



INDIAN CONSTITUTION BINDS THE NATIONAL AUDITOR TO DISCOVER WHERE OUR EIGHTY- FIVE PAISE GOES¹

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ABSTRACT:

Development runs on the wheels of state revenue. Corruption impedes development and is a big obstacle in optimum utilisation of public resources in public interest. The article explains what constitutional mechanism is available to discover governance fraud in misappropriation of public funds that force the executive's accountability to the legislatures regarding public finance management. It discusses the role and responsibility of Controller and Auditor General of India (hereinafter referred to as CAG) in a parliamentary democracy under the existing constitutional provisions. Audit of expenditure and receipts of consolidated funds is the exclusive, independent and constitutional mandate of CAG that makes him National Auditor.

Lamenting about recent organised bank scams involving crores of rupees happening in public sector banks as these banks were kept beyond the ambit of CAG audit, the paper highlights that CAG audit could have detected the banking scams and reduced the risk in time, had these banks been under the CAG audit.

The paper also elaborates that audit reports discover wastage and loss of revenue and are potential weapons in the hands of legislature to fix the responsibility of the executive. Certain latest audit observations are also included in the paper for illustration that sensitise to comprehend the wastage of public fund and point out how CAG exposes the financial mismanagement. The article deliberates that judiciary has expanded the scope of CAG audit covering whole range of public resources and terming CAG audit as 'basic structure of constitution'. Necessity to restructure the constitutional provisions pertaining to the appointment of CAG and to eliminate the executive influence in such appointment has also been discoursed.

KEYWORDS: Public Audit, Public Finance, CAG, Audit Reports, National Auditor.

INTRODUCTION:

Of one rupee, fifteen paise reaches to the intended beneficiaries, exclaimed in frustration the Former Prime Minister in 1985, who incidentally happened to occupy the post reluctantly. It was surely off the cuff impulsive remark, but after decades, the anguish and surprise emanated from a political and young premier is still relevant and maddening as it speaks volumes about corruption prevailing in public expenditure. Even today after more than three decades of such observation, corruption level is seemingly northwards. Controller and Auditor General of India (hereinafter referred as CAG) that detects governance fraud and blunts corrupt activities, functions as the national auditor with a constitutional mandate to ascertain the executive's accountability for its economic activities. Indian

¹ This paper was presented by the author in a Conference at National Law University, Delhi in October, 2018

constitution binds CAG- national auditor- to discover where remaining eighty-five goes and how it is spent.

Recent bank scams- PNB² of ₹11400 crore by Neerav Modi and Mehul Choksi, Rs 9000 crores³ by Vijay Mallaya, ₹3695 crores⁴ by Kotharis and many other corporate scams on public sector banks are certainly banks auditors' failures in discovering the systematic fraud in time. Reserve Bank of India has candidly admitted that 'over 23,000 cases of fraud involving a whopping Rs 1 lakh crore have been reported in the past five years in various banks'⁵ which certainly raises doubts regarding efficacy of banking regulator and desirability and efficacy of private auditors in public sector banks. One of the major contributory factors for such frauds is that these banks are not under the realms of national auditor.

It's relevant to note that while deliberating the powers and duties of national auditor in a Joint Parliamentary Committee⁶, many Parliamentarians insisted that public sector banks should be brought under the audit of CAG to ensure the executive's answerability to Parliament as public money is at stake in running of these banks. But it was opposed and not agreed to by the Government of the day and public banks thus remained outside the realms of public auditor and their audit primarily came under private chartered firms which are empaneled by the CAG for audit purpose. From 2014-15 onwards based on specific norms of RBI, bank managements were given liberty to select and appoint auditors from empanelment that placed the auditors' authority at the bank's mercy and 'compromise' their independence. This was a surprise policy departure as earlier the banks did not have any role in selecting the auditors. Audit stalwarts at the helms were amazed on the new policy and one even went on to the extent that 'no statutory auditor will be bold enough to look for NPAs if his appointment squarely hinges on the senior management of the bank.'⁷ On the ploy that the regulator lacks sufficient powers in regulating the public-sector banks; RBI has shifted the onus to the Government. Eventually, public money has been swindled as if it belongs to none. Considering the experience and being independent from Executive, CAG audit could certainly have discovered the organized scam and thus could have assessed the risk in time.

