



CRITICAL ANALYSIS OF THE JUDICIAL INTERPRETATION OF 'OFFICE OF PROFIT' WITH REFERENCE TO THE ADVOCATES ACT

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INTRODUCTION

The concept of 'office of profit' was imported from Britain in India and came into vogue with the Morley- Minto reforms proposal. The 'office of profit' disqualification started in England through the Act of Settlement, 1701. Till 1919, legislators who were appointed ministers used to lose their right to sit as members in the House of Commons. The Commons Disqualification Act, 1975, lists the offices which can be disqualified. In the US Article 1, Section 6, Clause 2 explicitly lay down that '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 be 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 the continuance in office'. Thus, legislators cannot create an office and then be appointed to it.¹

The principle debaring holders of office of profit 'under the Government' from being a member of Parliament is such that a person cannot exercise his functions independently of the executive of which he is a part.² In *Satrucharla Chandrashekar Raju v. Vyricherla Pradeep Kumar Dev*³ the Supreme Court held that the object to this provision is to secure the independence of the member of Parliament from the benefits of the executive which may be under influence and there may be conflict between duty and self-interest among the members of Parliament.

In India article 102 (1) and 191 (1) has been incorporated in the Constitution which prescribe restrictions at the Central and State levels. Therefore, Art.102 and Art.191 deals with disqualification of members of Parliaments and state legislature respectively.

Article 102 and 191 of the Constitution of India states-

“102. Disqualification for membership – (1) a person shall be disqualified for being chosen as, and for being, a member of either House of Parliament—

(a) 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;”

“191. Disqualification for membership – (1) a person shall be disqualified for being chosen as, and for being, a member of

¹ <https://thewire.in/216169/grab-opportunity-abolish-disqualification-due-office-profit/> (Visited on February 1, 2018).

² P.M Bakshi, *The Constitution of India* 154 (LexisNexis, Haryana, 14th edn., 2017).

³ AIR 1992 SC 1959.



Legislative Assembly or Legislative Council of a State—

(a) if he holds any office of profit under the government of India or the government of any state, specified in First Schedule, other than an office declared by Legislature of the State not to disqualify its holder;”

Article 58(2) and 66(4) deals with disqualification for election as President and Vice-President. They read as under-

“58. Qualifications for election as President-

(2) A person shall not be eligible for election as President if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said governments.”⁴

“66. Election of Vice-President-

(4) A person shall not be eligible for election as President if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said governments.”⁵

Under Arts. 58(2) and 66(4) no person is eligible for election as President and Vice-president respectively “if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said governments.” On the other hand, under Art. 102(1)(a) 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, other than an office declared by parliament by law not to disqualify its holder;” and Art. 191(1)(a) makes the same provision mutatis mutandis for being a member of the Legislative Assembly or Legislative Council of a State.⁶ Therefore, it is clear that a person shall be disqualified for election or membership if the person holds an office of profit.

The essential conditions as laid down under Article 102(1)(a) to hold an office of profit

1. there must be an office of profit
2. it must be under the Government of India or Government of any State
3. it must not be declared by Parliament not to disqualify its holder.

ESSENTIAL CONDITIONS TO HOLD OFFICE OF PROFIT

I. THERE MUST BE AN ‘OFFICE OF PROFIT’

The expression ‘office of profit’, has not been defined in the Constitution or in the Representation of the People Act, 1951. But the courts in various cases have defined it.

Lords in the case of *McMillon v. Guest*⁷, where Lord Wright has opined –“The word

⁶H.M. Servai, *Constitutional Law of India* 2148(Universal Law Publishing, Delhi, 4 edn.).
⁷(1942) A.C 561.

⁴The Constitution of India
⁵*Ibid.*



'office' is of indefinite content. Its various meanings cover four columns of the new English Dictionary, but I take as the most relevant for purposes of this case the following; a position or place to which certain duties are attached, especially one of a more or less public character."

In *Deorao v. Keshav Lakshman Borkar*⁸ the court held that the word 'office' necessarily implies that there must be an existence of office apart from the person who holds it. It must exist independently of the holder of the office.

In *S.S. Inamdar v A.S. Andanappa*⁹ the Apex court opined that profit means any pecuniary gain or material gain.

