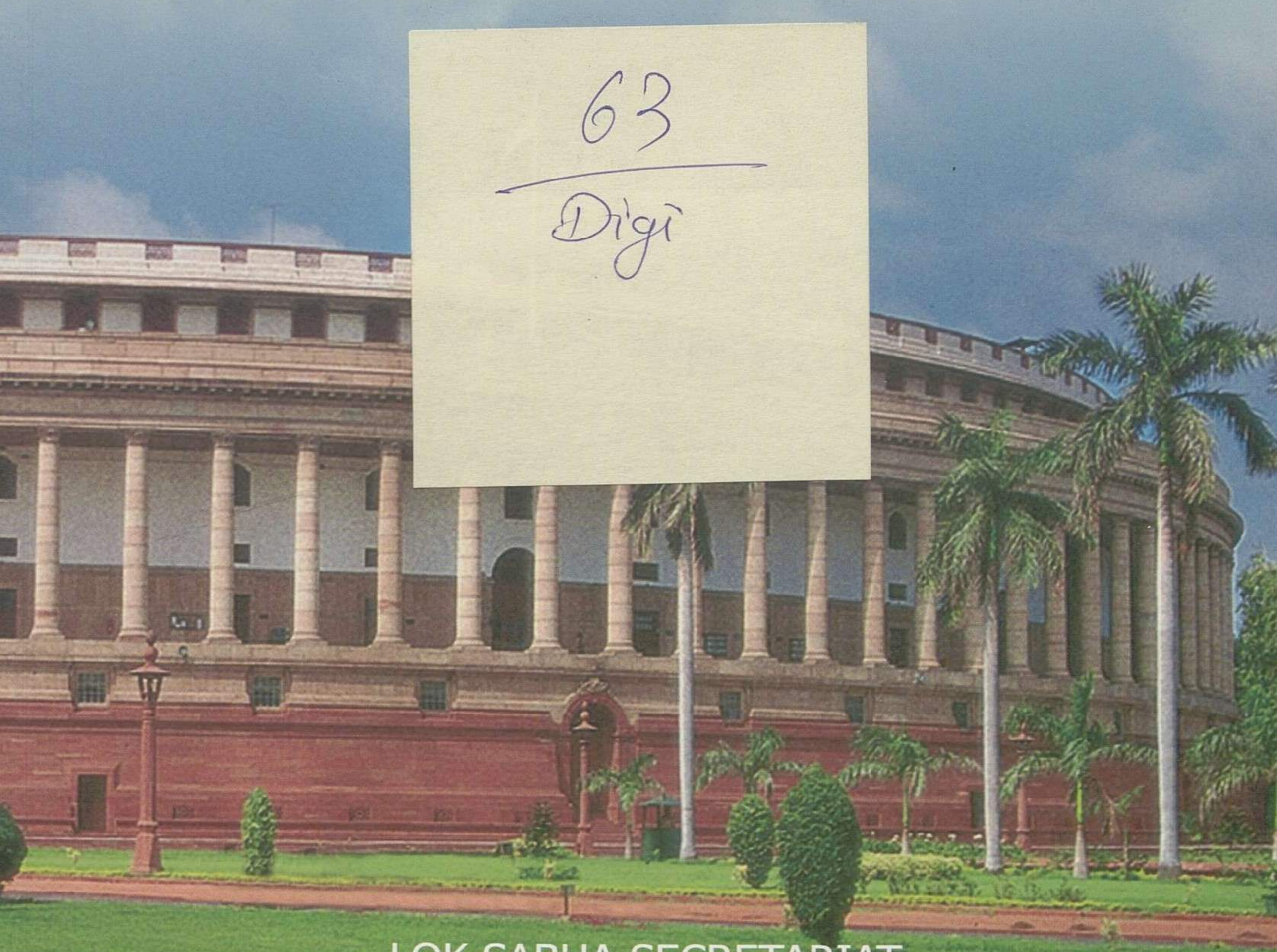
Joint Committee to Examine the Constitutional and Legal Position Relating to Office of Profit

(FOURTEENTH LOK SABHA)

Evidence

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LOK SABHA SECRETARIAT
NEW DELHI
DECEMBER, 2008 / AGRAHAYANA, 1930 (SAKA)

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LOK SABHA

JOINT COMMITTEE TO EXAMINE THE CONSTITUTIONAL AND LEGAL POSITION RELATING TO OFFICE OF PROFIT

EVIDENCE

Laid on the Table of Lok Sabha on 22.12.2008
Laid on the Table of Rajya Sabha on 22.12.2008



LOK SABHA SECRETARIAT
NEW DELHI

December, 2008/Agrahayana, 1930 (Saka)

CB.No. 521

Price : Rs. 150.00

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Published under Rule 382 of the Rules of Procedure and Conduct of Business in Lok Sabha (Twelfth Edition) and printed by Jainco Art India, New Delhi.

The JOINT COMMITTEE TO EXAMINE THE CONSTITUTIONAL AND LEGAL POSITION RELATING TO OFFICE OF PROFIT

COMPOSITION OF THE COMMITTEE

Shri Iqbal Ahmed Saradgi — *Chairman*

MEMBERS

Lok Sabha

2. Shri V. Kishore Chandra S. Deo
3. Shri Santosh Gangwar
4. Dr. Satyanarayan Jatia
*5. Shri Ganesh Prasad Singh
6. Shri A. Krishnaswamy
7. Shri Madhusudan Mistry
8. Shri Mohammad Salim
9. Shri Rajesh Verma
**10. Vacant

Rajya Sabha

11. Shri Virendra Bhatia
12. Shri Arun Jaitley
13. Shri Ram Jethmalani
14. Dr. Abhishek Manu Singhvi
15. Shri Sitaram Yechury

SECRETARIAT

1. Shri P.K. Grover	—	*Joint Secretary*
2. Shri R.S. Misra	—	*Director*
3. Shrri Kusal Sarkar	—	*Deputy Secretary-II*
4. Shri D.K. Arora	—	*Senior Committee Assistant*

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* Nominated *w.e.f.* 22 May, 2008 *vice* Shri Raghunath Jha resigned.

** *Vice* Prof. Ram Gopal Yadav (ceased to be member of Lok Sabha consequent on his election to Rajya Sabha *w.e.f.* 14.11.2008.

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JOINT COMMITTEE TO EXAMINE THE CONSTITUTIONAL
AND
LEGAL POSITION RELATING TO OFFICE OF PROFIT

WITNESSES EXAMINED

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JOINT COMMITTEE TO EXAMINE THE CONSTITUTIONAL AND LEGAL POSITION RELATING TO OFFICE OF PROFIT

RECORD OF EVIDENCE TENDERED BEFORE THE JOINT COMMITTEE TO EXAMINE THE CONSTITUTIONAL AND LEGAL POSITION RELATING TO OFFICE OF PROFIT

Friday, the 17 November, 2006 from 1500 hrs. to 1730 hrs. in Committee Room 'D' Parliament House Annexe, New Delhi.

Shri Iqbal Ahmed Saradgi—*Chairman*

MEMBERS

Lok Sabha

2. Shri V. Kishore Chandra S. Deo
3. Shri Santosh Gangwar
4. Dr. Satyanarayan Jatia
5. Shri Raghunath Jha
6. Shri A. Krishnaswamy
7. Shri Madhusudan Mistry

Rajya Sabha

8. Shri Virender Bhatia
9. Shri Arun Jaitley
10. Shri Sitaram Yechury

WITNESSES EXAMINED

1. Shri Fali S. Nariman, Senior Advocate
2. Shri Rustom S. Gae, former Law Secretary, Government of India

MR. CHAIRMAN: Shri Nariman,

I welcome you to this hearing of the Joint Parliamentary Committee constituted to examine the Constitutional and Legal position relating to Office of Profit. Being a constitutional and legal expert, you are well aware of various aspects of the Constitutional Provisions and the underlying constitutional principles regarding the concept of Office of Profit. The Joint Parliamentary Committee would like to benefit from your knowledge and experience in finding answers to various issues related to the subject.

Before we start our discussion, let me state that the proceedings of the Committee are to be treated as confidential and are not to be made public till the Report of the Committee is presented to Parliament. I would also like to make it clear that your evidence shall be treated as public and is liable to be published at the time of report, unless you specifically desire that all or any part of the evidence given by you is to be treated as confidential. Further, I may also make it clear to you that even though you might desire that your evidence is to be treated as confidential, such evidence is liable to be made available to the Members of Parliament.

Since the list of points has already been sent to you, you may kindly make your submissions point-wise. Hon. Members may have some clarifications wherever necessary.

SHRI FALI S. NARIMAN: Thank you, Mr. Chairman and hon. Members. I am grateful to you for having called me and asked me for my views. None of my views are confidential. They can be published because I do not believe in any confidentiality on matters of public importance.

I have taken the liberty of seeing your excellent points for discussion and I, therefore, prepared my response which you will first permit me to read and then I will answer any questions that you or hon. Members would like to ask.

I. About defining the term—"office" or "office of profit"—I am of the view that to attempt a definition universally applicable—to each and every case as it arises—is just not feasible.

I do not think that the draft definition suggested in the List of Points which may be used by the Joint Parliamentary Committee would cover all possible cases that could conceivably arise in future.

II. I am of the opinion that each case must be left to be judged in the light of relevant provisions of the statute in question establishing or creating the "office", and in the light of its own peculiar facts: always keeping in view the overall object of enacting Article 102 (1) (a) and Article 191 (1) (a)—which is that there should not be seen to be any conflict between the duties and interests of an elected Member. In other words, these Articles are designed to ensure that Parliament and State Legislatures do not have Members who receive from the Executive largesse or benefits in any form—and who may on that account be perceived as being under its obligation, and thus, become amenable to its influence, whilst discharging important Legislative Functions.

This purposive interpretation of Articles 102 (1) (a) and 191 (1) (a) has received acceptance from the Courts ever since the Constitution was enacted—right up to the leading case of Shibu Soren *vs.* Dayanand Sahay 2001 (7) SCC 425 (3 Judges). Any new approach to these Articles would create unnecessary confusion in settled law.

III. I am in agreement with the view tentatively expressed in the Points for Consideration that the Constitution (Ninety-first) Amendment Act, 2003, which placed a ceiling on the Council of Ministers in the Union and in the States, and prohibited Members disqualified on ground of defection from holding any "remunerative political post" till they get re-elected, would be defeated if prevention of disqualification statutes, enacted in the Centre or in the States, were to include a very large number of "offices". If my suggestion made in paragraphs IV (A) and IV (B) below finds acceptance, I would submit that Parliament need no more have recourse to adding to the already over-burdened schedule with a further list of "offices" declared not to disqualify its holders.

MY RECOMMENDATION

IV(A). I would recommend the insertion of a specific provision in the Constitution to the following effect: *viz.* that a person shall not be disqualified for being chosen as, and for being a Member of either of House of Parliament or of a State Legislature, only because that person holds an office under the Government of India or the Government of any State, whether it be an office or profit or not, so long as that person does not in fact receive or enjoy any benefit whatever, monetary or otherwise, in connection with the holding of that office.

IV(B). It should also be clarified in a sub-clause inserted in article 103 (and in corresponding provision article 192) that where a person holds any office (whether an office of profit or otherwise) under the Government of India or the Government of any State, and a question arises as to whether that person has or has not received, or has or has not enjoyed a benefit (monetary or otherwise) in connection with the holding of that office, the burden of proving that he or she has not received or enjoyed any benefit with reference to that office shall be on the person who holds that office.

IV(C). The above should be in addition to the existing prevention-of-disqualification law as enacted and as amended.

IV(D). Provisions, as suggested by me above in IV (A) and IV (B) above will enable responsible Members of Parliament and responsible Members of State Legislature to freely perform additional public duties that may be entrusted to them by Central or State Government authorities from time-to-time without any possible risk arising of a conflict of interest. In other words, it would enable the Centre and the State (in the course of their ever increasing welfare activities) to avail of the services of public-spirited Members of Parliament (and of State Legislatures), without fear of it being perceived by the public as the exercise of some form of control by the Centre (or the State) over its elected representatives in legislative bodies.

I now come to specific comments on the Section which has not been put in and I have a serious view about it.

V. Specific comments on Section 4 of the Parliament Removal of Disqualification Amendment Act 2006.

You will recall that that is a validation provision.

(A) It is settled law that the power to amend laws includes the power to amend laws retrospectively. This has been said to the context of article 191 of the Constitution (see Kanta Kathuria *vs* Nanak Chand: AIR 1970 SC 694—a Bench decision of four Justices). But I am of the opinion that a statutory provision like Section 4 of the Parliament (Prevention of Disqualification) Amendment Act 2006 should not remain on the statute-book and should be deleted—on higher principles of public morality. In the case of Kanta Kathuria, in the majority judgement of Justice Hidayatullah doubts were raised about "the propriety of such retrospective legislation, but not of the capacity to make laws".

But I am of the view that a validation provision like Section 4 smacks of patronage—of taking care of one's own; it shows that Parliament is exercising its statutory power—"its capacity to make such laws", as Justice Hidayatullah has said—only to protect the pecuniary interests of some of its own Members who had already incurred a disqualification under the Constitution. That was never the intent or purpose of article 102(1)(a) (or of article 191(a)(a): the words in the latter part of these articles "other than an office declared by Parliament by law not to disqualify its holder" mean that the non-disqualification law should be addressed to the office, not to the person holding it: an office may be declared as from a retrospective date not to disqualify its holder but where the holder has already incurred the constitutional disqualification before the enacted law and that disqualification cannot be nullified by a validating statute—but only by a constitutional amendment. A retrospective validation can be made (in accordance with settled law) only to remove a "defect": but a constitutional disqualification previously incurred is not a "defect" that can be removed by a retrospective statutory provision: it can only be removed by a constitutional amendment.

(B) The deeming clause in Section 4(1) "shall not disqualify or shall be deemed never to have disqualified the holders thereof for being chosen as, or for being a Member of either House of Parliament" are words which are looked upon not by lawyers or judges but by members of the general public (not used to the niceties of law-making)—as being targeted only at relieving persons who had held and are holding offices of profit, and not as being targeted at the offices as such.

(C) I would respectfully urge upon this august Committee to recommend that this Special Provision as to Validation and Other Matters (Section 4) be deleted. But if it is so desired and if Parliament, as a body, is convinced—as it appears to have been convinced when it enacted this law, despite the caution expressed by the President—if (as I say) Parliament, as a body, is convinced that in covering large number of cases mentioned in Section 4 there were no conscious violation of the constitutional provisions regarding disqualification (article 102(1)(a), it would be appropriate to invoke Parliament's constituent power under article 368, and not its ordinary legislative power.

(D) By a one-time constitutional amendment the constitutional transgression that had already occurred in the numerous cases (covered by Section 4) could be wiped out and condoned: the reason I recommend this preferred course of action—even if Parliament may possess the statutory power to do so—is that it would send a clear message to all State Legislatures — and this is very important. I am not so bothered about the Parliament, but the State Legislatures must not have this power. The message must come from its heart that the State Legislatures should not have

this—not to utilize their ordinary law making power under article 191 (1)(a) for condoning constitutional transgressions that have been already incurred.

(E) I make this suggestion not in any spirit of bitterness or rancour but merely so that proper conventions are established—conventions which will be reflected in the future course of action to be pursued by State Legislatures. A precedent must not be established (as it would be if Section 4 remains on Parliament's statute-book)—and this is what worries me—that State Legislatures would then be free, by passing retrospective validating laws under the last part of article 191(1)(a), to exonerate its own Members from time-to-time even of deliberate statutory and constitutional transgressions that may occur in the future. What about disqualifications on conviction for certain offences provided for in Section 8 of the RP Act 1951; Or for dismissal for corruption or disloyalty under Section 9 of the RP Act, 1951? The disqualification so (section 8 says) must be from the date of conviction and must continue for six years thereafter and section 9 says that the disqualification is to be reckoned for a period of five years from the date of dismissal. Can (or should) a retrospective validating law be passed by the State Legislature under article 191(1)(a) removing such disqualification of the current holder of that office? Possibly it can (though I doubt it) if section 4 remains on the Parliamentary Statute Book: but should such a law be passed by a State Legislature? In my view definitely not. This is the point where "power" and "propriety" conflict—and I would submit that "propriety" must always prevail.

(F) I would humbly suggest that it does not behove a body like Parliament to retain a provision like section 4 on its Statute Book. My request is please delete it and pass a one-time constitutional amendment exonerating the large body of members (covered by existing section 4) from the constitutional transgressions that each of them may have incurred: which transgressions were neither deliberate nor intended, but were incurred by a misunderstanding of the true legal position. Even the true legal position in some respects was in doubt. It will be recalled that in the case of Jayabachchan *vs* Union of India decided in May 2006 by the Supreme Court, the Supreme Court had refused to follow its own two previous decisions in 1969 and 1975 which had held that the "office of profit" disqualification was not attracted where there was no "pecuniary gain". But the Supreme Court held in Jayabachchan's case that those decisions should be confined to the fact of those cases and that the true test was whether pecuniary gain was "receivable" in regard to the "office", not whether pecuniary gain was in fact received or received in negligible amounts. The decision in this case itself would justify the need for a constitutional amendment, namely, nullifying past constitutional transgressions of certain individual members based on impressions conveyed by past decisions of the Supreme Court itself: but I do beseech you, do not do this by ordinary law, by maintaining section 4, it will set a bad precedent for State Legislatures. Please take recourse to your constituent power under article 368 because it is a power exercisable only by Parliament as a constituent body, never by State Legislatures.

This is my comment on section 4 regarding other matters which are specifically incorporated.

(1) I do not recommend designating an authority to give decisive opinions as to whether a particular office under the Government (Central or State) is or is not "Office of Profit" this must be left to the established Courts of the land.

(2) I do not think that there should be a Joint Committee on Office of Profit as a permanent measure: since it would not redound to the status of such a Joint Committee to have its decisions (Recommendatory or otherwise) negated at some time or another by the established Courts.

(3) I do not think it is possible or advisable in our constitutional scheme "to simplify the process of amendment to the Parliament (Prevention of Disqualification) Act". On the contrary, I believe that it should not be used in the future in view of my suggestion already made in Clauses IVA and IVB.

(4) I do not agree to a "negative list" as attempted by the Constitution 42nd Amendment Act, 1976 which amended Article 102 and Article 191. It is true that it had the advantage of clarity and certainty, but it had fundamentally altered the object and purpose of the Articles. I am against the reintroduction of a provision regarding disqualification as envisaged by the Constitution 42nd Amendment Act.

(5) It is true that unlike in England, India is a vast country with a very large number of Government bodies and it may not be possible to exhaustively define all offices which would subject the holder to disqualification, but from that it does not follow that "it would be more appropriate if the Act of Parliament identified those offices which would not result in disqualifying its holders. This would be a Herculean task. The more appropriate provision would be that suggested in IVA and IVB above.

Thank you.

If there are any questions, I would be happy to answer them.

MR. CHAIRMAN: Thank you for your valuable suggestions made on the subject matter. Most of the points have been covered. One of the Terms of Reference given to the Joint Parliamentary Committee was to have a comparative study with the law prevailing in UK and Australia. I would like to know whether that system of law can be considered and adopted. It is because it has been mentioned many times that that procedure is very simple and the Parliament of UK used to issue the circulars yearly to announce which office amounts to office of profit or which does not amount to office of profit. I would like to have some more clarifications specifically on this point.

SHRI FALI S. NARIMAN: My own view is that we should not go by the UK procedure for the reason that the United Kingdom does not have a written Constitution. That is the basic point. There, Parliament is supreme. Not only is it supreme, as said in Keshav Singh's case here, it is the High Court of Parliament. So, it exercises even judicial power in England. That is why, even after England has joined the European community and the European Union, it still does not have power; courts do not have power to strike down laws of Parliament. They can only declare that these laws will not be operative until Parliament otherwise decides. So, the supremacy is of Parliament. Under our written Constitution, until we alter it, at least the position is that the Constitution is supreme and the supreme interpreter of the Constitution is the Supreme Court whether we like it or do not like it. I would just like to tell you the conditions are very different in each country. I am very averse because I have no doubt; for instance you know how the Tenth Schedule operates. I would just like to give you an instance. The Tenth Schedule operates perfectly well with the Speaker here. There is no difficulty. There are one or two cases which have been decided. It has not operated at all well in the States for various reasons which we need not go into. Therefore, I am very worried that if we set this precedent, like Section 4, then why should not State Legislatures exonerate all its Members from time-to-time whenever it chooses, depending on the whim of the party in power? If the party in power has a particular majority, it can always pass retrospective validating registration. Then, where is the Constitutional morality? Where is Section 8; Where is your Section 9; Where is your Section 10 of the RP Act?

Persons who are convicted of imprisonment, have to be disqualified for six years. You can remove the disqualification by a simple majority of the State Legislature. This is worrying me. Therefore, I would beseech you to consider it very carefully because the State Legislatures will say: "Parliament has done it, why should we not do it?" Therefore, I am suggesting a way out because I am not saying that let all these Members resign or let all these Members go back and hold the mini national election. That is a disaster. I do not accept it. Have a Constitutional amendment. It is because you have a dual role. As a constituent body, you can pass a Constitutional amendment; State Legislatures cannot pass, fortunately. Only Parliament can pass. Therefore, the very same provision which you want can be included in a Constitutional amendment. The message will then go out: "No, do not do this." It is because I have serious doubts about the Constitutional validity of Section 4. Rest is all right, but I have very serious doubt.

MR. CHAIRMAN: One of the Terms of Reference given to the Committee is to suggest a comprehensive system of law applicable to the State Governments and the Union Territories. As it has been mentioned by you that States should not have such powers. In the context given by the Terms of Reference, what would be the suggestion to have a system of law? What type of system of law can be there that should be applicable to all the States and Union Territories?

SHRI FALI S. NARIMAN: That is what I was respectfully suggesting for your consideration that if we had a positive provision in the Constitution, as I suggested in paragraph 4, then whether you hold an office of profit or an office under the Government of the Centre or the State, so long as you do not take any honorarium, take any perquisite in respect of that office, then there is no difficulty. Exonerate them; there is no difficulty. You get the benefit. It is because we do know the Members of Parliament and Members of the State Legislatures have to perform now several functions. Let them perform it. Raise your salaries; I have no objection; I have no difficulty. I would be the first person to support it. Raise the salaries of State Legislators. Why do we have this hypocrisy that we are taking only Rs. 2,000 or Rs. 3,000; and then we go out and take Rs. 30,000 from public sector undertaking? Why this hypocrisy? There is no need for that. Why should we not face it? Take the largest amount possible. You are doing enormously good work in my opinion. State Legislatures are also doing enormously very good work. Please increase your salaries. There is no difficulty. Nobody is going to say anything about it or he will not be able to say anything about it.

MR. CHAIRMAN: The subject matter given to this Committee is to define Office of Profit; Articles 102 and 191 are there. You have already made valuable suggestions. Apart from this, would you like to suggest any workable definition?

SHRI FALI S. NARIMAN: I believe, there will be no workable definition which will be universally applicable. Definitions will always fail. Therefore, it is best left. We all know what an office of profit is after working this Constitution for 50 years.

MR. CHAIRMAN: Do you agree that a workable definition is not possible?

SHRI FALI S. NARIMAN: That is right.

MR. CHAIRMAN: If it is not possible, how do you think that the above problems can be overcome?

SHRI FALI S. NARIMAN: That is what I was suggesting; you kindly see my paragraph IVA and IVB.

SHRI SITARAM YECHURY: It is a concrete Constitutional amendment that is proposed.

SHRI FALI S. NARIMAN: Of course.

MR. CHAIRMAN: The questionnaire is already given. Members can seek their clarifications.

SHRI SITARAM YECHURY: Thank you as usual for your very illustrative and enlightening opinion on this. About paragraph IVA-Otherwise, it all sounds very good and logical - my basic problem is this. Suppose an MP is holding an office of profit and suppose we already have your paragraph IVA and IVB in place, when a dispute arises - whether X or Y is holding an office of profit - your definition talks in terms of monetary or otherwise. Then you go on to say in paragraph IVB that the onus of proving whether it is so and so rests with the Member. Can there be any better definition for this 'otherwise'? 'Otherwise' means what? The whole thing is very vague.

SHRI FALI S. NARIMAN: You are right because it is very difficult. But, suppose you are entitled to a car. The Chairman of a Committee would be certainly entitled to a car.

Now, I would respectfully suggest that we could not have it both ways. Once you start, that is a thin end of the way. So, I would respectfully suggest that you exclude all benefits from that particular office and concentrate on what you are elected to do. You are appointed to that office only because you are a Member. Therefore, I would very earnestly suggest that we forget this onus part. I am not very keen on onus. If Section 4A or something like that is adopted, then perhaps there would be no need then to make the lists.

SHRI SITARAM YECHURY: Otherwise, it could mean telephone; it could mean a private secretary; and it could mean even a functional office.

SHRI FALI S. NARIMAN: That is right. It could mean or it could not mean.

Well, that is where your public spirit comes in if you are an elected as a Member. That is why I say, "Why should we have this hypocrisy?" You deserve much more by way of salary or by way of remuneration as a Member. I do not see any reason why you should have only so much and no more. Please have more. I would support it; publicly I would support. You see, this conflict goes on. I am not worried so much about the Members of Parliament. Please do not misunderstand me. I am really worried about the State Legislatures. Once you give this power, you are finished. I am afraid so. That is my very firm opinion. Then, you cannot differentiate between the Centre and the State.

SHRI V. KISHORE CHANDRA S. DEO: Shri Nariman ji, at the outset, you have very rightly said that it is not just feasible to give a gentle definition for 'Office of Profit'. I quite agree with you on that aspect. Well, you have referred to Section 8 of the RP Act. Well, disqualification under Section 8 of the RP Act is actually subsequent to a conviction made by a court of law. There is a sort of a precondition that only if you are convicted for a criminal offence over a period of two years, you will be disqualified. There is a qualitative difference as far as that section for disqualification and this is concerned. Here, this is a specific case, as you have put it in your note. Ultimately, if you do not make a list - it is not practical to make a list - who will decide whether it is an Office of Profit or not, and if a Member is holding an office, which actually will not ultimately be construed to be an Office of Profit and in the meantime some untoward takes place. Is there no recourse for such a Member?

SHRI FALI S. NARIMAN: I think, we are now burdened this Schedule with enormous lists here. I think, it is better if we leave it like that. Whoever accepts that office will get all the perks and all the remuneration. I am not saying you delete that. That will remain. I am only saying for the future. Let us not imagine any more offices to be created. If they are to be created, then at least let us have them without remuneration and without honorarium so that there is no controversy at all. That is my suggestion.

We have a list. Parliament has a list. State Legislatures have a list. I am not saying, "Please abolish them." Whatever is there, even this Section 4, let it remain. My problem about Section 4 is not that there is a list and the existing Members are protected. I am only on the precedent. You are setting a very dangerous precedent by permitting retrospective validation of something when there was no law, when the concerned Member lost his office. Therefore, to constitutionally reverse that, it can only be done by an amendment to the Constitution. That is my view. Why should you take the risk of some proceeding in a court of law where people ultimately will say, "You should not have done this way and you should have done this way." Please do it now. You have the majority. Everybody is going to agree because this is not in order to benefit the Members of the Congress Party or BJP or CPM or any such party. It is across the board. There has been some genuine misunderstanding of the legal position. Therefore, I am sure that a constitutional amendment will be passed without a single adverse vote. I have no doubt about that and it should be passed. There is no difficulty. My problem is that the moment you give this message that here is Section 4, your State Legislatures will pick it up and I am afraid - there are so many State Legislatures - that this provision will be misused. I would not say abused. I have no doubt that it will be misused.

SHRI V. KISHORE CHANDRA S. DEO: The basic spirit behind this entire provision of the Constitution is, as you have rightly put it, that there should not be conflict between one's duties and interest. Could you elaborate a little more on that? Does the interest relate only to monetary or pecuniary gains? What is your concept of that?

SHRI FALI S. NARIMAN: The very purpose is that there should be no pressure seen to be brought. There may not be any pressure at all. What is that pressure? The pressure is of giving you salary as the Chairman of a public enterprise or giving you a motorcar as so and so. Now, all those things are to be avoided if you are to independently fulfil your functions as a Member of Parliament or a Member of the State Legislature. That is the purpose. Therefore, we must at least observe that spirit. There is no difficulty in observing it. Please do not mind my saying so very frankly. Let us not fool the people. Let us not tell them, "Look here, we are getting so much as the salary." If somebody investigates, he will find that Mr. State Legislator is getting not only this much as salary but he is also getting five times the amount because he is also, by reason of being a Member of the Legislature, a Chairman of some organization where he is drawing enormous amount.

The public figures today are in the public eye. The public does not like to see that, in my opinion. I am also a member of the public although I had the privilege to be also a Member of Parliament for a while. I am just saying that. I would personally not like the Members of Parliament to be denigrated like this. It hurts me. I really tell you that. It upsets me when people say, Oh, these Members of Parliament or the Members of the State Legislatures walk away with all the goodies. Why should you walk away with the goodies? There is no need to. We cannot just now today contemplate about the new office. If some new office is going to be created, then please fulfil your duty there, do it free of charge. That is all.

डा. सत्यनारायण जटिया: हमारे सामने प्रश्न आसान है कि सुविधा लेना या सुविधा का न लेना। अगर सुविधा लेनी है तो कितनी लेनी है या बिलकुल नहीं लेनी है। इसी प्रश्न में सारी बात को डिफाइन करना है। सिलैक्टिव होना है, पूरे तौर पर परफैक्शन या डिलीट करना है, यह महत्वपूर्ण है। श्री नरीमन जी ने जो बातें यहां पर कही हैं या जो जानकारी दी है, उसमें इनका कहना यह है कि किसी प्रकार की सुविधा नहीं ली जानी चाहिए, नहीं तो उसे रोकना मुश्किल होगा। कौन कहां लेगा, यहां फिर भी रोका जा सकता है लेकिन राज्यों में यह करना संभव नहीं होगा। इनकी बातें सुनने के बाद यदि हमें किसी अलग-अलग व्यक्ति की क्षमता का उपयोग अलग-अलग जगहों पर लेना है तो निश्चित रूप से यह तय करना पड़ेगा कि उसकी क्षमता का उपयोग अलग-अलग लिया जा रहा है, वह अनावश्यक रूप से न लें। जो काम उसे मिला हुआ है, उसे करने में उसे जो कुछ मिल जाता है, वह प्राप्त करता रहे, यही हम समझ पाये हैं।

SHRI ARUN JAITLEY: I was reading your note. Three or four things arise. As we understand very clearly, in the first instance that Executive is accountable to the Legislature. Therefore, if Members of the legislative bodies take benefits of profit from the Executive, their independence gets compromised. At least there will be a perception of compromise of that independence. Would it be correct if I understand as that is key rationale behind this law?

SHRI FALI S. NARIMAN: Yes, Sir. I believe so because perception is everything. You may not be compromised.

For instance, you or I or any Member here will not be compromised just because somebody is giving you Rs. 5,000. I quite agree. But it is the perception of the public. That is a very great significance because you have to have an image in the public eye. That is very important.

SHRI ARUN JAITLEY: Secondly, what was not one of the original intentions of the framers, but as the Constitutional process evolved over the last 55 and odd years, pursuant to what started in the early Sixties, the recommendations of the Administrative Reforms Commission, the recommendations of various Committees including Justice Venkatchaliya Committee on the Review of the Constitution, the Parliament unanimously amended the Constitution and limited the size in the Centre and the States of the Council of Ministers. And, one of the rationales was that you must have a trim-sized governance. Now, would I be right in assuming that after the second lot of Amendment, if we allow those Members of the Legislative Bodies, who cannot be inducted into Council of Ministers, to enjoy the same monetary and other perquisite facilities, this could be one bypass for violating what is the object of the 2003 Amendment itself?

SHRI FALI S. NARIMAN: That is my view.

SHRI ARUN JAITLEY: Thirdly, there is a perception now amongst the legislators both in the States and the Centre that ultimately there are a large number of bodies, which have to be headed by somebody. There are governmental bodies; there are institutions; there are corporations. Some may need professionals to head; some may need civil servants to head them; some are such where legislative experience or the experience of public life also may help. Should the legislators—this is the other side of the view – altogether be barred from those offices? The argument then put is that: Are these only meant for former civil servants or somebody, and the Members of the Legislative Bodies are completely barred from them? Now, if they are not to be completely barred, then how do we reconcile with the first two that you are seen as conferring? So, from your note, if I put it in my own language, the substance of what you say is that 'if in such offices you have to put Members of the Legislative Bodies, then unlike what is an Office of Profit, and create an institution called an Office Without Profit. And, if somebody gets his salary and

perquisites only as a Member of a Legislative Body, but also chooses to discharge the functions of another body and takes no benefit out of that, then in such a case, if there is some kind of legislative change which incorporates this, would that be a balancing act between these two converse views?

SHRI FALI S. NARIMAN: I now pick up the point, which Mr. Yechury made, and that is, we can accommodate all views, in my opinion. If you say Office Without Profit, I accept that. But as Mr. Yechury said, look here, when the man does go to the office and if he orders a cup of tea or something, then you will suddenly say that : 'Oh, my God, you will receive profit.' By all means, provide for any minimum benefit that he would otherwise receive. It has to be compromised. You have to have a compromise. It is because if you do not set a limit then sky is the limit. If I like Mr. X and I want to influence him, I will offer him a job of Rs. 10,000, as Chairman. But if I do not like some other person, who does not belong to my party, I would not give him a job. Therefore, the two can be accommodated. These two concepts can be woven in as to how it is to be drafted.

SHRI ARUN JAITLEY: This is my last question. On what you said towards the end of Mr. Yechury's suggestion on his point, therefore, would you say that any kind of perquisites, which can be utilized by him otherwise than for this office, let us say, a house, a salary, an allowance, a car, a driver, petrol, would fall on the profit side?

SHRI FALI S. NARIMAN: On the profit side.

SHRI ARUN JAITLEY: Let us say, there are elements. If he is a Chairman, he requires an office, office telephone and office staff.

SHRI FALI S. NARIMAN: Yes, all right.

SHRI ARUN JAITLEY: I am not talking about residential telephone. I am talking about office telephone and office staff. Now, that could be on the permitted side. So, if this is the kind of demarcation comes up, what would happen?

SHRI FALI S. NARIMAN: I agree to it. A line has to be drawn there so that there is no hanky-panky. I accept the point of Mr. Jaitley that you either formulate this particular thing which I have recommended or this may be Office Without Profit. It is a good thing. But the Office Without Profit will not disentitle you to the normal appurtenances of office, namely a telephone; a peon who rushes around and does something for you, *viz.,* telex, fax and so on.

SHRI ARUN JAITLEY: So, it will not disentitle you from office facilities.

SHRI FALI S. NARIMAN: But if he tries to be greedy and then gets a motor car or the Mercedes car etc., then I think, that is where we have to draw a line.

SHRI MADHUSUDAN MISTRY: I have one clarification. Even if it is not an Office of Profit, it is not taking a salary and other things. But these positions were largely used by a number of States in order to get the continuous support, if the Government or one A party or B party was in minority. Supposing, for example you do not pay him a salary and forget about the telephone. But if he is given a power of recruitment, transfer, purchase etc., as a person sitting over there, does that amount an Office of Profit? That is a regular work. How can it not be construed as a bribe for seeking a continuous support by a party, which may be in minority or which may be seeking continuous support to remain in power? How does that compromise here?

SHRI FALI S. NARIMAN: That is a good question. I would suggest that this formula is a good one. If you first start with Office Without Profit, save and accept for office expenses, then all that gets excluded. It is because then, if I have a power to recruit people and take money from them or I have a power to recruit people to the police force or recommend people to the police force with all these appurtenances, then of course, it is bad. Of course, it would be an Office of Profit. If I were a Judge, I would say that and anybody would say it as an Office of Profit. Mr. Mistry has put a very fine question. It is a real problem, which the States always face.

SHRI ARUN JAITLEY: Therefore, keeping this in mind, if I was to ask the citizen in you, not the Constitutional lawyer, given between the two choices – an absolute bar or an Office Without Profit – which one would you suggest?

SHRI FALI S. NARIMAN: Office Without Profit. I think, the public will accept. I have no doubt about it.

SHRI SITARAM YECHURY: I have a fundamental problem, in the sense that we are all talking of profit in terms of its monetary content, finally reducible to its monetary content. Now, we have all talked of the conflict of interest of the Members of the Legislature being a check on the Executive and not being subservient to the Executive, and that is a fundamental contradiction. Conflict of interest arises there. Now, that is not necessarily measurable on the monetary terms alone. That is where the problem comes in.

SHRI FALI S. NARIMAN: It is principally measured in monetary terms, I am afraid. You are right. You can have some philosophical view on that. But principally, it is under monetary terms.

SHRI SITARAM YECHURY: I would tell you why I am raising it. When Mr. Arun Jaitley was the Minister, they brought in an Amendment, and a Law was made for limiting the size of the Cabinet in the smaller States. Now, in this era of Coalition politics, Cabinet size being limited, if you want to accommodate certain allies, whose support is necessary for the Government to be formed or even to survive, you found a way out. It was not to make him as a Minister but to give him a Ministerial rank, by appointing him as Chairman of various committees etc. Now, the rank comes in.

Now, as a Member of the Legislature or Parliament, I can be a Minister and that is not an office of profit. Now, as a Member of Parliament, if I can be a Chairman of the Committee with ministerial rank and hence with ministerial perks, how do you differentiate between the Minister and the person holding the Chairman of a committee with the ministerial rank?

SHRI FALI S. NARIMAN: I think this ministerial rank is a ruse. Nobody should be given ministerial rank except a regular Minister. What is all this? I have never heard of this. Why should you get a ministerial rank?

SHRI SITARAM YECHURY: But it is happening.

SHRI FALI S. NARIMAN: I know but you must set your face against this. This is what the public crying about.

SHRI SITARAM YECHURY: Directly, if you are a Minister, it is not an office of profit.

SHRI FALI S. NARIMAN: I agree.

SHRI SITARAM YECHURY: But if you are a Chairman with the rank of a Minister, then it is considered as an office of profit.

SHRI FALI S. NARIMAN: But look, the Constitution says it is Minister. The Explanation says very clearly it is a Minister, not the person who is holding the ministerial rank. This rank business is our own innovation.

SHRI ARUN JAITLEY: When you add this to 15 per cent, all the Ministers who got excluded came back next day as Parliamentary Secretaries. Now, Parliamentary Secretary is an office which is alien to the Constitution. I can understand if you create it by administrative order, you require one Parliamentary Secretary. Now a State cannot have a Council of Ministers of 12 people and 11 Parliamentary Secretaries.

SHRI SITARAM YECHURY: That is what is happening. Take for example, the Committee on Administrative Reforms or the Committee on Expanding something. All of them become Chairmen with the status of a Minister.

SHRI FALI S. NARIMAN: For this style of a Minister, if necessary, let the Law Minister come with an Act that Minister only means this. This is an endemic thing. In many States, I was shocked to hear that there are 15 Additional Advocates-General. There is one Advocate-General and there are 14 Additional Advocates-General. There is no such thing.

SHRI ARUN JAITLEY: I am sorry. You are understating it. Advocate-General, Additional Advocate-General, Deputy Advocate-General, Attorney-General, like this there are 200 in Punjab.

SHRI FALI S. NARIMAN: There you are.

MR. CHAIRMAN: Every State Law Officer is an Additional or Assistant or Deputy or some Advocate-General.

SHRI FALI S. NARIMAN: You must set some constitutional morality. If you, the Members of Parliament, do not do it, the State Legislators will never do it, and particularly I am very particular about section 4. How did you read it? This whole Bill is of section 4. Let us face it in the four corners of this room. I do not want to say it outside.

SHRI MADHUSUDAN MISTRY: Mr. Nariman, you now feel the concerns and the issues raised by some of the Members on this side. With the given note containing your suggestions, do you now feel that your suggestions take note of these concerns? Or do you still feel that this is all right? Or do you want to amend whatever you have said so that it can be further worked out?

SHRI FALI S. NARIMAN: I do not want to amend it. I think you must leave the drafting to the Law Ministry officials who could be better than my good friends here. But you see, the concept is important, and particularly I would respectfully request you that people outside are watching us. That is why, I introduced the Bill which had lapsed because I ceased to be a Member. If you do not attend Parliament, you do not get your daily salary. Nobody accepted it. But people want it. People say what are you people doing. You collect Rs.5000 or Rs.1000, put it in your pocket and walk out just because you want to walk out because the Chairman said something to you or the Opposition Leader said something to you. So, what? Do your job and come back again after five minutes and do something. That is what people want. We do not do that. Therefore, a simple thing like no work no pay was not accepted. Now if such sort of a pattern that you, as Members of Parliament, are going to set, then it is a very bad thing for the Members of Parliament.

श्री संतोष गंगवार: महोदय, आपने बहुत अच्छा एनलाइटन किया। होता यह है कि जब कानून बन जाता है, तो फिर समझ में आता है कि उसमें क्या-क्या कमियां निकलती हैं। अब जैसे एक राज्य में 15 मंत्री तो बन सकते हैं, पर उन्होंने 300 लालबत्तियां दे रखी हैं। अब इसमें सभी शामिल हैं। हमारा आग्रह आपसे यह है कि आप हमें इस प्रकार एनलाइटन करें कि हम इस व्यवस्था को ठीक प्रकार से बना सकें जो भविष्य में भी ठीक प्रकार से काम करती रहे?

SHRI FALI S. NARIMAN: I personally believe we must reduce this Mughal rule that we have. This is all Mughal. I have been to many countries in the world. I tell you about New Zealand and Australia. I found that the Governor-General was at a party. You will pardon me for just mentioning to you. We did not even know that he was Governor-General. His car did not have any light. He had no armed guard or no bodyguard. Just one fellow was sitting there with the phone and something like that. That is how, they function. But we believe that *batti* is everything, the big light is everything. This is the Mughal tradition that we have.

श्री संतोष गंगवार: महोदय, लालबत्तियों के रुआब में ऐसे इनडायरैक्ट काम होते हैं कि जिन कामों को हम डायरैक्ट नहीं करा सकते हैं।

SHRI FALI S. NARIMAN: You are absolutely right.

MR. CHAIRMAN: Sometimes it is required for security purpose also.

श्री संतोष गंगवार: सिक्योरिटी पर्सनैल को लेकर हम सारे गलत काम करें, यह भी उचित नहीं, लेकिन हो यही रहा है।

MR. CHAIRMAN: Administrative requirements are there. We cannot say that this will amount to office of profit.

SHRI SANTOSH GANGWAR: People say that they are carrying narcotics and other things with their *lal batti* vehicle.

