



Decision on questions as to disqualification of members of Parliament: A Comparative Study with U.S.A., U.K., Australia and French Indian position

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Introduction

Article 103 of Indian Constitution says

- i) If any question arises as to whether a member of either House of Parliament has become subject to any of the disqualifications mentioned in clause (1) of Article 102, the question shall be referred for the decision of the President and his decision shall be final.
- ii) Before giving any decision on any such question, the President shall obtain the opinion of the Election Commission and shall act according to such opinion.”

Article 103: Decision of dispute as to disqualification of members

Contrary to the English practice, the decision of questions as to whether a duly elected member has become disqualified, is left to the President who, however, is required to act according to the opinion of the Election Commission. The President's decision is final and the courts shall have no jurisdiction to question the validity of the Presidents' decision, except on the ground that he has acted otherwise than according to the opinion of the Election Commission, for 'finality' can attach only to *intra vires* exercise of the power, when a power is limited by conditions. The word 'Shall' in Cl. (2) of the Present Art. Also indicates that the President's obligation to act according to the opinion of the Election Commission is absolute. It is also to be noted that there is nothing in the present Article, corresponding to the provision in Article 74 (2), ante.

Cl. (1): Question as to disqualification

1. That a question for the application of the Clause are-
 - i) That a question as to disqualification has arisen. The Clause however, does not lay down where, by whom and in what manner the question should arise. ^[1] It is *not* necessary that it should arise in the Legislature itself. It also does not indicate the proper method for referring such question to President or Governor as the case may be. But in deciding such question, the President or the Governor neither consult his council of ministers nor decide the matter himself. "He has to forward the question to the Election Commission for his opinion and act according to the opinion received. Though the matter is decided by the Election Commission, it is announced in the name of the President or the Governor. The Election Commission holds an enquiry before giving an opinion. ^[2] The power

conferred under this Article cannot be regarded as a power of removal of a member of Parliament by the President. ^[3]"

- ii) That question must be referred to the opinion of the President. It does not, however, say that some other authority must receive the complaint, hold an inquiry and then refer it to the decision of the President. If any such question arises in any manner, it has to be decided by the President alone and the courts shall have no jurisdiction to determine it. ^[4]
- iii) Though the ultimate decision is that of the President, the Constitution has practically left it to the Election Commissioner, to whom the complaint is forwarded by the President, to try the complaint, arrive at its decision and then pronounce it in the *name of the President*. ^[5]

'Has become'. - It has been held by the Supreme Court, ^[6] that the words 'has become' in Arts. 103 (1) and 192 (1) indicate that the scope of these Articles is restricted to *post election* disqualifications, so that the question whether a member was disqualified at *the time of election* cannot be referred to the President or the Governor under either of these Articles. Such a question may be raised only in an election petition, under Sec. 100(1) (a) of the Representation of the People Act, 1951, as amended in 1956.

Cl. (2): Opinion of the Election Commission

1. When a question as to the disqualification of a member is referred to the President, he is bound to obtain the opinion of the Election Commission on the question, and is bound to give his decision in accordance with such opinion. ^[7] The Government has no discretion in the matter. ^[8]

It was held that "on a conjoint reading of the two clauses of Art. 192, that over a question of the type mentioned in the first clause is referred to the Governor alone meaning thereby is raised before the Governor, and the Governor and the Governor alone must decide it, but this must be taken after obtaining the opinion of the Election Commission and the decision which is made final is that decision which the Governor nor has taken in accordance with the opinion of the Election Commission. In effect and substance, the decision of the Governor must depend on the opinion of the Election Commission and none else, not even the Council of Ministers. Thus the opinion of the Election Commission is decisive since the final order would be solely based on that opinion. ^[9] It was further held in that case that the Election Commission acts in a

quasi-judicial capacity while adjudicating the question as disqualification and principle of natural justice have to be followed including the rule against bias. In that case, it was contended that Chief Election Commissioner was disqualified to participate in the decision because Subramaniam Swamy's wife was engaged as counsel in a case filed by Seshan. Supreme Court directed that a decision be taken by the other two members of the Commission and in case of differences of opinion; Chief Election Commission may decide the case on the Principle of doctrine of necessity.

A peculiar question arose in *K. Venketachalam v. A. Swamickon*.^[10] In that case, a disqualified person got elected and no election petition was filed. Long after the period of limitation to file an election petition, a writ petition under Art. 226 to declare that the election of the successful candidate as void. It was held that High Court could declare the election void as he had no basic constitutional or statutory qualification to stand for election and directed that the Government should recover the penalty under Art. 193 (Article 104). It was observed that Art. 226 is couched in the widest possible terms and unless there is a clear bar of jurisdiction of the High Court, its power under Art. 226 can be exercised when there is an act which is against any provision of law or violating of constitutional Provision and when recourse cannot be had to the provision of the Representation of the People Act for appropriate rating.

