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The Disputable Nuances of Office of Profit: An Analysis with Respect to the Election to the Legislative Houses

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Abstract

Office of profit is essentially any post or position under the government held by a person apart from the one they already hold which provides or has the tendency to provide for monetary or material benefit to the occupant. This research work deals with the office of profit with special regard to the members of State Legislative Houses, viz. MLAs and MLCs. Articles 102(1)(a) and 191(1)(a) lay out the provision for disqualifications of MPs and MLAs or MLCs respectively. It's possible that the recent incident in Jharkhand, where the Chief Minister has been accused of asking the department he oversaw for a mining concession, does not exactly fall under the office of profit regulation. It relates to agreements made in the course of commerce or business with the relevant government for the provision of commodities to or the carrying out of any tasks the government undertakes.

The concept of pecuniary or financial gain in respect to the "office" has been dealt with in this research. To make this research more coherent, the offices of profit in India have been compared to those in the USA and UK. That office of profit is a Western notion, cannot be disputed and hence, the said comparison furnishes this work with invaluable insights regarding the idea of the "office". Even after the existence of the said provision, certain malpractices in that regard have plagued the State Legislatures all across the nation. The Narada Scam presents a great example as to how official Legislative positions and posts can be used to one's advantage by eliciting bribes for the performance of some unofficial functions and favors. This research work also deals with various amendments that led to the gradual evolution of the theory and the usage of the provisions dealing with office of profit. Ultimately, the exceptions to the "office" have been discussed followed by numerous case laws related to the same.

Introduction

The English Act of Settlement, 1701¹, can be considered as the root of the expression "Office of Profit," which has been designed to facilitate protestant succession to the crown as well as to reinforce the functioning of Parliament through specific assurances. "No individual that bears profit-making position underneath the Crown, or who gains a pension from the King, should be qualified to serve as a participant of the House of Commons," the Act read. The term entered India's legal discourse through the Morley Minto Reforms in 1909, which were enacted during the British invasion of India. Nevertheless, even as England went ahead and replaced the generalization in the notion of office of profit, that only discussed disqualification of members if they were discovered occupying a profit-making position under the king, with specifics in the 'House of Commons Disqualification Act of 1975' India stayed the course.²

The main concept of disqualification for occupying a government sponsored profit making position is that the government does not stand in a place wherein it could influence the motives and the decisions of the MLAs and the principle of separation of power is maintained. Recently, 22 Biju Janata Dal members of legislative assembly were exempted from disqualification due to occupying a profit-making position under the state government in Odisha.³ MLAs who've been entrusted as heads of 'special development councils', 'district planning committees', and the 'Western Odisha Development Council' will not be disqualified as MLAs, according to the Odisha Offices of Profit (Removal of Disqualifications) Amendment Act⁴ passed by the government of Odisha in 2016. However, the number of MLAs holding an office under this act is staggering and may give way to the question whether the doctrine of separation of power is still upheld.

Meaning & Scope Of 'Office Of Profit'

The notion of Office of Profit arrived in India from the British legal system, where the Act of Settlement, 1701,⁵ forbade members of the House of Commons to hold offices of profit under their King, or receiving a pension via the Crown. This was done so that the members can commit to their administrative affairs without being influenced by the Royal family. It is a rudimentary form of Montesquieu's Doctrine of Separation of Powers, where the power of the Royalty in the House of Commons is kept in check.

¹ The Act of Settlement, 1701 (Eng.)

² Rashmi Bagri, *OFFICE OF PROFIT: IT'S TIME TO LAY DOWN THE SPECIFICS*, LiveLaw, (Nov. 21, 2021, 11:48 a.m.). <https://www.livelaw.in/columns/office-of-profit-doctrine-of-separation-of-power-governance-legislations-supreme-court-decisions-185994>

³ Debabrata Mohanty, *ODISHA: EC ACQUITS 22 BJD MLAS OVER OFFICE-OF-PROFIT CHARGES*, Hindustan Times, (Nov. 10, 2021, 10:48 a.m.) <https://www.hindustantimes.com/india-news/odisha-ec-acquits-22-bjd-mlas-over-office-of-profit-charges-101636521498746.html>

⁴ Odisha Offices of Profit (Removal of Disqualifications) Amendment Act, 2016.

⁵ *Supra* note 1.

In India, 'Office of Profit' as a concept is given by 'Article 102(1)(a) and Article 191' of the Constitution. "Article 102(1)" disqualifies a person who is chosen as a member of either House of Parliament if the said member occupies an office of profit under the Central or State Government.⁶ Some offices have been listed as exceptions by Parliament and thus, occupying those offices won't amount to disqualification.

'Article 191(1)(a)' gives a similar provision for Legislative Assemblies or Councils of the States. It prohibits a member of a State Assembly or Council from holding offices of profit under the Central and State Governments.⁷ Thus, certain offices as exceptions have been provided.

A skeleton of this provision in the Constitution of India was provided by 'the Government of India Act, 1935', where a person could be disqualified from membership of either Council if they held an office of profit controlled by the Crown in India, except any office proclaimed by Acts of the Federal Legislature that do not disqualify the member from holding such office.⁸ A similar provision was made for Provincial Legislative Assemblies under Section 69(1)(a).

