



This article is in continuation of an earlier piece published in *Bureaucracy Today* (November 16-30, 2015 issue) which debates whether there is a need to amend the Indian Constitution in regard to the powers, duties and responsibilities of the CAG.

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‘Tyranny of the unelected’ versus ‘tyranny of the elected’

The Supreme Court of India had to review the duties and powers of the Comptroller and Auditor General (CAG) with reference to their relevant constitutional provisions and the CAG (DPC) Act, 1971 in a few important judgments. These judgments were necessitated because of the issues highlighted in the CAG reports, including serious financial improprieties and enormous loss to the exchequer. The CAG reports on the allocation of 2G Spectrum, the Coal Block allocation for mining, the revenue sharing of the Krishna-Godavari (KG) D6 Gas Block, and issues pertaining to Delhi electricity distribution companies were all challenged in the court of law by the aggrieved parties.

JUDICIAL REVIEW LIMITS SUPREMACY OF PARLIAMENT

These judgments acknowledged the importance of the role, duties and mandate of the CAG as a constitutional authority who also enjoys the status of a Judge of the Supreme Court. The latest 2014 judgment by the Supreme Court Bench of Justices K S Radhakrishnan and Vikramjit Sen examined comprehensively the constitutional provisions and relevant Sections of the CAG (DPC) Act, 1971 and upheld the role and constitutionality of the CAG's audit of all Public Private Partnership projects wherever there is a revenue sharing agreement with the Government and the legitimate share of the Government which is

to be determined. The Court agreed that the State is the legal owner of “spectrum”, a scarce finite and renewable natural resource, as a trustee of the people. The Court made it clear in its verdict that the State is empowered to distribute ‘spectrum’, but it must be according to the constitutional provisions and the doctrine of equality and larger public good.

Quoting Article 148 of the Constitution, the Court stated: “The CAG is, therefore, an important functionary under the Constitution and it is often said he is the guardian of the purse and that he should see that not farthing of it is spent without the authority of Parliament...Duties and powers conferred by the Constitution



on the CAG under Article 149 cannot be taken away by Parliament.”



JUDICIARY ON ROLE OF PAC AND CAG

The role of the Public Accounts Committee (PAC) and the CAG was also examined at length by the judiciary in a few recent judgments. In *Arun Kumar Agrawal vs Union of India & Ors* on May 9, 2013, the Supreme Court Bench of Justices KS Radhakrishnan and Dipak Misra observed: “The CAG’s report is always subject to parliamentary debates and it is possible that PAC can accept the Ministry’s objection to the CAG report or reject the report of the CAG. The CAG indisputably is an independent

constitutional functionary. However, it is for the Parliament to decide whether after receiving the report the, i.e, PAC to make its comments on the CAG’s report.”

The report, being from a constitutional functionary, commands respect, but the Ministry can always point out mistakes in the CAG report or the CAG has inappropriately appreciated the various issues.

The judiciary acknowledges the supreme power of Parliament and the PAC to review any of the CAG reports and bring its own conclusions. The CAG reports on the Union Government are submitted to the President to be laid before each House of Parliament under Article 151(1) of the Constitution and on a State the report is submitted to the Governor to be laid before the Legislature of the State under Article 151(2) of the Constitution. These reports are scrutinized by the PAC formed under the Rules of Procedure and Conduct of Business in the Lok Sabha and State legislatures. The function of the PAC is to examine the accounts of the Union and the States and reports of the CAG. The PAC “shall be principally concerned whether the policy is carried out efficiently, effectively and economically, rather than with the merits of government policy”. The PAC has powers to receive evidence, summon persons, papers and record and receive oral evidence. The CAG assists the PAC.

PAC EXAMINES CAG REPORTS

Reports of the PAC are presented to the House. The PAC examines

CAG reports to verify that the moneys shown in the accounts as expenditure have actually been spent for the purpose for which Parliament granted them. The PAC has to satisfy itself that the moneys granted by Parliament were spent “within the scope of the demands” ensuring that expenditure must not exceed the amount granted without fresh parliamentary approval. Money cannot be appropriated to another account without the sanction of Parliament. The Committee has power to oversee the entire scheme of expenditure of the Government. The Committee has to scrutinize the implementation of policies, extravagant or wasteful expenditure of public money and deficiencies in the administration of departments.

