

**AMENDMENT IN “OFFICE OF PROFIT” –
A DILUTION OF THE SPIRIT OF
THE INDIAN CONSTITUTION**

MOST PARLIAMENTS of the world besides requiring certain general qualifications, regard particular categories of persons as ineligible usually because the posts that they hold are termed to be incompatible with the office of Member of Parliament.

Down the ages certain qualifications and disqualifications have become an inherent part of the law for selection of the members of the law making body of any country. These conditions of eligibility usually reflect a legitimate concern of the people to select suitable candidates democratically.

The independence of the members needs protection. The problem is to determine the extent of the ineligibility. It was felt that the ineligibility relating to the holding of an office other than as Member of Parliament should constitute an absolute legal bar to membership. This is because a Member of Parliament should be independent and be able to work without any influence and prejudice. He should be free of control of the executive.

If the executive government were to have untrammelled powers of offering to a member any appointment, position or office which carries emoluments of one kind or the other with it, there would be a risk that an individual member might feel himself beholden to the executive and thus lose his independence of thought and action and cease to be a true representative of his constituents.¹

A provision requiring such a disqualification is needed to protect the democratic fabric of the country from being corrupted by executive patronage. Further, it also secures the independence of Members of Parliament from the influence of the government. As a result, they are able to discharge their functions without fear or favour.

**Origin of the concept of disqualification for
holding an ‘office of profit’**

. The origin of the law regarding disqualification of a holder of an office of profit, relates back to the English Act of Settlement of 1700. The Act was subsequently re-enacted as the Succession to the Crown

1. *In the matter of Vindhya Pradesh Legislative Assembly Members*, ELR, Vol. IV at 422.



Act, 1707. This was done obviously to prevent the government of the day from exercising influence over Members of Parliament by appointing them to sinecure posts created for the purpose.

A select committee of the House of Commons was set up to look into the matter since various difficulties had arisen on the question of 'office of profit'. It made certain recommendations in 1941² and summarized the gradual development of the law.

There can be traced the genesis and gradual development of the three chief principles which by the beginning of the eighteenth century had become, and have since been, and should still be, the main considerations affecting the law on this subject. These, in order of historical sequence, are (1) 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); (2) 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 (3) 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.

It is these three principles, which form the basis of the Indian law on 'office of profit'. The Act of 1707 was the first effective attempt to establish these principles in an Act of Parliament in England. Taking into account the recommendations of the committee, the House of Commons Disqualification Act, 1957 was enacted. Before the passing of this (later re-enacted as the House of Commons Disqualification Act, 1975), the law on disqualification for membership of the House of Commons through holding certain offices was exceedingly complicated. Now the position is greatly simplified. Section 1(4) of the Act of 1975 reads, "except as provided by this Act, a person shall not be disqualified for membership of the House of Commons by reason of his holding an office or place of profit under the Crown or any other office or place." The provisions of the Act for disqualification of the holders of certain offices in fact apply to the majority of the offices, which involved disqualification under the former statutory provisions before 1957, although certain anomalies have been removed, and the former provisions disqualifying pension-holders and government contractors are abolished. 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.³

2. H.C. *Paper* 120 of 1941. Quoted in A.R. Mukherjea, *Parliamentary Procedure in India* 17 (1983).

3. Erskine May, *The Law, Privileges, Proceedings and Usage of Parliament* 45 (1976).



India itself has a long history on the 'office of profit'. The Committee on Offices of Profit, 1955, has described this history.⁴ This committee after examining the issues relating to the 'office of profit' submitted its report in November 1955. It recommended firstly that a new bill should be passed incorporating their suggestions and secondly that frequent scrutiny should be made by a Standing Parliamentary Committee in respect of those offices of profit which had eluded their attention or which would come into existence in future.

