

ANTI-CORRUPTION HELPDESK

PROVIDING ON-DEMAND RESEARCH TO HELP FIGHT CORRUPTION

INELIGIBILITIES ARISING FROM CRIMINAL LAW DECISIONS

QUERY

How do different countries regulate ineligibilities for elected office arising from criminal law decisions, particularly those related to corruption offences?

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CAVEAT

This answer is an update of a previous query from 2012, [which is available here](#).



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SUMMARY

Ineligibility to stand for office typically arises from the holding of certain posts or the exercise of certain activities. It may also arise from an individual civil law or criminal law decision.

In some countries, having a criminal record prevents a person from being eligible for public office, and committing a serious criminal offence while a public servant can result in removal from office. In other states, specific disqualifications to stand for elections arise from corruption or failure to comply with electoral laws. In a third group of countries, the law has set out only “positive” eligibility criteria to be met by candidates. It is left to the voter to judge whether to elect a candidate who has criminal record.

While this answer focuses on the issue of ineligibility, it also briefly considers removal from office and immunities. Clear rules on (i) removal from office, (ii) eligibilities and (iii) immunities from prosecution can help to prevent individuals convicted of a crime from becoming or continuing to serve as a public servant.

1 INTRODUCTION

Ineligibilities

Many countries have set requirements determining who is entitled to run for office. These requirements usually involve age, nationality and place of residence, among others. Most countries have also established disqualifying conditions or “ineligibilities” which prevent candidates judged to be unsuited to public office from standing for election.

Ineligibilities may arise from the holding of certain posts or the exercise of certain activities. For example, in many countries, officers of the armed and security forces, magistrates of the constitutional court, or members of the audit court are not allowed to run for elections. Ineligibilities can also arise from an individual civil law or criminal law decision.

Removal from office

Countries can establish rules defining in which circumstances members of the parliament can be removed from office. In some countries, sentences to a term of imprisonment of a determined period automatically have as a consequence that the person concerned is no longer eligible for election and is expelled from parliament, as in the UK and Canada. Removal from office may also take place by a decision of the parliament itself. In some countries, such as Finland, the parliament has the power to expel members who are facing criminal charges or are convicted of a crime.

Immunity

The majority of countries have established mechanisms to protect members of the parliament, including non-liability for opinions expressed in the performance of their duties and inviolability, prohibiting detention or legal proceedings against the parliamentarian without the authorisation of the parliament. Parliamentary immunity aims to guarantee that parliamentarians can perform their functions without suffering pressures from other branches of government or stakeholders.

With regards to inviolability rules, it generally means that members of the parliament cannot be arrested or prosecuted, including for acts that are not carried out

as part of their function, unless the parliament gives authorisation. In the majority of countries, this type of immunity lasts only for the period of the legislative term and is not valid in the cases where the parliamentarian is caught in the act of wrongdoing (European Parliament 2015).

Some countries have restricted their immunity rules to avoid misuse by parliamentarians – instead of prohibiting detention and prosecution, the law establishes certain privileges, such as that members of the parliament can only be judged by a superior court, as is the case in Colombia.

2 INELIGIBILITIES ARISING FROM CRIMINAL LAW DECISIONS

Many countries differentiate between the right of those with a criminal conviction to (i) vote in elections in their capacity as a private citizen (active suffrage), and (ii) the right to stand for or maintain an elected office (passive suffrage).

Political disenfranchisement for people serving prison sentences is common practice in the UK, Armenia, Bulgaria, Estonia, Georgia, Hungary, New Zealand and Russia (Travis 2015; New Zealand Parliamentary Counsel Office 2016).

Most western democracies, however, permit prisoners to vote on the basis that disenfranchising them would impinge on their rights as citizens or human beings (Ewald & Rottinghaus 2014; Human Rights Watch 1998; Bowers & Pruehs 2009; Young 2010).

Some countries, like France and Germany, have provisions for limited electoral disqualification depending on the nature of the crime committed, particularly those which target the state’s democratic order (Horne & White 2015). In other countries, notably the United States, some prisoners are prohibited from voting even after their release from prison (Horne & White 2015).

