enacted as the Succession of Crowns Act, 1707. This act aimed to secure the interference of the government on the members of Parliament (House). Gradually, with the development of the society; various appointments, posts and offices were also generated because of which chief three principles had become the main consideration during the eighteenth century, which till today holds true affecting the laws on this subject matter. These are:

- I. incompatibility of certain non-ministerial offices with membership of the House of Commons (which must be taken to cover questions of a member's relations with, and duties to, his constituents);
- II. the need to limit the control or influence of the executive government over the House by means of an undue proportion of office-holders being members of the House; and
- III. the essential conditions of a certain number of ministers being members of the House for the purpose of ensuring control of the executive by Parliament.<sup>1</sup>

The act of 1707 was the first attempt to consolidate these three principles in the Act of parliament of England. Thereafter, House of Commons Disqualification Act, 1957 (later re-enacted as House of Commons Disqualification Act, 1975) was passed in England which simplified the status of disqualification based on the office of profit. Section 1(4) of 1975 Act which enumerates certain offices which will make a person ineligible or disqualified to be the member of parliament. The main effect of the Act has been to replace the large number of statutory and common law provisions on disqualification by a single simple code.

The Indian law of disqualification is also based on these three principles which are enshrined under Article 102(1)(a)<sup>2</sup>. India also has a very long history relating to the development of office of profit. Following the Government of India Act, 1935 (Section 25-26), the first draft Constitution prepared by the constitutional Adviser (October, 1947) contained comprehensive provision on categories of persons to be disqualified for the membership of parliament. Section 68 (f)<sup>3</sup> of the Draft Constitution provided for the disqualification when person holds any office

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<sup>1</sup> Amendment In "Office Of Profit" – A Dilution Of The Spirit Of The Indian Constitution, Shruti Bedi, published by Indian law Institute, available at: <https://www.jstor.org/stable/pdf/43952049.pdf?refreqid=excelsior%3A0b3610c6eb4932b00b83caebc84cde68>, last visited on October 25, 2019.

<sup>2</sup> Art. 102(1)(a)- A person shall be disqualified for being chosen as, and for being, member of either House of Parliament if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder.

<sup>3</sup> "If he holds any office of profit under the Federation or any unit other than an office declared by Act of the federal Parliament not to disqualify its holder;" (Article 68 (f))



of profit. Thus, Article 83(1)(a)<sup>4</sup> of the Draft Constitution of 21<sup>st</sup> February, 1948 provided for the disqualification on holding office of profit. The editor of the Indian Law Review and some other members of Calcutta Bar had suggested that in sub clause (a) of clause (1) of draft article 83, the words “other than an office declared by parliament by law not to disqualify its holder” should be deleted.

The Constitutional Adviser noted that if the words “other than an office declared by parliament by law not to disqualify its holder” were omitted from the draft article , then no member of the legislature could be appointed as Parliamentary Secretary or Minister to help the members of the council of ministers in discharge of their duties. It would not also enable any member of the legislature to take up during the time of emergency military duties. As it was not possible to define clearly the offices which might be necessary to exclude from the operation of Article 83 (1)(a), it had been left to the legislature to declare by law those offices. The Article was considered by the constituent assembly on 19 may, 1949.

The committee on Office of Profit was formed in 1955, and it submitted the report in November 1955. After, studying various issues regarding the office of profit recommended that a bill should pass based on their suggestions and constant scrutiny should be made on the Standing Committee of Parliament while rendering the any office to be an ‘office of profit’. Consequently, article 102(1)(a) states that a person shall not be disqualified for being chosen as member of either house of Parliament if the office of profit he holds is declared by Parliament by law not to disqualify it’s holder.

Under this provision the Parliament enacted the Parliament (Prevention of Disqualification) Acts, 1950, 1951 and 1953, exempting certain offices from being regarded as office of profit. All these acts were replaced by the Parliament (Prevention of Disqualification) Act, 1959. Further, a Joint Standing Committee is also formed by the Parliament to scrutinize the list offices of profit made by the Government.

The Parliament (Prevention of Disqualification) Amendment Act, 2006, added new clauses to specifically exempt from disqualification of certain offices. Also new table of bodies was added to the existing schedule of the Act. There are other enactments, such Wakf Act, 1995; Tobacco Board Act 1975; Spices Board Act, 1954, etc. which make specific provisions that an office created by such Acts shall not be deemed to be an office of profit for the purpose of disqualification for membership under article 102.