Judicial Review is maintainable against the decision of the President or Governor if it is based on no evidence whatsoever regarding the alleged disqualification or when the decision is perverse.^[11]

2. Under the Provisions of the Representation of the People Act, 1951, the Election Commission has to make an inquiry into the facts causing the disqualification alleged and, for that purpose, he may require the respondent to furnish information on matters relevant to the inquiry.^[12]

Before seeking for an action under Art.103 (2), there should be specific plea of disqualification and unless it is alleged that the person complained of has incurred any one of the disqualification by or under law made by Parliament, no further action would be contemplated under Art.103 (2).^[13]

Analogous provision. - The provisions of Art. 192 relating to the State Legislatures are exactly similar.

While the decision of questions are relating to disqualifications of members of Parliament is vested in the President, the decision of election disputes is to be made by such authority as is prescribed by Parliament, under Art. 329 (b), post.

Art. 103 of the Constitution will be applicable only if the member incurs the disqualification after he becomes the member of the Parliament and not if he was disqualified after to be chosen as member of the Parliament or he was not qualified to be chosen to fill a seat in the Parliament - "*G.Y. Bhandare v. E.J.J. Sequeira*".^[14]

When an elector submitted a petition to the President of India under Articles 84, 101-104 of the Constitution alleging that the returned candidate has become subject to the disqualification mentioned in Article 102(1) and the President sought to the opinion of the Election Commission under Art. 103(2), it was held that the President acted both in the exercise of Constitutional authority and in the discharge of his

Constitutional Commission "*Election Commission of India v. N.G. Ranga*".^[15]

"A writ petition seeing direction to the President of India to forward the representation of the petitioner, pertaining to disqualification of Dr. Manmohan Singh, M.P. and to obtain opinion of the Election Commission as per Art. 103 was held not maintainable, as, inter alia, no specific plea of disqualification was made in the petition against the said M.P." - "*Madras Citizens Progressive Council v. President of India*".^[16]

Question of qualification or disqualification- Role of Courts

Role of courts is limited to questions of disqualification or disqualification of candidates, and elected representatives as clearly laid down in the relevant statute. Qualification or otherwise in the background of education qualification is not a field where courts have any role to play - "*Baljeet Singh v. Election Commission of India*".^[17]

Disqualification incurred by chairman of Interim Council of Jharkhan Area Autonomous Council as a candidate for election to the Council of States, cannot be held to be removed by Parliament (Prevention of Disqualification) Act, 1959 on the ground the Chairman of Interim Council enjoyed status of Minister, as the Jharkhand Area Autonomous Council Act nowhere provides that Chairman enjoys status of Ministers - "*Daya Nand Sahay v. Shibu Soren*".^[18]

Office of Profit Legal Options

"To constitute an 'office of profit' under Article 102 (1) (a) of the Constitution, there are three conditions are to be satisfied that:

- (i) There should be an office to which an appointment is made,
- (ii) It should be an office of profit,
- (iii) The office should be one under the Govt.

However, the Parliament (Prevention of Disqualification) Act 1959 specifies certain offices, which will not come within the purview of the disqualification, and several offices have been added after the enactment of the law."

Article 103 says "If any question arises as to whether a member of either house of Parliament has become subject to any of the disqualifications mentioned in Article 102, the question shall be referred for the decision of the President and his decision shall be final. Before giving any decision on any such question, the President shall obtain the opinion of the Election Commission and shall act according to such opinion."

In the case of *Jaya Bachchan*, President A.P.J. Abdul Kalam acted on the advice of the Commission to disqualify her as a member of the Rajya Sabha since she held the post of chairperson of the Uttar Pradesh Film Development Council

(A) England: Either House of Parliament has the right to provide for its due composition and to decide questions as to the legal qualifications of its members.

- (a) If it is alleged that any candidate who has been elected is disqualified, his right to sit and vote in the House of Commons must be decided by the House itself.

As regards disqualifications arising under the House of Commons Disqualifications Act, 1957, 1975, the House itself

has been empowered to give relief in proper cases, where disqualification is alleged in the House. Apart from this, the Act gives a right to any person to seek a declaration by an application to the Crown that a member of the House is disqualified under the Act. Application shall then be referred to the judicial committee Act, 1833. As regards disqualification under the Act, this is an alternative method to an election petition, though without time limit. The judicial committee may direct an issue of fact to be tried in the High Court whose decision shall be final. A declaration may not be made however, if an election petition is pending or has been tried or if the House of Commons has directed that the disqualification shall be disregarded. ^[19] This jurisdiction of Privy Council is, however limited to disqualifications incurred under the House of Commons Disqualification Act, 1957.

