CHAPTER II

LEGISLATURE AND THEIR MEMBERS

Constitution and Composition of Legislatures

Some of the Legislatures in India are bicameral and some unicameral. The Head of the State i.e. the President in the case of the Union and the Governor in the case of the State is an integral constituent part of the Legislature. In this respect the Indian Constitution has departed from the Constitution of the United States where the President is not a constituent part of the Congress but has followed the English Constitution where the Queen is a constituent part of the Parliament. Though the Constitution itself provides for a Second Chamber in some of the States and leaves the others to be unicameral, it makes it possible either to abolish the Second Chamber in the States having one, or to create a Second Chamber in any of the remaining States without the necessity of going through the process of Constitutional amendments. The only requirement for effecting such a change will be a resolution passed by a special majority of the Lower House of the State Legislature itself, as per provision of clause (1) of Art. 169, followed by an appropriate Act of Parliament. Such a resolution under Ar. 169(1) of the Constitution was passed by the Bombay Legislative Assembly on 26.9.53.

The Union Parliament consists of two Houses - the Council of States (Rajya Sabha) and the House of the People (Lok Sabha). The Council of States consists of not more than 238 representatives of the States and the Union territories and 12 members nominated by the President. The above numbers are however the maximum fixed by the Constitution, the total number of representatives of different States being however less than the maximum. The Fourth Schedule of the Constitution shows the allocation of seats in the Council to different States. Unlike in the United States, Australia and Switzerland where local states (cantons) are represented in the Second House by an equal number of seats, local States in India do not enjoy equal representation in the Council of States. The framers of the Constitution accepted the scheme suggested by the Union Constitution Committee regarding the allocation of seats in the Council of States on the basis of one seat for every million of the population of the State upto five

2 Art. 79. For adoption of the nomenclatures Lok Sabha and Rajya Sabha see Parl. Deb. Part II d/- 14.5.54 cc. 7389-90 and C.S. Deb. dt. 23.8.54. cc. 36-37.

3 Art. 80.
millions plus one representative for every additional
two millions plus 12 members to be nominated by the
President. The nominated members must be persons having
special knowledge or practical experience in such matters
as literature, science, art and social service. The
qualifications for membership of the Council of States
are the same as those for the House of the People except
that the minimum age is thirty instead of twenty-five.

The House of the People consists of not more than
500 members from the States elected on adult franchise
and not more than 20 members from the Union territories
partially elected on adult franchise and partially nomina-
ted. The President may, if he is of opinion that the
Anglo-Indian Community is not adequately represented,
nominate not more than two members of that community to
the House of the People. As in the case of the Council
of States, the above members are the maximum fixed by
the Constitution, the actual number being fixed by the
Parliament by law viz. the Representation of the People
Act, 1950.

The members of the Upper Houses of State Legislatures
known as Legislative Councils are partially elected and
partially nominated. The total number of members of a
Legislative Council of a State shall not be less than
5 Art. 80
6 Arts. 81, 331.
forty and shall not exceed one-third of the members of the Legislative Assembly of that State. One-third, as nearly as possible, of the total number of members is elected by the Lower House, the Legislative Assembly, a similar one-third by specified local bodies, one-twelfth (as nearly as possible) by graduates, a similar one-twelfth by teachers, and one-sixth, as nearly as possible, is nominated by the Governor. This composition was provisionally fixed by the Constitution which made it liable to be varied by Parliament by law. By the Legislative Councils Act, 1957 and other Acts relating to reorganisation of States the composition as provisionally fixed by the Constitution has been varied. The members of the Lower Houses known as Legislative Assemblies are elected on adult franchise and there is provision for the nomination of a few members from the Anglo-Indian community when they are not properly represented. Unlike Lok Sabha, the number of Anglo-Indian members for a State has not been limited by the Constitution, the matter being left to the discretion of the Governors of the States. The question of fixing a

7 Art. 171.
8 Art. 333.
maximum for this purpose was, however, under consideration of the Central Government. The members (other than those nominated) of the Upper House, both Union and States, are elected under the system of proportional representation by means of the single transferable vote. (For the method of proportional representation see Appendix II).

The question of the due constitution of the House in India is not a matter of privilege, as it is in the British House of Commons. General Elections and bye-elections to the Legislatures are conducted by the Election Commission but are held when directed by the President or the Governor, as the case may be, that is to say, by the Government concerned, in the case of General Elections to the Lower Houses and biennial elections to the Upper Houses, and by the Election Commission in the cases of bye-elections. Art. 324 provides for the creation of an independent body, referred to in the Constitution as the Election Commission, which is in charge of all matters connected with elections under the Constitution in order to ensure their freedom. Art. 327 empowers the Parliament to make provision with

9 A Constitution Amendment Bill (Bill No. 79 of 1959) was introduced fixing a maximum for the State Assemblies but the relevant clause was not passed by the required majority; See also Mr. Jyoti Basu's speech in W.B.L.A.P., 1957, vol. XVII, No. I, p. 61.

10 Art. 324; sects. 12, 14, 15, 16, 147, 149, 150 & 151 of the Representation of the People Act, 1951.
respect to elections to Houses of Legislatures (including Parliament) and all other matters for securing the due constitution of such Houses. In England, however, it is a privilege of the House of Commons to provide for its due constitution. The privilege, as May says, "is expressed in three ways: first, by the order of new writs to fill vacancies that arise in the Commons in the course of Parliament; secondly, by the trial of controverted elections; and thirdly, by determining the qualifications of its members in cases of doubt." In the British Parliament, the House itself decides such matters. In the case of sitting members the House claims the right to decide any question of law or fact which arises as to their disqualifications. "Any doubtful question, whether of law or fact, which arises concerning the seat of a member is habitually referred to a Select Committee and the House awaits its report before taking a decision." The expulsion of a member or the declaration of vacancy is made by resolution of the House. "When a vacancy occurs during the session by death, elevation to the Peerage, acceptance of office, etc., the House on motion orders the Speaker to issue his warrant to the

