



COMMON CAUSE PETITIONS ON CAG

A Thorough Selection Criteria 'Must' for an Effective Institution

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The Comptroller and Auditor General of India is an oversight agency whose vast potential stretches beyond its constitutional auditing mandate.

So far, the appointments to the post have been based on an opaque and arbitrary method. The common thread running through the last several CAG appointments is fairly well established. Only an officer holding the rank of Secretary to the Government of India has been appointed as CAG. Inevitably, the arbitrariness in the appointment compromises the independence of this high functionary.

The Story So Far

Several appeals to the court for transparency in the appointment of this crucial constitutional post have met with little success so far.

Common Cause has been campaigning since 1996 for a transparent, broad-based procedure for the CAG appointment. As the term of C G Somiah approached its end in March 1996, *Common Cause* filed a writ petition in the Supreme Court (SC). It sought directions to evolve and follow a policy, including guidelines prescribing the requisite

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qualification/ experience, for the appointment but the petition was rejected.¹ The government later appointed V K Shunglu as the new CAG, the criteria for whose selection were never made public. In 2007, Public Cause Research Foundation filed a writ in the apex court with similar prayers, which also met the same fate.²

Common Cause has consistently stood for a thorough selection criteria and emphasised on a candidate's high degree of professional knowledge and background as well as impeccable integrity. It has maintained that the appointing authority must cast its net wider rather than insisting on just one service. The contenders should be experienced in financial management, audit and accounting procedures, rounded off with a deep understanding of the complexities of governance and a vision of the future of our democratic polity.

Common Cause also made representations to this effect to the Prime Minister, Finance Minister, Lok Sabha Speaker and Chairman of the Public Accounts Committee (PAC), who happened to be the Leader of the Opposition in Lok Sabha, outlining the grounds and possible mechanisms for making the process objective, transparent and accountable. A well-researched and comprehensive memorandum on the subject was addressed to the Chairman of the PAC on November 23, 2012, when the term of Vinod Rai, the then CAG, was drawing to a close.

When the Union Government named the incumbent Defence Secretary as the next CAG, his appointment was challenged, inter alia, on the ground of a serious conflict of interest in a PIL filed in the Supreme Court on June 3, 2013. Dr. B P Mathur, former deputy CAG and a governing council member of *Common Cause*, as well as Kamal Kant Jaswal, director of the society, filed a writ petition along with several former public servants. It was alleged that the CAG appointment was liable to be declared void for being arbitrary and made through a procedure unable to stand the test of constitutionality. The petition also argued that the

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appointment was illegal on the ground of conflict of interest, and violated the principle that no person shall be a judge in his own cause. Declining to entertain the petition, the SC asked the petitioners to approach the High Court concerned for relief.

A petition on the same grounds was accordingly filed in the Delhi High Court (HC). The HC upheld the appointment of the CAG, observing that it had been made as per past conventions. It also declined to direct the government to frame a transparent procedure for the selection. The HC dismissed the petition on August 13, 2014, declining to review the appointment on merit under the guise of judicial review.³

A Special Leave Petition against the order of the Delhi HC was filed on September 2014 and was dismissed on February 11, 2015 as the SC could not see any good ground to interfere with the impugned judgment and order.⁴

In August 2017, when the government named the present CAG, Rajiv Mehrishi, *Common Cause* protested by issuing a press release, criticising the government's failure to set a high benchmark to fight systemic corruption.

Parliamentary Review

Conscientious parliamentarians have made similar demands on numerous occasions. On May 25, 2012, Gurudas Dasgupta had written to the then Prime Minister Manmohan Singh, stressing on the need for a

collegium, featuring the PM, Leader of Opposition in the Lok Sabha and Chief Justice of India, to choose the CAG. Singh rejected the demand while holding that the Opposition already played a definitive role in the scrutiny of CAG reports through the PAC.

A baby step in the right direction was taken by the National Commission to Review the Working of the Constitution headed by Justice M N Venkatachaliah. The Commission observed in one of its two reports:

"...the appointment of the C&AG should not be the exclusive purview of the executive and a high level committee consisting of the Prime Minister, the Union Finance Minister, the Speaker of the Lok Sabha, the Leader of the Opposition and the Chairman of the Public Accounts Committee should be empowered to make the appointment... The Commission would, however, recommend that a healthy convention be developed to consult the Speaker of the Lok Sabha, before the Government decides on the appointment of the C&AG so that the views of the P.A.C. are also taken into account."⁵

Views of PAC Chairmen

The technical passage of CAG reports is pretty elaborate. The audit reports are submitted first to the President in case of the Union and then make their way to the Parliament. Once tabled in the Parliament,

the reports stand referred to the PAC for examination. Inevitably, the independent and efficient functioning of the CAG enhances the credibility of reported financial information of the government, impacting both the Parliament and the PAC. Hence, the lack of transparency and disregard for professional qualifications in CAG appointments have come under scrutiny from the PAC. In February 1996, when a new CAG was about to be appointed, Ram Naik, the then PAC Chairman, took up the CAG selection issue with the President and PM and suggested that the PM and Leader of Opposition in Lok Sabha jointly choose the right candidate. He also demanded that a selection criteria be laid down.

