GST COMPENSATION TO STATES: AN INELUCTABLE OBLIGATION ON THE UNION

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The Central Government in the year 2020 initially refused states a recompense for both actual and notional losses in their GST revenues for the FY 2020-21. While the discombobulated state governments scrambled to find legal and fiduciary justification for their demands, the Centre simply cited situational expediency and the absence of any obligations, for their denial. It suggested two alternatives to the states, both of which evolved borrowing, as the only mechanisms for compensation. However, as the GST Council meetings and the 101st Constitutional Amendment Act would collectively reveal, the Centre had promised to the contrary. The obligation of maintaining a constant supply of compensation- credit to states emanates from that promise and is all the more binding, given the huge sacrifice made by the states. The historically unique creation of legislative tax-fields outside of Schedule VII of the Indian Constitution and the overwhelmingly dominant role of the Centre in administering them, were both premised on this future consideration to the states. Herein, the proviso to Article 368(2) has the same outcome as its laterally inverted version, Article 252, insofar as it crafts a contract between two vertical government branches operating in a 'federal market'. This, then, adumbrates the foundation of what presently prevails in American Constitutional jurisprudence as the 'anti-coercion' principle. This paper argues that the Indian Constitution has encapsulated this principle inceptively. GST compensation then becomes a contractual obligation at a Constitutional level, eliminating any legal space of revocability otherwise available to the Centre.

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I. INTRODUCTION

The Indian Goods and Services Tax ('GST') regime is essentially composed of three core elements – the 101st Constitutional Amendment Act ('the Amendment'),[1] the ensuing acts establishing the levies of different goods and services taxes,[2] and an act to compensate for the transition to this nebulous regime.[3] These, in turn, were made possible only because the Indian states acquiesced to this broad Constitutional overhaul. In 2016-17, the Indian states raised the issue of transitional losses when proposed with this regime's implementation.[4] This fear of losses was rooted in three concerns. Firstly, any old tax administration supplanted by a new one necessarily denotes certain temporary losses in the beginning.[5] Secondly, the Centre's decision of demonetisation in 2016 had drastically reduced the states' Value-Added Tax ('VAT') collections.[6] Lastly, the loss of fiscal autonomy over local taxes implied greater fluctuations in state revenues.[7] In response, the Centre proposed a Constitutional guarantee of a holistic compensation

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1 The Constitution (Hundred and First Amendment) Act, 2016.

2 The Central Goods and Services Tax Act, 2017; The Integrated Goods and Services Tax Act ('IGST Act'), 2017; The States Goods and Services Tax Act, 2017 ('SGST Act'); The Union Territory Goods and Services Tax Act, 2017.

3 The Goods and Services Tax (Compensation to States) Act, 2017 ('Compensation Act').

4 THE SCROLL (Editorial Staff), *All States, Barring One, have Agreed to Back the GST Bill Says Arun Jaitley*, June 14, 2016, available at https://scroll.in/latest/809937/all-states-barring-one-have-agreed-to-back-the-gst-bill-says- arun-jaitley (Last visited on May 11, 2021).

5 ET BUREAU, *GST: Centre, States Reach Consensus Over Dual Control, Rollout Likely from July 1*, January 17, 2017, available at https://economictimes.indiatimes.com/news/economy/policy/april-1-deadline-for-gst-ruled-out-4- options-now-for-arun-jaitley-in-budget-2017/articleshow/56598850.cms?from=mdr (Last visited on May 11, 2021); A. Sri Hari Nayudu, *Tax Revenue Efficiency of Indian States: The Case of Stamp Duty and Registration Fees,* 3 (National Institute of Public Finance and Policy, Working Paper Series No. 278 of 2019),.available at https://pfmkin.org/sites/default/files/202002/9%20Tax%20Revenue%20Efficiency%20of%20Indian%20States%20The%20case%20of%20Stamp%20Duty%20and%20Registration%20Fees_NIPFP.pdf (Last visited on May 12, 2021).