11 May, p. 175.
12 Campion, 2nd edition, p. 70.
Clerk of the Crown to make out a new writ for the election of a member. This is generally moved by the Chief Whip of the party to which the member whose seat is vacated belonged. During recess elaborate procedure is laid down by an Act relating to the formalities to be observed by the Speaker in issuing writs, e.g., the receipt of a certificate from two members specifying the cause of the vacancy, etc. Under the Lunacy (Vacating of Seats) Act and the Bankruptcy Act, provisions have been laid down for the vacation of seats and the issue of new writs. It therefore appears that these matters are not decided on points of order but must be moved by motions. There appears to be also a procedure under which the Court gives information to the Speaker of any conviction of a member. In the case of Horatio Bottomley, Mr. Justice Salter informed the Speaker about his conviction and Bottomley was called upon to attend the House on a day on which the then Leader of the House moved a resolution for his expulsion. Only in the matter of disputed elections, the decision is left to the Court. The decision of the Court is communicated to the House and orders are made by the House for giving effect to

13 Campion, 2nd edition, p.67
14 H.C.D. (1922), vol. 157, c.1288
the decision. In India, due constitution of the House is not a matter of privilege as it is in England because of the fact that specific provisions are outlined in the Constitution with regard to such matter. The House of Commons has power to determine all matters touching the election of its members. Contrary to the English practice, the decision of questions as to disqualification of members is left to the President of India or the Governor of the State concerned who, however, is required to act according to the opinion of the Election Commission. The decision of the President or the Governor is final. The courts in India have no jurisdiction to question the validity of the decision of the President or the Governor on the opinion of the Election Commission. In India, the Supreme Court however in a case entered into the question of due constitution of the Assembly. A judgment of the Supreme Court declared that the Himachal Pradesh Legislative Assembly had not been properly and validly constituted. The circumstances in which the Supreme Court of India had the occasion and necessity of enquiring into the question of constitution of a House of Legislature in India are as follows:

Himachal Pradesh and Bilaspur were two contiguous

15 Arts. 103, 192.
States of the category Part C under the Constitution passed in 1950. In 1951 an Act known as the Part C States Act was passed by the Parliament according to which it was open to have a Legislative Assembly and a consequent ministry in some of the Part C States. The powers, privileges and immunities of these Assemblies were defined by the same Act to be such as those of the House of the People. Himachal Pradesh was one such State having a Legislative Assembly (of 36 members) whereas Bilaspur was not brought under the said Act. In the General Election of 1952, members were elected to the Himachal Pradesh Assembly. While this Assembly was functioning, a Bill known as the Himachal Pradesh Abolition of Big Landed Estates and Land Reforms Bill was introduced in 1953 and while it was pending before the said Assembly an Act was passed by Parliament known as the Himachal Pradesh and Bilaspur (New State) Act (Act 32 of 1954) which came into effect from 1st July, 1954. This Act provided for a House of 42 members (5 for Bilaspur territories) for the new State. In the meantime, on 7th May, 1954, the Lt. Governor of Himachal Pradesh summoned the second session (the first session being held in 1953 i.e. prior to 1st July, 1954) of the Himachal Pradesh
Assembly to commence on July 16, 1954. The Bill introduced in 1953 regarding abolition of Zamindaries and introducing certain reforms was passed during the said session and the Act was given effect from January 26, 1955. Certain landlords who believed that their rights had been curtailed by the Act filed applications before the Supreme Court of India. The validity of the Act passed by an Assembly which purported to be the legislative House of the Himachal Pradesh after its merger with the State of Bilaspur, the latter having no representation on the House, was impugned for the purpose of assailing the Land Reforms Act. In Vinod Kumar and others vs. the State of Himachal Pradesh referred to above, the Supreme Court declared the Land Reforms Act ultra vires on the ground that the Legislative Assembly which passed the Act had not been properly and validly constituted.

A Bill had to be introduced in Lok Sabha on 3rd December, 1958 to validate the constitution and proceedings of the Legislative Assembly of the New State of Himachal Pradesh formed under the Himachal Pradesh and Bilaspur (New State) Act, 1954. This was in due course enacted into law.

Qualifications

Qualifications and disqualifications for membership of

17 L.S.D., dt. 3rd December, 1958, c. 2939.
a legislature are laid down in the Constitution\textsuperscript{19} and also by the Representation of the People Act, 1951. In order to be eligible for election or nomination to a legislature, a person must be -

(i) a citizen of India;
(ii) registered as a voter,
   
   (a) in any Parliamentary Constituency in any State in India, in the case of the House of the People,
   (b) in any Parliamentary Constituency in the State from which election is sought, in the case of the Council of States,
   (c) in any Assembly Constituency of the State, in the case of the Legislature of that State.

(iii) not less than -

(a) 25 years of age, in the case of the House of the People and the State Legislative Assemblies,
(b) 30 years of age, in the case of the Council of States and the State Legislative Councils.

In India there appears to be a departure from the general principle that any person who is qualified to be a voter may become a member of the House unless he incurs any disqualification under any statute in force. The departure

\textsuperscript{19} Arts. 84, 102, 173, 191.
lies in the fact that our Constitution has accepted the adult franchise, that is to say, a voter must attend the age of twenty-one while a candidate must be of age twenty-five or thirty, as the case may be, to become a member of a lower House or upper House of a Legislature.

Disqualifications

A person is disqualified for being or remaining a member of any House of Legislature:

(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 the Union Legislature or the State Legislature, as the case may be, not to disqualify its holder;

(b) if he is of unsound mind and stands so declared by a competent court;

(c) if he is an undischarged insolvent;

(d) if he is not a citizen of India or has voluntarily acquired the citizenship of a foreign State or is under any acknowledgment of allegiance or adherence to a foreign State.

20 Art. 326
21 Arts. 102, 191.
Further disqualifications are prescribed by section 7 of the Representation of the People Act, 1951 which is as follows:-

'Disqualification for membership of Parliament or of a State Legislature. - A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State :-

(a) if, whether before or after the commencement of the Constitution, he has been convicted, or has, in proceedings for questioning the validity or regularity of an election, been found to have been guilty, of any offence of corrupt practice which has been declared by section 139 or section 140 to be an offence or practice entailing disqualification for membership of Parliament and of the Legislature of every State, unless such period has elapsed as has been provided in that behalf in the said section 139 or section 140, as the case may be or the Election Commission has removed the disqualification;

(b) if, whether before or after the commencement of the Constitution, he has been convicted by a Court in India of any offence and sentenced to imprisonment for not less than two years, unless a period of five years, or such less period as the Election Commission may allow
in any particular case, has elapsed since his release;

(c) if he has failed to lodge an account of his election expenses within the time and in the manner required by or under this Act, unless three years have elapsed from the date by which the account ought to have been lodged or the Election Commission has removed the disqualification;

(d) if there subsists a contract entered into the course of his trade or business by him with the appropriate Government for the supply of goods to, or for the execution of any works undertaken by that Government;

(e) if he is a director, managing agent, manager or secretary of any company or corporation (other than a co-operative society) in the capital of which the appropriate Government has not less than twenty-five per cent share;

(f) if, having held any office under the Government of India or the Government of any State or under the Crown in India or under the Government of an Indian State, he has, whether before or after the commencement of the Constitution, been dismissed for corruption or disloyalty to the State, unless a period of five years has elapsed since his dismissal.

