NLSIR

FOR A MESS OF POTAGE: THE GST'S PROMISE OF INCREASED REVENUE TO STATES COMES AT THE COST OF THE FEDERAL STRUCTURE OF THE CONSTITUTION

—Alok Prasanna Kumar[1]

Abstract The Constitution (101st Amendment) Act, 2016 which provides a framework for the levy of Goods and Services Tax in India has re-cast India's federal structure in a manner that is fundamentally damaging to the basic structure of the Constitution of India. It has made the States' fiscal policies subject to the control and veto of the Union Government in the GST Council. It has also not given aggrieved States any effective remedy against the decisions of the GST Council, as the dispute settlement mechanism will be constituted by the very GST Council against which a State has a grievance. When challenged in court, the 101st Amendment Act might not withstand scrutiny on grounds of violating the basic structure of the Constitution of India.

I. INTRODUCTION

The Constitution (101st Amendment) Act, 2016, ("the 101st Amendment Act") is a radical re-structuring of the constitutional basis for taxation by the Union and State Governments in India. Enacted to create a constitutional framework to introduce the Goods and Services Tax (GST), the 101st Amendment Act grants new powers to the Union Parliament and State Legislative Assemblies, and also creates institutions that have a significant bearing on the federal character of the Constitution.

[1] The author is an advocate at the High Court of Karnataka.

The Constitution, as it was when initially brought into force, had a particular vision in respect of taxation of goods and services supplied within India; while customs duty and excise on manufacture were within the scope of the legislative powers of the Union Parliament,[2] taxation of sale and movement of goods was within the exclusive purview of the States.[3] The demarcation of Union and State taxing powers in List I and List II of the Seventh Schedule was precise and clear, leaving little room for any overlap in the kind of taxes that the Union could impose and those that a State could impose. List III or the "Concurrent List" contains no taxing entries, suggesting that the constitutional scheme of taxation was to allot two separate, exclusive spheres of taxation for the Union and the States.[4] That States should have independent taxing powers is a necessary feature of a federal polity, and mere plenary legislative power, in the absence of the power to impose taxes and raise revenue, would be meaningless.[5]

With the coming into force of the GST regime, both the Union and the States will ostensibly have the power to tax the supply of goods and services. The 101st Amendment Act takes away neither the Union's nor the States' taxing power but instead gives them the power to impose taxes on supply of goods and supply of services respectively.

This is a fundamental change from the earlier, exclusive spheres of taxation reserved for the Union and the States under the constitutional scheme. This change has implications for the federal character of India's polity that must be examined in some depth. More so in light of the fact that the federal character of the Constitution of India has been held to be a basic feature of the Constitution of India by the Supreme Court in *S.R. Bommai v. Union of India*,[6] and therefore cannot be abrogated by a constitutional amendment.

I argue in this paper that the 101st Amendment Act fundamentally upsets the federal structure of the Constitution, and therefore is an abrogation of the basic structure of the Constitution. I say this for two reasons: one, the GST Council

---

2 INDIA CONST. Entries 83 and 84, List I, Seventh Schedule. No separate entry for Service Tax existed in the Constitution at the time it was enacted. Though the Supreme Court in *T.N. Kalyana Mandapam Assn.* v. *Union of India,* (2004) 5 SCC 632 held that such service tax as a subject matter was within the "residuary power" of the Union, Entry 92C was introduced into List I by the Constitution (88th Amendment) Act, 2004 to clarify that the Union had the exclusive power to impose a service tax.

3 INDIA CONST. Entries 54 and 52, List II, Seventh Schedule.

4 This is not to say that the Union and the State can never tax the same subject matter or transaction. The Supreme Court's judgments following *Federation of Hotel & Restaurant Assn. of India* v. *Union of India,* (1989) 3 SCC 634 allow the State and the Centre to tax the same subject matter but different "aspects" of it. Whether or not the aspect theory has any place in Indian constitutional law, given the clear division of powers between Union and the States is also a matter to be examined, but outside the scope of this paper.

5 Nirvikar Singh, *Fiscal Federalism*, *in* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 521, 521 (Sujit Choudhary, Madhav Khosla & Pratap Bhanu Mehta eds.).

6 *See S.R. Bommai* v. *Union of India*, (1994) 3 SCC 1.

makes States subordinate to the Union in matters of taxation when they have never been in such a position under the Constitution and; two, a State aggrieved by the decisions of the GST Council has no effective legal remedy. I argue therefore, that the structure of the GST Council is a violation of the basic structure of the Constitution, and could therefore be struck down by the Supreme Court when challenged.

In order to expand upon the above argument, this paper is divided into three parts.

The first part will examine the concept of federalism as enshrined in the Constitution of India and the aspects of it which constitute a "basic feature" of the Constitution. In doing so, this part will refer to the history of federalism in India, theories of what federalism is, and the jurisprudence of the Supreme Court (which heavily examines the Constituent Assembly debates to arrive at its conclusions) to distil certain core elements of federalism as a basic feature of the Constitution.

The second part will be an analysis of the 101st Amendment Act and its features, pointing out how it violates the principles of federalism discussed in the previous part. In doing so, this part will compare the 101st Amendment Act with its previous iterations to point out what has changed and why these changes affect the constitutional validity of the 101st Amendment Act. Further, this section will also briefly mention how countries with a federal Constitution, which have implemented a GST, namely Australia and Canada, did so within their federal framework.