6 Reuters, *Arun Jaitley Faces Hurdles for Launch of GST by April 2017*, ZEEBIZ, December 24, 2016, available at https://www.zeebiz.com/india/news-arun-jaitley-faces-hurdles-for-launch-of-gst-by-april-2017-9603 (Last visited on May 11, 2021).

7 Gireesh Chandra Prasad, *How Arun Jaitley Steered Landmark Economic Reforms*, Livemint, August 25, 2019, available at https://www.livemint.com/politics/news/what-changed-for-businesses-people-under-arun-jaitley-s- watch-1566634025576.html (Last visited on May 11, 2021).

accounting for all these concerns.[8] The safeguard was to operate for the initial years of the GST coming into play. The states reposed trust in this Constitutional promise, resolving the deadlock. An unforeseen pandemic in 2020 tested the veracity of the Centre's claim. The compensation was supposed to be calculated by factoring in the opportunity cost of state revenues that would have been generated by the pre- GST tax regimes. If the GST revenues were to fall short of this estimate, the Centre would bridge the gap.[9] It was supposed to do so through funds generated by a special levy under its own GST collections.[10] The pandemic brought about an enormous shortfall for the states.[11] When the due compensation was sought from it, the Centre and its legally appointed representatives opined that there appeared to be no Constitutional mandate to continue compensating states. The reason cited was the Union's own financial losses necessitated by the COVID-19 pandemic.[12]

However, the United States of America had previously witnessed the federal branch's attempted departures from such Constitutional mandates, which were secured through states' consents. Its judiciary had devised a Constitutional norm as a fail-safe mechanism, precisely for these circumstances.[13] By treating the deliberative fields carved out for legislatures on all vertical levels as something 'tradeable', it made inter-mural bargaining, in a federal setup, a Constitutionally accountable enterprise. When a state gives up its powers on certain subjects of law-making in favour of the Union, the latter is said to consensually 'purchase it for a cost'.[14]

These costs were to be disbursed from the GST Compensation Fund in the form of periodical credits to the states.[15] These credits, as stated earlier, would compensate the latter for losing out on revenue from the previous regime. Contained as legal provisions in the Goods and Services Tax (Compensation to States) Act, 2017 ('Compensation Act'), this mechanism was the most essential feature of the compact between the Centre and the states. I argue that in the Indian GST context, those supposed credits are 'costs' in lieu of which the Indian Union

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8 *Id*.

9 *See* discussion *infra* Part III.C.

10 *Id*.

11 Rakesh Mohan Chaturvedi, *Centre Says it May Not be Able to Pay GST Dues to States due to COVID-induced slump*, The Economic Times, July 29, 2020, available at https://economictimes.indiatimes.com/news/economy / finance/centre-says-it-may-not-be-able-to-pay-gst-dues- to-states-due-to-covid-induced-slump/articleshow/ 77231 994.cms?from=mdr (Last visited on May 11, 2021).

12 Firstpost (Press Trust of India), *GST Shortfall to COVID-19 Impact, Says Economy Facing 'Act of God' Situation*, August 27, 2020, available at https://www.firstpost.com/india/nirmala-sitharaman-attributes-gst- shortfall-to-covid-19-impact-says-economy-facing-act-of-god-situation-8761421.html (Last visited on December 22, 2020).

13 Michael C. Tolley & Bruce A. Wallin, *Coercive Federalism and the Search for Constitutional Limits*, Vol. 25(4), Oxford University Press, 73, 74-83 (Autumn, 1995).

14 Aziz Huq, *The Negotiated Structural Constitution*, Vol. 114(7), Columbia Law Review, 1595, 1621-1622 (November, 2014).

15 The Goods and Services Tax (Compensation to States) Act, 2017, §2(f), §7(6) ('Compensation Act').

purchased and compromised the powers of state-level taxation. Albeit, these costs were not supposed to be the exclusive means for the Union to discharge this responsibility. The obligation on the Union was created when the states assented to this compromise. The former may not impose GST if it chooses to depart from this obligation.