(b) Since the Parliamentary Election Act, 1868, replaced by the Representative of the People Act, 1949, cases of election disputes (as distinguished from questions relating to disqualifications of members where the election is not disputed by a petition under these Acts) are determined not by the House but by two Judges of the High Court who are appointed to hear election petitions. The Judges report their decision to the House and the House then passes orders for giving effect to the decisions. [see, further, under Art. 324 post]. The distinction is clearly brought by the following observations in Anson's Law and Custom of the Constitution. ^[20]

"The House has given over to the Law Courts the right to determine controverted elections: that is to say, which are called in question on the ground that a candidate, otherwise properly qualified for a seat, has been, returned in an informal manner, or by reasons who are not entitled to vote, or by votes procured through improper inducements. But it retains the right to pronounce at once on the existence of legal disqualifications in those returned to Parliament, and will declare a seat to be vacant, if members returned is subject to such disqualifications, without awaiting for the return to be questioned by persons interested in the matter." ^[21]

(B) U.S.A: Under Art. I. Sec.5 (1) or the American Constitution, similarly-

'Each House shall be the judge of the elections, returns and disqualifications of its own members'.

Hence the power to decide both election disputes and question relating to the disqualification of members belongs to each House of Congress. In exercising this power each House acts as Judicial Tribunal, having the power, to summon witnesses ^[22] and to punish them for perjury. ^[23]

(C) Japan: The Japanese Constitution, similarly [Art. 55], gives to each House the power to judge disputes relating to disqualification of its members; but a special majority of two-third of the members present is required to unseat a member.

(D) West Germany. - Art. 41 of the West German Constitution of 1949 says:

"(1) The Scrutiny of elections is the responsibility of the Bundestag. It also decides whether a deputy has lost his seat in the Bundestag.

1. Against the decision of the Bundestag an appeal can be made to the Federal Constitutional Court.

2. Details will be regulated by a Federal law."

(E) France: Art. 8 of the Constitution of the Fourth French Republic Provided:

"Each of the two chambers shall be judge of the eligibility of its members and of the regularity of their election."

Under the Constitution of 1958, the matter is left to be dealt with by an organic law(Art.25).

(F) Australia: Section 47 of the Australian Constitution Provides :

"Until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representative, or respecting a vacancy in either House of the Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises."

According to this provision, thus, question as to disqualification of a member as well as election disputes are determined by the House itself

(G) Canada: Section 33 of the British N.A. Act provides:

"If any question arises respecting the qualification of a Senator or vacancy in the Senate the same shall be heard and determined by the Senate."

Sec. 41 provides:

"Until the Parliament of Canada otherwise provides, all laws in force in the several Provinces....relating to the following matters or any of them namely,-the qualifications and disqualifications of persons to be elected or to sit or vote as members of the House of Assembly or Legislative assembly in the several Provinces.....the trial of controverted elections, and proceeding incident thereto, the vacating of seats of members....shall respectively applies to elections of members to serve in the House of the Commons for the same several Provinces.

References

1. Brindaban v. Election Commissioner, AIR 1965 SC 1892: (1965) 3 SCR 53.
2. See Ramakrishna Hegde v. State, AIR 1993 Kant 54.
3. Narsimha Rao v. State (CBI/SPE), AIR 1998 SC 2120
4. Brindaban v. Election Commissioner, AIR 1965 SC 1892: (1965) 3 SCR 53.
5. Ibid.
6. Election Commission of India v. Saka Venkata Rao, (1953) SCR 1144.
7. Election Commission v. Ranga, AIR 1978 SC 1609
8. Ibrahim v. Election commission, AIR 1957 All 292.
9. See Election Commission of India v. Dr. Subramania Swamy, AIR 1996 SC 1810.
10. AIR 1999 SC 1723: (1999) 4 SCC 526.
11. Kihota Holluhan v. Zochillhu, AIR 1993 SC 412: see also Haja Shariff K.S. v. His Excellency the Governor of Tamil Nadu, AIR 1985 Mad 55.
12. Election Commission v. Ranga, AIR 1978 SC 1609: (1978) 4 SCC 181.
13. Madras Citizen Progressive Council v. President of India, AIR 1995 Mad 16.
14. AIR 1972 Goa 11.
15. (1978) 4 SCC 181.
16. AIR 1995 Mad. 16.
17. AIR 2001 Delhi 1 (8).
18. AIR 2001 Pat. 79.

19. See Hood Phillips and Jackson ON Constitutional and Administrative LAW, 8th Edn. 2001, Chap. X, ‘‘THE House of Commons’ para 10.013. at p. 207. See also Constitutional Law and Administrative Law by A.W. Bradley and K.D. Ewing, 13th Edn. 2003, Chap IX, ‘‘Composition and Meeting of Parliament’ at p. 172.
20. ANSON’S LAW AND Custom OF THE Constitution, 1922, VOL. II, PP.181-82, HALSBUR’S 4th Edn. Vol. 15. Paras, 573, 930.
21. Michael Davitt’s case, (18882) 137 CJ 140; Wenslydale Peerage case, (1856) 140 Hans 3.
22. Barry v. U.S., (1929) 279 US 597 (616)
23. Loney, in re, (1980) 134 US 372.