The PAC report, after its adoption by the Committee, is presented by the Chairman to the Lok Sabha with a copy laid on the Table of the Rajya Sabha. The reports of the Committee are adopted. Action Taken Reports are to be made out by the Ministries. Direction 102 requires the Government to, as early as possible, furnish the PAC with a statement showing the action taken on the recommendations of the PAC report.

“The scope of Article 148 vis-à-vis the powers of the CAG came up for consideration before this Court in *S.Subramaniam Balaji vs State of Tamil Nadu and others* in 2013.” The Supreme Court held that “CAG has the power to examine the propriety, legality and validity of all expenses incurred by the Government” and “the office of CAG exercises effective control over the government accounts



Justice DIPAK MISRA



Justice VIKRAMJIT SEN



Justice KS RADHAKRISHNAN

and expenditure on the schemes only after implementation of the scheme. As a result, the duties of the CAG will arise only after the expenditure has been incurred.”

In *Arvind Gupta vs Union of India and others* in 2013, the Court upheld the CAG’s functions evaluating the economy’s efficiency and effectiveness with which the Government has used its resources through Performance Audit reports. In *Arun Kumar Agrawal vs Union of India and others* in 2013, the Court interpreted Section 16 of the CAG (DPC) Act, 1971 and ruled that the “CAG has to satisfy himself that the rules and procedures, designed to secure an effective check on the assessment, collection and proper allocation of revenue, are being duly observed and CAG has to examine the decisions which have financial implications, including the propriety of decision making. By placing the reports of the CAG in Parliament, CAG regulates the accountability of the Executive to Parliament in the field of financial administration, thereby upholding the parliamentary democracy.”

The Supreme Court’s verdict including duties and powers conferred on the CAG being part of the basic structure of the Constitution is significant. It limits the supremacy of Parliament in amending constitutional law. The verdict of the Supreme Court protects the constitutional auditor under the ambit of the doctrine of the basic structure of the Constitution providing protection under the judicial review.

The basic structure of the Constitution is not defined. What constitutes the basic structure is determined by the judiciary in some of its judgments. In 1973, in *Kesavananda Bharati vs State of Kerala*, the Supreme Court changed



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its earlier view that the power of Parliament to amend the Constitution was unfettered. The Court adjudicated that though Parliament has “wide” powers, it did not have the power to destroy or alter the fundamental features of the Constitution. In *Indira Nehru Gandhi vs Raj Narain* and *Minerva Mills vs Union of India*, the Supreme Court applied the basic structure doctrine to strike down the 39th Amendment of the Constitution and parts of the 42nd Amendment paving the way for restoring Indian democracy.

The basic structure of the Constitution cannot be altered by amendment to the Constitution under Article 368. From the 2014 Supreme Court judgment, it can be interpreted that duties and powers conferred by the Constitution on the CAG cannot be changed by amendment to the Constitution being part of the basic structure of the Constitution and will be attracting judicial review. It is pertinent to note here that the recent Supreme Court verdict on the 99th Constitution Amendment Act and

the National Judicial Appointments Commission declared them to be *ultra vires* the Constitution. The history of judicial review vindicates that “the tyranny of the unelected’ can not only limit and control but can also stop at times altogether the tyranny of the elected as in the dark days of democracy during the emergency period.

NO ALTERATION IN BASIC STRUCTURE OF CONSTITUTION

The Supreme Court reviewed, interpreted and protected the constitutional mandate and duties and powers of the supreme audit institution in the country. The judicial pronouncement of the apex court was with specific reference to constitutional provisions and relevant sections of the CAG (DPC) Act, 1971, most particularly Sections 13, 16 and 18 where the CAG, as the nation’s sole comptroller and auditor, is duty bound not only to account for all the moneys spent from the Consolidated Fund of India but also all the receipts legitimately due to the national exchequer.

In a vibrant parliamentary democracy like India it is unlikely that the apex court would ever permit any alteration in the basic structure of the constitution including altering the duties and powers of the CAG. This constitutes the basic structure of the Constitution of India. As Newton’s Law says, every action has an equal and opposite reaction. If there is “any tyranny of the elected”, it can be controlled, limited and nullified, if need be, by “the tyranny of the unelected”. That is the beauty of the doctrine of basic structure in India’s parliamentary democracy which empowers the judiciary to have judicial review challenging the supreme law making power of people’s representatives whenever there arises a legitimate need. ■

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