To make this argument, I will first lay down the elements of the anti-coercion principle and its premise in Part II of the article. Consequent to this, I will attempt to establish the principle's application to the circumstances surrounding GST in India. Part III.A. will attempt to cull out the intent of the Constitution framers in India. Therein, I argue that the Indian Constitution contains provisions with the very objective of inter-governmental negotiation. These provisions are Article 252 and Article 368. Following this thread, I will argue in Part III.B. that state ratification under Article 368(2) constitutes 'consent'. The transition to GST took the route of negotiation as espoused by the proviso to Article 368(2), and as such, makes a case for an informal federal contract. In Part III.C., I equate legislative subjects in Schedule VII of the Indian Constitution to entitlements, akin to tradeable property. I will then explore the jurisprudential status of informal federal contracts in India, in Part III.D. It will briefly describe the implications of the GST regime in the larger distributive scheme of taxing powers. Tying it all up, it will finally argue that the Indian scenario is fertile ground for applying the anti-coercion principle, a skeletal version of which already seems to exist. This principle completely bars the Union from claiming any exception in compensating states for transitioning to the GST arrangement of indirect taxes. Furthermore, it also prevents the Centrefrom coercing the states into taking alternative routes for reimbursement, not agreed upon earlier.

For convenience, the terms federal executive and Centre are used interchangeably for 'Union', as representative of the topmost vertical unit in a federal setup, unless specified otherwise.

II. PROPERTY RULE IN FISCAL FEDERALISM: THE ANTI-COERCION PRINCIPLE

Legal and economic scholars have advanced the view that the Constitutional documents confer entitlements not only to its citizens but also to their representative institutions wielding a Constitutional status. This, however, only constitutes a baseline allocation.[16] This interpretation of the Constitution has its exclusive roots in the United States, and is considered an extension of 'living constitutionalism'.[17] A federal or a quasi-federal Constitution pre- supposes institutional bargaining in the future for functional efficiency, based on the possible reallocation of such entitlements with time. Mostly, this happens between federal

[16] Huq, *supra* note 14, at 1620.

[17] Jack M. Balkin, Living Originalism,5 (Harvard University Press, 2011).

and provincial levels which seem to have substantial entitlements. These negotiations could be horizontal (amongst states) or vertical (between the Union and the states).

But to understand this 'inter-mural' bargaining amongst Constitutional bodies, the cost of entitlements exchanged in an intergovernmental market had to be first explained. This required an economic view of legal relationships between State institutions. Therefore, to deem legal entitlements as transferable commodities, three rules have been laid down by scholars – the liability, inalienability and property rules.[18]

The liability rule comes into play when one party, with a superior claim on the right, disentitles its current holder. The effect of this rule is to provide a 'just compensation', deemed fit unilaterally by the former, for its deprivation. The best illustration of this is the acquisition of private land by a Government under the eminent domain principle.

The inalienability rule simply bars an exchange of entitlements despite there being willing parties. The initial entitlement in such a case remains frozen in its place. An instance of this would be a bar on the states to secede, by offering the Union a chunk of their revenue.[19]

In contrast to these is the property rule entitlement. It exists when the Constitutional right in question is transferrable only on a mutually agreed-upon price. The underlying premise is then a voluntary transaction where the right is deemed to be a 'property' in a figurative sense. At a micro level, a defendant citizen's right to jury trial under the U.S. Constitution's Sixth Amendment[20] is asserted to be covered by this rule.[21] A plea agreement offered by the government is the negotiated price for this supposed trade.[22] At a macro level, it may apply when the federal branch chooses to dispense with its governmental control over an area of economy for a cost.[23] For instance, broadcasting rights which is a singular concern of the Commerce Clause[24] in that Constitution, may be auctioned away to states as if it were a piece of property.[25]

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18 Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, Vol. 85(6), HARVARD L. REV., 1089, 1092-1093 (1972).

19 Constituent Assembly Debates, November 4, 1948 speech by Dr B.R. Ambedkar 43, available at https://eparlib.nic.in/bitstream/123456789/760458/1/CA_Debate_Eng_Vol_02.pdf (Last visited on January 2, 2021).

20 The Constitution of United States, 1789 (Amendment VI).

21 Erin Ryan, *Federalism at the Cathedral: Property Rules, Liability Rules, and Inalienability Rules in Tenth Amendment Infrastructure*, Vol. 81, , 1, 18-19 (2010).