Electoral offences entailing disqualification are bribery or undue influence or personation in connection
with any election sections 171 E and 171 F of the Indian Penal Code and offences defined under section 135 and clause (a) of sub-section 10 of section 136 of the Representation of the People Act, 1951. Practices doing so are corrupt practices specified in section 123 of the above-mentioned Act. The disqualification for conviction for an electoral offence lasts for six years from the date on which the finding of the Election Tribunal takes effect, i.e. the date on which the order of the Tribunal is pronounced by the Tribunal. The Election Commission, can, however, remove any disqualification or reduce the period of such disqualification.

There are certain exceptions to the above-mentioned disqualifications which are laid down in section 8 of the Representation of the People Act, 1951 which is as follows:

8. Savings, - (1) Notwithstanding anything in section 7 -

(a) a disqualification under clause (a) or clause (b) of that section shall not, in the case of a person who becomes so disqualified by virtue of a conviction or a conviction and a sentence and is at the date of the disqualification a member of Parliament or of the Legislature of a State, take effect until three months have elapsed from
from the date of such disqualification, or if within these three months an appeal or petition for revision is brought in respect of the conviction or the sentence, until that appeal or petition is disposed of;

(b) a disqualification under clause (c) of that section shall not take effect until the expiration of two months from the date on which the Election Commission has decided that the account of election expenses has not been lodged within the time and in the manner required by or under this Act;

(e) a person shall not be disqualified under clause (e) of that section by reason of his being a director unless the office of such director is declared by Parliament by law to so disqualify its holder;

(f) a disqualification under clause (e) of that section shall not, in the case of a director, take effect where the law making any such declaration as is referred to in clause (e) of this section in respect of the office of such director has come into force after the director has been chosen a member of Parliament or of the Legislature of a State, as the case may be, until the expiration of six months after the date on which such law comes into force or of such longer period as the Election Commission may in any particular case allow.
Office of profit

The disqualifying provision that a holder of an office of profit under the Government could not become or remain a member of a Legislature was first enacted in England in the Act of Settlement of 1700-1 and subsequently re-enacted in a somewhat amended form in the Succession to the Crown Act, 1707. This was done obviously to prevent the Government of the day from exercising influence over members of the Parliament by appointing them to sinecure posts created for the purpose. On the other hand, when parliamentary Government came to be established, the Ministers had, of necessity, to be members of the House. The phrase 'office or place of profit' and the distinction of 'old' and 'new' offices introduced by the Act of 1707 gave rise to various difficulties and a Select Committee of the House of Commons went into the question in 1941 and made certain recommendations which are worth consideration in India. The Committee summarises the gradual development of the law in the following words:

'There can be traced the genesis and gradual development of the three chief principles which by the beginning of the eighteenth century had become, and have since been, and should still be, the main considerations affecting

22 H.C. Paper 120 of 1941.
the law on this subject: these, in the order of historical sequence, are (1) incompatibility of certain non-ministerial offices with membership of the House of Commons (which must be taken to cover questions of a Member's relations with, and duties to, his constituents); (2) the need to limit the control or influence of the executive Government over the House by means of an undue proportion of office-holders being members of the House; and (3) 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. The Act of 1707 was the first effective attempt to establish these principles in an Act of Parliament.

The Committee recommended the passing of a Bill which subsequently emerged as the House of Commons Disqualification Act, 1957 the chief provisions of which are as follows:

Except as provided by the 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 of place; and a person shall not be disqualified for appointment to or for holding any office or place by reason of his being a member of that House.
With the exception of holders of political or ministerial offices, all persons employed either whole or part-time in the Civil service under the Crown are disqualified for membership. Holders of certain judicial offices, members of the regular armed forces, members of any police force, members of Legislatures of any country or territory outside the Commonwealth and holders of certain specified posts, including membership of certain Committees, Commissions, Boards, etc., are also disqualified. The lists of disqualifying offices may be amended by Order in Council made in pursuance of a resolution of the House of Commons.

Of the holders of the ministerial offices not more than 27 of the Ministers named in Part I of the Second Schedule and not more than 70 of the Ministers named in both parts I and II of the said Schedule are entitled to sit and vote in the House.

No Member of the House of Commons is required to accept any office or place by virtue of which he would be disqualified for membership.

A person shall not be disqualified by reason of his having a pension from the Crown.
In India the 'office of profit' has also a long history which is best described by the Committee on Offices of Profit, 1955.

The Committee after discussing the history of the office of profit came to the following conclusion:

"Broadly speaking there are five categories of offices from the point of view of emoluments, which may be deemed to be offices of profit, namely:

i) Where a person is appointed to an office of profit and takes remuneration which may, when set against expenses or less incurred by not being able to follow his ordinary avocation, be less.

ii) Where a person is appointed to an office of profit even though he does not take remuneration.

iii) Where a person is appointed to an office of profit although the payment of remuneration may have fallen into disuse.

iv) Where a person is appointed to an office of profit which is not financed from Government funds.

v) Where a person is appointed to an office which may not give any advantage by way of monetary gain.

but is an office which carries with it honour, influence of patronage."  

As regards the word "under" used in the term "under" the Government of India or of a State" the Committee have come to the conclusion that the word "under" in Articles 102(1)(a) and 191(1)(a) of the Constitution has been used in a broad sense and must be construed to include even offices which may be remotely under the control of the Central or State Governments.  