श्री रघुनाथ झा: महोदय, आम धारणा यह है कि जो लैजिस्लेटिव मैम्बर हैं या पार्लियामैंट के मैम्बर हैं, वे यदि दूसरी सुविधाएं लेते हैं, तो उसमें ऑफिस आफ प्रॉफिट की व्यवस्थाएं आड़े आती हैं, लेकिन जो इन पदों पर रहते हैं, वे किसी कॉलेज में प्रोफेसर होते हैं, कहीं लैक्चर होते हैं, वहां से वे तनख्वाह लेते हैं। आप मेरी इस बात को अन्यथा न लें, हमारे कई सासंद ऐसे हैं जो एडवोकेट हैं, वे सांसद होने का भी फायदा लेते हैं और वकालत के माध्यम से धन कमाते हैं। कृपया हमें बताएं कि ऐसी स्थिति में क्या ऑफिस ऑफ प्रॉफिट की व्यवस्थाएं उन पर लागू होंगी या नहीं?

श्री अरुण जेटली: आपका मतलब यह है कि जितने बेरोजगार हैं, केवल वे लोग ही संसद में आएं?

SHRI SITARAM YECHURY: What we were discussing earlier was also the fact that as far as office of profit is concerned, we are now mainly confining ourselves to positions within the Government. Conflict of interest with it will also arise. The fundamental conflict of interest that we were talking about will also arise in the private sector. There, what I wanted to know is your opinion on that. I am making a distinction between professionals like what Mr. Raghunath Jha has raised about the lawyers. That is a different category. They are professionals and they are doing their professional works.

There are owners or corporate chiefs. Now, for example, we were talking about morality. We were talking about ethics. Now supposing a big corporate CMD or an owner of a corporate house is also an hon. Member of Parliament and if he were to function in the Committee on Industries, obviously there is an issue involved. For example, if somebody, who is running an airline, were

to function in the Committee on Civil Aviation—he is not holding any position in the Government—under all this law that we are talking of, he does not come into conflict but there obviously is an issue involved. So, what would you suggest? How do we go into that? He can become a Minister also. He can be on the Board of Director of that Airline. He can become a Minister. But how do we tackle that issue?

SHRI MADHUSUDAN MISTRY: It is a very serious issue in this Parliament.

SHRI FALI S. NARIMAN: You are absolutely right. Yes, in this Parliament it is a very serious issue. I have no doubt about it. I would suggest to Mr. Yechury that let us tackle one thing at a time. I am not joking. I am not trying to evade it. You are absolutely right. I myself have this view but we will have to tackle it at some point of time because particularly in the Upper House, we will have to tackle it. The Lok Sabha is all right. I do not find any difficulty there but in the Upper House, we find this problem.

SHRI ARUN JAITLEY: The normal precedent in this has been that you cannot say that a person, who is knowledgeable in a filed, let us say, a trade union leader who knows the labour laws, who knows the labour problem, can be on the Standing Committee on Labour. He is the most suitable to be a member there. Similarly, somebody, who is an economist, could be on the Finance Committee. A lawyer could be on the Law Ministry's Committee. But wherever there is office, personal vocation or business or anything to do with his personal business or vocation, a conflict of interest or likelihood of conflict of interest *per se* will arise and from that he must withdraw.

SHRI MADHUSUDAN MISTRY: The question is not that. The question is, who decides this? He himself does not decide that there is a conflict of interest.

SHRI FALI S. NARIMAN: That is your Speaker and Chairman.

SHRI ARUN JAITLEY: So far the Chair's rulings in the past have been that you must disclose your interest before you do it.

But it can go to the extent of the hon. Chairman or the hon. Speaker directing you to withdraw. As in Shri Yechury's example, let us take that the aviation policy is being discussed and you own an airline; in such a case whether you can seriously be on that Committee or not at that moment is to be seen. A serious conflict of interest would arise.

SHRI FALI S. NARIMAN: You are Member. The Chairman should not appoint him.

SHRI ARUN JAITLEY: There would be different cases. Let us take another case. For example, a newspaper editor is a Member and the media policy is being discussed in the Standing Committee.

SHRI MADHUSUDAN MISTRY: One is in the Petroleum Committee who is running the business of gas and refinery and so on.

MR. CHAIRMAN: What should be done in this case?

SHRI SITARAM YECHURY: Let us begin one at a time. As you say, at least stop him from becoming a Minister where there is a conflict of interest.

MR. CHAIRMAN: I think it has been clarified in Rule 255 of the Rules of Procedure and Conduct of Business in Lok Sabha. It says:

"Where an objection is taken to the inclusion of a member in a Committee on the ground that the member has a personal, pecuniary or direct interest of such an intimate character that it may prejudicially affect the consideration of any matters to be considered by the Committee, the procedure shall be as follows:"

That procedure is already given in the Rules of the Lok Sabha.

SHRI FALI S. NARIMAN: There is another matter which is totally the other extreme, entirely different from what we are discussing. It is in England also, in the House of Commons.

MR. CHAIRMAN: We are concerned only with the person who is holding Government office. We are confined to that.

SHRI SITARAM YECHURY: I raised it because very rarely we get people of the stature of Shri Nariman to give their opinion. That is why I wanted it. We are concerned. Therefore, in the first meeting I said that let us try to enlarge the scope.

SHRI FALI S. NARIMAN: I think there is one way to do it. In the House of Commons you have a Register of Interests. There, you say—'I am the owner of this airline, I am the Managing Director in, say, Tatas, or in ACC etc.' Then I come to the Rajya Sabha or the Lok Sabha. At that time, I disclose all these interests. It is a public disclosure which is made, which is open. That is one way of doing it. It does not matter how much I earn or do not earn. I publicly disclosed it. Therefore, you can get up and say—'Mr. Nariman's view is bound to be clouded because he happens to be Director of such and such company' because you know it. I did not conceal it. I am compelled to give it. This is one way of doing it. That is an entirely extreme position—compelling everybody to disclose their interest in firms, companies wherever they are. That is a possibility.

डा. सत्यनारायण जटिया: एक आदमी जब काम करता है तो वह अपनी कैपेसिटी, एफिशियन्सी और प्रोफेशन के हिसाब से करता है। उसको इन्सेन्टिव भी उसके काम के अनुसार ही मिलता है। उसकी अलग-अलग काम की कैपेसिटी के अनुसार उसका उपयोग किया जा सकता है। मोटे तौर पर यह प्रश्न काफी उलझा हुआ है। इसका विश्लेषण करने के लिए हमें कुछ बातें कहनी होंगी कि हम यह कर सकते हैं। बाकी कामों के बारे में भी कहना होगा कि हमें यह करना चाहिए और यह नहीं करना चाहिए। कुछ बातें जो रह जाती हैं, उसका निर्णय करने के लिए एक अधिकरण बनाना होगा। निश्चित रूप से ऐसा विभाजन करने के बाद ही एक व्यक्ति की क्षमता का अलग-अलग उपयोग करने में समर्थता मिल सकती है।

SHRI FALI S. NARIMAN: You are right.

MR. CHAIRMAN: Are there any more questions?

Shri Nariman, I thank you on behalf of the Committee and on my own behalf for taking the pains and coming here and sharing your views on the subject. I am sure your valuable views and suggestions on the subject of Office of Profit will help the Committee to make meaningful recommendations.

I once again thank you for appearing before the Committee.

SHRI FALI S. NARIMAN: Thank you very much.

MR. CHAIRMAN: I invite you to join the members of the Committee for a cup of tea.

[TEA BREAK]

(AFTER TEA BREAK)

WITNESS EXAMINED

Shri Rustom S. Gae, Senior Advocate, and Former Law Secretary to the Government of India

MR. CHAIRMAN: Shri Gae:

I welcome you to this hearing of the Joint Parliamentary Committee (JPC). Having been the Law Secretary, you must have had the first hand knowledge of various aspects of the Constitutional Provisions, and the underlying Constitutional Principles regarding the concept of Office of Profit. The Joint Parliamentary Committee would like to benefit from your knowledge and experience in finding answers to various issues related to the subject.

Before we start our discussion, let me state that the proceedings of the Committee are to be treated as confidential, and are not to be made public till the Report of the Committee is presented to the Parliament. I would also like to make it clear that your evidence shall be treated as public, and is liable to be published at the time of Report unless you specifically desire that all or any part of the evidence given by you is to be treated as confidential. Further, I may also make it clear to you that even though you might have desired that your evidence is to be treated as confidential, such evidence is liable to be made available to the Members of Parliament.

Since the list of points has already been sent to you, you may kindly make your submissions point-wise. Hon. Members may have some clarifications, and they may seek those clarifications wherever necessary.

SHRI RUSTOM S. GAE: Sir, thank you very much for giving me an opportunity to speak on this occasion. As rightly pointed out, I had the occasion to deal with the Constitutional law frequently in my capacity as Law Secretary, Government of India. As a matter of fact, Article 102 (1) (a) became a subject of controversy in those days also. I am talking of the years 1970 onwards when I was Secretary to the Government. At that time also long discussions took place with regard to the Office of Profit (OoP) issue. What definition should be given to it? Unfortunately, at that time no conclusion could be arrived at regarding this issue.

If I could proceed further, with your permission, I would like to make a few general observations on this subject. I am sure you must have seen the Addendum sent by me regarding the Office of Profit. This addendum was written by me in view of the points raised by the hon. President. He has raised two or three issues in the matter. The first issue was regarding retrospective effect, which I shall deal afterwards. The second issue was regarding the uniform principles of law regarding disqualification. As regards the second point, I was tempted to write this brief article in the form of an Addendum, which is before you.

I may make a few observations in this connection with the help of the addendum sent by me to you on 13th of this month. As you are aware Article 102 (1)(a) provides that:

"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."

Here I may point out that the OoP under the Government is an expression used since last more than three centuries. This expression owes its origin to the British Succession to the Crown Act, 1707. Since then it is followed in England in so many statutes. I am referring to the English precedent for the simple reason that one of the Terms of Reference to the Joint Parliamentary Committee clearly specifies that the English precedents should be taken into consideration. It clearly points out that the system of law on the subject followed in England shall be relevant in this connection. Therefore, I am raising the issue regarding the Succession to the Crown Act, 1707. This Act amended from time to time was followed subsequently in England on many occasions.

Subsequently, a Select Committee was appointed by the House of Commons in 1941, and that Select Committee made important recommendations, which form the basis of discussion on the subject. The Select Committee of the House of Commons made three important recommendations. These recommendations are referred to in my Addendum, and I need not repeat them. These are very important items, which form the subject of discussion not only in England, and need be followed in India too. Therefore, I may briefly refer to them. The first principle is incompatibility of specified non-ministerial offices having Membership of the House of Commons. Second, the need to limit the control or influence of the Executive Government over the House by means of an undue proportion of office bearers being Members of the House. The third is the essential condition of a certain number of Ministers being Members of the House for the purpose of ensuring control of the Executive by Parliament.

I may add here that these three principles are the main principles, and they are followed in England with slight modifications. These principles may also be followed with suitable modification or adaptations, as required, in India too. I am quite positive that they will be very helpful in enacting a law containing uniform principles regarding disqualifications for membership. This is the most important issue, which I would like to raise here. The hon. President in his caveat has raised this important point while referring back the Bill on the subject to the Houses of Parliament for reconsideration. He pointed out that there must be some uniform principle laid down for the purpose.

As pointed out earlier, up to now it has not been possible to frame any precise definition of the expression "OoP under the Government". But if these three principles are followed, I am confident that they will be very helpful in laying down the uniform principles on the subject. They were followed from time to time in England, and several times confusion arose in the matter. The British Parliament passed an Act known as House of Commons Disqualification Act, 1957 in order to remove the confusion. This Act was subsequently replaced by another Act known as the House of Commons Disqualification Act, 1975. This is the most important enactment, and the law on the subject in England is based on this enactment. I would like that this may be

treated as a precedent to be followed in India as well. Section 1 (4) of that Act clearly provides that:—

> "except as provided by this Act a person shall not be disqualified for membership of the House of Commons by reason of his holding an office or place of profit under the Crown or any other office or place."

In India, the principle applicable is just the reverse as contained in Article 102 (1) (a). All offices of profit under Government disqualify the holders unless otherwise cleared by Parliament. The main effect of the Act has to replace a large number of statutory and common law provisions on disqualifications by a single simple code.

Disqualifying offices are set out in the first Schedule to the Act of 1975. This Schedule is subject to amendment by Order in Council on resolution passed by the House of Commons. [section 5(1)] House of Commons is thus authorized by resolution to add to the list of disqualifying offices at regular intervals.

This will also be helpful in framing general principles of law applicable in the matter. Whenever any new "offices" are created by statutes, they are included in the Schedule. Similarly, whenever "offices" are created by statutes subsequently passed, they may also be included in the list contained in Schedule. My submission is that if the principles contained in Section 1(4) and Section 5 (1) are adopted they will be very helpful, insofar as it is intended to apply them to India.

As mentioned earlier, as regards "office of profit", there is some distinction in the Indian law and the British law. Under the English law, no office of profit brings disqualification unless it is included in the Schedule containing disqualifications of offices appended to the Act of 1975. On the other hand, in India, as provided by article 102 (1) (a). According to article 102 (1) (a), all offices of profit under any Government will disqualify the holder thereof unless exempted by law enacted by Parliament. I am just pointing out that these are some of the distinctive features. As a matter of fact, this pattern contemplated in the English law was intended to be adopted by the Constitution (Forty-second) Amendment Act, 1976, but subsequently, it was given up by Constitution (Forty-fourth) Amendment, 1978 and the original text was restored.

My submission is that if we have due regard to the three main principles regularizing "office of profit" laid down by the Select Committee of the House of Commons in 1941 and if these principles are adopted in India with suitable modifications as required they will be helpful in laying down uniform principles regarding disqualifications. Judicial decisions on the subject will also be helpful. I would suggest that the principles laid down in the House of Commons Disqualification Act, 1975, especially the First Schedule thereof and the provisions contained in section 1(4) and 5(1) may also be adopted with suitable modifications as required.

So far as India is concerned, Parliament (Prevention of Disqualification) Act, 1959 was enacted exempting certain "offices under the Government" from disqualification of membership. That Act was amended by the Parliament (Prevention of Disqualification) Amendment Act, 2006. To meet the caveat raised by the President, I would request that the points raised by me in my discussion as aforesaid may be given due consideration so that a law containing uniform principles regarding disqualification for membership may be enacted, this will also meet the point raised by the President in his reservations.

These are general observations made by me. It is felt that if due attention is paid to these observations, it may be possible to frame a definition of the expression, "offices of profit under the Government" as contemplated by the JPC.

I shall now come to article 102 (1) (a) and shall go point by point as to what the expressions "office", "profit" and "under the Government of India" mean. General observations have been already made by me to point out that if proper care is taken and attention as paid to the three principles laid down by the Select Committee of the House of Commons in 1941 and also the principles laid down in Section 1(4) and 5(1) of the House of Commons Disqualification Act, 1975 as aforesaid, it is possible to have uniform principles applicable to this matter. These are general observations that I am making on the subject before I proceed further.

MR. CHAIRMAN: Thank you for making valuable suggestions on the subject matter given to the Joint Parliamentary Committee. I want a clarification on one issue. You have stated in your article, "Under article 102 (1) (a) of the Constitution, Parliament has a limited role in declaring an "office of profit", the holding of which does not disqualify a person from the membership of Parliament." However, at another place in your article, you have held that, "Article 102 (1) (a) gives wide powers to the Parliament to create exceptions to disqualification for membership." Can you please clarify this?

SHRI RUSTOM S. GAE: The word "wide" was not correctly used; it was used inadvertently.

If you permit me, I may make general observations on article 102 (1) (a) step by step and then you may ask me any questions which I will be pleased to answer.

SHRI ARUN JAITLEY: We can go through the notes which Mr. Gae has given to us. We will go through the notes that you have given along with your article. It may perhaps become easier if we are able to put some questions and to be able to understand the explanation.

SHRI MADHUSUDAN MISTRY: On the basis of notes, we can put questions.

SHRI RUSTOM S. GAE: If you permit me, sir I would like to say something about article 102 (1) (a). The most important expression is "office of profit under the Government". The first question I am raising is what is meant by an "office". Now, "office" means position to which certain duties are attached. "Office" confers powers of patronage as well as status, dignity, etc. Now, what is important is that "office" does not mean merely receipt of remuneration by the person concerned. It is the capacity of office to yield profit which establishes its character as an office of profit. A person may be appointed to an "office of profit", but he may not draw any remuneration other than compensatory allowance. That is not "office of profit" , if the office is capable of giving remuneration, or capable of yielding profit, it will be treated as an "office of profit" whether he accepts remuneration or not. In other words, the word "office" is treated widely as mentioned by me.

The next expression is "profit". The word "profit" is not restricted to "monetary gain" only. "Profit" is a much wider term than remuneration. Any benefit other than monetary benefit should also be included in the expression of "profit".

I may mention here that the observations made in my main article are based on a study made by me of the English law on the subject. Profit means any benefit, monetary or otherwise, obtained by person that includes patronage as well. Hence, I would submit that it is

not necessary that "profit" should be only in the form of money; it could be in the form of patronage as well.

This is the kind of opinion in England, a member drawing compensatory allowance is treated as not holding an office of profit because compensatory allowance is just an allowance to help him to pay his expenses regarding boarding, lodging, etc. Over and above that, if he is entitled to any other benefit it is treated as "office of profit".

In this connection, I have prepared a short caption note of one sentence only to summarise what exactly is the meaning of the expression "office of profit". The note reads: "Where a person holds an office, capable of yielding profit or other benefit, whether monetary or otherwise, under the control of the Government of India, article 102 (1) (a) would become attracted, irrespective of the fact whether remuneration or other benefit is received by him and whether the same is paid by or received from Government." In a nutshell, I have thus summarized the meaning of the expression "office of profit".

The next important expression is "under the Government of India". Does it mean that the person must be in the service of the Government or does it mean that the Government as the authority making and controlling the appointment of the persons concerned.

As regards the expression no doubt the Supreme Court has given some meaning to it in a case referred to in the note sent to me on the subject.[Biharilal Dabray Vs. Roshan Lal Dabray, AIR 1959 SC/85] I would like to summarise the matter by pointing out that where Government is the authority which appoints a person to an office and is controlling in continuance including the dismissal of the person from the office, that office is considered as an 'office under the Government of India'. In the Constitutional law, 'under' itself implies subordination. When a person is under the Government, it means that he is subordinate to the Government. Hence I will make a brief submission in this behalf by pointing out that where the Government is the authority making the appointment to an office and controlling its continuance including dismissal from office, that office will be an office under the Government of India even though remuneration may be paid by a body other than the Government *e.g.* a Government company or a Government Corporation and article 102 would become attracted the provisions in the matter.

SHRI ARUN JAITLEY: If I may just put a question or two to you, the principal contention that we are now confronted with is that you have an existing constitutional mechanism in which (1) there is prohibition from holding an office of profit, (2) there is power with Parliament to grant exemption by law that certain offices, even though they are offices of profit, will be exempted offices. The same applies as far as the States are concerned. You have elaborately given the interpretation of various phrases used and the spirit behind the Constitutional rationale. In a nutshell, as a constitutional expert, a former Law Secretary and a citizen, are you satisfied with the present state of things? Or, do you favour any substantial changes to the present status?

SHRI RUSTAM S. GAE: Let me point out that I am not satisfied with the present state of things. We have included umpteen number of offices under the Schedule with no principles laid down in the matter. That is the reason why when the President sent the message for reconsideration of the Bill by Houses of Parliament he specifically raised the issue that some general principle should be laid down regarding the exemption or disqualification". What is done at present shows that no general principles are laid down for the purpose.

SHRI ARUN JAITLEY: I can appreciate your point of view that if you have 60 to 70 offices in the Centre which are exempted and similarly in the States, we will have thousands of offices which are exempt.

SHRI RUSTAM S. GAE: I will request you to follow the principle laid down under section 1 (4) and 5(1) of the British Act of 1975 referred to above, that section under a Schedule included containing lists of offices and that Schedule is subsequently amended as and when required by order in council on resolution by House of Commons.

SHRI ARUN JAITLEY: That is a negative list. You are suggesting that we must have a negative list as to which offices you cannot hold and whatever offices are not in the negative list can be held.

SHRI RUSTAM S. GAE: Offices can be added to the list as and when required. That will be helpful in the matter. At present so many offices of profit are included in the list.

MR. CHAIRMAN: They have the same system as the negative list.

SHRI VIRENDRA BHATIA: Article 102 says, 'if he holds any office of profit under the Government of India or the Government of any State other than that office declared by Parliament by law not to disqualify its holder'. My question is that whether this power should be exercised at all? Is it an unfettered power or is it subject to some rationale? Suppose tomorrow they say that this is not connected with the parliamentary affairs. Or suppose tomorrow they say that a Doctor or a professional is disqualified without any basis. How should this be used? They can say this in case of any institution or any person or anything.

SHRI RUSTAM S. GAE: The words used are, 'other than an office declared by Parliament by law not to disqualify its holder'. Parliament has to make a law regarding disqualifications.

SHRI VIRENDRA BHATIA: Should it be subject to the spirit of the Constitution?

SHRI RUSTAM S. GAE: The power is given to Parliament only to declare what should be treated as not an office of profit, just the reverse of what is available in England. This power is only limited. You cannot say anything more than that. Only to say which offices are offices not to disqualify the holders. As I have already pointed out, I am not happy with this position, since you are just putting any number of offices in the Table . Take for example the recent Act of 2006. More than 50 offices are included in the table. If you look at the Schedule as a whole, it contains 70 or more offices and so many are included in the list. That is not the principle in which the power under article 102(1) (a) should be exercised. It will be better if the power is exercised in the form of a Schedule, having regard to sections 1(4) and 5(1) of the English Act of 1975 as mentioned above. Prepare a Schedule subsequently, as and when required, add other offices in it. That will meet the point. This way criticism may be met with to a great extent in the matter.

SHRI SATYANARAYAN JATIA: Can we have a comprehensive definition to the term office of profit?

SHRI RUSTAM S. GAE: With due respect I may observe that, if we follow the three main principles as laid down by the Select Committee of House of Commons in 1941 adopt with necessary modifications in India, I think it will be possible to have a definition of "office of profit". These principles are followed in England not only in 1941 but even in subsequent statutes

as well. Hence my submission is that if these three principles, which form the basis of exemption, are carefully adopted and followed in India with suitable modifications to meet the requirements of the country, supported by the various points raised by me on what is meant by 'office', what is meant by 'profit', what is meant by 'under the Government of India' and judicial pronouncements on the subject the expression 'office of profit under the Government'. Up to now with due respect, if I may say so, in India no attempt was made seriously even by the Central Government to define this expression. This question arose in 1971 when Indira Gandhi was the Prime Minister. Unfortunately, no progress was made in the matter. But now the mater has been carefully considered. If we consider the House of Commons Disqualification Act, 1975 and adopt the principles laid down by a House of Commons Committee in 1941 as referred to above I think to a great extent a reasonable definition of the expression 'office of profit under the Government' can be enacted for the purpose. I would request that attention may be paid to these three principles which are mentioned in my Addendum to the main article and attention may be paid to section 1(4) and 5(1) of the British Act of 1975. If these two items are taken into consideration carefully, it is possible to draft a definition to of the expression 'office of profit under the Government' bearing in mind at the same time observation made by me regarding the meaning of the words 'office', 'profit' and 'under the Government'. I may again add that the term 'under the Government' does not just mean that a person employed must be in the service of the Government. If Government is the authority making the appointment and controlling its continuance including dismissal from office, the person would be holding the office of profit under the Government, even though remuneration may be paid by some person other than the Government, for example the directorship in Government companies or corporations, etc. If these principles are kept in mind, it is possible to draft a proper definition of the expression 'office of profit under the Government of India' as contemplated in article 102(1)(a).

MR. CHAIRMAN: What do you suggest regarding the system of law regarding disqualification of office of profit being agreeable to all the States and Union Territories? It has been mentioned somewhere by someone that the Parliament should only have the power and the States should not have it. What do you suggest on this?

SHRI RUSTOM S. GAE: Whatever principles are adopted by Parliament for the purpose the same may with necessary adaptations be applied *mutatis mutandis* to the States also for the purpose, because article 191(1)(a) is on the same lines as article 102(1)(a). The principles applicable to Parliament under article 102(1) (a) and principles applicable to States under article 191(1)(a) are more or less virtually the same.

MR. CHAIRMAN: Thank you for enlightening us with your valuable suggestions.

SHRI RUSTOM S. GAE: I would like to raise some issues which were not raised by JPC in the matter, if you permit me to do so.

MR. CHAIRMAN: If you have any note on this, you can give us in writing.

SHRI RUSTOM S. GAE: No, Sir. I have not written anything about the States. My only point is that article 191 is akin to article 102. Principles applicable to article 102 will *mutatis mutandis* apply to article 191 also. I have not written anything separately about article 191.

MR. CHAIRMAN: You can send us written replies to the clarifications sought in this regard by the hon. Members.

SHRI RUSTOM S. GAE: I would like to raise some points which have not been raised by JPC, if you permit me to do so.

MR. CHAIRMAN: Yes.

SHRI RUSTOM S. GAE: One point raised in this regard is regarding retrospective legislation withdrawing disqualifications. This point is not raised in the terms of reference of the JPC. I think that this matter is not free from doubt. As a matter of fact, two petitions on this issue are already pending in the Supreme Court. One Member of Parliament has filed a petition on the ground that retrospective legislation is not permissible. I may point out here that the expression used in Article 102(1)(a) is "declared" by Parliament by law not to disqualify its holder. I am raising the issue here by pointing out that the words in article 102 show that on the date of disqualification the law enacted by Parliament should already be in existence declaring the personal office not disqualifying its holder. Hence, the power under the article cannot be exercised retrospectively, though Parliament has got the power to make laws prospectively as well as and retrospectively unless otherwise provided by terms of the statute.

My submission is that when the word 'declared' used in article 102(1)(a) it may be urged that the power under article can be exercised only prospectively. Secondly, as provided by article 101(3), when a Member becomes subject to any disqualification as metioned in article 102(1)(a), his seat shall become vacant. The moment he accepts the office, the seat become vacant and thus becomes subject to disqualification. If Parliament now makes a law under article 102 (1)(a) providing that this office is not to disqualify its holder and is deemed never to have disqualified the holder such law would be affected by article 101(3). In other words, that law may be treated *ultra vires* article 101(3). I am raising these two points to indicate that the power under this article is to be exercised prospectively. However at the same time, I may point out that in a case the Supreme Court itself has held that the power can be exercised retrospectively as well. I may add here with due respect to the Supreme Court that matter was not considered by the Court in great detail. Now that the issue has been raised in two petitions pending before the Supreme Court, it is likely that the Court will consider the matter in great detail. In other words, question regarding retrospective legislation is an open issue. With due respect to the Court, I may point out that that matter is not free from doubts. The court may hold that retrospective legislation is permissible. As a matter of fact, in the past on several occasions Parliament has made laws regarding disqualifications with retrospect effect. I may repeat that the Supreme Court in one case, which has been referred to above, has held that it is possible to have retrospective laws. I am again pointing out that this issue is now pending before the Supreme Court and needs consideration.

The other issue I would like to raise relates to penalty for contravening the provisions of article 102(1)(a) is provided by article 104. The penalty of Rs.500 per day for the purpose when the Constitution came into force in January, 1950 it had some effect but now the paltry sum of Rs.500 has lost that effect. I feel that this penalty for contravention as mentioned in article 104, (namely only Rs.500 per day) should be well enhanced so that it may serve as a deterrent to a erring a person. In some foreign countries when person is disqualified, he is required to resign a few months prior to the date of an election. The constitution is silent on this point. Further a condition should be imposed and that he should not be allowed to contest the elections for a specified period. Some such provisions need consideration by the JPC, if necessary, by amending the Constitution for the purpose.

As pointed out in my Addendum as regards the House of Commons, Disqualification Act, 1975, provisions contained in the Schedule thereto used for the purpose of expanding the list so that instead of including separate offices every time by law, the Schedule may be amended from time to time. That would meet the requirement as mentioned above.

As regards about uniform principles for exemption from disqualification, I have already mentioned about the same I would like to repeat if care is taken regarding three main principles already mentioned alongwith the British Act of 1975, uniform principles regarding disqualification may be laid down in the matter.

I will finally submit that these three main principles, along with the House of Commons Act, 1975, may be given due consideration in the matter.

MR. CHAIRMAN: I thank you on behalf of the Committee and on my own behalf for taking pains and showing keen interest on the subject in your advance age. In spite of that you have taken very keen interest.

(The Meeting then adjourned)

RECORD OF EVIDENCE TENDERED BEFORE THE JOINT COMMITTEE TO EXAMINE THE CONSTITUTIONAL AND LEGAL POSITION RELATING TO OFFICE OF PROFIT

Monday, the 1st December, 2006 from 1500 hrs. to 1655 hrs. in Committee Room No. 63, Parliament House, New Delhi.

Shri Iqbal Ahmed Saradgi —*Chairman*

MEMBERS

Lok Sabha

2. Shri V. Kishore Chandra S. Deo
3. Shri Santosh Gangwar
4. Dr. Satyanarayan Jatia
5. Shri Raghunath Jha

Rajya Sabha

6. Shri Virendra Bhatia
7. Shri Ram Jethmalani
8. Shri Sitaram Yechury

WITNESSES EXAMINED

Shri Rajeev Dhavan, Senior Advocate

Shri Harish N. Salve, Senior Adovcate

1511 hours.

WITNESS EXAMINED

1. Shri Rajeev Dhavan, Senior Advocate.

MR. CHAIRMAN: Shri Rajeev Dhavan and your colleagues, I welcome you to this sitting of the Joint Parliamentary Committee. You have submitted a detailed Memorandum giving your views on the subject under consideration of the Committee. The Committee appreciates your efforts in this regard because the Memorandum covers all the points in the questionnaire. The JPC would like to seek clarifications on some points and would like to elicit your views related to this subject.

(DIRECTION 58 WAS READ OUT)

Since the list of points has already been sent to you, you may kindly make your submissions point-wise. Hon. Members may seek clarifications wherever necessary and I will request you to reply to them.

SHRI RAM JETHMALANI: Mr. Chairman, before Dhavan starts, let me just tell everybody present here that he is not merely a very distinguished practicing lawyer, but in a real sense, he is a scholar and an expert. I think, we are indebted to him that he has come here and written that very valuable paper for us. Thank you very much.

SHRI RAJEEV DHAVAN: I am privileged to be here, and what Ram has said only makes my task a little more difficult, I think. I would not refer to my paper. It is important that I do not. I would much rather respond to the questions that have come from the Committee in some systematic way.

I would only begin by saying that this is both a political problem and a constitutional problem. To the extent to which it is a political problem, it has been created by the politics of patronage. Offices are being distributed, sometimes, in a discerning way, and, sometimes, purely as a largesse. That is a fact that Parliament, at some stage, must recognize, whatever may be the turmoils that accompanied the passing of the Office of Profit (Amendment) Bill. As long as this largesse continues in an indiscriminate way, it will be virtually impossible to provide any kind of definition or any kind of framework to control what seems to be the problem. That is one aspect of it.

The second aspect emerges from a very interesting judgment of Justice Krishna Iyer. While looking generally at the concept of office of profit, my own sense is that the courts have regarded this more as a largess and, therefore, they have looked at it with absolute and strict scrutiny. The result is, we get a huge diversity of tests and decisions which add to the uncertainty. Therefore, over these years—and you can see that I have tabulated them at the end of my

paper—it is not really possible to turn round to the courts and say that look you have given us in some sense a very clear definition as to what an office of profit is. I think it has moved from case to case, from instance to instance and from argument to argument.

A Vice-Chancellor has been described as belonging to the category of an office of profit and he has also been defined as somebody not belonging to the category of office of profit. Therefore, you have a bewildering variety of decisions and this I think adds to our problem in a very big way. The reasons for it I submit are largely because the courts now do not seek to define office of profit except in some formal way. What the courts do is that on an *ad hoc* basis, they decide things and equally the uncertainty becomes greater at least in the minds of those outside the Parliament when offices are added in the Schedule. Therefore, this element of *adhocism* increases.

It is not for me to go into the wisdom of the office of profit amendment that was made. There were political necessities and compulsions. We are now looking to the future. But the reason why I mentioned Justice Krishna Iyer is that he makes a very telling point—which is there in one of the passages in my submission. People of talent, must be available to government to support the efficiency of governance. It cannot be that while we are pursuing an extra critical line on "Offices of Profit" generally we throw the baby out with the bathwater.

Justice Krishna Iyer very rightly says, we have got to strike a balance in this. It is necessary that doctors, lawyers, businessmen, financial experts have a role to play simultaneously in both Parliament as well as governance. This, therefore, is an important perspective that we have to bear in mind—that we have to draw that experience of MPs and MLAs and their intrinsic expertise to be able to support governance as well.

Now, how are you going to go about this process? I will indicate some brief points of what could or could not be done. Firstly, I will submit to this Committee that the concept of office of profit is an archaic way to go about things. It is something that was not there in the 1920 Act. They were only concerned with civil servants at that time. So, it said 'services under the Government of India or otherwise'.

As we proceed, we have now gone into a very ancient kind of concept called office of profit. I personally think that article 102 sub-clause 1(a) should deal with the concept called 'disqualificatory office' and not use this archaic language of 'office of profit'.

This is my first submission. What would be a disqualificatory office? That is something I think we need to work through. In my view, I do not think a single definition is possible, but I think it is possible to say that certain kinds of offices should be offices that cannot be occupied by MPs and MLAs. The first category here would be an office which is a civil post under Articles 309 to 311 of the Constitution. It would be a travesty if civil servants who are responsible through their Ministers to Parliament could also be MPs.

Secondly, although the Supreme Court has indicated otherwise any office in or under any article 12—institution should be an Office of Profit. We use the concept of an article 12—institution for the purposes of Fundamental Rights; and my suggestion is it would become simpler and more manageable if we include in the first instance civil servants and in the second instance we include people who are appointed to or appointed under any article 12 institution within the concept of Office of Profit. Now this is subject to two caveats. The first caveat would naturally flow from the fact that we are a parliamentary democracy and Ministers would therefore have to be exempted—as indeed they are under article 102 of the Constitution.

The second exception I would say is that if somebody is appointed on a purely advisory capacity with only remunerative recompense even if that person falls within the framework of an article 12—institution, then such a person is acting in a purely advisory capacity. That is why I am concerned not with getting into whether it is an office of profit or not. We are talking of disqualificatory offices. So, my first port of call would simply be a definition along these four parameters—inclusion of civil servants, inclusion of those associated or employed by article 12—institution, excluding people will act in an advisory capacity on a remunerative basis, and as the fourth including the members of the Judiciary from Offices of Profit. All this flows from our understanding of the Constitution—separation of powers as far as Judiciary is concerned, accountability as far as civil servants are concerned, a broad concept of what constitutes governance by virtue of invoking article 12. I think, it is possible to redefine this through explanations. I prepared a draft but it is not ready. If the Committee would permit me to submit it later on as to how this can be operationalised. I would do so.

MR. CHAIRMAN: You can submit later.

SHRI RAJEEV DHAVAN: We will do that. This would then define things in a way that strikes a balance. The balance would be those who want to assist in the process of governance can certainly do so on an advisory and non-remunerative basis and it would deal with all the constitutional questions of accountability.

This would be my first submission to you on how we can define disqualificatory offices.

There is no doubt that some element of office of profit comes back into our understanding when we talk in terms of advisory capacity and remunerative expenses.

But that is a little easier to handle than the complex jurisprudence that we have now got from our courts. That, to my mind, is the first broad submission that I would make to you. Secondly, it is very important that there should be a distinction which is inherent in article 102 but, which needs to be explored further. That is the distinction between a person who has chosen or seeks to be chosen as an MP and the Member. This distinction is already there in article 102. The problem that this creates is that there may be some persons who want to enter into the parliamentary process by wanting to be elected. But at the same time, there are people who may occupy some office of profit of some kind. What are they expected to do? Should they, in fact, abandon their office of profit before election or after the election? This is a very important issue because we do not want to turn around to large number of people, who are talented enough, who have public responsibilities and who want to join the parliamentary process and exclude them at the threshold. Now, there is a provision in article 101 that if you are a member of some other legislature, you can resign after you have been elected. That is a choice that you should make.

My submission in this regard would be that there are certain categories of offices that are absolute. People occupying those offices cannot enter the electoral fray. In this, I would include, firstly, civil servants. If a civil servant does not resign before election, then there is something seriously wrong. The second would be judicial officers. Therefore, if we take this argument a little further, there would be need to change either article 101 or there would be need to make changes in the Representation of People's Act. The changes would be along the lines that in the first place, as far as the bar to fighting elections is concerned, that bar would exist only for those occupying civil posts or those occupying judicial posts.

If, for example, there is a person who is a part of a corporation which would be an article 12—institution, but that person would not be a civil servant, can that person fight elections? I think, in order to maximize democratic choice, it is necessary that at the first threshold, such a person should be allowed to fight elections, without sacrificing the post of which he is a part. What happens after the person wins? If he does not win, that is the end of the matter; he will continue in whatever corporation or body of which he is a part. But if he does win, he should be in a position at that point in time to say that I have to now make a choice. Do I want to be a Member of Parliament or should I give up the corporation or body, statutory or otherwise, of which I happened to be the Head or member or whatever it is?

Therefore, the answer to the second set of broad questions that you had sent to us is that there has to be a distinction between the disqualification for choosing an MP and the disqualification of a member. At the first stage, there would be a somewhat restrictive disqualification. that is confined to civil servants and the judiciary. I would also think that provisions of sections 9 (A) and 10 of the RPA, 1951, dealing with Government contractors etc., also need to be re-examined. I see no reason why the provisions in the RPA that deal with the Government contractors and others should be a bar to standing for elections. I understand all the reasons which are: that Government contractors will fund the electoral processes. But the answer to that lies in the chapter on corrupt practices. It does not lie in placing such an absolute bar at the very threshold.

The next question is what do we do after elections because if we have a definition which is clearer, then the job of Joint Parliamentary Committee after election would become somewhat minimized. What the JPC could do by way of scrutinizing the range of the membership of the Offices of Profit would be to say that since a declaration is made by an MP of the offices that he occupies because all this has to be declared as a matter of transparency and accountability, the JPC in light of the information that is has might consider what its views on these particular offices are. On whether Parliament should retroactively validate certain Offices of Profit, I think that such validation is not the correct way to proceed. It gives a very different picture of Parliament to us on the outside and it gives an impression that this is a self-serving method by which Parliament validates candidates who want to remain here. In the ultimate analysis, it is not saying that Parliament does not have that power, it is simply saying that power must be exercised with restraint.

I have a fourth broad submission and then I am more or less done. I have been very concerned about the kite flying that takes place when these complaints are filed against politicians. The original complaint in fact contains very little data or no data at all. This has given rise to what I believe to be vexatious and frivolous complaints. You simply say that so and so occupies that particular Office of Profit, not give any detail whatsoever as to what that Office of Profit is; or what the perks of that particular office is. Certainly, in a civil court one would say that this is vexatious and frivolous and we do not want to examine it at the threshold. Please come back with greater and better information. The reason for concern is once you have put in a kite flying application, for whatever reasons political or otherwise, it goes to the President. The President sends it to the Election Commission and the Election Commission in fact moves into an inquisitorial mode. Therefore, the situation that is created for you is that an application which may be without substance, results in the entire might of the Election Commission being then pushed in support of the application which in the first place is vague. Something has to be done to weed out these kite flying applications from serious applications where a case can be proved. I do not think that the Election Commission should be put in an inquisitorial mode. I think it is the

responsibility of any complainant to make out the case which is complete and total. It is only then that the Election Commission when examining the application would consider that this is a case on which they will proceed because these rivalries, jealousies, that come from personal and political compulsions is also another reason why people are then caught into the entanglement of the office of profit case.

There is a phrase that has been used by a very distinguished criminal lawyer, namely, the process is the punishment, and what we see here is that the process itself becomes the punishment and we are not in a position to do anything about the process because the process admits to kite flying. All in all I will stop here and I will just summarize basically what I have said and thereafter I would answer any questions.

Therefore, my first point is that the concept of office of profit is archaic and must be replaced by a concept of disqualificatary offices. These fall within three broad categories, namely, civil servants under articles 309 to 312 and article 12, judicial offices and the big two caveats to this are the exemption of Ministers and those in an advisory capacity. I think that is the first leg of my argument.

The second is, there has to be a distinction between disqualification from contesting elections and disqualification as a Member so as to expand the process in article 101 which already exists as far as Legislative Members are concerned.

Thirdly, we need to look at the Representation of People's Act. Those people who believe that people who occupy posts in article 12 institutions will influence the process, can be dealt with by the law of undue influence. But I think anyone in an article 12 category should have an option to make a choice after they have been elected. There are other aspects of the Representation of People's Act that needs to be looked at. My tremendous concern is to why an amendment cannot be made to article 103 so that the procedure by which complaints and kite fly complaints are made is also regulated. I think this can be achieved by constitutional and statutory amendments because at present there are three options that are available to us, a constitutional amendment, the statutory process and the parliamentary process. I think these would require a combination of constitutional amendment and a statutory change and we would be happy to make some drafts to implement this which we can send to you by week end.

MR. CHAIRMAN: Thank you for making valuable suggestions before the Committee.

SHRI RAJEEV DHAVAN: I am sorry I have just stuck to the submissions I wanted to make. This is a subject on which one can get very melodramatic and I do not want to that.

MR. CHAIRMAN: One of the terms given to this Committee is to have comparative study of the existing laws of UK, Australia and the present laws prevailing here. So, would you like to elaborate on this point? What are the things to be adopted? We would also like to know whether the law existing in Britain and Australia are applicable here and if applicable to what extent?

SHRI RAJEEV DHAVAN: The United Kingdom model is a slightly different model. It says in the 1975 Act that we proceed on the basis that these particular offices are offices of profit. It proceeds on a slightly negative approach. The Schedule is provided in a totally different way. So, for example, it uses the logic, I believe, not so much of office of profit, although the word is used.

I think, on an overview and reading of the 1975 Act, it has actually the concept of a disqualificatory office saying that these are disqualificatory offices and the rest are not disqualificatory. It is so much easier to handle and we have far greater experience in our country on Office of Profit than in any other democracy in the world. I think this is something which we have to sort out by ourselves. But if I were to take an overview of the significant changes in 1975 in UK legislation, the phrase was used to classify offices into two kinds, that is disqualificatory and non-disqualificatory. We say that the office was non-disqualificatory. That is the difference. The legendary Attorney General, Mr. Setalvad had given some lectures abroad and he said that one day maybe people will follow our practice instead of us following theirs. I think, basically, the time has come for us to find our solutions. We have a vast apparatus of parliamentary interventions, the Joint Committee, and the courts. You do not get this kind of intervention elsewhere in the world. What we are trying to tidy up things and put some discipline into all these particular measures. The adhocism of Parliament in just listing offices one after the other, the lack of clarify by the courts, etc. are disturbing. At the end of the process, the helplessness of a Joint Committee is that it can recommend things but it does not have powers to implement. Therefore, the answer lies in working our solutions while looking at the very broad changes in approaches that have taken place in England and elsewhere.

MR. CHAIRMAN: One of the terms given to this Committee is to suggest a comprehensive system of law applicable to all the States and UTs. What do you suggest?