22 *Id*.

23 F.E. Guerra-Pujol, *Coase and the Constitution: A New Approach to Federalism*, Vol. 14(4), , 593, 597, 599 (2011).

24 The Constitution of United States, 1789, Art. 1, §8; *See* Pujol, *supra* note 23, at 598.

25 Pujol, *supra* note 23, at 597, 599; R. H. Coase, *The Federal Communications Commission*, Vol. 2, , 1, 25-26 (1959).

The bargain over fields of legislation is considered to fall squarely under the property rule entitlement. That is, a tier of legislature initially entitled to legislate on a particular subject can later part with it, for a negotiated price.[26]

This view of a legislative domain as 'tradeable' is in line with the literature surrounding the theorisation of 'rights'. The classical liberal view, most significant in this regard, is the Hohfeldian view of jural relations. Hohfeld takes a legal right to connote multiple jural relations, one of them treating right as a form of 'liberty'.[27] That is, the absence of legal prohibitions on an act leads to an entitlement to the same at par with a 'right', even though the legal framework may not spell this out explicitly. Similarly, a Weberian, opportunity-oriented notion of 'right' entails the freedom of self-disposal.[28]

A state legislature ceding subjects on which it had an exclusive entitlement is, therefore, a 'transaction' in the larger scheme of fiscal federalism. This has more popularly been referred to as "federalism by contract".[29] To check the Congress's contractual overreach, the Supreme Court of the United States ('SCOTUS') in due course devised two public law- equivalent doctrines of duress and coercion. The anti-commandeering principle explicitly recognises the property rights of state legislatures in their legislative powers.[30] This rule operates to bar the U.S. Congress from misusing its superior fiscal power to induce non- compliance from the state executive with enactments of their respective legislatures.[31]

However, the outcome changes if this leverage is sought to be misused after a state legislature has already sold that legislative entitlement.[32] The anti-coercion rule comes into play in this eventuality. It precludes the Congress from radically changing the terms after such an arrangement has been entered into.[33] Its application was consolidated in the decision *National Federation of Independent Business* v. *Sebelius* ('Sebelius').[34] Therein, a law subsidising medical facilities/services, popularly known as the Affordable Care Act, was sought to be expanded within the adoptive states by the federal government.[35] The subscriber base of citizens was supposed to be small at the time the states adopted it. Once the

26 Daniel J. Hemel, *Federalism as a Safeguard of Progressive Taxation*, Vol. 93(1), New York University L. Rev., 1, 6-7 (April, 2018).

27 Nikolai Lazarev, *Hohfeld's Analysis of Rights: An Essential Approach to a Conceptual and Practical Understanding of the Nature of Rights*, Murdoch University Electric Journey of Law, 2005, available at http://www.austlii.edu.au/au/journals/MurUEJL/2005/9.html (Last visited on February 02, 2021).

28 Maria Tereza Leopardi Mello, *"Property" Rights and the Ways of Protecting Entitlements*, Vol. 20(3), The Contemporary Economic Journal, 430, 434-437 (2016).

29 Bridget A. Fahey, *Federalism by Contract*, Vol. 129, The Yale Law Journal, 2326 (2020).

30 New York v. United States, 1992 SCC OnLine US SC 81 (Supreme Court of the United States).

31 Printz v. United States, 1997 SCC OnLine US SC 83 (Supreme Court of the United States).

32 Hemel, *supra* note 26, at 3-20.

33 National Federation of Independent Business v. Sebelius, 2012 SCC OnLine US SC 74 (Supreme Court of the United States).

34 *Id.*

35 *Id.*, at 2605–2606.

states began participating in its implementation, more often than not by sacrificing prior medical laws within their competence, the U.S. Congress intended financial mischief. The major contribution due on its part was not forthcoming unless states further expanded the federal law's application within their territories. SCOTUS held that a promise that led to re-arrangement of federal- financial relations in the area of a particular law is like a contract, citing previous authorities.[36] The implication was that the resultant Constitutional contract enjoys heightened protection by the Court, as opposed to a Constitutional promise/guarantee.