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<sup>4</sup> “If he holds any office of profit under the Government of India or the Government of any State other than an office declared by the Parliament by law not to disqualify its holder.”

## CONCEPT: OFFICE OF PROFIT

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The term 'office of profit under the Government' is not defined in the Constitution or the Representation of the People Act, 1951 or the Parliament (Prevention of Disqualification) Act, 1959. However, it is clear that before a person can be held to be disqualified under article 102(1)(a)<sup>5</sup> three things must be proved:

- I. he held an office,
- II. it was an office of profit,
- III. it was an office under the Central Government or the State Government.

It has been held in *Gulab Chand Chordia v. Thakur Narain Singh and others*<sup>6</sup> that "office of profit... is not a term of art and its meaning and import are well understood. The essentials of an office of profit are:

- I. it involves an appointment by the state in one form or the other,
- II. it carries emoluments payable mostly periodically,
- III. it is for a limited period,
- IV. it is terminable,
- V. it is not assignable,
- VI. it is not heritable,
- VII. the holder of the office must be sui juris.

In the usual sense of the word, an 'office' means "a right to exercise a public or private employment and to take fees and emoluments thereunto belonging". In its fullest sense an office embraces the element of tenure, durations, duties and emoluments, but the element of emoluments is not essential to the office.<sup>7</sup>

The word 'profit' does not only denote monetary or pecuniary benefits but it also includes both, remuneration in kind and cash. Where the person is getting some benefits from the post, necessarily it be advantage or a gain, be it in kind that would also fall in the ambit of "profits". Whereas, mere influencing power obtained through the post or office held would not suffer disqualification to become the member of Parliament.

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<sup>5</sup> Art. 102 (1) (a) - The corresponding provision for state legislatures is Art. 191(1)(a). Clause (1)(a) of Art. 102 was substituted by the Constitution (42nd Amendment) Act, 1976, but that amendment has been nullified, and the original text restored by the Constitution (44th Amendment) Act, 1978.

<sup>6</sup> ELR, Vol. VI at 397

<sup>7</sup> Committee on Offices of Profit (Bhargava Committee), 1955 part 1 at 11 available at: [http://loksabhaph.nic.in/writereaddata/Abstract/joint\\_committee\\_of%20offices\\_of\\_%20profit.pdf](http://loksabhaph.nic.in/writereaddata/Abstract/joint_committee_of%20offices_of_%20profit.pdf), last visited on October 24, 2019.

Specifically, the Bhargava Committee has stated that the emoluments attached to offices may be in the nature of pay, salary, honorarium, fees, daily allowance, traveling allowance. Where salary is attached to an office it immediately and indisputably makes the office an office of profit.<sup>8</sup>

"The broad criteria for the determination of the question whether an office held by a person is an office of profit have been laid down in judicial pronouncements. If the Government exercises control over the appointment to an dismissal from the office and over the performance and functions of the office and in case the remuneration or pecuniary gain, either tangible or intangible in nature, flows from such office irrespective of whether the holder for the time being actually receives such remuneration or gain or not, the office should be held to be an office of profit under the Government Otherwise, the object of imposition of the disqualification as envisaged in the Constitution will become frustrated. This first basic principle should be the guiding factor in offering positions to a member of the Legislature."<sup>9</sup>

## INTERNATIONAL PERSPECTIVE

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In major countries the **British system** of disqualification is chosen for being a Member of Parliament. The reason is that an assembly should not consist of members who are at the same time subordinated to the government because that would mean the end of any separation of powers and parliamentary control would cease to have effect. In these countries the civil servants and other persons who get remuneration from public funds are declared ineligible for membership. Disqualification based on office of profit is a democratic concept which has universal relevance in almost all democratic countries governed by a constitution.

Article I, section 6(2)<sup>10</sup> of the **US Constitution** in the first part of the clause disqualifies a member of Congress for appointment to a federal office which is created, or the emoluments of which are increased, during his term of membership. The second part disqualifies the holder of a federal office to become a member of Congress. But a federal officer may be elected and may take his seat as member of Congress if he resigns his office before presenting his credentials to the House. Article 35 of US Constitution mentions the phrase and defines it as an office to which fees, a salary or other compensation is attached, is ordinarily an office of profit.

