

The right of legislators to practice law

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Manifest Pedagogy

Office of Profit has been a recurring issue this year through Parliamentary Secretaries being nominated by many states. The concept involves both analytical and factual details around hence making it highly relevant for both Prelims and Mains. It should be studied comprehensively as below

1. Indian Polity and Office of Profit
2. Governance and Office of Profit
3. Ethics and Office of Profit

In news

Sc allows practicing law for MPs

Placing it in the syllabus

Separation of powers between various organs dispute redressal mechanisms and institutions.

Static dimension

1. Office of Profit
2. Constitutional Provisions on it
3. Statutory provisions on it
4. Supreme Court judgments

Current dimension

1. Issue of Parliamentary Secretary
2. Issue of legislators as lawyers

Content

What was the issue?

Supreme Court of India recently allowed the legislators to practice law and dismissed a plea to ban legislators from legal practice.

- The **petition** filed by a BJP leader and advocate Ashwini Upadhyay had challenged the permission given to legislators to double up as advocates, calling it a **violation of Bar Council of India and office of profit rules**, and a conflict of interest. The petition also pointed out that the MPs have the power of voting on the impeachment of judges of the Supreme Court and the high courts.
- The writ petition was filed under **Article 32** seeking ban on Legislators from practicing as an Advocate (for the period they are Member of Parliament or State Assembly) in spirit the **BCI Rule 49 and Article 14** of the Constitution.
- According to BCI Rule 49: "An advocate shall not be a full-time salaried employee of any person, government, firm, corporation or concern, so long as he continues to practise and shall, on taking any such employment, intimate the fact to the BCI and shall cease to practise as an advocate, so long he is in such employment.

SC judgment and reasoning given by it

Supreme Court bench mentioned that the provisions of the **Advocates Act, 1961** and the Rules framed thereunder, do not place any restrictions on the legislators to practice as advocates during the relevant period. The closest rule framed by the Bar Council of India is Rule 49 which, however, has no application to the elected people's representatives as they do not fall in the category of full-time salaried employee of any person, firm, government, corporation or concern.

What is the concept of 'office of profit'?

MPs and MLAs, as members of the legislature, hold the government accountable for its work. The essence of disqualification under the office of profit law is if legislators hold an 'office of profit' under the government, they might be susceptible to government influence, and may not discharge their constitutional mandate fairly. The intent is that there should be no conflict between the duties and interests of an elected member. Hence, the office of profit law simply seeks to enforce a basic feature of the Constitution- the principle of separation of power between the legislature and the executive.

According to the definition, what constitutes an 'office of profit'?

The law does not clearly define what constitutes an office of profit but the definition has evolved over the years with interpretations made in various court judgments. An office of profit has been interpreted to be a position that brings to the office-holder some financial gain, or advantage, or benefit. The amount of such profit is immaterial.

In 1964, the Supreme Court ruled that the test for determining whether a person holds an office of profit is the test of appointment. Several factors are considered in this determination including **factors** such as:

1. Whether the government is the appointing authority.
2. Whether the government has the power to terminate the appointment.
3. Whether the government determines the remuneration.
4. What is the source of remuneration, and
5. The power that comes with the position.

What does the Constitution say about holding an 'office of profit'? Can exemptions be granted under the law?

Under the provisions of **Article 102 (1)** and Article 191 (1) of the Constitution, an MP or an MLA (or an MLC) is barred from holding any office of profit under the central or state government. The articles clarify that “a person shall not be deemed to hold an office of profit under the government of India or the government of any state by reason only that he is a minister”. The Constitution specifies that the number of ministers including the Chief Minister has to be within 15% of the total number of members of the assembly (10% in the case of Delhi, which is a union territory with legislature).

Provisions of Articles 102 and 191 also protect a legislator occupying a government position if the office in question has been made immune to disqualification by law. In the recent past, several state legislatures have enacted laws exempting certain offices from the purview of office of profit.

Parliament has also enacted the Parliament (Prevention of Disqualification) Act, 1959, which has been amended several times to expand the exempted list.