It is more common for countries to place restrictions on passive suffrage, though here too some make the case that embedding restrictions on political candidacy into constitutions and electoral legislation may censor the range of political opinions citizens can

express and entrench in legal instruments about which community opinion may change (Holland 2003). A good example of this is Nelson Mandela; sentenced to life imprisonment in 1964, he was later elected president of South Africa.

In any case, one of the most frequent conditions preventing a person from being eligible for office is a criminal record. Countries often consider factors such as severity of the crime, the time that has elapsed since the crime was committed, as well as the nature of the punishment. Some countries, notably Canada, France and the United Kingdom, have also established specific ineligibility conditions for election to public office relating to corrupt practices.

In New Zealand (New Zealand Electoral Commission 2014) and Zambia (Inter-Parliamentary Union 2016a), conviction for a corrupt or illegal electoral practice in the previous three to five years disqualifies citizens from the electoral register. As this is in itself a precondition for standing for election, those found guilty of corrupt electoral practices can exercise neither active nor passive suffrage.

The period of ineligibility for public office may be prescribed by law, as in Canada, where a person may be disqualified from running for election for a period of seven years following the date of conviction in cases of corruption.

Alternatively, the duration of disqualification can be decided on a case by case basis, where the judge will take into consideration the specific circumstances and the gravity of the offence, as the case in Germany. In a third group of countries, the ineligibility will last for the period of the sentence, which is the case in Ireland and Spain, for example (Group of States against Corruption 2009a & 2009b).

Other countries have taken a different approach and have not established any causes for ineligibility. Countries which only require candidates to comply with “positive” eligibility criteria, such as those based on age and citizenship, include Sweden and the United States. In other countries, such as Finland, the lack of ineligibility criteria does not preclude parliament from deciding whether an elected candidate convicted of a crime is still worthy of the trust and respect required.

3 COUNTRY EXAMPLES

Countries where persons convicted of a crime are disqualified from standing for elections

Australia

Laws restricting the ability of criminals to stand for office exist in every Australian jurisdiction, although they vary widely by state and territory. Thus, while in Western Australia a person convicted of a felony is barred for life from holding public office, in Queensland convictions for certain kinds of criminal activity, such as political bribery, prevent a person from standing for office for a fixed length of time, even if they are not serving a prison sentence. [A useful overview](#) is provided by Holland (2003).

At the national (Commonwealth) level, any person who has been convicted and is under sentence, or subject to be sentenced, for any offence punishable by imprisonment for one year or longer is considered ineligible to stand for elections until the sentence has been served (Australian Electoral Commission 2016).

Bhutan

Bhutan democratised recently, holding its first elections in 2008. The 2008 Bhutan Election Act stipulates that candidates are disqualified from standing for election if they have ever been sentenced to imprisonment, found guilty of corrupt practices at an election, dismissed from either public service or the corporate sector, failed to lodge an account of their election expenses within the deadline, or attempted to raise money from private sources to finance their election campaign (Government of Bhutan 2008; Inter-Parliamentary Union 2016b).

Brazil

In Brazil, the law establishing who is entitled to run for office is the result of a citizens’ initiative bill. In 2008, the Brazilian civil society organisation Movimento de Combate à Corrupção Eleitoral (Movement Combating Electoral Corruption) gathered 1.6 million signatures for the petition, which was referred to the legislature and signed in 2010.

The *Lei da Ficha Limpa*, or [Clean Record Law](#), disqualifies those convicted of racism, homicide, rape, drug trafficking and misuse of public funds by a second-level court (even if an appeal is still pending), as well as those who resigned to avoid impeachment, from holding political office for a period of eight years.

Politicians engaged in vote-buying, abuse of power and electoral manipulation are also considered ineligible for a period of eight years. The law is retroactive, meaning that it applies to those who already have a criminal history (Presidency of Brazilian Republic 2010). It also enables prosecutors and political parties to officially challenge a candidate's legitimacy via regional electoral courts. To facilitate this process, the attorney general's office established a [System for Investigations of Electoral Accounts](#), which tracks convictions for those practices which disqualify candidates.

Due to legal challenges, the law was only applied for the first time at a national level during the 2014 general election, when regional prosecutors used the law to challenge the candidacy of over 430 candidates. The most common grounds for challenging candidacies were, in descending order, related to accounting irregularities, previous convictions and ongoing trials, and allegations of unjust enrichment (Americas Society/Council of the Americas 2014).

