



## DISQUALIFICATION OF MEMBERS IN THE CONSTITUTION OF INDIA: A CRITICAL ANALYSIS

By Richa Choudhary  
LLM from School of Law, Christ University

### Introduction

Members of Parliament and state legislatures in India are required to have certain criteria under the Indian Constitution. It lays forth the rules that govern how both chambers operate. It also allows members of parliament and state legislatures to be disqualified. These disqualifications have been discussed under the Articles 101, 102, 103, 105 for the Parliament. The corresponding provisions governing disqualifications for the members of state legislature are 191, 192, 193 among others. Disqualification can of members can take two forms; one before the members get elected and other after the member has been elected. The subject matter of this paper is second kind of disqualification.

This paper aims to deal with the intricacies and detailed analysis of the disqualifications. This paper looks into the grounds of disqualifications mentioned under Article 102, the judicial decisions with respect to same and then further analysis of these grounds. The *first part* provides on overview to disqualification and specifies five such grounds for disqualifications. The author discusses the notion of a profit office in the *second part*. The author has attempted to comprehend the notion and judicial tendencies in defining what defines an office of profit in this chapter. The notion of expulsion will be discussed in the *third part*. Despite the fact that the Constitution as well as Rules of Procedure and Conduct governing each house of parliament do not

explicitly provide for power of expulsion, the author has resorted to House of commons and its application to Parliament. In the *fourth part*, the author looks into the disqualifications under The Representation of Peoples Act, 1952.

### Disqualification of Members of Parliament: An Overview

Article 102(1) provides for disqualifications of members of members. This Article provides for five grounds. To begin with, a member is disqualified if he or she has a profit-making position in the federal or state government that is not disclosed by parliament. Second, if a member is found to be mentally ill by a competent court. Finally, whether such a person is still bankrupt. Fourth, anybody who is liable to disqualification as a result of any legislation passed by parliament. Finally, if a person is no longer an Indian citizen or has gained citizenship in another country. The article further clarifies that a member cannot be disqualified because he or she is a minister. The decision to disqualify a member under Article 102(1) is made by President after consulting with Election Commission in accordance with Article 103. Also, it is the competent court which adjudges whether a person is of unsound mind or undischarged insolvent.

The 85th Amendment Act which added 10th Schedule to the constitution also added Article 102(2) of the Constitution. This amendment was made to ensure that a member does not defect from one political party to another after getting elected to legislature. If the question arises with respect to disqualification of member as per Article 102(1), under Article 103(1), the decision of president in consultation with Election Commission would be final. The Supreme



Court in its decision has observed that final order must always be based on the opinion of Election Commission. In this case, the Council of Ministers has no say.<sup>1</sup>

The Supreme Court went on to explain that the governor's point of view was really the Election Commission's point of view, and that the governor did nothing more than issue an official order.<sup>2</sup> In order to reduce political pressure to reduce decisions with respect to disqualification, the role of President has been reduced. The decision in this respect is the decision of Election Commission. Only the final order is given by President.

Before making a judgement, the Election Commission must conduct a thorough investigation. If a member has been disqualified according to Article 102 (1), the seat of such member becomes vacant as per Article 101(3)(a). It has been held by SC that there cannot be any gap between disqualification and vacancy.<sup>3</sup>

### Office of Profit

Disqualification on account of office of profit exists in other countries apart from India. The American as well as English Constitution have similar provisions. Similar is the case with South African Constitution. This criterion for members of state legislature exists in Article 191(1)(a) of the Constitution.

There has been some debate over what the government considers to be a profit-making office. There are various reasons for this provision's existence.

The provisions of disqualification on account of holding office of profit have been influenced by British Constitution. This idea came up when the power shifted from king to parliament in 1688. The monarchs of the eighteenth century exploited their power by creating titles of nobility without consulting parliament. They used these positions to expand their political power. Therefore, by promoting members of parliament to ministerial posts, the King could wield greater control over parliament. After offering such posts to various ministers, the king could get hold of parliament. The parliament thus became nothing more than an office of people who in any way were propagating the agenda of the king. There was a resulting disregard of the voters who had elected them.<sup>4</sup>

Under the US constitution however, there is a difference. Article 1, Section 6 of the US constitution enunciates:

*“No Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”*

The US constitution being strictly presidential does not allow for members of parliament to also be ministers. Even in India, the question of what constitutes an office of profit has come into question several times. The profit in the article refers to some pecuniary gain from the office. Money given to meet out of pocket expenditure connected with the office does not count for ‘profit’ to

<sup>1</sup> Election Commission of India v. Dr. Subramaniam Swamy, AIR 1996 SC 1810.