The final part will be a summary of the arguments presented, and the possible consequences of the 101st Amendment Act as it stands.

The focus of this paper is purely doctrinal, focussing specifically on the institutional design of the Goods and Service Tax Council (GST Council) and the dispute resolution mechanism contained within it; whether it meets the "basic structure" test laid down by the Supreme Court and what possible difficulties in implementation are likely to arise in light of its structure. This paper is not concerned with the fiscal wisdom of a GST in India or whether a GST *per se* violates the Constitution. There are numerous practical difficulties in the implementation of the GST which other authors have highlighted,[7] but these are beyond the scope of this paper. This paper is also not intended to be a comparative study of the GST as implemented in other countries.

---

[7] *See* M.G Rao, *Goods and Services Tax: A Gorilla, Chimpanzee or a Genus like 'Primates'*? Vol. XLVI No. 7 Economic and Political Weekly 43 (2011). *See also* Satish S and Kartik Dedhia, *The Challenges of Implementing GST*, Forbes India (Feb. 26, 2016)http://forbesindia.com/article/budget-2016/the-challenges-of-implementing-gst/42491/1.

II. FEDERALISM AS A BASIC FEATURE OF THE CONSTITUTION OF INDIA

A. Historical antecedents

The roots of the Indian Constitution's federal character lie in the Government of India Act, 1919 and the subsequent Government of India Act, 1935.[8] The Government of India Act, 1935 first introduced the concept of separate legislative powers for the "Centre" and the "Provinces", with a Federal Court empowered to adjudicate any disputes arising out of situations in which the Centre or the Provinces exceed their powers.[9] The Constitution of India, far from discarding this structure, builds upon it, re-distributing powers to some extent, arguably giving greater autonomy to the sub-national units and finding more equitable ways of distributing revenue between the national and sub-national units.

As far as taxation is concerned, the actual list of subjects of taxation reserved for States is remarkably similar to the Government of India Act, 1935. The 13 taxing entries in List II of the Seventh Schedule of the Government of India Act, 1935 are reproduced without much change in List II of the Seventh Schedule of the Constitution of India. The only additional subjects under which States could levy taxes under the Constitution are: taxes on mineral rights, taxes on consumption and sale of electricity, and taxes on vehicles.

B. Is the Indian Constitution federal in character?

The Constitution of India describes India as a Union of States.[10] Even though the Constitution allows for the creation of new States, renaming existing States, and alteration of boundaries of States by Parliament through a regular law, the States themselves are indestructible.[11] The Union Parliament can, through a constitutional amendment, also remove a State from the list of States and merge it with another, such as for instance States such as the Punjab and Erstwhile Patiala States Union (PEPSU) which has now been merged into Punjab.[12] New States have been carved out several times over the years on a linguistic basis (such as Karnataka) or for better representation of tribal peoples (such as Jharkhand). The Centre appoints Governors to States and has the power to dismiss State Governments under Article 356 on the recommendations of the Governor — a much used and abused power. When Emergency is declared in India, Article 250 permits Parliament to even legislate on subjects earmarked for the States. Under Article 254, where there is any conflict between a Union law and State law made

---

8 *See generally* Rohit De, *Constitutional Antecedents, in* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 26-9 (Sujit Choudhary, Madhav Khosla, & Pratap Bhanu Mehta eds.).

9 Section 204, Government of India Act, 1935.

10 INDIA. CONST. art. 1 cl. 1.

11 INDIA. CONST. art. 3.

12 States Reorganisation Act, 1956.

on the same subject matter in the Concurrent List, the Union law will prevail. All of these cast doubt on the claim that the Indian Constitution enshrines the principles of federalism.

Does this necessarily mean that we cannot describe India as a "federal" country? Given the greater tilt towards the Union, there has been a serious debate in the years after the Constitution came into force as to whether India is a federal polity at all.[13] Decades of actually working the Constitution, not to mention the judgments of the Supreme Court, have meant that the present common consensus is that India is a federal country, but one where the Union has a greater share of the powers than the States.[14] A federal state is not an abstract ideal nor just the opposite of a unitary state – it is any polity where there is a division of legislative and executive powers (or political sovereignty) between the national and sub-national units.[15]

A federal division of powers can lie on a spectrum ranging from purely unitary states, such as England to federal States, such as the United States where the bulk of legislative powers vests with the States. Merely because certain powers can be exercised in exceptional situations, does not mean that a polity ceases being "federal" conceptually.[16]

The common consensus that India's Constitution is federal in character cannot be dismissed. Some features of India's federalism are undeniable:

a. The States have plenary legislative power derived from the Constitution and not from a law made by the Union Parliament.[17]

b. The States have their own fields of legislation and a common one with the Union.[18]

c. The States have the constitutional power to levy tax and raise revenue for their functioning.[19]

d. The Constitution guarantees the States freedom to spend their revenue as they see fit.[20]

e. The States' executive powers are plenary.[21]

---

[13] For a summary of this debate, see M.P. Singh, *The Federal Scheme*, *in* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 464-6 (Sujit Choudhary, Manav Khosla, & Pratap Bhanu Mehta eds.).

[14] *Id.*

[15] Singh, *supra* note 13, at 464-6.

[16] Singh, *supra* note 13, at 464-6.

