

## A REMINDER ABOUT UNFETTERED CONSTITUTIONAL POSTS

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Two recent comments of the Supreme Court of India will have direct bearing on the concept of the independence of various constitutional authorities in India. In a hearing of the ‘Sena versus Sena’ case, the Court expressed its “serious concern” over the active role being played by Governors in State politics, observing that Governors becoming part of political processes is disconcerting. And, earlier, taking an important step in ensuring independence of the Election Commission of India, the Court divested the executive of its sole discretion in appointing the Chief Election Commissioner (CEC) and Election Commissioners (ECs) by forming a committee to suggest suitable names to man these constitutional posts.



### Need for independent institutions

A democracy requires a system of checks and balances to prevent the arbitrary use of power by the elected government of the day. India’s democracy provides for various constitutional authorities such as the Public Service Commission, the Comptroller and Auditor General of India (CAG), the ECI, the Finance Commission and the National Commissions for Scheduled Castes (SC), Scheduled Tribes (ST) and Backward Classes (BC), etc. The Constituent Assembly of India had recognised the need for such independent institutions to regulate sectors of national importance without any executive interference. It is necessary that such constitutional bodies are provided with complete independence to enable them to function without fear or favour and in the larger interests of the nation. It is towards this concept of clothing them with independence that the Constitution provides for the manner in which individuals heading these institutions are to be appointed.

An essential attribute of independence is about not being influenced by any vested interest and the ability to withstand pressure from the executive. While empowering the President of India to appoint all constitutional authorities, the Constitutionmakers had kept in mind those institutions whose independence is of paramount importance to the country and the manner in which the independence of these authorities could be safeguarded from the whims of the executive. A study of various provisions in the Constitution regarding India’s constitutional authorities is revealing.

## Appointment by the President to various constitutional posts

*The Constitution-makers have used simple words such as ‘shall be appointed by the President’ in the appointment of—*

1. Prime Minister (Article 75),
2. Attorney-General for India (Article 76),
3. Chairman and other members of the Finance Commission (Article 280),
4. Chairman and other members of the Public Service Commission (Article 316) and
5. Special Officer for Linguistic Minorities (Article 350B).

*Article 324 provides that the President will appoint the Chief Election Commissioner (CEC) and Election Commissioner (ECs) ‘subject to any law made on their behalf by Parliament’.*

*However the words ‘shall be appointed by the President by warrant under his hand and seal’ are used while authorising the President for appointment of—*

1. Judges of Supreme Court and the High Court (Articles 124 and 217)
2. CAG (Article 148)
3. Governor (Article 155)
4. Similar words have been used in Articles 338, 338A and 338B authorising the President for appointing Chairman and members of the National Commissions for SCs, STs and BCs. However, the original Article, Article 338, had stated that ‘there shall be a Special Officer for the Scheduled Castes and Scheduled Tribes to be appointed by the President’.

## N. Gopalaswami and Ors vs The Union of India

The Supreme Court has held, in N. Gopalaswami and Ors vs The Union of India) that the President acts on the aid and advice of the Council of Ministers, with the Prime Minister as the head in all matters which vests in the executive. However, in cases where the appointment of a particular constitutional authority is to be kept independent of the executive, the question arises whether such an interpretation would be in line with the thinking which prevailed during the relevant Constituent Assembly debates.

### ‘Unrestricted and unfettered’ choice

In the draft Constitution, the article for appointment of the CAG (Article 124) had provided that ‘There shall be an Auditor General who shall be appointed by the President ....’ While moving an amendment to this Article “That in clause (1) of Article 124 after the word ‘Present’ [‘President’] the words ‘by warrant under his hand and seal’ be inserted”, the Constituent Assembly had discussed that “the AuditorGeneral, like the Chief Justice of the Supreme Court, is to be appointed by the President and therefore it is essential that the words ‘by warrant under his hand and seal’ should be introduced”. The Constituent Assembly further discussed that ‘The AuditorGeneral should be always independent of either the legislature or the executive. He is the watchdog of our finances, his position must be made so strong that he cannot be influenced by anyone, howsoever great he may be. From that point of view I am very glad that certain amendments have been moved whereby the position of the AuditorGeneral has been made very strong.’