'The Representation of the People Act, 1951' also disallowed these members from occupying an office of profit, although the term 'office of profit' is not used. A person would be disqualified if they are a manager, secretary or a managing agent of a corporation which is not a cooperative society, where the relevant Government holds at least twenty-five percent of the shares.⁹

The Constitution and the Representation of the People Act don't define what 'office of profit' is. It was in *Gulab Chand Chordia v. Thakur Narain Singh and others*,¹⁰ that certain characteristics of an 'office of profit' were defined. It was expressed that the essential characteristics needed for an 'office of profit' are:

- (i) That it requires an appointment by the State,
- (ii) That it involves a salary paid periodically,
- (iii) That the time period of such appointment is limited,
- (iv) That said appointment is terminable,
- (v) That the appointment is neither assignable nor heritable,
- (vi) That the appointee of the office is *sui juris*.

Some offices can be exempted from such disqualification. "Section 3 of The Parliament (Prevention of Disqualification) Act, 1959", attaches a list of offices and declares that none of the mentioned offices of profit under the control of Central or State Government will disqualify the holder from

⁶ India Const. art. 102, cl. 1(a).

⁷ India Const. art. 191, cl. 1(a).

⁸ Government of India Act 1935, 26 Geo. 5 c. 2, § 26(1)(a).

⁹ The Representation of the People Act, 1951, § 10.

¹⁰ *Gulab Chand Chordia v. Thakur Narain Singh and ors.*, (1953) 6 ELR 399.

being a member of Parliament.¹¹ This includes offices such as the Chairperson of National Commission for Minorities, delegations sent to foreign countries by the Government, and office of village revenue officer, to name a few.

Constitutional Validity Of The Office Of Profit

With the exception of specifying particular skills of Members of Parliament and the Legislative Assembly, the Indian Constitution also includes specific exclusions. Having an "office of profit" is one of those exclusions. The division of powers among the Judiciary, the Executive, and the Legislative is essential in a democratic nation. It is critical, therefore, that only qualified lawmakers are chosen to and continue in the State legislature and in the parliament. Eliminating those who occupy profit-making positions is likewise an attempt in this way to maintain legislators' integrity. The administration possesses the ability to affect an individual, he or she may be able to fulfil his or her responsibilities as a lawmaker and critic of the administration. The concept of 'Office of Profit' was born out of this understanding. The British Constitutional system inspired this approach in India. The English Act of Settlement, which was passed in 1700, was among the first laws on the subject. Three broad concepts influencing the law on this topic were established in the start of the 18th century. The concept includes-

- Certain quasi positions are inconsistent with Parliamentary participation.
- The Executive's control over the House of Commons should be restrained, as a result of the overabundance of officials who are also representatives of the House.
- A particular number of officials should be house members in order for Parliament to have authority over the Executive.

The expression "Office of Profit" is not mentioned in the Constitution or in the "Representation of People Act of 1951".¹² Only the declaration of the bar and other regulatory authorities, such as the Election Commission and the President, can determine its scope. The purpose of the clause is mainly to ensure the integrity of members of Parliament by excluding those who have received favours or privileges from the administration and, as a result, are subject to influence since they are under a responsibility to the Government.¹³ The legislation in this regard for Members of Parliament and State Legislative Assemblies is governed by Articles 102(1)(a) and 191(1)(a).¹⁴

¹¹ The Parliament (Prevention of Disqualification) Act, 1959, § 3.

¹² The Representation of People Act, 1951.

¹³ Rajesh Ranjan & Naina Bhargava, *Office of Profit in India*, Legal Service India, <https://www.legalserviceindia.com/legal/article-1153-office-of-profit-in-india.html>

¹⁴ India Const. art. 102 & 119.

Parliament has a minimal part in identifying the Office of Profit, and holding one does not restrain a person from serving in the legislature. Article 103(1) of the Constitution¹⁵ authorized the President to determine if any member of parliament has been disqualified under article 102(1).¹⁶ There have been a few laws enacted for the very same aim, but they were not entirely adequate. In 1954, the Bhargava Committee on Office of Profit was established under the leadership of Pt. Thakur Das Bhargava to make up for the lack of a cohesive, comprehensive statute. "The Parliament (Prevention of Disqualification) Act"¹⁷ was proposed by the Panel. This Act, which was passed in 1959, covers the law governing profit-making presence in India. This law states which offices are exempt from disqualification. Regardless of the fact that the law was reduced in some respects, such as defining a "compensating provision," it failed to establish a "office of profit." This phrase is not mentioned in the Constitution or in any other article of legislation in India. Judicial judgements are the most important source for determining what constitutes an Office of Profit. The Joint Committee on Offices Profit, in addition to the court, has helped define the word. The concept "office" has never been interpreted explicitly. However, according to numerous judicial rulings, an "office" refers to a position that is stable in nature and exists independently of the person who holds it. An MP or MLA is prohibited from occupying an Office of Profit under Articles 102(1)(a) and 191(1)(a) of the Indian Constitution¹⁸ because it could place members in a condition to enrich themselves financially. "A person will be barred from being nominated to and serving as a member of either House of Parliament if they hold any Office of Profit position under the Indian government or the State, unless it is an office declared by Parliament by legislation not to disqualify its bearer. A person will be barred from being nominated to and serving as a member of either House of Parliament if they hold any Office of Profit position under the Indian government or the State, unless it is an office declared by Parliament by legislation not to disqualify its holder", the law states. Possessing an Office of Profit is also a reason for exclusion under the "Representation of People Act".¹⁹ Instances have occurred in West Bengal, Karnataka, Telangana, Nagaland, Meghalaya, Arunachal Pradesh, Punjab, Mizoram, and Manipur. The appointments were declared "unconstitutional" in West Bengal, Telangana, and Punjab, and were overturned by the relevant High Courts. The Karnataka High Court is now hearing the case concerning the nomination of parliamentary secretary. In October 2017, the state of Rajasthan enacted a statute making the appointments legal, however the law's constitutionality has been questioned.

