

Constitutional Law and Public Administration in India

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Constitutional Authorities - I (CAG & EC)

Some of the constitutional authorities are the Comptroller and Auditor General, the Attorney General, Solicitor General and Advocate General, Election Commission of India, Union Public Service Commission and State Public Service Commissions. Some of these have been established through the Constitution. Some are not. In addition to these authorities there is the Panchayati raj system, urban local bodies, and the idea of e-governance. Before looking into these authorities individually it is necessary to understand why these authorities have been established under the Constitution. Thus, there is a difference between a statutory body, a constitutional body, and an executive body. A statutory body is brought into existence through an act of the Parliament.

For example, the National Human Rights Commission which has been brought into existence through the National Human Rights Commission Act. On the other hand, a constitutional body like Election Commission of India owes its existence to a provision in the Constitution. There are executive bodies like Niti Aayog which have been established through a resolution or a notification that has been passed by the executive. So how is a constitutional body different from a statutory body or an executive body? First, there is independence. If it is a constitutional body the body is brought into existence without any interference from the Parliament or the executive. The members can exercise their functions without any fear or favor. They do not have to fear negative consequences like say a transfer or dismissal from their service. They also do not have to extend any favor in exchange for their appointment because this is being done without any involvement from the Parliament or the executive. Secondly, since it is established through a constitutional provision, the terms of appointment, their tenure, their eligibility, their salary, all these conditions are enumerated in the constitutional provision. So, if you need to make any change it is very difficult because you need to make a constitutional amendment. At times you need a special majority from the Parliament. At times you may also need a ratification from half of the states. So any alteration in the conditions of service will have to be affected by a constitutional amendment which is a difficult procedure. Thirdly, the members that

are going to assist this body in carrying out the functions that are also placed within the control of the constitutional bodies.

There also the Parliament or the executive does not have much role. This also goes a long way in safeguarding the independence of these constitutional bodies. Therefore, a constitutional body is different from other bodies, but how and why? Why are some of the bodies placed within the ambit of the provisions of the constitution and why not other provisions? The answer to this lies in the fact that only those bodies are placed under the constitution which perform very critical functions. Say for instance, we are the Election Commission of India. The need to ensure that elections are being conducted without any interference from Parliament or the executive is crucial in sustaining democracy. Only those bodies which perform very critical functions for which there is a need that there is no interference from any other arms like the Parliament or the executive or the judiciary. Only those bodies are placed within the ambit of the constitution.

The first of such authorities, the Comptroller and Auditor General of India. The provisions for Comptroller and Auditor General or the CAG have been provided under articles 148 till article 151 of the Constitution of India. Under Article 148, a CAG is appointed by the President by warrant under his hand and seal. It means that in case of appointment of CAG, the President is the final authority. The letter of appointment should bear the President's signature. There are also other authorities who are being appointed by the President but it is not necessary that it is the President himself who appoints such authorities. He may delegate it to some other executive function but if an authority must be appointed by the President by warrant under his hand and seal, then the President is the final authority.

He cannot delegate that function to any other executive function. A CAG is appointed by the President by warrant under his hand and seal. The Constitution also provides that the CAG should take an oath before the President. This oath is contained in the III schedule, that is the content of the oath that is to be taken by the CAG before he assumes office. The Constitution further provides that a CAG shall not be eligible for reappointment. This means that a CAG shall not be eligible for reappointment not just for the post of Controller and Auditor General but also for any other post within the Central Government or the State Government. So once a person becomes a CAG, he cannot be reappointed. It is a one-time affair. Now how is a CAG removed from his office? The Constitution provides that a CAG must be removed in a like manner and on like grounds as a judge of the Supreme Court. It has a special procedure that has been mentioned in the Constitution.

So, the President must move a motion for removal of a judge of the Supreme Court before each House of Parliament. And that motion for removal must be supported by a majority of the total membership of that House plus a two-thirds majority of the membership who is present and voting which is called a special majority. So, this is the procedure that is to be followed for the removal of a judge of the Supreme Court from his office. And on what

grounds can a judge of the Supreme Court be removed from his office? The Constitution provides two grounds. It must be either on grounds of proved misbehavior or incapacity. So, the CAG can also be removed from his office only on like manner and on like grounds as a judge of the Supreme Court, the same procedure and the same grounds have to be followed in this case as well. The Constitution provides that the salary and other conditions of service of the CAG has to be determined by Parliament. The Parliament determines this by enacting a separate law. There is another law called the CAG Duties, Powers and Conditions of Service Act which was brought in 1971. This particular Act determines the salary, the terms, and conditions of service, etc. of the CAG.