As a result the Parliament (Prevention of Disqualification) Act, 1959 was passed which superseded all the previous enactments. Also a Joint Committee on Offices of Profit was constituted by Parliament to scrutinize the list of offices of profit from time to time. The function of this committee is to undertake a continuous scrutiny of composition and character of various government appointed bodies and report to both Houses as to the membership of which of these bodies ought or ought not to disqualify a person for membership of Parliament. This committee in its discussion on 'office of profit' came to the following conclusion:⁵

Broadly speaking there are five categories of offices from the point of view of emoluments, which may be deemed to be offices of profit, namely:

- (i) Where a person is appointed to an office of profit and takes remuneration, which may, when set against expenses or loss incurred by not being able to follow his ordinary avocation, be less.
- (ii) Where a person is appointed to an office of profit even though he does not take remuneration.
- (iii) Where a person is appointed to an office of profit although the payment of remuneration may have fallen into disuse.
- (iv) Where a person is appointed to an office of profit, which is not financed from government funds.
- (v) Where a person is appointed to an office which may not give any advantage by way of monetary gain but is an office which carries with it honour, influence or patronage

Amendment of House of Commons Disqualification Act, 1975

The first schedule to the Act of 1975, in which the disqualifying offices are listed individually, is subject under section 5(1) of the Act to

4. See *Report of the Committee on Offices of Profit*, 1955, paras 18-23.

5. *Id.*, para 36.



amendment by Order in Council on resolution by the House of Commons. Acts creating new offices or official bodies commonly provide for the insertion of these offices or bodies in the relevant part of the schedule.⁶ Subsequent Acts frequently provide that offices thereby created shall be added to the list.

The Act of 1975 disqualifies amongst others, whole-time or part-time civil servants, active members of the regular armed forces, the police, members of the Seanad and Dail of the Republic of Ireland, holders of many judicial offices including the most important (but excluding justices of peace), ambassadors and high commissioners, election and boundary commissioners and electoral registration officers. In addition there are many public bodies, including boards of nationalized industries, tribunals and various statutory bodies, the members of which are disqualified; and certain offices, such as lords lieutenant, disqualified for particular constituencies.⁷

Comparative study of the particular ineligibilities in different countries

In most countries that have chosen the British system of disqualification for being a Member of Parliament relates mainly to the holding of a public office. The reason as has been pointed out earlier 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. For instance, article 35 of the US Constitution mentions the phrase and defines it thus: "An office to which fees, a salary or other compensation is attached, is ordinarily an office of profit."

The 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. Whereas in India the penalty (if one can call it that) is only Rs. 500⁸. 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

6. *Supra* note 3 at 52.

7. J.A.G Griffith and Michael Ryle, *Parliament Functions, Practice and Procedures* 48(1989).



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.⁹

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.¹⁰

The present Indian law on ‘office of profit’

Unless otherwise declared by Parliament by law, a person is disqualified for being chosen as, and for being, a member of either House of Parliament if he holds any office of profit under the Government of India or the government of any state.¹¹

Therefore, to constitute an ‘office of profit’ under article 102(1)(a)¹² of the Constitution, three conditions are to be satisfied — there should be an office to which an appointment is made; it should be an office of

8. Art. 104 of the Indian Constitution.

9. Michel Ameller, *Parliaments: A Comparative Study on the Structure and Functioning of Representative Institutions in Fifty-Five Countries* 44-45 (1966).

10. A.R. Mukherjea, *Parliamentary Procedure in India* 21(1983).

11. 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.



profit and the office should be one under the government.

The Parliament and the state legislatures are, however, empowered to exempt any such office from entailing disqualification. The Parliament (Prevention of Disqualification) Act, 1959 specifies certain offices, which will not come within the purview of the disqualification, and several offices have been added after the enactment of the law. The exemptions of the state legislatures are prescribed by Acts of the respective legislatures.

This rule is founded on the imperative need for neutrality and impartiality in the realm of public service. A positive legislation is, therefore, needed to remove the disqualification in any particular case, on special grounds, besides the exceptions already mentioned in clause (2).

Office of profit

The term ‘office of profit under the Government’ has not been defined in the Constitution or the Representation of the People Act, 1951 or the Parliament (Prevention of Disqualification) Act, 1959. The courts, tribunals and other authorities have laid down some broad criteria in this regard.