If there is really a gain, its quantum or amount would not be material; but the amount of money receivable by a person in connection with the office he holds may be material indicating whether the office really carries any profit.¹⁰ For the purposes of Article 102(1) and 190(3) a ministership either of the Union or of a State is not considered an office of profit. The word "Minister" occurring in Article 191(2) includes a deputy minister as he performs functions and has obligations similar to those of a Minister.¹¹

In case of *Shibu Soren vs. Dayanand Sahay & Ors*¹² it was held by the Supreme Court that it is the substance not the form which

matters and even the quantum or amount of "pecuniary gain" is not relevant. What needs to be found out is whether the amount of money receivable by the concerned person in connection with the office he holds, gives to him some "pecuniary gain", other than an 'compensation' to defray his out of pocket expenses, which may have the possibility to bring that person under the influence of the executive, which is conferring that benefit on him.

In case of *Jaya Bachan v. Union of India (UOI) and Ors.*¹³ declared that the post of Chairperson of Uttar Pradesh Film Development Council that is held by the petitioner as 'office of profit'. The court further held that it is immaterial if a person actually obtained a monetary gain or not. What is material is the fact that by virtue of his position the person is capable of yielding a profit or pecuniary gain.

SUPREMO AMICUS

II. IT MUST BE UNDER THE GOVERNMENT OF INDIA OR GOVERNMENT OF ANY STATE

It is therefore essential that the office so held by any person must be an office under the government.

In case of *Chandrasekhar Raju v. Vyricherla Pradeep Kumar Dev and Another*¹⁴ the Supreme Court, held that:

“(1) The power of the Government to appoint a person in office or to revoke his appointment at its discretion. The mere control of the Government over the authority

⁸ AIR 1968 Bom 314.

⁹ (1971) 3 SCC 870.

¹⁰ Shivamurthy Swami vs. Agadi Sanganna Andanappa, (1971)3 SCC 870.

¹¹H.M. Servai, *Constitutional Law of India*

2149(Universal Law Publishing, Delhi, 4 edn.).

¹² AIR 2001 SC 2583.

¹³ 2006 (5) SCALE 511.

¹⁴ AIR1992 SC 1959.



having the power to appoint, dismiss, or control the working of the office employed by such authority does not disqualify that officer from being a candidate for election as a member of the Legislature.

(2) The payment from out of the Government revenues are important factors in determining whether a person is holding an office of profit or not of the Government. Though payment from a source other than the Government revenue is not always a decisive factor.

(3) The incorporation of a body corporate and entrusting the functions to it by the Government may suggest that the statute intended it to be a statutory corporation independent of the Government. But it is not conclusive on the question whether it is really so independent. Sometimes, the form may be that of a body corporate independent of the Government, but in substance, it may just be the alter ego of the Government itself.

(4) The true test of determination of the said question depends upon the degree of control the Government has over it, the extent of control exercised by very other bodies or committees, and its composition, the degree of its dependence on the Government for its financial needs and the functional aspect, namely, whether the body is discharging any important Governmental function or just some function which is merely optional from the point of view of the Government."

Supreme Court in case of *Shivamurthy Swami vs. Agadi Sanganna Andanappa*¹⁵ said the test which may be applied to

determine whether an office is "office of profit" under the state government thus: -

"(1) whether the Government makes the appointment;

(2) whether the Government has the right to remove or dismiss the holder;

(3) whether the Government pays the remuneration;

(4) what are the functions of the holder and

(5) Does the Government exercise any control over the performance of those functions?"

III.

IT MUST NOT BE DECLARED BY PARLIAMENT NOT TO DISQUALIFY ITS HOLDER

Parliament may enact a law which may declare that a holder of an office of profit is not disqualified. By the virtue of the power conferred on the Parliament, it enacted that Parliament (Prevention of Disqualification) Act, 1959 which exempts certain offices as not to disqualify their holders for membership of Parliament. This Act provides that if a Member/Director of a Statutory or non-statutory body/ company is not entitled to any remuneration other than the compensatory allowance, the Member would not incur disqualification for receiving those allowances. Under Section 2 (a) of the said Act, "Compensatory allowance" has been defined as any sum of "money payable to the holder of an office by way of daily allowance (such allowance not exceeding the amount of daily allowance to which a Member of Parliament is entitled

¹⁵ (1971) 3 SCC 870.



under the Salary, Allowances and Pension of Members of Parliament Act, 1954), any conveyance allowance, house-rent allowance or travelling allowance for the purpose of enabling the member to recoup¹ any expenditure incurred by the Member in performing the functions of that office”.¹⁶ 2.