Thus having examined the question as to what should be considered as 'offices of profit under the Government of India or of a State' the Committee on Offices of Profit submitted their report in November, 1955 recommending that a Bill embodying such of their recommendations as were acceptable to Government should be passed. The Committee also recommended that frequent scrutiny should be made by a Standing Parliamentary Committee in respect of offices of profit in case of committees which had escaped their notice or which might come into existence in future.

24 Report of the Committee on Offices of Profit, 1955, para 36.

25 ibid., para 37 conclusion.
Thereafter, the Parliament (Prevention of Disqualification) Bill, 1957 was introduced before the Lok Sabha and referred to a Joint Committee of both Houses of Parliament. The report of the Joint Committee was presented in September, 1958. The Bill was subsequently enacted into law known as "the Parliament (Prevention of Disqualification) Act, 1959" which superseded all previous enactments made since 1950.

The Act exempted the holders of the following offices from any disqualification for being chosen as or for being a member of Parliament.

(a) Any office held by a Minister, Minister of State or Deputy Minister for the Union or for any State, whether ex-officio or by name.
(b) Offices of Whips in Parliament and Parliamentary Secretaries.
(c) Offices of Members of forces in the National Cadet Corps, Territorial Army, Reserve or Auxiliary Air Forces.
(d) Offices of Members of Home Guards formed in States.
(e) Offices of Sheriffs of Bombay, Calcutta and Madras.
(f) Offices of Chairmen or members of Universities or bodies connected therewith.
(g) Offices of Members of Delegations or Missions sent abroad.
(h) Offices of Chairmen or members of Committees set up for advising the Government or for any enquiry etc., if no remuneration other than compensatory allowance is paid.

(i) Offices of Chairmen, directors and members of certain statutory or non-statutory bodies included in the schedule, when no remuneration other than compensatory allowance is paid.

(j) Offices of village Revenue Officers not discharging any police function and paid by share of their collections.

The Act has declared offices of Chairmen and Secretaries of certain Statutory and non-statutory bodies (enlisted in the schedule) as disqualifying. The Constitution has expressly excluded the office of a Minister, whether of the Union or of a State, from the category of disqualifying offices. In the Parliament (Prevention of Disqualification) Act, 1950 (repealed by the Act of 1959) the office of a Minister of State or a Deputy Minister was expressly declared as not disqualifying. In some of the State Acts such offices have been expressly declared as not disqualifying. Evidently this has been done to obviate any misconception. In the Acts of other States there is no mention of Ministers of States or Deputy Ministers although
Such Ministers have been appointed from among the members of Legislature. These offices are included in the office of a Minister for which the Constitution has made express provision. The language of the present Act of Parliament regarding Ministers, Ministers of States, or Deputy Ministers closely follows that of the similar provision in the House of Commons Disqualification Act, 1957, declaring all offices of profit held by a Minister etc. ex-officio as no disqualifying. There is no such provision in any of the State Acts. The basic distinction between the present English law as contained in the House of Commons Disqualification Act, 1957 and the provisions of the Constitution of India in regard to offices of profit is noticeable. According to the English law no office entails disqualification unless it is included in the schedule of disqualifying offices appended to the Act whereas according to the Constitution of India all offices of profit under any Government in India are disqualifying unless exempted by the Legislature concerned.

The provisions of the State Acts are not uniform. Offices of Parliamentary Secretaries, members of National Cadet Corps, and some other forces, part-time officers or offices (including membership or Chairmanship of Committee) remunerated by compensatory allowance or fees have more or less been exempted everywhere. Other exemptions have been made according to local needs. It may be mentioned in this connection that in the Central Act, the term "compensatory allowance" means daily allowance up to an amount admissible to a Member of Parliament for attending a meeting of Parliament, and other allowances, namely conveyance allowance, house rent allowance, travelling allowance, which are necessarily spent for performing the duties for which they are paid. No such restriction in the amount of daily allowance has been made in any of the State Acts. This is because in the States the rates of daily allowance of members of Committee seldom exceeds those paid to members of the Legislature.

As regards the question whether disqualification attaches to any holder of an office of profit where no salary or allowance (disqualifying) is drawn, the answer is in the affirmative.

A question may also arise as regards holders of pensions from the Government. In England, holders of Civil Service pensions under the Superannuation Act were
exempted from disqualification by a special Act, Pensioners Civil Disabilities Relief Act, 1869. This Act has, however, been repealed by the House of Commons Disqualification Act, 1957 which has re-enacted the same provisions. There is no such Act in India. It may be noted that pension-holders were thought in England to be disqualified not because of the provisions as to 'office or place of profit' in the Succession to the Crown Act, 1707, but because Section 24 of that Act disqualified persons having any pension from the Crown at pleasure. It seems therefore that holders of pensions from the Government would not be disqualified from membership at the will of the Government. In fact, in the legislatures in India, there have been members who are in receipt of pensions from the Government.

Foreign State

A country within the British Commonwealth is not a foreign State for the purposes of the Constitution.27 'Any acknowledgment of allegiance or adherence to a foreign State', - an expression which has a much wider meaning than acquiring the citizenship of a foreign State - will not, it seems, disqualify a person under Article 102 and

Article 191, if the State concerned is a State within the Commonwealth, e.g., Pakistan.

Under Article 191, a person is disqualified to be a Member of a State Legislature, if he has voluntarily acquired the citizenship of a foreign State or is under any acknowledgment of allegiance or adherence to a foreign State. The last disqualification clause is very wide and will cover the case of a person, who may be a citizen of India but nevertheless is under an acknowledgment of adherence to a foreign State. This clause was enacted to cover the case of fifth columnists. The President’s Order, namely, the Constitution (Declaration as to Foreign States) Order, 1950, says that a State within the British Commonwealth of Nations will not be treated as a foreign State ‘for the purpose of the Constitution.’ It is not correct to say that no purpose has been mentioned. The purpose mentioned is quite clear, that is to say, wherever there is a reference to a foreign State in the Constitution, that provision will not apply to a State within the Commonwealth. Consequently, Article 191 will not apply to such a case. Pakistan is a State within the British Commonwealth (Declaration at the Prime Ministers’ Conference, London, dated April 27, 1949) and any person even if he is a citizen
of India will not be disqualified to be a member of a Legislature, although he may have adherence to Pakistan.

