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NOTES AND COMMENTS

OFFICE OF PROFIT UNDER THE GOVERNMENT

UNDER ARTICLE 102 (1)(a) of the Constitution a person is disqualified for being a member of either House of Parliament "if he holds an 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". Parliament has thus limited role of declaring an office of profit, the holding of which does not disqualify a person from the membership of Parliament. Though our Constitution generally embodies the parliamentary or the cabinet form of government on the British model, article 103 is an exception to this principle. Article 103(1) requires the President to decide whether any Member of Parliament has incurred any of the disqualifications mentioned in article 102 (1) and make his decision final and it cannot be questioned in any court. Article 103(2) requires the President to refer the question to the Election Commission for its opinion and requires him to act according to such opinion. Thus the opinion of the Election Commission is in substance decisive.

The principle contained in article 102 is based on the sound public policy of ensuring impartiality and neutrality in the public service and avoidance of conflict between duty and interest of an elected member, enabling him to carry on his duties freely and fearlessly without being subjected to any governmental pressure thereby maintaining purity of the legislature. 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.

Article 102(1) (a) follows principle of British constitutional law

Article 102(1)(a) re-enacts the provisions of section 26 of the Government of India Act, 1935, which were intended by the British Parliament to enact in a simplified form a well known principle of the British constitutional law initially enacted in the Succession to the Crown Act, 1707 and re-affirmed by Parliament in numerous subsequent statutes. This constitutional principle is well recognized as being of fundamental importance to the successful working of the parliamentary form of government. Hence in construing article 102(1)(a) it is useful to bear in mind the meaning attributed to the expression "office of profit under

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the Government" in the English constitutional practice[1] as well as the constitutional principle embodied in it, its *raison d'etre* and its object and purpose. As a matter of fact a joint committee has been expressly referred to examine the feasibility of adoption of law relating to prevention of disqualification of Members of Parliament as existing in the United Kingdom and considered by the Constitution (Forty second Amendment) Act, 1978.

"Office of profit under the Government" based on the Succession to the Crown Act, 1707

The expression "office of profit under the Government of India" owes its origin to the Succession to the Crown Act, 1707. Section 24 of that Act enacted that persons holding any office or place of profit under the Crown created after October 25, 1705, and persons holding various offices specified in the section, should be incapable of being elected or sitting as members of the House. Section 25 enacted that any member accepting any office of profit from the Crown which did not come within section 24 should cease to be a member but could be re-elected. This enactment, if it stood by itself, would have disqualified for membership most of the members holding salaried political offices. A number of Acts passed since 1705, while creating new offices, declared that the holders thereof should not be ineligible for election. The present position is regulated by the House of Commons Disqualification Act, 1975.

It is a settled practice in the United Kingdom, while enacting statutes establishing public corporations to include therein an express provision that a person shall be disqualified for being a director or a member of the corporation "so long as he is a member of the Commons House of Parliament"[2] Such express provision shows that these offices are also directly within the principle underlying section 24 of the Succession to the Crown Act, 1707. They are included *ex-majore cautela,* since the statutes authorize not the Crown but the ministers to make the appointments of directors and members. However, the inclusion of such provision in British statutes cannot furnish any real ground for argument that such offices in India would not be offices under the Government of India. All this would seem to indicate a tendency to extend the principle underlying the provisions of the Succession to the Crown Act, 1707 and analogous provisions to offices, which are not strictly, or directly offices under the Crown. The principle is thus extended to directorship of government companies or statutory corporations, chairman, deputy chairman or secretary of a statutory or non-statutory body etc.

1. *G.Webb* v. *Outrim,* 1907 AC 87.
2. See May, *Parliamentary Practice*, 14th Edition at 206.

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"Office of profit" not defined in the Constitution

What is disqualified from membership of Parliament is the holding of an "office of profit under the Government". The expression "office of profit" is not defined in the Constitution. Its meaning has generated a wide debate in view of the President returning the Parliament (Prevention of Disqualification) Amendment Bill, 2006 for reconsideration by the Houses having regard to the points raised by him. On 30th August 2006 the Speaker constituted the Joint Parliamentary Committee (Joint Committee) to examine the constitutional and legal position relating to the office of profit. In the absence of any statutory definition the expression "office of profit" must be given its ordinary meaning supported by judicial interpretations where available. The very first term of reference of the joint committee is to suggest a comprehensive definition of "office of profit".