To understand this, please note that the Commerce Clause, as a Constitutional promise, guaranteed federal non-interference in intra-state commercial matters.[37] Institutions may negotiate the operation of this clause in some matters, the Court stated. Illustratively, one such matter may be healthcare, with the states ceding their competence over it to the federal branch for a cost.[38] This cost was in the form of limited concession of state sovereignty and suspending the previously existing state legislation on the subject. The federal law was given priority even when the states were not Constitutionally obliged to do so. This negotiated alteration of an earlier Constitution promise with heavy 'costs' paid by states led to the creation of a Constitutional contract.[39] A federal branch, following this altered position, cannot exploit the helplessness of the states to change the terms of this contract.

The Court recognised the federal contract and applied a rule for its adherence. Firstly, it stated that even pre-existing Constitutional promises, like one in the form of the Commerce Clause, may be negotiated upon and restructured. Secondly and cumulatively, if the states pay the price by ceding both autonomy and legislative competence on an area of law, the obligation on the Federal branches to adhere to the new terms is even stronger. If this contract is not specifically enforced by the courts, the states will be coerced into implementing federal schemes without the financial backup promised by the union. This has been termed as the anti- coercion principle by scholars and has been lauded as the conclusive step in tackling the most intrusive kinds of coercive federalism.[40]

[36] Barnes v. Gorman, 2002 SCC OnLine US SC 56, 186 (Supreme Court of the United States); Pennhurst State School and Hospital v. Halderman, 1981 SCC OnLine US SC 73, 17 (Supreme Court of the United States).

[37] The relevant portion reads that "The Congress shall have power to regulate Commerce…among the several States."

[38] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (2012), 2608 (Supreme Court of the United States); Huq, *supra* note 14, at 1649.

[39] Non-interference of the Union in taxes covered by Schedule VII, List II, State List of the Indian Constitution.

[40] Huq, *supra* note 14, at 1595; Hemel, *supra* note 26; Fahey, *supra* note 29, at 2331-2332; *See* also Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, Vol. 95(1), Boston University L. Rev. 1 (2015); Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, Vol. 91, Texas L. Rev.,1283 (2013); James F. Blumstein, *NFIB v. Sebelius – Putting Enforceable Limits on Federal Leveraging: The Contract Paradigm, the Clear Notice Rule,\ and the Coercion Principle*, Vol. 6, J. Health & Life Sci. L., 123 (2013).

The anti-coercion principle acts to preserve the terms of this contract and to preclude the dominant federal unit from misusing its leverage strategically.[41] This, in turn, is premised on anticipating possible coercion post the stage of contract formation, by unilaterally imposing an alteration in terms.

This contractual approach then places the source of the Constitutional obligation in the act of cession by the states. While a Constitutional guarantee, mostly in the form of a law, is viewed from a polarising compliance-violation prism, the former takes into account the entire bargain surrounding its creation. It is the check on this contract enforcement, the anti-coercion principle, that bars the Indian Union's tergiversation on the issue of GST compensation. The entire gamut of transactions, of the Union promising future compensation as a result of which the states assented to a detrimental transfer of legislative competence, operate like a contract. The states, which could only revert to *status quo ante* if the Constitutional amendment so responsible is nullified, are compelled to implement the regime of the Union's choice. Not only does the Indian Union refuse its obligation to compensate directly, but also attempts to 'coerce' states into opting for financially detrimental alternatives.[42] It attempted to put the onus of generating funds for compensation on the states themselves. Though not recognised yet, the criminal breach intended by the Indian Union requires a remedy of a scale as the one devised in Sebelius.[43] The following section of the article will isolate the elements of the federal contract entered into by the Indian states and the Union in bringing about the GST regime, to eventually establish that the anti-coercion principle is indeed applicable in a case such as this.[44]

III. IMPORTING THE ANTI-COERCION PRINCIPLE INTO THE INDIAN INDIRECT-TAX JURISPRUDENCE

For a rule such as the anti-coercion principle, all the elements necessary for an implied federal-contract would be the prerequisites. Part II discussed the limited instances of its application in the U.S. Those were in cases where the supposed contract came into play by way of the states acquiescing to a governmental program, and not by way of a direct Constitutional modification. More significantly, the judiciary had to collectively view Constitutional provisions and

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41 Hemel, *supra* note 26, at 26.