[17] *See Maharaj Umeg Singh* v. *State of Bombay*, AIR 1955 SC 540 : (1955) 2 SCR 164.

[18] INDIA. CONST. art. 246. cl. 2 & 3. INDIA. CONST. List II & III, Seventh Schedule.

[19] INDIA. CONST. Entries 45-63, List II of Seventh Schedule delineate the subject matters on which the State has the power to levy taxes on.

[20] INDIA. CONST. art. 202.

[21] *See N.K. Chauhan* v. *State of Gujarat*, (1977) 1 SCC 308.

C. The concept of the basic structure doctrine and federalism as part of the basic structure

The federal character of the Constitution being a basic feature of the Constitution of India was hinted at by the Supreme Court in *Kesavananda Bharati v. State of Kerala*,[22] where the Supreme Court first articulated what came to be known as the "basic structure doctrine". While holding that constitutional amendments could be struck down by the Supreme Court for violating the basic features of the Constitution, the majority in *Kesavananda Bharati* also enumerated the features of the Constitution that they considered "basic" without exactly going into depth as to what they meant by each of these features. Of the majority in this case, CJI Sikri,[23] Shelat Grover,[24] and Jaganmohan Reddy JJ.,[25] explicitly identify the "federal character" of the Constitution as one of the basic features of the Constitution. The others in the majority, H.R. Khanna, K.S. Hegde and AK Mukherjea JJ.,[26] do not mention it explicitly but concede that the basic features enumerated by them are not exhaustive and can be expanded upon. The controversial "View by the majority" which nine of the thirteen judges signed on to as the definitive summary of the main findings of the case also does not list out the features which are considered to be part of the "basic feature or framework" of the Constitution.[27]

While the basic structure doctrine was accepted as law by the Supreme Court in its subsequent judgment in *Indira Nehru Gandhi v. Raj Narain*,[28] there was some scepticism about its scope. On the question as to whether the "basic structure doctrine" could be applied in a context outside the amendment of the Constitution, in *State of Karnataka v. Union of India*,[29] a seven judge bench of the Supreme Court of India while dealing with a dispute between the Congress-led Government in Karnataka and Janata Party led Union Government, doubted whether the basic structure doctrine could be used to strike down regular Government decisions or to interpret the Constitution in a particular manner.[30] Holding that a Commission of Inquiry headed by former Supreme Court Judge appointed by the Union Government to inquire into allegations against the Chief

---

[22] *See Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225.

[23] *See* Kesavananda, (1973) 4 SCC 225, 366 (Sikri, J.).

[24] *See* Kesavananda, (1973) 4 SCC 225 (Shelat & Grover, JJ.).

[25] *See* Kesavananda, (1973) 4 SCC 225 (Reddy, J.).

[26] *See* Kesavananda, (1973) 4 SCC 225 (Hegde & Mukherjea, JJ.).

[27] Full text of the "View of the majority" is extracted in T.R Andhyarujina, THE KESAVANANDA BHARATI CASE: THE UNTOLD STORY OF STRUGGLE FOR SUPREMACY BY SUPREME COURT AND PARLIAMENT 51 (Universal Law Publishing, 2011). Scholars have debated the legal validity of this "view of the majority" and until, Andhyarujina's book was published, no authoritative copy of it even existed in the public domain as the leading law reports which published the Kesavananda Bharati judgment had either not reproduced it at all or had done so incorrectly. *See Id.*, at 51-8.

[28] *See Indira Nehru Gandhi* v. *Raj Narain*, (1975) Supp SCC 1.

[29] *See State of Karnataka* v. *Union of India*, (1977) 4 SCC 608.

[30] *See* State of Karnataka, (1977) 4 SCC 608, 673 (Beg, CJI).

Minister of Karnataka, the Supreme Court rejected a challenge based on the ground that this was contrary to the basic structure of the Constitution.

Likewise, when the power of the President was used to invoke Article 356 on the ground that the Congress ruled State Governments had "lost legitimacy" in light of electoral reverses, in 1977, the Supreme Court refused to review the imposition of such President's Rule through its judgment in *State of Rajasthan v. Union of India*.[31] Although an argument was raised that the policy to dismiss State Governments was contrary to the basic structure of the Constitution, the Supreme Court did not think so, and held that it was perfectly acceptable within the framework of the Constitution.[32] In fact, CJI Beg's judgment seems sceptical about the whole notion of India's constitution being federal, pointing out the high level of "control" that the Union tends to exercise over the States.[33]

D. Bommai and federalism as basic structure

The Supreme Court in *Bommai* dispelled scepticism on both fronts – it asserted that the federal character of the Constitution was a basic feature of the Constitution and that it could be used in contexts beyond testing the constitutional validity of amendments. The case came to court following the dismissal of six State Governments by the Union Government in the late 80s and early 90s.[34] These dismissals were challenged by the respective States in court and the cases eventually worked their way up to the Supreme Court and were ultimately decided in 1994. A nine-judge Bench of the Supreme Court held that the *State of Rajasthan* case had been decided wrongly, holding that the decision of the President to impose "President's Rule" on a State could be judicially reviewed and listed out the narrow grounds on which President's Rule could be imposed. It therefore held the imposition of President's Rule invalid in the context of three States, but it also upheld the dismissal of three State Governments on the ground that their actions in helping *kar sevaks* was an abrogation of secularism; also a basic feature of the Constitution.[35]

Six opinions were delivered between the nine judges[36] who heard the *Bommai* case of which at least three went into some depth in examining the federal

---

[31] *See State of Rajasthan* v. *Union of India*, (1977) 3 SCC 592.