SHRI RAJEEV DHAVAN: I would submit to the Committee that constitutional changes with consequential changes in the Representation of Peoples Act are required. This would necessarily apply to the States and the UTs as well because I do not think that this is at the level of option. But there is a fine point to your question which I must address. Will the State Legislatures retain the power of *ad hoc* intervention? The answer must be 'yes'. We can tidy this process up and we can put discipline into this but you are absolutely right in putting a question. What would be the impact of it on State Legislatures? I think their power of *ad hoc* intervention cannot be taken away.

MR. CHAIRMAN: As you suggested, we have to define Office of Profit from case to case and instance to instance. Do you think that there should be an authority to decide an Office of Profit? It was suggested in the Bhargava Committee that there should be a Standing Committee to decide case to case. Keeping in view this point, do you suggest than an authority has to be created to decide which office comes under Office of Profit?

SHRI RAJEEV DHAVAN: In my view, it will be better if I answer it in two separate parts. The first is, we fail somewhere in our quest for definition. Adhocism can be contained if we answer the question of definition clearly. As I have indicated, in my understanding, a disqualificatory office would be offices under civil service, article 12 and the judiciary. These are simpler to handle. The second part is tougher because at present, the constitutional dispensation is that the question of disqualification is to be decided by the Election Commission.

Now, let us see what our alternatives might be. The alternatives could be the courts. The answer to that, in my view, would be that the courts should not be given this particular jurisdiction. Neither the record of the courts in the past nor given the complexities of time, and the adversarial process, do we have an answer from the courts. So, there are only two alternatives to set up a separate constitutional body. The first is that this should be internal to the parliamentary process itself. That is, a Joint Parliamentary Committee or some other Committee designated by

the Parliament will decide the "hard cases", as they say. I am not very sure whether the hard cases should be decided by Parliament internally. Therefore, the principle of article 103 to send this out to be decided by an independent body, in my view, is possibly a better solution. But certainly a change needs to be made in article 103 because article 103 sends cases to the President and then they go to the Election Commission. A mild proposal but a necessary one would be to say that the procedure by which the President and the Election Commission handles this leaves a lot to be desired. Parliament should certainly have the right to make rules whereby that particular procedure is to be handled. The second part of your question is a little tougher: Which institution should decide? It is a choice. Either going by article 103 as it is or to repose this in Parliament. People should have faith because this is not just for the MPs and MLAs. People should have faith in this process. If it is entirely internalized, I think, some element of faith may disappear. That is why I say, keep article 103 as it is, but do it in such a way that the procedure is more rigorous and this vexatious and frivolous complaint system that we have is subject to some discipline.

MR. CHAIRMAN: Thank you. We are here to define "Office of Profit". But the version you have made is totally different explanation. Now, hon. Members will ask clarifications.

SHRI RAM JETHMALANI: Have you got your report with you?

SHRI RAJEEV DHAVAN: Yes.

SHRI RAM JETHMALANI: Please refer to page no. 14. I agree with you that these are two principles, which ultimately have to be worked out by us in our definition. It is said: "The first imperative is the conflict of interest. The second imperative is that it should always be open to the Government to involve talented people in the work of Government in various Committees even though they are MPs and MLAs. Conversely, it should be the case that such talented people who are assisting the Government should not be excluded from membership of the legislatures."

Now, will you agree with me when I say that the first is much more important than the second. First is the dominating principle and the second has to play a subsidiary role.

SHRI RAJEEV DHAVAN: I would not subsidiarise that.

SHRI RAM JETHMALANI: If you look at page 15, in the last few lines Justice Krishna Iyer himself says: "Unfortunately, the legislatures have run coach and horses through this exemption from the office. Far from being in the public interest, appointments are made for partly political or personal purpose making a mockery of the whole process.

This greatly subtracts from the two. It does not subtract from one. Therefore, see the limitations of the second principle.

It is true that there is a very talented specialist in some subjects with which the Government wants to deal with and he happens to be a Member of Parliament. You want to utilize his services. I am quite sure that this expert who has been returned to Parliament can afford to receive only compensatory allowance rather than a salary. Today, if there is one thing settled by the authorities, it is settled that any person receiving purely compensatory payment does not enjoy an office of profit at all. Therefore, we are unnecessarily giving too much importance to the second principle. We are now fighting an institutionalized bribery system. That is the danger with which we are fighting and grappling. To me to give importance to the second principle

beyond a point is self-destructive. That is the danger which Justice Krishna Aiyar has really mentioned. It will be a very rare case really that a great expert whom we need has already entered Parliament or that he has entered Parliament with clean hands and you want to provide him with an office of profit. He can make it an ordinary office of profit. It is simple. This is one aspect of the matter. If you do not agree with me, please also think of the various other things which I am telling you. We can meet again.

SHRI RAJEEV DHAVAN: Sir, may I just respond? I do not want to use the language of subsidiarity. I will support what you say on this basis.

SHRI RAM JETHMALANI: Please take the spirit of what I am saying to you, whatever be the words.

SHRI RAJEEV DHAVAN: Sir, using the spirit, I would respond by making two comments. The first is that being a Member of Parliament is a full-time job. It is important. Therefore, a person who is a Member of Parliament and involved in the political process is redefined by various schemes of Parliament. For example, a parliamentarian may have money to distribute to his constituents. He has to see to his constituents' interests. He is a Member of many Committees and Joint Committees like this one. I, therefore, would support the spirit of your argument by firstly saying that people who have full-time occupation (and one must recognize that parliamentarians are in full-time constitutional offices) cannot occupy offices of profit. That is imperative. We must recognize. But on the flip side, you are absolutely right. This increases the distrust in those whom you could not make Ministers and you have gone and appointed to some post or office whose red light cars keep flickering away in traffic.

SHRI RAM JETHMALANI: The most serious work of Parliament is done in these Committees. It is true. We are spending so much time on this work and we are not getting an extra pie for this work.

SHRI RAJEEV DHAVAN: Therefore, I also support the suggestion while keeping the doors open, there may be people whom you want to appoint to enrich governance. What happens sometimes is that there are many people who are good in some technical area and they might be of use to the Government. If our President was not the President and he was a MP and you needed his services to advice on some matters, would the answer be to exclude him? Therefore, I keep the door open. That is why, I suggested that after the process of election, further choice that a person has to make whether they want to be MLAs or MPs.

That choice having been deferred, I think Parliamentary scrutiny is absolutely necessary. So, I see a divergent process, a complaint system which is there in Article 103 and a Parliamentary scrutiny system of all those who would declare that these are the offices that they occupy. Where is the teeth in this proposal? Public Exposure is the teeth.

SHRI RAM JETHMALANI: Between you and me, there cannot be a serious difference of opinion. I can assure you of that.

Now, let us talk of the authority business, which authority decides. I feel there is no escape from the final authority being in the courts. If a case arises at the time of pre-election, then, initially the returning officer has to decide. He has to take a decision one way or the other at the time of accepting the nomination paper. Then the election court decides if the election is challenged. The final appeal to the Supreme is there. So, there is no escape from the ultimate

decision being with the higher court. I would request you to go to the other end. It is a post election disqualification. The Election Commission decides. The President or the Governor, as the case may be, acts on the advice which is binding on him. It is a decision which you gave. It is a decision which is a recent decision. It is not a non-speaking decision. Therefore, ultimately it lies again with the judiciary. So, the final authority to interpret whatever we decide is the Judiciary. There is no escape from that. There can be no other authority which can take it away. You can streamline the procedure and all that. On the other hand, please see our difficulties. Please see, to some extent, the questionnaire which we have sent, which seems to expand our terms of reference. But our terms of reference are extremely limited. One of them says that a Joint Parliamentary Committee has been mandated to suggest a comprehensive definition of Office of Profit in the context of settled interpretation of the expression in Article 102 of the Constitution. Now, we have to take the constitutional scheme as it is. We are not authorized to interpret how Article 103 should be changed. We cannot even make distinctions between pre-election disqualification and post-election disqualification because Article 102 is committed to that. The same disqualifications apply. For a future Committee, this might be an excellent material. We might write an article and press our view point using the information. Today, based on the present terms of reference, we have to take the constitutional scheme as it exists and evolve a definition not applicable necessarily even to Article 58 but to Article 102 which leaves no room between pre and post elections. That is the settled aspect of the matter which I would like you to consider.

Thirdly, I frankly prefer the expression disqualificatory office. I really prefer it. It is a nicer thing. What do you really mean by having a disqualificatory office? Do you say it is enumeratory disqualificatory office? If you start the process of enumeration, I am telling you that of the whole process will become a dead letter. With a little exercise of ingenuity, you will create another office which may have practically the same duties. You can make some little change somewhere and give it a different name. Then, the statute will not apply.

So, ultimately after giving the enumerated list, you will have to give a general definition. Therefore, the definition must come first and your exclusion of civil servants and others must be illustrations of that general principle. So we cannot escape the need of a definition. Now, what has happened, unfortunately, is we are in great trouble here. We have passed this recent legislation which you have looked at. Now it is under challenge in the Supreme Court. That challenge is that there are hundreds of other posts bearing the same name with same duties. There is no definition. This runs foul of article 14 and the whole statute will go down. It is already under challenge. Therefore, we have to evolve some definition. That is what the President really had in mind when he referred the matter twice to the Government and in his message he wants a sensible definition which should cover all the exemptions which we have made. So we cannot escape. We have to assist the President now in having a definition before him which explains all this. If it does not, some of these offices will have to go in spite of the statute. Now, what is the definition? I am seeking your assistance for that.

SHRI RAJEEV DHAVAN: The first point you made was simply the exclusion of judicial review. It cannot be excluded. But I think the Chairman's question was slightly different. He said that quite apart from the fact that the ultimate backstop is, in fact, the courts, what other institutional arrangement which we want to make for final decision on qualification or disqualification, as the case may be, I think, that is the question that the Chairman put.

SHRI RAM JETHMALANI: I understand the Chairman's point, but ultimately there is no escape.

SHRI RAJEEV DHAVAN: On the second point that you made, I would respond by saying that the Members of this Committee will find it very useful to write a paper or article with the material that I have provided. So, let us leave that aside for a moment. I am not here for academic discussion or to act as your Research Assistant to write an article. I think there is a very important question that you have raised by talking about your terms of reference. I do not know the answer to it. The answer to it, unfortunately, lies in the questions that you have sent out by post.

SHRI RAM JETHMALANI: One great advantage we have reaped from that terms of reference, as provided by the office, is that we have got so much material from you. Otherwise, I would have had to make a research myself.

SHRI RAJEEV DHAVAN: Can you come to article 102 for a moment? I think your terms of reference is about the office of profit. Kindly have a look at article 102 of the Constitution. It says:

"Being chosen as and for being a Member..."

Now, the question is, whether this gives you the leverage as it were to, in effect, differentiate between these two situations or not. You can define your terms of reference very strictly and so it is actually limited to article 102 (1) (a) or you can say that this whole clause deals with both stages and that it may be unwise to group them together. That is how you rework your strategy within the terms of reference. I think you are much more experienced than I in interpreting terms of reference.

SHRI RAM JETHMALANI: For taking a difference between the two situations, article 102 itself will have to be amended.

SHRI RAJEEV DHAVAN: No doubt. Therefore, you have to work that out somewhere.

The last question that you raised about the definitional question, I think, the submission that I was making to you, in fact, classify categories that may be a little more absolute and more manageable, whether this requires an amendment or not. I do not think you can escape that. Within the framework if you insist that the reference is limited, there is nothing this Committee can do except summarise the jurisprudence. I have already indicated that it cannot be summarized.

SHRI RAM JETHMALANI: Last thing that I want to ask you is that at least one Supreme Court authority very clearly says that an office of profit must be first an office and then be described as profit. I am glad that you are so forthright in your expression about the Supreme Court decision. I like that decision of yours.

SHRI RAJEEV DHAVAN: You are responsible for many of them and I am responsible for expressing them. You created them.

SHRI RAM JETHMALANI: The Supreme Court decisions do not make any sense at all. There is no sensible discussion in any. But one distinction is made that first it must be a post then you go to the profit element. The word is 'office'. 'Office', according to Black Dictionary must necessarily mean an office where the incumbent has the right to control the actions of others without their consent. In other words, it must carry a statutory power. A non-statutory office is not an 'office' at all, as I understood.

In this expression, you must have some statutory power by which you are able to affect the rights and obligations of others. If this was clearly known to the Supreme Court, many decisions which they have rendered by an intuitive process would have become a decision given by a judicial reason.

Then, comes the question of profit. There are only two distinctions. Is it far in access of compensation? If it is far, it is proper. If it is substantially compensatory, it is not proper. It is so simple. Any non-statutory office is not an office of profit, first of all. It carries no office of profit and then secondly whether you see merely some compensation. That is not an office of profit. I think, it is the simplest thing to define office of profit in that sense. The second part is in conformity with the Supreme Court decision. The first is consistent with the unexpressed ratio of those decisions. Just think over this and tell us.

SHRI RAJEEV DHAVAN: I will tell you my discomfiture when I was writing this paper for your benefit. Since you have classified it to such an extent, my discomfiture was this: supposing, we define office in the sense in which you have described it. It would, according to you, cover two categories. The first category would be, of course, the constitutional category of a civil post. The second, according to you, would be statutory office.

Without going to Black Dictionary, what does it exclude? The entire problem that has been created as far as this is concerned is not just in relation to the civil service categories. They cannot be appointed in any other way on statutory bodies. It is the non-statutory bodies that form the basis of a large part of the patronage. Now, one solution that would emerge from your, at present tentative, suggestion for us to examine is, really do we want to exclude from patronage only statutory bodies or that huge area, which for want of a better expression, which I describe as '*lal batti*', outside the statutory bodies. Why should that come out of this ?

It is because, you called it bribery. I used the milder term 'patronage'. That would continue to survive extensively if 'office' were defined in too restrictive a way.

SHRI RAM JETHMALANI: But I thought that, that at least clears the definition; the rest is left to political action. If a Government habitually indulges in this kind of a thing, then it is for the electorate to put it where they want.

SHRI SITARAM YECHURY: As usual, it was very useful. I promise you not to write an article on this; I leave it to you. Honestly speaking, I have another fundamental problem, since we are only discussing it at this level. One area of this issue that we are discussing is the conflict of interest. The other area is of patronage that you have been talking of. When you are talking of patronage, all of us want to have some yardstick or some norm by which we can prevent it. It is not only a legal issue but also a moral issue as well. That is something that we will have to work out. But, in terms of conflict of interest, the interpretation, so far as Article 102 etc. is concerned, was that the Legislature cannot be subservient to the Executive and, therefore, they should not hold this post by and large. That is the argument. I want to enlarge this issue. Suppose, if you also happen to be in the private sector and a Member of Parliament and be on a Committee such as this, you can be an owner of an airline and sit in a Civil Aviation Committee. Should office of profit be defined only as a conflict of interest between Legislature and Executive, but also the other dimension of influencing the Executive in their decision making? Should such thing also be considered? The whole area of the private sector is actually being left out.

SHRI RAJEEV DHAVAN: I think, if you expand that, you will have a very poor Parliament.

SHRI SITARAM YECHURY:I am not stopping them for being MPs.

SHRI RAJEEV DHAVAN: It is like this. There are, for example, not in India but certainly across the board in England, trade unionists who are full-time members of the trade union who sit in the TUC or whatever it is. That is a good thing. I would like to minimize the concept of office of profit according to the narrower principle that those who are in some way accountable to Government, which is accountable to Parliament, should be excluded. That is why I want to narrow the area. If we go much further, I agree with you what is the difference between somebody who owns an airline and somebody who runs Air India. If you were to say anybody who makes a profit should not be in Parliament, then we are drifting somewhere outside the Constitution.

SHRI SITARAM YECHURY: I am not saying that at all. I am only talking of the definition of the Office of Profit. Since we asked to define the Office of Profit, I was wondering whether the definition, the ambit of it, can go beyond the appointments made by the Government, whether we should consider that area also. That was the question. You can also think about it and let us know. We will be grateful.

The second problem, and the last one, is this. Mr. Chairman, Sir, the definition of Office, as you and Ram Jethmalani were discussing at the moment, can it be only on monetary terms? I would like to know whether right to appointments which also translates into right to giving favours, giving licences, or giving permissions, making appointments, also fall under the definition of profit.

SHRI RAJEEV DHAVAN: I think, that is one of the reasons why I restricted it to remuneration of a particular kind. What you are saying that there are perks that go beyond remuneration is certainly a factor to be taken into account.

SHRI SITARAM YECHURY: Even if you are not taking a salary but suppose you have the right to appoint let us say ten people in ten posts and that in itself is the consequential patronage.

SHRI RAJEEV DHAVAN: I think, this is something to be looked into. That is why, I have defined it broadly in terms of articles 309 and 312.

I was not unhappy with my conclusions.

MR. CHAIRMAN: You have promised that you will be sending a written note and reply.

SHRI RAJEEV DHAVAN: Then, I will be able to respond to some of the points.

MR. CHAIRMAN: You have agreed to send your reply in writing. So, on my behalf and on behalf of the Committee I am very much thankful to you for sharing your views and thoughts with us today. You have given valuable suggestions.

Thank you.

SHRI RAJEEV DHAVAN: Thank you very much.

(The Witness then withdrew)

WITNESS EXAMINED

Shri Harish N. Salve, Senior Advocate

MR. CHAIRMAN: We are sorry for the inconvenience caused to you for the delay because of the discussions that we had with the earlier witness.

On my behalf and on behalf of the Joint Parliamentary Committee, I welcome you to this hearing of the Joint Parliamentary Committee. Being a constitutional and legal expert, as our Shri Ram Jethmalani knows very well, you are now going to enlighten the Committee as per the terms of reference. You might have gone through the questionnaire also. So, the JPC would like to benefit from your knowledge and experience in finding answers to various issues related to the subject.

Before we start our discussion, let me state that the proceedings of the Committee are to be treated as confidential and are not to be made public till the Report of the Committee is presented to Parliament. I would also like to make it clear that your evidence shall be treated as public and is liable to be published at the time of report, unless you specifically desire that all or any part of the evidence given by you is to be treated as confidential. Further, I may also make it clear to you that even though you might desire your evidence to be treated as confidential such evidence is liable to be made available to the Members of Parliament.

Since the list of points has already been sent to you, you may kindly make your submissions point-wise. Hon. Members may have some clarifications wherever necessary.

SHRI HARISH N. SALVE: Thank you, Sir. I am indeed honoured for this opportunity to come and express my views on these points of moment, which have been exercising our country for some time. I do feel that there is some need for amending the Constitution to bring in clarity into the law. It was almost 50 years back that the Pandit Tagore Das Bhargav Committee, borrowing from the phrase used by the UK Committee, said: "There is considerable obscurity in the law." I think we are exactly there because the four Supreme Court judgements do not really present a cohesive pattern of the law. I think there is some need, therefore, to make this law more certain.

According to me, the fundamental premise why we got this law continues to be the same, is to prevent Members, elected representatives of the people, from holding certain offices which are incompatible with their duties as elected representatives. That fundamental premise continues to hold. But in my perception, today the law has to balance three competing values. One is the underlying principle of independence of the elected representatives. The second equally important competing value is that the law should not unduly restrict the right of a citizen of India to represent the people by getting elected to Parliament. And the third equally important feature, important value in this is that there must be certainty in the law.

This law cannot be a death trap. It requires an enormous effort, which you all know today, to get elected to office. This cannot be a death trap by which suddenly you realize you get

elected; people have reposed their faith in you; you become a Member, either the Lok Sabha, Rajya Sabha or the Assembly; and suddenly you realize that by some interpretation, you fall in on the wrong side of the law. That is not, how election law is to be administered. So, these are the three competing values, namely, independence, the right of the candidate and the certainty of the law.

If one goes through the cases as they have evolved, there are three parts which create problems. One of which, over a period of time has become less troublesome. What is an office? What is profit? What is under? These are the three parts which create difficulties.

Profit has been construed by our courts in wide meaning. I do not think that really is a problem because labels do not matter. As long as you are getting something from the Government, it is profit. The real problem comes in what is office and what is under. I think that is where the law needs to be clarified. Anything which is directly by way of employment or service or interaction with the Government, which yields profit, is fairly simple. The trouble comes in where you are employed by statutory authorities or where you are associated with statutory authorities.

In one case, the Supreme Court said: "If you are a Head of the Municipal Corporation, you are not holding an office of profit under the State." In Soren's case, they said: "If you are in the autonomous council, you are holding under the State." Quite frankly, if you read the judgement carefully, apart from the niceties, I think there is some inconsistency in this. Either we take the view that it is Government in the narrow sense, namely the Central Government or the State Government, which falls within the meaning of the word 'Government'— and then all other autonomous corporations are out—or, we take the wider view, which the Soren's case takes, namely everybody, who is in the Government, is in some way connected with the Government.

Sir, my suggestion to the Committee for consideration is keeping in view today the activities of the Government, keeping in view the realities of India, keeping in view that we are a Welfare State, keeping in view the fact that we act through so many agencies and bodies, we could think on the lines of classifying it into four. One would be, of course, directly under the Government which is relatively easy. The second is statutory authorities or corporations in which the Government has the power to either appoint or remove or both. If you are completely autonomous of the Government then it is another matter. But if the Government has the power to appoint or remove, then the conflict comes in.

The third could be, as the Supreme Court decided in the Coal Authority case, public sector undertakings owned wholly or partly by the Government, where the Government has the power to appoint or remove. So, if you are holding an office which is senior enough, where the Government has the power to appoint or remove, consistent with the judgement of the Supreme Court also as they have interpreted the law.

For the fourth, I have a radical suggestion. There are a large number of other bodies which are significantly funded by the Government where the Government has pervasive control. It becomes very difficult to decide. My suggestion to this Committee to consider is—whether we cannot have a blend of the English law and the Indian law for the fourth category where a body or authority is funded by the Government and there is a degree of governmental control. We must have a Committee which identifies those bodies. In relation to the fourth, we must have a list because that gives certainty to the law. If somebody feels that a person should not, a

person who is holding that office should not be elected and that office is not in the list, he can move that Committee. That Committee would examine and decide. When the Committee examines and decides, one of the suggestions made in the paper, is the power to resign. If you are holding an office which is not in the list and the Committee decides that this office should be in the list, you should be given three months' time to decide which of the two offices you want to hold.

This way, we could have a blend between the English and the Indian laws. The English law, perhaps, will not work for us that where there is only a negative list and all other than the negative list is coming. Equally, the Indian law is too vague because you only find out, after being elected and way down the road that you are in the wrong office which also is a very unsatisfactory position to be. So, we must have, with some sense of certainty, if you are holding an office where you are appointed by the Government or can be removed by the Government, you know that. If you are directly under the Government you know that. The problem comes in this nebulous third category and for that we could have a list, we should have a list with somebody who identifies and the test is the same test as we have for Article 12 of the Constitution—deep and pervasive control of the Government and funded by the Government.

Who decides? In my suggestion a Committee decides. If I feel that a particular person who is in a particular office should not be in Parliament, I can petition that Committee and say—please add this office to the list. If the Committee says no for the wrong reasons, a limited judicial review under Article 226 or Article 32 may be available. But there will be certainty because whenever an office is added to the list that incumbent to that office must get three months' time to elect which of the two offices he wants to continue. This is not a deathtrap to somebody who innocently takes an office and then suddenly he realizes that he is on the wrong side of the law.

The other change, which I feel, which you could consider bringing in our law is a change which is in accordance with the English law. Suppose a person holds an office of profit and this is particularly true for people who are in the fourth class—if he foregoes and says I am willing to work on an honorarium. The whole idea is if you are on the payroll of the Government, if one may use that loose expression, there is a likelihood of conflict between your personal interest and your duty as a Member of Parliament, if you forego that payroll.

In my perception, the Indian history is such that it would justify excluding such offices from disqualification. The English history, as we know from the THAKURDAS BHARGAV COMMITTEE is very very different. In England they did not want officials appointed by the King, who were called the King's stooges, to come into the House of Commons. That was a very different time and it was a very different perception. Even when our system started under the 1915 Act and the 1935 Act, as the non-officials in our Councils grew, we did not want British officials coming in. Today the scenario is totally different. Today our reason for this law is completely different. Today we do not Members of Parliament who may perceptively have a conflict between their income coming from the Government and their being Members of Parliament or Members of the Assembly who hold that very Government accountable.

So, if the person says that he is willing to forego and in a manner prescribed by law, then the conflict goes away. Then, the fear that he will bend in favour of his own remuneration goes away. I do not see any reason why we should not have that.

Finally, on the question of exemptions, I would submit that once the Constitution is corrected and Parliament by law establishes a Committee which will identify these fourth category of offices and Parliament by law lays downs the rules in which you forego the remuneration, then I think, considerable degree of problems would be avoided. On exemption, with respect, I concur with the expert quoted in the Committee. Exemptions are really meant for those offices which strengthen the parliamentary system; otherwise it looks like the case by case exemption. If there is an office which strengthens the parliamentary system, you may exempt it. Otherwise, the holder of that office should be able to forego the remuneration and say 'Very well, I continue to hold the office, but the conflict goes away because I will not draw any remuneration'. It is important because we have to see what is prohibited under Office of Profit. It is not an office in Government which is prohibited. If he gives up the profit, it ceases to be an Office of Profit. The idea is to remove the conflict. The idea is following the principle that it must appear to be fair, appear to be transparent, and not merely be transparent in reality. Public confidence, public perception is where there is no conflict. So, this will satisfactorily address that problem.

In this context, I would address the Committee very quickly on the specific points. As far as definition is concerned, this kind of a definition can be for the fourth category, namely, bodies which are controlled by the Government. This kind of a definition could be there, but ultimately a Committee must decide and a Committee must publish the list well in advance. It cannot be that you fight an expensive election and three years later, you are told that you are on the wrong side of the law. Quite frankly, if it is classified into these three or four, with the fourth category, namely, the nebulous category being left to a Committee to identify, then all these elaborate definitions may be unnecessary because this definition will only benefit my community. This definition will lead to only more litigation.

The second point which is put is on the newly amended 75A and 164A and the comment is 'very purpose of the amendment would be defeated if one were to liberally interpret the Office of Profit'. Sir, I am a little confused about the word 'liberally interpret'. If 'liberally interpret' means interpreted in favour of exclusion, then that is correct because the law now is marching in step. We frown upon those who have defected and that is why, we prohibit them. Therefore, I do not think that the interpretation which I am suggesting will, in any manner, run counter to these two provisions.

The proposed definition of Office of Profit, I find, would be incompatible with the constitutional philosophy underlying Article 102. That is for two reasons. Sir, we are now getting into very grey areas. It will defeat certainty because it excludes very bodies which are wholly or partly owned and the holder of an office which is capable of exercising legislative, judicial and quasi-judicial powers. Again, what is legislative power and power of legislative character is a very nebulous concept. Price fixation is legislative in character and framing of policy is also legislative in character. What is quasi-judicial power? Anybody who has the power to hire and fire an employee exercises quasi-judicial power. The principle of fairness today has been extended to such an extent by the Supreme Court that quasi-judicial power is, again, a very nebulous concept. If the whole idea is to bring certainty in the law, bringing in these will bring in more uncertainty in the law.

Secondly, these kinds of exclusions are uncalled-for. A perception of conflict arises not because of the nature of powers you exercise. The perception of conflict arises because you are earning a profit from the Government; you are earning an income or gain from the Government,

and you are now holding that Government accountable for it. This is the perceived conflict. How does it matter what powers you exercise? I think that, even conceptually, these qualifications are totally uncalled-for.

Similarly, to clarify remuneration as something commensurate with the status is not correct. What is commensurate with somebody's status is again such a nebulous concept. I do not know whether the salary of the Chief Justice is commensurate with his status; I do not know whether in today's standards the salary paid to a Minister is commensurate with his status; and I do not know whether we deserve the fees we earn half the time. Something being commensurate with status is such a nebulous concept. This will again bring in such a great degree of uncertainty. It will all depend on the perception ultimately of that Supreme Court judge sitting there whether this Rs. 5,000 is too little or too much for a particular office.

There is also the issue of the opportunity for resignation. I also feel that in the fourth nebulous category. Once you have a list, of course, the person knows if he is joining a prohibited category. But if he is not in the list and you add something to the list, then you must give him a chance that within 3-4 months he should choose whatever is appropriate and whichever he wants to continue.

As far as the definition of profit is concerned, I do not see any reason for it not applying across the board. I am asking this because the basic philosophy is the same, namely, preventing conflict. If the definition comes in, then it is much better if it governs all these articles that are quoted, namely, 18, 58, 59, 64, 66, and 102, and puts all of them on par.

As far as the designated authority is concerned, I entirely agree that for the fourth nebulous category there must be an authority, who prepares the list in advance.

As far as the exemptions are concerned, I have already indicated about it. I respectfully concur with the experts who have been quoted in the Committee that the exemptions are for the benefit of the Parliamentary system, but much of the need for exemptions will go away if we bring certainty in the law, and also by providing for forgoing remuneration.

The additions and deletions from the list of office have to be by strict scrutiny, and it must be by a thorough process of Parliament, if you want to add any exemptions. Finally, on its application to the States, there is no question about it. I think, we must have a uniform principle, and those uniform principles must be across the board. The Members of our Legislative Assemblies are no less representatives of the people than the Members of Parliament, and we must have a common yardstick and common basis for this.

As far as the UK law is concerned, I do not think our ground realities; our situation; and our culture would be relevant. They are a far more liberal society. The things which pass muster in UK would never pass muster in India. The way they award contract; the way they award tenders; and the way their Government runs is totally different. They are appalled when they hear of our Public Interest Litigation, and the way our court takes the Government to task. They would have said that they would never have been built in a millennium if the court had subjected the process of award of tender to strict scrutiny. But we have learnt to live with that discipline, and that is our strength. We have learnt to live with transparency and discipline. Our system is different, and I do not think that we should dilute our system. I think that they should be following our example rather than we following their example in these respects. This is really the important comment on point 12 and 13.

MR. CHAIRMAN: Thank you very much. I have one small clarification. There are large numbers of offices either in the Union Government or the State Governments, but they have not been mentioned in their schedules. Have they been exempted or not? There is some sort of ambiguity in it. For example, a Wakf Board has been given exemption in West Bengal, and in some other State the same Board has not been given exemption. Similar kinds of Boards are there in other States also. Therefore, there is a difference in the States.

I want a clarification. You suggested in this context that there should be some institutional authority to decide these things. If you are in favour of having some institutional authority to decide, then whom do you suggest should be designated for this purpose?

SHRI HARISH N. SALVE: With respect, Sir, I would say this. First of all, I myself said that all these problems arise with other bodies which are not directly Government, which are not public sector undertakings and which are not statutory corporations, but are substantially funded by Government, etc. I personally feel that it would be in keeping with the dignity of this House and in keeping with the dignity of our Legislative Assemblies that this Committee must be manned by the Members of the Assembly. There will always be limited judicial review available against their orders. The Constitution Amendment which I am suggesting could lay down the criteria consistent with the Supreme Court's judgments on Article 12—deep and pervasive control of the Government. In an apparent case, despite all this, if the Committee does not include an office, somebody can move the court and say that it is wrong, and the Committee should include those offices. In the first place, I think, it would be consistent with the dignity of this House and consistent with the dignity of the Legislative Assemblies to do this. If we trust our Assemblies and if we trust this House with making these laws for this country, we can surely trust them with making a list of offices. I do not think that we need a Committee of Judges to decide that.

SHRI SITARAM YECHURY: Thank you very much for enlightening us. In all your explanations, whenever you talk of profit, you talk of monetary remuneration. Strictly speaking, that is right. Suppose, there are offices where monetary remuneration is not there, but if the right to appoint and the right to clearances were to be there, would that not in the larger sense fall under the conflict of interest category?

SHRI HARISH N. SALVE: In my view, it is a question of where we draw the line. Ideally speaking, a Member of Parliament should be free from all other prejudices, but that is a perfect world. Our Constitution had to draw this vital line, and we drew it at office of profit. If you ask me personally, I think, it would inspire the greatest public confidence if our Members of Parliament do not hold any other offices. For that, a code of conduct could be evolved. But amending the Constitution and rising to that higher level would possibly be utopian. Let us not shut out a lot of talent which may be available for this office. Let us not shut out the availability of those people. People may want to vote them into an office. You may have people who are in a position to appoint and remove, the very fine people who deserve to be the representatives of the House. That is where you have to strike the balance.

SHRI SITARAM YECHURY: Since we have been asked to define the term "office of profit", all our discussion essentially is about the Government appointing the MPs to an office. But is there anything outside of the Government where you think this conflict of interest will arise? Let us say, you have Members of Parliament who are also owners of big industries. If they sit on particular Committees which will take policy decisions, is there some area that you consider that could also constitute a conflict of interest?

SHRI HARISH N. SALVE: In my perception, there is a complete conflict of interest when captains of industry get elected to the House and then join Committees which are going to make recommendations. But that is a perception of a constitutional lawyer; maybe, we live in a utopian world.

SHRI SITARAM YECHURY: But is there no way where we can bring in some correctives?

SHRI HARISH N. SALVE: I feel, there could be a code of conduct which could ensure that the conflict of interest does not arise. If you are asking me this question, my respectful answer is that a stage has come, possibly seeing the changing nature of this House, when this House could have a Conflict Committee comprising of some senior Members, who, in all perceived cases of conflict, would decide on whether a particular person should be on a particular Committee or should be doing or not doing something. It would be consistent with the dignity of the House and also with the credibility of this House in the public eye.

SHRI V. KISHORE CHANDRA S. DEO: Thank you very much, Mr. Salve, for what you have enlightened this Committee about. Basically, you have confined your perception on "office of profit" to appointments by the Government and basically to whether a person who has been appointed is receiving any remuneration or not. There could be a situation where without receiving any remuneration or by accepting a particular post or an honorarium, still one's interest in that particular office could come in conflict with his functioning as a public person. What are your comments on that?

SHRI HARISH N. SALVE: As I told the hon. Member, Shri Yechury, this is absolutely correct. Article 102 picks up one class of conflict. Today, society has grown so diverse and the functioning of the Government has become so widespread that there could be so many other conflicts which we had never thought of.

One has to ultimately balance between protecting the right of a democracy to elect the one the people like to and send him to this House and the need for transparency and credibility of this House where people with conflicting interests do not come in. The difficulty is, if we go beyond the office of profit, unless we can find some other definite head, profit is a definite head right now, if we can find some definite head of conflict, possibly we could also include that. But, equally, clarity and precision in the law is very important because looked at it from the other point of view this is one area which could be an area of minimum litigation. It takes a huge effort to get into this House, to go and represent the people in this House and then your status is under a question mark on whether you are on the right side or wrong side of the line. That should be avoided.

SHRI V. KISHORE CHANDRA S. DEO: What is your opinion about a person who is appointed in a purely advisory capacity? For example Ministers and whips and others are for obvious reasons exempted from office of profit. If the Government wants to take, let us say your services or services of any other expert in whichever field they have years of experience, do you think that such a position would also attract the provision of office of profit?

SHRI HARISH N. SALVE: In my perception, if I want to be a member of this House, which is a solemn duty to democracy, one should not view it as a personal profit. It is a solemn duty to be a member of this House if you are elected and sent inside. If the House needs my services, I should be willing to do it even though otherwise it carries remuneration. That is why I suggest

that I must have a right to that House to forego that remuneration and continue with my membership. If I want remuneration for that job, then I must give up my membership of that House. But if I am willing to make that sacrifice, I do not think this is asking for too much.

SHRI RAM JETHMALANI: Harish, I have a lot to discuss with you but I think we will discuss it in more convivial circumstances. May I just tell you one thing? Kindly look at the newly added article 361(b). Do not look at it now, just revolve it in your mind. There is that definition of remunerative political post. Is this not an adequate definition of office of profit? Kindly apply your mind and let me know. Article 361(b) was added by the 91st Amendment. Just see that definition of remunerative political post. In fact they have brought in another concept now which is creating more confusion.

SHRI HARISH N. SALVE: It is bound to create trouble. I will certainly look at it, Sir.

MR. CHAIRMAN: Lastly, a view has been held that the only feasible method could be to amend the Constitution to make it obligatory for all the State Legislatures to be guided by such principles as the Parliament may by law provide in regard to the matter. Do you agree with that opinion? If not, would you suggest anything to achieve the objective of uniform applicability? This is one of the terms of reference, the criteria regarding disqualification for office of profit.

SHRI HARISH N. SALVE: With great respect, I would say that this should be done. We need to have uniformity. It cannot be that in one State a particular office is out and in the next State it is in. That is not at all desirable. This is a larger principle. The perception of a State is not relevant here. Like our Constitution runs across the length and breadth of the country, these principles must run across the length and breadth of the country.

MR. CHAIRMAN: I thank you on behalf of the Committee and on my own behalf, for sharing your views and thoughts with the Committee on various aspects of the concept of office of profit. This will certainly help the Committee in understanding various issues relating to the subject in proper perspective and would enable it to make useful recommendations in their report. On receipt of the written statement, we would proceed further.

Thank you once again.

(*The Committee then adjourned*)

RECORD OF EVIDENCE TENDERED BEFORE THE JOINT COMMITTEE TO EXAMINE THE CONSTITUTIONAL AND LEGAL POSITION RELATING TO OFFICE OF PROFIT

Tuesday, the 20 March, 2007 from 1500 hrs. to 1600 hrs. in Committee Room 'A' Parliament House Annexe, New Delhi

Shri Iqbal Ahmed Saradgi — *Chairman*

MEMBERS

Lok Sabha

2. Shri Santosh Gangwar
3. Shri Raghunath Jha
4. Shri Madhusudan Mistry
5. Shri Mohammad Salim

Rajya Sabha

6. Shri Ram Jethmalani
7. Shri Sitaram Yechury

WITNESSES EXAMINED

Ministry of Home Affairs

Shri Vinay Kumar	—	Additional Secretary
Shri B.A. Coutinho	—	Joint Secretary

National Capital Territory of Delhi

Shri Ramesh Narayanaswami	—	Chief Secretary
Shri B.S.Mathur	—	Principal Secretary (Law, Justice & Legislative Affairs)
Smt. Shakuntala D. Gamlin	—	Deputy Secretary(GAD/Services)

Union Territory of Puducherry

Shri John Claude Pompei Mariadassou	—	Deputy Secretary Union Territory of Puducherry

MR. CHAIRMAN: I welcome all the hon. Members of this Committee. I also welcome the representatives of the Ministry of Home Affairs and Union Territories of Pondicherry and NCT of Delhi to this sitting of the Joint Parliamentary Committee.

As you are aware, this Joint Committee has been constituted mainly to examine the constitutional and legal aspects of the "Office of Profit" under Articles 102 and 119. So the terms of reference given to this Committee is to define the Office of Profit.

The second term of reference given to this Committee is to suggest a comprehensive system of law regarding this Office of Profit applicable to all the State Governments and Union Territories.

The third reference given to the Committee is to study the law existing in the UK also. These are the three terms of references given to the Committee. We are seeking your suggestions in this regard.

I may add that the proceedings of this Committee are to be treated as confidential and are not to be made public till the report of the Committee is presented to the Parliament. Since the list of points and questionnaire for the discussion have already been sent to you, you may kindly make your submission point-wise and then the hon. Members may also seek clarifications from you. Before you start, you may kindly introduce yourselves.

INTRODUCTION OF WITNESSES

SHRI VINAY KUMAR: Sir, we have already submitted our written response to the hon. Committee. If there are any further clarifications, to the best of our ability, we would like to submit them before the Committee.

MR. CHAIRMAN: The first question is to define the Office of Profit. In case of Pondicherry, under the Legislative Assembly's Prevention of Disqualification Act, 1994 various offices have been enumerated in section 3, namely, the Pondicherry Agro Services, Pondicherry Agro Products, the Pondicherry Tourism and Transport Development Corporation, etc. as has been given in your reply. What is the criteria adopted in the system of law under which these offices have been given exemption?

SHRI JOHN C.P. MARIADASSOU: Sir, in the case of Pondicherry, we have gone through the criteria as given by the higher courts including the Supreme Court in various decisions to the effect that the office of profit should be given to an incumbent in such a way that he does not have any benefit or fringe benefit, except compensatory allowance. In this respect, the Government may have the compelling necessity that the Committee or the Corporation is to be headed by a legislator.

Then, out of the sheer necessity we have had prior consultations and we have seen to it that no unnecessary benefit would accrue to the MLAs who head such situations. We have enacted this 1994 Act. Thereafter, there were also two amendments to this Act. This apart, prior to 1994, we have four legislations in which in-built provisions are there, namely, Parliamentary Secretary, Khadi and Village Industries, Housing Board and Slum Areas.

In all these respects we have seen to it that unnecessary profit measures are not given or not extended to the MLAs except compensatory and facilitative benefits.

MR. CHAIRMAN: The mechanism is available with the Government to process the cases of office of profit. Also, may be, in many of the cases which were deserving the exemption, this has been rejected. What is the mechanism applied for rejecting those cases?

SHRI JOHN C.P. MARIADASSOU: In fact, it is only in certain contingencies or certain situations when it was thought fit that there should be held by MLAs only, then they were given. Even presently, all these offices are not headed by MLAs. In fact, off and on, mostly Secretaries to Government or Pondicherry Civil Services Officers are heading these corporations. Only when the necessity arises that some MLAs should be given a charge, then only he is inducted.

MR. CHAIRMAN: In many cases, while giving exemption there are certain norms in the Central Government and there are certain cases which have been decided in the courts also. We can have some idea that what should be the guidelines, what should be the norms while granting exemption to all these Boards; whether they have followed or as per the necessity the exemptions have been given.

SHRI VINAY KUMAR: As we have submitted in the written reply, actually it has gone by the judgement of the Government concerned both in Pondicherry and Delhi. They have considered exemption necessity and exemption has been provided. Pondicherry started with the system of individual legislation for each office and then they moved over to a common legislation with enabling provision. Otherwise it is the judgement of the Government considering it necessary to exempt; and therefore it has been exempted. The two Acts do not carry any definition and, therefore, by implication do not also carry any conditionalities.

MR. CHAIRMAN: Do you suggest the association of the public representatives like Members of Parliament and the Members of the Legislative Assemblies is necessary for the welfare of a particular area or particular region? For example if there is any tribal area like in North-Eastern Region etc. where many of the councils and development authorities have been created—may be in Union Territories also—whether the participation of the representatives of public like MLAs and MPs is also necessary for the development of that area and welfare of that region.

SHRI R. NARAYANASWAMI: Specifically the answer to the question that the hon. Chairman has put would be 'Yes'. He has mentioned North-Eastern Region, for instance. These are all very remote regions like Arunachal Pradesh or Mizoram or other States. In these circumstances, it is only the Members of Legislative Assembly who have live in that area; it is not the Officers who go there. There is no doubt that every State has got its own cadre and officers also do live there for 20 or 25 years. At the same time those who have been grown up there, they are in a much better position to articulate the grievances of those areas. The more remote the area, the importance of the hon. Members of the Legislative Assembly in being involved in such offices is very much felt. I would hold this view.