This particular Act provides that CAG shall hold office for either 6 years or till he attains 65 years of age, whichever is earlier. And he is eligible for a salary which is also equivalent to that of a judge of the Supreme Court. Now you might wonder that if the matters such as salary and other conditions of service are left to the Parliament to decide, would it not cause an interference, would it not breach the independence that is otherwise secured to the office of the CAG under the Constitution? Well, the Constitution does provide two safeguards to CAG even though it leaves the matter of determination of salary and other conditions of service to the Parliament. First of all, it provides that matters related to the salary, age of retirement or leave of absence, cannot be varied to the CAG's disadvantage after his appointment. This means you can make amendments in salary or conditions of service or tenure, but it cannot be made once a CAG has been appointed.

So, you cannot reduce the amount of pension, you cannot reduce the tenure because all of this will act as disadvantage to a CAG once he has been appointed. So once a CAG is appointed, his terms and conditions of service cannot be varied to his disadvantage. This is one crucial safeguard that has been inserted in the Constitution to ensure that the Parliament does not erode the independence that is otherwise secured to the office of CAG. And the Constitution also says that salary and all the other expenses of the office of CAG shall be borne out of the consolidated fund of India. So, what is it? There is something called the consolidated fund. The salary of a CAG comes from the consolidated fund of India. There are powers and functions that have been vested in a CAG under the Constitution. The makers of the Constitution had intended the CAG to carry over the functions that were performed by an office called the Auditor General of India.

This is an office that existed prior to the coming into force of the Constitution. So, the makers of the Constitution had intended that the CAG would perform functions which are similar to that of the Auditor General. But in the Constitution, the powers and duties of the CAG have been prescribed in a very broad manner. The details, say for instance, the scope of each of these powers and duties, the manner in which it has to be exercised, all of these have been left to the Parliament to decide. So, under the Constitution, it has been provided that the CAG should perform duties and powers with respect to the accounts.

Accounts of what? Accounts of the Union, accounts of the states, accounts of any other authority or body. So, this is the broadest manner in which the Constitution has laid down CAG's powers. The details of CAG's powers will be found in the statute namely, the CAG Duties, Powers, and Conditions of Services Act. In addition to this, there is a hint about the powers and duties of CAG in two other provisions. One of these is with respect to the administrative powers of CAG.

The President has to frame rules to determine the powers, the administrative powers of CAG. So before doing this, the President has to consult the CAG. Similarly, the President also has to frame rules for the conditions of service of people serving in the Indian Audit and Accounts Department. Before framing these rules also, the President has to consult the CAG. So, CAG has been vested with a power to be consulted before rules are framed for its administrative powers and before the conditions of service are framed for the Indian Audit and Accounts Department.

Another function, mentioned in the Constitution, is that the President has to consider the advice of the CAG in maintaining the accounts of the Union and States. It says that the accounts of the Union and States should be kept in such form as the CAG prescribes. The President has to take the advice of CAG with respect to maintaining accounts. These are the broad powers and duties found in the Constitution. How is it to be exercised? What is the scope of these powers? These are to be found in the statute. The Comptroller and Auditor General Duties, Powers, and Conditions of Service Act 1971 sheds light into what the powers and functions of a CAG are. The first set of functions that are to be performed by a CAG is with respect to accounts. They have to prepare the accounts of the Union and States, compile them and they have to submit it before the President, the Governor, or the Administrator of Union Territories.

So, this is one set of functions. The second set of functions is with respect to giving information and providing assistance to the Union and States on matters related to finances or accounts. The third set of functions is with respect to audit. This is a major function. They have to audit all the expenditure that arises from the government funds. There are three types of government funds. The Consolidated Fund of India is from which the government meets most of its expenditure requirements. The Contingency Fund as the name suggests is used for meeting all the unforeseen and unexpected and emergency situations. We also have the Public Accounts in which all the other public money that does not go into the Consolidated Fund of India will be received. The audit of all these three government funds, the Consolidated Fund, Contingency Fund and Public Accounts has to be done by the CAG. The CAG also has to audit all the other bodies or authorities which are substantially financed by the Union Government or the State Governments. This might also include the government corporations, the government companies etc. All these authorities have to be audited by the CAG. The CAG has to prepare companies for the audit and submit the accounts of the Union and States to the President or the Governor.

Once the President or the Governor receives this report, they cause it to be laid before the Houses of the Parliament or the State Legislature as the case may be. This infuses an additional layer of accountability to the whole process of spending of public money.