[32] *See* State of Rajasthan, (1977) 3 SCC 592, 620-624 (Beg, CJI).

[33] *See* State of Rajasthan (1977) 3 SCC 592, 623 (Beg, CJI).

[34] These states were Karnataka, Meghalaya, Nagaland, Madhya Pradesh, Rajasthan and Himachal Pradesh. The first three had been dismissed owing to defections and alleged loss of support of Chief Minister whereas the latter three had been dismissed in light of the respective State Government's support for *kar sevaks* in the events leading up to the Babri Masjid demolition and communal violence that followed.

[35] *See* S.R. Bommai, (1994) 3 SCC 1, 296.

[36] The *Bommai case* was decided by a majority of 6:3 on the main issue of justiciability of the imposition of President's Rule in a State. Ahmadi, J.S. Verma, and Yogeshwar Dayal, JJ. disagreed with the majority on the point with Ahmadi, J. giving detailed reasons for disagreeing

character of the Indian Constitution. Ahmadi, J. (who was in the minority on the issue of the scope of Article 356) describes the Constitution as "quasi-federal",[37] while Sawant and Kuldip Singh, JJ. (part of the majority) did not use a specific label in describing India's federalism, even though they held that "democracy" and "federalism" are part of the basic structure of the Constitution.[38] Ramaswamy, J. while agreeing that federalism is a basic feature of the Constitution, used the terms "federal" and "quasi-federal" to describe the relations of States inter se and the relations of State and Union respectively.[39] Jeevan Reddy and Agrawal, JJ. noted that the federal character of the Constitution is not just a "convenience" but in fact a principle born out of a "historical process" and an understanding of the "ground realities".[40] They recognize that the federal character of the Constitution does indeed have a bias towards the Union without necessarily rendering the States mere "appendages" to the Union.[41]

As to what federalism actually means in the context of the Constitution of India, the judges in the majority take different approaches to expand upon it. Sawant and Kuldip Singh, JJ. list out eleven features of the Indian constitution given by constitutional scholar H.M. Seervai to argue that India was a genuine federal constitution.[42] Of relevance here is this attribute of federalism which is cited with approval:

> "The view that unimportant matters were assigned to the States cannot be sustained in face of the very important subjects assigned to the States in List II, and the same applies to taxing powers of the States, which are made mutually exclusive of the taxing powers of the Union so that ordinarily the States have independent source of revenue of their own. The legislative entries relating to taxes in List II show that the sources of revenue available to the States are substantial and would increasingly become more substantial. In addition to the exclusive taxing powers of the States, the States become entitled either to appropriate taxes collected by the Union or to a share in the taxes collected by the Union".[43]

For Ramaswamy, J. also, the "essence of federalism" is the division of legislative and executive powers of a State between the Union and the States. He is of the view that each is sovereign within its own sphere to the extent of the power

---

with the majority on the question of use of Article 356 violating the basic structure of the Constitution.

37 *See* S.R. Bommai, (1994) 3 SCC 1, 75. (Ahmedi, J.).

38 *See* S.R. Bommai, (1994) 3 SCC 1, 112 (Sawant and Kuldip Singh, JJ.).

39 *See* S.R. Bommai, (1994) 3 SCC 1, 156 (Ramaswamy, J.).

40 *See* S.R. Bommai, (1994) 3 SCC 1, 215 (Jeevan Reddy and Agrawal, JJ.).

41 *See* S.R. Bommai, (1994) 3 SCC 1, 216 (Jeevan Reddy and Agrawal JJ.).

42 *See* S.R. Bommai, (1994) 3 SCC 1, 112 (Sawant and Kuldip, JJ.).

43 H.M. Seervai, CONSTITUTIONAL LAW OF INDIA, 301 (N.K Tripathi ed., 4th ed. 1994).

that has been given to it under the Constitution.[44] As far as the constitutional status of the Union and the States go, he sees them as co-equal in their respective spheres, but to the extent that certain powers have been given to the Union vis-à-vis the State, "Indian federalism", in his view is unlike the federalism in Australia, Canada or the United States of America.[45]

Reddy and Agrawal, JJ. also state that "within the powers allotted to them, States are supreme". They acknowledged that the Union cannot be allowed to whittle down the power of the States through the process of interpretation of the Constitution. At the same time, they noted that the Constitution has made the Union more powerful than the States when it comes to certain matters, including the matter of taxation, though this is accompanied by an obligation to turn over a part of the tax proceeds to the States under the mechanism provided under the Constitution.[46]

All the judges in the majority acknowledged that the Indian constitution is a federal one, and that the federal structure of the Constitution is a basic feature of the Constitution. All of them agreed that within the constitutional spheres allotted to them, States are sovereign and constrained only by the express limitations imposed on them by the Constitution. Sawant and Kuldip Singh, JJ. go on to identify fiscal independence (as pointed out by Seervai) as one of the features of federal character of the Indian Constitution, while Reddy and Agrawal, JJ. noted that the Constitution couples the Union's greater tax powers with an obligation to turn over some to the States. What cannot be denied from examining the majority judgments in *Bommai* is the conclusion that the core of the federal character of the Indian Constitution is found in the fact that the legislative and executive powers of the States are vested in them by the Constitution, limited only by the Constitution itself and not the Union Government.