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<sup>8</sup> *Ibid.*

<sup>9</sup> Joint Committee On Offices Of Profit (Sixteenth Lok Sabha), 19<sup>th</sup> report, available at [http://164.100.47.193/lssccommittee/Joint%20Committee%20on%20Office%20of%20Profit/16\\_Joint\\_Committee\\_on\\_Office\\_of\\_Profit\\_19.pdf](http://164.100.47.193/lssccommittee/Joint%20Committee%20on%20Office%20of%20Profit/16_Joint_Committee_on_Office_of_Profit_19.pdf) last visited on October 24, 2019.

<sup>10</sup> "No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the united states, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the united states, shall be a member of either House during his continuance in office."

Sections 44-45 of the **Australian Constitution** Act sets forth the disqualifications for membership of the House of Representatives as well as of the Senate. Australian Constitution provides for a very heavy penalty for contravening this provision. Any person declared ineligible would have to pay a fine of 100 pounds for every day that he occupies the seat as a member or a senator. In the Central African Republic and in Libya a candidate holding an incompatible office must resign at least six months before the date of an election. For Israel the period is 100 days. It is the same for **Brazil** where only the state governors and prefects of police are ineligible if they have not resigned within three months of an election. There is no period prescribed as such for India. Although the candidate standing for election knows that he would have to choose between his occupation and his new office. It is crucial that this choice is made before the election rather than after.

The other categories of people, which are generally declared ineligible under various constitutions of the world are the members of the armed forces. The reason is the same as that for the civil servants. Apart from civil servants and the members of the armed forces, the judges and magistrates are also regarded as ineligible. The reason is that in such a case the impartiality of the judge may be put to question. Further, there are also some particular instances of ineligibility.

For example, in Great Britain, it is the clergy of the Church of England, ministers of the Scottish Church and Catholic priests. In Israel, all rabbis and clergy of different persuasions and in Greece, holders of mortgages are ineligible. In many other countries, persons who benefit from public contracts are not admissible as candidates. In the same spirit Directors of nationalized industries in Great Britain, India and Ireland are in some instances ineligible.

There is a basic distinction between the English law and the Indian Constitution relating to offices of profit. According to the English law, no office entails disqualification unless it is included in the schedule of disqualifying offices appended to the Act, whereas according to the Constitution of India, all offices of profit under any government in India are disqualifying unless exempted by the legislature concerned.

## CONCLUSION

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Article 102 before it was amended by the constitution (fifty Second Amendment Act), 1985 provided for a person being disqualified for being chosen as and for being a member of parliament on grounds of holding office of profit under the government, being of unsound mind or an undischarged insolvent or not being a citizen of India or being otherwise disqualified by or

under any other law. The term office of profit under the government has not been defined anywhere, but the courts and other authorities have, however, laid down some broad criteria in this regard.

The job of Parliament and its Members is to represent the people, to lay down policies, to make laws and to exercise surveillance over executive action. With the exception of Members who become Ministers, other Members are not expected to exercise any executive powers by accepting any office of profit under the government. If those charged with the responsibility of overseeing the executive, themselves become part of the executive establishment or become beholden to the executive for an office of profit under the Government, obviously they cannot be expected to faithfully perform any worthwhile oversight functions. That is why, article 102 of the constitution provides that apart from certain other things, holding an office of profit under the government would constitute a disqualification for membership of Parliament. Giving a somewhat arbitrary power to the Parliament/ state legislatures, it is provided that any offices can be exempted from disqualification.

The amendment passed by the Government has diluted the spirit of the Indian Constitution. It has struck at the very root of a parliamentary system of governance. It is violative of the basic structure. The rule relating to holding of double positions has been eliminated, which in turn leads to concentration of power in a few hands. It is a fact that the Parliament (Prevention of Disqualification) Act, 1959 needed no amendment. The list of exempted offices needed no expansion. The expression 'office of profit' needs no definition. The judiciary has already laid down the criteria and has defined it several times. The Joint Committee of Parliament on Offices of Profit should just restrict itself to formulating a definition for the term 'office of profit'. This can be done by taking into account the various judgments of the courts on the point. Such provisions of the Constitution have to be adhered to, as they are the very basis of a democracy. In fact, the members who are disqualified should be visited with a harsher penalty than merely being asked to pay Rs. 500. They should be disqualified from contesting elections for a certain period of time.

De Lolme once said, "It is a fundamental principle with English lawyers that Parliament can do everything but make a woman a man, and a man a woman."<sup>11</sup> If this were to be true of India, our Constitution would lose its meaning. It would be a very sad day in the history of this country because we all know that absolute power corrupts absolutely.

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<sup>11</sup> *Supra* note 1.