A CRITICAL ANALYSIS OF DISQUALIFICATION BASED ON OFFICE OF PROFIT: A COMPARATIVE STUDY

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ABSTRACT

“Office of Profit” is a controversial matter. It is so because it imbibes a sense of ambiguity as it is defined nowhere under the Constitution of India. Time and again several MPs and MLAs are disqualified at the discretion of parliament and hence, advocating a system where the executive controls the legislature despite the presence of clear separation of power. There have been made a number of attempts to define “office of profit” by the judiciary. Such as in Jaya Bachchan v Union of India the court said that “payment of honorarium, in addition to daily allowances like compensatory allowances, rent-free accommodation, and chauffeur-driven car at the state expense, are clearly in the nature of remuneration and a source of pecuniary gain and hence constitute profit.”

Despite judicial pronouncements as well as through some legislature the term “Office of Profit” is not capable of providing an exhaustive list based on some rational classification as to what constitutes the “Office of Profit”? Hence, this paper will analyze this further by examining how the similar provision works in different countries. And what is their procedure to justify disqualification through the office of Profit?

Specifically in India, to discover its true intent, its point of origin will also be studied. That is how the theory of England influenced the Constitutional makers to insert “Office of Profit” under Articles 102 and 191.

Through all of this, the paper will try to justify the fulfillment of the true intent of inserting “Office of Profit” and is there a need to properly define it or not.

I. Introduction

Parliamentary system of government has an exquisite role in a country like India. It carries forward such tasks which are fundamental in governance of a country. Independence of members of parliament is also a key element which makes sure that parliament works fairly. And so, parliamentary members require certain qualifications, as to test the eligibility of its members because the position they hold is distinguished in comparison to other persons. Therefore, the concept of disqualification has become an inherent part of selecting members under the Constitution of India.

However, this concept is not sufficient as it lacks the clear definition of the term “Office of Profit". What constitutes the Office of Profit is in itself a major lacuna and in addition, is it fulfilling the purpose for which it was inserted? As per Madhukar v Jaswant, object and purpose is to avoid conflict between duty and interest along with to eliminate the exploitation of official position to advance private benefit. In Ashok Kumar Bhattacharya v Ajoy Biswas, court said, “Dependence of a large number of members of Parliament on government patronage would weaken the position of Parliament vis-a-vis the executive; for such members may be tempted to support the government without considering any problem with an open mind.” Its essence clearly relates to the doctrine of Separation of Power. A provision like this will imbibe trust among the people of the country. While following the said doctrine, the members of parliament will perform their duties impartially and carry the highest amount of accountability, probity, honesty and integrity in exercise of their public duty.

Under the Constitution of India, to regulate disqualification Article 102 and 191 were inserted. Where Clause (a) of both the articles specifically states the holding of office of profit is a ground for disqualification of members of parliament. There should also be no conflict between the interest and duties of members of parliament. In other words, legislation should be free from executive influence as well as free from personal or pecuniary benefits. Therefore, insertion of Articles 102 and 191 is a way to provide protection to MPs and MLA’s through securing their independence to ensure fluency in discharge of their duties.

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2 Madhukar v Jaswant, (1976) SC 2283
3 Ashok Kumar Bhattacharya v Ajoy Biswas, (1985) SC 211
4 Somnath Chatterjee, Foreword to Acharya, P.D.T., Law & Practice Relating to Office of Profit (2nd ed., 2006).
However, this clause (a) itself carves out exceptions to determine what is Office of Profit? It provides exemption to those offices which are declared by Parliament as per law to not to conclude as office of profit. Hence, leaving the discretion to examine the office of profit in Parliament itself. Thus, this provision creates a lacuna where it amounts to vague and ambiguous interpretation, leaving it to be a long lasting debatable topic.

II. Office of Profit: From the very beginning

The gradual development of law traces its step back to the Crowns Act, 1707. This was done to prevent interference from the government within members of parliament. From there, its genesis and principles formed the basis of development of “Office of Profit” under Indian Law. To begin with, the Constitutional Law framers have tried to define disqualification through office of profit starting from Government of India Act, 1935 where, the constituent advisors prepared its first draft in 1947. In which it categorically stated about disqualification for membership from either house of federal parliament under Article 68 clause (f) that, “if he holds 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.”