It is arguable that though the Supreme Court has recognized the federal character of the Constitution as a "basic feature", the ultimate basis of the decision was the principle that judicial review can never be entirely excluded from the decisions of constitutional functionaries.[47] Nevertheless, the extremely narrow grounds on which President's Rule under Article 356 has been held permissible is a reiteration of the federal character of the Constitution. These grounds are a recognition that federalism, where the Union cannot interfere in the functioning of a State Government, is a basic feature of the Constitution and may only be abrogated for narrow, exceptional reasons, as articulated in the Constitution itself and not at the pure discretion of the Governor or the President, acting on the advice of the Union Government.

---

[44] *See* S.R. Bommai, (1994) 3 SCC 1, 158 (Ramaswamy, J.).
[45] *See* S.R. Bommai, (1994) 3 SCC 1, 158 (Ramaswamy, J.).
[46] *See* S.R. Bommai, (1994) 3 SCC 1, 215 (Reddy & Agrawal, JJ.).
[47] Singh, *supra* note 13, at 463.

While the basis of what constitutes federalism was articulated in the context of the use of Emergency powers under Article 356, the analytical framework it provides to understand the core of what constitutes "federalism" still holds. The consensus among constitutional law scholars is that India's federalism on the spectrum is perhaps closer to the unitary state than to a federal polity like the United States, where far greater powers vest in the sub-national units.[48] Nonetheless, the judicial position remains that the federal structure of the Constitution, in so far as it divides political sovereignty between the States and the Union, guaranteeing the independence of action of both within the spheres allotted to them, is a basic feature that cannot be done away with by amendment.

In the specific context of taxation, the Supreme Court's judgment in *State of W.B. v. Kesoram Industries Ltd.*[49] is also relevant. Here, the Supreme Court re-iterated the powers of the State Governments in imposing taxes on mineral rights, even though the power to regulate and control such minerals was vested with the Union. The court read the relevant entries of List I and List II of the Seventh Schedule harmoniously, holding that the Union's power to regulate and control could not be said to have deprived the State of its power of taxation on that subject. It premised this harmonious interpretation on the federal structure of the Constitution, acknowledging that there definitely was a bias in favour of the Union in the federal structure. The Court nonetheless states that interpretation of the Constitution should avoid "whittling down" the powers of the State.[50]

The Supreme Court in *Kesoram* does not explicitly discuss whether federalism is a basic feature of the Constitution (since no constitutional amendment was involved), but nonetheless operates on the assumption that judicial interpretation of the Constitution must work towards reinforcing rather than weakening the federal structure of the Constitution.[51]

A cumulative reading of these cases suggests the following propositions:

a. Though there is a strong bias towards the Union, there is no doubt that the Constitution of India envisages a federal polity.

b. The federal structure of the Constitution is a basic feature of the Constitution that cannot be abrogated by amendment.

c. The division of powers between the Union and States is an essential feature of this federal character.

d. The political sovereignty of States is inviolate under the Constitution, save for exceptional circumstances where constitutional rule is itself not possible.

[48] A comparison that Ahmadi J makes to say that the Indian Constitution is not "federal" in the same sense as the American Constitution. *See* S.R. Bommai, (1994) 3 SCC 1, 72.

[49] *See State of W.B.* v. *Kesoram Industries Ltd.*, (2004) 10 SCC 201.

[50] Kesoram Industries, (2004) 10 SCC 201, 289.

[51] Kesoram Industries, (2004) 10 SCC 201, 289.

e. States' power to levy taxes and cesses by laws is plenary and part of the federal character of the Constitution.

What the 101st Amendment Act does, however, in the way in which the GST Council is structured, is to abrogate States' political sovereignty when it comes to the levy of taxes. As I argue in the next part, it renders States subservient to the Union in the matter of taxation, giving the Union the power to dictate taxation laws and the policies of a State.

III. CONSTITUTIONAL INFIRMITY OF THE 101st AMENDMENT ACT

A. Legal problems with GST Council

The 101st Amendment Act which creates the constitutional framework for the GST also creates a GST Council to resolve issues of implementation. This Council comprises of the Union Finance Minister as Chairperson, the Union Minister for State for Finance or Revenue, and all Finance Ministers from the respective State Governments.[52] It has the power to issue "recommendations" on a range of matters outlined in Article 279A(4) of the Constitution. Decisions of the GST Council are taken by super-majority of three fourths of the weighted votes of members present and voting,[53] but each State and the Union don't necessarily have the same voting power. The Union alone has one-third of the votes, while all the States together have two-thirds of the total votes.[54]

Before getting into the two main problems with the structure of the GST Council, it is necessary to address one issue – whether the "recommendations" of the GST Council are in fact binding upon the Union and States.

There is scope for confusion over whether the "recommendations" of the Council are binding, since legally, a "recommendation" (in contrast with the word "prescription") would mean that it is non-binding on the parties concerned.[55] Explanation to Article 246A, Article 269A(1), clauses (4), (5) and (11) of Article 279A(4), and Section 18 of the 101st Amendment Act use the term "recommendations" or some variation of the same in the context of the GST Council. This would suggest that the Union and the States are still free to disregard the recommendation of the GST Council if they so choose.