Meaning of 'office'

The dictionary meaning of 'office' is stated to be "a position to which certain duties are attached, specially a place of trust, authority or service under constituted authority".[3] Office signifies a position or place to which certain duties are attached, especially one of more or less public character.[4] It connotes a position, which requires the person holding it to perform certain duties and discharge certain obligations. Offices are either public or private. A public office is one, which entitles a man to act in the affairs of others without their appointment or permission. Office confers on its incumbent powers of patronage and authority as well as status and dignity. It has been laid down that "if emoluments have ever been attached to the office, the fact that emoluments are not received by the particular holder is irrelevant".[5] The question is not whether the defendant himself makes a profit of the office, but whether the office was which enabled him to make a profit.[6] The question thus relates to the character of the office. It is not the receipt of emoluments by a particular person holding the office that makes it an office of profit. It is the capacity of the office to yield profit, which establishes its character as an office of profit.

Meaning of 'profit'

The word 'profit' in its literal sense is not restricted to monetary gain. It is a much wider term than remuneration or what is given by way

3. *Shorter Oxford English Dictionary*, Volume II, Third Edition at 1439.
4. *Kanta Kathuria* v. *Manak Chand* (1970) 2 SCR 835.

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of money consideration. One may have an office of profit notwithstanding that the advantage derived may not immediately be in terms of a cash payment. The word is used in the wider sense so as to include all advantages, whether monetary or otherwise, so as to include patronage as well. Considering the reasons which underlie the making of the holding of an office of profit under the government a disqualification for membership of Parliament, it stands to reason that benefits other than monetary benefit should also be included in the word 'profit'. This seems to indicate the trend of opinion in England.

Member drawing compensatory allowance not holding an office of profit

Where a person is paid compensatory allowance, *i.e.*, allowance just sufficient to compensate him for out of pocket expenses incurred by him in the course of performing his duties, the office held by him cannot be regarded as an office or profit.[7] Thus, if a Member of Parliament does not draw any remuneration or get any perquisites or derive any advantage or benefit, whether monetary or otherwise, from the office including patronage, he cannot be said to be holding an office of profit.

Meaning of "under the Government of India"

The next question arising for consideration is the true construction of the expression "under the Government of India" in article 102(1)(a). Is it to be construed as denoting offices which would constitute their holders government servants or should it be construed as including offices in respect of which the authority making and controlling the appointment is the government, even though the remuneration is paid by a body other than the government? Since the above expression comes to us from the Succession to the Crown Act, 1707 the principle emerging therefrom as referred to above would become applicable in the present case. It may well be informed that where government is the authority making the appointment to an office and controlling its continuance (including dismissal from office) the office would be one under the government, even though the remuneration may be paid by a body other than government (e.g. a government company or corporation) and the principle underlying the disqualification contained in article 102 (1)(a) would apply.[8]

5. May, *Parliamentary Practice*, 15th Edition at 212.
6. *Delane* v. *Hillcoat* 9B & C 309 at 313.
7. See 1970 UJ (SC) 334 at 340.
8. See *Maulana Abdul Shakur* v. *Rikhab Chand,* 1958 SCR 387 at 395.

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Under article 58(2) no person is eligible for election as President "if he holds an office of profit under the Government of India or the Government of any State *or under any local or other authority subject to the control of any of the said Governments"*. The absence of italicized words in article 102(1)(a) shows that in the case of election as a Member of Parliament the holding of an office of profit under a corporate body like a local authority does not bring about disqualification even if the local authority be under the control of the government.[9] A comparison of different articles, articles 58(2), 66(4), 102(1)(a) and 191(1)(a) shows that in the case of members of legislatures, unlike the case of the President and the Vice President, the disqualification arises on account of holding an office of profit under the government, but not if such officer is under a local or other authority under the control of the government.[10]

The main reason for the provision contained in article 102(1)(a) is the need to limit the control or influence of the executive government over the House of Parliament by means of an undue proportion of office bearers being members of the House. The provision is undoubtedly designed to protect the independence of Members of Parliament. The object of the provision would be defeated if it were to be construed as permitting the executive government to appoint Members of Parliament as directors or to such other posts in government companies, statutory corporations controlled by the government etc.