¹⁵ India Const. art. 103, cl. 1.

¹⁶ Gae R, *Office of Profit under the Government*, 48 JSTOR L. J. 1, 400 (2006).

¹⁷ The Parliament (Prevention of Disqualification) Act, 1959.

¹⁸ *Supra* note 14.

¹⁹ Sruthi Radhakrishnan, *The Hindu explains: Office of Profit*, The Hindu, (Jan. 20, 2018, 04:32 p.m.)
<https://www.thehindu.com/news/national/the-hindu-explains-office-of-profit/article22480152.ece>

It was established in *Kanta Kathuria v. Manak Chand Surana*²⁰ that a Member of the Legislative Assembly cannot be dismissed for possessing an 'Office of Profit' unless it is demonstrated that the office acts independently of the bearer of the aforementioned office. Mrs. Kathuria's nomination was challenged in the aforesaid case since she worked as a Special Government Pleader for the State of Rajasthan, that was purportedly an office of profit government position. The applicant was just assigned to perform certain duties given to her rather than occupying a permanent position, hence the job did not qualify as an Office of Profit, according to the court.²¹

Pecuniary Gain

It must have been comprehended by now that "Office of Profit" is broadly a government post which is competent enough to yield or capable of yielding material and pecuniary gains and benefits. Pecuniary gain is the financial or monetary benefit arising out of occupancy of an office of profit in this context. It also includes other material benefits arising out of the same. For example, if a candidate elected for the post of the Member of Legislative Assembly (MLA), and after being nominated for the seat happens to hold the office of a Lecturer in a Government University which generates income which is additional to what the person earns as an MLA, then the person may be deemed to be benefiting from what has been titled as pecuniary gain arising out of the incumbency an office of profit.

It is of cardinal significance to note here that the occupancy of an office need not generate any pecuniary gain in real-time to qualify the same as an office of profit. The mere capability and potential of an office to generate monetary and material benefits is enough to qualify it as an office of profit, that is to say that monetary gains being receivable in respect to an office regardless of the fact that no gain was actually received is enough to disqualify the holder of the ground of occupancy of office of profit.²² To explicate it even more, let's take the example we used in the last paragraph again. The person, in this case, is being paid no salary and allowance whatsoever for his post of Lecturer in the Government University. The only remuneration and benefits being rewarded to him arise from the post of MLA that the said person holds. Even after the circumstances being such, the MLA will be disqualified under Art. 191(1)(a).²³ This view was propounded by the Supreme Court in *Jaya Bachchan v. Union of India*²⁴ and has played a vital role in assisting the concerned authorities in identifying whether an office may be regarded as an office of profit or not.

²⁰ *Kanta Kathuria v. Manak Chand Surana*, 1970 SCR (2) 835.

²¹ Ananya Jha, *Office of Profit- Definition under the Indian Constitution*, Ipleaders, Nov. 16 2018, https://blog.ipleaders.in/office-of-profit/#_ftnref2

²² *Jaya Bachchan v. Union of India and Ors.*, (2006) 5 SCC 266.

²³ *Supra* note 7.

²⁴ *Supra* note 22.

Whether the occupant of the office is so affluent that he/she voluntarily denies the acceptance of remuneration and other allowances or is not provided with the same in due time or is negligible in accepting so, is immaterial to the cause of pecuniary gain. Even if the payment of allowances is in the name of honorarium, no respite can be provided if it is capable of causing a financial benefit to the office holder. However, if the office description carries no remuneration and emolument whatsoever, then the holder may be excused as the basic stipulation required to attain that state is not fulfilled. The emoluments and remuneration may be expressly stated in the office description or might be implied. When the allowances are implied, they are considered to be a natural consequence of the occupancy of any office, that is to say that the allowances will be receivable on the occupant's end in any case as they are inextricably connected with the post.

It is imperative to grasp here that the allowances paid in order to reimburse the monetary or material spending done by the holder of an office out of one's own pocket for the sake of discharging one's duties with regard to the office being held by him/her will not be, in any circumstance, considered to be and a part of pecuniary gain or any other material gain for the matter so specified. In a very similar manner, the allowances paid to the holder of an office for journeying to other districts or states or for attending meetings or discharging or attempting to discharge the duties in efficient and effective manner will not be deemed to make such office eligible to be treated as an office of profit provided that these actions are related to the description of the office and are necessary for exercising the duties conferred and required by the same. These are beyond the purview of the office of profit because they fall under the category of what is known as "compensatory allowance".²⁵

Barring all that has been stated above, pecuniary gains arising out of or resulting as a consequence of a person's own endeavours in any commercial field will not be taken into account. Similarly, the gains resulting out of an MLA's or MP's or for that matter any person eligible to be disqualified on the account of holding an office of profit, appointment in any sector apart from the government will not disqualify the holder. The same can be said about personal investments too. The reason for the case being so is very simple. These gains will not be accounted for as they do not constitute gains arising from an office controlled or funded by the Government of India or any state or Union Territory. It is imperative for the gain to arise out of a government office to constitute disqualification.