SHRI VINAY KUMAR: I would like to add that so far as officers are concerned - in any case the rules are clear - the conduct rules prevent them. But for the rest, for the Members of the Legislatures, it is what the submission made by the Chief Secretary.

SHRI R. NARAYANASWAMI: In all such positions, undoubtedly there would be a certain element of expenditure involved. The office itself, for instance, involve an honorarium; an office may

involve a perquisite like a vehicle. It depends upon how far away you are positioned and you are coming for the meeting; how frequently these meetings are held. It may be just equivalent to the out of pocket expenses that a person may be facing. It could also be a little more than that.

A person may be leaving his constituency, for instance, coming and staying in the Headquarters or in the capital city if he were a Member of Parliament. In those circumstances, there would be more than an ordinary honorarium, which could perhaps within the purview of what you call 'Office of Profit' in the sense of pecuniary gain. So, in those circumstances, I believe that on the one hand the need for the Member of Parliament or the Member of the Legislative Assembly to be involved in that Office is essential but on the other hand he would need the protection of a law so that he is not disqualified for that purpose.

MR. CHAIRMAN: In some cases, MPs and MLAs are scholars, experts, scientists or mathematicians and their services are required even though they are the Members, and because of that they are the Members they will be alleged as holding an Office of Profit. What do you think in cases where they are denied? So, it is the permissibility to hold some Boards. Is it permissible? What do you think? Many Members are there. Legal experts are there. Scientists are there.

SHRI R. NARAYANASWAMI: So, given their professional expertise, their being on particular Committees, it may be the Department of Space or the Department of Science and Technology or it may be the Bio-Technology, and if there are Parliamentary Committees, Special Committees and expert Committees which are created outside Parliament, I believe that their participation is essential. Otherwise, that expertise would be missing in that case.

MR. CHAIRMAN: The hon. Member will also seek clarification from you. There is one point. Do you think that there should be uniformity in this law? In some States, some Boards have been given exemptions and in other States, similar Boards have not been given exemptions. So, in this context, what do you suggest? Do you suggest that there should be uniformity in the system? If so, what legal method do you suggest in this?

SHRI VINAY KUMAR: On the subject of uniformity, our submission is that uniformity will be desirable. It will also make it open to examinations, scrutiny on what considerations and on what principles, exemptions are allowed from one area to the other. The present kind of difficulty that one situation obtains in one territory and another obtains in another, that will be got over.

SHRI MADHUSUDAN MISTRY: Shri Narayanaswami, since there is no particular definition of an Office of Profit and the situation warrants special expertise, which may be with some of the MPs or some of the elected representatives, do you think that the article of the Constitution should be amended accordingly?

SHRI R. NARAYANASWAMI: Hon. Members, as such two articles, both articles 102 and 191, neither of them define the Office of Profit but they inherent in them is a provision to the effect that if protected by law, passed by Parliament. That is what it says. That is equally applicable to the State Legislatures or the Union Territory Legislatures. My feeling is that the subject matter is this. I was looking at the old debates of the Committee of Parliament as far back as 1953. That Committee was chaired by the hon. Member, Shri Bhargava in 1954. At that time, they had defined very clearly certain fundamental things like civil servants, Armed Forces Officers and others cannot be holding it. They are clearly the Offices of Profit and they should not enjoy any protection. But after we crossed that stage, it has been nearly now nearly five decades, it has

been a difficult process even abroad in trying to define what exactly the Office of Profit is. There are some of the tests which the Courts have laid down. Broadly, there are only four or five tests which they have laid down. Does the Government appoint a person to this Office? Does the Government have the permission or the authority to relieve this person from this post? Does it exercise some control over the person's working? Questions like that have been posed. At the same time, the Courts have also varied in their emphasis if you look at different judgments. Some of them have said that it is not necessary for all the three or four tests to be answered in the same case.

At the same time, we have also said we lay stress on the substance rather than form. For example, let us say, there is a Managing Director of a Corporation and there is a person under him. Now, they have, in fact, tried to suggest that unless there is the direct control over his working, where he is answerable, he cannot really be in the category of an Office of Profit. There have been judgments of these sorts, where they have tried to define.

So, there are difficulties even in the courts from different rulings of the Supreme Court itself, in coming out with something very clear in the matter other than four or five tests, which I have just eluded to. So, there may be difficulty in pinning it down. Unless, therefore, we simply lay it down in a Schedule, it seems easier that from the point of view of the expertise, from the point of view of other requirements that the Government might feel, it may be better to place it in the Schedule rather than amend the Constitution as you had questioned.

SHRI RAM JETHMALANI: Mr. Vinay Kumar, I am specifically addressing some of my questions to you. The Home Ministry produced the last Bill, which became the Act of 2006. Now, you added about some 55 units of the Government in which you exempted Members, directors, vice-presidents, presidents and everybody. Now, when this Bill was prepared, did you just save all those who were facing trouble or did you also think of first evolving the definition, which would cover all this?

Please answer this question very candidly where something really turns on. It is all right that you wanted to save a situation, and therefore, whoever was in trouble, you put them in the Schedule and saved them. Did you really sit down and apply your mind to the evolution of common thread, which would explain all these cases?

SHRI VINAY KUMAR: While, I need your acceptance of one thing that I will have to refer to our records on one point, that is, what exactly were the considerations in each of those cases. But the only submission, which I can make right now is that without application of mind taking them for approval of Parliament would not have been possible. But in each case, what has been the consideration, that I will be able to answer after I refer to the records.

SHRI RAM JETHMALANI: It would be incorrect to suggest that you did not apply your mind. You applied your mind. But the question is whether you applied your mind to the real issue. Did you really think of a definition, which could cover all these cases?

SHRI SITARAM YECHURY: Ram Jethmalaniji, I think, is very unfair in asking this. It is not a question of applying their mind. They applied our mind as to how to get out of the situation.

SHRI RAM JETHMALANI: Frankly, I do not need his answer.

SHRI SITARAM YECHURY: I know.

SHRI RAM JETHMALANI: The answer is obvious.

Please see the danger of this. The danger is not that they have been saved; the danger is argument based on Article 14. What about other Offices of the same kind, which cannot possible be distinguished? Mind you, the matter is today in the court. There is a writ petition pending and you have to answer that petition. The main attack on you will be that you have not saved lots of other Offices, which answer practically the same description. For example, the Howrah Improvement Trust. There are improvements all over. Therefore, we are in great trouble so far as the Supreme Court is concerned. You are right when you said that the Supreme Court have also its problems. I know the problems of the Supreme Court, including the Judges crying in open Court now. What happened the other day, everybody knows.

SHRI SITARAM YECHURY: I know.

SHRI RAM JETHMALANI: Therefore, a definition has to be evolved. We cannot escape it. If you leave it in this condition, you will have constant problems with the Judiciary.

SHRI VINAY KUMAR: But I am sure the entire Committee knows that this is exactly the difference which comes between our Indian law and the British law. Group-wise dispensation has been done there while in the Indian law, under the Constitution, we have so far followed the system of case by case exemption.

SHRI RAM JETHMALANI: But you cannot do that because the British people do not have to face Article 14. There is no written Constitution there. You have a written Constitution. Therefore, we have a problem. So, please tell me whether you at least agree that a definition must be evolved to meet all cases. Otherwise, we face the charge of discrimination in individual case.

SHRI VINAY KUMAR: We have submitted that in our written reply also.

SHRI RAM JETHMALANI: If you want to give us any assistance, then evolve that definition and come back. We require some work to be done by your Ministry. At least, if you ask me, the Puducherry people have done something very sensible. You see what they have done. That is the least that you should do. The Puducherry legislation is based upon one simple Supreme Court principle. The Supreme Court has laid down that where the person is getting only compensatory allowance, it is not an office of profit. It may be an office but it is not an office of profit provided that the holder of any such office is not in receipt or entitled to any fee or remuneration other than the compensatory allowance. They have defined compensatory allowance. So, this legislation, at least, is free, is immune from the attack which can be levelled against the Central legislation. Will you please tell us whether the Home Ministry of the Government of India is prepared to accept this definition? If you ask me, that will solve all your problems.

SHRI VINAY KUMAR: We will make a submission on this.

SHRI RAM JETHMALANI: Now, I will tell you that the purpose of this provision is for the independence of the legislators so that they do not look to the Government to give them a source of income. Freedom of the legislator from the executive authority is one principle. The Executive is not in a position to offer them bribes. This is the intrinsic system of bribery.

And the third is—while in some cases it is necessary—you have some people who run this kind of institution or at least they make some contribution. A Minister is a necessary evil. Now,

therefore, he has been exempted by the Constitution itself. But otherwise the Minister is covered by the office of profit. What does the Minister do? He has got executive powers under various laws of the statute and he gets a big salary which is not merely compensatory. That gives you the idea. You adopt the Puducherry definition and you are through.

According to me, before an office of profit becomes an office of profit, it should be first an office. Office means an office in which the holder has some statutory power in which he can do against his fellow beings or against citizens something which an ordinary person cannot do. So, non-statutory offices, according to me, should be exempted but provided you are prepared to go that far. You apply your mind to this. Shall we exempt all non-statutory offices?

Second, is this not a good definition that he who gets compensation is not holding an office of profit? It is a very simple thing. Puducherry people have done it and you edit it out.

SHRI SITARAM YECHURY: I think that is a job that we have to do. We have to do it with some inputs from there.

SHRI RAM JETHMALANI: The Home Ministry should at least accept this.

SHRI SITARAM YECHURY: I think it is a logic question. We will have to discuss it. In a situation of a written Constitution, you are seeing a contradiction between the Executive and the Legislature. The Legislature being the watchdog of the Executive and, therefore, a Legislator holding any office under the Executive would be compromising that role of the Legislator and hence the conflict of interest and, therefore, to bar certain officers. If that is the logic, then we have to see.

SHRI RAM JETHMALANI: That is also the logic, a kind of non-ministerial attack etc.

SHRI SITARAM YECHURY: Exactly. That is the problem. That is what I am saying. You have a fundamental problem in this where your Executive is also part of your Legislature. The moment you have an Executive which is part of the Legislature, the conflict of interest between the Legislature and the Executive becomes very clouded. Therefore, the problem; how do you distinguish between these things, the non-ministerial thing?

In that context, why do you in your reply that the UK model does not hold good for us?

SHRI VINAY KUMAR: Sir, it is because they have had category-wise dispensation. The entire category of functionaries like functioning as judges or *quasi*-judicial authorities and like that is there. Then, of course, a long listing also is there. Instead of that our constitutional scheme has been different.

SHRI SITARAM YECHURY: The scheme is different. Now we are asking to examine the whole thing. We know the scheme is different. We know also the problems in the scheme that we have now. In one of your replies you said we have a good system—the President sorts it out in consultation with the Election Commission. What Mr. Jethmalani has been asking now—very correctly—we will have a similar nature of office which you have not listed, for instance. It would be an office of profit because it is not listed or exempted. But, offices which are similar in nature have been listed and exempted. You get a fundamental contradiction in it. The conflict here is with Article 14 as Mr. Jethmalani was saying. It is completely discriminatory. It is discriminatory by definition because you are choosing which ones you want to exempt and you are not defining

or giving a definition of what constitutes an office of profit. That is why in the present scheme of things there is something wrong, that needs to be corrected.

In the process of wanting to correct that, we were exploring the other options. Therefore, the British option was one of the options which was one of terms of reference for our Joint Parliamentary Committee itself. But the fact that a JPC has been constituted is a combined wisdom of the President of India and the Parliament of India, that this is an area that requires clarity which does not exist at the moment. That is why we are here to help create that process.

For that clarity one of the options that was there was the British option. If that option, you say, may not hold good in the Indian domain, these are the words that you have used—that is what we are not able to understand fully.

SHRI RAM JETHMALANI: I will tell you. They have hit upon the right answer by accident. They did not have this in mind because we have an Indian Constitution. They were exploring something other than this. The real reason is because of the presence of the Indian Constitution. You would have said it very clearly here. Obviously you had some other nebulous reason in mind.

SHRI VINAY KUMAR: No, sir. As a submission here, I am pointing out that provision. But the Committee's note itself starts with that provision.

SHRI SITARAM YECHURY: I think we will have to discuss it.

SHRI RAM JETHMALANI: You are right; we will also have to do it.

SHRI SITARAM YECHURY: We have to do the thing. There is no point in asking them.

SHRI RAM JETHMALANI: I wanted some confession from the Home Ministry.

SHRI SITARAM YECHURY: But, under duress confessions are not valid.

MR. CHAIRMAN: About the law existing in Britain, whether we should think it is seriously applicable to the Indian conditions?

SHRI RAM JETHMALANI: Whatever the British Parliament does there is valid.

SHRI SITARAM YECHURY: I think what Mr. Jethmalani is hinting at is the first cardinal mistake we made is to write down a Constitution.

SHRI RAM JETHMALANI: We have a mandate. It is the same situation with what it was in Moscow some years ago. Every four years they used to meet at the Supreme Presidium and one of the comrades will get up and say that during the last four years we have passed these laws which are against the Constitution, and, therefore, now let the Constitution be amended. That is what used to happen regularly.

MR. CHAIRMAN: But one of the opinions was that British law has the easiest method to identify the Office of Profit. They are listing the negatives. Here, we require the procedure of Constitution amendment and all that.

SHRI RAM JETHMALANI: Sir, I would suggest you that instead of our going to UK, please write a letter to them because I have tried to go into their system of Office of Profit to find out whether they are acting on some rational principle. I do not get it from the literature which is

available to me. You could write a letter to the Secretary of House of Commons and inquire from him.

MR. CHAIRMAN: We can get this information.

SHRI RAM JETHMALANI: You might be having some literature in your office.

SHRI JOHN CLAUDE POMPEI MARIADASSOU: Sir, we have got the House of Commons Disqualification Act, 1975. We have gone through the enactment at random. While going through the Act, we could not cull out any concrete criteria which has been embedded in the Act. For once, they have enumerated a large number of posts category-wise which would disqualify. It is giving a negative aspect of it whereas on our part, we have only a few enactments and said that this will not disqualify, meaning that this is very affirmative. Except that, I do not see any criterion.

MR. CHAIRMAN: You may be right there.

MD. SALIM: Since we have given this exemption list, exemption from being disqualified, we have to go and visit it on a regular basis. The problem is that when we do not go on our part, then we find that in retrospection. This is one reason for this confusion. It is clear now. When the Constitution was framed and this Act was enacted initially, at that time, conflict of interest was very limited because at that time, it used to be only Government sector or public sector which was important, and it was by virtue of occupying some posts in those organisations that he could get some benefit or extend some facilities. Now, there is another kind of conflict of interest growing because of growing role of business or big money or private sector or multinationals. Let us look at the office of Chairman of District Board and whether District Board Chairman is able to utilise that or this is discriminatory to other special position he is occupying.

Here, if someone becomes an MP or MLA and by virtue of becoming a Member of the legislative body or Parliament and having expertise in a field, he can be the Chairman of a Committee or a Corporation or a body which is dealing with same subject where he is also having his interest. That also amounts to a conflict of interest. May be, it is not an office under a State, but he is getting the advantage of being in the State machinery and passing these benefits to other persons or organisations. It is just an imaginary thing.

SHRI VINAY KUMAR: Sir, I have been following you.

SHRI SITARAM YECHURY: They cannot do anything on this. They are looking at us to do something.

SHRI VINAY KUMAR: Sir, hon. Member has already clarified that.

SHRI RAM JETHMALANI: This is an evasion of the legal upper limits we have put. We have put an upper limit on the size of the Cabinet also.

SHRI SITARAM YECHURY: Obviously.

MD. SALIM: Is 10 per cent limit not applicable to Puducherry? Traditionally, you had three to six Members in the Council of Ministers. There are 30 persons in the Assembly.

SHRI VINAY KUMAR: Sir, the total size is 33 including the nominated Members.

MD. SALIM: Then, 10 per cent will come to 3.3.

SHRI VINAY KUMAR: Yes, but the Government has to be functional also.

MD. SALIM: Is exemption granted in the law?

SHRI SITARAM YECHURY: Yes, exemption is granted for all Assemblies of the size of 60 and below. There, it is 15 per cent.

MD. SALIM: This exemption is given only for Ministers, but as you rightly pointed out, the expertise is available for certain development aspects. So, in the Backward Region Development Council, someone from that backward region for tribal development should be there as best of those elements are there in the legislative body. So, it is given because the Government may think it fit. It is not always social bribery!

In that case, in Puducherry, after all, the Puducherry Distilleries Limited is a business organization. It is not a welfare activity. May be, the person who is occupying may not be taking more than the compensatory allowance. How do you justify that? The Government is having so many business enterprises.

SHRI JOHN CLAUDE POMPEI MARIADASSOU: Sir, it is true, but predominantly when some officer is occupying the post, at times, there are some grievances stating that he cannot totally commit himself to the job because usually one officer is entrusted with more than one job. In this respect, when the public outcry is there that the benefits do not reach them, and then there is a request that some MLA can be made in-charge because ultimately, when the Assembly is not in session, they may not have enough workload and, therefore, they can commit themselves to the cause of the public service. In this respect, in order to see to it that public good is done, this sort of appointment is being made.

SHRI SITARAM YECHURY: The Constitution does not bar any owner of a private distillery from becoming an MLA.

SHRI JOHN CLAUDE POMPEI MARIADASSOU: Yes, Sir.

SHRI SITARAM YECHURY: According to my understanding of the law, you cannot bar him from being the Chairman of the Puducherry Distilleries Limited. There is no conflict of interest here, and that is the point I want to make.

SHRI JOHN CLAUDE POMPEI MARIADASSOU: There is a conflict of interest, as far as functions of the MLAs and the executive functions are concerned. Even in our response, we have mentioned that there is incompatibility.

SHRI RAM JETHMALANI: MLAs have a lot of contribution to make to various things, but how does an MLA contribute to a distillery?

SHRI SITARAM YECHURY: Except by consuming it!

MD. SALIM: I have just given the examples. These days a lot of private airlines are coming, and the MD or CMD of any one of those airlines could become a Member of Parliament. Then, you have the Government owned airlines also. If you do not have an officer to head that, a bureaucrat, or for that matter, if a person with technical expertise is there, you put him or her there. There is a clash of interest there. That is why, in the original Parliament

Act and later on also, such things were not there. You cannot become the Chairman of the Coal India. There is a list barring such appointments. But here, in the State Legislature, even commercial activities have also been included.

MR. CHAIRMAN: A company is registered under the Companies Act. If some MLA or MP is put on the Board and they are holding such offices like in Puducherry, five to six cases have already been identified, then the criteria followed in these other States is different from the normal guidelines that are being followed. It means that such Boards must have been exempted.

SHRI JOHN CLAUDE POMPEI MARIADASSOU: Sir, as we have given in our comments itself, generally speaking, we have agreed with the fact that putting an MLA in-charge of an executive post is not in tune with the principles enshrined in the Constitution. That is the general proposition of law. However, taking an exception to the general thing, as it has been done in the case of Central Government also, we have thought it fit to do that when the contingency arose, that is, by limiting the role of the MLA to the least extent possible and by ensuring that he does not get any profit out of that, and at the same time, appeasing the general public to the extent that most of the work and activities would be done to the fullest, maximum extent possible.

SHRI RAM JETHMALANI: To save your Puducherry Act, which according to you is very safe from any attack, you must say that similarly all offices in which only this compensatory allowance will be paid are exempt.

SHRI SITARAM YECHURY: That is what it is in general.

SHRI RAM JETHMALANI: That removes article 14 (10).

SHRI JOHN CLAUDE POMPEI MARIADASSOU: We have limited it only to 12. Even in the 12 companies/corporations, all MLAs are not covered. As and when necessity arises the MLAs are put up and then when the necessity causes we have taken them out, in which each case the officers are occupying the posts.

SHRI RAM JETHMALANI: Office of Profit applies only to legislators. You do not have to save anybody else.

MD. SALIM: Delhi Act and Puducherry Act are on the same lines. The wording is also the same. Only the list is different.

SHRI SITARAM YECHURY: Out of 33, one will be the Speaker, one will be Deputy-Speaker, and others would be Ministers. To manage that, that many corporations will be exempt. It is not their fault.

MD. SALIM: In Delhi Act I find that only two posts are exempted from being disqualified. Naturally these are posts which are a type of public service. Do you not put any other Members in any other Committees or Corporations?

SHRI R. NARAYANASWAMI: We are a much newer Assembly than Puducherry. Our Assembly came into being only in 1992. In 1997 the first Disqualification Act came into force. It had only two posts, as you have mentioned. But then, in 2006, at the height of the issue which had been raised in Parliament, there were also questions raised in Delhi, particularly with regard to our District level Committees. In 1992 when the Assembly came into being, sometime around mid 1992 or a little later, we created what is known as District Development Committees. In fact

there was only one Deputy Commissioner for the whole of Delhi at one time historically. Following Justice Sarkaria-Balakrishnan Committees' recommendations, new Districts were created. So, the new Districts came into being only in 1996. Immediately after this, District Development Committees were created and it was felt that MLAs should play a role in the development in that particular area. So, all the MLAs in that area, irrespective of the parties, automatically became members and one person was named as Chairperson. So, when this issue came up last year, questions were raised as to whether or not those persons who had served in the DDCs either as Chairpersons or as Members had been in offices of profit. There were small honourarium which were paid at different times. If it was a Chairperson, he might have enjoyed the facility of a staff car, for instance. So, this was one of the posts which came into limelight.

Similarly on the governing bodies of the colleges which had been set up by Government, if you are a Member of that area you have to be a person on the Governing body. That also seemed to have attracted the provision of office of profit. So, we enlarged our list last year, the same schedule which originally had two. We have added a number of other posts to this. Now the list has as many as 14.

SHRI RAM JETHMALANI: It only shows that Delhi bureaucrats are very clever. You wanted some jobs for bureaucrats and you appeased the legislators by putting them crumb.

SHRI SITARAM YECHURY: A classic 'Yes Minister' episode.

SHRI R. NARAYANASWAMI: Hon. Members, with great humility I would like to suggest that it may not have been that way. It is not a 'Yes Minister' situation at all.

MD. SALIM: You should have given us the updated lists. The Acts as amended have not been submitted to the Committee. Same is the case with Puducherry.

SHRI SITARAM YECHURY: Please send the updated Acts to the Committee.

MD. SALIM: This is not an attempt to find fault with anybody.

MR. CHAIRMAN: I thank you on behalf of the Committee and on my own behalf for the oral evidence tendered by the representatives of Ministry of Home Affairs, and Union Territories of Puducherry and Delhi on various aspects concerning with the subject of Office of Profit.

So, I am very much thankful to all the invitees who have attending the meeting.

Please join us for a cup of tea.

(*The Meeting then adjourned*)

RECORD OF EVIDENCE TENDERED BEFORE THE JOINT COMMITTEE TO EXAMINE THE CONSTITUTIONAL AND LEGAL POSITION RELAITNG TO OFFICE OF PROFIT

Thursday, the 23 August 2007 from 1500 hrs to 1610 hrs. in Committee Room No. 63, Parliament House, New Delhi

Shri Iqbal Ahmed Saradgi — *Chairman*

MEMBERS

Lok Sabha

2. Shri V. Kishore Chandra S. Deo
3. Shri Santosh Gangwar
4. Shri Madhusudan Mistry
5. Shri Mohammad Salim
6. Prof. Ram Gopal Yadav

Rajya Sabha

7. Shri Virendra Bhatia
8. Shri Arun Jaitley
9. Shri Ram Jethmalani
10. Shri Sitaram Yechury

Representatives of Ministry of Law & Justice (Legislative Department)

Dr. B.A.Aggarwal	—	Additional Secretary
Shri N.L.Meena	—	Joint Secretary

WITNESS EXAMINED

Representatives of State Government of Gujarat (Department of Legislative and Parliamentary Affairs)

Shri H.D.Vyas	—	Secretary
Shri I.A.Parmar	—	Joint Secretary

1. Shri H.D. Vyas, Secretary, Department of Legislative and Parliamentary Affairs, Government of Gujarat.

MR. CHAIRMAN: I welcome you on behalf of the Members of the Joint Parliamentary Committee. We all know that the Joint Parliamentary Committee has been constituted to examine the legal position of the Office of Profit under article 102. Another term given to the Committee is to evolve a fair and just system of law mechanism applicable to all the State Governments and UTs.

In that context, the Committee was scheduled to visit Gujarat last time. But the Government of Gujarat had requested us to postpone the visit due to severe flood there. Due to paucity of time, the Committee thought of having a presentation of the Gujarat Government through the Law Secretary.

I may add that the discussions that we have here are treated as confidential and not to be made public till the Report of the Committee is presented.

A list of points has already been sent to you. You may kindly start your presentation.

SHRI H.D. VYAS: First of all, I would like to thank the Committee Members for giving us this opportunity. As it was heavily raining, we had requested the Committee to postpone the visit. We are thankful for granting that request.

The main view of the Government of Gujarat is that the present provisions in the Constitution is very adequate and satisfactory in this regard. It is quite workable. We have no difficulty in implementing it. We are not of the view that we should have a particular definition for office of profit in the Constitution. If it is done, then we have an apprehension that it would narrow the scope of office of profit. We should not narrow the scope of that particular term. That is our main idea. Our Constitution has provided for federal system. If anything is done which is contrary to that, then we will lose that. We are not in favour of formulating any definition or criteria for the office of profit as suggested or as viewed by this Committee. That is the main idea.

SHRI MADHUSUDAN MISTRY: So you can put any number of MLAs as Chairman whenever the Government likes besides the Ministers. Do you favour that?

SHRI H.D. VYAS: We do not favour that. Before appointing any Chairman or Member to that particular Committee, the Government thinks twice whether this appointment is necessary or not.

SHRI MADHUSUDAN MISTRY: That is a different part altogether. The point is that suppose if a State Government wants to appoint 20 MLAs which could not be, in fact, accommodated in the Ministry or in the Council of Ministers, can be appointed as Chairman. There will not be any problem. Do you favour that?

SHRI H.D. VYAS: I think we are going into theoretical portion of that thing.

SHRI MADHUSUDAN MISTRY: That is a fact in some of the States of this country.

SHRI H.D. VYAS: The Constitution framers have left this to the wisdom of the Legislature. There is nothing provided in detail by the Constitution. So in so many spheres and in so many walks of these legislative or Constitutional provisions, it is left to the wisdom and fate to the persons who are governing the State. Accordingly, this is also there.

MR. CHAIRMAN: As per the Clause 11 of the Gujarat Legislative Assembly Members (Removal of Disqualification) Act, 1960, you have given blanket exemption to all the Chairmen and Members of all the Committees but whereas after that 12.2, the last one clause, you have made some specifications for giving exemption. On the one hand, you have given blanket exemption under Clause 11 and thereafter after 12 to last 40, you have given some specifications for the exemption. What compulsions you have to use some specific reasons for giving exemption and in clause 11, you have given blanket exemption.

SHRI H.D. VYAS: I will answer to this thing in two ways. Number one, in our view, this is not the blanket provision because if you read, there is one proviso.

MR. CHAIRMAN: The office of Chairman or Member of any Committee or anybody appointed by the Central or the State Government. This is the blanket exemption.

SHRI H.D. VYAS: This is one proviso. It is governed by that proviso. Sir, if you permit me, I may read:

"Provided that the Chairman or any Member of such committee or body does not receive any remuneration other than compensatory allowance... "

It means there is one embargo. It should not be not other than compensatory allowance. Then there should not be any other than such type of remuneration or something like that. Entries from 12 onwards to 40, there is nothing separation like compensatory allowance or remuneration. So from clause 12 to 40 if even it is remuneration paid to that Chairman or Member, then they are not considered as disqualified for that purpose whereas here it is restricted to the compensatory allowances only. That is one thing. There is one explanation provided below that. It says about travelling allowance and what will be the compensatory allowance. It is restricted to the travelling allowance, daily allowance and such other allowances which are paid to the holder of office for the purpose of meeting his personal expenses. So it is not like as if we are paying remuneration by way of this entry 11 and this is blanket permission. It is not like that.

Secondly, entries 12 to 14 are about offices which are having a nature of permanency. It is some sort of permanent offices whereas these types of committees and occasions that some committees may be required to appoint some *ad hoc* basis committee is required and it is appointed there and one member or Chairman is appointed. It is not required. This is written because now and then it is not required to the Legislative Assembly to have some enactments off and on and waste their time. That is why, this type of some general provision is required whereas these are the special provisions. Special provisions are operating in their respective fields and this general provision is in its own way.

SHRI ARUN JAITLEY: Just turn to your Gujarat Act. I am going to put questions now in order to make a point clear. Please turn to Entry 40 of the exempted offices. You have exempted the Office of the Chairman or the Member of the Gujarat Pollution Control Board under the Water (Prevention and Control of Pollution) Act, 1974. When you put this Entry 40, why was it only relating to Water Pollution and not Air Pollution? Are you from the Judicial Service?

SHRI H.D. VYAS: I am from Legislative Service.

SHRI ARUN JAITLEY: I can understand that if a category of offices has to be exempted, Water Pollution and Air Pollution have to be at par in Gujarat. Why did you consider that an MLA can head the Water Pollution Board and not the Air Pollution Board?

SHRI H.D. VYAS: This had been amended in 1997.

SHRI ARUN JAITLEY: That was the point which my colleague made just now. At that particular time, there must be a need to place somebody in that Office. Therefore, this list was added. Entry 40 was added to the list since one man was to be accommodated. He was put as Chairman of the Water Pollution Board. So, that Office was exempted. It seems that there was no candidate among them for the Air Pollution Control Board and there was no need for such an amendment. Is it so? If legislative experience and a nexus of legislative activity for holding of office are relevant, it should apply to both Water and Air Pollution Boards. Similarly, if you see Entry 39 above, when you say about the Wakf Board, there could be offices for the management of religious institutions or properties other than Wakf. But the candidate must have been available only for the Wakf Board then. You have said: "We support the existing system." Do you accept that in the existing system exemptions are really based not on the requirement of office but the need to place a particular individual in that office?

SHRI H.D. VYAS: In that context, I would like to reply. You have referred to the Gujarat State Wakf Board. At that particular point of time, there was no political person as the head of a particular Wakf Board. Till now also, there is no political person as Chairman or an elected Member. There is a Chairman. That is my personal knowledge.

SHRI ARUN JAITLEY: Please apply the same logic to Entry 40.

SHRI H.D. VYAS: I would like to say that the requirement of legislation is required to be examined from the exigencies point of view. That is not decided by a Department. But the thing is that we do not encourage needless legislation. If there is no need, if there is no requirement at present to enact a particular law or amend a particular law, then, we do not encourage that particular legislation.

MR. CHAIRMAN: There is a proviso. It could have been applied for Entries 12 to 40. Why was it not applied to rest of Entries 12 to 40? What were the compulsions that made you see that some different guidelines were adopted for the other categories?

MD. SALIM: This Act was amended last in 2001. What about the latest amendment? The copy that we are having was modified in 2001.

SHRI H.D. VYAS: The last amendment was made in 1997.

MD. SALIM: This was there in the original Act.

SHRI H.D. VYAS: It was incorporated later.

MD. SALIM: When was it done?

SHRI H.D. VYAS: It was incorporated in 1984.

MD. SALIM: In response to the Chairman's question you said that it does not cover all bodies.

SHRI H.D. VYAS: It is not a blanket provision.

MD. SALIM: Normally an office of profit attracts disqualification for Government appointments to bodies constituted by the Government. So, in that case, any board or corporation or committee, development committee which is constituted by the State Government or the Central Government, the Chairman or the Members are exempted. This means, it covers all organisations.

SHRI H.D. VYAS: There is one difference. I have said before also that such type of Members or Chairman are not going to have remuneration, but they are going to have Compensatory Allowance whereas in rest of the committees and boards they may have some regular remuneration also.

MD. SALIM: I have listened to your earlier arguments also. Other individual entries up to Entry 40 are not covered under that proviso. In that case, these offices are exempted even if the office attracts remuneration or compensatory allowance and because most of the offices are covered under this - I found there are many boards or corporations in Gujarat which are involved in financial transactions, economic activities and commercial activities like Dairy Development Board, Mineral Development Board, Transport Corporation etc.,—the Members or the Chairmen of such boards or corporations are entitled to get salary or remuneration and that will not affect disqualification. Is that so?

SHRI H.D. VYAS: There is a logic behind this. It is ultimately the money of the people and it is to be managed by that particular board or corporation. So, it is always better to have a representative of the people. That is the logic behind this.

SHRI MADHUSUDAN MISTRY: We understand that. But the point is, the Mineral Development Corporation or other such corporations have commercial activities and being the Chairman of such a corporation is almost equal to a Minister because it has a huge amount of money at its disposal. So, any MLA who does not get accommodated in the Council of Ministers can be accommodated in such corporations to satisfy him. Are you satisfied with this arrangement? You said you do not want to change the definition.

SHRI H.D. VYAS: I straight away deny this. This is not the situation prevailing in my State. It is not that somebody is being accommodated in such corporations.

SHRI MADHUSUDAN MISTRY: I am not saying that this is the situation prevailing there. We would like to know whether you like this situation to continue or you want to suggest any changes in that.

SHRI H.D. VYAS: I have no personal views on that. In my State, this is not the situation prevailing. With much respect to you, I would like to say that this practice is not being adopted in my State and nobody is accommodated this way and given appointments this way.

SHRI MADHUSUDAN MISTRY: You may express your frank opinion. You are deposing on behalf of your Government.

SHRI H.D. VYAS: I am here to answer on behalf of my State.

SHRI ARUN JAITLEY: Your last nine entries, 31 to 40, have been added in one year, 1996-97. Now, since you are generalising for all times to come, what is the exigency that these nine entries were considered to add at that point of time.

SHRI H.D. VYAS: I have no idea. At the most I can say that Legislative Assembly has passed this amendment after much deliberation and it is the will of the Legislature to do that.

MR. CHAIRMAN: You send the replies in writing if you are not able to respond to them right now.

SHRI V. KISHORE CHANDRA S. DEO: You are aware that the Constitution was amended a few years ago to the effect that in any State Legislature or Parliament the number of Ministers cannot be more than 15 per cent of the strength of that House. In Gujarat, in your experience, have you ever found or felt that such appointments were made to overcome that restriction which has been imposed by the constitutional amendment or to negate the spirit of that.

SHRI H.D. VYAS: We do not have any comment on that.

SHRI V. KISHORE CHANDRA S. DEO: Have any appointments been made after this?

SHRI H.D. VYAS: No.

MD. SALIM: Again, I am coming back to that, because of the existing scenario, political exigencies may compel the legislatures to enact, we accept. Now, as was told, the entries towards the end of your listing suggest that it is the commercial nature of activities that the board is conducting and the Chairman and Members are entitled for those facilities. Now, time and again, in the Parliament and Supreme Court, it is decided that these are the areas which will not attract and these are the areas which will attract office of profit. I think, in some cases where this provision is not there beyond 11, those provisions can attract the attention of the court or adverse comments of the court.

I am not going into those. I found, there are many cases, particularly, in case of Gujarat on office of profit thing. Was there any case that the court decided adversely that these are the cases which attract office of profit and disqualification? A favour is all right, but sometimes the adverse judgement is also delivered.

SHRI H.D. VYAS: not at all. There is no case.

MD. SALIM: It stands scrutiny of the court.

SHRI VIRENDRA BHATIA: You have said that the State Governments receives compensatory allowance. Have you fixed any compensatory allowance for every authority or corporation? Is it different for different corporations; or there is only one unified compensatory allowance?

SHRI H.D. VYAS: No, Sir. As far as my knowledge goes, unified compensatory allowance is not fixed.

SHRI VIRENDRA BHATIA: According to you, compensatory allowance, if it is given, will not come within the definition of disqualification. Suppose, tomorrow if you fix compensatory allowance at Rs. 50,00 per month, whether it will not amount to the office of profit which may amount to disqualification.

There is one more question. The person who has been made the Chairman has the authority to transfer, has the authority to take several decisions regarding the business activities and commercial activities. He has an authority to appoint certain persons. I would like to know whether that will not amount to office of profit, whether that will not run contrary to the Supreme Court's decision.

SHRI H.D. VYAS: It should be read like this: "Other than compensatory allowance, to be essential, for the efficient performance of his duty."

SHRI VIRENDRA BHATIA: That is right but tomorrow who will fix it? The State Government will fix it. The State Government while appointing the Chairman may have some political compulsions. Everybody knows it. Suppose an MLA says: "Give me Rs. 50,000 per month." If the State Government agrees to that and pays compensatory allowance of Rs. 50,000 per month, then what will happen? I would like to know whether it will not be contrary to the Supreme Court's judgement. Apart from that, he has the authority to transfer, he has the authority to appoint, he has an authority to affect the business transactions or commercial transactions.

SHRI H.D. VYAS: At the most I will say that we have got sufficient provision here. We have given linkage to the compensatory allowance with the essential efficient performance of that particular utility. Ultimately I would rather say that in all the provisions throughout, it is ultimately in the hands of the administrator or in the hands of the people enforcing this law. There should be some end or full stop where we can say that it will be done as per the provisions laid down. Supposition, to some extent is very hypothetical.

SHRI VIRENDRA BHATIA: Have you gone through the Supreme Court's judgement?

श्री संतोष गंगवार: अभी हाल ही में उत्तर प्रदेश सरकार ने तय किया है कि वह हर चेयरमैन को 35,000 रुपए देगी। अभी तक उन्होंने कम से कम 40-50 चेयरमैन बना दिए हैं। उन्होंने वैसे ही घोषणा की है कि लगभग 35,000 रुपए मिलेंगे।

श्री एच.डी. व्यास: नॉर्मली जो एनफोर्स कर रहा हो, यह उसके हाथ में रहता है।

SHRI ARUN JAITLEY: You see the existing system is good. There are three options. One you say that the existing system is very good. The second option is that the criteria that the legislature must follow for including the exempted officers must be a category of officers where political and legislative experience helps. Or can it be any arbitrary office chosen? I give you the example that for Water Pollution Board it is "Yes" but for Air Pollution Board it is "No" because the person was required for that. Third is, should we do away with this Act and restructure the Constitution so as to specifically define an office of profit? Once there is a clear definition, if you fall foul of it, you fall foul of it. You are following the first one. Is there any merit in your view in the alternative systems also?

SHRI H.D. VYAS: We thought the present system adequate. I know the Supreme Court has given so many judgements and laid down guidelines also. That is also with us. It is laid down by the Supreme Court. It is there.

It is there. If we provide something else and define this Office of Profit, then it will restrict other things also. We are a large nation. We have got many situations. We have got many functions, variety of functions with the State. So, it cannot be foreseen यह हो सकता है या वह हो सकता है। नैरो डेफिनेशन करने से कुछ नहीं हो सकता।

श्री सीताराम येचुरी: यहां हम आपको इसलिए नहीं बुलाया कि आप गुजरात की प्ली करें या न करें। एद, do not fall into that psychological trap. You have been repeatedly saying that you represent the State of Gujarat. It is correct and you do that. We are asking you as an Officer certain opinions. Shri Jaitley and Md. Salim were asking your opinion on this matter. The point being asked here is that with your experience, can you categorise certain offices which may require legislative experience and hence they should be exempt from this Office of Profit or not. This is number one. You may have your own experience in your own State, in the Offices where legislative experience is not a necessary to be the Chairman. We would like to know whether they have been given and in which case have they been specifically amended. That particular two years slot has been given by Shri Jaitley. We would like to know your opinion on the basis of your own experience and expertise. Please do not think that this is Union *versus* the State. That is not the issue. We all want to learn a little more so that we can improve the law.

SHRI H.D. VYAS: Thank you very much for these words. Now, I will say definitely that I have full faith in the views expressed by the State Government. My experience say that. जो शब्दों में व्यक्त करने की ताकत होती है, वह लिमिटेड होती है। So many things are there. That cannot be covered and expressed by words. यह शब्दों की ताकत का लिमिटेशन हमें स्वीकार करना चाहिए। हम बार जो एक्ट संशोधित कर रहे हैं, वही कर रहे हैं और सुप्रीम कोर्ट भी बार-बार वही सजेस्ट करता है, we have got a very rate limited rather vocabulary and we are not capable of giving the exact meaning and what we have thought in our brain. We are not capable. These are the limitations of words. वह भावना के तौर पर स्पिरिट के तौर पर यह जो अमलकर्ता है, उसके विश्वास पर जाना ज्यादा ठीक रहेगा, यह मैं समझता हूं। हमारा अनुभव है कि वह ठीक काम कर रहे हैं, उसे ज्यादा वर्ड्स देने की जरूरत नहीं है। हमारा अनुभव है कि वह ठीक काम कर रहा है।

MR. CHAIRMAN: You have to express exactly your legal opinion in the context of this subject. As our hon. Member has said, this is not the matter between the State Government and the Central Government to defend or oppose it. We would like to know how you are going to define the legal position. You give your answer legally and technically.

SHRI MADHUSUDAN MISTRY: Has there any office been created in the last 20 years, whereby MLAs were appointed as the Chairmen of certain Corporations. Do you have any knowledge?

SHRI H.D. VYAS: I have to gather some information later. I have to call information from various Boards and Corporations.

SHRI MADHUSUDAN MISTRY: So, you have no idea about that.

SHRI H.D. VYAS: At present.

SHRI MADHUSUDAN MISTRY: That is what your law says here. If you take all these from 1996 onwards, as Shri Jaitley has said, some of the Offices were brought in Office of Profit under that ambit. What have you to say on this?

SHRI H.D. VYAS: I can supply that information later on.

MR. CHAIRMAN: If you are not able to give your answer here, you can send your reply in writing. You must be aware of the existing law in Gujarat. We are asking you about the definition of the Office of Profit.

It is because the Committee is supposed to know all these things connected with the State laws. If I ask you, while giving exemption to the office from disqualification under Gujarat Act, you should not take it as a Gujarat or Central Government. As it was said, 'disqualification under the Gujarat Act'. But whether the Parliament Prevention of Disqualification Ac, 1959 has been followed. Specify the similarities and dissimilarities of the Parliament Act and the Gujarat Act for giving exemption for the Office of Profit, as it has been mentioned from entry 12 to 40.

SHRI H.D. VYAS: There, we find some similarities in the sphere of general exemptions. That is what we have said about the term as a blanket exemption. We find something of that sort in Section 3(1). We find that in the Central Act also. In our State Act, it is entry number 11.

SHRI RAM JETHMALANI: Now, you have 40 entries in your State Act. Correct?

SHRI H.D. VYAS: Yes, Sir.

SHRI RAM JETHMALANI: Are you in a position to suggest that the definition, which will cover all these 40 entries and at the same time exclude others, which are similar?

SHRI H.D. VYAS: Sir, the suggestion for a definition for the Office of Profit, is a secondary thing. We do not want any type of definition for this Office of Profit.

SHRI RAM JETHMALANI: It is all right. I am glad that, at least, the State of Gujarat is candid. You do not want a definition. But are you intellectually able to envisage the definition? If you cannot, then it would help us to think of the next course of action.