It is also important to understand that the duty of the CAG arises only after an expenditure has been incurred. So the public money is spent after an elaborate process. It is submitted before the Parliament. There is an intense scrutiny of the Parliament as to whether this expenditure is needed or not. So that duty is taken care of by the Parliament. The CAG steps in only after an expenditure has been incurred to ascertain whether it has been made through proper channels, whether it has been made after following all the legal procedures etc. The CAG steps in only after an expenditure of public money has been incurred. The second constitutional authority is the Election Commission of India. It is important to understand we need elections.

Elections are needed because it is the most democratic way of choosing the persons who should govern. Voters are given the power to choose who will form the government and make laws and policies for them. Voters are not only given power but are conferred with a responsibility to exercise the power in a manner that will ensure that democracy continues to thrive. But it needs to be noted that merely because elections are there, it need not mean that the elections themselves are being conducted in a democratic manner. So, what makes elections democratic?

First of all, everyone should have the right to vote. The right to vote should not depend on financial status, educational background, or any other consideration such as caste, religion, class or gender. It is also important that each vote has an equal value. It cannot be the case that a higher value is ascribed to a vote cast by a rich person or a bureaucrat and a lower value is fixed for a person pursuing any other profession. There must be an equal value for each vote. Thirdly, there must be a real choice for the parties to win elections. For the voters, there must be an option to choose from. Real choice here means that there should be more than one political party capable of forming a government and running the country, if they secure enough votes of course. It cannot be the case that there are three political parties A, B and C. But it is an open secret that party A will always win the elections. If elections are to be democratic in the real sense, there should be the possibility of change of power between political parties offering the candidates an option to choose from. Fourthly, it is also important that elections happen regularly. In some countries you might have seen how the heads of the government have altered the provisions of their laws so that they can continue in power for four to five terms consecutively. This should not be the case if elections take place in a democratic country. Elections should happen regularly.

Lastly, it also is important that elections are free and fair. It should be free from any bias, influence or corruption and it must be fair in all sense. There are various stages of elections in India, and it is important to understand the role played by the Election Commission in

each of these stages. First, there is delimitation of constituencies. The act of delimitation that is demarcating of the boundaries of various constituencies is done by the delimitation commission. But the act of initiating the delimitation is done by the Election Commission. For example, recently in the state of Assam, a delimitation exercise was initiated by the Election Commission. After receiving the request of delimitation from the Ministry of Law and Justice, the Election Commission directed the chief electoral officer of Assam to coordinate with the state government to issue a ban on creating any new administrative units until delimitation was completed in the state. So, the Election Commission also has a crucial role in initiating the delimitation exercise in each of the constituencies. Secondly, we also have the aspect of reserved constituencies. Some constituencies are reserved for groups who might not be adequately represented in the legislature. For example, Scheduled Cast, Scheduled Tribes, or women. Some constituencies are reserved for people belonging to these communities. Only persons who belong to these communities can contest as candidates from these constituencies. Reserved constituencies are also declared by the delimitation commission, but they do so after they collaborate closely with the Election Commission. The third aspect in the Indian elections is that of the voters list. So in any election, the list of those who are eligible to vote are prepared much before the election and are published beforehand. This aspect is taken care of by the Election Commission. The official publication of voters list is a mandate that falls within the ambit of the Election Commission. Fourthly, there are candidates who nominate themselves as candidates for each constituency.

In the nomination of candidates, there are certain dates beyond which nominations cannot be made. There are also dates beyond which candidates cannot withdraw themselves from the candidature list. The last dates of nomination and withdrawal of nominations are fixed by the Election Commission. So beyond these dates, you cannot register yourself as a candidate nor can you withdraw your name as a candidate from an election. Finally, there are election campaigns that take place before elections.

All election campaigns in various constituencies are also regulated by Election Commissions. They fix the time within which the election campaigns can take place, and the manner in which election campaigns should be conducted. There are certain dos and don'ts for election campaigns. It is the Election Commission which decides which of the activities are permissible, which of the activities are not permissible during an election campaign. Lastly, there is an election in which the Election Commission has a considerable role to play and in each of the crucial stages in the election; and the Constitution of India envisages the creation of the Office of Election Commission of India.

Under Article 324 of the Constitution, the Constitution has vested a major duty on the Election Commission of India. This is the superintendence, direction, and control of preparation of electoral rules. And the Election Commission is tasked with doing this function for the elections to four major offices, the Parliament, State Legislatures and to

the Office of President and Vice President. So, the Election Commission of India performs this function of superintendence, direction and control of the preparation of electoral rules for the election to the offices of the Parliament, State Legislatures, President and Vice President. The Election Commission of India consists of a Chief Election Commissioner and other Election Commissioners.