However, a closer examination suggests that this is not so. It is a well-accepted canon of construction that words must interpreted in the context in which they

---

[52] INDIA. CONST. art. 279A. cl. 1.

[53] INDIA. CONST. art. 279A. cl. 9.

[54] INDIA. CONST. art. 279A. cl. 9(a).

[55] *See Naraindas Indurkhya* v. *State of M.P.*, (1974) 4 SCC 788 where the Supreme Court made the distinction between "recommendation" and "prescription" in the context of school syllabus.

occur[56] and in line with the intent of the legislature.[57] The use of "recommendation" may be an instance of poor drafting as the intent in introducing the GST Council is quite clearly to make the recommendations binding. Two reasons can be forwarded for this: *one,* if the GST Council can't make binding recommendations, the entire structure of the GST will collapse, as each State will have a different and possibly conflicting tax levy and collection mechanism. The GST, as envisioned, is supposed to be uniform, with second order benefits to flow out from such uniformity. The Union Finance Minister, Mr. Arun Jaitley, in his speech introducing the 101st Amendment Bill in the Rajya Sabha said,

> The merits of the system itself are that it would convert India into one uniform economic market with a uniform tax rate, bring about a seamless transfer of goods and services across the country, enable us to check evasion and, therefore, enlarge the revenue, as far as the Centre and the States are concerned.[58]

The uniform rates promised by the GST would go out of the window if the GST Council can't ensure uniformity in rates.

Two, the fact that there is a dispute resolution mechanism provided for in Article 279A(11) suggests that the recommendations are supposed to be binding – if they were merely recommendatory and non-binding, no legal obligations would arise out of them, and there would be no dispute to address as the State or the Union would be free to disregard the recommendations. If the intent was to make the recommendations non-binding there would be no need to have a dispute settlement body to enforce compliance of recommendations.

Given that the "recommendations" of the GST Council are actually binding on the States, the manner in which the decisions are taken by the GST Council is constitutionally defective for two broad reasons.

First, recommendations of the Council are made on the basis of a three fourths majority of the members of the Council according to Article 279A(9). However, as mentioned not all members of the Council have an equal vote in the Council. The votes are weighted with the Union Government's vote having the weight of one-third of the total votes cast and *all* the States together having two-thirds of the total votes. With the requirement for majority being three-fourths of the votes cast, this effectively gives the Centre a veto over all "recommendations" of the Council as it is mathematically impossible to attain the required three-fourths majority if the Union does not vote for it.

---

[56] *See Yedida Chakradhararao* v. *State of A.P.*, (1990) 2 SCC 523.

[57] *See Pratap Singh* v. *State of Jharkhand*, (2005) 3 SCC 551.

[58] Arun Jaitley, Speech to the Rajya Sabha (Aug. 3, 2016) http://164.100.47.5/newdebate/240/03082016/14.00pmTo15.00pm.pdf.

Considering once again the kinds of subjects that the GST Council has the power to make binding recommendations on, it implies that the Union Government has veto power over the law making functions of the States – a concept entirely alien to the federal structure of the Constitution of India.

Such a mechanism which allows the Union to determine and direct the tax policies of a State through a binding "recommendation" of the Council is unlikely to pass the "basic structure" test in that it could amount to a violation of the Constitution's basic feature of federalism. It directly infringes and violates one of the fundamental tenets of the Constitution's federal structure – the political sovereignty of the States.

Curiously, this particular feature of the GST Council is of relatively recent vintage. The earlier version of the 101st Amendment Act, the Constitution (115th Amendment) Bill, 2011 mandates that decisions of the GST Council be taken on the basis of consensus of all parties.[59] However, this was changed on the basis of a report of the Parliamentary Standing Committee which recommended a change on the basis that consensus may be difficult to achieve between the Union and the States.[60] The basis for doing so is a "suggestion" made during a meeting of the Empowered Committee of State Finance Ministers in 2013. However, it was never clarified in the report if this was a suggestion made by the Empowered Committee itself or one of the suggestions made at the meeting by a party.[61] Only the view of the Chairman of the Empowered Committee of State Finance Ministers is reproduced to this effect and it has never been made clear if this was the decision of the Empowered Committee or his personal opinion.[62] Immediately after that the Report says that it would be preferable to have a consensus based decision making,[63] but in the ultimate recommendation to the Government, it suggests the present voting format.

The 115th Amendment Bill which proposes that decisions of the GST Council be taken by consensus arguably provides for a more constitutionally appropriate method as it treats the Union and the States as equals instead of placing one above the other. There is no logic or rationale given by anyone for why the consensus requirement was replaced by the majority system with a veto for the Union, save for a cursory line in the Standing Committee Report that sometimes consensus may be difficult. Even the dissent note by the member from the All India Anna Dravida Munnetra Kazhagam party, in the report of the Select

---

[59] Proposed Article 279A(8) Constitution (115th Amendment) Bill, 2011 <http://www.prsindia.org/uploads/media/Constitution%20115/Constitution%20115,%2022%20of%202011.pdf>.

[60] STANDING COMMITTEE ON FINANCE, 15TH LOK SABHA, SEVENTY THIRD REPORT ON THE CONSTITUTION (ONE HUNDRED FIFTEENTH AMENDMENT) BILL, 2011 <http://www.prsindia.org/uploads/media/Constitution%20115/GST%20SC%20Report.pdf>.

[61] *Id.*, at 61.