SHRI H.D. VYAS: It is in my knowledge that the Supreme Court has laid down certain criteria deciding the Office of Profit.

SHRI RAM JETHMALANI: We will deal with those individual criteria. I have read all these judgments. Even the Supreme Court seems to have, at least, in a couple of cases, thrown up its hand and said that the definition is perhaps not possible. But what is your opinion on this issue? Is the definition capable of being conceptualised by you, which should cover all your 40 entries and at the same time keep out others, which are similarly situated? If the answer is no, please tell us.

SHRI H.D. VYAS: Sir, We have not conceptualised that.

SHRI RAM JETHMALANI: Now, again you are making it 'we'. I am not talking of you, I talk of you as a legal expert. I want your advice. Are you able to conceive of any definition, which will serve that purpose?

SHRI H.D. VYAS: Till today, we have not.

SHRI RAM JETHMALANI: You have not. Okay.

Secondly, before an Office of Profit becomes an office, it should become an 'office' also first and then it should be 'of profit'. Do you not think that office necessarily means a position in which you are able to, by action, affect the rights and obligations of others? For example, you appoint a doctor. What would the poor doctor do except healing the people? We appoint a professor in a college; he teaches. But do you not think that an office necessarily means, in its technical language, some position in which you have the power to affect the rights and obligations of other citizens?

SHRI H.D. VYAS: Office means office under the State, appointed by the State.

SHRI RAM JETHMALANI: Under the State means a different thing.

SHRI H.D. VYAS: There must be some attachment of functions of the State.

SHRI RAM JETHMALANI: According to you, an office must necessarily have the characteristics of the State. In other words, it must be, in some sense, an instrumentality of the State.

SHRI H.D. VYAS: Yes.

SHRI RAM JETHMALANI: That is fine. That is good enough. Now, if it is an instrumentality of the State, it means that it must have some statutory power. Mere moral power or informal power is no good. You cannot be exercising State power unless you have some power under some statute, under some law. Therefore, am I right that an office means necessarily an office under which you have some powers created by the law?

SHRI H.D. VYAS: You are right, Sir.

SHRI RAM JETHMALANI: Third, then if you are in an office, you must be in an office under the Government. Now, that is quite clear that you must be appointed as well as removable by the Government.

SHRI H.D. VYAS: Exactly.

SHRI RAM JETHMALANI: Fourth is about the profit. You will agree that profit is something so much in excess of the reasonable costs of attendance that it becomes an attraction for accepting that office. It is not mere honorarium or a small sitting fee for a particular day. After all, when he comes to attend a meeting, he may have to go and have his lunch and dinner and you give him something. Do you agree that profit is much more than normal compensatory allowance?

SHRI H.D. VYAS: I agree.

SHRI RAM JETHMALANI: And lastly, if you cannot think of a definition which we can incorporate in a statute, then we have to do it *ad hoc.* If we do it *ad hoc,* we will always be faced with the difficulty under article 14 that people similarly situated are not subjected to a disqualification or are exempt from disqualification. Therefore, do you agree in such a case, office of profit which you want to exempt, must be by a Constitutional amendment. In other words, just as the Minister is expressly excluded by the Constitution, we should have a list of people who are excluded. The list must be in the Constitution and not challengeable under article 14.

SHRI H.D. VYAS: There one thing is there. We have got federal system of governance. If we format some view by way of an amendment in the Constitution, then again there will be problem because the Corporation has to discharge their functions under the particular State. So, if Parliament decides something else and the State decides something else, that may not be advisable.

SHRI RAM JETHMALANI: But it is the Constitution of India which creates the State Governments also. The office of profit notion is created by the Constitution and not by any State law. So, you are making exception to the Constitution. Therefore, exception should be in the Constitution applicable both to the Centre and to the States. That is logical. Is it not?

SHRI H.D. VYAS: We are in favour of the State's legislative competency.

SHRI RAM JETHMALANI: Again I am not talking of we in favour. I am talking of you as an individual. What we are discussing is, do not worry about what your State thinks.

SHRI H.D. VYAS: I am of the view that State legislative competency should be there and it should be left to the State that it should be decided by the State which office should be office of profit and which office should not be office of profit.

SHRI RAM JETHMALANI: Then, it will have to be *ad hoc.*

SHRI H.D. VYAS: It is there.

SHRI RAM JETHMALANI: I know but then it will have to be *ad hoc.* You would not be able to comply with article 14 at all.

SHRI H.D. VYAS: It is a case to case basis. It is to be decided on case to case basis by the judiciary.

SHRI RAM JETHMALANI: Every time you go to the court. That is precisely what we are facing now. We are faced with the task of evolving a definition of office of profit which will work for all cases. After all, a Member of Parliament wants to accept an office of profit. He should know what an office of profit is. How does the poor fellow know? How do we educate him?

MR. CHAIRMAN: Shri Vyas, the Committee would like to know your views on all these issues. Whatever information that you feel has been raised by the hon. Members of the Committee which you could not reply properly here, you may please send it in writing to the Committee at the earliest.

I thank you and all the officials and also all the hon. Members of the Committee for attending the meeting of the Committee.

Thank you.

(*The Committee then adjourned*)

RECORD OF EVIDENCE TENDERED BEFORE THE JOINT COMMITTEE TO EXAMINE THE CONSTITUTIONAL AND LEGAL POSITION RELATING TO OFFICE OF PROFIT

Wednesday, 31 October, 2007 from 1130 hrs. to 1315 hrs. in Committee Room 'D', Parliament House Annexe, New Delhi

Shri Iqbal Ahmed Saradgi — *Chairman*

MEMBERS

Lok Sabha

2. Shri V. Kishore Chandra S. Deo
3. Shri Raghunath Jha
4. Shri Madhusudan Mistry
5. Shri Rajesh Verma
6. Prof. Ram Gopal Yadav
7. Shri Santosh Gangwar

Rajya Sabha

8. Shri Ram Jethmalani
9. Shri Sitaram Yechury

Representatives of Ministry of Law & Justice (Legislative Department)

Shri K.N. Chaturvedi	—	Secretary
Shri N.L. Meena	—	Joint Secretary

Representatives of North Eastern State Governments

TRIPURA

Shri Swapan Chandra Bose	—	Law Secretary

MIZORAM

Shri P. Chakraborty	—	Secretary, Parliamentary Affairs Department

ARUNACHAL PRADESH

Shri K.K. Sharma	—	Chief Secretary
Shri C.P. Mansai	—	Secretary (Law & Parliamentary Affairs)

ASSAM

Shri P.C. Sharma	—	Chief Secretary
Shri P.K. Chaudhary	—	Principal Secretary, Parliamentary Affairs Department

NAGALAND

Shri R. Kothandaraman	—	Secretary, Parliamentary Affairs Department

MANIPUR

Shri Saichhuana	—	Additional Chief Secretary

SIKKIM

Shri R.K. Purukayastha	—	Secretary, Parliamentary Affairs Department

MEGHALAYA

Shri L.M. Sangma	—	Joint Secretary, Parliamentary Affairs Department

MR. CHAIRMAN: I welcome you to this sitting of the Joint Parliamentary Committee on Office of Profit convened mainly to examine in the context of certain interpretations of the expression 'office of profit' in Article 102 of the Constitution and the underlying Constitutional principles therein and to suggest a comprehensive definition of Office of Profit. One of the Terms of References to the JPC is to recommend in relation to the Office of Profit the evolution of generic and comprehensive criteria which are just fair and reasonable and can be applied to all the States and Union territories. The JPC would like to hear your views in this regard. I may add that the proceedings of the Committee are to be treated as confidential and are not to be made public till the Report of the Committee is presented to the Parliament. The List of Points of Discussion has already been given to you. The Committee would like to have discussed further with you on the matters under reference of the JPC and the hon. Members may seek whatever clarifications necessary. Before we start the discussion you may kindly introduce yourself to the hon. Members of the JPC.

INTRODUCTION

MR. CHAIRMAN: The Terms of Reference before the JPC is to define the Office of Profit. The second term of reference for which we have invited you is to seek suggestions or legal opinion from all the State Governments and the Union Territories suggesting a comprehensive system of law regarding the Office of Profit applicable to all the State Governments and the Union Territories. As you know, all the State Governments are having their own existing laws. As per the existing laws, exemptions are being given in the respective States.

Sometimes we do not feel any similarity in the State exemptions given to different boards, committees and advisory boards. There is a necessity to have uniformity in the laws regarding office of profit. Where the disparities in the State laws are existing and what is the required law to be if there are disparities or differences? By way of amendment in the Constitution can we bring in a comprehensive law applicable to all the State Governments? That is the purpose for which we have invited you. We will take up this matter for discussion now.

SHRI R. KOTHANDARAMAN: From the Government of Nagaland, we have sent two replies to this hon. Committee. First reply was to the letter written last year about the general views relating to the difficulties involved in evolving a comprehensive and universally applicable criteria for defining the office of profit in the Constitution. A supplementary questionnaire had been given last month. We have given a reply to this also very recently. In the original reply, the Government of Nagaland has said that since the Anti-Defection Law has come into force the lure or blandishments arising out of holding office of profit acting as an influence from the Government side to a legislator to cross the floor as well as to exercise powers in favour of such institutions in which they are members in the executive body while functioning as parliamentarians in their Houses does not arise. This is what we have said. There is no office in the Government of India or in the Government of any State which does not involve any exercise of power or influence by the member of a legislature who is empanelled as the Chairman or a member of that body. The question will be from office-to-office how much power is exercised and how much influence is

exercised and whether such power and influence exercised on that member who is holding that office of profit will lead to compromise of his parliamentary duties. This question has never been examined by the Election Commission of India or by any court which has ruled that some member is holding the office of profit. The examination of the courts so far is whether according to the five to six tests which they have prescribed whether that particular office held by the legislators qualifies to be an office of profit and if it is held even if pecuniary benefits are attached to the office of profit even if the holder does not draw the pecuniary benefits even then they have been disqualified. The question is if the constitutional principle and purpose is to avoid this lure and blandishment acting as a compromise of the legislative duties, in that case, that question should have been gone into by the Election Commission of India and the courts first whether this has acted actually in compromising the duties of the legislator. I do not think in any case which ever I have seen – the Election Commission cases or the court judgements–we find they have limited themselves to the point whether they held the office of profit or not and not whether these lure and blandishments should have arisen out of the offices have indeed acted as compromise on the legislative duty. This has not been gone into so far in any case. Therefore, my Government's view point would be that every office which is in the Government is an office of profit. This is our general inference which we should draw because any office which is in the Government of India or the State Government whether you attach salary to it or not it involves the exercise of power and influence. Otherwise, where is the attraction for a member to be appointed to this office? Suppose a member of a legislature will perform duties in an executive body better than a person who has been especially recruited as a Government servant or any other expert into the executive body to perform those functions, in that case it is unavoidable to exercise that power and blandishment. What we have to see is whether even after holding an office of profit whether the person from legislature who has been holding office is exercising his influence. I would not call it office of profit because I have clarified that point why it is not to be called as office of profit. It is because these are all pros and cons of English language. For English standards, we have imported them into our Constitution and we have been operating them. So our Government's point would be that there is no office in the Government which does not involve exercise of power and influence. Therefore, all offices you call it as offices in the Government or offices of profit in the Government, it is one and the same. Now the question is about pecuniary benefits attached to it. If the pecuniary benefits are attached to it and if he does not draw and only the pecuniary benefit is deemed as acting as lure or blandishment to the legislator then without considering whether actually by receipt of these things whether you limit that thing to only TA/DA or it is a full-fledged salary, it is one and the same thing. It is only our own artificial difference which we are creating. He may be getting Rs.10,000 as TA/DA, it is a question of relative reasonableness. In each case the court will go into it to see whether this is a right pecuniary benefit or this is a pecuniary benefit which is not commensurate with the duties he was performing. So, unnecessarily we are opening areas for interpretation by the courts. The moment it goes to the courts and the Election Commission which is away from the Parliament, you will have a plethora of interpretations in which you will have a lot of confusion. A person who is not to be disqualified will be disqualified and a person who is to be disqualified will not be disqualified. When we communicated a reply to the hon. Committee with the approval of the hon. Chief Minister, we have said that retrospective validation of the legislation was really bad in law. How far the courts accept them, that is a different thing. But realistically speaking and from a practical point of public perception I should say that retrospective validating legislation in this case where offences have already been committed by the legislator and then making them escape the disqualification is particularly bad in law. This is what our Government's view point is.

The other point is that now the governmental areas of functioning are shrinking. Privatisation and globalisation are taking place. Now in the context of globalisation and in the context of Government shedding powers, duties, etc. in favour of more private agencies, would it be very relevant to hold on to this concept of office of profit under the Government or government of any State? For example, suppose a Member of Parliament holds an Adviser's post in the Reliance Energy and he is getting influenced by it, you will not be able to disqualify him under this constitutional provision because you are saying that it should be office of profit under the Government of India or Government of any State. A large number of areas which are critically influenceable on the functioning legislator have gone into the private influence and now there is no question of holding on to this idea of defining an office of profit under the Government of India or the Government of any State any further. This is our view. I have given the examples to this hon. Committee how it can happen because large number of functions and lucrative areas are in private sector now and not in public sector. Nobody would want to have a post of a Chairman which gives him only Rs.100 or Rs.1000. He will take up the Adviser's post in Reliance Energy or some other position in some other company. In that case if he is compromising his position, what is the solution under the Constitution? We are not supposed to find out solutions only to these areas but to the emerging areas also. This is another point which we want to mention from the Government of Nagaland.

The other thing is that we would find it very difficult to find out the quantum of influence of an office of profit under the Government by a member of legislature as there is no objective mechanism to find out how much it has influenced him in his parliamentary duties. If it is in term of money, then the assets and liabilities of all the legislators must be declared and then one has to have a constitutional monitoring system to know how much assets and liabilities have increased over the five year period when one holds the membership of the legislature. We do not have such a mechanism. So, pecuniary-wise we will not be able to find it out and influence-wise how much it has affected, there is no objective mechanism. So, there is nothing which is objectively possible under the law except a cosmetic way of dealing with it where innocent legislators may also get disqualified and people who are actually holding office of profit in which case the constitutional principles have been compromised is also possible.

So, both things are possible. Finally, as I told you, with the advent of the Anti-Defection Law when the political loyalties have been clearly identified and with the NDA Government removing that provision relating to split and anti-defection becoming tighter and stricter, there is no question of this office of profit having an influence on the over all stability of the Government also. That is also not possible.

The other case relating to the last reply we have said that the idea of office of profit in Indian Constitution has to be abolished and the Members of Legislatures should hold their positions as full time Members.

MR. CHAIRMAN: We have your detailed reply here. Now, the Members will seek clarifications on some of the points.

SHRI RAM JETHMALANI: You have challenged the philosophy of the constitutional provision itself. The Constitution provides in no uncertain terms that an office of profit is a disqualification. The question is, how do you define that? We cannot go into the larger question that the Constitution should be amended and the whole provision should be dropped and all that. That is not the terms of reference of our Committee. While you have been in this Office, has your

Government created a new office and have you got the experience of dealing with the creation of that office?

SHRI R. KOTHANDARAMAN: No office of profit has been created in Government of Nagaland during my tenure.

SHRI RAM JETHMALANI: There are certain offices which are being held by Members of Legislatures. Have you had time to examine the reasons which prompted those persons being appointed to this position? After all it is not compulsory to appoint a Member of Parliament or a Member of the Legislature, then why do you have to appoint a Member of the Legislature as Chairman? What are the reasons which impelled you to do so? That will give us an inkling into how these provisions are being actually utilised in practice.

There is another serious problem and that serious problem is that unless you evolve a uniform definition all these appointments will be struck down as violating article 14 of the Constitution. In one State a particular office, exactly the same office is not considered an office of profit, in another it is. That creates a constitutional impropriety on the face of it and we will land up in courts. Therefore, a definition is imperative to avoid all these problems. Now, you may only try and help us if you can from your working in your State arrive at a definition. In your State you have created so many positions in which you have put legislators at the head of those organisations, or even as Members of those organisations. You are giving them emoluments.

One thing is certain that if it is a purely honorary job, then it is not an office of profit. Why is it necessary therefore that when you appoint a legislator you must necessarily pay him? You may pay him a compensatory allowance, you may pay him small honorarium to meet his out of pocket expenses. As we say in our courts that justice must not only be done, but justice must seem to be done. Members of Parliament and Members of Legislatures should seem to be free from Government's control. When you are providing him with an extra salary which he gets otherwise as a Member of the Legislature, obviously people will think that he is a man of the Government. That is what we have to avoid. The look of things is bad. Now, help us to evolve a definition. I am clear about one part of the definition that any honorary job, however exalted his/her duties, is not an office of profit. Any office in which you are only paying out of pocket reasonable subsistence is not an office of profit. But if you have to do something more than that, in that case you may help us to have a uniform definition which we can adopt for the Centre as well as for the States. If you have done any work on this you may give us the answer or write back to us after you have considered it.

SHRI R. KOTHANDARAMAN: You have rightly pointed that honorary positions are not office of profit. If compensation is only related to compensating out of pocket expenses, then that should be there. That is what we also have said. Even if we retain the idea of office of profit which our Government does not want to put in the Constitution. You have very rightly said that this is the beyond the scope of the Committee to go into the root questions. Here we have said that you limit the consideration only to pecuniary benefits. That is why we have said a model article 102. We have given in the first reply itself. We have said that do not use two terms in the Constitution. One is office of profit and other is the remunerative political posts which have recently been put in the Constitution in article 361(b). Both are one and the same. Remunerative political posts gives emphasis to remuneration, that means which are now considering as you have said honorary posts should be exempted and out of pocket expenses can be there. Give emphasis to remuneration and put that definition. That should be enough.

SHRI RAM JETHMALANI: Political posts are different from office of profit because political posts will create other complications. The word 'political' is ambiguous. The two words are not absolutely synonymous. That is for sure.

SHRI R. KOTHANDARAMAN: Sir, we have said that provided that office of profit or remunerative political posts if the salary or the remuneration as compensatory in nature payable in respect of the remunerative political posts or office of profit does not exceed 10 per cent of the total emoluments paid to a person as a Minister or a Parliamentary Secretary or a Member as the case may be. This is what we have said. You quantify it and then there is no doubt left in that. That is what we have said.

SHRI RAM JETHMALANI: So you are saying that it should not exceed 10 per cent of his normal emoluments which he/she gets as a legislator. Has anybody any different view points on this?

SHRI MADHUSUDAN MISTRY: Correct me if I am wrong. You seem to have said that even the elected Members if they are Chairmen of any private companies, even that should not be considered as office of profit. Am I right?

SHRI R. KOTHANDARAMAN: I said this in the context of Government shedding powers.

SHRI MADHUSUDAN MISTRY: You gave the example of Reliance Energy. Any MLA or anybody who can be put from the Government as a Chairman of Reliance Energy should not be treated as Office of Profit.

SHRI R. KOTHANDARAMAN: What I said was that in the context of globalisation, the primary and fundamental duties of the Government are being shed in favour of private agencies. I gave the example of Reliance Energy. There is no bar under the Constitution for any Member of Parliament without the interference of the Government getting into very senior positions of Reliance Energy. In that case, energy was earlier under the control of the Government, now a substantial part of it is with M/s Reliance. There may be some more private companies also. Once it passes on to these private agencies then in that case the Members of the Legislatures who are holding key and critical positions in those private agencies, I am asking a simple question to myself and to others also, whether that would involve any compromise of the duties and functions of the Legislatures. That is what I am trying to say.

SHRI RAM JETHMALANI: Office of profit is under the Government. That is the expression used. That is not under the Government. It may have its own baneful consequences but we are not concerned with that. It has to be under the Government.

SHRI MADHUSUDAN MISTRY: I just did not get that. If M/s Reliance Energy is a private sector, then I can be a member of that private sector even in my capacity as a Member of Parliament and that is despite the fact that there would not be any influence of holding that position on any decision which is made by the Government relating to that sector.

You mean to say that there will be completely two separate things and there would not be any undue influence

SHRI V. KISHORE CHANDRA S. DEO: You are suggesting that the office of profit should be extended to the private sector also.

SHRI R. KOTHANDARAMAN: We should remove the word 'Government of India'.

MR. CHAIRMAN: We have confined ourselves to the points given in the terms of reference, that is, to define the office of profit and whether any comprehensive law can be made. If possible, you may suggest on that point. So, we are not here to challenge the articles in the Constitution of India.

SHRI MADHUSUDAN MISTRY: Are you agreeing that the office of profit should be extended even to the private sector also and MPs should not take position in private companies as Chairman of those companies or that should not be considered as office of profit?

SHRI R. KOTHANDARAMAN: Sir, since you are considering that question again and again, with due deference to the wishes of the hon. Members who say that they should be confined to the scope of the questions before the Committee, I may be permitted to go beyond the scope of the Committee to try to answer you. We say that the office of profit should be abolished at all. This is our Government's view. If you are saying that the lure blandishment from offices are compromising the legislative duties of Legislators, then it is happening from the Government and the private sector sides also. Now, the hon. Member has said that that question does not arise and it is not before the Committee.

SHRI RAM JETHMALANI: The idea is, the patronage should be with the Government. In the private sector, that sort of patronage is not there with the Government. It may be that the Minister might help you to get into that position. But that is not relevant.

MR. CHAIRMAN: The main purpose of inviting the North-Eastern States is for the development of the respective regions and communities of the respective States. The Central Government have created many authorities to develop these areas particularly whereas that the association and involvement of the public representatives of that areas was felt necessary for the development of that area. So, the case is different like whether they are getting monetary benefits or whether they are influencing other things and whether they are having executive and judiciary powers or not. That has to be checked by the existing laws of the State Governments and the Central Government. So, there should be some guidelines to have uniformity. According to you, in paragraph 2, Parliament does not have the legislative competence for evolving uniform principles for State Legislatures in view of article 191(1) of the Constitution.

SHRI R. KOTHANDARAMAN: There is the distribution of powers between the States and the Centre under the existing law. If you amend the Constitution, then it has got the power.

MR. CHAIRMAN: Parliament is the highest body to make laws. Do you agree that Parliament does not have any competency?

SHRI R. KOTHANDARAMAN: Parliament has competence to evolve like what you are saying a comprehensive definition applicable to both the States and the Centre. Of only article 191 is dismembered or amended from the Constitution, it will have it. As long as it stays, it does not have it.

SHRI V. KISHORE CHANDRA S. DEO: You first said that these are all English concept. We must understand that the concept of Parliament itself was imported from UK. Government still refers to it as the mother of Parliaments. The basis itself is that and we have borrowed our Directive Principles from the Constitution of Ireland and the federal system from other Western constitutions. So, the question is not that. The question is not to evolve an Indian system from old scriptures or something like that. Here there is a certain amount of confusion. On the one hand, you have

said that the idea of office of profit has to be abolished and it needs to be scrapped from the Constitution. In the same paragraph 2 in page 12, you have said that a Member of a Legislature should hold his position as member of that Legislature on full time basis. Doctors, lawyers, actors and other professionals must stop their practice and every member must take an oath in this regard and violation of such oath must be punishable. So, on the one hand, you said that the concept of office of profit should be abolished and on the other hand, you say that even the professionals must discontinue their profession. Is there not a contradiction between these two ideas? And then later on you have said that the concept of remunerative political post in article 361B should also be abolished alongwith the idea of office of profit. There is a certain contradiction or confusion in these statements also. You may answer right now or send it to us later as there are others to be heard.

SHRI R. KOTHANDARAMAN: I will reply in writing.

MR. CHAIRMAN: How many Boards and Development Authorities have been there in your State? Have there been any guidelines followed in view of the different verdicts given by different courts at different times and at the Central level? Have they been followed while giving exemptions in Nagaland?

SHRI R. KOTHANDARAMAN: We have a law which given an omnibus exemption to all the offices. In our State, whoever holds an office of profit will not get disqualified because omnibus entries are there in the schedule in the Prevention of Disqualification Act. There is particularly entry 8 which says about all Chairmen of all Boards, Corporations, etc. Once that omnibus entry is there, nobody can be disqualified in our State. There were two cases in 2006 which were against the Chief Minister and the Leader of Opposition. Both the cases have been dealt with under this entry 8 and then the disqualification pleas have been rejected. So, there is no disqualification on holding an office of profit in Nagaland because of the omnibus entries.

MR. CHAIRMAN: Do you agree that Parliament has the competency under article 368 to amend the article 191 without effecting suitable legislations for incorporating uniform principle in so far as office of profit is concerned?

SHRI R. KOTHANDARAMAN: It is possible. But having a uniform definition will be difficult.

MR. CHAIRMAN: Whereas in question No. 2, you stated that Parliament has no competency and on the other hand, your view is that it can be done.

SHRI R. KOTHANDARAMAN: Let me clarify. I said in the face of article 191 when the distribution of legislative powers have taken place between Parliament and State Legislatures, Parliament cannot do that. If you are saying that article 191 will be removed from the Constitution in relation to the empowerment of the State Assemblies, then you have the power under article 368.

MR. CHAIRMAN: Some of the offices have been given exemption in your State like Wakf Boards, Fisheries Board, the Coffee Board and some other similar Boards have not been given exemption in other States. If such a situation arises, then do you think that there should be a uniform law?

SHRI R. KOTHANDARAMAN: In respect of that, I have a different view. It is not that the Coffee Board at the Centre is exempted. For example, the Wakf Board at the Centre exempts Members

who are taking an office in the central Wakf Board. In the case of MLAs of Nagaland, if there is a Wakf Board and if they become members, they should also be exempted because it is the State Government's view whether that particular office involves any compromise on the duties of the Legislator or not, what are the powers of the Board, etc. So, statute differs and there is no question of uniformatizing all the statutes relating to offices of profit. You can have a definition but you cannot say that in respect of offices, if there is an office in the Centre which disqualifies, the similar office in the State should also disqualify them because powers, duties and pecuniary benefits may differ. In that case, you will have to first uniformatize the powers, duties and pecuniary benefits of all offices in the States and the Centre of the country and only then you can have uniformatization of definition in relation to these offices.

SHRI P. CHAKRABORTY: Sir, I represent Mizoram. We have submitted the views of our State Government. We fully agree with the JPC's questionnaire and the propositions there like there is a need for a uniform law. Secondly, absolutely there is a need to define office of profit. What we want to highlight before the hon. Committee is that if we go by article 102 and 191 read with 58(2) and 66(4), then there is a little difference with reference to the office of profit under Government whereas article 102 and 191 speak of office of profit under Central Government or the State Governments.

Articles 58 (2) and 66 (4) includes even offices under any local or other authorities. So, our humble submission is: Why is this difference? If there is any meaning in this difference, then why cannot it be brought into articles 102 and 191 also? Secondly, as I have been dealing with these autonomous districts also, if we say "offices under Government" and if we go by this expression, then what will happen to these autonomous bodies and other local authorities? There are a plethora of court cases going on to decide which office is under the Government and which office is not under the Government. If we look into the Right to Information Act, it talks about the concept of "public authority." Even an NGO having substantial financial contribution or assistance from the Government is also under obligation to furnish information to a citizen. Now, there are hundreds of NGOs which are being substantially financed by the Government. If that is so, then why not we expand the scope of office of profit definition to those types of NGOs. This is the view of our Government. Many States have made Prevention of Disqualification Act. Some States have Removal of Disqualification Act. Legal luminaries, like Shri Ram Jethmalani, are here. We should not say much before all of you. Our humble view is that why prevention and removal? Prevention means pre-emptory. Removal is after something happens. So, according to our law office of profit is not banned. The State Legislature has been empowered to remove or to exonerate him by making a law. So, if that power continues to remain with the State Legislature or the State Government, then there cannot be any uniformity. Every State Government will go in their own way. Hon. Chairman has rightly observed that in some States the Chairman, Wakf Board has been exempted and in some other States he is not exempted. So, a uniform law is very much required. We fully agree with the definition that has been drafted by the hon. JPC. We have given our comments also. But the ways and means may please be decided by the hon. Members as to whether a separate law will be required or whether an amendment to the Constitution will be required. They are the best persons to decide. We feel that a separate law is required because disqualification is spread here and there. For example, pre-election disqualification is dealt by Representative of Peoples Act; post-election qualification is dealt under articles 58, 66, 102, 191, etc; then there is a disqualification under Tenth Schedule. Why can the hon. Members not think of having one law to deal with all aspects of disqualification of office of profit? Thank you very much for your patient hearing.

SHRI P.C. SHARMA: Thank you. We are of the view that exemption of office of profit should be left to the State Governments as presently envisaged in the Constitution, especially for States like Assam, which have huge differences in culture, identity and ethnicity.

SHRI RAM JETHMALANI: What has ethnicity got to do with office of profit? Please tell us the relevance of that to the office of profit.

SHRI P.C. SHARMA: Sir, for example, one of the State representatives has talked about the District Council Authority.

SHRI RAM JETHMALANI: I cannot see the relevance.

SHRI P.C. SHARMA: We have an Act of the State Legislature, which has named the offices of profit which are exempted. It has the detail. We have also organisations like District Councils, which are bodies of Sixth Schedule of the Constitution. The posts like the Chairman of the District Council are exempted. Now, it has been introduced in the plain districts also. After the Bodo Accord, Bodoland Territorial Council has been put in place. These are elected posts.

SHRI RAM JETHMALANI: We do not have objection to your creating these organisations. They are very useful. But what is the necessity of having Members of the Legislature in charge of them and to give them emoluments? That is what you have to justify. These organisations which exist do a very great job. We have no objection to that at all. You can have any other person who is not a legislator in charge of it. Why do you have to put legislators there? You put them because you want to get their votes and you want to have them in your bag. That is the objection.

MR. CHAIRMAN: Do you mean to say that the public representatives should be involved in the development authorities for the welfare of that area, for the welfare of that particular community for which they have been funded specially under some special schemes? Do you mean to say that their association or corporation is essential?

SHRI RAM JETHMALANI: If it is essential, all right keep him there, but not give him more than ten per cent of what he otherwise gets. That was a good suggestion.

SHRI P.C. SHARMA: They are given honorarium only. They are not given salaries. They are given only honorarium and TA/DA.

SHRI RAM JETHMALANI: That does not make it an office of profit.

SHRI P.C. SHARMA: They have been exempted. There is a State Act where various posts have been named and they have all been exempted. We have got a very detailed list.

SHRI RAM JETHMALANI: Those who have been exempted get only this kind of compensatory allowance or are you giving them big salaries?

SHRI P.C. SHARMA: It is not necessary that they get it. They do not get any salaries. That list is available. If required we can submit it. They are part of the law.

SHRI RAM JETHMALANI: Give us the data how much are they being paid?

SHRI P.C. SHARMA: We can provide you that also.

A question was raised about the "applicability to the States." There, we are of the view that the position as envisaged under article 191 should not be abrogated by Parliament, especially

since it relates to State subject. This is a subject given to the State Legislatures. So, this should continue with the State Legislatures. That is the view of the Government.

SHRI RAM JETHMALANI: That is the provision in the Constitution. Unless we change it, the power is with the State Legislature. Article 191 talks of the State Legislature and article 102 talks of Parliament. So, that power is there with the State Legislature. The question is: Should we have some kind of uniformity, at least a uniform principle?

SHRI P.C. SHARMA: So far as the uniformity is concerned, we have to look at it whether uniformity can be there with regard to a State subject. There will be variance from State to State because the ground situation and the requirements will vary from State to State. Therefore, there is bound to be difference.

SHRI RAM JETHMALANI: We will not impose our views on the State Governments until the law is changed. That is certain.

SHRI P.C. SHARMA: Our Government's view is that the State Legislatures should continue to have this power.

SHRI K.K. SHARMA: As far as Arunachal Pradesh is concerned, our overall position is that the Members of Legislative Assemblies should have the opportunity to participate in the development activities and other welfare types of bodies which are engaged for undertaking different businesses in the State.

Now, many of these bodies thus have MLAs appointed as Chairpersons or Vice Chairpersons. We have also stated in our written reply which has been submitted to this august Committee that they should not be paid remuneration. However, the office space and other things that are needed to make their office functional should be provided to them. This is our broad position. But having said that and going by your previous questions whether Arunachal Pradesh Government can come with a definition which will help, a sort of encompass the issue, and take care of the situation prevailing in our State also, that reply we do not have today. I am saying that because there are already legislations passed by the State Government exempting certain offices as offices of profit. Now having been done, the State Government would like to maintain those offices as not offices of profit. As far as the future is concerned, I would say that if we take today's position, there are already some MLAs who were appointed as Parliamentary Secretary or were appointed as Chairpersons of some of the Corporations and those offices have been declared today as not offices of profit. There are certain other MLAs who are not falling in those categories and they are not holding any such office. Now, with reference to that our position is that yes, a uniform definition should be devised that the Parliament should make a law or we would support making of such a law which would take care of the situation in Arunachal Pradesh also. But whether I can articulate a definition which takes care of our existing exemptions and also takes care of the future is not there. Also, we have not posed that question to the Government in such a clear form. Of course, if I anticipate, the Government will obviously say that no this is the law of the land. We have passed in Arunachal Pradesh and we abide by that law which means, as was said by Chief Secretary of Assam, even though I have not taken an approval from the Government to make this statement, but the Government's position would be that since we have defined certain offices as not offices of profit, we would like to continue to have that power. So, if the august Committee would like that we should go back and pose this question in more detail to our Government, we will do that and send additional replies. That is my broad position.

SHRI RAM JETHMALANI: We would like to have some information. How much are you paying in these positions?

SHRI K.K. SHARMA: Sir, we have two types of bodies. Our first law came in 1977. It is, in fact, there in the Questionnaire which was circulated by the Committee itself. The Arunachal Pradesh Legislature Prevention of Disqualification Act, 1977 gives general exemption from disqualification to the Chairman, Vice-Chairman and Members of any Committee. Now, as far as these persons are concerned, they are not being paid salaries. They receive the salaries which is admissible to the Members of the Legislative Assembly. But they get the facilities to run their offices, office space is provided and vehicles and office staff are provided. But recently in 2007 we have enacted another legislation providing for appointment of Parliamentary Secretaries. Parliamentary Secretaries are getting salaries as Parliamentary Secretaries and not as MLAs in addition to certain other facilities. Of course, we have further amended the Exemption Act and exempted Parliamentary Secretaries and certain other positions as not being the offices of profit.

SHRI RAM JETHMALANI: I said that is really an evasion of the limitation which we have put on the size of the Cabinet.

MR. CHAIRMAN: They are entitled for one post one salary.

SHRI SITARAM YECHURY: What is the salary of the Parliamentary Secretary?

SHRI K.K. SHARMA: The only difference is that Parliamentary Secretaries have not been given Executive powers. The factual position is that they are appointed in departments. That department has a Minister and there is a Parliamentary Secretary. As per the rules of business that we have adopted, the file earlier typically moves from the Secretary to the Government and to the Minister for a decision and now it moves from the Secretary to the Government (Civil Servant), to the Parliamentary Secretary and then to the Minister with a clear understanding that the Parliamentary Secretary will not dispose off the file at his level. So, that is the rules of business we have specified.

MR. CHAIRMAN: But they are enjoying the status of Ministers of State.

SHRI C.P. MANAI: Yes, Sir. Parliamentary Secretaries have been given the status of Minister of State. We have amended what is called the business rule of Arunachal Pradesh. The Secretary concerned will put up the file to the Parliamentary Secretary, but he cannot take any final decision. He has to send the file to the concerned Minister who is the final authority to dispose off the file.

SHRI SITARAM YECHURY: What is the salary they are getting?

SHRI K.K. SHARMA: In the Act we have mentioned that a Parliamentary Secretary shall be entitled to such salaries and allowances as are admissible to the Minister of State under the business rule of the Arunachal Pradesh.

SHRI SITARAM YECHURY: That is why I asked you this question.

SHRI C.P. MANAI: Sir, I am sorry. I do not have the figures. We will give you the information.

SHRI SITARAM YECHURY: We have got the answer.

SHRI RAM JETHMALANI: He cannot dispose off the file finally makes the office of profit there a complete office of profit. It is purely an office of profit. You do not do any work, but it is as office of profit.

SHRI L.M. SANGMA: Hon. Chairman, hon. Members and respected Officers, my name is L.M. Sangma, I am the Joint Secretary in the Law Department. I have been authorized to come from Meghalaya. I am in-charge of Parliamentary Affairs. There is no Secretary in Parliamentary Affairs and there is no Principal Secretary. So, I have been authorized to come today to depose before this august Committee. We have replied as to what definitions will be given relating to an office of profit. This matter has been sent to the Director on Ist November, 2006. The matter was put up to the Cabinet and it was unanimously decided that any office which has a pecuniary benefit or remuneration whether in the form of salary or honorarium whatever may be called is paid for holding such office/post but will not include any office/post which have been declared not to disqualify the holder of such office/post by law made by Parliament or the Legislature of the State/Union Territories. This is the definition that we have given to the hon. Committee as far as the State of Meghalaya is concerned.

Regarding the subject, this power of making law for the MLAs should remain with the State Government and for MP should be with the Parliament because of the doctrine of separation envisaged under the Constitution of India. So, these are the main points.

Again for all the queries given to us, we have sent by fax on 26th and today I have given 17 copies of the hon. Committee. So, I do not have much to speak now and this is the comment of the State Government.

MR. CHAIRMAN: Regarding para 9 (i), you have commented that if the Parliament (Prevention of Disqualification) Act, 1959 is made applicable to all States, then, offices/posts under the Meghalaya Act, 1972 may have to be incorporated in the Schedule/Table to the Act, 1959. Do you mean that whatever exemptions have given under the existing law in Meghalaya should be totally protected?

SHRI L.M. SANGMA: Yes.

MR. CHAIRMAN: Regarding the exemptions which have been given under the existing law of Meghalaya, whether any guidelines have been followed in view of the many Supreme Court judgements or observations by Parliament.

SHRI L.M. SANGMA: If the Supreme Court judgements are there, we respect them.

SHRI RAM JETHMALANI: You have created so many Offices of Profit and so you do not have to create any more now but only preserve them!

MR. CHAIRMAN: The point is that you agree to the amendment provided the State law is incorporated.

SHRI L.M. SANGMA: We have a comprehensive law applicable to Government and not for the private institutions.

SHRI S.C. DAS: Sir, our Government has very carefully considered all the points formulated by the JPC. We have submitted the State Government's view in writing. The Government of Tripura is, substantially, of the view that a comprehensive definition as has been formulated by

the JPC may be added in the Constitution by an amendment which is likely to serve the purpose. It will ensure uniform application of the law in all the States and the Union.

Secondly, the power of the State Legislature to make laws respecting the Members of the State Legislature under Article 191 of the Constitution should be retained to meet the requirements peculiar to the States. The Draft Definition which has been formulated by the JPC seems to be comprehensive and consistent with the constitutional principle. Our Government is not in favour of re-introduction of the provisions as envisaged under the 42nd Amendment Act of the Constitution.

MR. CHAIRMAN: It seems that you agree to bring forward some constitutional amendments to have uniformity in the law throughout the country covering all the States and the Union.

SHRI S.C. DAS: Yes.

SHRI RAM JETHMALANI: There is contradiction in what you say. You want uniformity and at the same time to retain power of the States under Article 191. You are going on creating exemptions.

SHRI S.C. DAS: Our Government's view is that a definition may serve the purpose. That will be uniformly applied by all the States and the Union also. They should make their own laws to meet the peculiar position of the particular State.

SHRI SITARAM YECHURY: It should not be at the expense of taking away the right of the States to exempt the offices. You want both things. Am I right?

SHRI S.C. DAS: We want both. Uniformity should be there. The State Legislature's power must be retained.

SHRI RAM JETHMALANI: What you say is that you should have power to apply that definition to whatever offices you want!

SHRI SITARAM YECHURY: We will have to discuss all these matters.

SHRI SAICHCHUANA: We find that there does not appear to be a workable definition of all categories of the bodies. That is why, we would prefer to have our own Acts for the State. In fact, we have amended the Removal of Disqualifications Act last year representing as many as 43 bodies having 52 offices. Since some of the categories are commercial in nature and since some others are developmental in nature, we could not define which is an office of profit.

SHRI RAM JETHMALANI: What is the total membership of your House?

SHRI SAICHCHUANA: 60.

SHRI RAM JETHMALANI: You have created 43 more offices.

SHRI SAICHCHUANA: Some of them are by designation and some of them are from the Legislature Committee. The main reason is the necessity of having such bodies in respect of the State.

SHRI RAM JETHMALANI: We have no objection to the bodies. We have objection to putting the Legislators in charge of it.

SHRI SAICHCHUANA: I am coming to that. That is why, the necessity has come into the picture.

SHRI SITARAM YECHURY: You have 43 offices in your List. 12 Ministers are there. The Cabinet can be of the size of 12 according to the new law. So, that makes it to 55. There is also one Speaker and one Deputy-Speaker. That makes it to 57. Why have you left out the other three Members?

MR. CHAIRMAN: They must be in the Opposition!

SHRI SAICHCHUANA: There are many bodies where a Minister by virtue of being a Minister is the Chairman or Vice-Chairman as the case may be. Likewise, in the case of the Hill Areas Committee of the Legislature, the Chairman is an MLA. By virtue of that, he becomes the Chairman of the body of the Legislature. Since we could not define which will be an office of profit, whether we can describe in terms of remuneration or body as such, we have difficulty in defining that. That is why, we have exempted the entire bodies from the purview of the office of profit. The very fact that we have exempted them means that we feel that there are some offices which could be described as offices of profit. As we could not define that, we have exempted all of them in our amendment.

MR. CHAIRMAN: What is the criterion you follow in giving exemption to all the offices? There must be a criterion to give exemption to a particular office like necessity and purpose.

SHRI SAICHCHUANA: Necessity is basically a criterion. Manipur is made up of so many ethnic groups. We have got as many as 33 recognised tribes. Most of these groups are having their own representatives. So, somebody has to be active in the development process and the state of affairs in one way or the other.

MR. CHAIRMAN: You fell that their involvement or association with the bodies and corporations is essential for the welfare of that region, particular community or like that. Do you mean to say that?

SHRI SAICHCHUANA: Most of the groups would like to have their own representatives to have some say in the running of the Government as such.

SHRI SITARAM YECHURY: This is a live problem in the North-East. In fact, when the constitutional amendment was made limiting the size of the Cabinet, there were serious objections from many of the State Governments saying that since many tribes existed in each State, if they did not represent those tribes in the Cabinet, that would create a lot of problems.

MR. CHAIRMAN: That is why, this meeting is held for the North-Eastern Region. There is a peculiar situation. The circumstances are different in respect of each State. So, involvement and association of the elected representatives in the Committees/Bodies and Authority is necessary for the welfare of that particular area, community or the tribals. That is the main purpose.

But, at the same time, we should follow the criteria and guidelines.

SHRI SAICHCHUANA: That is exactly the reason why the States would like to have their own Acts and rules on this issue.