<sup>2</sup> M.P Jain, INDIAN CONSTITUTIONAL LAW 40, (6th edition, (2012).

<sup>3</sup> Lily Thomas v. Union of India, (2013) 7 SCC 653.

<sup>4</sup> Steven G. Calabres, Joan L. Larsent, *One person, One office: Separation of Powers or Separation of Personnel?* 79(1045) CORNELL LAW REVIEW 1047, 1052 (1993).



classify it as 'office of profit'.<sup>5</sup> However, it does not matter whether the person actually received pecuniary gain from the office, all that is considered is if the person stood to gain from the office. The issue emerged in the case of *Jaya Bachchan v. Union of India*, in which Bachchan was prevented from standing for parliament after becoming the Chairperson of the Uttar Pradesh Film Development Council. She was paid a daily allowance, as well as an honorarium of Rs 5000. The Supreme Court ruled that it was a for-profit office, and the election commission's decision to disqualify her was affirmed.

The question of determination of office of profit also depends on the amount of power exercised by government on an entity. A teacher at a government-aided primary school cannot be considered to be in a position of profit under the government since the school retains its own identity, personality, and property.<sup>6</sup> Another important consideration is that it must be an 'office'. A lawyer hired by the government to represent it in a specific lawsuit cannot be regarded to have a profit-making 'office.'

In the case of *Satrucharla Chandrasekhar Raju v. Vyricherla Pradeep Kumar Dev*,<sup>7</sup> the Supreme Court established five criteria to evaluate whether a member was holding a profit-making position. Those are mentioned below:<sup>8</sup>

- 1) If the appointment is made by the government
- 2) If the government has the authority to

remove or dismiss the officeholder

- 3) Is the salary paid by the government or by the private sector?
- 4) Whether the holder of the office performs the tasks of the office for the government
- 5) If the government has control over the holder's responsibilities and functions.

In collaboration with the chairman of the Rajya Sabha, G.V. Mavalankar, the then speaker of the Lok Sabha, formed a committee to investigate the office of profits. The committee's goal was to look at a variety of difficulties and tangents related to disqualifications for holding a profit-making post so that parliament could come up with complete legislation. After receiving the suggestions and report from the committee, the parliament came up with a bill which was introduced in lower house in 1957. After that, the bill was forwarded to a joint committee. The bill was passed with few amendments in 1959. After the bill was passed, a joint committee was constituted for office of profit. The job of the committee is to continuously examine the composition of government bodies and report to parliament whether any membership within these bodies would attract a disqualification for any member of parliament.<sup>9</sup>

The term "profit office" may not apply to all offices. Section 3 of the Prevention of Disqualification Act of 1959 established several exceptions. This section provides some offices which would not attract

<sup>5</sup> *Umrao Singh v. Darbara Singh*, [1969] 1 SCR 421.

<sup>6</sup> *Govinda Kurup v. S.A. Paul*, AIR 1961 Ker 242.

<sup>7</sup> AIR 1992 SC 1959.

<sup>8</sup> *Id.*

<sup>9</sup> Joint committee on Office of Profit available at [http://164.100.47.192/loksabha/writereaddata/Abstract/joint\\_committee\\_of%20offices\\_of\\_%20profit.pdf](http://164.100.47.192/loksabha/writereaddata/Abstract/joint_committee_of%20offices_of_%20profit.pdf) (Last Visited on March 20, 2022).



disqualification on account of holding office of Profit. It is believed that this act has the tendency to dilute the provisions of the Constitution. After Jaya Bachchan was disqualified in 2006, there was an appeal to make amendments to this law. This qualification was on account of holding certain office which are a weapon of the ruling parties to quell internal dissent within the party. These offices can be considered as office of profit but they are rarely brought under that ambit. It has also been declared by the court that it is permissible to retrospectively remove a disqualification.<sup>10</sup> This means that parliament may amend the law to individually remove the disqualification of particular members. This creates a real danger of the constitutional provision being diluted by an amendment the law motivated by political considerations.