[62] STANDING COMMITTEE ON FINANCE, *supra* note 60, at 35.

[63] STANDING COMMITTEE ON FINANCE, *supra* note 60, at 37.

Committee considering the 101st Amendment Act in its Bill form, which criticizes the voting structure in the GST Council, is not referred to or responded to at all.[64]

Second, the supremacy of the Union over the States in the GST Council is re-affirmed by the manner in which disputes arising out of the recommendations of the GST Council are resolved. The 101st Amendment Act leaves it to the GST Council itself to set up the manner in which disputes will be resolved. The 101st Amendment Act does not provide for any other separate procedure by which the dispute settlement mechanism must be decided upon leaving one to conclude that this too will be subject to the rule of super-majority, with the Union continuing to enjoy a veto over the decisions of the GST Council. In effect, the Union, which dominates decision making in the GST Council, will also decide how these decisions may be challenged by aggrieved States. Given its veto, it can be safely assumed the Union will never have a grievance against any recommendation of the GST Council and it may, at best, use this dispute settlement mechanism to enforce the decisions of the Council against States. A State that is unhappy with a GST Council recommendation is therefore left with little or no effective legal remedy.

Apart from compounding the subordinate position of the States under the GST Council, the dispute settlement mechanism could also fall afoul of the Supreme Court's judgment in *Supreme Court Advocates-on-Record Assn. v. Union of India*,[65] where the Court struck down the Constitution (99th Amendment) Act, 2015 for the reason, *inter alia*, that the Government, which was the largest litigant had a say in the appointment of judges.[66] With the Supreme Court's jurisdiction over decisions of the GST Council having been excluded by implication (specifically its jurisdiction under Article 131 in relation to inter-State or Union-State disputes), it is likely that this might be seen to be an abrogation of judicial review under the Constitution – a basic feature that has been responsible for all constitutional amendments struck down so far.

Irrespective of whether the Supreme Court is ultimately going to hold the 101st Amendment Act as being constitutionally valid or otherwise, the fact remains that the GST, in order to be functional, requires a massive, coordinated effort on the part of the Union and the States. This requires both the Union and the States to be on the same page as regards the benefits and drawbacks of the GST and its operation. A GST Council which is riven by distrust between parties and suspicion about the motives of the other is unlikely to perform this coordination function with any real effect. The GST Council, as presently structured, seems to deprive States of a real say in the decision making around the GST.

---

[64] *See* SELECT COMMITTEE ON THE CONSTITUTION (ONE HUNDRED AND TWENTY SECOND AMENDMENT) BILL, 2014, REPORT OF THE SELECT COMMITTEE ON THE CONSTITUTION (ONE HUNDRED AND TWENTY SECOND AMENDMENT) BILL, 2014 http://www.prsindia.org/uploads/media/Constitution%20122nd/Select%20comm%20report%20-GST.pdf.

[65] *Supreme Court Advocates-on-Record Assn.* v. *Union of India*, (2016) 5 SCC 1.

[66] Supreme Court Advocates -on-Record Assn., (2016) 5 SCC 1, 497.

B. A comparative perspective on the GST

Two federal systems which have adopted the GST, Canada and Australia, provide interesting contrasts in terms of how the GST was incorporated into the federal structure. Whereas Canada and Australia adopted a GST in 1991[67] and 2000[68] respectively, neither Canada nor Australia amended their respective Constitutions to adopt the GST and it is quite interesting to examine why.

The Canadian example would not be particularly relevant for India since the power to impose a GST would be entirely within the legal competence of the federal Parliament as the Provincial Legislatures have power only to impose direct taxes and not indirect taxes.[69] There is no question of an incursion on any Provincial power since the exclusive competence to enact the GST was with the Parliament. This was confirmed by the Supreme Court of Canada in *Goods and Services Tax, In re*[70] which held that Part IX of the Excise Tax Act, 1985 was constitutionally valid and did not in any way infringe the powers of the Provincial legislatures under the Canadian Constitution. It found however that there was some encroachment which was "necessarily incidental" but not in a manner which affected the constitutional validity of the GST.[71]

More relevant for the Indian experience perhaps is the Australian Constitution, where save for the power to impose customs and excise duty, the power to levy taxes is concurrent between the Commonwealth and the States.[72] The GST however is levied only by the Commonwealth Government and not by the States. This does not mean that the States have no say in the GST. On the contrary, Section 1-3 of the A New Tax System (Goods and Services Tax) Act, 1999 makes it clear that the Commonwealth will maintain the rate and base for the GST in accordance with the Agreement on Principles for the Reform of Commonwealth-State Financial Relations ("the Agreement"). Furthermore, the same section goes on to confirm that revenue from the GST will go to the States and the sub-national units.

The Agreement itself was entered into in 1999 and lists out what sort of taxes are being given up by both, the Commonwealth and the States and Territories.[73] It also provides for a revenue sharing arrangement between the Commonwealth and the States and territories of revenues arising out of the levy of the GST.[74]

---

[67] By introducing part IX of the Excise Tax Act, 1985.

[68] A New Tax System (Goods and Services Tax) Act, 1999.

[69] *See* Sections 91 and 92, The Constitution Acts, 1867 to 1982.

[70] *Goods and Services Tax, In re*, 1992 SCC OnLine Can SC 64 : (1992) 2 SCR 445.