Later it got modified into Article 83 where clause (1) sub-clause (a) states that. “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 the holder.” Later, the Parliament (Prevention of Disqualification) Acts of 1950, 1951, and 1953 exempted some positions from being classified as profit-making offices in India. The Parliament (Prevention of Disqualification) Act, 1959, repealed all of these Acts. Pandit Thakur Das Bhargava Committee, presented its report in 1955 where Members of Parliament were encouraged to serve the committee which is of advisory nature. It says that, when a profit-making office needed to be exempted, the matter was referred to a Joint Committee, which gave its opinion on whether the office should be exempted or not. Only when the Joint Committee recommended that a particular office should be exempted then the Act was amended to add that office to the list of exemptions. This was, however, a parliamentary procedure rather than a constitutional convention. Any alleged infringement of any norm or conventional practice cannot deprive Parliament of its right to adopt a legislation once it is recognized as having the power to exempt from disqualification with retrospective effect. This Act, of 1959 was formed on the report submitted in 1955 by a committee after examining the issues related to “office of
profit”. The said report also stated few criteria from where the term “office of profit” can be determined.

After that, Parliament (Prevention of Disqualification) Amendment Act, 2006 was introduced where the said bill was presented to the president after being passed again by both the houses without amendment. Thus, the Amendment Act came into existence which inserted a table in the schedule determining bodies constituted as Office of profit at center and state level.

III. Comparative Analysis

The position of “office of Profit” distinguished itself in various Nations.

- **England** - In England, it gets revolutionized through House of Common Disqualification Act, 1957, 1975. This statute replaces all previous forms of Act and determined certain principles as to what constitutes “Office of Profit”. With the formation of this act it is no longer necessary to use precedents and common law principles to determine “office of profit”.

- **U.S.A.** - Under Article 1 Section 6(2) - “No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of 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”.

- **Australia** - Section 44(iv) of Australian Constitution says that, “anyone who holds an office of profit under the Crown is disqualified from sitting in or being elected to Federal Parliament. The High Court of Australia, sitting as the Court of Disputed Returns, has had to interpret this law.”

- **French Republic** - Article 23 says: “The function of a member of the government shall be incompatible with the exercise of any parliamentary mandate, with the holding of

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5 Report of the Committee on Offices of Profit, 1955, p 36
7 U.S. CONST. art VI, sec. 6(2)
8 Australian Constitution, s44(iv)
any office, at the national level in business, professional or labour organization, and with any public employment or professional activity.’”

In all of these countries, there is a specific mention of “office” which will decide the eligibility of members in the Parliament. Thereby, disqualification for being a Member of Parliament in most nations that have chosen the British system is mostly based on holding a public post. An assembly should not consist of members who are simultaneously subordinated to the administration because this would result in the loss of any separation of powers and the ineffectiveness of parliamentary control. Civil servants and those who get remuneration from public funds are considered ineligible for membership in these countries. On the other hand, for violating this provision, the Australian Constitution imposes a severe penalty. Any person who is deemed ineligible must pay a fee of 100 pounds for each day he or she sits as a member or senator. In India, the punishment is merely Rs. 500. There is a major difference between British law and Indian law on “Office of Profit”. England specifically provides that no office can be disqualified until it is included in the schedule whereas, in a democratic country like India disqualification will be based on laws framed by parliament. Under, US Constitution the office of profit is nowhere defined similarly to the Indian Constitution.

IV. Office of Profit’s current state under Indian Constitution

It is quite contrary to know that the term “Office of Profit” is not defined under the Constitution of India or in the Representation of People’s Act, 1951. It is up to the courts to interpret the importance and meaning of this notion and to decide whether a person is disqualified or not under the constitutional provisions in the context of specific factual situations. Therefore, the judiciary has interpreted this term in its own sense through various cases.

