

A REMINDER ABOUT UNFETTERED CONSTITUTIONAL POSTS

Relevant for: Indian Polity | Topic: Indian Constitution - Historical underpinnings & Evolution

To enjoy additional benefits

CONNECT WITH US

April 15, 2023 12:16 am | Updated 12:16 am IST

COMMENTS

SHARE

READ LATER

'A democracy requires a system of checks and balances to prevent the arbitrary use of power by the elected government of the day' | Photo Credit: Getty Images/iStockphoto

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.

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 Constitution-makers 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.

The Constitution-makers have used simple words such as 'shall be appointed by the President' in the appointment of the Prime Minister (Article 75), the Attorney-General for India (Article 76),

the Chairman and other members of the Finance Commission (Article 280), the Chairman and other members of the Public Service Commission (Article 316) and a Special Officer for Linguistic Minorities (Article 350B). Article 324 provides that the President will appoint the CEC and ECs 'subject to any law made in that 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 the judges of Supreme Court and the High Court (Articles 124 and 217), the CAG (Article 148) and for appointment of the Governor (Article 155). 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'.

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.

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 Auditor-General, 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 Auditor-General should be always independent of either the legislature or the executive. He is the watch-dog 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 Auditor-General 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.

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.

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.

Anupam Kulshreshtha is a former Deputy Comptroller and Auditor General of India, and teaches law at the Institute of Management Technology (IMT), Ghaziabad, Delhi NCR

COMMENTS

SHARE

[constitution](#) / [democracy](#) / [executive \(government\)](#) / [judiciary \(system of justice\)](#) / [election](#) / [laws](#)

BACK TO TOP

Comments have to be in English, and in full sentences. They cannot be abusive or personal. Please abide by our [community guidelines](#) for posting your comments.

We have migrated to a new commenting platform. If you are already a registered user of The Hindu and logged in, you may continue to engage with our articles. If you do not have an account please register and login to post comments. Users can access their older comments by logging into their accounts on Vuukle.

END

Downloaded from **crackIAS.com**

© **Zuccess App** by crackIAS.com