In recent past, 2-G Telecom Spectrum scam, Coal Allocation scam and Commonwealth Games embezzlement are other examples of governance fraud on public resources that are still afresh in the public memory. Transparency International has ranked India at position 81 in the Corruption Perception Index in a survey conducted amongst 180 countries that depicts corruption level in managing public funds in India. CAG performs the responsibility of public auditor, who ensures executive financial accountability to the legislatures. Auditing public funds and resources reduces the vulnerability to corruption by public servants as *Kautilya* – the ancient Indian statecraftman -- aptly sensed the susceptibility of human nature when he professed that 'officials who deal king's money are tempted to embezzle the money in however small a quantity as it is not possible not to taste honey or poison placed on the surface of the tongue'.⁸ CAG reports discover where and how the public money has been (*mis*) applied. 'Government infused ₹1,18,724 crores⁹ in public sector banks (PSB) during 2008-09 to 2016-17' and, public has a right to know where such huge money goes. Such accountability from banks is possible only through CAG audit that can also divulge political interference in loan disbursement, and not by private chartered audit firms as the history of bank frauds reveals.

² "PNB fraud case: Govt revokes passports of Nirav Modi, Mehul Choksi" *The Asian Age*, Feb.24, 2018.

³ Pulapre Balakrishnan, "Lessons from the Mallya case" *The Hindu*, Apr.18, 2018.

⁴ "At Rs 3,695 cr, Rotomac Pens' fraud gets bigger", Available at: <http://www.dailypioneer.com/todays-newspaper/at-rs-3695-cr-rotomac-pens-fraud-gets-bigger.html> (last visited on May 24, 2018).

⁵ Ashwini Shrivastava, "23,000 bank frauds involving Rs 1 lakh crore in 5 yrs.: RBI", *The Free Press Journal*, May3, 2018.

⁶ Parliament of India, Report of the Joint Committee on CAG's (Duties, Powers and Conditions of Services) Bill, 1969 (Nov.16, 1970).

⁷ K.R. Srivats, "Public sector bank boards get to choose auditors" *Business Line*, Nov. 29, 2014.

⁸ R.P. Kangle, *The Kautilya Arthashastra Part II, An English Translation with Critical and Explanatory Notes*, 91 (Motilal Banarasidas Publisher Private Limited, Delhi, 2nd edn., 1972).

⁹ "CAG raps Centre on banking recapitalization" *Deccan Chronical*, Jul.3,2017.

PROVISION OF NATIONAL AUDITOR

Indian Constitution¹⁰ stipulates appointment of CAG by the President under his seal and warrant, who can only be removed from his office in like manner and on like grounds as a judge of the Supreme Court. Before he enters upon his office, he is to take oath/affirmation to bear allegiance to the Constitution and perform his duties without fear or favour, affection or ill-will. He is bound to behold the Constitution of India. He is forbidden to take any employment under Government of India or any State Government after he ceased to hold office. He is appointed for a term of six years or till he attains the age of 65 years whichever is earlier, and his terms and conditions of employment cannot be adversely altered after his appointment. These provisions provide him independence from executive influence to function independently.

In our Constitutional scheme, CAG is entrusted with the responsibility for maintenance of accounts of the Union/ States/UTs and for the audit of receipts and expenditure of Consolidated Funds of Union/States/Union Territories having legislative assemblies to ensure executive's accountability to the legislatures. Role of CAG has been visualized as a watchdog of public finance. Therefore, CAG is appropriately known as 'Supreme Audit Institution of India' and rightly called National Auditor. Duties, powers and conditions of service of CAG have elaborately been defined by an act of Parliament. CAG is a constitutional body with the constitutional mandate to apprise the legislatures as to how the public money was utilised and whether it was spent for the purpose for which it was appropriated that enable them to make the executive answerable.

Article 151 provides the CAG complete independence in preparation of audit reports relating to the accounts of the Union/State which are to be submitted to the President/Governor, as the case may be, for laying before the concerned legislature. These reports are the effective tools in the hands of legislatures to demand accountability from executive as far as financial activities of the Governments are concerned. CAG audit is not only about compliance audit or voucher audit that generally examines compliances and correctness of accounts, but it is primarily independent assessment of the organizations whether schemes or programmes are executed with efficiency, economy and effectiveness to determine value for money spent from public fund.

AUDIT REPORTS DISCOVER WASTAGE AND LOSS OF REVENUE

CAG is the chief executive of the Indian Audit and Accounts Department which is primarily responsible for auditing financial activity of the Central Government, State Governments and state instrumentalities, and in the course of action accomplish audit reports that are potent instruments to be used by the respective legislative arms to ascertain the accountability of the executive. A topical audit report would suffice to validate that auditors are economic warriors to safeguard the public resources and function as 'eyes and ears' of legislatures. Recently, after auditing 19 Ministries/ Departments and autonomous bodies/ corporations under the Government of India for the year ending March 2017, CAG has found various kinds of irregularities that highlight wastage and/or loss of revenue involving ₹ 1,179.16 crores. The report¹¹ has been submitted to the Parliament where executive would be questioned to explain such misdeeds that ensure parliamentary control on public financial management. Certain major audit observations included in this report are illustrated below that provide evidence as to how the audit detects mismanagement of public money and endeavours to discover governance fraud and financial irregularities.