### Expulsion

In the earlier chapters, the discussion was related to the topics which were independent of the behaviour of the members. In order to ensure the proper working of both the houses of Parliament, it is very important to regulate the behaviour and conduct of the members therein. Such regulations would help in preventing disruptions of the house and at the same time ensuring that the business of house if taken care of without much of a hassle. The members of the parliament enjoy immunities under the guise of parliamentary privileges to discharge their duties effectively. These privileges also make them immune to various suits and actions. However, there are limits to which these privileges can be enjoyed and immunity be granted to these members. In

order to ensure proper working and dignity of the house, the house has been granted with power to expel a member. It's worth noting that neither the Constitution nor the Lok Sabha's Rules of Procedure and Conduct of Business expressly confer expulsion authority. Rule 259 of Rules of Procedure of Rajya Sabha provides that the chairman shall preserve the order of the house and in preserving the order, he shall have the necessary powers to enforce his decisions. To ensure this. Rule 256 empowers the chairman to bring a motion to suspend a member for a maximum period of remaining session of the house. Only the house has the powers to take action against acts and omissions of the members. This exclusive power to house is absolute. However, expulsion may also be attracted in the case where the conduct of member, whether inside or outside the house, may affect the dignity of individual.<sup>11</sup>

To understand this, reference can be made to first instance of expulsion. In 1951, a committee was asked to submit a report in the matter of Mudgal accepting monetary considerations. After the report of the committee, the said member was expelled from the house. There have been several instances of disqualifications of members after this incident. These include but are not limited to disqualification of Subramaniam Swami in 1976, Indira Gandhi in 1978 among others. Quite recently, in consideration of taking money in exchange of questions, a member was disqualified from the parliament.

The Supreme Court in the case of *Raja Ram Pal v. Speaker*,<sup>12</sup> looked into the case of

<sup>10</sup> Kanta v. Menak Chandra, 1970 SC 694; *see also*, Ibmcha v. Chandranani AIR 1977 SC 682.

<sup>11</sup> Parliamentary privileges available at [http://rajyasabha.nic.in/rsnew/rsat\\_work/chapter-](http://rajyasabha.nic.in/rsnew/rsat_work/chapter-)

8.pdf (Last Visited on April 23, 2022).

<sup>12</sup> Raja Ram Pal v. Speaker, Lok Sabha & Ors, (2007) 3 SCC 184.



whether expulsion amounts to disqualification of member. The Supreme held it affirmative that disqualification does not amount to expulsion.<sup>13</sup> The Supreme Court differentiated between disqualification and expulsion. It held that while expulsion implies that a member is unable to hold a seat in the opinion of the house, disqualification attack the root of qualifications of candidates making such person unable to hold a seat in parliament. Additionally, the house has the powers to use force if it is absolutely necessary to expel a member.

Disqualifications/expulsion and parliamentary privileges are contrary to each other. In order to understand the former better, latter must also be resorted. The unamended Article 105 provided that the privileges of house would be parallel to those of England. However, with the passage of time, such resort to British privileges, in the opinion of jurists and judges, had the capability of affecting the sovereignty and spirit of the constitution. In light of this, Article 105 was amended through 44<sup>th</sup> Amendment Act in 1978. This article now provides for privileges as prescribed by parliament through a law. It was also made clear that until such law is made, the privileges prior to 44<sup>th</sup> Amendment Act continue to exist. However, the modification has not yet been implemented since no such bill has been passed by parliament. As a result, privileges in our nation are still governed by the privileges that exist in the House of Commons and British norms. Looking through a different perspective, the Parliament would not want to restrict its own

powers and privileges after enacting such law.

Expulsion is considered as one of the methods of punishment in House of Commons. Malcom Jack, in the book Parliamentary Practice highlights few situations where members have been expelled from the house.<sup>14</sup> These include but not limited to proceedings to expel on the basis fo reports of commissions, fleeing from justice without a conviction being recorded. Following the principles of natural justice, the member is given an opportunity to vindicate himself before the expulsion takes place. It's also important to consider the Supreme Court's and other High Courts' roles in determining the extent and degree of these rights. The courts have considered the situations to determine whether the privilege was rightly applied or not. The court concluded that Articles 101 and 102 do not constrain the ambit of 105(3).<sup>15</sup>

### Representation of Peoples Act

Disqualifications for membership are addressed in the Indian Constitution under Article 102. A member may be disqualified "by or under any legislation established by the Parliament," according to clause (1)(e) of this article. One such statute is the Representation of People's Act of 1951. Following that, it was changed.