In the case of *Consumer Education and Research Society V. Union of India*¹⁷, Supreme Court clearly held that when the amending act “retrospectively removed the I. disqualification with regard to certain II. enumerated offices, any member who was holding such office of profit, was freed from the disqualification retrospectively, as of the date of the passage of the Amendment Act, none of the Members who were holding such offices had been declared to be disqualified by the President.”

For holding that a person holds an office of profit or not, the Supreme Court Considering the subjectivity of the topic held that all the determinative factors need not be conjointly present. The critical circumstances, not the total factors, prove decisive. A practical view, not pedantic basket of tests, should guide in arriving at a sensible conclusion. (*Madhukar G.E. Pankakar v. Jaswant Chobbidas Rajan, A.I.R.1976, S.C. 2283*)¹⁸

Therefore, if a person holds an office of profit, the person shall be disqualified on the ground of holding it.

¹⁶Sixteenth Lok Sabha, Report: *Joint Committee on Offices of Profit*(2017).

¹⁷ (2009) 9 SCC 648.

¹⁸Sixteenth Lok Sabha, Report: *Joint Committee on Offices of Profit*(2017).

Two important questions which now arise in relation to ‘office of profit’ and the Advocates Act are-

Whether practicing law in courts by MP’s and MLA’s fall under office of profit?

Whether there is violation of Article 14, Advocates Act, 1960 and Rule 49, Bar Council of India Rules if MP’s and MLA’s are permitted to plead in courts as advocates?

MP’s AND MLA’s AS ADVOCATES AND THE ‘OFFICE OF PROFIT’

As per the Advocates Act, 1961, section 2 (a) states that an “advocate” means an advocate entered in any roll under the provisions of that Act.

As per article 102 (1)(a) the office of profit must be under the government of India or the Government of any State.

Supreme Court in case of *Shivamurthy Swami vs. Agadi Sanganna Andanappa*¹⁹ said the test which may be applied to determine whether an office is “office of profit” under the state government thus:-

“(1) whether the Government makes the appointment;

(2) whether the Government has the right to remove or dismiss the holder;

(3) whether the Government pays the remuneration;

(4) what are the functions of the holder and

¹⁹Supranote 15 at 5.



(5) Does the Government exercise any control over the performance of those functions?"

Applying the test laid down in the above-mentioned case, it is clear that the Members' of Parliament do not hold an office of profit because working as an advocate is not an employment under the Government of India or the Government of any state. MP/ MLA's are not appointed as advocates by the Government, nor does the Government have the right to remove or dismiss them. The Government does not pay any remuneration to them and it certainly does not exercise any control over the performance of the functions of such MP/MLA who practices as an advocate.

In the case of *Mahadeo v. Shantibhai and Ors.*²⁰ the question for consideration was whether appointment of a person on the panel of lawyers by Railway Administration can be held to be an office and is that office is one for profit? The Court, in that case referred to observation of Lord Wright of the House of Lords in the case of *Millon v. Guest*²¹, where Lord Wright has opined – "The word 'office' is of indefinite content. Its various meanings cover four columns of the new English Dictionary, but I take as the most relevant for purposes of this case the following; a position or place to which certain duties are attached, especially one of a more or less public character." and opined that it is difficult to hold that the person held any office of profit under the Government.

The Supreme Court of India further observed in All India Bar Examination case

that right to practice law is a fundamental right of every person who holds a law degree.²²

*In Re. Lily Isabel Thomas*²³ the Supreme Court held that right to practice is equal to enlightenment to practice. Further section 30 of the Advocates Act, 1961 states that-

"30. Right of advocates to practice. — Subject to provisions of this Act, every advocate whose name is entered in the State roll shall be entitled as of right to practice throughout the territories to which this Act extends, —

(i) in all courts including the Supreme Court; (ii) before any tribunal or person legally authorized to take evidence; and (iii) before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practice."

The act nowhere mentions that a person who is an MLA/ MP shall be debarred from practicing as an advocate or the name of the person shall not be entered into the state roll. Therefore, as per the aforementioned section, an advocate can practice law as a matter of right conferred to him under the Advocates Act, 1961.

This protection to practice on any trade, business or profession is further given under article 19(1)(g) of the Constitution of India. Since practicing law is a profession, therefore, it is the fundamental right of a law degree holder to carry on the profession of

²⁰ [1969]2SCR 422.

²¹Supranote 7 at 3.