It has been held in *Gulab Chand Chordia v. Thakur Narain Singh and others*¹³ that “office of profit...is not a term of art and its meaning and import are well understood. The essential characteristics of an office of profit are (1) it involves an appointment by the state in one form or the other, (2) it carries emoluments payable mostly periodically, (3) it is for a limited period, (4) it is terminable, (5) it is not assignable, (6) it is not heritable, (7) the holder of the office must be *sui juris*.

In fact, the Rajasthan High Court has held:¹⁴

It is not necessary that there must be a fixed pay attached to the office; if the holder can charge any fee or remuneration for exercising the functions of the office, he holds an office of profit.

Also the word ‘profit’ here does not necessarily mean any remuneration in cash but it certainly means some kind of advantage or gain, which can be perceived. Hence, the mere influence, which one gains by virtue of his position as member of a committee, which has no

12. 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.

13. ELR, Vol. VI at 397.

14. *Hotilal v. Rajbahadur*, ELR Vol. XV at 55.



remuneration attached to it, is not profit within the meaning of articles 102 or 191, and the member of such a committee would suffer no disqualification by being a member thereof.¹⁵

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.¹⁶

Further, it has been held that for the purpose of deciding the question of disqualifications, so long as any profit was attached to any office, it did not matter whether the profit has in fact been appropriated or not and, therefore, there was no distinction for the purpose between the members who drew the allowances and those who did not. Some offices may be considered offices of profit even if the actual payment of emoluments attached might have fallen into disuse.¹⁷

What follows is that the office must be capable of yielding a profit; the actual making of profit is not necessary. Profit means gain or any material benefit, and the amount of such profit is immaterial.¹⁸

It has been held by the Supreme Court that an office is an office of profit where the several elements of the power to determine and the power to control and give directions as to the manner in which the duties of the office are to be performed and the power to determine the question of remuneration are all present in a given case.¹⁹

The joint committee on offices of profit has laid down the following criteria in regard to office of profit for deciding the question of disqualification for being a Member of Parliament:

- (i) Whether the holder draws any remuneration like sitting fee, honorarium, salary etc., *i.e.* any remuneration other than the 'compensatory allowance' as defined in section 2(a) of the Parliament (Prevention of Disqualification) Act, 1959;
- (ii) Whether the body in which an office is held exercises executive, legislative or judicial powers or confers powers of disbursement of funds, allotment of lands, issue of licences etc. or gives power of appointment, grant of scholarships, etc.; and
- (iii) Whether the body in which the office is held wields influence or power by way of patronage.

15. *Chander Nath v. Kunwar Jaswant Singh and others*, ELR Vol. III at 147.

16. *Committee on Offices of Profit (Bhargava Committee)*, 1955, Part I at 11.

17. Chief Election Commissioner, *in the matter of Vindhya Pradesh Legislative Assembly Members*, *supra* note 1.

18. *Deorao Laxman Anande v. Keshav Laxman Borker*, AIR 1958 Bom 314.

19. *Guru Govinda v. Sankari Prasad*, AIR 1964 SC 254.



If the reply to any of the above questions is in the affirmative, then the offices in question will entail disqualification.²⁰

Office of profit under the government

The next thing which needs consideration is as to what constitutes an ‘office under the government’. This is because, for the purposes of disqualification, the office in question must be under the government. If the office is not under the government, no disqualification will arise.

It has been held that the source from which a person receives profit is not the sole test as to whether he holds an office of profit under the government within the meaning of article 102(1)(a) of the Constitution. The power to appoint and remove is also one of the tests and if a person is appointed by the government to an office of profit and is removable by the government from the office, he would be a person holding an office of profit under the government even though he is not paid out of government funds.²¹

Further the word “office” does not necessarily imply that it must have an existence apart from the person who may hold it. There could be cases in order to make use of the special knowledge, talent, skill or experience of certain persons, posts are created which exist only for so long as these persons hold them.²²

To determine whether a person holds an office under the government, there are several tests, which are ordinarily applied. These are:

- (i) Whether the government makes the appointment;
- (ii) Whether the government has the right to remove or dismiss the holder of the office;
- (iii) Whether the government pays the remuneration;
- (iv) Whether the functions performed by the holder are carried on by him for the government and
- (v) Whether the government has control over the duties and functions of the holder.²³

For example, a person serving as a teacher in a school receiving grant-in-aid from the government does not hold an office of profit under the government merely because the school receives grant from the government for payment of a portion of the dearness allowance and the pay. The real test would be whether the government of the state had the

20. 10R (JCOP-7LS), paras 10.5 and 10.6.