Brazil has, however, ongoing and serious challenges around the issue of parliamentary immunity. The [1988 Brazilian constitution](#) provides parliamentary immunity to members of the Chamber of Deputies and the Senate extending to crimes committed outside a parliamentarian's official duties. Moreover, even when caught in flagrante, arrests can be overruled by the respective parliamentary chamber.

The significance of these immunity provisions became apparent in August 2016, when the Senate impeached President Rousseff of budget manipulation, but refused to strip her of her right to run for office or be nominated to a government post, thereby shielding her from prosecution (Alves 2016; Margolis 2016).

Canada

In Canada, there are explicit provisions in electoral legislation which render certain people ineligible to run for election to the House of Commons. Under the

Canada Election Act (Government of Canada 2016; Elections Canada 2016):

- Any person who is convicted of having committed an offence that is an illegal practice (for example, exceeding election spending limits, submitting false statements, or failing to file an election finance report) is not entitled to be elected or sit in the House of Commons for five years after the date of the conviction (Section 502 [1], Canada Elections Act).
- Any person who is convicted of a corrupt act (for example, offering bribes or accepting gifts and advantages, among others) is not entitled to be elected for seven years after the date of conviction (Section 501 [2] Canada Elections Act).
- A person who is imprisoned in a correctional institution is ineligible to stand for election.

In addition, Section 750 of the criminal code establishes that if a serving member of the Senate or House of Commons is convicted of an indictable offence and sentenced to a term of imprisonment of two years or more, that member may be expelled from parliament. He or she is not entitled to be elected, or to sit as a member, or to vote in the Senate or House of Commons (Robertson & Virgint 2012).

France

In France, the following groups of people are ineligible to stand for office (Group of States against Corruption. 2014a):

- Any person sentenced to imprisonment by a criminal court, which, in addition to the handing down a custodial sentence, determines on a case by case basis whether the offender should also be deprived of their political rights for a fixed period. Disenfranchisement is therefore not automatic upon imprisonment, but rather applied as an additional penalty by the court. Under Article 131-26 of the French penal code, offenders sentenced to imprisonment for felonies may be disenfranchised for up to ten years, while those serving a custodial sentence for misdemeanours may be disenfranchised for up to five years (Legifrance 2016a).

Until 2011, when Article 130 of the Electoral Code was amended (Legifrance 2016b), individuals whose conviction included a provision depriving

them of the right to be on an electoral roll for a certain period were also deprived of the right to run for the French National Assembly for double that length of time. This is no longer the case.

- Any person who has contravened the regulations governing the financing of elections. Those found to have violated Articles 118-3 and 118-4 of the Electoral Code by exceeding the limit on electoral expenses, not filing their campaign accounts or submitting fraudulent campaign finance reports may be declared ineligible to stand for election by the Constitutional Council or an administrative court for a period of up to three years under Article 128 of the Electoral Code (Legifrance 2016c & 2016d). Articles 118-3 and 118-4, however, are not retrospective in that they have no effect on mandates acquired prior to the date of the decision and therefore cannot be used to remove public officials from office (Legifrance 2016e).
- Members of the National Assembly who have failed to submit a declaration of assets in the appropriate form and within the deadline. Since the formation of la Haute Autorité pour la transparence de la vie publique in 2013, deputies of the National Assembly are required to file asset declarations to this body under Article 135-1 of the Electoral Code (Legifrance 2016f). Any deputy failing to do so can be compelled to resign by the Constitutional Council under Article 136-2 (Legifrance 2016g) of the Electoral Code and is then ineligible for election for a period of one year under Article 128 (Legifrance 2016d). Where deputies fail to declare a substantial part of their assets or interests, or provide a false valuation of their assets, they are subject to the removal of their civic rights under Article 131-26 and banned from holding public office under Article 131-27 of the French Penal Code, in addition to facing up to three years' imprisonment and a €45,000 fine (Legifrance 2016f). A March 2016 amendment to the Electoral Code (LO135-2) makes asset and income declarations available to the public on request (Legifrance 2016h).

Until 2010, under Article 7 of the Electoral Code any person convicted of offences against the public administration (accepting bribes, illegal promotion of interests, embezzlement or misappropriation under

Articles 432-10 to 432-16 and 433 of the Criminal Code) was considered ineligible for a period of five years from the date of the conviction. In 2010, however, the Constitutional Council struck down Article 7 as unconstitutional (Legifrance 2016i).

