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"Office of Profit – Elucidating the Constitutional Conundrum"

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Introduction – A brief about the Office of Profit

In India the notion of disqualifying the holder of any administrative position from being vulnerable to executive temptations i.e. Office of profit is adopted from Britain and the Morley Mito reforms first embodied it under the garb of Act of 1909. The Constitution makers thus incorporated Art 102(1) and Art 19(1) to restrict this practice at Central and State level. The position is such that it can't be held by MLA or MP and one such that yields certain perks. Ironically the term stands undefined in the Indian Constitution and the Representative of People Act 1951.

The expression Office of Profit has 3 elements which are essential for disqualification as was held in the case of Keshav Laxman Borker[1]

1. The office must be held by a person
2. The particular office must be under the respective State or the Central Govt.
3. Office must derive some Profit

But the million dollar question arises is what is profit and what is office per se. Profit has been defined as pecuniary gain. The measure of cash receivable by a man regarding the workplace he holds might be material in choosing whether the workplace truly conveys any benefit.[2]
On the other hand, an office is a "subsisting, permanent and substantial function" which has an "existence independent of the person who fulfills it", which continues and is successively completed by successive holders. [3]The expression 'office' as the Article suggests, refers to a duty

[1] AIR 1958 BOM 314
[2] RavannaSubanna v. G.S.Kagerappa, AIR 1954 SC 653
[3] Brahma Dutt v. Paripuma N And Family, AIR 1972 All.340

attached position, specifically, a position of trust, authority or service that is constituted under an authority.[4]

The inception of Office of Profit in the Indian political sphere was in 1954 at the time of G.V.Malvalankar's term of being the Lok Sabha speaker. It was somewhere around this time that a law on the issue of office of profit was settled and it was decided that it is immaterial if the person received actual remuneration but it is of absolute necessity to ascertain whether the office he holds if of some profit itself.

The underlying principle behind the Constitutional provisions remains the same such as that of the British, i.e., there should be no conflict between the duties and interests of the members; that he/she should be able to carry the administrative duties freely and fearlessly without bowing to the government strain.

Another equitable factor that it aims to accomplish is to keep the three pillars of the democracy sound by insuring the isolation and "independence of one branch of government from interfering in the actions of another". The disqualification is thus a result of breach of this separation of powers.

History of office of profit in India and the Current Scenario

The origination of the Office of profit was from the House of Commons in England wherein the Crown offered remunerative executive positions to the members to buy their authority. The members who accepted such offers faced a dilemma between their duty as a legislator and their private interests. Due to this they faced a hurdle in conducting their duties with impartiality. Eventually the House of Commons weakened owing to this divided interests of the members who were preoccupied with the Executive engagements and thus could not fulfill their respective duties of the House of Commons. Ensuing this, a law was passed by the House prohibiting the members from "accepting gifts from the Crown" ordering for the disqualification of the members who would disobey the law.

The entire rationale behind the office of profit thus, originated in England, through the "Act of Settlement 1701". Under this law "no person who has an office or place of profit under the King

[4] P.V.Narsimha Rao v. State, AIR 1998 Sc 120

or receives a pension from the Crown shall be capable of serving as a member of House of Commons." This was instituted so that no undue influence from the Royal household puts hurdles in the administrative functions of the State

Article 1 Clause 2 Section 6 of the US Constitution explicitly lays down that "no senator or representative shall during the time of being elected, be appointed to any civil office under the authority of US." Thus in this scenario an office cannot be created by the law makers and then their appointment be done in the same.

One of the earliest cases to have been referred to the "Election Commission" is in 1953. The dilemma was for the EC to decide the fate of the MLAs of Vindhya Pradesh Assembly' whether they be disqualified from appointment as member of the District Advisory Council. Being members they were paid Rs 5 for each day that they stayed at the place of the meetings. The EC decided that the members living in district headquarters and receiving allowances were deemed to hold office of profit and hence 12 out of 160 MLAs were disqualified.[5]

At the time of enacting the provisions the Constitution for office of profit "it was felt that none of the acts met the needs" comprehensively. Thus on 21 Aug 1954, Speaker G.V.Malavankar appointed a "committee on Office of Profit under the chairpersonship of Thakur Das Bhargava" to analyze matters that are related to disqualification.