21. *Hansa Jivaraja Mehta v. Indubhai B. Amin and others*, ELR Vol. I at 171.

22. *Supra* note 18.

23. *Biharilal Dobray v. Roshan Lal Dobray*, AIR 1984 SC 385.



power to remove the person from the office. It must be held that the person holds that office under the government of the state and this is irrespective of whether the salary attached to the office is paid by the state or paid out of some other funds.²⁴

Under article 106 a Member of Parliament receives salaries and allowances as determined by Parliament by law. Nevertheless, he does not hold an office of profit under the government. The membership of Parliament is not an office under the government. Therefore, a sitting member of Lok Sabha is not disqualified from contesting the next general election for Lok Sabha.²⁵

In *M. Ramappa v. Sangappa*²⁶, the question arose as to whether the holder of a village office who has a hereditary right to it is disqualified under article 191 of the Constitution. The court observed:²⁷

The government makes the appointment to the office though it may be that it has under the statute no option but to appoint the heir to the office if he has fulfilled the statutory requirements. The office is, therefore, held by reason of appointment by the government and not simply because of a hereditary right to it. The fact that the government cannot refuse to make appointment does not alter the situation.

The underlying object of this constitutional provision is to secure the independence of the Members of Parliament or a state legislature and to ensure that the Parliament or the state legislature does not contain persons who have received favours or benefits from the executive government and who consequently, being under an obligation to the executive, might be amenable to its influence. Obviously the provision has been made to eliminate or reduce the risk of conflict between duty and self-interest among the legislators.²⁸

The aspects – ‘office of profit’, and ‘under government’ — came up for decision before apex court in the case of *Shibu Soren*,²⁹ the Jharkhand Mukti Morcha(S) leader. The Supreme Court set aside the election of Shibu Soren, to Rajya Sabha in June 1998, on the ground that he was holding “an office of profit” under the state government as Chairman of the Interim Jharkhand Area Autonomous Council (JAAC). The council was setup under the JAAC Act, 1994 at the time of his filing of his “nomination papers” and Soren was thus disqualified to contest election

24. *Krishnappa v. Narayan Singh and others*, ELR, Vol. VII at 294.

25. *Bhagwati Prasad v. Rajeev Gandhi*, AIR 1986 SC 1534.

26. AIR 1958 SC 937.

27. *M. Ramappa v. Sangappa*, AIR 1958 SC 937 at 959.

28. *Deorao Laxman Anande v. Keshav Laxman Borker*, AIR 1958 Bom 314; also see *Hansa Jivaraja Mehta v. Indubhai B Amin*, *supra* note 21.

29. *Shibu Soren v. Dayanand Sahay*, AIR 2001 SC 2583.



to Rajya Sabha. The court explained: “with regard to the ‘office of profit’, what needed to be found was, if the amount received by the person concerned from the office he/she holds provides some pecuniary gain, other than the compensation to defray him/her out of pocket expenses.”

The apex court held that Soren was holding office “at the pleasure of the State Government”. The court noted that the government had the right to remove or dismiss the holder of that office, besides controlling the manner of functioning of the interim council and providing funds for the interim council, out of which an honorarium of Rs.1750 per month, besides daily allowance, rent-free accommodation and a chauffeur driven car at the state expense, was paid to the appellant. The CJI further observed that all this “was a benefit capable of bringing about a conflict between the duty and interest of the appellant as a Member of Parliament - the precise vice to which Article 102 (1)(a) is attracted”. The right to appoint and remove the holder of office in many cases becomes an important and decisive test.