Germany

In Germany, candidates can be declared ineligible from running for elected office where a court has found them guilty in the following circumstances:

- Under Article 45 of the penal code, persons sentenced to at least one year in prison automatically lose the right to hold public office and stand for election for a period of five years. The ban only begins from the day the custodial sentence has been served. In addition, a court may additionally remove an offender's rights to active suffrage for a period of two to five years. After serving half of the sentence, a court may decide to reinstate the offender's political rights (Bundesministerium der Justiz 2016).
- Custodial sentences of at least six months for crimes against the fundamental constitutional principles (Article 92a), the disruption of the electoral process (Article 108c) and corruption in public office (Article 358)¹ can also be accompanied by a court order to remove the offender's right to hold public office, vote and be elected in public elections. In this case, the judge will analyse the specific circumstances and decide whether the disqualification criteria apply and for how long.

In addition, MPs can be retrospectively removed from public office if (i) the attainment of their office is shown to be invalid, (ii) the election result is reviewed and revised, or (iii) the MP loses one of the prerequisites for permanent eligibility, such as if they are convicted of a criminal offence and are handed down a custodial sentence of at least one year (Group of States against Corruption 2014b). As in many countries, after an elected official has left office, their immunity from prosecution expires, and they are able to be tried for alleged crimes committed during their time in office (World Bank Group 2016a).

¹ Corruption offences in public office include bribery of voters under Section 108b, active and passive bribery of members of parliament under Section 108e and passive bribery of public

officials under Section 332 of the German Penal Code (Bundesministerium der Justiz 2016).

India

There are a number of provisions for disqualifying a candidate from contesting elections to the national and state parliaments in India, including those arising from criminal law decisions. These are listed under Article 8 of the Representation of the People Act (Lok Sabha n.d.), which stipulates the offences which render a candidate ineligible for election; these include bribery and exercising undue influence at an election. A person sentenced to two or more years in prison for *any* offence is disqualified from standing for election to national or state parliaments from the date of conviction and for the six years following their release (Electoral Commission of India 2014).

In addition, Article 9 of the Representation of the People Act further specifies that anyone dismissed from government employment for corruption is disqualified from standing for election for five years, while Article 10 empowers the Election Commission to disqualify those who fail to submit election expenses for three years (Lok Sabha n.d.).

A recent ruling by the Indian Supreme Court stipulated that those holding public office are dismissed with immediate effect after any criminal conviction, are prohibited from contesting elections and forbidden from casting their vote from prison under any circumstances (First Post India 2013).

The success of these measures to reduce the number of criminals in politics is, however, doubtful, especially as disqualification only enters force from the date of conviction. Moreover, disqualification from parliament is suspended where an MP or a candidate has an appeal pending in a higher court. The current national parliament has the highest ever proportion (34 per cent) of MPs with criminal cases pending against them. One report found that those candidates with pending criminal charges were twice as likely to be elected as those without (The Hindu 2014).

New Zealand

In New Zealand, in order to register as a candidate, one must meet the following conditions: be enrolled as a voter, be a New Zealand citizen and comply with rules on election donations, expenses, advertising and broadcasting.

According to [session 80 of the Electoral Code](#) (New Zealand Parliamentary Counsel Office 2016), the main grounds of disqualification for enrolment that could affect eligibility to be a candidate are:

- if a person is sentenced to imprisonment
- if a person has his or her name on the Corrupt Practices List for any district

Sri Lanka

According to Article 89 of the Sri Lankan constitution, citizens lose the right to vote if they have been imprisoned for six months or more in the preceding seven years, or have a conviction for a corrupt or illegal practice connected with elections (Sri Lankan Parliamentary Secretariat 2015).

In addition, they are ineligible to stand for public office if they have been found guilty of accepting a bribe or gratification offered with a view to influencing their judgement as an MP in the preceding seven years, or have in the past five years been sentenced under Public Bodies Prevention of Corruption Ordinance (Sri Lankan Parliamentary Secretariat 2015; Inter-Parliamentary Union 2016c).