It was under this committee, furthering the motives of Speaker Malavankar that the Parliament (Prevention and Disqualification Act) bill was introduced in Lok Sabha on Dec 5, 1957.

The appointment of MLAs as Parliamentary Secretaries has been prevalent I the past, Delhi is one of the many states that have made use of it. A parliamentary secretary's position is similar to that of a minister of State assisting the Minister in his/her duties. According to Article 164 1 (A) of Constitution the number of ministers in State Cabinet is to be restricted by 15% of the total number of State assembly and not more than 10% of total 70 seats of Delhi as per Art 239 A(a) and that is what also the entire current Delhi issue is all about.

The predicament with the appointment of MLAs as Parliament Secretaries is[6]

[5] Ritika Chopra, Office of Profit-What & Why, Indian Express, Jan 20, 2018.
[6] Insights into Editorial:Weakeing the watchdog, June 17,2016 www.insightofinida.com/2016/06/17/insights-editorial-weakening-watchdog.

a. It fails the whole idea of modern republic thus weakening the separation of power principle
b. It contradicts the idea of legislator working freely under the Government

Disqualifications vis. a vis. the Infamous Cases

According to Art 102(1) (a) and 19(1)(a) of Constitution, MPs and MLAs can be barred from "holding an office of profit under the Government" that might offer them benefits.
They can also be disqualified for being of an unsound mind; undischarged solvent and not being an Indian citizen or giving up their citizenship rights under the RPI 1951. [7]

Tests for office of profit[8]

The tests for finding out whether an office in question is an office under a Government and whether it is an office of Profit are-

1. If the appointment was made by the Govt.
2. Does the Govt. has the right of removal or dismissal of the holder
3. Are the remunerations paid by the Govt.?
4. Functions of the holders and if the same are performed for the Govt.
5. Does the Govt. has any domination over the functions being performed

In the same case it was held that, *"The power of the Government to appoint a person to an office of profit or to continue him in that office or revoke his appointment at their discretion and payment out of government revenues are important factors in determining whether that person is holding an office of profit under the government*."[9]

For the activity of the preclusion of the holding of an office of benefit under the Government the fundamental prerequisite is that the applicant himself must hold the workplace.[10] To occupy a position of gain under the government, it is not necessary to be in the service of the government, and it is not necessary that there be a "relationship of master and servant".[11]

[7] JAIN, *supra* note 10
[8] Abdul Shakur v. Rikhab Chand, 1958 SCR 387, AIR 1958 SC 52
[9] *Id.*
[10] SatyaPrakash v. Bashir Ahmed, AIR 1963 M.P. 316
[11] Madhukar G.E. Pamkakar v. J.C.Rajani, (1977) 1 SCC 70;AIR 1976 SC 2283

The Infamous cases:

1) In *Jaya Bachchan* vs *UOI* case[12] the Supreme Court dismissed petition of Mrs. Bachchan in which her disqualification as Rajya Sabha MP was challenged by then President Dr. Kalam following the recommendation of the Election Commission on the basis of holding an office of Profit.
2) In another case the Bombay HC in 2009 took similar action for the appointment of 2 parliament secretaries in Goa.
3) In May 2015 the Hyderabad HC stayed the appointment of Parliament secretary in Telangana. The matter is *sub judice* in Punjab and Harayana Court.
4) The former Congress President Sonia Gandhi faced similar charges in March 2006 such as Jaya Bachchan wherein she had to resign as a Member of Parliament after the opposition raised an outcry over her on the position of National Advisory Council Chairperson.