- i Missions/Posts in Australia, Bahrain, Berne, China and Dubai have failed in implementing applicable instructions to levy/revision of visa and consular fees which resulted in short collection of revenue of ₹ 74.83 crore.

¹⁰ The Constitution of India, art.148.

¹¹ CAG, Report (No.4 of 2018) on Compliance Audit Observations, Union Government (Civil), Available at: <https://cag.gov.in/audit-reports>, (last visited on September 29, 2018).

- ii Non-adherence to rules and guidelines relating to payment of pay/entitlements of personnel resulted in irregular payment/reimbursement amounting to ₹ 26.23 crore in 13 cases in five Ministries of Government of India.
- iii Indian Institute of Technology, Mumbai, paid special allowance/honorarium in violation of the General Financial Rules resulting in irregular payment of ₹ 9.76 crore.
- iv Six States (Andhra Pradesh, Gujarat, Jammu and Kashmir, Rajasthan, Telangana and Tripura) diverted ₹ 36.31 crore approved for 'reproductive and child health scheme' under (NRHM) National Rural Health Mission to other schemes¹² and the Ministry accepted utilisation of funds for non-NRHM purposes.
- v Chandigarh Administration constructed an Air-Conditioned Fish & Meat Market at a total cost ₹ 1.53 crore¹³ even though viability of the market was in doubt. The entire integrated market has been lying vacant for past eight years due to lack of response for shop booths from vendors.
- vi Mumbai Port Trust suffered loss of revenue of ₹ 17.13 crore¹⁴ during April 2015 to March 2017 as the Port failed to recover wharfage at the agreed rate from the licensee.
- vii Improper planning and lack of necessary synchronization of activities resulted in unfruitful expenditure and idling/sub-optimal utilisation of assets valued at ₹ 18.87 crore¹⁵ in six cases pertaining to four Central Ministries.

SCOPE OF CAG AUDIT

Past experience shows that Government alone cannot be the 'developer' to meet the public aspiration for quick development of the country and new economic models have emerged necessitating private enterprises investment. Governments have adopted Public-Private participation in infrastructure development and various other economic activities that require public resources at the disposal of private entities and sharing revenues and profits as per agreed terms amongst them. Use of public resources and public money in any format by the private entities certainly invites the role of CAG, being the custodian of public purse that predictably is resisted and disputed by private players questioning the legality of CAG powers in their financial affair.

Development moves on the wheels of revenue collected by the state. To audit all receipts payable into the Consolidated Fund of India and of each State and of each Union territories having legislative assembly is the constitutional responsibility of CAG who is to ensure that rules and procedure are adequately devised to enhance the revenue collection and elimination of leakages in the receipts in any manner¹⁶. CAG audit is a mechanism to verify that any receivable money to exchequer is adequately monitored and regulated with the aim that there is no laxity in revenue collection.

When CAG decided to audit the books of accounts of private companies using spectrum under revenue sharing agreement with department of telecommunication to assess the government share out of the revenues carried by these companies, it was opposed on the ground that just because licence fee under the agreement is payable in the Consolidated Fund of India does not mean that CAG audit would extend to private telecom operators and that there must be an element of government control of finance for the application of section 16 of the CAG's (Duties, powers and service conditions) Act, 1971 and the same is completely lacking in the case of the service providers.

In the landmark judgment¹⁷, Supreme Court held that 'when national wealth like spectrum is dealt whether by State or its instrumentalities or even the private parties, like service providers, they are accountable to the people and to the Parliament.' Therefore, CAG audit of service providers' books

¹² CAG, Report (No.25 of 2017) on Performance Audit of the Reproductive and Child Health under National Rural Health Mission, 14, Available at: <https://cag.gov.in/audit-reports> (last visited on September 30, 2018).

¹³ CAG, Compliance Audit Observations, Report (No. 3 of 2018) of the Union Government (Civil), Union Territories without Legislatures, 23, Available at: <https://cag.gov.in/audit-reports> (last visited on September 30, 2018).

¹⁴ Supra note 11 at 194.

¹⁵ Id. at xiv.

¹⁶ The CAG's (DPC) Act, 1971 (56 of 1971), s.16.

¹⁷ Association of Unified Tele Services Providers & Others v. Union of India, (2014) AIR (SC) 1984.

of accounts is essential to determine whether Government has received entire share of its revenue under the agreement. This judgment clarified and amplified the scope of CAG audit reiterating that when State allows private entities to utilize natural resources which are public assets; legislature, on behalf of public, have obligation to ascertain as to whether returns because of utilisation of public resources by the private entities has been credited to the exchequer and that is only feasible by bringing such entities under the ambit of CAG audit.