SHRI R.K. PURUKAYASTHA: Coming to the basic issue, on the uniformity of the definition, our position is same as has been elaborated by Government of Tripura which is that on the principle of law, there should be uniformity. But, the paraphernalia or the criteria as to which are to be exempted should be left to the State Governments. In our State also, we have got more than17 ethnic tribes. So, each of the groups seems to feel that there should be some public representation

in some form. This is an aspiration reflected in terms of people's expectations. We have to be alive to their expectations. So, keeping their expectations on the forefront, we thought that they should be represented in some way. So, recently, we have enacted the Sikkim State Legislature (Appointment to Different Authorities) Act whereby we have authorised that the Government of Sikkim would be legally empowered to appoint some of the members to such bodies and certain authorities in which they feel that these people should be represented so that some sort of developmental activities could take place in these bodies.

While on the principal of law, uniformity could be maintained, but the criteria for exclusion or disqualification should be ultimately decided by the respective States based on their ground realities as would be considered from time to time. While uniformity, in principle, should be maintained, the criteria for exemption has to be ensured, somehow or the other, in considering the situation prevailing in a particular State. India is such a big and diverse country that we cannot put the entire country on the same footing. Even the law has to be diverse. So, uniformity on the principle of law defining the Office of Profit could be worked out. We have the benefit of having constitutional and legal pandits like Hon. Shri Ram Jethmalaniji. This being possible, I believe, from the legal point of view, the detailed paraphernalia could be worked out also so that the State authorities could be in a happy position. That would be a happy blending of the aspirations of the States as well as the requirements of a national uniform approach.

SHRI RAM JETHMALANI: You have made a perfect statement except your saying that ground reality needs political compulsion.

SHRI SITARAM YECHURY: I think there could be other compulsions as well. For example, you cannot have a board for development of water tourism in Delhi. It makes no sense. But, you can have one in Kerala. You will have these ground realities. You cannot have a Tea Board in Delhi. But, you could have a Tea Board in Assam and this could be very remunerative.

MR. CHAIRMAN: I thank you all for coming here and taking part in this meeting.

(*The Committee then adjourned*)

RECORD OF EVIDENCE TENDERED BEFORE THE JOINT COMMITTEE TO EXAMINE THE CONSTITUTIONAL AND LEGAL POSITION RELATING TO OFFICE OF PROFIT

Tuesday, the 27 November 2007 from 1500 hrs. to 1545 hrs. in Committee Room 'D', Parliament House Annexe, New Delhi

Shri Iqbal Ahmed Saradgi — *Chairman*

MEMBERS

Lok Sabha

2. Shri Santosh Gangwar

Rajya Sabha

3. Shri Ram Jethmalani
4. Shri Sitaram Yechury

Representatives of Ministry of Law & Justice (Legislative Department)

Shri K.N. Chaturvedi	—	Secretary
Shri N.L. Meena	—	Joint Secretary

Representatives of State Government of Rajasthan

Shri A.K. Pande	—	Additional Chief Secretary
Shri Mahesh Bhagwati	—	Law Secretary

MR. CHAIRMAN: I welcome you to this sitting of the Joint Parliamentary Committee. As you are aware, JPC has been constituted mainly to examine in the context of certain interpretations of the expression Office of Profit in article 102 of the Constitution and the underlying constitutional principles therein.

One of the terms of reference given to this JPC is to recommend in relation to the office of profit, the resolution of generic comprehensive criteria which are just and fair and reasonably applied to all States and Union Territories.

The JPC would like to hear your views in this regard. I may add that the proceedings of the Committee are to be treated as confidential and are not to be made public till the report of the Committee is presented to the Parliament.

The list of points for discussion have already been sent to you. The Committee would like to discuss further with you on the matters and reference of the JPC. Hon. Members may seek clarification wherever necessary. Before we start, please introduce yourself to the Committee.

INTRODUCTION

SHRI A.K. PANDE: Sir, the questionnaire that was sent to us, we have already sent point-wise reply to each one of them. The answers that we have given, have the approval of the highest level of the State Government and it is the considered view of the State Government on each of the point which was referred to us.

Point Nos. one and two basically are more of generic in nature. We appreciate the efforts being taken by the hon. JPC and we are in agreement with that. It is necessary to evolve some kind of generic definition which can obviate complications and difficulties in years to come.

So far as point No.2 is concerned, the State Government is of the view that the matter is closely related to the working of a sound democracy and is also of common concern of the nation and the States therefore, evolution of uniform principles for determination of 'office of profit' and applicable equally to all the articles using the term would be useful. Some kind of common definition of generic principles needs to be evolved and the State Government supports that.

As regards the query regarding existence of a Standing Committee in the Rajasthan Legislature is concerned, I have to say that there is no such Standing Committee in the Legislature of the State of Rajasthan on the office of profit. Similarly, we have also not developed any criteria to define office of profit within the State.

There is one major area relating to Q.No.7, where we have made some concrete suggestions. With your permission, shall I request the Law Secretary to elaborate on this point?

SHRI MAHESH BHAGWATI: Sir, thought the term 'office of profit' has been used in so many articles in the Constitution of India, surprisingly, it is defined no where. Whereas, when we talk of disqualification, we say that the Members of Parliament or the Member of State Legislature

should be disqualified if he holds 'office of profit', we are unable to understand even today what is office of profit. The first and foremost requirement is that the term 'office of profit' must be defined. For the first time, the hon. JPC has made an effort to go through it and they have proposed the definition which pertains to Q.No.7.

A definition of office of profit has been attempted in some quarters which read as under:—

In article 102 of the Constitution in clause (1) for the explanation, the following Explanation shall be substituted, namely, Explanation I. For the purpose of this clause—Office of profit means—Any office under the control of the Government of India or the Government of a State, as the case may be whether the salary or remuneration for such office is paid out of the public revenue of the Government of India or of the Government of State.

(ii) Under a body which is wholly or partially owned by the Government of India or the Government of any State and the salary or remuneration is paid by such body; and

(A) The holder of office under sub-clause (i) is capable of exercising legislative, judicial or quasi-judicial power.

(B) The holder of officer under sub-clause (ii) is capable of exercising powers by means of disbursement of funds, allotment of lands issuing of licenses and permits of making of public appointments or granting of such other favours of substantial nature.

(II) 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 either for the Union or for such a State.

Explanation II. For the purposes of this clause the expression:—

(a) "Office" means the permanent substantive position which exists independently of the holder of the office.

(b) "Remuneration" means any pecuniary gain commensurate with the status and responsibilities attached to the office.

(c) "Salary" means salary or pay scale attached to the office whether or not the holder of such an office draws such salary.

After clause (1) the following clause shall be inserted namely:—

"(1A) Notwithstanding anything contained in sub-clause (a) of clause (1) if a Member of either House of Parliament has become subject to any disqualification mentioned in that sub clause he shall not be so disqualified unless he has not resigned from such office which is the subject of disqualification."

MR. CHAIRMAN: All these things are already given in the note.

SHRI MAHESH BHAGWATI: Sir, in the Rajasthan Assembly the Disqualification Act contains all these provisions. The officers and persons and authorities or chair-holders are not held to be disqualified if they are holding a particular office.

MR. CHAIRMAN: You already have furnished that list. It seems that there are contradictions in your statement in certain parts. Like you have expressed in para VII that several office holders shall not be deemed to be holding offices of profit.

If that is so, what are those criteria? You are simply saying that the State Government has given exemption. What are the guidelines and criteria for giving exemption? It is because one of the important terms of reference of this Committee is to evolve or to suggest a law regarding this office of profit applicable to all the State Governments and the Union Territories. As per our existing law some of the offices in which case your Government has given exemption, the same is not applicable to other States. What do you suggest in this regard? Are you right in giving exemption to these offices?

SHRI MAHESH BHAGWATI: The present position is that there is no guideline on the basis of which this exemption has been provided. We have an Act in our State.

Simply the list has been given. But there is no criteria or guidelines behind this list.

MR. CHAIRMAN: It is good that you have suggested that there should be a comprehensive law. We must have a comprehensive law. It is a good suggestion. But at the same time you are saying that whatever exemptions you have given under the existing law should not be interfered with.

SHRI MAHESH BHAGWATI: This is the present position in the State.

MR. CHAIRMAN: You have suggested exemptions even for those who are holding some executive, judicial, quasi-judicial powers and for those who are having powers to appoint or terminate. What is the criteria followed?

SHRI MAHESH BHAGWATI: No criteria has been followed.

SHRI RAM JETHMALANI: They have said so in the written submission. In para 3 they have candidly admitted that they are not following any criteria and that it is only *ad hoc*.

You please refer to para 7. I believe it is the copy of your State Act. This formulation itself has two or three serious objections. I am referring to II (iv). Here, you are saying, "Chairman, Vice-Chairman or a Member of the Committee set up for the purpose of advising the Government or any other authority in respect of any matter of public importance." Having said that, how can you justify II (vi), which says "Chairman or Member of the Committee other than any such Committee as is referred to in clause (iv)"?

SHRI MAHESH BHAGWATI: What is there in the law, we have just lifted and incorporated them here.

SHRI RAM JETHMALANI: You see the difficulty there. In (vii), it is said: "A Chairman, Director, Member or an officer of a statutory body where the power to make any appointment to any such office or power to remove any person from there is vested in the Government." Naturally, office of profit has to be with the Government. Therefore, this is no exemption at all.

SHRI MAHESH BHAGWATI: Either it is Government or semi-Government, where there is a control of the Government.

MR. CHAIRMAN: Does it mean that Chairman, Member of any Committee, Commission, Council or Board or any body set up by the Government would be exempted from the office of profit?

SHRI MAHESH BHAGWATI: Sir, they have been exempted.

SHRI RAM JETHMALANI: Instead of making him a Minister, you are making him a Parliamentary Secretary, Under Parliamentary Secretary. You are really evading the provisions of the law, which puts ceiling on the number of Ministers. A Minister called by a different name does not cease to be a Minister.

MR. CHAIRMAN: In response to Question no. 2, your Government has favoured "evaluation of uniform principles for determination of office of profit." However, in response to Question no. 11, the State has suggested that "in respect of disqualification based on office of profit, the UK pattern may be adopted. But the power to declare office of profit under article 102 should be given to the Parliament, while the power to declare office of profit under article 191 should be given to the State Legislatures."

So, retaining the power with the State Government, do you suggest that the law existing in the Britain can be adopted?

SHRI MAHESH BHAGWATI: Sir, whatever the UK pattern is, in addition to that, the power should be with the State Government under Article 191.

SHRI RAM JETHMALANI: That is the whole idea.

MR. CHAIRMAN: Would this not result in situations where same kind of offices would be declared as Office of Profit in the State while it has been exempted in other places?

SHRI RAM JETHMALANI: If we have to evolve a uniform definition which will apply to both the Centre and the States, then the power under article 191 will have to go. We will have to have a constitutional amendment that this is a definition by which everybody is bound—Centre as well as the States.

MR. CHAIRMAN: That is the main object of this.

SHRI A.K. PANDE: Sir, I fully appreciate that there are certain inherent anachronisms in our definition in the Office of Profit that we have identified for exemption. But this may kindly be taken as a concern of the State Government that as and when the principles are evolved to define the Office of Profit, these are real life situations, all these exemptions that we have made. They actually reflect real life situations. There have been occasions where the hon. Members of the Legislative Assembly, their elections have been challenged because they were holding any one of these offices. It is quite common in State Government for Members of the Legislative Assemblies to be nominated to district level committees and to State level committees for various programmes. So, if we do not have this kind of a comprehensive list, it can create difficulties in the implementation.

SHRI RAM JETHMALANI: Frankly, nobody can have any objection to what you say. But that is good enough.

SHRI A.K. PANDE: In fact, particularly dangerous is, as you rightly pointed out, is number 3—a Parliamentary Secretary. We can have many numbers of them.

SHRI RAM JETHMALANI: Parliamentary Secretary, Parliamentary Under-Secretary, etc., these are all ministerial jobs.

SHRI A.K. PANDE: They cannot be equated.

SHRI MAHESH BHAGWATI: But this is the law which has been passed by the hon. Legislature in their wisdom.

SHRI RAM JETHMALANI: Actually, the politicians are depriving the good bureaucrats from some jobs by this method.

MR. CHAIRMAN: Even the public representatives are supposed to be associated with some of the bodies like Development Authority and like that. Their involvement is to have some development in their own region or in community. So, do you agree with this?

SHRI MAHESH BHAGWATI: Yes, Sir. As I myself have pointed out, this is an extremely prevalent practice in the State Governments to associate the elected representatives of the Legislative Assemblies into various developmental schemes at different levels. They are there to monitor, to supervise, to advice, to guide etc.

SHRI RAM JETHMALANI: We have no objection to that also. The question is profit part because then, it becomes some kind of a settled bribery.

SHRI A.K. PANDE: In fact, I had an occasion to be examined by another Joint Parliamentary Committee only a fortnight ago.

MR. CHAIRMAN: You have suggested a long list for giving exemptions right from Advocate General etc. It is mentioned from one to ten. But the basic principle is that those who are getting pecuniary interest or monitory interest, they are not supposed to hold such offices. But other than that, the others are, if the nature of the committee or office is like advisory or like that, they are supposed to be continuing. But here what you have suggested is a long list—whether you have followed any principles or guidelines for suggesting long list to give exemptions?

SHRI MAHESH BHAGWATI: There is no principle.

SHRI RAM JETHMALANI: As a Member of Parliament, I have once taken up the job of a Public Prosecutor to prosecute late Sanjay Gandhi. I charged Re. 1. There was no fee. That is how it should be done if you are really trying to do some service.

SHRI SITARAM YECHURY: You are of the opinion that there should be a uniform definition that should apply to both the Centre and the States.

SHRI A.K. PANDE: Yes.

SHRI SANTOSH GANGWAR: Do you have any other suggestion?

SHRI MAHESH BHAGWATI: In my personal view, so far as the term 'office of profit' is concerned, now there is a great need of this term to be defined in the Constitution. The definition can be either way. Either it should be inclusive or it should be exclusive. When we are going to define anything whether it is inclusive or exclusive, if we include certain things, then rest of the things are automatically excluded. If we exclude certain things, then rest of the things are automatically included. So, the definition should be comprehensive, generic, reasonably just and reasonably fair. But once the definition is provided, then there is one question whether there should be any authority who should interpret as to whether a particular office is an office of profit or not. Our State Government has answered that the Legislature has got the power to enact the laws, but so far as interpretation of the laws are concerned, this power lies with the High Courts and the

hon. Supreme Court. There is no authority which can be conferred with the powers to interpret the constitutional provisions. This lies with the High Courts and the Supreme Court. We have answered like this. But the term 'office of profit' should be very well defined which should be applicable to all the States so that the other States may not be able to pass their own laws for removal from disqualification and prepare a long list as per their own convenience and as per the need of the hour. This is my personal opinion.

SHRI SITARAM YECHURY: If you have any other suggestion on this matter, please send us in writing.

MR. CHAIRMAN: I thank you very much for coming over here and sharing your valuable thoughts with us. Please join us for a cup of tea.

(*The Committee then adjourned*)

RECORD OF EVIDENCE TENDERED BEFORE THE JOINT COMMITTEE TO EXAMINE THE CONSTITUTIONAL AND LEGAL POSITION RELATING TO OFFICE OF PROFIT

Monday, the 28th April, 2008 from 1500 hrs. to 1610 hrs. in Committee Room 'C' Parliament House Annexe, New Delhi

Shri Iqbal Ahmed Saradgi — *Chairman*

MEMBERS

Lok Sabha

2. Shri V. Kishore Chandra S. Deo
3. Shri Santosh Gangwar
4. Shri Madhusudan Mistry
5. Shri Mohammad Salim

Representative of Ministry of Law & Justice (Legislative Department)

Shri N.L. Meena	—	Additional Secretary

Representatives of State Government of Uttar Pradesh

Shri P.K. Misra	—	Chief Secretary
Shri Pradeep Dubey	—	Secretary Parliamentary Affairs
Shri Atul Kumar Gupta	—	Commissioner Industrial Development

MR. CHAIRMAN: Dear Shri Misra and colleagues,

I welcome you to this sitting of the Joint Parliamentary Committee. As you are aware, this Joint Committee has been constituted mainly to examine in the context of settled interpretation of the expression "Office of Profit" in Article 102 of the Constitution and the underlying principles therein, and to suggest a comprehensive definition of "Office of Profit".

One of the terms of reference of the JPC is to recommend, in relation to 'Office of Profit' the evolution of generic and comprehensive criteria which are just, fair and reasonable and can be applied to all States and Union Territories.

I may add that the proceedings of the Committee are to be treated as confidential and are not to be made public till the report of the Committee is presented to Parliament.

The list of points for discussion has already been sent to you. The Committee would like to discuss further with you on matters under reference of the JPC and the hon. Members may seek clarifications wherever necessary.

Before we start our discussion, you may kindly introduce yourselves to the Committee.

INTRODUCTION OF WITNESSES

SHRI P.K. MISRA: Respected, Chairman and hon. Members of the Committee, this Office of Profit is a very important subject matter. But at the same time, I must say that it is illusive. It needs careful deliberations and quite consultations. All of you must be aware about the constitutional provisions in this regard, that is, article 102 of the Parliament and article 191 of the State Legislatures and also the Parliament's Prevention of Disqualification Act and finally the Parliament's Amendment Act 2006. Before that also, some provisions with regard to Coffee Act, the Rubber Act of 1947 and the Rehabilitation Councils of India Act, 1922 are there.

In the UP State Legislature, we have the Preventions of Disqualification Act, 1971 and the amendment Act of 2006 and before that ten legislations in respect of this have been repealed. The list is there.

We have given our response in respect of the questionnaire provided to the State Government. The views and observations of the UP Government, the constitutional provisions, the observations of the courts and the Election Commission in various cases are to be kept in mind while finalising it. The constitutional provision, the position of the court and the Election Commission should not be undermined.

A blanket definition taking into consideration the complexity and the problems faced probably may not be able to solve the problems. We believe that there is a need for evolving certain general principles which will guide in this respect. But at the same time, while doing so, the specific needs, the requirements of the State and the federal nature of the State must not be lost site of.

Sir, we also believe that in a democratic welfare State, the participation of the representatives of the people in different areas of State development and other activities is essential. So, we must proceed in such a manner that this important element of a democratic process should not be eliminated. Well, Sir, we may have the list of posts.

Sir, I was just going through the previous recommendations of the Committee which were made long time back. It lists out the posts which attract disqualification and which does not. We may have the list of posts which attract disqualification and also the list of posts which does not attract disqualification. There may be some grey areas. If there is any problem in interpretations about the grey areas and other things, then we must have some mechanism.

We now depend on the court interpretation. If we have a constitutional legal mechanism, I think, that will help us in avoiding the complexities, the legal battles which consume long time. We also agree with the suggestions given. Suppose it is held that the Member has held the post of office of profit and if he resigns that post, then he should not be disqualified. After disqualifying the Member, you will have to go through the entire election process which takes a lot of time and involves a lot of expenditure. The purpose is served if he resigns from that post. Disqualifying him for that may be a little bit of too much.

With these, I now close my opening statement. I would like to say that we have already given our written response to the questionnaire sent to us.

SHRI MADHUSUDAN MISTRY: Are you of the opinion of fixing a limit as to how many MLAs should be given posts which attract the office of profit? Suppose you have 100 MLAs. Are you of the view that all these MLAs should in fact be adjusted or given the posts even if they were considered as 'office of profit' or do you think that it should be barred completely?

SHRI P.K. MISRA: Sir, there is a percentage with regard to the Council of Ministers.

SHRI MADHUSUDAN MISTRY: That is fixed. I am talking about those who are not in the Council of Ministers.

SHRI P.K. MISRA: In that way, one can fix it. A certain percentage of the Members of Legislature can hold it.

SHRI MADHUSUDAN MISTRY: What about having a certain percentage of the Members of the Legislature, who are not, in fact, in the Council of Ministers? What could be that percentage?

SHRI P.K. MISRA: Sir, I will communicate it to you later on, after having discussions. At this stage, it is my individual opinion. But it is a consultative process within the State. We do believe that it is a welcome thing. But it depends upon the consultations with the various State Governments. I would communicate it to you very soon.

SHRI MADHUSUDAN MISTRY: Why do you say that there cannot be a uniform definition for Office of Profit? What is your apprehension if we say that yes there could be a uniform definition?

SHRI P.K. MISRA: Instead of having a straight jacket definition, it would rather be appropriate to take into consideration the Constitutional provisions, the observations of the cases in various courts, the observations of the Election Commission in various cases and wide consultations. We should enumerate the guidelines that there are guidelines, which should determine; and on the basis of those guidelines, if consensus emerges with regard to the definition, it is okay.

SHRI MADHUSUDAN MISTRY: Do you have any apprehension if we come out with a comprehensive definition of Office of Profit?

SHRI P.K. MISRA: If you look at the developmental processes, the developmental processes in different States are different. In a developmental field, in a particular area, we evolve the State Government; and there is no need for all these things. But if States say: "Yes, we need the participation of the Members of the Legislature" there is a possibility. There are different stages of development.

SHRI MADHUSUDAN MISTRY: Is it a fact that a number of State Governments have misused this Office of Profit in order to dole out the post.

SHRI P.K. MISRA: Misuse or to use it, unless it is established in a court of law and after somebody has made a representation, we cannot say. I cannot comment in that respect. Only when it is established, I would be able to comment.

SHRI MADHUSUDAN MISTRY: I do not think, that would be a right and appropriate answer. We are here to seek your opinion. As the Chairman has clarified, this is to help out the Committee in order to come out with a comprehensive definition.

SHRI P.K. MISRA: Where the State Government has taken a decision and that decision stands unless it is challenged in the court and contrary views/directions are given by the court of law.

MD. SALIM: I would put the same question in other words. As a senior bureaucrat, overseeing the affairs of the State in a particular State, and so the country, do you think that the provision of disqualification on certain issues/posts is more abused than used?

SHRI P.K. MISRA: Sir, is it expected from a Civil Servant to say anything against the Government?

SHRI MADHUSUDAN MISTRY: I do not think, that could be the answer. We are here to have your free and frank opinion. Forget about for a while that you are a Civil Servant. Suppose, you have been deputed here in the Central Government, then you have nothing to do with the State as such.

SHRI P.K. MISRA: Sir, there is certain Code of Conduct. We go through the Code of Conduct of All India Service Manuals and other things, and I am bound by that Code of Conduct.

MD. SALIM: You are invited here so that the Committee can be benefited of your experience. Now, as Legislators, as Parliamentarians we have our own experience. From one side, we are looking into it. May be we have diverse opinion on the basis of political background. Similarly, we are talking to the academicians, we went to the National School of Law, intellectuals, Judges, former Judges, lawyers and then bureaucrats because the problem is everywhere. I am talking about the use or misuse or abuse, but it is a national issue. We have seen the debate also. Now, the Committee's mandate is to arrive at a decision if at possible or not so that some framework can be thought of. So, in order to arrive at that framework, we are trying to examine the same issue from different points. It is not a comment.

It is not a certificate. We can arrive at a correct decision to the maximum possible extent. As you rightly pointed, we cannot say about definition. It is exhaustive. But despite that, we are trying to approach that. So, with experience from various sides—it may not be correct—but at least to the possible extent we can arrive at a correct decision.

SHRI P.K. MISRA: As I said in my statement before you that the various observations given by the court, the Election Commission and the consensus or wider consultations you have, definitely they must throw out certain principle which will be a guiding principle in this respect. While formulating the Constitutional provisions, again and again I say that the various observations of the hon. courts in various cases and the Election Commission of India must be borne in mind. That is good enough an indicator to evolve a guideline.

Regarding whether it was used or misused, well the court has declared in certain cases that it is null and void or disqualified them. That means, in this particular case, it has been misused.

SHRI ATUL KUMAR GUPTA: With your permission, I would like to say that there would be many situations where it could be alleged that there is, probably, misuse but there would be many instances where the presence of hon. Members of Legislatures has been very substantial and very useful. I would say that ultimately it is a provision which has tremendous utility. But just because there is a possibility of misuse, I think, it may not be very appropriate to do away with this provision. That is why, probably, we are looking at ways to work out and ways to ensure that while on the one hand we are able to get very substantial or useful contribution from the hon. Members and at the same time, it should not be misused. That is why, the State Government believes that this general provision should continue. Also, the definition may be there. Since it is a growing situation, ever changing situation, therefore, it may not always be possible to define it very precisely for all times to come. Therefore, there should always be some scope for the Legislature or for the Government to play within that.

SHRI MADHUSUDAN MISTRY: There are situations where in a number of States, the Parties do not get an absolute majority, and there is a fluid situation. One way could be that since the number of Council of Ministers has been fixed, there is all possibility that in order to satisfy some of the Members, this has been used as leverage to get the support for the Government as such. Though we agree with you that those expertise, which is available with the MLAs and others, should very well be used and if there are such cases, perhaps, appointing a few of them for this kind of work will really benefit the people. Even if we take the Office of Profit, perhaps, we should go ahead. The question there is, where would you draw a line? Where would you keep a balance? Who would keep a balance? Who could see that it has been applied justly? You say that there should be an authority for disqualification. That is what your paper says that you are in favour of appointing an authority of expert for the Constitutional Heads or anybody in order to disqualify any of the Members either from the House or from the post. But that is a part. The first thing that we are coping with is this. How would you stop this? In a coalition politics, this is grossly misused by a number of States.

SHRI P.K. MISRA: Sir, so long as coalition politics is part of political process, it is entirely with the enlightened voters to determine whether it is going to be a coalition politics or it is going to be a two-party system or a multi-party system. That means political education and political inter-play of forces is very important in this respect.

Sir, you asked how to go about it. Sir, you yourself suggested that if certain percentage is fixed, that might be a welcome step, but in reply to that I said that we would consult and definitely communicate to this hon. Committee what this percentage should be. Ultimately, we agree with all these things that participation of the Member in different forums is essential in a democratic process. So, we can identify the areas and the sectors which are very important for that particular State where their participation will be required. Of course, since they are

legislators, they are welcome on any matter pertaining to the State. Secondly, as you said, if a particular percentage is carved out, that will also help. Thirdly, if there is a constitutional mechanism in the case of disqualification for that matter as to which is to be included and which is not to be included, it will also help.

SHRI PRADEEP KUMAR DUBEY: Sir, with your permission, about misuse of office of profit, I would like to submit that the basic premise of disqualifying a public representative from occupying the office of profit is the clash between the duty and the interest. We have to see if there is a clash between the duty of a public representative and his interests which are created by his occupation of that office of profit. There may be instances of large number of public representatives holding office of profit in various States, but whether they have really resulted in sacrificing their interests as Members of the House will have to be seen before we can really determine the extent of misuse. There may be instances where we see that too many offices are being occupied by the public representatives for survival of coalition governments, but whether they have resulted really in sacrificing their interests towards the people at large or towards the House, that will be or can be determined only when a specific study is made in that regard.

Earlier till the ceiling for the Ministers was not fixed in the Constitution of India, a number of Ministers were being made for the survival of the Governments, especially in this era of coalition politics in the growing democracy of this country. Now maybe because of that reason, a ceiling has been fixed. In the same manner, as submitted, we can have a ceiling on the number of MPs or MLAs who can hold office of profit from the Ruling Party. But it will be very difficult to say that it was misused in the sense that interest was sacrificed because that is one test or criterion that has been discussed at the level of the apex court also in different cases. It will be very difficult to say that it was misused or abused in that sense of the term.

In the same manner, it will be difficult to say that we can have a uniform definition because it may not cover every situation. Honourable Supreme Court has also observed in certain cases that it has to be determined on case to case basis, apart from laying down certain tests and the general principles which may guide. At the same time, one should not always be apprehending that the public representative will misuse the office of profit. If there is pecuniary interest, that may be a test. If that is barred, it may help. It may only be because of the fact that a public representative is occupying a position not necessarily for a pecuniary gain but to give an impression to the masses he represents that he may be of some more use or he may contribute to things like that.

Therefore, misuse or abuse in the financial terms may not be very specific and may not be very appropriate too in every case. In case of occupation of office of profit and to that extent the ceiling may be of some help like the ceiling in the Council of Ministers. Apart from that, as the State Government's view has been put forth by the respected Chief Secretary that general principles will definitely guide in this regard.

MD. SALIM : In the first place, I also do accept that legislatures can be given this responsibility depending on the State's condition and society's situation, and their experience, expertise can be incorporated in the governance. I accept it, and it means that it is the call of the duty. It is the nature of work, that is, the essential responsibilities that the legislature may enter upon because of the nature of the work. But if we talk about ceiling of a particular number, then it would mean that it is a question of opportunity given to a specific number of people. How many can we provide now? It will be a self-defeating argument in this case. It is all right that I have

this opportunity to provide 5, 10 or 20 posts, which may be available rather than the first argument of incorporating the expertise. The first argument is all right that being a legislature it cannot be a bar that even if in other capacity he can serve the Nation and the State, it is welcome. Of course, those conditions are there that pecuniary benefits and financial benefits will not be there, etc.

For example, Mr. Kasthurirangan becoming a Parliament Member– but his expertise as ISRO Chief and as a space scientist – should not debar him, and the nation can get benefits of it. So, he can be put in certain Government Committees to share certain things, so that his experience can flow. If that is acceptable, then it should not be the Central Government or State Government that 20 or 50 seats are there because 10 per cent of the MLAs can become Ministers. But we require more number, so we can put some more number that is required. This will be a self-defeating argument according to me. What is your response on this issue?

SHRI PRADEEP KUMAR DUBEY: Sir, for that matter, even the ceiling in as far as the Council of Ministers are concerned was not visualized, and there were arguments against it also, that is, having 15 per cent of the total number.

MD. SALIM: As regards becoming Minister, in this Parliamentary democracy, which we have adopted, the Executives are accountable to the Parliament or the Legislature. Therefore, the political Executives are from among the elected representatives. Hence, that is kept out of the office of profit concept. For example, the Chairman of the Transport Board, Chairman of some Development Council or Corporation, etc. is not accountable – as political administrator – to the Legislature or the Parliament. They are sort of political bureaucrats and Executives appointed by the political administration. Therefore, their accountability is not ensured in the Legislature, but they are accountable only to the appointees.

SHRI P. K. MISRA: As you have said, in an ideal situation, yes, but you look at the operations of the democratic Governments. Ideally speaking, it should not have any defection laws because it is an ethos, essentially a democratic condition, but we have to put these things into consideration.

Likewise, say a limit on the Council of Ministers, what is ideal may not always necessarily be possible to be practiced. Definitely we will strive towards the ideal, there is no doubt about it. There is a desire to strive for that ideal. But in a given practical situation, we may think of having some ceiling so as to ward off any possible misuse in this respect.

श्री संतोष गंगवार: मैं जो कहूंगा मेरी बात को अन्यथा न लिया जाए, क्योंकि मैं सीधे उत्तर प्रदेश से जुड़ा हुआ हूं। सरकारें आती हैं और जाती हैं। आप उसका हिस्सा हो सकते हैं, कोई पद हो सकते हैं। आप व्यवस्था को चलाने वाले हैं। इस समिति को जो कुछ काम हुआ, उसका कारण उत्तर प्रदेश था। इसकी शुरुआत उत्तर प्रदेश से थी, जया बच्चन जी के केस से हुई थी। अभी आपने कुछ बातें बताई और कुछ बातें कोर्ट ऑफ लॉ पर छोड़ दीं, पर जया बच्चन के केस को आप समझ सकते हैं, जैसा अभी सलीम साहब कह रहे थे कि कस्तूरी रंगराजन साहब इस क्षेत्र के विशेषज्ञ हैं। अगर हम उन्हें वह जिम्मेदारी न देकर यह कहें कि हम आपको पश्चिम बंगाल में देना चाहते हैं तो वह किस क्षेत्र में आएगा। जया बच्चन राज्य सभा की सदस्य थीं, उन्हें उत्तर प्रदेश से यह जिम्मेदारी मिली थी। उसकी व्याख्या में मैं नहीं जाना चाहता हूं, पर उसके परिणाम के बाद जो फैसला हुआ, जैसा अभी आप कह रहे थे कि सदस्यता समाप्त हो, पैसा खर्च हो और सारे काम हों, यह भी एक अच्छी बात नहीं है। यह विषय तब उठा जब जया बच्चन जी का केस आया। हम देश के अंदर कौन सी ऐसी व्यवस्था बनाएं, आप हमें यह बिल्कुल न कहें कि हमारी वर्तमान सरकार हमें यह कह रही है और हम उसी लाइन पर चल रहे हैं। यह समिति इस चीज के लिए नहीं आई है। यह समिति इसके लिए आई है कि हमारे देश की लोकतांत्रिक व्यवस्था अच्छे ढंग से कैसे

चले। अच्छे ढंग से कैसे चले, इसके लिए आपको ऊपर उठकर सुझाव देना होगा। मुझे ऐसा नहीं लगता कि अगर आप ऊपर उठकर सुझाव देंगे तो कोई आप पर हमला कर देगा और आपको नुकसान पहुंचाएगा। मैं इसलिए कह रहा हूं कि दो-तीन बातें बिल्कुल साफ हैं और उसके परिप्रेक्ष्य में आप सुझाव दें हमें क्या बनाएं। वर्तमान सरकार ने सारी पुलिस भर्ती निरस्त कर दी कि पैसा लेकर पुलिस में भर्ती हुई है और कुछ पुलिस अधिकारियों के खिलाफ कार्रवाई भी कर दी। सब लोग कहते हैं कि पुलिस अधिकारी तो माध्यम थे, लेने वाले कोई और थे। सजा आपको भुगतनी पड़ रही है। हमारा एक मौलिक सवाल है कि हम लोकतंत्र के अंदर जिसे भेज रहे हैं, जो जा रहा है और उस व्यवस्था का इंतजाम आप कर रहे हैं, उस व्यवस्था में अगर कोई कमी है तो आपको सुधार करना है। हमारे चेयरमैन साहब हमसे अप्रसन्न होते थे, हम कई जगह पूछते थे मीटिंग्स में कि लाल बत्तियां क्यों बांटी जा रही हैं। वर्तमान में उत्तर प्रदेश में भी कुछ ऐसा हो रहा है और यह ध्यान में रखकर किया जा रहा है कि किसको दें और किसे न दें। क्या यह व्यवस्था सही है? आपको जो प्रश्नावली दी गई है, यह उससे हटकर सवाल है। आप जो कह रहे थे, मेरे दिमाग में सवाल आया कि मैं चुना गया किसी दल से, मैंने इस्तीफा दे दिया और फिर दोबारा चुनाव हुआ तो व्यवस्था में खर्चा आया कि नहीं। उसके लिए कौन जिम्मेदार है? यह मैं इसलिए कह रहा हूं कि हम यहां इसलिए बैठे हैं, हमारे देश में लोकतंत्र स्थापित हुए 60 साल ही हुए हैं और यह लम्बे समय तक चलेगा। अच्छे ढंग से चले, चलाने वाले आप लोग हैं। आप लोग सरकार का वर्शन हमें बता दो कि सरकार गलत करे तो कोर्ट उसका फैसला कर दे, यानी कोर्ट हमसे ऊपर है। हम यह मानकर चलें कि न्यायपालिका जो करे वह दुरुस्त करेगी। कहीं पीने का पानी चाहिए, कहीं सूखा है, उससे निपटने के लिए राहत चाहिए, कहीं गरीबी है उसे दूर करने के लिए चाहिए। न्यायालय जब निर्देश देगा तब दुकानें गिराई जाएंगी, क्या तब ही ये सारे काम होंगे। अगर यही सब उन्हें करना है तो फ़िर तो हमारी कोई जरूरत ही नहीं है। मेरा आपसे यह कहना है कि आप इस प्रश्नावली के साथ हमें सुझाव दें कि हम कौन से सुझाव इनकार्पोरेट करें। यह मैं इसलिए कह रहा हूं कि यह न हो कि सिर्फ आपसे बैठकर यहां बात हुई, आपके व्यक्तिगत क्या विचार हैं, यह बताएं। आपने इस प्रश्नावली के जवाब में सरकार के विचार तो बता दिए। वे हमारी समझ में आ गए। आप हमें यह बताएं कि हम कैसे इस लोकतंत्रीय व्यवस्था को और ईमानदार बनाने का काम करें क्योंकि आज कोई मुख्यमंत्री है, कल कोई और होगा, आप नहीं होंगे तो कोई दूसरा इस कुर्सी पर होगा। वह जो सुझाव देगा, उसके हिसाब से काम होगा और उसके हिसाब से व्यवस्था चलेगी। पर व्यवसथा अच्छी चले, व्यवस्था की अच्छी पहचान हो, ये कमियां हम अपने में से धीरे-धीरे दूर करें। इसमें हम चाहते हैं कि आप हमें सुझाव दें। अभी जो आपने उत्तर दिया वह तो समझ में आ गया, पर समस्या उत्तर प्रदेश से शुरू हुई थी। जया बच्चन जी का केस अगर नहीं आता, तो शायद यह कमेटी भी नहीं बनती। संसद में आफिस ऑफ प्राफिट की कमेटी बनी हुई है, वह अपने हिसाब से काम करती रहती। इंग्लैंड में भी वहां के संविधान के हिसाब से आफिस ऑफ प्राफिट की व्याख्या है कि अगर हमने आपको दे दिया तो तय कर लो कि कौन से पद पर रहोगे। फिर हम क्यों इन चक्करों में पड़ें। अभी एक बात आई कि हमारे यूपीए की चेयरपर्सन को किसी दूसरे देश वाले सम्मान देना चाहते हैं और यहां पर व्याख्या की जा रही है कि यह तो लाभ का पद है। मेरा आपसे आग्रह है कि आप इस परिप्रेक्ष्य में सुझाव दें कि किस प्रकार से हम व्यवस्था बनाएं कि आने वाले समय में सरकार उस हिसाब से काम करे। यह बात मानी जा सकती है कि हर राज्य की बात अलग-अलग है। यह भी दिक्कत की बात है कि दिल्ली में एक पद लाभ वाला है तो उत्तर प्रदेश में वह लाभ का पद नहीं है। उत्तर प्रदेश में जो लाभ का पद है, वह दिल्ली में नहीं है। हम उत्तर प्रदेश से सांसद हैं तो हमारी जिम्मेदारी उस प्रदेश के प्रति है। हम वहां अगर कोई ऐसा पद पा लेते हैं तो पता चला कि दिल्ली वालों ने हमारी सदस्यता समाप्त कर दी। यह एक ऐसा विषय है कि हम चाहते हैं कि आप इस पर हमें कुछ एनलाइटन करें और इसमें आपके व्यक्तिगत विचार क्या हैं। सरकार के विचार तो आपने बता दिए, वे तो सब समझ में आ गए। कुछ काम ऐसे होते हैं, लोग काफी कानून पढ़ते हैं, पर जब अदालत में जाते हैं तो उस कानून की जरूरत बहुत कम पड़ती है। लोअर कोर्ट में तो कतई नहीं पड़ती। सुप्रीम कोर्ट में देखें तो वह अलग बात है। जो प्रैक्टिकल चल रहा है, उसे कैसे चलाएं, इस पर आप सुझाव दे सकें तो ज्यादा अच्छा रहेगा।

श्री पी.के. मिश्रा: आपने अभी पुलिस में रिक्रूटमेंट के बारे में कहा, उस पर मैं कुछ नहीं कह सकता। वह मामला सब-जुडिस है।

श्री संतोष गंगवार: लेकिन उसमें प्रताड़ित तो अधिकारी ही हुए। यह भी समझने की बात है।

श्री पी.के. मिश्रा: इसमें मैं कुछ नहीं कहूंगा। इस बारे में मैं यह कहना चाहूंगा कि हम लोग सरकार नहीं चलाते। लोकतंत्र में सरकार में जनता द्वारा चुने हुए प्रतिनिधि होते हैं। संविधान के प्रावधानों के अनुसार डिफरेंट विंग्स हैं, सब मिलकर सरकार चलाते हैं। सिविल सर्विस और सिविल सर्वेंट एक इंस्ट्रूमेंट है। Civil service is an instrument to be used for the welfare of the people within the framework of the constitutional and legal provisions. जहां तक इसका सवाल है, उत्तर प्रदेश का चीफ सेक्रेटरी होने के नाते, उत्तर प्रदेश सरकार का व्यू है और उसे व्यक्त करना मेरा धर्म और कर्त्तव्य है। उसी के अंदर सब प्रोवीजेंस और सुझाव दिए हुए हैं, डिटेल में हम लोगों ने डिस्कशन भी किया है। जैसे कहा गया कि मैं केवल स्ट्रेट जैकेट डैफिनेशन न देकर, स्ट्रेट जैकेट डैफिनेशन देने से दिक्कत होगी। It will create a lot of problem in future. उसमें गाइडलाइंस जरूर दे दीजिए कि ये एक-दो-तीन महत्वपूर्ण पैरामीटर्स हैं। उन गाइडलाइंस को आधारित करते हुए, आपके नोट में हाउस ऑफ कामंस का भी था, मैं उसे लेकर भी आया हूं। उसमें उन्होंने केवल एक लिस्ट दी है आफिस ऑफ प्राफिट में कि ये-ये प्रोविजंस हैं और ये-ये पोस्ट हैं जो कोई होल्ड करेगा, ये नेगेटिव लिस्ट है, दूसरी भी आप दे देंगे तो ठीक रहेगा। लेकिन उसके अतिरिक्त जो भी पोस्ट होल्ड करेगा, उसमें कोई इस प्रकार का नहीं है, चेंज स्पीच में हुआ होगा, तो अलग बात है। गाइडलाइंस के आधार पर हम लोग आइडेंटीफाई तो कर ही लें एपार्ट ऑफ दी नेगेटिव लिस्ट। यह है कि जो सांसद हैं, विधायक हैं, इसमें जो प्रावधान है, जरूरी है, ऐसी बात नहीं है। आप उसे कर लीजिए कि जरूरी है, बना लिया जाए, एक-दो करके। फिर विभिन्न राज्यों से जब आ जाएगा, उसके बाद वी कैन स्टिल हैव, उसके बाद अगर कोई डाउट होता है कि यह हो गया, क्योंकि हो गया, उन कारणों को तलाशा जा सकता है, उसमें कोई दिक्कत नहीं है। इसको लेकर जो ग्रे एरिया है, जैसा मैं कह रहा हूं, कांस्टीट्यूशनल प्रोविजंस, कांस्टीट्यूशनल मैकेनिज्म फ्रेम कर दीजिए जो कि इस प्रकार का एडीशंस, डिलीशंस या ग्रे एरिया के बारे में जो दिक्कत है, उसे करने में आती है, क्योंकि अभी मैकेनिज्म नहीं है इस वजह से बहुत दिक्कत हो रही है। हैव ए मैकेनिज्म टूवर्ड्स इफेक्ट, जैसे आपने सुझाव दिया है आइडियल सिचुएशन तो प्रिवेल नहीं करती है।

उसके बारे में आप लोग विचार कर सकते हैं। फिर फाइनल राउंड जब खाका तैयार हो जाता है, तब आप डेफिनेटली आप सलाह-मशविरा वगैरह कराएं। इस प्रकार हम जाएंगे तो, गवर्नर, प्रेजिडेंट, इलेक्शन कमिश्नर, वह तो कांस्टीट्यूशन प्रोविजन में है ही। मेरे ख्याल में यह अगर हम करेंगे तो हम काफी हद तक इसका समाधान कर सकते हैं। There should be enough percentage and ensure participation. उसके बाद फाइनल राउण्ड कंसल्टेशन्स वगैरह कराइए। इस तरह से अगर हम चलते हैं तो कोर्ट्स, इलेक्शन कमीशन, गवर्नर आदि के बारे में कांस्टीट्यूशनल प्रॉविजन्स हैं। मेरे ख्याल से अगर हम ऐसा करें तो काफी हद तक इसका समाधान कर सकते हैं।

मोहम्मद सलीम: आपके संसदीय सचिव ने यह सही कहा है कि इसका मूल कारण कांफ्लिक्ट ऑफ इंट्रेस्ट है क्योंकि लेजिस्लेचर की जो ड्यूटी है और एक्जीक्यूटिव की तरह से वे डिलीवर करते हैं। आजकल यह एक नया किस्म का मामला हो रहा है क्योंकि पहले यह सोचा गया था कि सरकार ही मेनली जो डोल या पिक्यूनरी बेनिफिट्स देने हैं, तो the Government was in the helm of affairs in the Government sector and public sector. लेकिन अब तो ऐसा नहीं है। इस समय जो फाइनेंशियल बेनिफिट्स हैं, उसमें प्राइवेट सेक्टर आगे है। इस तरह कभी-कभी उल्टा भी होता है। इस तरह समझिए कि अगर किसी के कोई बिजनेस इंट्रेस्ट हैं तो he gets into Rajya Sabha or Lok Sabha or Assembly or Council, and then, presides over the policy making body. मिनिस्टर हो गए तो ठीक है, वह सब छोड़ देंगे, कोई इंट्रेस्ट नहीं रहेगा। अभी जैसी प्रॉब्लम हो रही है, जैसे पार्लियामेंट में हंगामा हो रहा है, यह तो चलता रहेगा। इस तरह समझिए कि मैं माइन का बहुत बड़ा बिजनेसमैन हूं, फिर जो मिनरल बोर्ड बना उसमें मैं चेयरमैन बन गया तो इस तरह से कांफ्लिक्ट ऑफ इंट्रेस्ट तो रहा। अगर वह न भी करे तो भी सिस्टम को तो ईमानदारी प्रूव करनी होती है। यह सब चुनौतियां हमारे सामने आ रही हैं और हमारी संसद की यह जिम्मेदारी है। इसे हम कोर्ट के ऊपर नहीं छोड़ सकते

हैं कि एक-एक घटना होगी, उसके बाद उसकी केस टू केस व्याख्या होगी। ऐसा नहीं है, बल्कि हमारे सामने जो चुनौती आई है या भविष्य में आ सकती है, उसको ध्यान में रखते हुए एक सिस्टम को इवाल्व करना होगा, रिइनवेंट करना होगा या उसमें कुछ एडिशन या आल्टरेशन करना होगा। इसीलिए यह समिति के सामने आया है। देश में काम करते हुए कांफ्लिक्ट ऑफ इंट्रेस्ट एक नए रूप में आपके सामने आएगा और ऑफिस ऑफ प्रॉफिट का कोई पिक्युनरी बेनिफिट सामने नहीं आएगा लेकिन वे जो पॉलिसी निर्णय लेंगे, that will have an impact both on the Government and on the people. How do you think, this challenge can be addressed?