United Kingdom

Those serving a prison sentence in the United Kingdom are prohibited from voting (Horne & White 2015). However, in the UK, the rights to active and passive suffrage are decoupled; a person can run for office even if they are not entitled to vote (The UK Electoral Commission 2015). To prevent those serving custodial sentences from standing for election, The Representation of the People Act 1981 (available [here](#)) established restrictions on the right to stand for election, including making ineligible those people:

- who are serving a prison sentence of more than one year
- who have been convicted, or even reported guilty of corrupt or illegal electoral practices, or offences relating to political donations

The disqualification for membership of the House of Commons lasts for the duration of the sentence.

In the UK, legislators enjoy parliamentary privilege providing civil immunity for libel while they are in

parliament, but do not have immunity from criminal investigation or prosecution. Cabinet ministers in the UK do enjoy limited immunity from prosecution to the extent that their conduct falls within their official capacity, but can stand trial for actions that exceed the scope of their office (World Bank Group 2016b).

Convicted MPs automatically lose their seat to prevent them from continuing with their parliamentary duties, and they are not entitled to vote in general elections (Myttenaere 1998). In the 2009 expenses scandal, many of the implicated MPs facing custodial sentences resigned to pre-empt their disqualification as MPs under the Representation of the People Act 1981 (The Telegraph 2009).

Countries where no such disqualification is in place

Denmark

Any person who is entitled to vote in parliamentary elections (18 years of age, legal capacity and a permanent resident in the country) is eligible for election to the *Folketing* (Danish parliament), unless he or she has been convicted of an act which, in the view of the public, makes him or her unworthy to become a member of parliament (Section 30 of the Danish Constitution). Under Section 33, the decision of whether a MP has lost eligibility is made by the parliament (University of Bern 2010).

However, as such a pronouncement is made after the votes have been counted, the opinion of the *Folketing* that a candidate is not a suitable representative cannot be used pre-emptively to prevent a citizen from standing for election (European Parliament 1997).

Finland

In Finland, since the amendment of the penal code in 1995, offences under the code no longer lead to ineligibility. As a result, the right to candidacy is granted to all eligible voters, with the only requirement being that he or she is at least 18 years old. Nevertheless, if an elected official has been convicted of a deliberate crime or an electoral offence, parliament can, having consulted the Constitutional Law Committee, terminate the MP's term of office by

a two-thirds majority vote (Group of States against Corruption 2012).

Sweden

In Sweden, a criminal conviction is not an impediment to stand for elections. According to the law, any person who is entitled to vote is eligible for a seat in the Swedish parliament. This means that every Swedish citizen, above the age of 18, who is or has ever been domiciled within the realm, is entitled to vote and therefore entitled to run for office.

Once in office, MPs cannot resign without parliament's consent. If a serving parliamentarian commits a crime with a mandatory sentence of at least two years, an MP is considered to be unfit for office and may be dismissed by a court decision, under Chapter 4, Article 11 of the Instrument of Government and Chapter 20, Article 4 of the penal code.

A report by the Group of States Against Corruption (2013) mentions two cases in which courts have stripped MPs of the mandate under these provisions. In one instance, an MP was sentenced for fraud in 1996, in the other, an MP was convicted for obstruction of justice in 2001.

United States

The three qualifications to be eligible to become a representative in Congress are set out in the United States Constitution: age (they must be at least 25 years old); US citizenship (at least seven years); and inhabitancy (one must be an "inhabitant" of the state from which they chose to represent "when elected"). The constitution does not establish any disqualification criteria, including for serious crimes, thus members of Congress are entitled to attend and vote in sessions of Congress even when serving a prison sentence. Voters are the ones to decide whether someone with a criminal record is fit for public office (Group of States Against Corruption 2011).

Nonetheless, Congress does have a seldom-invoked prerogative to expel a member felt to be unsuited to public office. In a rare case in 2002, Congressman Traficant, convicted of bribery and other corruption charges, was expelled from Congress, and was later sentenced to eight years in prison. This in itself was no obstacle to standing for re-election, and from his

prison cell, Traficant ran as an independent in the next election, securing 15 per cent of the vote (BBC News 2002; Squitieri 2002).

Individual states are free to set restrictions on eligibility as they see fit; indeed, as voter qualifications are not laid out in the constitution, some states ban prisoners from voting even after they have served their sentence, although bizarrely this would not prevent them from standing as candidates (Maskell 2002).

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