²⁵ Umrao Singh v. Darbara Singh & Ors., AIR 1969 SC 262.

Malpractices Around Disqualification Due To Holding Office Of Profit Under The Government

Malpractice can be defined as improper, illegal practice done with malafide intention. The MP's and MLA's that are appointed in India are not allowed to hold houses of profit although there are exceptions. The essence of disqualification under the government sponsored profit making office law is that if legislators hold a government "office of profit," they may be subject to government impact along with its influence and may not be able to carry out their constitutional mandate honestly or fairly.²⁶ Since "office of profit" is not defined in law, it varies from case to case. It's completely at the discretion of the judge to state as to what constitutes the office of profit. Although there are some exceptions, there were members of either house who were reported to be involved in malpractices and scams which are discussed below.

The issue of holding office of profit along with being an MLA or MP has been going on since long. In 2004, Jaya Bachchan, who was MP of Samajwadi party was held liable for holding a house of profit and was eventually disqualified. She was the chairperson of Uttar Pradesh Film Development Corporation (UPFDC) while also being the cabinet minister.²⁷ In the same year, Anil Ambani who was also from Samajwadi party, was elected as Rajya Sabha member. He resigned from his seat, when asked about the office of profit, saying that he was abiding by his rules of transparency. In 2006, in another incident, Sonia Gandhi was disqualified but soon quit the position of Lok Sabha member, as she held the office of National Advisory Council (NAC) along with holding a position in Lok Sabha.²⁸

In 2018, the Election commission reportedly recommended that 20 MLAs of Arvind Kejriwal led Aam Aadmi Party should be disqualified for holding office of profit. While the AAP approached the Delhi High Court in opposition to the Election Commission's recommendations, the court declined to provide interim relief to the MLAs and ordered the President Ram Nath Kovind to act according to the recommendations of the Election Commission.²⁹

²⁶ Vibhor Relhan, *Explained: Law on holding an 'Office of Profit'*, PRS Legislative (Feb. 22, 2018)

<https://prsindia.org/theprsblog/explained-law-on-holding-an-%E2%80%98office-of-profit%E2%80%99>

²⁷ *Our Political Bureau*, *Political pot on boil over Jaya disqualification*, Business Standard (Feb. 6, 2013, 06:31 a.m.)

https://www.business-standard.com/article/economy-policy/political-pot-on-boil-over-jaya-disqualification-106031801049_1.html

²⁸ BS Web Team, *EC disqualifies 20 AAP MLAs: All you need to know about 'Office of Profit'*, Business Standard (Dec. 27, 2019, 06:01 p.m.) https://www.business-standard.com/article/politics/20-aap-mlas-disqualified-what-is-office-of-profit-all-you-need-to-know-118011900575_1.html

²⁹ Vakasha Sachdev, *AAP MLAs' Disqualification: Decoding the Office of Profit Case*, The Quint (Jan. 19, 2018, 10:24 p.m.) <https://www.thequint.com/news/india/decoding-aap-mla-disqualification-office-of-profit-case#read-more>

In “Guru Gobinda Basu v. Sankari Prasad Ghosal and ors,”³⁰ the court concluded that the appellant held profit-making office of India as two of the three companies were government companies under Section 2(18)³¹ along with Section 617³² of “Indian Companies Act 1956. Under Article 102 (1)”³³ of Indian Constitution and therefore was disqualified from being chosen or being the member of either house. The case justifies that the office of profit depends on a lot of factors like who is appointing authority and who provides the remuneration.

There are so many cases in which members of legislative assembly or legislative council were disqualified as they held office of profit. Even in Soniya Gandhi’s case, she was re-elected after the law was amended to exclude the position of Chairperson of NAC under office of profit. Accused positions of corruption against people with high political and administrative status have become an eminent feature of Indian politics.

Narada Scam

Mathew Samuel was the mastermind behind the Narada sting operation, which targeted AITC personnel and politicians. Number of politicians and cops were found accepting cash bribes in exchange for giving a corporation with benefits. It was performed in 2014 for the Indian newsmagazine Tehelka, and months before the West Bengal legislative elections, it was published.

CBI, ED and a parliamentary ethics committee are currently investigating this case. AITC has denied the charges, claiming that the money was given to them as a gift.

MPs like Mukul Rou and Suvendu Adhikari as well as state ministers Madan Mitra and many more, were seen accepting alleged bribes.³⁴

Amendments Of The Parliament (Prevention Of Disqualification)

Act, 1959

According to Article 102(1)(a) and Article 191(1)(a) of the Indian Constitution,³⁵ MPs or MLAs are prohibited to occupy any profit-making office within the Central or State governments unless it has been excused by the Parliament, by law. If he does so, he would be disqualified. The purpose of this ground for disqualification is to avoid the influence of the Executive over the duties discharged by the

³⁰ Gurugobinda Basu v. Sankari Prasad Ghosal and ors., 1964 (4) SCR 311

³¹ Indian Companies Act, 1956, § 2 (18)

³² Indian Companies Act, 1956, § 167

³³ *Supra* note 6.