In Britain, there is no general theory that a disqualification arises from holding an office of profit under the Crown. In that country the disqualifications are specific and the disqualification arises only when a person holds a disqualifying office so declared under a parliamentary legislation.³⁰ The House of Commons Disqualification Act, 1975, lists the offices the holders of which are disqualified from the membership of the House. The position is, however different in India, as there prevails a general disqualification under the Constitution, but specific exemptions may be granted from it under a law of Parliament.³¹

The Joint Committee of Parliament on Office of Profit generally applies two tests in deciding whether a member of a body ought to be exempted from disqualification-

- (i) what are the emoluments or allowances attached to the membership;
- (ii) what is the nature of the functions of the body?

If a member of a body gets only a compensatory allowance and the body exercises merely an advisory function, then no disqualification would arise. But if the allowance given is more than compensatory allowance, and/or the body exercises executive and financial powers and is in a position to wield influence and patronage, then its membership would not be exempted from disqualification.³²

Exemptions - The Act of 1959 exempts the following offices from any disqualification from being chosen as or for being a Member of

30. Wade & Phillips, *Constitutional and Administrative Law* 154 (1986).

31. M.P. Jain, *Indian Constitutional Law* 36 (2003).

32. *Id.* at 36-37.



Parliament:

- (i) any office held by a minister, minister of state or deputy minister for the union or for any state, whether ex officio or by name;
- (ii) offices of whips in Parliament and of parliamentary secretaries;
- (iii) offices of members of forces in the national cadet corps;
- (iv) territorial army, reserve or auxiliary Air forces;
- (v) offices of members of the home guards formed in the states;
- (vi) offices of sheriffs of Bombay, Calcutta and Madras;
- (vii) offices of chairmen or members of universities or bodies connected therewith;
- (viii) offices of members of delegations or missions sent abroad;
- (ix) offices of chairmen or members of committees set up for advising the Government or for any enquiry, etc., if no remuneration other than compensatory allowance is paid;
- (x) offices of chairmen, directors and members of statutory or non-statutory bodies other than those included in the schedule, when no remuneration other than compensatory allowance is payable; and
- (xi) offices of village revenue officers not discharging any police function and paid by a share of their collections.

A Member of Parliament does not hold office under the government.³³ A government servant where resignation is effective before scrutiny of nomination is no longer an officer.³⁴ However, on the other hand the Comptroller and Auditor General though he is assigned an independent status by the Constitution, is an officer of the Union Government.³⁵ The judges of the Supreme Court and high courts are not government servants in so far as they hold a constitutional office.³⁶ Nevertheless they hold their office 'in connection with the affairs of the union' [vide article 360 (4)(b)] and are therefore holding office under the Union Government, even though not under the control of that government.³⁷

Therefore, if one looks at the list of offices exempted, it seems sufficient. It covers those offices that need exemption because of the nature of their job. For example, ministers need exemption if they are to

33. *Bhagwati v. Rajeev*, AIR 1985 SC 1534, para 14.

34. *Sitaram v. Rajilabai*, AIR 1987 SC 1293, para 14.

35. *Pashupati v. Nem*, (1984) 2 SCC 404, paras 18, 42.

36. *Union of India v. Sankalchand*, AIR 1977 SC 2328, para 32.

37. *Durga Das Basu*, *Shorter Constitution of India* 316 (1988).



work because they will always be occupying two offices. People such as those from the armed forces or the police or members of different statutory or non-statutory bodies (where only compensatory allowances are paid) or members of universities or other similar bodies are exempted because we do need representatives in the Parliament belonging to different walks of life. These are people who are qualified and can contribute effectively to the governance of the country. The Supreme Court has observed in this respect:³⁸

Doctors, lawyers, engineers, scientists and other experts may have to be invited into local bodies, legislatures and like political and administrative organs based on election if these vital limbs of representative government are not to be the monopoly of populist politicians or lay members but sprinkled with technicians in an age which belongs to technology.