42 C.P. Chandrashekhar & Jayati Ghosh, *Co-operative Federalism has Given Way to Coercive Federalism*, The Hindu Businessline, January 25, 2021, available at https://www.thehindubusinessline.com/opinion/columns/c- p-chandrasekhar/co-operative-federalism-has-given-way-to-coercive-federalism/article33661082.ece (Last visited on February 7, 2021); Rajeev Gowda & Manpreet Singh Badal, *In 'Act of God', Coercive not Cooperative Federalism*, The Hindu, August 29, 2020, available at https://www.thehindu.com/opinion/op-ed/in-act-of-god- coercive-not-cooperative-federalism/article32469299.ece (Last visited on February 02, 2021).

43 National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (2012) (Supreme Court of the United States); *See* also South Dakota v. H. Dole, 1987 SCC OnLine US SC 137, 211 (Supreme Court of the United States).

44 *See* Fahey, *supra* note 29, at 2354-2368.

the act of federal branches to infer the existence of this rule. The judicial focus is confined to identifying a promise, the consent in accepting it and a reimbursement. Scholars read one more requirement into it, which was the tacit treatment of the subject matter of trade as transferable property.

Part III will argue that each of these components is present in the context of states adopting GST. I assert that in spite of lacking historical precedents of the kind, Indian Constitution has laid a much more fertile ground for this principle. The Constitutional support for the rule in the U.S. is limited to an implied flexibility in its provisions for inter-mural bargaining. The Indian Constitution is richer than having kept only a baseline allocation. I will demonstrate that there exist specific provisions within the Constitution that envisaged these negotiations. When any of these routes is adopted, all the elements of a federal contract come to be satisfied, by default. The legislative demarcations for those branches is deliberately flexible by keeping them 'transferable'. Hence, I will argue that Indian Constitutional text is more specific in having installed this precise mode of federal agreements. The only requirement is the due recognition of an anti-coercion rule that prevents a breach. Even a prototype of that rule has been devised by the Indian judiciary in the past.

To make the complete argument, I have divided this Part into four sub- sections. Sub-section A discusses the legal costs involved in transferring the powers of indirect taxation such as those involved in this case. In doing so, it will discuss the precise legal and financial implications of states transitioning to the GST scheme. It will also dispute the claim of a federally 'shared' relationship as its outcome. There is indeed a 'transfer', but it results in a compromised position of the states through a loss of control over essential taxes. Following this, sub-section B describes the primary routes of an inter-governmental bargain in a federal context explicitly provided for by the Constituent Assembly. Both Article 252 and the proviso to Article 368(2), it is argued, plays an equally facilitative role. As in the case of the former, a Constitutional amendment requiring state-ratification also translates to states giving their 'consent' for an informal contract. This consideration takes the form of a compensatory levy incorporated in the mechanism of the Compensation Act. This would be under sub-section C. Lastly, sub-section D establishes two vital points, discussed together, as the cases aiding both those submissions are inextricably linked. The first is that the promise of compensation for transitional losses enjoys a Constitutional backing in this case. The second is that these promises have the impact of making any resultant contract susceptible to an anti-duress rule, such as the anti-coercion principle.

A. THE HEAVY LEGAL COSTS BORNE BY THE INDIAN STATES IN PARTING WITH THEIR 'PROPERTY'

Nivedita Menon has argued that Indian Constitutional values cannot be construed as divorced from political economy imperatives.[45] A quasi-federal scheme was designed in light of an intended functional relationship between democracy and the evolving capitalist-stages of a natal economy.[46] It was in this context that the Union Constitution Committee ('UCC') was given the task of distributing powers between the tentative Union and its provinces, which became functional a full six months even before the first sitting of the Constituent Assembly.[47]

Overriding the suggestion of the Expert Committee on Financial Relations, which was a sub-committee within the UCC, the Drafting Committee went on to give the Union a stronger grip on taxation due to the destabilising circumstances of Partition at the time.[48] This is despite the categorical assertion of the Expert Committee that the Union's finances would be stable in the long run, since national debt is mostly governed by the rarely disruptive external wars and large-scale internal disorder, as compared to the infinitely demanding functions ofthe provinces.[49] However, after several discussions, a few areas of taxation were left for the states that could help them maintain this functionality. It is this context that makes fields of taxes previously available to the state, extremely valuable.