“Office of profit” generally means “an office which generates profit to the holder of the office”. By ‘office’ we mean that “it is a right and duty to exercise an employment or a position of authority and trust to which certain duties are attached”. Membership in Parliament is an office in the sense that it is a position with particular responsibilities of a public nature, and it

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9 CONST, art 23
10 INDIA CONST., art 104
exists independently of the person who holds it. As a result, while a member of parliament holds an office\textsuperscript{12}, it is not one held by the government.

As for Profit, actually making profit is not an essential condition to constitute an “Office of Profit”: although it is enough if the holder reasonably expected to make the profit out of it.\textsuperscript{13} The word “Profit” means pecuniary gain. If there is a gain, the size or amount of it is unimportant; but, the amount of money a person receives in connection with the office he occupies may be important in determining if the office is truly profitable.\textsuperscript{14}

Even the legislature has power to declare by law any office to be termed as Office of Profit. In Bhagwandas v State of Haryana where it said that: “It must be remembered that Article 191(1)(a) of the Constitution gives a wide power to the state legislative to declare by law whether office or offices of profit under the government shall not disqualify the holder thereof from being chosen or for being a member of the state legislative. Classification of such offices for the purpose of removing the disqualification has thus been left primarily on legislative discretion. It follows that so long as this exempted power is exercised reasonably and with due restraint and in a manner which does not drain out Articles 191(1)(a) of its real content or disregard any constitutional guarantee or mandate the court will not interfere.”\textsuperscript{15}

There are few tests in order to determine that whether a person holds office of profit under the government through Satruchala case\textsuperscript{16}:

1. The appointment, dismissal or control of the working of employed officers under a particular authority experiencing control of governmental power is not considered to be a basis for disqualifying the officer from being a candidate for Parliament/state legislature elections.

2. If the persons receives revenue outside the government revenue, then it is not the sole decisive factor to disqualify for office of profit.

3. The government's incorporation of a body corporate and delegation of functions to it may show that the statute intended it to be a statutory company independent of the government. However, it is not conclusive as to whether it is truly autonomous. Sometimes the form is that

\begin{itemize}
  \item \textsuperscript{12} P.V. Narasimha Rao v State (CBI/SPE), (1988) (3) SC 537
  \item \textsuperscript{13} Delane v Hillcoat, (1829) 109 ER 115
  \item \textsuperscript{14} Ravanna Subanna v Kaggeerappa, (1954) SC 653
  \item \textsuperscript{15} Bhagwandas v State of Haryana, (1974) SC 2355 : (1975) 1 SCC 249
  \item \textsuperscript{16} Satrucharla Chandrasekhar Raju v Vyricharla Pradeep Kumar Dev, AIR 1992 SC 1959
\end{itemize}
of a body corporate apart from the government, but the substance is that it is only after the government's ego.

4. The actual test of determining the said issue will be dependent upon the government control over it and also the extent of control exercised by other bodies or committees, along with the dependence of financial needs over government and functional aspects, that, whether the concerned body discharges some governmental functions or just some function which is prime facie options as per the government.

While Supreme Court decisions have offered much-needed transparency on the subject, still there is a need of legislation to be passed by the center on the above discussed matter. As it is still a lacuna which needs to be analyzed to maintain transparency in disqualifications held in parliament.

V. Joint Committee of Parliament Recommendations

The state governments in 2008 contended that if a law to be made on definition of term “office of profit” then it might go contrary to the federal structure of the country. As for states, they enjoy certain liberties as to frame exceptions under offices of profit but are not allowed to define the term “Office of profit”. In 2006, Sonia Gandhi had given up her membership in Lok Sabha over the persisting issue of Office of Profit. In the same year, a parliamentary joint committee was set up to examine the legal and constitutional provisions related to office of profit. The committee in its report, contended that it is essential to evolve the principle of “Office of Profit”. The committee in its report recommended definition of “Office of Profit”:-

“any office under the control of the Government of India, or the government of a state, whether or not the salary or remuneration for such office is paid out of the public revenue of the government of India or of the government of state — any office under a body, which is wholly or partially owned by the government o India or the government of any state and the salary or remuneration is paid by such body — any office the holder of which is capable of exercising executive powers delegated by the government, including disbursement of funds, allotment of
lands, issuing of licenses and permits or making of public appointments or granting of such other favors of substantial nature; or legislative, judicial or quasi-judicial functions.”