Decision as to disqualification

When a member becomes subject to any of the disqualifications, his seat becomes vacant. Whether a member has become subject to any disqualification is a matter of evidence. In the British Parliament, the House itself decides such matters. Any doubtful question, whether of law or fact which arises concerning the seat of a member is habitually referred to a Select Committee and the House awaits its report before taking any action. It appears that the case of Mr. Anthony Wedgwood Benn was referred to a Committee of Privileges which reported that he was disqualified for membership. The case of Reverend James George MacManaway, Member for Belfast, West was also referred to a Select Committee. The Judicial Committee of the Privy Council was also consulted and on the report of that Committee the House declared Mr. MacManaway disabled from sitting and voting in the House of Commons. It may be pointed out, however, that the decision of an Election Petition Court, if any,

28 Arts. 101, 190.
29 H.C.D.(1955-6) 545, c.73
30(a) H.C.Deb(1950)478, cc.2243-76.
cannot lawfully be overridden by the House of Commons. In the case of Mr. Wedgwood Benn the Election Court held that he had not been duly elected to the House of Commons. In India, however, the decision on a question whether a member has become subject to any disqualification has been left to the President in the case of the Indian Parliament and to the Governors in the case of the State Legislatures. The President and the Governors, however, cannot take any decisions themselves. The matter has to be referred to the Election Commission for its opinion and the decision has to be given in accordance with its opinion. The question may arise either as one of law or one of fact. For example, if a point is raised that a member has accepted an office of profit under the Government and it is disputed whether that office is an office of profit or not, the question is a question of law. Or, the question may arise whether a member is an undischarged insolvent which is a question of fact. In either case, in case of a dispute, the question must be

31 Arts. 103, 192.

32 ibid.
referred to the Head of the State and his decision will be the final.

Now, the consequential question that suggests itself is about the point of time from which the President's or the Governor's decision becomes operative. As the question for decision of the President or the Governor under Arts. 103(1) or 192(1) is - whether a member 'has become' subject to the disqualification - it appears to be clear that the President's or the Governor's decision would be operative retrospectively. Or, in other words, the member shall be deemed to have been unseated from the very moment when he had incurred the disqualification. Under Arts. 100(2) and 139(2) of the Constitution, however, the proceedings of the House in which such a member had participated before being declared disqualified 'shall be valid' inspite of such vacation of seat retrospectively.

The Articles do not say where this question can arise and who is to refer the dispute. It will be noticed that under Arts. 101(3) and 190(3) a seat becomes ipso facto vacant if the member incurs any of the disqualifications and the date on which the vacancy occurs is the date of
becoming disqualified and not the date on which any decision of the Head of the State may be given. No declaration of vacancy is necessary. A duty has, therefore, been cast upon a member to refrain from attending the House after incurring any of the disqualifications on penalty of a daily fine. The question may arise in the House on a point of order raised if a disqualified member takes his seat or by communication, e.g., by a Court that a member has been adjudged insolvent. The Presiding Officer may also see that the House is properly constituted and he may take notice of any disqualification of a member either of his own knowledge or from any communication made to him. In such cases, unless the member admits the disqualification, the question will have to be referred to the Governor.

An anomalous position has arisen by reason of the phrasing of Arts. 101 and 190 which provide that if a member 'becomes subject to any of the disqualifications', his seat shall become vacant. It has been held by the Supreme Court that the expression 'becomes subject to' means becomes subject to any disqualification after a person has been elected a member and does not cover the case of a person who was disqualified to stand for an
election but has in fact been elected without challenge. Therefore if a disqualified person has been elected a member his seat does not become vacant under the above-mentioned Articles and the provision regarding enquiry by the Election Commission under Art. 103 or Art. 192 would not apply. The election of such a person can be challenged by an election petition under Section 100 of the Representation of the People Act, 1951, on the ground that the nomination paper of the person was improperly accepted. And the Election Tribunal may declare the election void.

Whether the House can declare the election of a disqualified person void is a difficult question to answer. In the British House of Commons, the question of the due constitution of the House is one of privilege of the House and as stated by May: 'The House is bound to take notice of any legal disabilities affecting its members and to issue writs in the rooms of Members adjudged to be incapable of sitting.'

There are many instances in the British House of Commons when the elections of disqualified persons have been declared void. In India, however, the question does

33 A.I.R.(1953) S.C. 210
34 May p. 186.
not seem to be one of privilege and the House has no authority to issue any writ for bye-election. Whether the House can do so by reason of the fact that the privileges of the House of Commons attach to the House and therefore the privilege of the House of Commons to declare a person disqualified for membership is attracted is also a difficult question to answer.

The penal provisions of Arts. 104 and 193, of course, would apply and a disqualified person would be liable to pay the fine if he sits or takes part in the proceedings of the House. But beyond that there seems to be no remedy. Of course, if such a person desists from attending the House for a period of sixty days for fear of incurring the penalty, his seat can be declared vacant by the House.

Double membership

If a person becomes a member of both the Parliament (either House) and a State legislature (either House), then his seat in the Parliament becomes vacant unless he resigns his seat in the State legislature within fourteen days of the latest date on which his election is published in the official Gazette.35

35 Arts. 101, 190; Prohibition of Simultaneous Membership Rules, 1950.
If a person is elected to any Houses of Legislatures of more than one State, all the seats become vacant unless the person elects to resign all but one seat within 10 days from the latest day of publication to any of the seats.

If a person is elected to both the Houses of Parliament he has, before taking his seat, to elect the House he desires to be in within 10 days of the latest date on which his election is notified in the official Gazette. In the absence of any election, his seat in the Council of States becomes vacant. If within 10 days he takes his seat in any of the Houses, it seems that his seat in the other House would become vacant.

If a member of one of the Houses is elected to the other House, his seat in the House of which he is a member becomes vacant.

If a person gets elected to either House of Parliament from more than one constituency, he has to resign all but one seat within 14 days of the latest date of publication of his election in the official Gazette, and unless he

36 Arts. 101, 190; Prohibition of Simultaneous Membership Rules, 1950.
37 Representation of the People Act, 1951, s. 68
38 Representation of the People Act, 1951, s. 69.
does so all the seats shall become vacant. The provisions as regards State Legislatures are similar and are governed by Acts of different State Legislatures.

Vacation of seats

A member may resign his seat by writing addressed to the Presiding Officer of the House of which he is a member. When a member has been elected from more than one seat of a House and the Offices of the Presiding Officers (including the Deputy Speaker or the Deputy Chairman as the case may be) are both vacant at the time, the resignation is to be addressed to the Election Commission. Resignation takes effect as soon as the letter is received by the authority concerned. No acceptance of resignation is necessary.