Before further elaboration on their value to states, please note the precise nature of items in the three lists of Schedule VII of the Indian Constitution. The nature of legislative domains, as specified under the Indian Constitution, remains both under-theorised and judicially ignored. The most frequent assertion in this regard from the Court is that the fields do not confer a 'power' on legislatures, but merely function as a theoretical boundary within which they could deliberate.[50] The closest the Court ever came to taking a step further than this was in the case *State of Karnataka* v. *Union of India* ('State of Karnataka').[51] The Appellant state had disputed the Central government's act of appointing a commission of inquiry against its sitting Chief Minister. The state disputed that List III may not grant the Centre overriding powers in criminal law and inquiries, so much so that it affects the functioning of a legislative assembly.[52] To establish the maintainability of its

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45 Nivedita Menon, *Citizenship and the Passive Revolution: Interpreting the First Amendment*, in Politics and Ethics of The Indian Constitution 191-192 (Rajeev Bhargava, 11th ed., 2018).

46 *Id*.

47 S. B. Chaube, Constituent Assembly of India: A Springboard of Revolution, 181 (Sanctum Books, 2nd ed., 2000).

48 *Id*., at 186.

49 *Id*.

50 Union of India v. Harbhajan Singh Dhillon, (1971) 2 SCC 779, ¶190.

51 State of Karnataka v. Union of India, (1977) 4 SCC 608.

52 *Id*., ¶8.

petition under Article 131,[53] the Appellant made two arguments relevant to the enterprise of this article. Firstly, it stated that the relevant entries in List III permit the Centre to take only legislative, and not executive action.[54] If it did, the larger federal scheme and rights therein would be jeopardised.[55] Alternatively, it argued that state executive action based in the same law, preceded that of Centre's.[56] Hence, if legislative and executive rights were coextensive, its right under List III were unjustly superseded.[57] The Court only partially accepted the first argument, noting that legislative fields do grant an equal executive power.[58] The second argument was rejected by the majority, but the state's locus to file the suit was held as established.[59] The seven-judge bench declared that a field specified in the State List of Schedule VII deals with 'liberty' of the states to deal with them legislatively.[60] Premised on this, it equated such liberty with a state's 'right' for Article 131. Holding that violation of the former by legislative intrusion invites the latter, it stated:

> "[...] Hohfeld [...] gives four different meanings of the word right [...] If, for example, the State claims to be entitled to legislate exclusively on a particular matter on the ground that it falls within List III of the VII Schedule to the Constitution and the Union of India questions this right of the State, the dispute would be one relating, not to any right of the State in the strict sense of the term, but to the 'liberty' of the State to legislate on such matter and it would come directly within the terms of Article 131".[61]

The inferable link may be phrased as follows — exclusivity of this liberty confers an entitlement akin to a right. With another oft-repeated description of legislative subjects, the 'plenary power of a legislature to act or not to act', this then becomes crystallised as liberty in the Hohfeldian context.[62] So sanctimonious is this liberty that no Constitutional Writ may lie even to compel the introduction of a Bill in the legislature(s).[63] This liberty adumbrates the foundation for a property rule paradigm to apply in the Indian context.

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53 Art. 131 of the Constitution supplies the Supreme Court with ordinary original jurisdiction. Exclusive in nature, it is available only if the parties to a dispute are state and/or central governments. The pre-requisite for its invocation is that at least one of these claim a violation of their legal rights.

54 *Supra* note 51, ¶158.

55 *Id*.

56 *Id*., ¶¶170, 173A.

57 *Id*., ¶74.

58 *Id*., ¶99.

59 *Id*., ¶¶81, 204, 205.

60 *Id*.