³⁴ News, *Narada sting operation: CBI files FIR against 12 Trinamool leaders for 'criminal conspiracy'*, The Times of India (Apr.17, 2017) <https://timesofindia.indiatimes.com/india/narada-sting-operation-cbi-files-fir-against-12-trinamool-leaders-for-criminal-conspiracy/articleshow/58227792.cms>

³⁵ India Const. art. 102 &191.

32 India Const. Art. 102

legislators.

On 4th April 1959, the Parliament passed the Parliament (Prevention of Disqualification) Act, 1959 in which certain offices are listed that are exempted from 'office of profit' in Section 3 of the Act.³⁶ The Parliament had also enacted this Act in the years 1950, 1951 and 1953 but they were repealed under Section 5 of this Act.³⁷

After 1959, this act has been revised five times in the years 1993, 1999, 2000, 2006, 2013 to expand the list of offices exempted from the purview of 'monetary gaining positions' disqualification.³⁸

"The Parliament (Prevention of Disqualification) Amendment Act, 2006" excluded 55 offices held by the MPs from disqualification with retroactive effect from 1959. In the case of "*Consumer Education and Research Society v. Union of India*,"³⁹ the Supreme Court ruled that the amendment was constitutionally valid.

With this amendment act, the Parliament was attempting to expand the list of exempted offices to save over 40 Members of Parliament from getting disqualified. Former President A.P.J. Abdul Kalam was initially not satisfied with the Bill and had returned it on the ground that there were no transparent criteria to include the offices in the exemption list. Eventually, he had to sign it.⁴⁰

These amendments have removed the disqualification status from plenty of posts within both the governments over the years.

Exceptions To Disqualification Of Members Upon The Incumbency Of An Office Of Profit Under The Government

When it comes to disqualification of members of several Legislative Assemblies around the country for holding a profit-making office, there are some exceptions. The position of Minister in the Union Government or any State Government is the first and principal exception to the concept of a 'office'.⁴¹ This exception has been explicitly mentioned under Art. 191 of the Constitution for the matters and purposes of State Legislatures. The exceptions for the Members of Parliament (MPs) have been set forth in the "The Parliament (Prevention of Disqualification) Act, 1959". The exceptions for MLAs have been asserted through the various Prevention of Disqualifications Acts passed by numerous State Legislative Assemblies.

³⁶ The Parliament (Prevention of Disqualification) Act, 1959, § 3.

³⁷ The Parliament (Prevention of Disqualification) Act, 1959, § 5.

³⁸ Faizan Mustafa, *Grab This Opportunity To Abolish Disqualification Due to 'Office of Profit'*, The Wire (Jan. 22, 2018), <https://thewire.in/government/grab-opportunity-abolish-disqualification-due-office-profit> .

³⁹ *Consumer Education and Research Society v. Union of India*, MANU/SC/1499/2009.

⁴⁰ Faizan, *supra* note 38

⁴¹ India Const. art. 191, cl. 1.

As stated, the exceptions to the office of profit have been mentioned in the respective laws passed to that effect by different State Legislatures. For example, The Bihar Legislature (Removal of disqualifications) Act, 1950, mentions the names of certain offices and posts which are not considered office of profit if held by MLAs or MLCs of Bihar Legislature.⁴² Another example could be The West Bengal Legislature (Removal of Disqualifications) Act, 1952. Under this act, many posts have been kept beyond the purview of or exempted from the purview of profitable posts including the office of Parliamentary Secretary or Parliamentary Under Secretary, the Office of Chairman or member of a Road Transport Corporation and a few other offices.⁴³ These exceptions have been referred to by the Court whenever an issue arises that requires the perusal of the said Acts. The subject-matter of all these laws is more or less the same but does contain peculiarities and regional influences. Many MLAs and MLCs are necessary to hold numerous specialized offices for the efficient management of various ministries and parts of the government, hence these exemptions are critical for the good functioning of State legislatures.

Comparison With Other Nations

Office of Profit in the US

The thought of holding a “office for monetary benefit” has not clearly defined itself in the constitution. The point is that whenever an executive officer like a judge or a politician holds a position of power for monetary benefits, it can be assumed that they might either be incompatible with their particular duty and it may affect the position as well as the loyalty to the office.⁴⁴

Instead of becoming an office with accountability to the people, it becomes a point of corruption.

There is an emoluments clause in the USA, which is also recognized as foreign emoluments clause, it is a provision of the constitution of the USA mentioned in “Article I, Sec.9, Para 8.” that normally prohibits officeholders of federal organisations to receive or accept any gift or payments from or any other item that carries a significant value from state rulers of foreign countries or their representatives.

It is also mentioned in the constitution of USA about domestic emoluments clause which prohibits the president of USA from accepting any gifts or similar things of monetary value for his services as the supreme authority. The main motive behind this only was to ensure that the leaders of the country are not at any cost influenced through providing them with luxury items because it is stated that this was corrupt practice which was generally followed among diplomats and rulers of the European union.

Interestingly, some provisions like nobility titles were dropped from the first draft but were restored on the kind request of Charles Pinckney who talked about the importance of preserving officers of federal agencies and politicians who hold the office from foreign influences.

⁴² The Bihar Legislature (Removal of Disqualifications) Act, 1950.

⁴³ The West Bengal Legislature (Removal of Disqualifications) Act, 1952 § 2(i)(a) and 2(i)(d).