Subsequently, in a conference of the central and state PACs, Dr. Murli Manohar Joshi, the then PAC Chairman, recommended that the control of the executive be minimised, if not eliminated altogether. It was suggested that a small collegium or screening committee could examine the candidates and recommend a panel of three to the President to make a choice out of this candidate pool.

CPIL and Common Cause Vs Union of India (2010): A Summary

The writ petition filed in the Supreme Court by Centre for Public Interest Litigation (CPIL) and Common Cause sought to declare as void the appointment of Shashi Kant Sharma as India's new CAG. The petition pointed





out that the appointment of Sharma as CAG was liable to be declared non est or void as it was made arbitrarily by a procedure that did not withstand the test of constitutionality. It was liable to be declared void also on the ground of conflict of interest, and *Nemo iudex in causa sua*, i.e. no person shall be a judge in his own cause.

The petition sought a direction for the future to the Union of India to frame a transparent selection procedure based on definite criteria by calling for applications and nominations and also to ask the government to set up an objective selection process by constituting a broad-based non-partisan committee for the appointment.

The petition alleged that the process was entirely arbitrary and opaque, and thus completely violative of rule of law as well as several judgments of the SC itself. Also, the zone of consideration had been restricted to civil servants, a limitation not found in the Constitution. The response of the government to an RTI application filed on February 21, 2013, seeking information on the system of appointment, etc. clearly revealed that there was no search committee, criterion, system, call for applications or nominations. Rather, it was discovered that the system of selection was arbitrary.

The petition stressed that though the CAG selection method had not been prescribed by the Constitution, it was obvious that the process had to be

constitutional, non-arbitrary and accomplished in a manner that enabled choosing the best person for office. It also pointed out that the selection procedure would have to be consistent with Article 14 of the Constitution, which mandates non-arbitrariness, non-discrimination and transparency.

Emphasising the importance of the post, the petition stated that the top auditor's reports are submitted to Parliament and thereafter remitted to the PAC for detailed examination. Every year, the CAG submits to the Parliament 15 to 20 audit reports relating to central government transactions. In addition, the CAG submits audit reports for each of the 28 state governments to their respective legislatures.

This exercise covers in aggregate expenditures of Rs 13 lakh crore and revenue receipts of Rs 11 lakh crore and borrowings of Rs 2 lakh crore. Diverse subjects covered by the reports run the gamut from implementation of development schemes, defence deals and privatisation of public sector undertakings to public private partnership, transfer of natural resources and effectiveness of tax machinery. The plea maintained that if the CAG is to discharge the onerous responsibility of his/her office, only a person of the highest professional competence and unimpeachable integrity should merit an appointment to the post.

The petition admitted that the status of the CAG under Indian Constitution was superior to its

counterparts in other countries. This was so because it is not just a statutory institution but a constitutional one, and the CAG is the auditor for both the Union and the states, unlike in other federal systems. Therefore, great care must go into his/her selection primarily owing to the institution's crucial role in our constitutional scheme, but also because once appointed, the incumbent will have a long tenure of six years.

(Endnotes)

- 1 Common Cause v Union of India (1996), Writ Petition (Civil) 115 of 1996, Supreme Court of India.
- 2 Public Cause Research Foundation v Union of India (2008), Writ Petition (Civil) 618 of 2007, Supreme Court of India, <https://www.sci.gov.in/jnew/bosir/orderpdf/661237.pdf> (Retrieved September 24, 2018).
- 3 N Gopalaswami & Ors v Union of India & Anr (2014), Writ Petition (Civil) 4653 of 2013, High Court of Delhi, <http://commoncause.in/uploadimage/case/1452367233WP%204653%20of%202013%20Date%2013-Aug-2014.pdf> (Retrieved September 24, 2018).
- 4 Special Leave Petition (Civil) No. 024328 of 2014
- 5 Hussain, A, Narasimham, M, et al. (2002). Efficacy of Public Audit System in India: Comptroller and Auditor-General in *National Commission to Review the Working of the Constitution*, Book II, Department of Legal Affairs, Ministry of Law and Justice, Government of India, <http://legalaffairs.gov.in/sites/default/files/%28IX%29Efficacy%20of%20Public%20Audit%20System%20in%20India%20C%26AG%20.pdf> (Retrieved September 24, 2018).