Over the years we have seen that whichever party comes to power looks for means and ways of decorating the legislators with different positions in the government. However, one should not go to such an extent where the government is only looking to offer plum positions to silence the dissidence of the Members of Parliament. If the Members of Parliament hold positions under the government, they would have to toe the line of government and cannot consequently act independently.

In India, as it is, the line of separation between the executive and the legislature is very thin. This is because the executive emerges out of and is a part of the legislature. In case, the Members of Parliament are allowed to hold various offices of profit under the government, the government would lose the already miniscule responsibility and accountability it owes to the legislature. It is difficult to carry on opposing your employer who has bestowed you with benefits. In such a case, the line of separation totally vanishes. The theory of separation of powers loses its essence and parliamentary control ceases to have effect.

Moreover, the states in India don't need a big push to follow suit. There is a danger of a spate of legislations being enacted by different state governments to circumvent article 102 and 191. As it is, the Uttar Pradesh (79 positions exempted) and Jharkhand State Assemblies had passed legislation to exempt hundreds of posts from being considered as 'offices of profit', to avoid the disqualification of its legislative members. This would lead to a dismal situation in India. The equality between the different organs of the government as established by the Constitution would be eroded.

Article 103 of the Constitution says:

38. *Madhukar v. Jaswant*, AIR 1976 SC 2283.



If any question arises as to whether a member of either House of Parliament has become subject to any of the disqualifications mentioned in Article 102, the question shall be referred for the decision of the President and his decision shall be final. Before giving any decision on any such question, the President shall obtain the opinion of the Election Commission and shall act according to such opinion.

In the case of Jaya Bachchan, President A.P.J. Abdul Kalam acted on the advice of the Commission to disqualify her as a member of the Rajya Sabha since she held the post of Chairperson of the Uttar Pradesh Film Development Council. This was rightly done. However, the recent amendment on 'office of profit' has nullified the effect of the action of the President. Actress Jaya Bachchan, Lok Sabha Speaker, Somnath Chatterjee and Sonia Gandhi are amongst the 40 Members of Parliament who have benefited from the amendment.³⁹

A look at the new list of exempted offices of profit shows us clearly that no specific criterion has been followed in exempting the offices. These exempted offices include the Haldia Development Authority, the Hooghly River Bridge Commissioners, the Asansol Durgapur Development Authority, the West Bengal Pharmaceutical and Phytochemical Development Corporation Ltd., the Society for Self-employment for Urban Youth, the Tirumala Tirupathi Devasthanams Board, the Auroville Foundation, the Uttar Pradesh Co-operative Bank Ltd., etc⁴⁰. There is absolutely no compatibility of the exempted offices with the theory requiring exemptions for disqualification. These are clearly offices of profit under the government and the government can exercise full control over the holders of such offices. The list is a clear indication of the favours bestowed by the government on various Members of Parliament.

Articles 102 and 191 provide for the disqualification of membership of the Houses of Parliament and the state legislatures, which are *mutatis mutandis* the same. A person is disqualified from being chosen as, or being a member of, if he holds any office of profit under the Government of India or of the government of any state other than an office declared by law by Parliament, or by a state legislature, not to disqualify its holder.⁴¹

39. The Parliament (Prevention of Disqualification) Amendment Act, 2006 has exempted under s.3, the office of the Chairperson of the National Advisory Council previously held by Sonia Gandhi. Also exempted are the offices of the Sriniketan Santiniketan Development Authority and the Uttar Pradesh Film Development Council held by Somnath Chatterjee and Jaya Bachchan respectively.

40. The Parliament (Prevention of Disqualification) Amendment Act, 2006, (Act no. 31 of 2006).

41. *Kanta Kathuria v. Manak Chand*, AIR 1970 SC 694.



In *Bhagwandas v. Haryana*⁴² the Supreme Court observed: ⁴³

It must be remembered that Article 191(1)(a) of the Constitution gives a wide power to the State Legislature to declare by law what office or offices of profit held under the government shall not disqualify the holder thereof from being chosen or for being a member of the State Legislature. Classification of such offices for the purpose of removing the disqualification has thus been left primarily to legislative discretion. 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 191(1)(a) of its real content or disregard any constitutional guarantee or mandate, the Court will not interfere.