⁴⁴ Chowdhury M.J.A., *Judiciary and the Dilemma of ‘Office of profit*, Vol.XI CUJ.L. 1, 58-82 (2010).

The final text included a provision which permitted the receiving of items of monetary value with clear approval from Congress. There was a surprising experience of Benjamin Franklin, who was a minister to France and he was presented with a snuff box with jewelry by Louis XVI, he didn't want the king to feel bad so he asked for the permission to keep the gift from Congress, the permission was given too.⁴⁵

Office of Profit in United Kingdom

In the UK, there are only three ways a Member of the House of Commons' seat can be vacated, which are death, disqualification, and expulsion.⁴⁶

Historically, serving within the House of Commons, that is, the Lower Chamber of the Parliament, was met with a lot of reluctance. Nor was there a proper procedure for resignation in place prior to the sixteenth century, as it was considered unnecessary as the parliament usually met for a few weeks only.

On 2nd March 1624, the House decided to prohibit Members of Parliament from resigning from their seats.⁴⁷ Not even a claim of terminal illness always ended in an acceptance of a Member's resignation. Having to go abroad for royal business was a reason commonly used by Members to apply for resignation, but the success of such applications being accepted tended to be very low.⁴⁸

It was in 1701 where the Act of Settlement inserted the concept of 'office of profit.'⁴⁹ The Act essentially prevented Members from occupying an office under the control of the monarch, or to receive pension from the Crown. It was recognized that acceptance of a paid office or pension under the Crown would not be agreeable with the membership of the House of Commons. This was because these offices included salaries from the Crown itself, and since a Member had to bring under scrutiny actions of the Crown or its Government, accepting such an office was seen as worthy of disqualification from the House. In 1707, the Act of Parliament provided that if a Member is disqualified because of acceptance of an Office of Profit, such Member can be elected again.⁵⁰ Thus, a Member could be re-elected to the House of Commons.

In 1740, a Member, Sir Watkin Williams Wynn's membership came into question when he inherited the stewardship of the lordship and manor of Bromfield and Yale, from his father. It was decided by t

⁴⁵ Brian Duignan, *What is the Emoluments clause*, Britannica (Oct. 21, 2001), <https://www.britannica.com/story/what-is-the-emoluments-clause>.

⁴⁶ [UK Parliament, https://www.parliament.uk/about/how/guides/factsheets/procedure/p11/](https://www.parliament.uk/about/how/guides/factsheets/procedure/p11/) (last visited Nov. 26, 2021).

⁴⁷ Edward Hicks, *Resignation from the House of Commons*, UK Parliament (Sep. 11, 2019), <https://researchbriefings.files.parliament.uk/documents/SN06395/SN06395.pdf>.

⁴⁸ *Ibid.*

⁴⁹ *Supra* note 1.

⁵⁰ Succession to the Crown Act 1707, 6 Ann. c. 41, §26.

he House that he had, in fact, vacated his seat by accepting that appointment. Thus, the House of Commons Disqualification Act 1741⁵¹ was made, which listed the offices which were disallowed with membership of the House. From here the idea of using a certain number of Crown stewardships for the aim of helping Members in order to vacate their seats, began.

In 1975, the House of Commons (Disqualification) Act 1975 came into power. It listed various offices, such as a judicial office, civil services, and armed forces, which were not compatible with membership to the House. However, Section 3 stated that a person won't be deemed unfit for membership of the House of Commons if they occupy an office of profit under the control of the Crown.⁵² Instead, Section 4 of the Act reserved two such offices to be used for resignation of a member. The offices of the steward or bailiff of the three Chiltern Hundreds of Stoke, Desborough and Burnham, and the Manor of Northstead will be used as offices of profit for vacating the position of a Member of the House of Commons, thus disqualifying them from membership.⁵³

Thus, currently, to resign from the House, a Member would have to apply to the Chancellor of the Exchequer in order to obtain appointment to one of the two mentioned offices. The two offices are only 'Office of Profit' in name, and do not carry any monetary gain with it. They are solely used as a way for resignation by a Member. This office is retained by such a Member until another Member wishing to retire applies for that office. With the existence of two such offices, i.e The Chiltern Hundreds and the Manor of Northstead, it allows for two Members to alternately resign from the House at the same time.

Currently, Tracy Brabin of the Labour Party occupies the office of Crown Steward and Bailiff of the three Chiltern Hundreds of Stoke, Desborough and Burnham. The office of the Manor of Northstead is occupied by Owen Paterson, of the Conservative Party.

Prominent Cases

Ashok Kumar Bhattacharyya Vs. Ajoy Biswas and Ors.

Citation: (1985) 1 SCC 151

Hon'ble Judges/Coram: A. Vardarajan, S. Murtaza Fazal Ali and Sabyasachi Mukherjee, JJ.

In this case of Ashok Kumar Bhattacharyya v. Ajoy Biswas and Ors.,⁵⁴ the main contention is whether the accountant-in-charge of the Agartala Municipality be considered as a profit making position under the state government and hence be considered a ground of disqualification for the respondent Ajoy Biswas. Both the appellant as well as the respondent were contesting in the election

⁵¹ House of Commons Disqualification Act 1741, 15 Geo. 2 c. 22.