At the time when Dr. Pranab Mukerjee became the "Deputy Chairperson of the Planning Commission" under P.M., P.V. Narsimha Rao, exemption of the office was done by means of including it to the list in "Parliament Act 1959". [13]

The retrospective effect to the exemptions obliterates the basic structure of the Constitution. Every Constitution has its own philosophy and jurisprudence embodies in certain features these provide for a foundation "on which the edifice of the Constitution is built". The Supreme Court decided in the case of Keshavanda Bharati v. State of Kerala[14] held that "the basic structure acts as an effective check on the unrestrained powers of the Parliament by laying down certain principles that the Parliament cannot amend, modify or destroy". [15]

The separation of power principle is the underlying concept behind the two constitutional provisions that deals with the office of profit. The object of enacting Art 102 is that" no conflict shall be there between the duties and interests of an elected member" also without giving in to the Government pressures which is to say that "if a minister is holding an office returning him

[12] 5 SCC 266 AIR 2006 SC 2119
[13] K Subramaniam, *Office of Profit and Disqualifications*, The Hindu, April 14, 2006
[14] (1973) 4 SCC 225
[15] MP JAIN, INDIAN CONSTITUTIONAL LAW, (7th ed., LexisNexis 2014)

certain remunerations from the Government then his actions can be easily controlled and manipulated by the Government".[16]

It was discussed in the Jaya Bachchan's case that relevancy is that "whether pecuniary gain is *receivable* in regard to the office and not whether pecuniary gain is, in fact, received or received negligibly."[17] It was also held in the same case that "payment of honorarium, in addition to daily allowances in the nature of compensatory allowances, rent free accommodation and chauffer driven car at State expense are clearly in the nature of remuneration and a source of pecuniary gain and hence constitute profit".

On a comparative basis, office of profit when talked about in the context of USA seems legit, as the separation of powers between the three organs of the Government is stark and also there the government is not responsible for the Congress. On the other hand India follows a parliamentary form of democracy where the government cannot survive if it loses confidence of the houses of the Parliament. Therefore "disqualification due to office of profit in a parliamentary democracy" is flawed to the extent that all members and ministers of Parliament of the majority party constitute the treasury benches. [18]

It is said that the Parliament must control the government but as a matter of fact it is the Government that controls the parliament. The Supreme Court in the case of Agadi Sanganna[19] observed that "profit means pecuniary gain other than as compensation to defray his out of pocket expenses that may have the possibility to bring that person under the influence of the Executive which is conferring the benefit on him."

In the Shibu Soren Case[20], it was clarified by the court that irrespective of nomenclature, if some pecuniary gain is there, it is "profit". His election was set aside on the same grounds. The bench held that, "*both Articles 102(1)(a) and Article 191(1)(a) of the Constitution were incorporated with a view to eliminate or in any event reduce the risk of conflict between duty and interest amongst Members of the Legislature so as to ensure that the concerned legislator does not come under an obligation of the Executive, on account of receiving pecuniary gain or profit from it, which may render him amenable to influence of the Executive, while discharging his obligations*

[16] Ashok Kumar Bhattacharya v. Ajoy Biswas & Ors, AIR 1985 SC 211
[17] *supra* note 7
[18] Faizan Mustafa,*Grab this opportunity to abolish disqualification due to Office of profit* , The Wire, Jan 22,2018
[19] Shivamurthy Swami Inamdar v. Agadi Sanganna Andanappa, 1971 3 SCC 870
[20] Shibu Soren v. CBI, 1999 IIIAD Delhi 508

as a legislator."[21] Similarly in case of Mrs. Bachchan[22] it was discussed that, it does not matter if the person has received the payment or not. A payable amount is sufficient in order to invoke the disqualification on the grounds of Office of Profit. It was stated that, "*it is well settled that where the office carries with it certain emoluments or the order of appointment states" that "the person appointed is entitled to certain emoluments, then it will be an office of profit, even if the holder of the office chooses not to receive/draw such emoluments."*[23]

The Relevance of Available Legal Provisions

The laws in India contain the "Parliament (Prevention of Disqualification) Act, 1950, 1951, and 1953" that exempted certain posts from offices of profit. These acts were replaced by the "Parliament (Prevention of Disqualification) Act 1959". Section 3 of this statute stated that "certain houses did not disqualify their holders from being members of either house of Parliament."[24]

Many offices were declared as non-profit. A list of same has been enumerated in "Part II of the Schedule to the Parliament (Prevention of Disqualification) Act, 1959." The membership of bodies listed in Part I of the same schedule leads to no disqualification on the grounds of an office held. This expression "office of profit" has no definition in the Indian Constitution or the Representation of People Act, 1951 either.