A rule of the Lok Sabha and also of Legislatures of some States prescribe a form of letter intimating the resignation of a member to take effect from the date of resignation specified in the letter. If, however, no date from which the resignation should take effect is specified in the letter, the resignation shall take effect from the date of the letter; if the

39 Representation of the People Act, 1951, s. 70 and Rule 91 of the Conduct of Elections Rules, 1961.

letter of resignation does not bear any date the
resignation shall take effect from the date of the
receipt of the letter in the Lok Sabha Secretariat.
Such a rule may lead to several anomalies.

As regards coming into operation of Statues -
the General Clauses Act lays down a presumption that
unless otherwise provided, an Act comes into operation
on the expiry of the day previous to the day on which
it comes into force. There is also such a presumption
in regard to judicial acts. There is no such presumption,
however, with regard to acts of parties which are deemed
to take effect at the time when they are actually
performed "vide Clarks vs. Bradlaugh, 8 Q.B.D. (63)".
Resignation of a seat is an act of a private individual
and it takes effect at the time when it is performed
(or is deemed to be performed). If a letter is dated
as of a particular day, resignation takes effect not on
the expiry of the previous day but at the time on that
day at which the letter is written. If any time is
indicated on the letter, resignation takes effect and
the seat becomes vacant at that time. If no time is
indicated, enquiry will have to be and can be made
(as was held in the case cited above) as to the exact
time when the letter was written. There are a number of cases where Members indicated not only the dates but also the time in their letters. Notifications in such cases stated that the seats became vacant on the date either at forenoon or afternoon as the case might be.

Another alternative might be considered. When a Member hands in his letter of resignation personally to the Speaker, the resignation must take effect at the time when the letter is handed over. There are instances (e.g. resignation of the Judicial Minister of West Bengal in 1958, and that of Mr. Mudgal, in the House of the People in 1951) where Members have handed over their resignation after attending the House. It cannot be said that the seat became vacant on the expiry of the previous day, as, in that event, the Members would have become functus officio, and could not have taken part in the proceedings on the day on which he tendered his resignation.

The question can now be taken up as to whether resignation takes effect on the date which the letter of resignation bears. Article 190 says that a Member may resign his seat by writing under his hand addressed to
the Speaker (this term hereinafter includes the Chairman). The Article obviously implies that a Member must resign into the hands of the Speaker. A declaration at large addressed to the Speaker and signed by the Member will be of no effect. Such a declaration will not cause resignation even if it is passed on the Notice Board of the Legislatures. No period of notice is prescribed and the Speaker cannot refuse to accept resignation, but the fact of resignation must be communicated to the Speaker. Mere signing a letter of resignation addressed to the Speaker does not cause the seat to become vacant at the moment of signature. Something more is necessary and that is that the writing must reach the hands of the Speaker. The material point of time is, therefore, not the date of the letter but the date on which the Speaker receives it.

No precedent of the House of Commons is available because there is no provisions for a resignation of a Member there. As an analogy, however, a case of a Company Director may be cited. A Director resigned his seat by a letter dated 17th June, 1884, which was considered by the Board of Directors on 15th July, 1884.
It was held that the Director was to resign into the hands of the Company in General Meeting. The Company in General Meeting considered the letter on 31st December, 1884. It was held that although no period of notice was necessary the Company could not have declined to accept the resignation. The resignation took effect on the day when the letter was considered by the Company in General Meeting viz., 31st December, 1884, and not on the date on which the letter was written, viz. 17th June, 1884. The Director remained liable up to 31st December, 1884, although after resignation on the 17th June, he did not take any part in the Company's affairs. The following passage from the judgment will make the point clear:

The real legal question is, what was the contract of service on the one hand and the Company on the other. Had he contracted to serve until he resigned into the hands of the Company and he accepted the office which he had undertaken? It is not contended on the part of the Company that they could have refused to accept

it, but they say that the office must have been resigned into their hands to accept. They do not place themselves in the position of a sovereign, who can, if so pleased, decline to accept the resignation of a Minister or an Officer. They only say, "resignation must be made to us and not to our colleagues. Now on principle that seems to be so."

This case is, therefore, an authority for the proposition that when resignation has to be made to a particular person resignation does not take effect until it is communicated to that person. Resignation of a Member, therefore, takes effect at the time and date on which Speaker receives the letter, whatever may be the date of the letter.

Any other conclusion would result in various anomalies. The following instances may be considered:

(1) A letter of resignation is received by the Speaker but it does not bear any date. On which date then his resignation is to take effect? The Speaker cannot engage in an investigation as to when the letter was written or posted or handed over for delivery. The material time in such a case is the time when the Speaker receives the letter;
A member writes a letter of resignation dated as on a particular day, keeps it in his pocket because he is not quite decided about resignation but afterwards he posts the letter when he comes to a firm decision. It may also be that he forgets to post the letter and posts it afterwards. If the time of posting is the material time, an investigation will have to be made not only as to the fact when the letter was posted but also as to the state of the mind of the Member - whether he was undecided on the day when he wrote the letter, or whether his decision was firm but he merely forgot to post it. The Constitution does not envisage any such investigation;

A Member posts his letter of resignation but before the letter reaches the Speaker he withdraws the letter by a telegram. Can it be said that the resignation became operative and irrevocable on the date on which the letter was written or posted, or the Member may recall the letter from the post office on payment of the necessary fee so that the letter does not reach the Speaker at all? It may also be that the letter gets mislaid and is not delivered to the Speaker. In neither case can it be said that the resignation was effective on the date of posting. There will be nothing to prevent a Member to give a back date in his letter and post it. In that way he can make
his resignation retrospective in effect which he cannot certainly do;

(4) A Member sends his resignation by messenger. The messenger makes delay in delivering the letter or does not deliver the letter at all; or it may be that the letter was exacted from the Member by coercion and sent to the Speaker. In any such case, a detailed investigation would be necessary and there will be ample scope for putting up various legal pleas either in support or against resignation. The Speaker cannot surely constitute himself a court of law to determine whether there was fraud or coercion or some other legal defect on the part of the Member, the messenger or any third party. It may also be that before a letter sent by a messenger is actually delivered to the Speaker the Member states that this letter of resignation stands withdrawn; it cannot be contemplated that in such a case the letter of resignation will be effective over the express intention of the Member.