⁵² House of Commons Disqualification Act 1975, c. 24 (UK),

<https://www.legislation.gov.uk/ukpga/1975/24/body>.

⁵³ *Ibid.*

⁵⁴ Ashok Kumar Bhattacharyya Vs. Ajoy Biswas and Ors. (1985) 1 SCC 151.

for the West Tripura Parliamentary Constituency. Proviso (ii) of Section 66(2) of the Bengal Municipal Act, 1932⁵⁵ which was extended to the State of Tripura in 1975 provides that “Without the approval of the State Government, no appointment with a monthly earnings of greater than 200 rupees or a pay rate increasing by regular increments to greater than 200 rupees may be constituted, as well as every nomination to, and dismissal from, any such nomination must be confirmed by the State Government.” Considering that, it was determined that employment of the respondent would be, in fact, considered as a profit making position. According to the Article 102(1)(a)⁵⁶ as well as Article 191(1)(a),⁵⁷ an individual being elected to Parliament or a Legislature must not occupy a government sponsored profit making position. This provision is made so that no governmental pressure could be exerted on the members to influence their decisions. However, upon analyzing it was considered that the Agartala Municipality is a local authority since there is only some amount of authority that the Tripura government has over the Municipality and is not entirely under its control and hence the accountant-in-charge of Agartala Municipality wouldn't be considered as a government sponsored profit making position. Hence, the respondent had not been disqualified.

Jaya Bachchan Vs. Union of India (UOI) and Ors.

Citation: AIR 2006 SC 2119

Hon'ble Judges/Coram: Y.K. Sabharwal, C.J., C.K. Thakker and R.V. Raveendran, JJ.

The case of *Jaya Bachchan Vs. Union of India (UOI) and Ors.*,⁵⁸ helps to determine the answer of the question whether occupying a profit making position but not receiving such profit or not using the perks of such a job be considered as a ground for disqualification. *Jaya Bachchan* had been appointed as the Chairperson of the UP Film Development Council by the government of Uttar Pradesh. Simultaneously, she was a member of the Rajya Sabha. The appellant was given an honorarium of Rs. 5,000 along with allowances and other perks. This appointment is, without a doubt, a profit-making position under state government, however it was argued since the appellant did not use the given perks or receive the honorarium amount, there is no pecuniary gain that has been availed or claimed. It was argued that even if the appellant had been appointed for a post which had carried a remuneration, but if the remuneration was not paid, it wouldn't be considered as a government sponsored profit making position.⁵⁹ However, it was decided that it does not matter if the remuneration is received or not, but that it is due and receivable.

⁵⁵ Bengal Municipal Act, 1932, § 66(2)

⁵⁶ *Supra* note 6.

⁵⁷ *Supra* note 7.

⁵⁸ *Jaya Bachchan Vs. Union of India (UOI) and Ors.* AIR 2006 SC 2119.

⁵⁹ *Biharilal Dobrav v. Roshanlal Dobrav* [1984] 1 SCR 877.

Therefore, it did not matter that the appellant had not used the perks she was allotted or that she did not receive the remuneration. What matters is that those perks and the remuneration was due to her and she was entitled to receive them. Hence, it was considered as an office of profit and therefore the appellant was disqualified.

Divya Prakash Vs. Kultar Chand Rana and Ors.

Citation: AIR 1975 SC 1067

Hon'ble Judges/Coram: A. Alagiriswami and R.S. Sarkaria, JJ.

In the case of Divya Prakash Vs. Kultar Chand Rana and Ors.,⁶⁰ The main contention was whether the respondent was occupying a government sponsored profit making position at the time of filing of nominations. The respondent, Kultar Chand Rana had had an honorary post of Chairman of the Board of School Education of Himachal Pradesh when he was filing for nominations in the Himachal Pradesh State Legislative Assembly. He was appointed under the Section 18 of the Himachal Pradesh Board of School Education Act, 1968.⁶¹ Therefore there is no doubt that the office was under the government, however the question that arises is whether it is an office of profit or not. The respondent was not entitled to receive a salary, but the post had a pay scale attached to it which was argued to be a means of profit. The Court rejected the contention of the appellant. It was held that the Board had no authority to fix a salary structure for the Chairman and had no power over the appointment of the Chairman. Therefore, the defendant had not occupied a profit-making position and the appeal was dismissed.

Gurugobinda Basu Vs. Sankari Prasad Ghosal and Ors.

Citation: AIR 1964 SC 254

Hon'ble Judges/Coram: S.K. Das, Acting C.J., J.R. Mudholkar, K. Subba Rao, N. Rajagopala Ayyangar and Raghubar Dayal, JJ.

In the case of Gurugobinda Basu Vs. Sankari Prasad Ghosal and Ors.,⁶² The appellant, Gurugobinda Basu was a partner of the firm that served as the auditor for a number of corporations which were owned by the government as defined under the Indian Companies Act, 1956.⁶³ The appellant was also occupying a position which was appointed to him by the West Bengal State Government. He used to get paid by both of these offices. He contested in the election of Lok Sabha and won but his election was challenged on the grounds that he occupied profit-making positions under the Centre and the

⁶⁰ Divya Prakash Vs. Kultar Chand Rana and Ors. AIR 1975 SC 1067.

⁶¹ Himachal Pradesh Board of School Education Act, 1968, § 18.

⁶² Gurugobinda Basu Vs. Sankari Prasad Ghosal and Ors. AIR 1964 SC 254.