There is no indication of any restraint being exercised in the present amendment.

Article 102 or article 191 recognizes the power of the Parliament or the legislature of a state to declare by law that the holder of an office would not be disqualified for being chosen as a member. There is nothing in the words of either article to indicate that this declaration cannot be made with retrospective effect. The word 'declared' in these articles does not imply any limitation on the powers of Parliament or the state legislature, declaration can be made effective as from an earlier date. In relation to the power to validate election retrospectively by law, the Supreme Court observed: ⁴⁴

It is true that it (the power) gives an advantage to those who stand when the disqualification was not so removed as against those who may have kept themselves back because the disability was not removed. That might raise questions of the propriety of such retrospective legislation but not of the capacity to make such laws.

Therefore, the government can amend the law retrospectively and it has exercised this option. The office of profit amendment has resulted in clearing 56 posts of their disqualification and that too retrospectively. As a result, the meaning and the purpose of articles 102 and 191 of the Indian Constitution have been lost.

While returning the bill on May 30, the President had wanted that the exemption criteria should be "fair and reasonable" and applicable in a "clear and transparent" manner across the states and union territories. Another important point the President had raised was in relation to the posts sought to be exempted by the new law. The implication was that

42. AIR 1974 SC 2355.

43. AIR 1974 SC 2355 at 2356

44. *Supra* note 41.



the names of offices, for which petitions were under process by the competent authority, should be addressed by Parliament while reconsidering the bill. He was also against the application of the Act with retrospective effect. All this has fallen on deaf ears. The wise words of the head of the country have gone unheeded.

The Members of Parliament are expected to discuss the defects of the policy or the bills effectively and thus contribute to unbiased legislation development. But if a legislator is given an office of profit by the government, he would never talk against the pre-fixed policies and never bother to know the difficulties flowing from it to the people. In sum, if the legislators hold office of profit under the government, they have to toe the line of government and cannot act independently.⁴⁵

In the early English Parliamentary history, the Members of Parliament were usually the wealthy and the rich because only the comparatively wealthy or the adventurous could afford the expense of membership. Over the years however this concept has undergone a radical change. If we want a better and a more representative Parliament, it would do us well to pay heed to Sir Ivor Jennings' words. He says:⁴⁶

In an age in which almost everyone has to earn his living, Members of Parliament must increasingly be drawn from the following groups:

- (a) Persons whose inherited or accumulated wealth, family connections, or 'names', enable them to become company directors.
- (b) Persons engaged in professional or business occupations who can leave their chambers or offices for a few hours every evening or who have become semi-sleeping partners.
- (c) Persons who have retired from the armed forces, other public services and similar pensionable employments.
- (d) Persons who have inherited wealth or have accumulated it through capital appreciation and who are prepared to live on capital.
- (e) Trade union officials and others who can find part-time secretarial, administrative or advisory appointments in London.
- (f) Persons of a journalistic frame of mind who can increase their income by journalism, broadcasting, or the writing of popular books.

45. K. Subramanian, "Office of profit and disqualification", *The Hindu*, Friday, Apr 14, 2006.

46. Sir Ivor Jennings, *Parliament* 58 (1970).



Finally, the object of the rules governing ineligibility is to secure the independence of Members of Parliament from private interests. In practice, this concern raises the difficult problem of how to judge whether a given influence upon a given individual is too great. There is also the risk that particularly well-qualified people who would be useful to the country may be prevented from standing for election.⁴⁷ However, if we follow the basic criteria of disqualification as laid down by the three principles of the House of Commons Committee, we are unlikely to go wrong.

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."⁴⁸

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.

*Shruti Bedi**

47. *Supra* note 9 at 45.

48. De Lolme, as quoted by A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* 43 (1973).

* Lecturer, University Institute of Legal Studies, Panjab University, Chandigarh.