As regards the case of a Member who has given notice of resignation from a future date, it is only a notice of intention to resign on a particular date. It cannot take effect as resignation on the day on which the letter
is delivered to the Speaker. The Member may change his mind before the future date arrives and withdraw his letter of resignation at any time before the date.

It is evident, therefore, that in all such cases an investigation as to the time when a seat becomes vacant will be necessary. That cannot be in the contemplation of the Constitution. The Speaker is to give notice of any casual vacancy to the Election Commission. He cannot spend his time in investigation into the various pleas that may be raised in such circumstances.

It seems, therefore, that resignatin of a Member takes effect as soon as and not until a communication addressed to the Speaker in writing under the hand of the Member resigning his seat is received by the Speaker.

It is a debatable question as to how far a court has jurisdiction to enquire whether a letter of resignation is a void document on the ground that it is forged or obtained by force or fraud and to direct the Speaker to allow the member to continue to take the seat after declaring that the member has not lost his seat by the alleged resignation. Such a question arose in the case of Thankama v. Speaker (A.I.R.1952, T.C. 166) and the
Travancore High Court held that the resignation under sub-clause (b) of clause (3) of Art. 101 must be a voluntary act of the member and that, accordingly, a civil court has the jurisdiction. But if the resignation tendered by a sitting member be considered to be a part of the 'business of the house' it may be argued that the Court cannot *prima facie* have any jurisdiction in it under Art. 122(2). The judgment of the Travancore High Court may be considered to be open to criticism from this point of view. For, the Speaker or Chairman is an officer in whom powers are vested as contemplated in Art. 122(2) of the Constitution.

The House may declare a member's seat vacant if he absents himself without leave of the House for more than 60 days. In computing the period of 60 days no account is taken of days during which the House is prorogued or adjourned for more than four consecutive days.\(^42\)

The procedure for asking for leave of absence is laid down in the rules of the various legislatures. The usual procedure is to read the letter asking for leave of absence in the House and if no one objects, the leave

\(^42\) Arts. 101, 190.
is deemed to have been granted. If there is any objection, the matter is put to the vote of the House without any debate or discussion.

Party organisation and Whips

As is well-known, the members of a legislature are usually divided into two distinct blocks - the Government and the Opposition. Each block may be composed of a single party or a combination of several parties or groups. Although the party system has an important bearing on the work of the Legislature, the standing orders or the rules of procedure do not formally recognise the parties or party officials as such; on the other hand, the members of the Government and other members whether supporting the Government or in the Opposition are theoretically treated as on the same footing. The respective rights of the Government Party and the Opposition in the arrangement of the business of the House and allocation of time etc. have been discussed in their proper places.

Leader of the House

In India the leader of the majority i.e. the Government Party, usually the Prime Minister or the Chief Minister,
as the case may be, is known as the Leader of the House of which he is a member. But any other member, usually a Minister, may be nominated by the Government Party to be the Leader of the House and that is always done in the House of which the Prime Minister or the Chief Minister is not a member. In the House where the Prime Minister or the Chief Minister is a member such a course is adopted only when he requires to be relieved of a part of his burden namely the day to day management of the sittings of the House but nevertheless nothing can deprive him of the ultimate responsibility. The Leader of the House is the Chief spokesman on behalf of the Government in the House and it is he who usually keeps the House informed about the Government's intentions.

The title of Leader of the House appears in almost all the Rules of Procedure of Legislatures in India though the term has not been defined. The functions of the office are, of course, the same as in the British Parliament, i.e., suggesting and in a great degree fixing the course of all principal matters of business viz. arranging business with the Chief Whip, settling procedure and distributing time with the Opposition and giving assistance to the Speaker or the Chairman in the
maintenance of order and decorum, supervising and keeping in harmony the actions of other Ministers and members, taking the initiative in matters of ceremonial procedure and advising the House in every difficulty as it arises. The term does not appear to have been established in the British Parliament before the middle of the last century.

May says⁴³ :—

"The member of the Government who is primarily responsible to the Prime Minister for the arrangement of Government business in the House of Commons is known as the Leader of the House. He controls arrangement of business in that House while the programme and details are settled by the Government Chief Whip.

When each week's programme of business has been arranged the Leader of the House states the business for the following week in answer to a question put to him at the end of Questions on Thursdays by the Leader of the Opposition, and, whenever necessary, makes further business statements from time to time. He may also move procedural motions relating to the business of the House.

⁴³ May, pp. 260-61.
In the absence of the Prime Minister the Leader acts as spokesman of the House on ceremonial and other occasions; and at all times, being responsible to the House as a whole, he "advises the House in every difficulty as it arises."

The leadership of the House is not a statutory office nor is the Leader formally appointed by the Crown; for these reasons the post has usually been held together with another office. Until 1917 the Prime Minister, if a member of the House of Commons, also acted as leader of the House; if he was a member of the House of Lords the duties of the Leader of the House of Commons were performed either by the First Lord of the Treasury or by the Chancellor of the Exchequer. In 1917, Mr. Lloyd George appointed Mr. Bonar Law as Chancellor of the Exchequer and Leader of the House, but the practice of having a separate Leader of the House while the Prime Minister was in the House of Commons was not continued between 1922 and 1942. It has, however, been the regular practice since the latter date."

Leader of the Opposition

When the Opposition consists of a single party, the leader of that party is known as the Leader of the Opposition. When the Opposition consists of several parties, the parties may by agreement among themselves nominate a member to be the Leader of the Opposition.
The expression 'Leader of the Opposition' has been defined in the Ministers of the Crown Act, 1937, as 'the Leader in that House of the Party in Opposition to His Majesty's Government having the greatest numerical strength in the House.' If any question arises as to which party is the party in opposition having the greatest numerical strength, the Speaker has been given the power to decide the question. The prevalence on the whole of the two-party system in the House of Commons has, as pointed out by May, usually obviated any uncertainty as to which party should be recognised as the official Opposition. The test of determining which party has a right to be called the official Opposition and its leader, the Leader of the Opposition, has been laid down by Mr. Speaker Pitsory as follows: 'It must be 'a party in Opposition to the Government from which an alternative Government could be formed.'