On the same day, while initiating the amendment for the Article providing for a Governor (Article 131 of the draft Constitution) it was moved to substitute the following that: ‘The Governor of a State shall be appointed by the President by warrant under his hand and seal’. The Constituent Assembly discussed the following: “To say that the President may nominate from a panel of names really means restricting the choice of President. It gives power into the hands of the Legislature. It is necessary, Sir, that the President should be free from the influence of the Legislature... So I say the choice of the President should be unrestricted and unfettered....” Both amendments were passed.

For appointments to be made by the President (Articles 75, 76, 280(2), 316 and 324(2)), the Constitution provides for certain conditions to be fulfilled by those who may be considered for such appointments. In these articles, the words used are – ‘To be appointed by the President’, and as such the President must act on the advice of the Prime Minister after ensuring that the requisite qualifications are fulfilled.

### **A special status**

It is pertinent to keep in mind that the Constitution affixes the phrase “by warrant under his hand and seal” only to refer to appointment to positions (Judges, the CAG and the Governors) where it assigns a special status to distinguish them from other constitutional positions.

Constitutional authorities such as the Judges of the Supreme Court and the High Court and the CAG of India are to be kept free from political or executive pressure. Whereas appointment of judges and the ECs have been made free from the influence of the executive, the need to set up a well defined criteria and procedure for the appointment of the CAG of India remains keeping in view the intention of the framers of the Constitution, as evident from the Constituent Assembly debates.

### **Way forward**

The process of selecting a person to be appointed as the CAG of India should begin by appointing a committee consisting of the Speaker of the Lok Sabha, the Chief Justice of India, and the Chairman of the Public Accounts Committee to shortlist names to be considered for appointment as the CAG of India; and a panel of three names should be forwarded to the President for him to make the final selection as in Article 148 of the Constitution of India.

#### **Constitutional bodies:**

These are the institutions which are mentioned in the constitution of India and hence they are considered to be independent and more powerful. For example Election Commission, Union Public Service Commission and National Commission for Scheduled Castes and Scheduled Tribes etc.

#### **Non-constitutional bodies:**

Non-constitutional or extra-constitutional bodies are the same. These institutions are not written in the constitution of the country, that is, for their formation, the central government has to pass a bill in the parliament, so such bodies are non-constitutional bodies, which are formed to fulfill a particular purpose, for example, the Central Bureau of Investigation (CBI) is not a constitutional body as it was established in 1963 by a resolution of the Ministry of Home Affairs, NITI Aayog, National Development Council etc.

### Expected Question

**Que. In India, other than ensuring that public funds are used efficiently and for intended purpose, what is the importance of the office of the Comptroller and Auditor General (CAG)?**

1. CAG exercises exchequer control on behalf of the Parliament when the President of India declares national emergency/financial emergency
2. CAG reports on the execution of projects or programmes by the ministries are discussed by the Public Accounts Committee.
3. Information from CAG reports can be used by investigating agencies to press charges against those who have violated the law while managing public finances.
4. While dealing with the audit and accounting of government companies, CAG has certain judicial powers for prosecuting those who violate the law.

Which of the statements given above is/are correct?

- (a) 1, 3 and 4 only                      (b) 2 only  
(c) 2 and 3 only                        (d) 1, 2, 3 and 4

**Answer : C**

### Mains Expected Question & Format

**Que.: Exercise of CAG's powers in relation to the accounts of the Union and the States is derived from Article 149 of the Indian Constitution. Discuss whether audit of the Government's policy implementation could amount to overstepping its own (CAG) jurisdiction.**

**Answer Format :**

- ❖ The exercise of the powers of the Comptroller and Auditor General is derived from Article 149 of the Constitution of India. Discuss in brief.
- ❖ Whether auditing the policy implementation of the Government amounts to encroachment of their own (Comptroller and Auditor General) jurisdiction. Analysis.
- ❖ Give a balanced conclusion showing the result.

**Note:** - The question of the main examination given for practice is designed keeping in mind the upcoming UPSC mains examination. Therefore, to get an answer to this question, you can take the help of this source as well as other sources related to this topic.