²²[www.livelaw.in/right-to-practice--law-is-a-fundamental-right-and-aibe-negates-the-very-right-sc/\(Visited on February 4,2018\).](http://www.livelaw.in/right-to-practice--law-is-a-fundamental-right-and-aibe-negates-the-very-right-sc/(Visited%20on%20February%204,2018))

²³ 1964 CriLJ 724.



his choice, namely, practicing as an advocate in the courts in India.

The Supreme court in *Bhagwati Prasad Dixit Ghoshal v. Rajeev Gandhi*²⁴ held that a member of Parliament drawing salary cannot be said to hold an office of profit.²⁵ The same is applicable to MP's practicing as advocates in the courts and drawing a salary therefrom.

The rationale behind the concept of 'office of profit' and maintaining separation of powers between executive, legislature and judiciary does not work in India. Disqualification on the basis of office of profit seems to be incorrect as in India, there is no water tight compartment for separation of powers. It is imprudent to think that members of ruling party will act independently of their government. Therefore, even absence of perks cannot ensure that there will not be any undue influence on them. Further, certain offices are exempted from being held as Office of profit to enable disqualification of a member of parliament. If such exemptions are allowed then it clearly indicates that the doctrine of separation of power is not complied with in all circumstances and therefore, allowing MP's and MLA's to plead in court is not against the law.

Section 24 and 24A of the Advocates Act states the qualifications of any person for admission as advocate on State roll and disqualification for enrolment.

“24. Persons who may be admitted as advocates on a State roll. -(1) Subject to the provisions of this Act, and the rules made thereunder, a person shall be qualified to be admitted as an advocate on a State roll, if he fulfills the following conditions, namely:

- (a) he is a citizen of India
- (b) he has completed the age of twenty-one years;
- (c) he has obtained a degree in law
- (e) he fulfils such other conditions as may be specified in the rules made by the State Bar Council under this Chapter...”

“24A. Disqualification for enrolment. — (1) No person shall be admitted as an advocate on a State roll—

- (a) if he is convicted of an offence involving moral turpitude;
- (b) if he is convicted of an offence under the provisions of the Untouchability (Offences) Act, 1955 (22 of 1955);
- (c) if he is dismissed or removed from employment or office under the State on any charge involving moral turpitude.

(2) Nothing contained in sub-section (1) shall apply to a person who having been found guilty is dealt with under the provisions of the Probation of Offenders Act, 1958 (20 of 1958) ...”

III. MP's AND MLA's PLEADING IN COURTS AS ADVOCATES AND THE RELEVANT LAWS

²⁴ 1986 SCC (4) 78.
²⁵Government of India, Report: *Joint Parliamentary Committee to Examine the Constitutional and Legal Position Relating to Office of Profit*(2008).



Therefore, section 24 and 24A deal with admission of a person to get enlisted on state roll after which the person will be considered as an advocate as defined under section 2(a) of the Advocates act, 1961. Section 24A deals with disqualification for enrollment but the legislature has not provided any express disqualification for Member of Parliament from getting enrolled as an Advocate. Unless a disqualification is incurred or section 24 is not complied with an application for enrollment to Bar Council of the respective state cannot be cancelled, except as provided under section 26A where BCI has been conferred the power to remove names from roll of persons who are dead or of the person who has made a request in this behalf, and therefore, MLA's/MP's have the right to plead in the court.

Section 49 of the Act deals with general power of the Bar Council of India to make rules. Clause (1) states that The Bar Council of India may make rules for discharging its functions under this Act. By virtue of this power conferred on the Bar Council, it formulated the Bar Council of India Rules.

As per Part VI, Chapter-II, Section VII, Rule 49 of the Bar Council of India Rules:

“An advocate shall not be a full-time salaried employee of any person, government, firm, corporation or concern, so long as he continues to practice, and shall, on taking up any such employment, intimate the fact to the Bar Council on whose roll his name appears and shall thereupon cease to practice as an advocate so long as he continues in such employment.”