The word 'under' in the expression 'under the Government of India' in article 102(1)(a) would indicate subordination of the Members of Parliament to the government. In *Emperor* v. *Sibnath Banerji*[11] the Privy Council held that the Home Minister was an officer subordinate to the Governor within the meaning of section 49(1) of the Government of India Act, 1935 on the ground *inter alia* that the right to his appointment and dismissal rested with the Governor. On a parity of reasoning there can be no doubt that a minister of the Union is an officer of the Union.[12]

An office to which government has merely a right to appoint, but thereafter has no control or direction over the appointee and where government does not pay his remuneration would not be an "office of profit under the Government of India" as contemplated by article 102(1)(a).

To this may be added consideration arising from the language used in article 102(1)(a). The words "under the Government of India" do not

9. *Gurushantappa* v. *Abdul Khuddus,* AIR 1969 SC 744.
10. *Maulana Abdul Shakur* v. *Rikhab Chand,* 1958 SCR 387 at 395.
11. AIR 1945 PC 163.
12. See *Shiv Bahadur Singh* v. *State of VP*, 1953 SCR 1188 at 1210.

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necessarily imply that the office is an office in the government or that it is remunerated out of the Consolidated Fund of India. They merely signify that the office is one with respect to which government has certain powers and authority, notwithstanding that the remuneration of the office is provided by government companies or statutory corporations and not out of the Consolidated Fund. It is clear that where a person holds a post, being the post under government control and having authority attached to it, and is entitled to profit or benefit, whether monetary or otherwise, other than compensatory allowance, article 102(1)(a) would become attracted, irrespective of the fact whether he accepts any remuneration or receives any benefit and whether the same is paid or given by the Government of India or not.

Ministership not an office of profit

A minister is undoubtedly the holder of an office of profit.[13] Explanation to article 102(1)(a) is in the negative form and expressly provides that a minister shall not be deemed to hold an office of profit under the Government of India for the purpose of disqualification for membership of either House of Parliament. This phraseology (especially the use of the words "be deemed") clearly suggests that in the absence of the express provision contained in the explanation the minister would definitely be holding an office of profit under the Government of India. For the purpose of article 102(1) ministership is not considered as an office of profit.

Directorship of government companies or companies is an office of profit

Now-a-days government exercises controlling powers over corporate bodies, whether government companies or statutory corporations (e.g. power to appoint or remove directors, auditors, etc. to such bodies). Directors so appointed are entitled to receive sitting fees, perquisites and other allowances. These directorships are offices of profit under the Government of India within the meaning of article 102(1)(a). Person appointed auditor of Durgapur Projects Ltd. or Hindustan Steel Ltd. holds an office of profit under the government. For the purpose one need not be in the service of government.[14]

Member of Parliament practising as an advocate, etc. not holding "an office of profit under the Government"

If a Member of Parliament practises as an advocate of the Supreme Court or any other court – he acts as an officer of the court assisting the

13. See Arts. 102(1)(a) and 102(2).
14. AIR 1964 SC 254.

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court in the discharge of its function. When he charges fees from his clients he holds an office of profit, but that is not an office of profit under the government as contemplated by article 102(1)(a). He is not an officer serving under the government. In *Kanta Kathuria* v. *Manak Chand*[15] an advocate appointed as a special government pleader in a particular case was held as not holding an 'office' and did not incur disqualification under article 191 (akin to article 102). The very fact that the legislature of the state has been authorized by article 191 to declare an office not an office of profit thereby not to disqualify a member, contemplates an office independent of its holder.

Similar observations will *proprio vigore* apply to a Member of Parliament practising as a chartered accountant, doctor or engineer or any other profession.

Retrospective legislation withdrawing disqualification of membership

One of the issues raised by the President in his message for reconsideration of the Parliament (Prevention of Disqualification) Amendment Bill, 2006 under article 111 was regarding the propriety of applying the law with retrospective effect. This important issue needs consideration, though it has not been actually raised in the terms of reference of the Joint Committee.