The "Joint Committee on Office of Profit" constituted in furtherance of a Government motion that was adopted by the Lok Sabha and further concurred in by Rajya Sabha. Out of its 15 members, 10 are elected from Lok Sabha and the remaining 5 from the Rajya Sabha. The members are elected by following the principle of "proportional representation by means of single transferable vote", amongst the members of respective Houses. The duration of each committee is equal to that of each Lok Sabha. The examination of the composition and the character of the Committees appointed by the State and the Central Government is one of the main functions of the Joint Committee. Another function is to recommend the offices that ought to disqualify and what offices ought not to disqualify a person for being chosen as, and for being,

[21] *Id.*
[22] Jaya Bacchhan v. UOI, 2006 (5) SCC 266 : AIR 2006 SC 2119
[23] *Id.*
[24] Mustafa, *supra* note 18

a member of either Houses of Parliament under "article 102 of the Constitution". The report is presented by the Committee before the Lok Sabha initially and then to the Rajya Sabha.

"Section 15(1) (a) of the Government of National Capital Territory of Delhi act, 1991", says "a person shall be disqualified for being chosen as, and for being, a member of the legislative assembly if he holds any office of profit under the government of India, a state or a union territory" other than an office protected by law.[25]

Like "articles 102 (1) and 191(1), Section 15(2) of the NCT act" also aims at protecting the ministers at the Centre, State and UTs. Section 15(3) of the NCT act enumerates down that in cases of disputes over the "disqualification of a Member of Legislative assembly", the matter shall be left to the referral of the president and the decision thereby shall be final. But another nuance is that the President shall seek an "opinion of the Election Commission", before deciding on a disqualification petition under the NCT Act and the same shall be binding on him.

Conclusion and suggestions

Constitutional theory visualizes that the legislature practices oversight works over the administration. The making of laws, endorsement of the financial plan, and observing of all administration activities are inside the domain of the lawmaking body.

The official branch of government should execute the laws, use the public cash for the affirmed purposes, and be responsible to the lawmaking body in its working. In this way, if the legislature is under obligation to the executive, the lawmaking body can never again hold its independence, and loses the capacity to control the Council of Ministers and the armed force of authorities and public servants. From this point of view, the Constitutional ban on office of profit for officials is both vital and welcome. As it has already been discussed in the paper by the researcher that the term office of profit is a conundrum in itself, the term is unexplained so far and also there is room for interpretation which makes it all the more ironical for anyone who tries to give meaning to the term.

To think that by disallowing the "perks and positions" to the legislators will make them completely independent and will speak and perform their duties fearlessly is naïve on the very

[25] Office of profit under NCT Act, 1991

outset. In the parliamentary from of democracy that India follows, all the ministers including the PM and the CMs are part of the House, to expect that "members of the ruling party" will act independently from their ruling parties is not only unrealistic but impractical too. The anti-defection law lays down the provision that "no member of the ruling party can speak or vote against his party", which means the rudimentary legislative privilege that is of freedom of speech is deprived of them.

Legislative independence does not at all means depriving members of the House from speaking their mind, and also the objective of having the disqualification provision of office of profit remains unclear and hazy. At the very outset it seems to give them power and status over the pecuniary gains.

So it is suggested that the definition of office of profit as given in the Constitution should be expanded and the ambit of it should be widened to include the power and status, the primary reason for which they are created. To bar members of the House from taking benefits from the office is against the existing law and also goes against the principle of the democracy, of which India is part of.

The researcher through the paper has justified how the law of Office of Profit is advisable in a country like USA and how it can be gravely misused in India. The disqualification of AAP members of Delhi brings upfront the discrepancies of the system and accounts for how outrageously these provisions can be used. The researcher has also tried to do justice to the objectives of the paper and the hypothesis that the criterion of the "disqualification is to avoid the conflict between the functionaries of the State".