⁶³ Indian Companies Act, 1956, § 2(18) & 617.

State government and should be disqualified from running for election.⁶⁴ The election Tribunal ruled that he held monetary gaining positions under the government and hence he was disqualified. An appeal was filed to the Calcutta High Court which was dismissed; however, the fitness certificate was granted under Article 133(1)(c) of the Constitution.⁶⁵

The sole issue that needed to be addressed by the Court was whether the appellant was disqualified within the purview of Art. 102(1)(a) of the Constitution or not.⁶⁶ The Supreme Court found that the appellant was an auditor of the government companies due to which his appointment and removal from offices solely rested with the Central Government and India's CAG held complete authority over the appellant. Even though the company paid the auditors, the remuneration was decided by the Central Government under the Indian Companies Act.⁶⁷ The Court further discarded the argument that all the factors of the five test of appointment⁶⁸ must coexist and every test should be fulfilled to declare an 'office of profit' within the Government. If the government has power over the appointment, removal or remuneration of the holder of office and any one of the elements is present, then that would be an 'office of profit.'

The appeal was dismissed by the SC and was ruled that the test of appointment, removal from the office and the source of remuneration is necessary in the present matter.

The Court agreed with the Election Tribunal and the High Court and held that the appellant occupied a government sponsored profit-making position under Article 102(1)(a) of the Constitution⁶⁹ due to which he was disqualified.

Pradyut Bordoloi Vs. Swapan Roy

Citation: AIR 2001 SC 296

Hon'ble Judges/Coram: *R.C. Lahoti and Shivaraj V. Patil, JJ.*

In the case Pradyut Bordoloi Vs. Swapan Roy,⁷⁰ the appellant and the respondent filed for nomination in the by-election in Margherita Legislative Assembly Constituency No. 124 where the Margherita Block Congress Committee's working President filed a complaint for disqualification of the respondent from the election on the ground that the respondent was working for the company Coal India Ltd. in which the Government had not less than 25% shares.

⁶⁴ *Supra* note 6.

⁶⁵ India Const. art. 133, cl. 1(c).

⁶⁶ *Supra* note 6.

⁶⁷ Indian Companies Act, 1956.

⁶⁸ Satya Ranjan Swain, *The Concept of 'Office of Profit' in India*, SSRN (Dec. 10, 2011),

<https://ssrn.com/abstract=2181796> .

⁶⁹ *Supra* note 6.

⁷⁰ Pradyut Bordoloi Vs. Swapan Roy, AIR 2001 SC 296.

The appeal filed in the Supreme Court needed to decide whether the respondent was holding a profit-making position under the Government and whether he was ineligible for being a manager under a company where the Union Government had not less than 25% shares.

The Court took various case laws into consideration and applied the determinative test of appointment on the former issue. It was stated that if the government had no control over the appointment or removal of the person from the office then that person did not hold a position under the Government. Therefore, the appeal was rejected by the Court and it was ruled that the respondent had not occupied government sponsored profit-making position and hence could not be disqualified under Article 191(1)(a)⁷¹ of the Constitution. The Government had no authority over the appointment, removal and duties of the respondent hence it was not a government sponsored profit-making position.

Conclusion

The disputable nuances of government sponsored profit making office in relation to election of legislative houses can be looked through various lenses.

The dispute arises when the phrase “office of profit” is challenged in the court. This is because the Constitution or any other Act does not specify the definition of the above mentioned phrase. Although some landmark judgements have provided the periphery of this phrase, it still remains to be the topic of debate. The ‘Gulab Chand Chordia v. Thakur Narain Singh and others’ case lays out some key characteristics of the government sponsored profit making office.

The government sponsored profit making office in the USA and United Kingdom explains the history of the system of disqualification of members and how the system evolved over the time.

The instances of Sonia Gandhi, Anil Ambani, Jaya Bachchan etc show that malpractices of occupying a lucrative position or government sponsored profit making office is not a new concept and people have been involved in the cases of malpractices. The Narada scam also briefly talks about how the Indian politicians who are high ranking officials, accept bribes of exorbitant amounts.

The section of Amendments also highlights that the law has been amended in order to expand the list of offices. Case overviews analyses the essential case judgements which play a significant role in defining certain terms and lays out conditions required to qualify an office under office of profit.

The Key Takeaways Of The Article Includes-

Through this article, we get to know that the profit yielding offices need to be separated so that the MLA’s or MLC’s can focus entirely on the administrative work without getting influenced. This also maintains the constitutionality of the Doctrine of Separation of Powers.

⁷¹ *Supra* note 7.

Office of profit does not need to yield real time pecuniary gain, the mere potential of becoming financially enriched is enough to qualify under office of profit. The section of pecuniary gains also underlines that compensatory allowances and the allowance paid in order to reimburse the money paid out of one's own pocket will not count as pecuniary gain.

There are 55 offices which come under the exception of government sponsored profit making offices and exceptions of ministers under the union or state government are also laid down that justifies that some of the posts require exemptions. This is because such posts need extensive knowledge in various fields for the proper functioning.

Overall, the article talks about the disputes, the cases, exceptions and a lot of other key factors that help us in realizing that the definition of the phrase "office of profit" is much required. Although there have been amendments in the law and there are precedents, this phrase needs a justification along with the illustration and explanation.