The Chief Election Commissioner is a permanent body. His tenure is a fixed tenure, and he is designated as the Chairman of Election Commission of India. The other Election Commissioners are appointed by the President from time to time depending on the need. In addition to the Chief Election Commissioner and other Election Commissioners, officers called Regional Commissioners may also be appointed by the President before the general elections to Lok Sabha and State Legislatures.

But Regional Commissioners are appointed for elections to certain specific areas or regions. Now the conditions of service of Election Commissioners are to be determined by the Parliament. And until such law is made, it is determined by the President. This is similar to the provision for the Comptroller and Auditor General of India. And even though the conditions of service are to be determined by Parliament, the Constitution has drafted two important safeguards.

The first is that the Chief Election Commissioner shall not be removed from his office except on like manner and on like grounds as that of a Supreme Court Judge. Very similar to that of the Comptroller and Auditor General. The second safeguard that has been provided to the Chief Election Commissioner is that his conditions of service shall not be varied to his disadvantage once he has been appointed. These two safeguards are similar to those that we saw for CAJ. Now it is very important to note that these two safeguards are available only for the Chief Election Commissioner.

When it comes to the other Election Commissioners, although they are appointed by the President, they are not clothed with the same safeguards. Instead of that, their independence and security of tenure is ensured through a provision that for removal of Election Commissioners from their office, Chief Election Commissioner has to recommend. That is the only safeguard that has been provided to the other Election Commissioners. The Parliament has enacted a separate legislation to deal with the terms and conditions of service of the Election Commissioners called the Election Commission, Conditions of Service of Election Commissioners and Transaction of Business Act of 1991.

Under this legislation, the Parliament has provided that the salary for all Election Commissioners, that is the Chief Election Commissioner, and all other Election Commissioners is equivalent to that which is paid to a Supreme Court Judge. And all of them have a tenure of either six years of service or 65 years of age, whichever is earlier. And if the Election Commissioners have to resign, it has to be made to the President.

Although in the Constitution we have a separate or a differentiation of the Conditions of Service of the Chief Election Commissioner and other Election Commissioners, from this legislation that is enacted by the Parliament, they are treated at par. All the Election Commissioners are subjected to the same terms and conditions of service.

This has created a lot of ambiguity. The Constituent Assembly members envisaged certain aspects by creating an independent Election Commission of India. So initially the conducting of independent elections without any interference from executive parliament or judiciary was proposed to be included as a fundamental right in Part III of the Constitution but was withdrawn later. But that cannot lead one to infer the importance that was attached by the members of the Constituent Assembly to the independence of the Institution of Election Commission of India. There were also proposals for appointing ad hoc bodies before each election. Before an election to the Parliament there would be an Election Commission which would be constituted. Before elections to the State Legislative Assembly another Election Commission would be constituted and this was the original idea.

Instead, it was decided to have one permanent body in one person called the Chief Election Commissioner. This was done so as to take care of any emergencies that might arise. There may be unexpected scenarios like a political party resigning from power, a member of legislative assembly or a member of parliament vacating the office due to any illness or death; and in such cases, you can't leave the office of a representative vacant for too long. In order to avoid such a vacuum and to take care of emergencies it was decided to have one permanent person as the Chief Election Commissioner.

The other Election Commissioners are, as already seen, appointed from time to time. But the Chief Election Commissioner is a permanent body. Another aspect that is interesting to note is that under the Election Commission we see a centralizing of powers. People are usually seen arguing against centralization of powers for various reasons. But in India, we decided to centralize most of the powers on the Election Commission and particularly on the Chief Election Commissioner. This is a deliberate exercise to ensure that because of regional differences among people due to culture or language or religion or community that regional differences do not result in an exclusion of people from electoral rolls. That is why there is one central body of Chief Election Commissioner which heads the Election Commission of India. But that does not mean that there is no decentralization,

There are regional commissioners who are appointed before each election. To say that Election Commissioners are completely centralized would also be a wrong idea. However, there are significantly centralized powers because of this reason. To avoid regional differences creeping into electoral rooms. Another important step that was taken by the Constituent Assembly was to accord the Chief Election Commissioner a status that is

similar to that of a judge of the Supreme Court. This was done to ensure that the Chief Election Commissioner would not be removed by any member of the executive.