SHRI PRADEEP KUMAR DUBEY: In the Supreme Court, these things have been discussed for years. They have talked about the control of Government on the point of power to disburse funds and naturally, the pecuniary considerations and others are there. But they have not been able to lay emphasis on one thing; there may be certain offices where the representatives of the people may be there and it will be useful.

It is because the nature of work in those offices is public oriented. A test or a mechanism may be evolved where only such offices may be given to the public representatives which are basically connected with the public welfare and which are benefited because of their connection with the masses at large, instead of giving them an administrative power or giving an office which may give an impact on such area where they have interest otherwise, because remuneration or pecuniary interests may not be always direct. It may be by virtue of misusing that particular office in one way or the other. This particular aspect has not been discussed till now as far as law or courts are concerned. But definitely this could be a major concern for this hon. Committee and for that reason, apart from the tests which have already been evolved there may be a test or some kind of criteria where offices which are public oriented and which does not only give a purely administrative power to the public representative should be earmarked for these purposes. That may give some kind of help.

SHRI ATUL KUMAR GUPTA: With your permission if I may add to this? You are absolutely right that this issue of conflict of interest changes its shape. Yesterday it was very prominent in one kind of a set up and now it is coming up in a different form. That is why we come back to the same issue that it may not be a very tightly defined definition. But the flexibility that would be available in the Constitutional authority that this hon. Committee in its Questionnaire has suggested and the State Government has also agreed with it and recommended it, this authority may answer some of these questions if they are raised to them from time to time and lay down certain norms. For example, what you have raised is very important. If one hon. Member has some interest in that area, should he preside over a Committee formed to advise on that matter? It can be argued on both sides but probably the authority may devise a solution to have the benefit of his advice also but it may also be kept at a level where he is not in a position to dictate the outcome of that advice. That is why things are so important yet somewhat nebulous that very restrictive or very exhaustive definition may perhaps defeat the purpose. That is why this authority concept is very welcome and this should probably address some of these issues.

MD. SALIM: Only problem is, in such matters it is the Parliament or the legislature which can do. When you talk of an authority or court that means shifting the responsibility. According to the Constitution it is the Parliament or the legislature which has to decide. If we have this authority besides Parliament or legislature, the court of law will decide that means we are shifting our responsibility and that is contrary to the Constitutional provision.

SHRI ATUL KUMAR GUPTA: I am not an expert on Constitutional law but I would believe that if such an authority under the Constitution has the power to define what would and what would not constitute in a given situation.....

MR. CHAIRMAN: Do you mean to say that a designated authority is to be created to determine whether such and such offices amount to Office of Profit or not?

SHRI ATUL KUMAR GUPTA: That was not the point. The point was in a given situation certain kind of arrangement may amount to office of profit. For example, having a Member who has an interest in that issue, to keep him on an Advisory Board should it be acceptable or not?

A verdict or a definition in that sense by this authority not in specific cases 'a', 'b' or 'c' offices, office of profit and this is not an office of profit, they may not be probably with the answer but if this authority may deliberate and indicate that under these circumstances, this may not be advisable.

MR. CHAIRMAN: You have stated that instead of having a blanket definition, it will be better that general principle and tests may be evolved on issues of office of profit. Will you elaborate what according to you should be the acceptable principle and tests?

SHRI P.K. MISRA: As I have previously also narrated these general principles and tests have already been laid down by the observations of the hon. courts and the Election Commission. Those are the tests and if we have to add further more, out of the discussion that should be done. These specific tests have been laid down.

MR. CHAIRMAN: You have given 3(y)(n) or (x) under the existing law of UP Government. Whatever exemptions are given under the present Act, do you think that blanket exemptions given have been followed by the general guidelines or in view of the different views held by the different courts at different times whether there is uniformity in giving exemptions compared to other States also.

SHRI P.K. MISRA: Actually, this is one of the grey areas as far as law on office of profit is concerned because presently the power is given to the legislature by way of amendments in this schedule either at the level of Parliament or at the level of State Legislature. They can put any office out of the purview of office of profit. That is the power which is unfettered at present. It appears that there is a move because of the experience of time that this power could be fettered or there should be some guidelines even for the legislature for putting that office in that list. Otherwise, the guidelines which we will be evolved, will be of no use if the power to put any office in this schedule is to remain unfettered.

MR. CHAIRMAN: Generally, it has been given exemptions keeping in view the monetary or other gains whereas some of the offices are having some executive power or judicial power or power of appointing and terminating. These are all the powers which amount to office of profit. We would like to know whether this aspect has been taken into consideration while giving exemptions to such offices.

SHRI P.K. MISRA: Clause (n) which has been mentioned by you, actually enumerates the general principles that it will not be disqualified if there is no remuneration but then later on the Governments might have felt that the offices are given in (x) and (y). Actually, (y) has now been omitted and the office which was mentioned in (y) has been added in (x). They are the

specific offices given in clause (x). In (n), there is general principle that any office of Secretary or Director which does not have remuneration. They did not specify the offices there. It appears that the offices which are mentioned in (x) may be having some remuneration but still they are protected.

MR. CHAIRMAN: One of the terms of references given to this Committee is to suggest a comprehensive system of law regarding office of profit applicable to all the State Governments and the Union Territories. Suppose in one State some Board such as Fisheries Board or Wakf Board has been given exemptions but the similar Board has not been given exemptions in other States.

There should be some similarity. Do you suggest that there should be uniformity? What is your suggestion in this regard?

SHRI P.K. MISRA: Sir, uniformity with regard to x, y, z organisations may not be appropriate. There should be uniformity with regard to the general principles and guidelines under this. Suppose in a fishery they are making all appointments and suppose there is no other fishery, they are not giving anything. If you say fishery is here and here it is a ban and here it is not a ban, that will not be appropriate. If the general principle is specified, if these general principles and guidelines are specified, they should be uniformly applicable.

MR. CHAIRMAN: I thank you for extending your valuable suggestion enabling us to give a Report before the Parliament regarding this Office of Profit. I am thankful to the Chief Secretary and other associated members for this. The clarifications that we have sought you may send it in writing.

SHRI P.K. MISRA: On behalf of the UP Government I extend our respect to the hon. Chairman of the Committee on Office of Profit and also to the Members of the Committee. I am enlightened by this discussion. I am sure something positive and beneficial will come out of this discussion.

(The Committee then adjourned)

RECORD OF EVIDENCE TENDERED BEFORE THE JOINT COMMITTEE TO EXAMINE THE CONSTITUTIONAL AND LEGAL POSITION RELATING TO OFFICE OF PROFIT

Thursday, the 5th June 2008 from 1100 hrs. to 1245 hrs. in Committee Room No. 62, Parliament House, New Delhi.

Shri Iqbal Ahmed Saradgi—*Chairman*

MEMBERS

Lok Sabha

2. Shri V. Kishore Chandra S. Deo

Rajya Sabha

3. Shri Abhishek Manu Singhvi

Representatives of Ministry of Law & Justice (Legislative Department)

Shri K.D. Singh	—	Secretary
Shri N.L. Meena	—	Additional Secretary

Representatives of State Government of Chhattisgarh

Shri R.S. Sharma	—	Law Secretary
Shri A.K. Samantray	—	Addl. Law Secretary

Representatives of State Government of Orissa

Shri B.K. Nayak	—	Principal Law Secretary
Shri K.C. Patra	—	Joint Secretary, Parly. Affairs
Shri S.K. Panda	—	Joint Resident Commissioner

MR. CHAIRMAN: Dear Shri R.S. Sharma, Shri N.L. Meena and colleagues,

I welcome you to this sitting of the Joint Parliamentary Committee. Before I start the meeting, I would like to state that the Chief Secretary was supposed to appear before the Committee today, but he has not come nor has he sent any communication about his absence. So, you please convey the feelings of the Committee that we view this very seriously and this should not be repeated in future.

As you are aware, this Joint Committee has been constituted mainly to examine in the context of settled interpretation of the expression "Office of Profit" in Article 102 of the Constitution and the underlying constitutional principles therein, and to suggest a comprehensive definition of "Office of Profit".

The second terms of reference of the JPC is to recommend, in relation to "Office of Profit" the evolution of generic and comprehensive criteria which are just, fair and reasonable and can be applied to all States and Union Territories. The JPC would like to hear your views in this regard.

The third term of reference of the JPC is to examine whether the law existing in the United Kingdom regarding "Office of Profit" is applicable here also.

These are the three terms of references of this Committee and for this purpose we are seeking opinion of different State Governments. We have already sought opinion of a number of State Governments.

I may add that the proceedings of the Committee are to be treated as confidential and are not to be made public till the Report of the Committee is presented to Parliament.

The list of points for discussion has already been sent to you. The Committee would like to discuss further with you on matters under reference of the JPC and the hon. Members may seek clarifications wherever necessary.

Before we start our discussion, you may kindly introduce yourself to the Committee.

INTRODUCTION OF WITNESSES

SHRI A.K. SAMANTRAY: We have already replied to all the issues.

As far as Q.No. 1 is concerned, we agree that the uniform principles should be evolved in regard to disqualification for holding office of profit under articles 102 and 191. However, States must be consulted in the process of evolution of principles.

Regarding Q.No. 2, like the Joint Committee on Office of Profit in Parliament, Chhattisgarh Legislature does not have any such Committee which can examine such types of matters.

Regarding Q.No. 3, the only criteria of remuneration is adopted. We have already amended the Chhattisgarh Vidhan Mandal Sadasyata Nivaran Adhiniyam 1967. The copy is attached with the replies given.

Regarding Q.No. 4, we agree that the uniform principles should be evolved and guidelines should be given and these must be applicable to all the States. The Parliament should frame the law which shall be applicable to all the States and Union Territories. Regarding definition, our emphasis is given on remuneration and no alternative definition is required.

Regarding Q.No. 5, we have stated that the office of profit must be specifically mentioned in the Schedule and the exemptions must be specified with specific posts. It is written as qualification, but it should be disqualification leaving no room for the courts to interpret it.

Regarding Q.No. 6, the objects under articles 102, 191 and 361(b) are different. So, both the articles should not be clubbed together.

As far as Q.No. 7 is concerned, whatever draft definition has been provided in the questionnaire, we agree with that.

Regarding Q.No. 8, opportunities should be given whenever a question arises with regard to certain office of profit and then option should be given to the Member to resign. If he resigns, then it should not be treated as disqualification.

Regarding Q.No. 9, here we have opined that it should be entrusted to the courts to decide and no other authority is required.

Regarding Q.No. 10, we agree with the principles that are adopted in the UK, that is, specifying the posts in the Schedule and that the holder of such type of post shall disqualify the Member. That means, all other posts shall not disqualify any person and only the post which shall disqualify the Member should be specified in the Schedule.

In the 42nd Amendment, the same provision was introduced but it was struck down in the 44th Amendment. We agree with that principle because practically we always try to give certain offices to certain Members and later on try to amend the Schedule so as not to disqualify him. If it is specified then rest of the posts shall not disqualify any Member and there would be no dispute in the future.

As far as Q.No. 11 is concerned, the earlier answer was given regarding three posts to be held *ex-officio* by the Ministers, but later on it was withdrawn.

That is all.

SHRI ABHISHEK MANU SINGHVI: I want to put two-three specific questions, but before that let me give you the backdrop in the context of which I am putting the questions.

This is a Committee of two Houses and obviously a Joint Committee at the Central level, which is charged with the task of creating a uniform broadly integrated consistent Central law or a model law which is identical to the Centre and the States cannot specify the desires and whims of each State and each region. So, each individual State's individual desire cannot be reflected in a uniform resolution. That is the purpose of this Committee.

If that be so, today you have a Chhattisgarh law which you are more familiar with than we are. We have a Central law as amended by the Parliament here in the context of the reference from the former hon. President. You are also aware of some of the State laws.

The first question that I want to put to you is, keeping in view the object of this Committee, which is created and ultimately we have to do a job to make something and it is not just an academic exercise, if you were a member of this Committee or if you were a Chairman of this task, would you agree that you take either the Central law as it is now and almost all the elements are covered so that the Central law can become a model or with a slight variation you would adopt the UK model, make it a Central law? If that is applicable, the Committee takes up the Central law, broadly keeps it as it is, makes some subtractions or additions to take again on all the 28 States and then takes it as a model. What is your view on that question?

SHRI A.K. SAMANTRAY: Basically, the difference is that here we have exempted the posts, whereas in the UK model, we have specified certain posts and left other posts.

SHRI ABHISHEK MANU SINGHVI: Let us first concentrate on the first part of the question to take the Central law as the basic model and adopt the uniform State law with some minuses and pluses.

SHRI A.K. SAMANTRAY: We are ready to accept the Central law because the law we are having is somewhat similar to the Central law.

DR. ABHISHEK MANU SINGHVI: So the basic principle can be recorded that Chhattisgarh is prepared to accept broadly the law which is before you. You have the copy of the Central Law.

SHRI A.K. SAMANTRAY: We agree with that.

DR. ABHISHEK MANU SINGHVI: That is very important. If different States agree like this, then we will make some headway. Suppose 80 per cent of the States agree like you are rightly doing, then it becomes easier for the Committee. One or two States, we can always include or minus and take it into consideration.

SHRI A.K. SAMANTRAY: What we would like to say is that it should be uniformly applicable to all the States. That is why we agree with that.

DR. ABHISHEK MANU SINGHVI: The second question is this. Now, I am asking something unrelated. Do you have any statistics, any figures of how many disqualifications have actually taken place in your State in the recent past or since Independence or in the last 10 or 12 years acting under this law? How old is your Chhattisgarh law?

SHRI A.K. SAMANTRAY: It was amended in 2006.

DR. ABHISHEK MANU SINGHVI: Earlier Chhattisgarh was part of Madhya Pradesh. It was bifurcated in 2000. From 2000 till now, how many disqualifications have you had?

SHRI A.K. SAMANTRAY: We did not have any disqualification.

DR. ABHISHEK MANU SINGHVI: How you would react to a separate idea of having a Small Core Committee of five or seven people by consent created from all the 28 States which will broadly work out a consensual draft of the States and report to this Committee?

SHRI A.K. SAMANTRAY: Yes, we agree with that.

DR. ABHISHEK MANU SINGHVI: It will not be like one State, one Member. There will be just five or seven Members in that Committee.

SHRI A.K. SAMANTRAY: Yes, we know that it will also not be feasible. We agree with that.

MR. CHAIRMAN: Why this uniformity is required is that because in the present situation, different States have given exemptions according to their existing laws in their respective States. For example, some Fishery Board has been given exemption in some State; a similar Board has not been given exemption in some other States. Wakf Board also has been given exemption in some States; in some other States it has not been given exemption. So, this is the dissimilarity existing now. The main purpose of this Committee is to bring uniformity. I would like to know whether you would suggest that Constitutional amendment is required. If required, are you going to support it?

SHRI A.K. SAMANTRAY: If needed, the Constitutional amendment should be made so that the law should be applicable to each and every State equally.

MR. CHAIRMAN: Do you not think that in the federal structure, it is going to have some effect?

SHRI A.K. SAMANTRAY: I think, to some extent, it will affect the independence of the States. But we are unitary as well as federal; both the features we are having. So, you have to adjust somewhere.

MR. CHAIRMAN: While you are giving exemption in your own State as per the existing Act in your State, only the remuneration criteria has been taken into consideration whereas the different guidelines are held by courts also.

SHRI A.K. SAMANTRAY: Yes, we know, but we are helpless.

MR. CHAIRMAN: Having the judicial or executive powers or having the powers of appointment, those criteria have not been considered as per the reply given by you in point Nos. 5 and 7. Not only remuneration, but also the other aspects should have been taken into consideration. If any office is having the judicial power or appointing power or executive power or having such power which can influence the other things, those aspects also should have been taken into consideration while giving exemption in your State. I would like to know whether they have been taken into consideration.

SHRI A.K. SAMANTRAY: It was not taken into consideration and it was not brought into notice at that time also. We did not receive any objection regarding that also.

MR. CHAIRMAN: At the same time, the services of the Members of Parliament or the Members of the Legislative Assembly also are required at the national level as national service. Some scientists are there; experts are there, economists are there. If they are in different Committees serving the nation, do you think that their participation through these Committees is justified?

SHRI A.K. SAMANTRAY: Yes Sir. At certain places, they have to participate for such development. That is why we have to exempt them from being a Member of that Committee or Board or whatsoever.

MR. CHAIRMAN: In backward provinces like the North East Region, many authorities have been created to develop that particular region and fund has also been earmarked for the development of these tribal areas. In those provinces, the service of the Members of the Parliament and the Members of the Legislative Assembly are required in different authorities and Boards for the welfare of that area. Do you think it as justified?

SHRI A.K. SAMANTRAY: Yes, Sir, it is justified.

MR. CHAIRMAN: What is your opinion about the law existing in Britain? We would like to know whether it is applicable here also. There is no written Constitution there. They issue ordinances, circulars, list of offices of profit etc.

SHRI A.K. SAMANTRAY: What we mean to say is that here gradually once we specify the posts exempted from being disqualified, later on what happens that again we have to amend it; we have to add certain other posts that such and such posts are hereby amended to the schedule, which are also exempted either prospectively or retrospectively. By specifying the posts which shall disqualify him, rest of the posts shall be outside the purview of disqualification. So, in future, there will be no dispute about that or no ambiguity will arise.

MR. CHAIRMAN: In your State whether some of the Legislative Members are holding offices in the companies registered under the Companies Act or posts having some more powers which will certainly have some political influence or like that.

SHRI A.K. SAMANTRAY: Regarding this, we are not in favour of that. Those posts should be kept under disqualification.

MR. CHAIRMAN: One thing is good. As our hon. Member appreciated your response regarding supporting the Central law and supporting the uniformity in this law, I also appreciate it.

Regarding this questionnaire, if you want to express your opinion on anything other than this, you can send it in writing.

SHRI A.K. SAMANTRAY: Sir, there is nothing more to add. We have already replied.

MR. CHAIRMAN: We are thankful for your opinion. Your opinion will definitely support this Committee to enable it to give a Report in this regard. Thank you.

(The Witnesses then withdrew)

WITNESSES EXAMINED

1. Shri B.K. Nayak, Principal Law Secretary, Orissa
2. Shri K.C. Patra, Joint Secretary, Parliamentary Affairs, Orissa

MR. CHAIRMAN: This Joint Parliamentary Committee has to examine legal and constitutional aspects of 'Office of Profit' under article 102. The other terms of reference given to this Committee is to evolve a comprehensive system of law to enable all the State Governments and the Union Territories. The third one is whether the law existing in Britain regarding this Office of Profit will be applicable here also. These are the three terms of references given to this Committee for which we are seeking the opinion of different States.

Before I start, I would like to say that the Chief Secretary of Orissa is supposed to attend this meeting because it is the Joint Parliamentary Committee, and at least if he is not able to attend, he should intimate to this Committee that he is unable to attend because of some other schedule. So, you kindly convey the Committee's feeling that the Chief Secretary must attend such Committees.

I would like to say that the proceedings of the Committee are to be treated as confidential and are not to be made public till the Report of this Committee is presented to Parliament.

Before you start, you kindly introduce yourself and your colleagues to the Committee.

INTRODUCTION OF WITNESSES

MR. CHAIRMAN: You have already furnished the reply in writing. Apart from that, if you want to make any points now, you can do so.

SHRI B.K. NAYAK: Hon. Chairman and hon. Members of the Committee, the Government of Orissa had received the list of points, and the State Government was asked to give its views on those points. Accordingly, the views of the Government of Orissa on those points have been submitted to the Joint Secretary, Legislative Council, Ministry of Law and Justice on 1st March, 2008.

So far as the points are concerned, they relate to three basic issues. The first issue is whether there should be a uniform principle regarding disqualification for holding Office of Profit under article 102(1) and article 191(1) of the Constitution so as to govern all the States and the Union Territories. The second issue is whether there shall be a comprehensive and precise definition of the expression 'Office of Profit'.

MR. CHAIRMAN: Our hon. Member, Dr. Abhishek Manu Singhvi will seek a specific clarification from you. Already you have furnished your reply to all the points. Apart from that you, if you want to say anything, you can say now. Now, our hon. Member, Dr. Abhishek Manu Singhvi will seek a specific clarification from you.

DR. ABHISHEK MANU SINGHVI: We have received your reply. We are only going to seek a similar clarification as we have sought from the representatives of the Chhattisgarh Government, who came in prior to you. It is the same thing that I am going to ask you very briefly because ultimately this Committee has a job to do. This Committee is tasked with an object of trying to find a legislation which is either a model law that covers the whole of India uniformly, a law which will make all other State laws irrelevant and make one Central law which will cover everything. Now, that means uniformity.

It is not an easy task to deal with so many States. Before I ask the question, I would like to tell you that obviously when you seek to achieve a uniform law, when you seek to achieve a broad consensus of principles or a model law, you cannot satisfy the angularity of each State, and each State's narrow knitty gritty or particular provision cannot be a model law. Otherwise, you will have a document as large as the Constitution of India with 400 articles, and it will never finish. Therefore, to achieve uniformity and to do it quickly with consensus, the first question that I wanted to ask you is this. You know your Orissa law. You also know broadly the Central law, which is available after its passage in Parliament a few years ago. Suppose this Central law which we have today—this is only by way of getting your view, there is no decision yet, and this is just a discussion—was broadly taken as the model law, and except for one or two minor modifications, some additions and some subtractions, broadly that was taken to the law which is uniformly applied to all the States, would we be right in saying that the Orissa Government would support that model law? This the first question.

SHRI B.K. NAYAK: Yes, definitely. Our replies are also in that line. One law should be made applicable to all the States and the Union Territories.

DR. ABHISHEK MANU SINGHVI: My question is not that one law should be applicable. Of course, we are agreeing to that in principle. I am saying that one law could be the existing Central law which we already have. Suppose that became the model law, may be that one or two clauses can be added or subtracted, and broadly if that law, with the text as it is, became the Central law, then can I take it that Orissa—Chhattisgarh has already supported that—would also have no objection to that?

SHRI B.K. NAYAK: We will have no objection to that.

DR. ABHISHEK MANU SINGHVI: So, that is a good advance because that helps us to make a start with all the States in that same manner. Secondly, just for my information, yours is an old law of 1961, Chhattisgarh is 2000 onwards. So, from 1961 law, for the last 45 odd years, do you know the number of disqualifications under this Act actually? Are you aware?

SHRI B.K. NAYAK: No, Sir. We do not have that statistics.

DR. ABHISHEK MANU SINGHVI: Has it been frequently applied or used at all? You do not know.

I would ask one last thing. That is a very important advance. Your State is agreeable to this system of the existing law. Now, suppose, the existing law which is with us, says that it would exempt, 1,2,3,4,5,6,7,8 offices. Suppose, we were to make that into a Negative List of UK model, again taking the Central law as a model. Would you prefer that or would you prefer the existing model of actual exemption and no Negative List? Which is the one you would prefer as the State of Orissa? Would you prefer the Negative List of the UK model or the Affirmative List model, which we have now?

SHRI B.K. NAYAK: There is one point. There is a Constitution 42nd Amendment, which is similar to the UK model that was repealed by the 44th Amendment. We have already given our views that the provisions in the 42nd Amendment will better serve the purpose.

DR. ABHISHEK MANU SINGHVI: So, you do not prefer the UK model.

SHRI B.K. NAYAK: Yes, Sir. We prefer the Affirmative List.

SHRI V. KISHORE CHANDRA S. DEO: You said that you prefer the Affirmative List. Or in other words, you would prefer a List, which would detail those offices, which should be excluded from the Office of Profit. Is it that what you want to say?

SHRI B.K. NAYAK: Yes, Sir, I am saying about those offices, which will disqualify. This is to be enumerated, 'which will disqualify' so that it would be known beforehand that yes, if somebody who assumes that office he is going to be disqualified as a Member of the Legislature.

SHRI V. KISHORE CHANDRA S. DEO: Which means, you keep on adding. If you nominate an MLA to a particular post, then you will have to add to that particular List.

SHRI B.K. NAYAK: That situation may also arise since the Central Act of 1959 is also being amended from time to time.

SHRI V. KISHORE CHANDRA S. DEO: In UK, they have a List and excluding that List all other Offices would be construed as Office of Profit. Am I right? Have you understood the position of UK?

SHRI B.K. NAYAK: Yes.

SHRI V. KISHORE CHANDRA S. DEO: If you have that position over here, that means, apart from those Offices, which are enumerated in the List to be excluded from the Office of Profit, any other Office will be construed to be an Office of Profit. If you have to include certain Offices, which should be excluded from the Office of Profit, then you see, there may be timely necessity for you to bring it to the Assembly and keep getting new subjects added on to it.

SHRI B.K. NAYAK: It may not necessarily arise.

SHRI V. KISHORE CHANDRA S. DEO: May not arise. It has arisen continuously. So, there is no reason to say specifically that it will not arise, under the present circumstances, under the trend, which is continuing in different States.

Now, you have agreed to a Central List. I think, during my absence here, Chhattisgarh people have also agreed to adopt a Central List by the State. Have you also thought about it that in the States there are many Offices, which are not there in the Centre and each State has its own compulsions. They have their own necessities. Therefore, many States specially, from the North-Eastern Region were against this idea. Have you considered this aspect while agreeing to my colleague's question that the Central List will be acceptable to you?

SHRI B.K. NAYAK: The States should also have the option.

SHRI V. KISHORE CHANDRA S. DEO: In other words, you are not for it.

SHRI B.K. NAYAK: Broadly, it would be a Central List.

SHRI V. KISHORE CHANDRA S. DEO: But the States would have the latitude to include in that or to exclude. It is what you want to say?

SHRI B.K. NAYAK: Yes.

SHRI V. KISHORE CHANDRA S. DEO: So, in other words, only a Central List is not acceptable to you. When you accept a Central List, then the question of State in intervening—including/excluding—will not arise. Please think properly because depending on your responses, we will also have to prepare our Report.

SHRI B.N. NAYAK: From the points, which have been answered by the State, I am answering. I am able to give any definite opinion on behalf of the Government. I am giving the views of the State Government.

SHRI V. KISHORE CHANDRA S. DEO: That is all right. But you are also free to give your personal views. What we want is ideas. So, you can give the views of the State and your own views also because you have got long years of experience in the Law Department and you see these things happening. Certainly, we will value your views also.

SHRI B.N. NAYAK: Sir, I do not have a long experience in the Department because I am only one month old in the Department.

SHRI V. KISHORE CHANDRA S. DEO: Okay.

SHRI B.N. NAYAK: But should I give beyond what the State has replied?

SHRI V. KISHORE CHANDRA S. DEO: Yes, why not? Certainly. You can tell us what you want to be recorded as the views of the State and what you would like to record as your personal views. There is not harm in that.

SHRI B.N. NAYAK: With regard to the queries, we have given the reply. The reply answers, to certain extent, what has been asked now?

In the first query, we have replied that keeping in view, there should be uniform principle all over the country to be evolved in regard to disqualification for holding Office of Profit, which can apply to all States and the Union Territories. We have already said it.

SHRI V. KISHORE CHANDRA S. DEO: Now, the limited question is whether the State should have that independence and latitude or not. You say that the Centre can have a list.

SHRI B.N. NAYAK: In that case, I am just of the view that whether the Centre can foresee all those situations etc., where the State would also like to have some Office.

SHRI V. KISHORE CHANDRA S. DEO: This is precisely my point. That is why I said that it varies from State to State; different States have different compulsions.

SHRI B.N. NAYAK: With a little latitude to the State, I think broadly, the Central List should be acceptable.

SHRI V. KISHORE CHANDRA S. DEO: All right. Can you suggest some general guidelines or principles, which should be followed while declaring a particular Office as an Office of Profit? I am asking about some basic principles or general guidelines, by which we could lay out from here and say that when a State decides to declare a particular Office to be an Office of Profit or not, these are the guiding principles or basic factors, which should be taken into consideration. Do you have any such suggestions to make? After all, what was the ethos and idea of having these things, first of all, to be included in the Constitution? What is the purpose?

So, whatever we do, that should not negate the purpose for which this particular provision was included by our founding fathers.

MR. CHAIRMAN: You can reply in writing afterwards.

SHRI B.K. NAYAK: I am sorry. I cannot give any specific guideline.

MR. CHAIRMAN: One of the important tasks given to this Committee is to evolve a comprehensive system of law applicable to all the State Governments and Union Territories. We have sought the opinion of many of the States like your State. The background is that some States have given exemption to some Boards or some Authorities. Take the Fisheries Board. Some Boards have not been given exemption in some other States. So, the important task is that we should have a comprehensive system of law applicable to all. So, in this regard, if uniformity is brought through amending this Constitution, do you agree with this? It is for the uniformity in the system of law.

SHRI B.K. NAYAK: There should be uniformity. Whatever we do now, it will always be challenged in the courts of law.

SHRI V. KISHORE CHANDRA S. DEO: Forget about the courts. That is a different matter. So, definitely when we discuss it among ourselves, the representatives of the Law Ministry have to guide us. So, we will certainly take all these factors into consideration. So, forget about what

the courts may say or may not say. We want your views. Accordingly, we can make our recommendation.

I would like your views in one or two other aspects. You know the legislation was brought in Parliament restricting the strength of a Ministry to 15 per cent of that particular House, whether it is Parliament or Assembly. Now, do you think that exempting certain offices from office of profit would also be indirectly negating that very purpose for which that amendment was made to the Constitution? It is because what happens is that you can make 15 per cent of the Members as Ministers. But what you can do is, you can make any number of people as Chairmen of Corporations and Boards and give them Ministers of State rank or Cabinet Ministers rank or Deputy Chief Ministers rank or whatever you like. It is up to your State Government. Do you think there is any contradiction between these two? This is one way of actually negating the provisions of that particular enactment.

SHRI B.K. NAYAK: I do not think so because merely giving a particular status of a Minister or a State Minister to some Chairman or Authority or some Head of Corporation or body would not make him a Minister. Therefore, that will not come within the ceiling of 15 per cent.

SHRI V. KISHORE CHANDRA S. DEO: What about enjoying those perks?

SHRI B.K. NAYAK: The real crux is, what perks he is getting and what remuneration or emolument he is getting. That is the crux. So, in any way the question revolves round the word 'profit'. So, that is the monetary gain or pecuniary gain. To what extent pecuniary gain can be said that it is remuneration or to what extent it can be said that it is compensatory allowance, that has to be decided.

SHRI V. KISHORE CHANDRA S. DEO: Do you think that it could be restricted to remuneration alone? Do you think that office of profit can be just linked to monetary aspect alone? What about powers to appoint people or recruit people? What about executive authority? There are some positions where people enjoy executive authority, which MPs do not even enjoy. You know that.

SHRI B.K. NAYAK: Yes. In my personal view, what I am saying is that has nothing to do with profit. That cannot be equated. Supposing a particular authority or office holder has the authority or he has been empowered to give some appointment, it cannot be equated.

SHRI V. KISHORE CHANDRA S. DEO: All right. Tomorrow, if I become the Chairman of a Corporation, take honorarium or salary, then what would be construed to be an office of profit? Money is going to be the only consideration. Suppose I do not take money but I have powers to appoint or recruit or sack somebody or to clear certain projects and I have executive authority as a Chairman of a particular Corporation or Board, will that not amount to be an office of profit?

SHRI B.K. NAYAK: It should not be.

SHRI V. KISHORE CHANDRA S. DEO: The purpose, according to you, was just to ensure that there is no other income that the legislator gets. It has nothing to do with any conflict between his function as a legislator or parliamentarian on national interest. That is what your statement implies. Was it only to prevent me from getting some extra money? Or, was it also to prevent me from doing something which will contradict my work as a parliamentarian and with my commitment to the people?

SHRI B.K. NAYAK: While holding some office, definitely he will execute some functions. Those may be executive functions.

SHRI V. KISHORE CHANDRA S. DEO: Sometimes, those functions may have certain contradictions with my parliamentary work but it need not constitute any fiscal or financial involvement.

MR. CHAIRMAN: In your point No. 5, you have written that.

SHRI V. KISHORE CHANDRA S. DEO: Please read paragraph six. This is what you have submitted to us. Please go to page two, paragraph six. Please read the last five lines.

"The underlying object of Article 102(1)(a) and Article 191(1)(a) is to eliminate the possibility of conflict between the duties and interest so that the purity of Legislature is unaffected whereas the object behind Article 316-B of the Constitution that the Members when defected the political party and joined another political party, should not be given any scope of getting advantage by holding any remunerative political post."

That comes under Anti-Defection and other laws. But as far as Articles 102(1)(a) and 191(1)(a), which apply to Assembly, are concerned, this is to eliminate the possibility of conflict between duties and interest irrespective whether there is financial implication or not. What is not elaborated or designed in the Constitution, this is the general tenor or ethos of this particular provision.

SHRI B.K. NAYAK: Kindly see page 4, "certain powers and privileges".

SHRI V. KISHORE CHANDRA S. DEO: This is a suggestion of your State Government. "The State Government further suggests to evolve a general policy for declaration of certain offices to disqualify the holders of the offices for being chosen as the Member of Parliament or State Legislature, that is, if the office is enjoined with certain powers and privileges which directly indirectly prohibits or prevents the holder of the post to act independently as Member of the Legislature under Article 194."

So, this is actually beyond the scope of just financial remuneration. Could you elaborate a little more on this? If you cannot do it now, you can think about it and send some points to our Secretariat so that it will help us to formulate our views.

SHRI B.K. NAYAK : Sir, we will send in writing.

SHRI V. KISHORE CHANDRA S. DEO : Mr. Chairman, Sir, finally I would like to ask one more question. Mr. Nayak, this is basically to do with Corporations, Commissions, Boards and any other statutory bodies which exist in a State or in the Centre. This is basically the provision which I just read out, it mentions that there should be no conflict of interest between public duties and the charges or duties that you may get as Chairman of this particular post that is assigned to you. You please be frank in your views whether it is of your Government or your personal. Of late, there is a trend in our country to have coalition Governments in the Centre and in the States also. I am not going to beat around the bush. When this came about in Parliament, at that time there were charges that the President of our Party, Shrimati Sonia Gandhi, as Chairman of the National Advisory Council should resign because she was given the Secretariat, some assistance by the Government. In this new era, this changing world, when coalition Governments as a concept have come to stay, whether it is in the States or in the Centre, today it may be UPA, tomorrow it may be NDA, day after tomorrow it may be some other Third Front. I am not looking at it from a Party point of view.

If there is such a post which will facilitate the function of a State or a Central Government, do you think that that should also be considered as an office of profit? Is there any conflict of interest between what that one person is doing and national interest? In fact, tomorrow it may be Shri Vajpayee if it is NDA, it was Soniaji the other day, it may be Shri Prakash Karat tomorrow if the Left Front comes, or somebody else, some X, Y, Z etc. I am not looking at it from a narrow partisan point of view. But this is something which may become a necessity tomorrow. Then, to provide the basic assistance and do duties, just because Government is providing a Secretariat, do you think such a post should be termed as an office of profit? What are your State's views or your views on this?

SHRI B.K. NAYAK : Sir, we will consider and give the details.

SHRI V. KISHORE CHANDRA S. DEO: Please do consider. If there is anything you have to say, please do let us know in writing because we have to react also to new situations, new developments which are taking in place. In Orissa also, you have a BJD-BJP Government today; tomorrow there may be some other coalition. So, to facilitate a coalition, to prevent frequent elections, to see that these Parties together run a Government properly, there is a particular post that is created by that Government. Is it proper to call that also an Office of Profit and demand resignation? What do you say on this? I am not criticising anybody. That situation has gone. It is behind us. But I am saying for the future. I think this is an aspect which also one should consider.

MR.CHAIRMAN : As you have mentioned, there are two types of bodies - one is statutory and one is non-statutory or some other bodies. As you have expressed your opinion, in the case of statutory bodies, those who are holding this office, they should be given exemption. Then what about the other bodies which are not statutory? What guidelines should they follow for giving exemption?

Please come to point No. 5 of your reply where you said of statutory or non-statutory. You have suggested to give exemption to the statutory bodies, if Members of a Legislature or of Parliament holding office. Then what is the criteria which should be followed about the non-statutory bodies?

Secondly, whatever the exemptions given as per the existing law in your State, whether the guidelines have been followed by the different opinions held by the judicial courts and some other verdicts of the courts or only the remuneration criteria is followed?

SHRI B.K. NAYAK : Sir, for that a study is required to be made. In fact, to be honest, we have not been able to make a study in that light. It requires a study.

MR.CHAIRMAN : I would like to know whether some criteria is followed while exemptions have been given under the present Act. Is it that only remuneration criteria is followed or other criteria is there?

The third point is this. You can give the reply in writing also. While you are supporting the Central law for this uniformity, if some Boards have been given exemption in some States and similar Boards have not been given exemption in other States, what is the position? Do you think that uniformity should be there? For that, if any constitutional amendment is required, do you agree for this?

During the last one decade, how many Members of your Legislature have been disqualified violating this one? Has any Member been disqualified for not following the guidelines? These are the three-four clarifications for which you can send the reply in writing.

SHRI B.K. NAYAK: Yes, sir.

SHRI V. KISHORE CHANDRA S. DEO: What is the number of your MLAs who are today Chairmen of Corporations, Boards and such other bodies? We would like to know the proportion or the ratio, the percentage.

SHRI B.K. NAYAK: Is it Chairman or Member?

SHRI V. KISHORE CHANDRA S. DEO: Whichever it is; Chairman or Member or Director, wherever he was drawing remuneration. That is the criteria which you had mentioned or they enjoy any executive powers.

MR.CHAIRMAN: Are you in favour of creating some designated authority to determine whether this amounts to office of profit?

SHRI B.K. NAYAK: My Government has said there is no necessity. The Government have said there is no such necessity.

MR.CHAIRMAN: How many Members of your Legislature are holding the offices in your State?

SHRI B.K. NAYAK: We do not have information or statistics. I will send it later.

SHRI V. KISHORE CHANDRA S. DEO: I have asked for it.

SHRI B.K. NAYAK: As the hon. Member said, we will get that and send it.

SHRI V. KISHORE CHANDRA S. DEO: It is just for us to get an idea. This is all about. So far, rather than criteria from the various representatives of the States that we have met, Mr. Chairman, Sir, to me it seems that the criteria has been political expediency rather than anything else. So, it is alright. Politics is the art of possible. One has to do something. But we would like to get into the depth of it.

MR.CHAIRMAN: While we are deciding this one, the other part is also necessary that the association of the Members of Parliament and Members of Legislature for some advisory Committee, for the development or welfare of such region like that, their association or involvement also is necessary. So, only remuneration is not the criteria. The other aspects also could be the overall development of that region or particular community, tribes or backward areas where some special funds have been created, some special authorities have been created for the development of that special area. So, participation or involvement of public representatives also is essential. Do you think that this is justified?

You can send the reply in writing later.

SHRI V. KISHORE CHANDRA S. DEO: What the Chairman means to say is that constitutionally the job of a Parliamentarian or a Legislator is the legislative job. The task of development has not been assigned to us by the Founding Fathers of the Constitution. As years have passed and things have gone on, we see that people expect development work also from their representatives. Therefore, it has been found necessary, and it has also paid dividends, that legislators are involved in developmental activities in the respective States, like boards and other different kinds of activities that take place over there. So, what the Chairman wanted to know is this. Is that not desirable or should that also be included in the 'office of profit'? If not, you may give us some kind of guidelines which you feel would be all right to permit legislators and MPs to

participate in activities related to development in their constituencies or in the particular region.

SHRI S.K. PANDA: Sir, MPLAD Scheme is there for MPs.