The question of retrospective legislation by Parliament withdrawing disqualification of membership raises points of great difficulty. Ordinarily, and in the absence of any indication to the contrary, a power to legislate is to be construed as the power to legislate prospectively as well as retrospectively. *Prima facie* Parliament acting under article 102(1)(a) would have the power to declare by law an office not to disqualify its holder both prospectively and retrospectively. Is there any indication in the language of the article itself ("an office *declared* by Parliament by law not to disqualify its holder") that the power under it is capable of being exercised only prospectively? The use of the word "declared" in the article seems to indicate that on the date of the disqualification alleged, there should already be in existence a law by Parliament declaring the particular office not to disqualify its holder. This view gains support from the identical language used in section 25(1) of the Government of Burma Act, 1935. In a case[16] it was held that "Having regard to the terms of section 24(2) [a provision corresponding to article 101(3)], the only meaning which I can assign to section 25(1)(a) is that if an office of profit is not to disqualify its holder it must have been so declared before the time comes when the

15. AIR 1970 SC 694.
16. Reported in AIR 1941 Rangoon 5.

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seat would, but for such a declaration by the Burma legislation, have become vacant." It appears that this view is based on the use of the word "declared" being supported by the provision in the Burma Act analogous to article 101(3) of the Constitution of India.

Greater difficulty is, however, created by article 101(3). This article *inter alia* provides that if a member "becomes subject to any of the disqualifications mentioned in clause (1) ... of article 102, his seat shall thereupon become vacant". When an office held by a Member of Parliament is an office of profit under the Government of India, the seat of member becomes vacant the moment he accepts that office and he thus becomes subject to disqualification. If Parliament now enacts a law under article 102(1)(a) providing that this office is not to disqualify its holder and is deemed never to have disqualified the holder it appears that Parliament does in substance provide by law that the seat of the member, which has already become vacant under article 101(3), shall be deemed not to have become vacant. No doubt legislation will enact retrospectively the office to be not one that disqualifies the member. However, it appears that such a provision would virtually be legislation affecting the effect and operation of article 101(3) and, therefore, repugnant to it.

In the past Parliament has enacted laws by taking the view that once legislation having retrospective effect is enacted under article 102(1)(a) its effect would be to create a legal fiction that such disqualification had never existed, so that article 101(3) would never have come into operation and the seat would not at any time have become vacant. Such retrospective legislation would not, therefore, be repugnant to article 101(3). In *Kanta Kathuria*,[17] the Supreme Court held that the state legislature under article 191 had the power to remove the disqualification retrospectively and the legislature had done so by section 2 of the Rajasthan Legislative Assembly Members (Prevention of Disqualification) Act, 1969.[18]

The matter is not free from doubt. It is ultimately for the courts to decide on the constitutional validity of the law enacted with retrospective effect. As a matter of fact the Supreme Court has been already moved by a Member of Parliament challenging the constitutional validity of the Parliament (Prevention of Disqualification) Amendment Act, 2006.

Such legislation should, however, be passed before the decision of the President under article 101(3). This would abrogate the contention that the legislation is repugnant to article 101(3).

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17. *Supra* note 15.

18. See also the Parliament (Prevention of Disqualification) Amendment Act, 2006. Similar view may also be taken in respect of future laws as well.

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Law removing disqualification of membership of Parliament

Clause (a) of article 102(1) empowers Parliament to declare by law an office of profit, the holding of which does not disqualify a person from membership of Parliament. Though the article gives wide power to Parliament to create exceptions to disqualifications of membership, it does not specify the principles to be applied in creating such exceptions. Classification of such offices for the purposes of removing disqualifications has been thus left primarily to the discretion of Parliament. It follows that so long as this exemptive power is exercised reasonably and with due restraint and in a manner which does not drain out article 102(1)(a) of its real content or disregard any constitutional guarantee or mandate, the court will not interfere.[19]

Explanation to clause (a) of article 102(1) exempts a member from disqualification prescribed by the operative part of the article. Article 74 requires the President to act on the aid and advice of the council of ministers and gives a clue to the insertion of the explanation. In the absence of any principles to be applied for creating an exception to disqualification specified in article 102, the explanation would serve as an aid to the construction of clause (a) in general and declaring by law offices of profit not to disqualify holders from disqualification in particular. It would, therefore, be useful to follow the example provided by the explanation, while enacting the law under article 102(1)(a) exempting offices from disqualification. Provisions set out in the explanation or provisions akin thereto would serve as a guide in determining the nature of the law to be enacted under the said article.

The above aspects of the matter may be given due consideration by the Joint Committee while providing general criteria in relation to "office of profit" and the law to be enacted for removing disqualifications for uniform application.

*Rustom S. Gae**

19. *Bhagwandas* v. *Haryana*, AIR 1974 SC 2355.

* Senior Advocate; former Law Secretary to the Government of India .

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