May has paraphrased this as follows: 'It is the largest minority party which is prepared in the event of the resignation of the Government, to assume office.'

Therefore, where there are more parties in Opposition than one, the party which is numerically the largest of

45 May, p. 260.
them all cannot necessarily be recognised as the Official Opposition. The other test must also be satisfied, that is to say, it must be one from which an alternative Government may be formed. In 1935, when there were more than two parties in the House of Commons, the Conservatives having 387 members, the Labour Party 154, the National Liberals 33 and the Liberals 17, it appears that the Labour Party was recognised as the official Opposition and its Leader, Mr. Attlee, was the Leader of the Opposition. On the other hand, in 1940, a small party led by Mr. Maxton, when there was no other party in opposition, was not recognised as the official Opposition. Three things are, therefore, necessary before a party can be recognised as, and given the privileges referred to above as of, the official Opposition. It must be an organised Opposition in the House; it must have the largest numerical strength and it must be prepared to assume office. Where there are numerous small parties or groups, it cannot always be said that these three tests are satisfied. In such circumstances the party which has the largest numerical

strength among the Opposition Parties need not necessarily be recognised as the official Opposition and its leader given the status of the leader of the Opposition unless all the parties unite as a single Parliamentary Opposition Party. And it is quite reasonable in that the other Opposition Parties would be deprived of the right of selection of subjects for debates and other privileges of the Opposition Parties.

This view has been taken in the West Bengal Legislative Assembly. It is understood that in the House of the People the following principles are followed in recognising the official Opposition.

(1) Unity of ideology and the programme of the members who form a party or group.

The function of a party is not merely to have a fluid partnership of individuals or members for the purpose of opposing Government. For a party to pull its weight in a legislature, it should have a distinct

47 The Table, vol.xxiii, pp. 153-4.
49 In accordance with these principles the Speaker has recognised no one as a party in the House of the People. He has, however, recognised the Communist Block as a Group as they satisfy all the three conditions laid down above. The Leader of the Group has not been recognised as Leader of the Opposition.
ideology and programme of its own whether on the political, economic or social side. In this view a group of independents can never be a homogenous party capable of developing into a well-knit Opposition, as it would never stand the chance of forming the Government in an emergency. The Opposition should have all potentialities of enlarging their numbers from election to election.

(2) Number of members of party or group.

A Parliamentary party should be able to command a minimum strength which will place it in a position to keep the House. In other words, the number of members to form a party should not be less than the quorum fixed to constitute a sitting of the House.

(3) Party organisation.

A party should have a party organisation not only inside the House, but outside the House, which is in touch with the public opinion on all important issues before the country.

A group has to satisfy all the above conditions except that the number of members to form a group has been fixed at 30 in the House of the People which consists of more than 500 members.
In England the Leader of the Opposition gets a salary under the Ministers of the Crown Act, 1937. In West Bengal an amendment was made in 1957 in the Legislative Assembly (Members' Emoluments) Act, 1937 providing for the payment of a salary to the Leader of the Opposition. The Leader of the Opposition is a private Member. He owes no allegiance to the Government. No action of his can in any way implicate the Government. He is responsible only to his constituents and to the Members from whom he derives his position. He is under a special obligation to defend the rights and privileges of private Members particularly the right of every Member to express his opinion freely on all matters of public policy.

Whips

The parties inside the Legislature have elaborate organisations of party members and officials. The officials who are closely connected with the business of the House are the Whips. Each party has its own Whips, one of whom acts as the Chief Whip. The Government Chief Whip is usually a member of the Government - a junior Minister or a Parliamentary Secretary. There seems to be some misconception in

India about the status of the Chief Whip. The Chief Whip is only a party official and as such has no official status in the Government although he may be a junior Minister or a Parliamentary Secretary. This misconception has led some State Governments to have the Government Chief Whip nominated by the Governor. The Governor as the Head of the Executive Government has no party affiliation and it would be improper for him to nominate the Chief Whip of a Party. The main function of the Whips when the office came into existence was to shepherd the party members to support the Government or the Opposition, as the case may be, when voting was demanded. And the word 'Whip' is said to have been borrowed from the expression 'whipping in' used in hunts.

In modern times, however, the functions of the Whips have become much more elaborate and onerous. They have been succinctly described by May as follows:

'The efficient and smooth running of the parliamentary machine depends largely upon the Whips. Certain duties are common to Whips of all parties, but by far the most important duties devolve upon the Government Chief Whip. He is concerned with mapping out the time of the session;
for applying in detail the Government's programme
of business; for estimating the time likely to be
required for each item, and for arranging the
business of the individual sitting. A statement
is made in the House, usually on Thursday, of the
business to be taken in the following week. In drawing
up the programme he is limited to a certain extent by
the standing orders, which allot a modicum of time to
private Members; and by statute law or standing orders,
which require, or may require, certain business to be
completed by specific dates; as well as by certain
conventions which make it obligatory upon him to consult
the Whips of Opposition Parties and even to put down
items of their selection. In carrying out his duties,
he is directly responsible to the Prime Minister, as
Leader of the House. It is also part of his duties to
advise the Government on parliamentary business and
procedure, and to maintain a close liaison with Ministers
in regard to parliamentary business which affects their
departments. He, together with the Chief Whips of other
parties, constitutes what is known as business arrangements
and other matters which concern the convenience of Members
as a whole.
The duties which are common to whips of all parties are the following: They keep their Members supplied with information about the business of the House, secure the attendance of Members, arrange for their Members who are unable to attend divisions to "pair" with Members of the opposite side of the House so that their votes may be neutralised and lost, and supply lists of Members to serve on standing and select committees. They also act as intermediaries between the leaders and rank and file of their parties in order to keep the former informed as to the trend of party opinion. 51

The notices which are sent out to party members by the Whip informing them about important debates and votes in which they should be present are also known as 'Whips'. The importance of debates is indicated by lines (one, two or three) with which a whip is underscored and it is assumed that a member receiving a whip would support the policy of the party. To ignore a whip without sufficient reason, e.g. illness, is considered to be a serious offence against party discipline. Whips are not issued for all debates - sometimes members are allowed a 'free vote'. To decline a whip is a method of resignation from a party and withdrawal of a whip is a means of expelling a member from a party.

51 May, p. 262.