CAG AUDIT - BASIC STRUCTURE OF CONSTITUTION

Supreme Court in *Kesavananda Bharati v. State of Kerala*¹⁸ has established the 'basic structure doctrine' professing that parliament has limited powers to amend the constitution reiterating that every provision can be amended provided that fundamental structure and foundation of the constitution remains without a scratch. What constitutes the basic structure remains undefined and the apex court has been enlarging the scope of the doctrine in various cases.

Like parliamentary democracy, independence of judiciary, rule of law, judicial review, unity and integrity of the country, secular and federal character of the constitution, CAG audit was held as the basic structure of the constitution, when telecom private companies questioned the CAG authority to audit their accounts. Apex court held in *Re: Association of Unified Tele Services Providers & Others v. Union of India*¹⁹ that Article 149 empowers the CAG to exercise constitutional powers and duties in relation to the accounts of the Union and the States or any other authority or body, as may be prescribed under the law made by the Parliament as the High Court under Article 226 and the Supreme Court under Article 32 are exercising judicial powers. Duties and powers conferred by the constitution on the CAG under Article 149 cannot be taken away by the Parliament, being the basic structure of our Constitution.

APPOINTMENT OF CAG: RECIPROCITY OF OBLIGATIONS

Although CAG is appointed by the Executive but does not hold the office under the 'Doctrine of Pleasure'. His removal from office does not depend on the sweet will of the executive. CAG is fully independent in his audit responsibility to legislature. But independence is interlinked in the methodology being adopted in the appointment procedure of CAG. It is paradoxical that CAG is to be appointed by the same executive which he is bound to question for their wisdom in public expenditure management. Past experience shows that only one specific class of bureaucrats are being given this crucial assignment at the end of their career or after retirement as reward for the services rendered in the past. This appointment system does not generate confidence amongst stakeholders and may make the "CAG as lapdog of executive as political pets could not be the best watchdog."²⁰

Civil society groups have been consistently demanding change in the appointing procedure of CAG and it is observed that CAG appointment has always been challenged in courts questioning the opaque and clandestine way he was selected. The National Commission to Review the Working of the Constitution (NCRWC) in 2002 also said that there should be transparency and integrity in the appointment of the CAG, and a 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 (PAC) should be empowered to make the appointment²¹. Chief Justice of India needs be included in this collegium to make it comprehensive and such an appointing system needs to be codified so that constitutional post of CAG remains beyond the alleged manipulations of executive and conflict of interest and reciprocity of obligations are altogether eliminated. But what did the Commission deliberated finally did not recommend in the report on the ground that such a collegium system would weaken the constitutional and moral authority of the Prime Minister and rather

¹⁸ (1973) 4 SCC 225.

¹⁹ *Supra* note 17.

²⁰ K.P. Joseph, "CAG: Watchdog or Lapdog" *Economic and Political Weekly* 569-570 (March 14, 1998).

²¹ Dr A Surya Prakash, Appointment of the CAG – Some Concerns, available at: <http://www.vifindia.org/article/2013/april/29/appointment-of-the-cag-some-concerns> (last visited on May 25, 2018).

recommended that a convention be developed to consult the Lok Sabha's Speaker who may also take the views of the PAC. These recommendations are apparently stale now and needs reworking and modification in view of the scams of massive plundering of public resources by highly and mighty in the last few years.

It is disheartening that political rulers of all shades are facing criminal charges and even jail terms on embezzlement and siphoning off of public resources which emphatically point out that public resources no longer appear to be under safe guardianship. In such backdrop, role and responsibility of CAG has increased tremendously to defend the public resources/funds by discovering corruption, wastage, and misappropriation and governance fraud. The task to bring out unflinchingly and dispassionately audit reports to the notice of Parliament/State Assemblies, public and media as expected in prevailing state of affairs can only be accomplished without any fear and favour by such a CAG who is appointed through the said collegium and is not under any illusive or real obligations of Executive.

CONCLUSION

Bank auditors could not detect the prolific mismanagement of public money and has failed in risk assessment of lending. Auditors' authority might have been compromised by the bank management since heads are rolling at the highest level. As public funds are at stake, state-run banks should be brought under the audit of CAG, being independent constitutional body, as its capability to detect governance fraud is nearly flawless and beyond the executive influence. Such audit reports would stir the banking sector forcing them to be answerable to parliament and would expose the governance frauds and intervention of political rulers.

Public is the real owner of public resources which state possess in trusteeship and may be utilised by the state only for the welfare and in the interest of the public. National Auditor, in a parliamentary democracy is under constitutional obligation to discover governance fraud and determine the executive's accountability for public finance management to legislatures. These objectives of determining the accountability are attained with the examination of expenditure and receipts of exchequer by the CAG on behalf of public by producing audit reports for the legislative arm. CAG can only shoulder such towering responsibility without fear and favour if he is entirely independent from executive that firstly calls for fresh look at the prevailing appointing system.

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