SHRI V. KISHORE CHANDRA S. DEO: The fund under MPLADS has been given by the Centre. That is all right.

But you have your backward region like KBK. Can an MP be involved in development of such a region by getting a particular post or not? Different regions may have different things. Today, these have become the demands of the people and we learn from our democratic process also. Today, the situation is not what it was 50 years ago. Today if development does not take place in my district, nobody will ask the District Collector or the State Secretary. They will ask me why this has not been done. They may not realize that the power does not lie with us. The power with us is only to recommend, to write, to telephone and to persuade, but the ultimate authority is with the bureaucracy. Today, there is a feeling or demand from the people that their representatives should also deliver the goods. In that context, MPLADS has given some latitude to Members to Parliament to participate in some developmental activity. So, MPLADS was actually the result of that situation. Before that, MP had no space in the constituency. You know what he could do. He could only write a letter or telephone one of the officers. Even *sarpanch* had more powers than an MP. Now at least, if somebody has no drinking water, I can sanction a bore-well or give a room in school or some connecting road. This has come out of our experience. Therefore, he has asked what the opinion of your State Government is with regard to associating MPs on boards which may be there for developmental activities.

MR. CHAIRMAN: Apart from MPLADS, in some of the provinces like Bodoland, a Special Authority has been created and special funds have been earmarked for that particular area. Almost all the public representatives have been associated with it for the welfare of that particular region or community. So, their participation is also essential for developmental works. That way, we do not say that it amounts to 'office of profit'. Somewhere some peculiar situations are there. Anyhow, there may be required participation of public representative, without his having some extra powers or judicial power or appointing power or terminating power or executive power, in some of the authorities. In your view, is it desirable or not? You can send us your view in writing.

SHRI V. KISHORE CHANDRA S. DEO: You let us know your opinion with reference to your experience in your State.

MR. CHAIRMAN: Thank you. I hope, your suggestions would enable us to place our Report before Parliament

Thank you.

(*The Committee then adjourned*)

RECORD OF EVIDENCE TENDERED BEFORE THE JOINT COMMITTEE TO EXAMINE THE CONSTITUTIONAL AND LEGAL POSITION RELATING TO OFFICE OF PROFIT

Wednesday, the 20th August, 2008 from 1500 hrs. to 1545 hrs. in Committee Room 'D', Parliament House Annexe, New Delhi

Shri Iqbal Ahmed Saradgi—*Chairman*

MEMBERS

Lok Sabha

2. Shri Santosh Gangwar
3. Shri A. Krishnaswamy
4. Shri Madhusudan Mistry
5. Mohammad Salim

Rajya Sabha

6. Shri Sitaram Yechury

Representatives of Ministry of Law & Justice (Legislative Department)

Shri K.D. Singh	—	Secretary
Shri N.L. Meena	—	Additional Secretary

Representatives of State Government of Madhya Pradesh

Shri Rakesh Sahni	—	Chief Secretary
Shri Dilip Mehra	—	Principal Secretary, Parliamentary Affairs Department
Shri Naresh Kumar Gupta	—	Principal Secretary, Law & Legislative Affairs Department

MR. CHAIRMAN: Dear Shri Sahni and colleagues, I welcome you to this sitting of the Joint Parliamentary Committee.

As you are aware, this Joint Committee has been constituted mainly to examine in the context of settled interpretation of the expression *Office of Profit* in article 102 of the Constitution and the underlying Constitutional principles therein, and to suggest a comprehensive definition of *Office of Profit*.

One of the terms of reference of the JPC is to recommend, in relation to *Office of Profit* the evolution of generic and comprehensive criteria which are just, fair and reasonable and can be applied to all States and Union Territories. The JPC would like to hear your views in this regard.

I may add that the proceedings of the Committee are to be treated as confidential and are not to be made public till the report of the Committee is presented to Parliament.

The list of points for discussion has already been sent to you. You have already submitted your replies. The Committee would like to discuss further with you on matters under reference of the JPC and the hon. Members may seek clarifications wherever necessary.

INTRODUCTION OF WITNESSES

SHRI RAKESH SAHNI : Sir, I would like to submit that the State Government had considered this at a fairly high level. We had actually constituted a sub-committee of the Cabinet to consider the questionnaire that was sent by the Secretariat here and we have already submitted in writing our general answers to the questionnaire. This is the combined wisdom of the Council of Ministers of the State Government. As the Chief Secretary of the Government it is my duty to abide by the stated position of the State Government.

With your permission I would mention our general remarks heading by heading. One of the first questions was whether the Government agreed that a uniform principle should be evolved. We had held that our answer has to be an unequivocal 'no'. We think that a uniform principle need not be adopted because it is not going to be practical to adopt common criteria or a uniform law all over the country. That is because the needs, the conditions, the situations and the contexts of various States in this Union of India do differ and to that extent the State Governments and the States should have the independence to frame their own laws.

We do not have a Committee of the legislature on the issue of office of profit. You had specifically whether any criterion other than the criterion of remuneration has been followed in granting general exemption. We had submitted that no criteria other than the remuneration item has figured in the Act that we have in the State which is called *Madhya Pradesh Vidhan Mandal Sadasya Nirarhata Nivaran Adhiniyam, 1967.*

The next question was about the applicability which is actually a repetition in terms of our answer not in the question. We have reiterated that we consider ourselves as belonging to a

variation of federal democracy and States should have the autonomy and the independence to frame their own laws on the question of office of profit. We also believe that it is not going to be feasible to define the office of profit in the manner that the draft has been somewhere in the Lok Sabha Secretariat it has been narrated as to what draft could possibly be adopted. Our view has been that we do not think that it is going to be feasible to draw up a comprehensive enough definition to cover all situations prevalent in all the States of the Union.

The next question is a very evocative question, after the ceiling on the Council of Ministers has been placed under the 91st amendment of the Constitution, the purpose is going to be defeated if the concept of office of profit is enlarged to include and cover a very large of offices exempt from the prohibition laid down under the Constitution. I would like to read it *in toto*. We had said that with the view to achieving greater participation and generate a sense of involvement with the developmental schemes of the Government, elected representatives have been nominated to posts falling in the category of office of profit and we believe that if we have to achieve the same, we really would need a very wide definition covering the exemption from the definition of office of profit. There, of course, we have not given a specific reply for the draft of the definition of office of profit in article 102. We have also not commented. I have individual opinion but I do not know is it even proper or appropriate for me to even state anything which is my personal view in the matter. If you permit me, I would elaborate. However, for the time being, the State Government's stated position is that whether an opportunity for resignation should be available, we believe that such a provision does indeed required to be incorporated. When there was something about the need for the designated authority, the next question, we believe that there is indeed not need to designate any authority although the question, which begs the question which has been asked again by the Committee, which is, in the event you do not have the authority, then, it inevitably falls in the domain of the court. Whether we must avoid looking to the status of Parliament *vis-à-vis* any other agency in the Union or in need of a legislation of the State.

As far as the law existing in the UK, our formal position is that we need not adopt this and then we have reiterated that one Central law relating to prevention of disqualification may not be able to address the question of requirement of all the States and Union Territories. I will stop here. I am at your service.

श्री संतोष गंगवार: आपने कहा कि मंत्रिपरिषद की उप-समिति ने फैसला लिया है और चार मंत्रियों ने बैठकर जो निर्णय लिया, वह आप बता रहे हैं, लेकिन आपका अपना ओपिनियन क्या है, वह इसमें शामिल नहीं है। इसका मतलब यह है कि हम मंत्रियों से बैठकर बात करें।

श्री राकेश साहनी: मेरा निवेदन यह है कि ऐसा मत राज्य सरकार के द्वारा चाहा गया था और जैसा आपको ज्ञात है कि राज्य सरकार चुनी हुई सरकार होती है और उसी के नियंत्रण में काम होता है, औपचारिक रूप से जो भी अभिमत राज्य सरकार ने इस सम्माननीय समिति के समक्ष प्रस्तुत किया है उसका विवरण मैंने आपके सामने रखा है। मैंने पहले ही अपने प्रेजेंटेशन में निवेदन व्यक्त किया था कि मैंने अपने व्यक्तिगत विचार व्यक्त नहीं किये हैं। अगर आप अनुमति देंगे तो ही मैं अपने व्यक्तिगत विचार व्यक्त करूंगा।

मोहम्मद सलीम: हमारी संसदीय परम्परा में बेशक चुनी हुई सरकार, जो राजनैतिक एग्जिक्युटिव है, उसके अधीन ही हमारी ब्यूरोक्रेसी काम करती है, सरकार काम करती है लेकिन इनका प्रश्न था कि जो कोरेसपोंडेंस होती, आदान-प्रदान होता है वह under the seal of the officials—जो चीफ सैक्रेट्री या अंडर-सैक्रेट्री होते हैं। इनका सवाल था कि चार मंत्रियों की सील

और सिग्नेचर से हमें यह भेजा गया था–इसमें कोई हर्ज नहीं है, यह भी मध्य प्रदेश सरकार की है, आप भी जो हमें बता रहे हैं, लेकिन व्यक्तिगत मत भी होता है। जनरली यह होता है कि जो उच्च-अधिकारी होते हैं, वे वही भेजते हैं और उसमें यह रहता है कि This has the concurrence of the concerned departments or the Ministries. चूंकि हम मंत्री से नहीं पूछेंगे, उन्हें समिति में नहीं बुलाएंगे, इसलिए हम समझते हैं कि इसे चीफ-सैक्रेट्री भेजते तो ज्यादा अच्छा रहता।

श्री संतोष गंगवार: यह बात सामने तब उठी जब जया बच्चन जी का केस आया। अब अगर राजनैतिक व्यक्ति इस प्रकार के लाभ के पद उठाएं और वही फैसला देंगे, तो वे तो अपने हिसाब से फैसला करके देंगे। हमारा आग्रह यह है कि मंत्री विचार करके फैसला दें लेकिन आपकी राय और आपके विचार भी आने चाहिए।

श्री राकेश साहनी: मैं आपकी सेवा में अपने विचार रखने के लिए उपस्थित हूं। I am at your service as I said, Sir. मैं एक निवेदन कर दूं कि माननीय मोहम्मद सलीम जी ने जो पूछा है कि राज्य सरकार के रूल्स और बिजनैस के तहत इसे औपचारिक रूप से मंत्रिपरिषद् के अनुमोदन के बाद भेजा गया है और यही रूल्स ऑफ बिजनैस कहते हैं कि जो भी हम लिखते हैं, वह राज्य सरकार के औपचारिक जो भी उपयुक्त स्तर होता है, डैलीगेशन ऑफ पावर में, after the approval at the level that it is required, हम आपके सामने भेजते हैं। I am at your service as I said. I have a view and I have a lot of personal views on the matter. I would be very happy to share all those views with you.

MR. CHAIRMAN: In the terms of reference given to this Committee and in the questions also,– to examine the legal and constitutional aspect of the office of profit. So, it only pertains to the legal interpretation. We are least bothered about the government's view. You have to express your views under the perception legally.

SHRI RAKESH SAHNI: I would answer that. On anything like the office of profit, only one of two extreme views is possible. You cannot have mix up of the kind that is prevailing today. It is a very confounded situation where anything which gets incorporated as a not earning or attracting disqualification becomes an office which you can carry as a legislator or a Member of Parliament and then if by default you happen to have an office of the kind that was mentioned by the hon. Member, Shrimati Jaya Bachhan, you would find that that individual is needlessly put to harassment and disqualification. I think that ideally you should be having only an extreme view of the matter. If you follow the hypothesis that a legislator must be in a position where he can impact in a routine manner the developmental schemes he has to exercise, measure or modicum of control.

In that event, you will have to give up the definition of office of profit. Contrarily, ideally speaking, a legislator must not have anything to do with anything which involves the exercise of Executive power. And that would also include something called the MPLAD fund, because there, whether he does or he does not implement it in that fashion, the fact is that the choice of a scheme or a choice of where to deploy that or invest that money is entirely in the hands of an individual Member; it is totally at his discretion and it is an Executive function in whichever way you might want to reckon it.

Therefore, you have already landed in a situation where a legislator is mainly even without holding an office of profit, by the fact of his becoming a legislator across the country today, he is indeed holding an office of profit.

MR. CHAIRMAN : Please refer to Question No. 3, you have mentioned no criteria other than remuneration have been followed in granting general exemption from disqualification to the offices mentioned in entry 17 of the Schedule of the Madhya Pradesh Act of 1967—other than remuneration, no norms, no guidelines have been followed in giving random exemption for the office of profit, etc. It is for exemptions given under the existing Madhya Pradesh Act of 1967, in which remuneration factor was considered while giving exemptions, whereas there are so many other aspects that are to be taken into consideration while giving exemptions, like, whether that office is having any Executive power, judicial power or power of recruitment or termination, etc. These are the factors that are to be considered. But these have not been considered in the existing Act. Generally the exemption has been given. What is the reason or explanation?

SHRI RAKESH SAHNI : A short while ago, when I was reading the formal position of the State Government, at that point, a hon. Member had remarked that it is not right for the political executive to take a view in the matter. This is an Act of 1967, which has been amended in the early 1980s, if I recall correctly in 1982, what we have specifically said in our answer is that any of these offices which are exempted will not be entitled to salary, which figure in the Schedule to the Act. However, there are certain offices like the Ministers in any event, we have added to them a lot of other offices which we thought were not going to be disqualified for a legislator on the ground of holding an office of profit.

SHRI MADHUSUDAN MISTRY : You look at your answer to point no. 6, which is with a view to achieve greater participation in generating a sense of involvement in a development scheme of the Government, the elected representatives have been nominated to the posts falling in the category of office of profit. How would you respond to a criticism that in a coalition period, where no party has an absolute majority and the parties have to seek support whereby the Parliament has enacted a law to fix a ceiling on the number of Ministers; that comes later, but where you do not have a majority and the party does not get absolute majority and you have to seek the support of a number of other parties, with a view to form a Government, there is a widespread criticism where people or the Members are given money or they are lured for their support, 'horse trade' was the word used, etc. Is not it the office of profit, under the guise of horse trading, can be offered to those Members which is completely unethical and completely otherwise? How would you subscribe to this view? You seem to be subscribing to the view that it is good—on the office of profit, you can offer as many posts as one wants.

SHRI RAKESH SAHNI: My personal submission was that you can take either of two extreme views, no middle ground is going to be possible—I do not subscribe to the view that this form of allurement, through this route is not unethical; if anything else is unethical, this too would be; similarly, getting somebody to join or support a Government at the assurance or with the clear understanding ...

SHRI MADHUSUDAN MISTRY: No, say bargaining, forget about understanding and assurance. Let us put it as bargaining.

SHRI RAKESH SAHNI : If a part of the bargain is that somebody, while supporting the Government, would be made as something, they are both going to be equally unethical. How do you draw the line? There is something called the 91st Amendment to the Constitution; how do you draw the line as to up to so many Members, it is going to be a valid or ethical allurement and beyond that it is going to turn unethical? Even the assurance of bargain, as you said, for a person to join the Council of Ministers, is equally bad, if you are purely talking of ethics.

SHRI MADHUSUDAN MISTRY: Here is a Government; the number has been fixed already; you cannot have more than 10-15 per cent as Ministers. Those who cannot be made as Ministers, they can be offered a status or a post like the Ministers, that is where the bargain takes place.

SHRI RAKESH SAHNI: I would like to repeat that you cannot have an artificial division of what is going to be like, either something is ethical or unethical—if someone is supporting you as a part of a bargain, to get power, whether he becomes a Minister—let us say there is a limit of 30, if he is the 31st person, he is going to get a Chairmanship and if he is the 30th, then, he is going to get Ministership, they are equally unethical.

SHRI MADHUSUDAN MISTRY: Do you mean to say that there is no limitation.

SHRI RAKESH SAHNI: I am saying all bargain is unethical.

SHRI MADHUSUDAN MISTRY: Suppose, I am supporting the Government and I have 15 Members and all the 15 are to be given a post of office of profit, what will happen?

SHRI RAKESH SAHNI: I did not say that.

SHRI MADHUSUDAN MISTRY: I am saying that. That is what it implies—this is what you are telling us.

SHRI RAKESH SAHNI: Are you talking about the written reply or my answer?

SHRI MADHUSUDAN MISTRY: It is on the basis of the written reply; I am asking you—you must be a part of this decision.

SHRI RAKESH SAHNI: I cannot answer that question. I have not the liberty to answer that question.

I am submitting purely at the personal level, since the Chairman gave me permission.

SHRI MADHUSUDAN MISTRY: It is not at the personal level; you are an official; you were a party to this decision, as an officer.

SHRI RAKESH SAHNI: As an officer, with 36 years of experience in Government I think, are we talking here of ethics or office of profit?

SHRI MADHUSUDAN MISTRY: We are talking of office of profit and this requires ethics. That is why, we have decided that there should not be more than 10 per cent. That is where, the office of profit comes in; you cannot have the benefit of both.

SHRI RAKESH SAHNI: My submission to you is this. Ideally speaking, then, other than Ministers, an MP or a MLA must not under any circumstances be holding any office, whatsoever.

SHRI MADHUSUDAN MISTRY: Okay, fine, thank you very much.

SHRI RAKESH SAHNI: Sir, you arrived slightly late and so, you would not have heard that part—I said, 'including, the MPLAD fund'.

SHRI SITARAM YECHURY: Is that why your signature is not appended to the written statement?

श्री संतोष गंगवार: मंत्रियों की ओर से लिख कर आया है। उनके विचार अलग हों तो देख लें, वही ज्यादा उचित होगा।

श्री सीताराम येचुरी: इनकी बात आ गई है। इनके मुताबिक कोई एमपी या एमएलए किसी पद पर नहीं होना चाहिए- इनक्लूडिंग एमपीलैड फंड। It is fair enough. He has got a very straight position. We may privately agree with you.

MR. CHAIRMAN: One of the important terms given to this Committee is to suggest a comprehensive system of law applicable to all the States and Union Territories. In the national perception it is good to have a uniform law and in that context you have said that common criteria and uniform law may not be practical to all States and Union Territories. In case uniform principle is implemented how is it going to harm the interest of States or its legislators?

SHRI RAKESH SAHNI: Sir, as I have said earlier, we have an Act of 1964.

MR. CHAIRMAN: For example, some Boards have been given exemptions in some States like the fishery board, Haj Committee or other such Board but similar Boards have not been given exemption in other States. That is why this question arises as to whether in the national perception a uniform law is required or not and you have given the reply in negative.

SHRI RAKESH SAHNI: Sir, my individual view is that instead of having a schedule which exempts—having stated my position clearly earlier—if indeed you have to have the so called battle ground it would be better if you have a default clause which means that unless any office is included as an office of profit debarring a legislator from holding that office, all other offices he would be entitled to hold. The advantage there would be that nobody goes or incurs the wrath of the law in the manner of Mrs. Bachchan.

MR. CHAIRMAN: That is the British system.

SHRI RAKESH SAHNI: That would be a much better idea.

MR. CHAIRMAN: Officially you are opposing that system also.

SHRI MADHUSUDAN MISTRY: Let us look at Point No.10 which says adoption of the system of law as existing in U.K. Whatever positions mentioned there are the positions of office of profit. Any other position which is not mentioned under that law is not an office of profit but you say no to that.

SHRI RAKESH SAHNI: I remember an old saying in the context to the Speaker of the House of Commons where he said, "I have no voice other than the voice of the House". Sir, as the Chief Secretary to the State Government, I have no voice other than the voice of the Government. Howsoever, as an individual I have served 36 years in Government, I am at your service. I am willing to state my view on virtually everything that has been incorporated.

SHRI MADHUSUDAN MISTRY: We would like to hear that saying that Point 10 has to be accepted.

SHRI RAKESH SAHNI: I am saying, Sir, that if you want to have a list, do not have a list of exemptions but have a list of prohibitions.

MR. CHAIRMAN: In case uniform law is going to be implemented how do you think this is going to affect the federal structure?

SHRI RAKESH SAHNI: If you do not have the prohibition list and have the list of exemptions, then there is always a scope. Let us say you have a law whether of a State Legislature or

Parliament, if you have a State law—somebody turns up and create a new institution, corporation or a Board and we want to exempt it—the State Government will have to go to the State Legislature, get the law or the schedule amended and get that office included in the exempted list. If you have a common law passed by Parliament, we will have to come to the Parliament and get our amendment incorporated. I should not be saying this here but I would like to still mention that there are identical laws, particularly on the control of crime. Maharashtra has got that law. I am not talking here about the desirability or otherwise, Sir. All I am saying is that there is a law which operates in Maharashtra. Madhya Pradesh, Gujarat and another State have sent identical drafts and those Bills have not been cleared by the Parliament. You would enable Parliament to be able to play with the freedom of the States and that is not acceptable.

MR. CHAIRMAN: Regarding the definition in Point No.7, whether the Government of Madhya Pradesh think that the draft defines office of profit comprehensively in the context of the Constitution and you have said, "No comments". Does it mean that you are satisfied with the present constitutional arrangement?

SHRI RAKESH SAHNI: Sir, I have already made my position clear. This definition will not do. If you want to have a general list why does not Parliament just say that the following offices anywhere in the country will attract prohibition?

MD. SALIM: One purpose of this meeting was this only, otherwise we would have sent you the questionnaire and you would have given your response. This is a very complex issue and there are different views about it. Some ideas can be generated from them and that is why we have asked for your personal opinion and you are free to do that. Parliament can frame law but at the State level you are the people who are executing it. Given the fragmentation of politics today there are more compulsions at the State level. In some cases you need some expertise, expert opinion or involvement of community is needed. In Madhya Pradesh also we find the Government companies engaged in business or economic activities and there you put someone from the legislature as a Chairman. It is not that expertise is not available outside. Then comes the question of compulsion that you have to satisfy the ego of certain political group or certain caste consideration. As the executive chief of the bureaucracy do you think this is going to help us or going to ruin the parliamentary spectrum?

SHRI RAKESH SAHNI: We are now discussing the other end of the spectrum. There was a question, when we were discussing it internally, as to why there is a prohibition of the kind of office of profit; how does it harm. There are so many people who are actually Members of Parliament and they become Ministers or other office holders of Parliament or State legislature. How does it impinge?

What are we really seeking in the constitutional scheme to prevent? You are seeking to prevent any conflict of interest and this conflict of interest is more in the mind, rather than in practicality. The question that arises is, what are we really seeking? If a Member of Parliament is running an organization, let us say, he is running the National Co-operative Federation, any law on the co-operatives which other people with very good intentions wish to introduce because they have found, based on experience that this modification or amendment to the law is a must if we have to prevent some mischief or promote the activity of that kind and he heads an organization, if he becomes a legislator, he can either influence the law in a manner that would benefit him individually or he can scuttle it if the amendment is going to hurt him individually. That is the intention because the law's impact unlike any Executive action impact is very large

and long-standing. An Executive action can be changed, nullified, revoked in no time at all. An act of Parliament or of the State legislature has long-term impact.

But have you pondered to think for a moment that a similar conflict of interest, not in the mind any longer but in reality exists when you have legislators and Members of Parliament who have business interest, who have, generally what we call private sector interests. If a businessman or an industrialist actually becomes a Member of Parliament he is at liberty to legislate, be a part of the legislative process, influence the law in any which way and that too has wide ranging impact, long-term impact of not merely of his own business interest but also of his rivals. If you want to now construe and he could be an owner of a huge industry group, he could actually be a part of the law making process which benefits him individually and we have nothing like a office of profit disqualification for him.

SHRI SITARAM YECHURY: I am glad that you have raised this issue, though it is not part of our Terms of Reference but many of us in the Committee are fairly passionately enraged about this possibility because if office of profit is applicable to Government positions and jobs, I mean, they equally, if not more, some degree of ethical norms must also be worked out for the private sector as well.

SHRI MADHUSUDAN MISTRY: You have raised the issue that those people should not at least be a Member of those Standing Committees which are related to their business interests.

SHRI RAKESH SAHNI: It is not only the question of the Standing Committees. I as an individual have passed through three layers of security. I am a responsible officer of the Government and yet I cannot enter any part of this Parliament except temporarily on a pass. I am not free to canvass issues with you people, on the other hand, the moment a person becomes a Member of Parliament his influence, without being on the Standing Committee, is so vast, I do not have to tell you.

SHRI MADHUSUDAN MISTRY: We know about it and we have also concern about it.

SHRI SITARAM YECHURY: This happened in the first meeting. The hon. Chairman said that he has saved himself by saying that this is not in the Terms of Reference.

MD. SALIM: A Member who is operating an airlines company also sits in position where rules of the game are decided, as has been pointed out, not only influencing his own business interests but also trying to influence the rivals also. Look at the mine sector. The Minister in charge of Mines, or the Chairman of the Committee that decides the policies, he can influence those decisions. In the earlier days the private sector was not so dominant in the economy. All these laws, and acts were meant to be applied only to the public sector undertakings, corporations. But these days the public sector is not enjoying that commanding position. It is the private business interest that is playing havoc. That is why, it is good that you have made this point; the Committee will also apply its mind on this.

SHRI MADHUSUDAN MISTRY: This point I am raising only to know your views. You have mentioned that wherever the expertise of the MPs and the MLAs are available in the State itself, what is wrong in appointing themselves to positions where they can use their expertise for the benefit of the State and the people?

SHRI RAKESH SAHNI: In fact, I did not answer fully to the second question of Shri Salim which was that, he specifically asked me, the need for Members of Parliament and Legislatures to be

on these Committees and so on. These days, anyone who becomes, I am sorry for saying this, a Member of any political party masquerades as a representative of the people. In my humble opinion a representative of the people is only that who holds an office like a Member of Parliament because he is recognized by the people, they elect him as their representative, even for the Upper Houses whether in the States or in the Parliament. An MLA is definitely and recognisedly elected Member or representative of the people. Where you want to have a situation where you want to have somebody who would be recognized as a representative of the people, then what is indeed the harm in getting an MP or an MLA to head or be a Member of that Committee even if that Committee, board or agency or organization does indeed perform Executive functions. The organizations like DRDAs and so on, the Members of Parliament are present. In some of the States the Panchayat laws incorporate for their presence for them to be able to sit on those Committees. The Constitution recognizes that a Member of Parliament will sit on the District Planning Committee. Their presence is far better than anyone else's rather than you have a Member of Parliament disqualify him because this will become an office of profit and he will not sit on any of these decision making bodies and somebody else who will not be an elected representative of the people will sit on those Committees as a representative of the people, I think, to that extent an elected Member of Parliament or an MLA should definitely get precedence and to that extent the definition of office of profit must also be widened. But I am still opposed to the MPLAD scheme.

SHRI MADHUSUDAN MISTRY: Are you subscribing to a view that if the expertise is available in the MPs and MLAs, they should be put to best use for the benefit of the people in the States? Moreover, since they are holding a post as an MLA becoming a Chairman of a Slum Clearance Board or other Board and he carries out a good work and his work is lauded by the people and so when he stands for election the second time and the third time, people elect him. Does that mean that we are strengthening the system of one party one person rule?

SHRI RAKESH SAHNI: Sir, no. The same thing will happen to Ministers. I think, at the end of the day the people elect a person they think are articulating their needs and aspirations the best. It hardly relatable to the office he holds or does not hold. But I was not even restricting myself to a person who has the expertise. After all, the Slum Clearance Board Chairmanship will not require much expertise. What I am saying is that wherever you need a person who is a representative of the people, it is best to appoint an MP or an MLA there.

SHRI SITARAM YECHURY: We had discussed this earlier in the Committee. For example, if I object to an industrialist sitting on the Committee on Industries deciding on exemptions and so on, then do I apply the same yardstick to a trade union leader who is an MP sitting on the Committee on Labour?

So, these issues are there. In fact, coming from my Party, I would advocate that trade union leaders must be there in the Committee. An industrialist may say as to why an industrialist should be there in the Committee. So, we get into a lot of problems.

MR. CHAIRMAN: In some cases, their services are required for the nation. When some scientists are there as Members in the Rajya Sabha, their experience is required for the nation.

SHRI RAKESH SAHNI: If you prohibit them, again they will have their own dummies sitting in the Parliament and it would not improve matters. That is why, I again reiterate, with your permission, that we must have only a list of prohibitions and the default position should not attract disqualification of the Office of Profit.

MR. CHAIRMAN: In your reply you have said that Offices of Profit are included/excluded in the Act by the State Legislative Assembly. So, it means that some offices are excluded as it amounts to office of profit. If some offices do not amount to it, then it is excluded. I want to know the basis on which such exclusion and inclusion is done. During the last five years, how many offices have been included or excluded as per your Act? In reply to point No. 2, you have said that in your Act of 1967, offices of profit are included/excluded in the Act by the State Legislative Assembly. On what basis some of the offices have been included and on what basis some offices are excluded?

SHRI RAKESH SAHNI: Section 3 of the MP Act says: "It is hereby declared that none of the Offices of Profit in the schedule shall disqualify or shall deemed ever to have disqualify the holder thereof for being chosen or for being a member of the Legislative Assembly." This is a decision taken. When you asked how and why, there has been no particular scheme for this. All that has been done is, certain offices have been picked up and have been included. In 2007, we have added a whole lot of 98 posts to be excluded.

MR. CHAIRMAN: What are the guidelines followed for including or excluding certain offices as per your existing Act?

SHRI RAKESH SAHNI: I will tell you the reason. Now I recall what had happened. This was in the immediate aftermath of all those notices which went. Some complaints were made against individual Members of Parliament. Everybody thought that they were earlier covered by general exemptions because we also had a general exemption which said: "...Chairman, Vice-Chairman, President or Vice-President, Managing Director or Director of a statutory body or a member of any committee by whatever name any of the aforesaid offices be called." This was 1982 introduction. Subsequently, when these notices started going around—I am very blunt and I am telling you the truth—all these people who were likely to be disqualified on account of a very narrow interpretation of entry 17 of our exemption schedule, the political masters decided that all these officers be incorporated in the schedule and that is how, it was done. So, quite honestly, it was done as a defensive move against any offence by the complainant.

MR. CHAIRMAN: You have mentioned somewhere that no criteria have been followed in granting general exemption but in Sl. No. 2 you have said that some of the offices are included/ excluded in the Act. What are the guidelines on which you have included or excluded? There must be some guideline for it. At random, you have said no criteria except remuneration. What are the guidelines that you have followed for determining some offices as office of profit?

SHRI RAKESH SAHNI: I think I have made my submission.

MR. CHAIRMAN: I am thankful to you on my own behalf and on behalf of the Committee for giving your suggestions and enabling this Committee to place its report before the Parliament. If you want to send any more suggestion, you can do so in writing. The Committee is once again thankful to you.

SHRI RAKESH SAHNI: On behalf of my colleagues and on my own behalf, I thank the Committee for having called us here.

(The Committee then adjourned)

RECORD OF EVIDENCE TENDERED BEFORE THE JOINT COMMITTEE TO EXAMINE THE CONSTITUTIONAL AND LEGAL POSITION RELATING TO OFFICE OF PROFIT

Tuesday, the 9 September, 2008 from 1500 hrs. to 1530 hrs. in Committee Room 'B', Parliament House Annexe, New Delhi

Shri Iqbal Ahmed Saradgi—*Chairman*

MEMBERS

Lok Sabha

2. Shri V. Kishore Chandra S. Deo
3. Shri Madhusudan Mistry
4. Shri Ganesh Prasad Yadav
5. Shri Rajesh Verma

Rajya Sabha

6. Shri Sitaram Yechury

Representatives of Ministry of Law & Justice (Legislative Department)

1. Shri T.K.Vishwanathan — Secretary
2. Shri S.R.Dhaleta — Joint Secretary & Legislative Counsel

Representatives of State Government of Kerala

1. Smt. Neela Gangadharan — Additional Chief Secretary Parliamentary Affairs Department
1. Shri B.R.Mohan Kumar — Law Officer

MR. CHAIRMAN: Shrimati Neela Gangadharan, I welcome you to this sitting of the Joint Parliamentary Committee.

As you are aware, this Committee has been constituted mainly to examine in the context of settled interpretation of the expression 'Office of Profit' in Article 102 of the Constitution and the underlying constitutional principles therein, and to suggest a comprehensive definition of 'Office and Profit'.

One of the terms of reference of the JPC is to recommend, in relation to 'office of profit', the evolution of generic and comprehensive criteria which are just, fair and reasonable and can be applied to all States and Union Territories. The JPC would like to hear your views in this regard.

I may add that the proceedings of the Committee are to be treated as confidential and are not to be made public till the report of the Committee is presented to Parliament.

The list of points for discussion has already been sent to you. The Committee would like to discuss further with you on matters under reference of the JPC and the hon. Members may seek clarifications wherever necessary. We have your replies also. Before we start our discussions, you may kindly introduce yourself to the Committee.

INTRODUCTION

MR. CHAIRMAN: In addition to the replies that you sent, if you have anything else to say, you may do so, to reinstate your views or to elaborate it further.

SHRIMATI NEELA GANGADHARAN: We do not have any additional points. I want to say that I am Additional Secretary in charge of Parliamentary Affairs. The replies to these questions were sent by the Law Department in our State. Unfortunately, the Law Secretary, due to some very important pre-occupation, could not be present here; to the extent possible, I will be definitely responding to the queries. If there are any additional points, that the hon. Committee like us to brief you about, I undertake that I will send that information. Only that, I wanted to say as additional point by way of introduction.

MR. CHAIRMAN: You have stated in your reply that the remuneration was the general or main criterion that was being followed in Kerala for granting exemption for disqualification. However, considering the importance, the necessity and nature of duties and obligations, certain specific offices have also been exempted without considering remuneration aspect. This is what you have said in one of your replies. Do you think, besides remuneration, there are other parameters like functions, power, patronage, associated with office or post would also be considered?

Remuneration is the main criteria which you have cited, which is taken into consideration, while considering an office as 'office of profit'. Do you think that, besides that, other aspects like functions, powers, patronage, powers to appoint or remove, etc. associated with office or post could also be considered? What is your view on that?

SHRIMATI NEELA GANGADHARAN: Basically in our reply what we had tried to address is that the 1951 Act that governs in Kerala had very clearly specified some of the offices that are exempt from the definition of 'office of profit'. In addition, the Secretariat had also asked us something about the Chairman of the Government Company, which has also been exempt. What we had tried to say is that in Kerala, we have the system in which the representatives are also appointed to the Government undertakings and we find it that it is a healthy system in terms of their ability to view the functioning of these public undertakings. These have been included from time to time in this; as you may see in the Act, these categories have been included from time to time, but having said that, the Government is in favour of having uniform guidelines in this regard. This is what we had tried to say.

MR. CHAIRMAN: You have said that as far as your State is concerned, you would prefer that uniform principle be applied all over the country. These are governed by different articles of the Constitution. Each State has its own powers to do so. In any case, what you think would be the uniform principle which could be applied uniformly to all States so that there is no difference? To achieve this uniformity, do you think that there should be a constitutional amendment or this will affect the independence which every State has for this purpose, because under article 191, the States perform this function whereas it is different for the Parliament? What would be the position of your Government?

SHRIMATI NEELA GANGADHARAN: We had replied that there could be uniform criteria regarding office of profit. We had also, in the same reply, said that the definition of office of profit, is something that needs to be discussed extensively by the State legislature also, that we need to have a State initiative in that and that it must be extensively discussed, which means that there should be a State enactment on that. For us, while we are quite in favour of having criteria, the actual definition of it needs to be debated with the representatives in the legislature. After that only, we would like to have an opinion on how this process would be taken forward.

MR. CHAIRMAN: In your reply, you have stated that this actually be left to the concerned legislatures to decide the qualification through enactments, that is in page 2 of your reply, point no. 5. It is very well to say that some common criteria can be suggested. But how do you implement that?

Having common criteria and leaving it to each State to decide for themselves, will be contradictory in terms of practical applicability of the entire exercise.

SHRIMATI NEELA GANGADHARAN: I have to get back to you on this. But the general understanding on which we formulated this was that there seems to be a problem in terms of uniform criteria as expressed by your own messages also. But at the same time, at the Government level, reply cannot be given as to what it would contain because it is very difficult for the Executive only to react on that. So, we had specifically said that since we have legislation already, in case, there is a suggestion for common criteria, this needs to be placed before the legislature and then only, we can get back to you on that.

That was the understanding but I could still go back and give more reactions on that.

SHRI SITARAM YECHURY: We all would be very enlightened if you could give us an example of any office which you have considered for exemption other than the remuneration aspect. You have mentioned it here, rather categorically, 'certain specific offices have also been declared exempted without considering the remuneration aspect'. What is the nature of such offices?

SHRIMATI NEELA GANGADHARAN: In the reply that we had given, the exemptions that we had referred to were the ones that were included in that from time to time. One of them, for example, is the Chairman of a Government company. That has been included in the 1951 Act. So, from time to time there have been insertions in the Act.

SHRI SITARAM YECHURY: That is all right but you have said, 'without considering the remuneration aspect'. I am talking of the last sentence in Point 3 on Page 2 of your reply which talks of 'without considering the remuneration aspect'. What was the other aspect that was considered?

SHRIMATI NEELA GANGADHARAN: The other aspect that has been considered is only the presence of the representatives in these Government companies. So, my understanding of that reply was, for example a Chairman of a Government company would be enjoying certain benefits so those are the kinds of exemptions that have been added in the Act from time to time and those were the ones which we referred to in that. I can send you back some specific examples.

SHRI SITARAM YECHURY: In Para 6 you have quoted from the Supreme Court's judgement. It is a much larger definition of what remuneration means. I take it that you are quoting it rather approvingly, in the sense you agree with that interpretation. If that is the case what else could be the factors other than remuneration that you have considered? That is for our enlightenment.

SHRIMATI NEELA GANGADHARAN: One of our suggestions had been, if you read the next paragraph where we had given our suggestion for the draft definition, that perhaps to avoid ambiguity and judicial interference honorarium, sitting fee, daily allowances, etc. should specifically be excluded from remuneration. That is one of our suggestions. I think the Supreme Court had held that honorarium for example cannot be construed. That was our view in terms of the definition. I could get back on the examples of any exemption given and I could definitely supply the Committee with the information.

SHRI SITARAM YECHURY: All this will also be unnecessary because in Paragraph 9 they say very clearly that they agree with the British conception. Once that is there then all the other quibbling are not necessary.

MR. CHAIRMAN: Yes because what you have said actually is contrary to what the Supreme Court has said. The Supreme Court has said that honorarium etc. in addition will construed profit whereas what you have said in the next para is contrary to that. As my colleague has very rightly put it the last paragraph is the position that actually prevails in the House of Commons where they have a list which says that what is outside that list is the Office of Profit.

SHRI MADHUSUDAN MISTRY: Just for clarification, does that mean that if all the MLAs who are elected are given one or other post anywhere in the State, the State will accept it and it will have no problem? Also, whether all MLAs should be made either Chairmen or the Managing Directors of some Board and the State will have no objection to that or it is not ethically wrong at all? Does it mean that?

SHRIMATI NEELA GANGADHARAN: Sir, as I said in the beginning itself, some of these responses have come from the Government and the definition of the Office of Profit itself needs to be discussed. So, I would say that as far as Kerala is concerned, in the present context we have included certain categories as per the Act which are exempted from the Office of Profit which includes also, as I said, things like Chairmen of public undertakings which may have honorarium.

So, as I said, this response was sent by the Law Department before I took over but responses had been to the questions raised in terms of our general view on the issues. Once the criteria or something is arrived at, I think it needs a larger discussion.

SHRI MADHUSUDAN MISTRY: We agree with you, as you have said in Para 9, that we should accept the British definitions. Unless people are specifically mentioned for disqualification they will not come under Office of Profit. But will there be some demarcation or some limit or any number of MPs or MLAs could be made the Chairmen or Directors of some Boards? What is your view on that?

SHRIMATI NEELA GANGADHARAN: Sir, it is very difficult for me to give my personal view on that but I would definitely get back to you on that. As I said, this is a general response but we could further examine this point in terms of the implications as to what would be our view in terms of some limitation or do we accept that in principle. Probably it is a kind of response in principle but in terms of the implications of implement-ability of this, I do not think this response carries that information. If the Committee so desire, we could re-examine and get back to you.

MR. CHAIRMAN: Please read Paragraph 8. Here you have said that, "There should be an enabling provision in the Constitution for exercising an option to an elected Member to resign from an office in the event of the office he is holding is determined to be an Office of Profit". Could you elaborate a little more on this? In the sense, what you are trying to suggest is that you need not resign earlier on.

SHRIMATI NEELA GANGADHARAN: Sir, I have discussed this also with the Law Department today and the intention behind this response, what I understood from our Government's view, is that there is already a provision regarding disqualification of Members when they want to get elected. Notwithstanding that if someone is elected and then there is a discovery that a person is holding an Office of Profit as per the criteria established, there should be an option given to the Member, an enabling provision should be given to the Member. This is the kind of intention behind that response from the Government.

MR. CHAIRMAN: In other words, until he is discovered he can enjoy both.

Coming back to the earlier question, by a Constitutional amendment, there has been 15 per ceiling of the number of Ministers you can have in ratio to the strength of that particular House. So, if a legislative body has 100 MLAs you cannot have more than 15 ministers. So, making them Chairmen or giving them these kinds of perquisites which sometimes may even exceed what a Minister gets, do you not think that it will be actually indirectly undoing what that amendment had sought to create?

SHRIMATI NEELA GANGADHARAN: Sir, I do find that we had not given a specific reply to that in our response and I think that point needed a little more examination. I could not get the response immediately. I did find that for Point 6 we have not given a clear response. So, we will give a clear response on that.

MR. CHAIRMAN: After you go back, you may please discuss with your Legal Department and send the replies as soon as possible.

श्री गणेश प्रसाद सिंह: इसमें मैं समझता हूं कि आर्टिकल 361(बी) डिफैक्टर्स के लिए एप्लीकेबल किया है। आगे भी ऐसा कहा गया है। उन एमपीज़ पर एप्लाई होगा न कि जनरल में भी, कृपया स्पष्ट करें।

SHRIMATI NEELA GANGADHARAN: We will definitely clarify that. These are quotations from the Constitution as well as the Supreme Court decisions. So, these are not really the views of the State Government. Probably they are contextualised paragraph quotes. We will clarify that paragraph.

MR. CHAIRMAN: You have said that some workable definition of Office of Profit should be worked out. Can you suggest some guidelines or some basic parameters within which it can be worked out?

In the State of Kerala you do not have a Committee on the Office of Profit. Who ultimately decides this? Is there a designated authority? Does it go to the Privileges Committee? What is the procedure? Who is the authority in your State?

SHRIMATI NEELA GANGADHARAN: I have to go back and find out. I will definitely do that. We will send our views both on the guidelines on the workable definition as well as the mechanism that exists now. We do not have a Committee. That is for sure.

MR. CHAIRMAN: I on behalf of the Committee thank you Smt. Neela Gangadharan and your colleagues for the evidence tendered before us today. You may send us in details the replies and also any other suggestions on any other matter that you would like the Committee to consider. You can send in your replies and suggestions to the Secretariat at the earliest. You may please join us now for a cup of tea.

(The meeting then adjourned)