Disqualification of a member of parliament is dealt with under Sections 8 to 10A of the Representation of People's Act. A list of laws may be found in Section 8. These are the laws that enable a member of parliament to be removed from office if he or she is convicted

<sup>13</sup> *Id.*

<sup>14</sup> Malcolm Jack, Erskine May, PARLIAMENTARY PRACTICE, 199, 24th edition (2011)

<sup>15</sup> Raja Ram Pal v. Speaker, Lok Sabha & Ors, (2007) 3 SCC 184.



of a crime. Sections 8(3) and 8(4) are highly debatable. They declare that if a member is convicted of a crime and sentenced to at least two years in prison, they will be expelled, that member will be excluded. This disqualification began on the day of his conviction and will last for another six months after he is released. If a disqualification does not take effect for three months after a conviction, and the member files an appeal or a revision application within that time, the disqualification does not take effect until the appeal is resolved by the court. This essentially is rendered ineffective. This is because by the time the trial is concluded post the appeal; the member of the parliament has already completed his term.

There has been an increase in political criminalisation. *The Law Commission Report of 2014* covers the developments regarding this in past few years and also deals with the Representation of People's Act. The Association for Democratic Reforms released some data on criminalisation in politics. It revealed that in 2013 general elections, 17% of candidates had some sort of criminal case pending against them. There were heavily "serious" criminal charges against 11% of the candidates. Even among the winning candidates, a percentage of them had cases against them. To be specific, as the data revealed, 34% out of the winning candidates had criminal charges pending in their names, and 22% had "serious" criminal charges against them.<sup>16</sup> This is clearly disappointing to see that the law makers of our country are involved in such activities. There has been an attempt to regulate the election of people who have criminal convictions through the Representation of

People's Act. However, problem arises as the Act is not able to regulate the internal administration that occurs in the political parties. In these political parties, members who have criminal convictions continue to flourish and stay on top. In this way, they manage to influence the happenings and law making that take place in the Indian Parliament.

Section 8(4) was declared illegal by a two-judge panel of India's Supreme Court in 2013. In the case of *Lily Thomas v. Union of India*, this was the case. The court pointed out that this clause distinguished between "candidates and legislatures." This was due to the fact that it gave sitting lawmakers a three-month window to file an appeal. In the case of a member of the legislative assembly or a member of the parliament, however, he was disqualified by virtue of 103(1) the instant he was convicted (a). However, a five-judge Supreme Court panel previously affirmed the validity of the Section 8 provision (4). The court examined this phrase in relation to Article 14 of the Indian Constitution in this case. On the grounds that when a member of parliament is disqualified, the composition of the House is changed, the court deemed it fair and equitable to make a difference between serving members of parliament and candidates. As in the Lily Thomas case, this case did not examine Section 8(4) in light of Article 102(1)(e).

The Supreme Court's ruling in *Chief Election Commissioner v. Jan Chaukidar* must also be considered. In this case, the Supreme Court construed the Representation of People's Act to affirm the High Court of Patna's decision that, under Section 62(5) of the

<sup>16</sup> Lok Sabha election summary available at <http://myneta.info/ls2014/> (Last visited on April 23,

2022).



Representation of People's Act, a person who is in the legal custody of the police must be barred from voting. The 1951 Representation of People's Act defines a representative "Elector" is defined as a person "who has not been disqualified under Section 16 of the People's Representation Act, 1950." "According to Section 16, if a person has been excluded from voting, he is unable to serve in an electoral duty (c). According to Section 4(d) of the Representation of People's Act, 1951, a person must be an elector to be eligible for membership in the Lok Sabha.