[71] Nathalie J. Chalifour, *Making Federalism Work for Climate Change: Canada's Division of Powers over Carbon Taxes*, 22 NATIONAL JOURNAL OF CONSTITUTIONAL LAW, 119 (2008).

[72] Section 90, Commonwealth of Australia Constitution Act, 1900.

[73] Part 2 [5], Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations, 1999.

[74] Part 2 [7-9], Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations, 1999.

Relevant in the context of India's GST structure is Part 3 which deals with the Management of the GST Rate and the GST Base.[75] Any changes to the rate or the base have to be on the basis of the unanimous support of the State and Territory Governments and cannot be done by the Commonwealth Government alone, even though it has the plenary power to enact the GST legislation.

Of course the structure of the GST in both these federal nations have been designed keeping their respective constitutional schema in mind, and it would be hazardous to suggest that India should have adopted either of these models in framing the GST law. More so, because the GST in India is envisaged as something which both Union and States will impose. Nonetheless, it is important to note that the GST does not necessarily require the sub-national units to be in a subordinate position vis-à-vis the federal government when it comes to their taxing powers. Through the introduction of the GST, States/provinces have not lost their taxing powers or become subordinate to the Union either in Canada or in Australia, nor do they have to exercise it in accordance with the Union's wishes. It is not therefore a necessary requirement of a GST that the federal unit gains control over the fiscal policies of the sub-national units.

IV. CONCLUSION

Save for a few stray articles,[76] there has not been much public debate about the structure of the GST Council and its problems. It is likely that the issue may come to the fore when the States actually attend a meeting of the GST Council and realise that the voting system is stacked against them and in favour of the Union.[77] With the present voting structure, there is no reason for the Union to take on board all States and it is quite likely that proposals relating to the rate of the GST, the exemptions and collection mechanism are likely to cause much disagreement. More so, since there's already been much public disagreement between so-called "producer States" and "consumer States" with the former taking a view that a GST is fundamentally against their interests.[78] It is quite likely that a legal

---

[75] Part 3 [31-2], Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations, 1999.

[76] *See*, Nilakantan RS, *The GST could sound the death knell for federalism in India*, THE WIRE, Aug. 5, 2016 http://thewire.in/56732/gst-killing-federalism/. Alok Prasanna Kumar, *The Bill that will doom the GST*, BLOOMBERG QUINT, Aug. 5, 2016 http://www.bloombergquint.com/opinion/2016/08/03/the-bill-that-will-doom-gst.

[77] Something of this nature seems to have occurred going by the complaints of the Kerala Finance Minister at the very first GST Council meeting: Express News Service, *Kerala Finance Minister worried about GST Council's agenda*, NEW INDIAN EXPRESS Sept. 21, 2016. http://www.newindianexpress.com/states/kerala/Kerala-Finance-Minister-worrired-about-GST-councils-agenda/2016/09/21/article3626366.ece.

[78] The concerns of "producing states" has been articulated here: A Sarvar Allam, *GST and the States: Sharing Tax Administration*, Vol. LI No 31 ECONOMIC AND POLITICAL WEEKLY, (2016) http://www.epw.in/journal/2016/31/web-exclusives/gst-and-states-sharing-tax-administration.html.

challenge could arise against the GST given the lopsided structure of voting that will leave some State aggrieved.

The legal challenge to the 101st Amendment Act, as this paper has outlined, will not be without firm legal basis. Given the effort that it took to get thus far on GST, it is quite unlikely that another round of constitutional amendments will be made by the Government to rectify the legal defects in the 101st Amendment Act pointed out here. It is quite likely that when challenged, the effort will be to defend the amendment legally in court.

That said, the 101st Amendment Act does not entirely foreclose the possibility of the States having a say in the decision making process in the GST Council. The Union still needs a majority of the States present and voting to agree with it in order to be able to take the decisions it wishes to in the context of the GST Council. Arguably this still provides some space for States to bargain with the Union and might save the 101st Amendment Act from being struck down. However, this risks creating "winners" and "losers" among the States in respect of the decisions taken by the GST Council. The "losers", the ones who may be adversely affected by a decision of the Council, will still have no effective remedy against the decisions of the GST Council given that the same decision making structure which went against them will also decide how their grievances will be addressed.

Whether the provisions of the 101st Amendment Act are struck down by the Supreme Court or not, the concerns for the federal structure of the Constitution will not go away. The success of the GST, in practice, requires high levels of co-ordination and trust between the Union and the States. This is a task that cannot be taken for granted. The present framework raises some questions, namely: Will States which feel that their interests have been crushed by a brute majority not try and throw further spanners into the works? Is the GST not likely to be mired in litigation, not between the assessee and State, but between State and State, and State and Union over the manner in which it is to be operated?

To re-iterate: India's federal character is not one of "administrative convenience" or mere accident. It is the result of specific historical circumstances leading up to the enactment of the Constitution. Indeed, as Ramaswamy J. recognized in his judgment in *Bommai,* a federal government was the Constitution makers' attempt at finding an effective way to govern a country as vast and diverse as India.[79] In attempting a large scale (and probably necessary) reform of indirect taxation, it would seem as if the federal character of the Constitution has been needlessly tampered with by the Union. If unchecked by the Court, this could have grave repercussions for the future of India's federal polity.

---

[79] *See* S.R. Bommai, (1994) 3 SCC 1, 156 (Ramaswamy, J.).