As per this rule an advocate shall not be a full-time salaried employee but the question

of salary arises only when there is an employer-employee relationship. Such a relationship comes into existence only when a contract of employment is executed between the parties. MLA's and MP's are not government employees because they have not entered into any contract with the government. They fulfill their constitutional duties which are of public nature and do not enter into any contract of service or contract for service. They do not work for the government, they instead form the government. They are not appointed by the government of India, rather they are elected and the Election Commission sends in a notification to the Lok Sabhasecretariat accordingly.²⁶ In *M. Karunanidhi v. Union of India*²⁷ the court categorically held that MP's and MLA's are public servants, though the employer-employee relationship will not apply to them. They draw their salary from the consolidated fund of India but this does not even remotely present the idea that they are government employees, even the CJI draws salary from the Consolidated Fund of India. Further their salary is taxable under the head income from other sources and not under the head income from salaries as they are not employees any more than working partners of partnership firms are. They are co-owners and in recognition of this fact they cannot pay salary to themselves.²⁸

²⁶ <http://www.google.co.in/amp/www.firstpost.com/economy/why-should-our-mps-enjoy-twin-i-t-exemptions-when-they-are-out-of-tds-regime-2327274.html/amp> (Visited on February 10, 2018).

²⁷ 1979 AIR 898.

²⁸ <http://www.google.co.in/amp/www.firstpost.com/economy/why-should-our-mps-enjoy-twin-i-t-exemptions-when-they-are-out-of-tds-regime-2327274.html/amp> (Visited on February 10, 2018).



Rule 52 states that “nothing in these rules shall prevent an advocate from accepting after obtaining the consent of the State Bar Council, part-time employment provided that in the opinion of the State Bar Council, the nature of employment does not conflict with his professional work and is not inconsistent with the dignity of the profession. This rule shall be subject to such directives if any as may be issued by the Bar Council of India from time to time.”

In the case of *Dr. Haniraj L. Chulani v. Bar Council of Maharashtra and Goa*²⁹ the court held that a person qualified to be an advocate would not be permitted as one if he is in full-time or part-time service or employment, or is engaged in any trade, business or profession.

Firstly, this case dealt with the rules framed by state bar council and is not related to rule 49.³⁰ It is further clear that in this case even part-time service or employment was not allowed which is contrary to rule 52 of BCI Rules and lastly, the services rendered by MP’s and MLA’s do not fall under the category of trade, business or profession.

Therefore, MLA’s and MP’s cannot be debarred from pleading in the court only on the basis of Rule 49, BCI Rules.

It has been argued that public servants cannot practice as an advocate but legislators are practicing which is a violation of Article 14 and 15 of the Constitution. This is in reality not the correct proposition because there has been no express provision

²⁹ 1996 AIR 1708.

³⁰ <http://www.livelaw.in/bci-sub-committee-decided-not-to-stop-legislators-court-practice/> (Visited on February 6, 2018).

barring MP’s and MLA’s who hold a degree in law from practicing profession. Further, they are different from other public servants like Judges, police personnel’setc. who aid in the justice delivery system itself. There can be a reasonable classification between these. Section 32 of the Advocates Act³¹, 1960 permits appearance of any person not enrolled as an advocate to plead in court and even members of the public are invited to give suggestions when laws are being drafted. Here public comprises of people from all professions, occupations etc. and if they are allowed to plead in courts there is no rational in disallowing legislators to practice as advocates. Therefore, there is no violation of Article 14 or 15.

CONCLUSION

The ‘office of profit’ concept which made way into the Articles of the Constitution of India came into being in the Morley-Minto reforms proposal of 1909. The principle behind this was to keep a check on the temptations that executive can provide to the legislature and to ensure the separation of powers. Judiciary has in its various decisions defined and discussed the scope of office of profit since it has not been defined either under the Constitution of India or the Representation of Peoples Act, 1951. An Act namely, Parliament (Prevention of Disqualification) Act, 1959 was enacted by the legislature which exempts certain offices

³¹Section 32. “Power of Court to permit appearances in particular cases.—Notwithstanding anything contained in this Chapter, any court, authority, or person may permit any person, not enrolled as an advocate under this Act, to appear before it or him in any particular case.”



as not to disqualify their holders for membership of Parliament. This was in addition to the legal provisions of the Constitution of India relating to office of profit. Various legal scholars argue that MLA's and MP's who practice as advocates are holding an office of profit and are thereby, violating Rule 49 of the Bar Council of India Rules. The contention put forward by them is incorrect as MP's and MLA's who practice as advocates do not fall under the disqualification of office of profit since they are not holding any office under the government of India when they practice as lawyers. Further, rule 49 deals with full time salaried employees but since legislators are not employees this rule is also not applicable to them and no question as to violation of Constitution rights arises. Therefore, MP's and MLA's who work as advocates are not barred from doing so under the provisions of any law whether express or implied.