The 244th Law Commission Report assesses the possibility of a comparable petition for disqualification when a charge sheet is filed against a sitting member of parliament. The idea of adopting such a provision was dropped at the National Consensus stage. The police report the evidence acquired during the investigation to the relevant court when a person is charged under the Criminal Procedure Code- Section 173. This is done so that the court can figure out what provisions the accused must be prosecuted under. The court does not go into detail about the decision of guilt on the side of the defendant of the accused. At this stage, disqualification amounts to penalty in the form of making a person giving up his seat even before he is found or established to be guilty. The other side argues that the process of framing of charges, and not conclusively establishing the guilt on part of the accused, still involves application of the judicial mind. This is because it has to be determined whether the suspicion raised is enough to proceed against the accused. This is a way to prevent false cases being filed.<sup>17</sup>

There is also chance of misuse in the cases of disqualifications of members who are standing for elections. Before the elections, a candidate could be arrested on a pretext. This would disqualify him from contesting the elections. Therefore, it does not seem fair to make a differentiation between sitting members and candidates.

This potential for abuse must be addressed as soon as possible. The Law Commission of India has given some recommendations for the same. These recommendations are mainly in regard to the cut off period, the period for applicability and the types of offences which could lead to disqualification of a member.

The Law Commission of India has proposed that any offences with a potential penalty of five years or more should result in the member being charged being disqualified. This is in regards to the sorts of offences that might result in a member's disqualification. When charges are presented against a sitting member of parliament or a sitting member of the legislative assembly, the trial must be expedited. It must be carried out on a daily basis. This whole procedure must be finished within a year. If the trial cannot be completed within the above-mentioned time frame, the individual is disqualified for a year. All of the person's remunerations, including his ability to vote, must be stopped at the conclusion of the time.

The Law Commission's proposals distinguish between candidates who run for office and incumbent members. In the case of candidates, disqualification occurs immediately, that is, the candidate is disqualified as soon as the charge-sheeting occurs if the restrictive requirements are not

<sup>17</sup> 244th Report of the Law Commission of India, Electoral Disqualifications (2014).



satisfied. Members of parliament and legislative assemblies, on the other hand, are allocated a one-year duration of service. Disqualification indicates that a person is deemed "unfit" to serve in the House of Representatives. Hence, it does not seem reasonable to give an extended time period in case of sitting members of parliament and members of legislative assemblies.

However, one can argue that this is done to ensure protection to the House composition. But these recommendations go against the decision in the *Lily Thomas* case. This decision was delivered one year before the Report of the Law Commission was released; that there should be no differentiation between sitting members and candidates and that there is no power in the hands of the parliament to give disqualifications to members under Article 102. It has to come into effect the moment the disqualification happens. The Supreme Court struck down Section 8(4) as unconstitutional for this very reason. The Law Commission of India in its recommendations has provided for the time period of one year to conduct the trial of sitting members of the parliament or sitting members of the legislative assemblies once the filing of charge-sheet takes place. On the other hand, for candidates, their disqualification is brought into force immediately.

### Conclusion

On a conclusory note, the author wishes to highlight the role of President under Article 102. It is an example of the President failing to act on the advice and assistance of the council of ministers. The final decision with respect to disqualification is made by Election commission, the role of President is only limited to the extent of issuance of final order. Even before such final order is issued

by Parliament, the member stands disqualified. However, the seat which goes vacant after the disqualification of member is only filled after the President issues final order.

In the second part, the author has dealt with office of Profit and what would constitute an office of Profit making a person disqualified from parliament. The way in which the disqualification has been dealt by Parliament is troublesome. The Prevention of Disqualification Act of 1959 empowers the Parliament to remove a retrospective disqualification. This implies that if a member of ruling party or coalition party stands disqualified, the parliament may resort to bring in some amendments to the law to remove such disqualification and apply that prospectively. It is also seen that in several cases, members belonging to the ruling or coalition parties have continued to hold office and no notice have been taken of it in an attempt to quell internal dissent. These trends clearly indicate a dilution of the constitutional provision.

The third and fourth parts, respectively, deal with expulsion and the Representation of People's Act. In terms of expulsion, the Supreme Court has ruled that the parliament has the authority to eject a member even if no specific law exists. It is because of the fact that codification would limit the powers and boundaries of the members of parliament. The Representation of Peoples Act also deals with disqualifications. Section 8(4), a controversial section which allowed deference of disqualification for a period of three months was held to be unconstitutional by the Supreme Court in the case of Lily Thomas.

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