Hence, despite the fact that judiciary has given certain guidelines as to what pronounces as office of profit still committee reports can be much useful to frame a proper legislature on a broader perspective as judicial decisions have limited scope.

VI. Critical observations

At both center and state level, the lists which signifies office of profit to be exempted keeps on increasing for Articles 102 and 191. Here, the drawback is that the offices specified in these lists does not have proper rationale to protect a member from disqualification except, protecting some offices over a period of time. It has become a repetitive practice that each time a person appointed to an office and that office might be categorized as office of profit then a law will come up to exempt it from the list of office of profit. This practice has become a repetitive task.

In addition to this, elected ministers who are not legislators possess the required expertise due to their inherited background. Hence, these persons when appointed as legislators have professional qualities which are much more efficient while performing the task of policy making. Thus, these committees and commissions possess such legislators only to deliver advisory opinion. It has been reiterated that by mere acquiring remuneration does not constitute such positions as executive. Also, holding such offices does not violate the principle of separation of power. It is crucial to differentiate between executive functions and mere exercising executive authority in process of defining office of profit, irrespective of considering salary or perks from the said office.

VII. Suggestions and Conclusion

Disqualification on the basis of “Office of Profit” is a flawed concept. Parliament is supposed to be in charge of the government, but it is the government that is in charge of parliament. Parliamentarian independence cannot be secured by disqualifying member legislators from holding a profit-making position. Hence, there is a clear glimpse of whip system. Here, executive being the whip ensures discipline in the legislative domain. Thereby, shaking the

very true essence of “Office of Profit”. Thus, issue is that it causes interference in the independent working of system.

There a first possible solution is to redefine the term “Office of Profit”. However, the Central government declared in 2020 that defining the office of profit is "dangerous," citing vague reasons such as defining the law could lead to a backlog of cases with the Election Commission of India (ECI) and courts, and that defining the law would necessitate amending various correlated provisions in the Constitution and other relevant acts.18 Because the legislation on the office of profit isn't defined, there's room for executive influence on the legislature, which can stymie government operations. This is further elucidated by the Supreme Court's decision in Ashok Kumar Bhattacharya v. Ajoy Biswas & Ors.19, which said, "If a person is holding a remunerated office and the government has a voice in his continuation in that office, there is every likelihood of such person succumbing to the government's wishes."

Although another consideration would be that, “Office of Profit” is arbitrary in nature and therefore, should be abolished. In continuation of the fact that it is not defined, it can simply promoting arbitrariness on the part of government. There is no rational based on which disqualification is given, it is always given on discretion basis. There are several states such as Delhi, Goa and Pondicherry who have listed several offices to be exempted from the list of “Office of Profit”. But, there is a serious lack on bar on number of these offices as the list is not exhaustive. Furthermore, a growing number of state legislatures are introducing legislation to exempt specific offices from the concept of profit-making office. “Even the Central Act on the subject, the Parliament (Prevention of Disqualification) Act, 1959, has been amended several times to expand the exempted list; the most recent amendment was in 2013, which exempted the Chairperson of the National Commission for Scheduled Castes and the Chairperson of the National Commission for Scheduled Tribes from any disqualification by virtue of their position as an MP”.

As per aforesaid discussion, it is concluded that according to D.D. Basu, the key question is whether there is any potential for a conflict between duty and personal interest, not whether the office's task is substantial or insignificant. And judicial decisions inevitably shield politicians by viewing their positions as non-profitable. This mentality must change in order for the

18 Madhukar, Supra Note 1
19 Somnath, Supra Note 3
legislature to function effectively and for democracy to function smoothly. Hence, there is an urgent need to appropriately define the term “Office of Profit” for better functioning under the Constitution of India.