61 *Id*.

62 K. Nagaraj v. State of A.P., (1985) 1 SCC 523.

63 *Id*.

A widely circulated view of the new Indian GST arrangement is that it introduces the concept of "pooled sovereignty" in India.[64] As opposed to the previously rigid notion of sovereignty as some indivisible concept, it holds that vertical-tiered governments may subtract from or add to their list of areas on which they assert sovereignty.[65] This refers to governments at different federal levels, sharing competencies to bring about a common entity, so as to conduce greater socio-economic benefits.[66] By the creation of an executive body like the GST Council with members from both states and the Union, with similar taxing powers on subjects, legislatures at both the levels have vacated some space, each for the greater good.[67] Not a recent concept, it rose from the dead only since the conception of the European Union ('EU'), wherein the control over a subject is not exclusive to either the supranational body, the EU, or to its constituent members.[68] However, the weightage of the Indian Union's vote in the GST Council, combined with the Council's overarching role in the implementation of every facet of the GST, belies this claim.[69] Before any further elaboration on the point, the precise implications of the concerned Constitutional Amendment are summarised for the convenience of making my argument.

The value of 'property' in this case has two components. Firstly, it is the lost revenues. Both the legislative subjects and tax administrators in the previous regime were accustomed to the taxes in place, generating consistent tax revenues. The new regime shall take its own time to sensitise both, resulting in transitional losses in the interim. This is estimable.[70] Second would be the lost legal entitlements, putting a precise fix on which is an unachievable task. However, an attempt in this direction may be made to ascertain the scale of this loss.

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[64] Swapan Dasgupta, *India Under Modi: The Establishment Overreacts*, Vol. 30(1), Journal of Democracy, 91, 92-96 (2019).

[65] *Id.*; Chanchal Kumar Sharma, *The Political Economy of India's Transition to Goods and Services Tax*, 18-22 (German Institute of Global and Area Studies, Working Paper No. 325 of 2021), available at https:// www. jstor .org /stable/pdf/resrep28523.pdf (Last visited on May 11, 2021).

[66] N.K. Singh, *GST will Help India Move Towards Becoming a Commercial Union*, Hindustan Times, April 19, 2017, available at https://www.hindustantimes.com/opinion/gst-will-help-india-move-towards-becoming-a- commercial-union/story-ku3DN3cgZmpSbQaVe7MetM.html (Last visited on December 30, 2020).

[67] Vijay Kumar, *GST Compensation - Déjà vu*, Tax India Online December 4, 2019, available at https://taxindiaonline.com/RC2/inside2.php3?filename=bnews_detail.php3&newsid=37632 (Last visited on December 28, 2020).

[68] Jan Pieter Beetz & Enzo Rossi, *The EU's Democratic Deficit in a Realist Key: Multilateral Governance,Popular Sovereignty and Critical Responsiveness*, Vol. 8(1), Transnational Legal Theory, 22, 33-36 (2017).

[69] Jayshree P. Upadhyay & Indivjal Dhasmana, *Centre Can Veto Any Measure Under Proposed GST Legislation*, Business Standard, May 8, 2015, available at https://www.business-standard.com/article/economy- policy/centre-can-veto-any-measure-under-proposed-gst-legislation-115050800029_1.html (Last visited November 28, 2020).

[70] *See infra* note 13.

When the states ratified the 101st Constitutional Amendment Bill[71] and enacted state GST laws, they made three sacrifices. The first was of numerous local taxes being subsumed into one. The second sacrifice by states was of their control over determining the 'measure' of the newly integrated sales tax was transferred to the GST Council (veto belonging to the representatives of the Union; Article 279A). Lastly, the tax base changed due to the change in the very nature of the tax (point of sale or origination based tax re-oriented to consumption-based tax). The change in tax base mattered fiscally (and adversely) to states with a manufacturing edge.[72] Other states had to give up various cesses and surcharges as sources of revenue.[73] The Indian states, thus, ceded both fiscal sources and effective control over sales tax-measures, over their previous Constitutional entitlements, to the Centre. §18 of the Amendment contained the guarantee of compensation for the loss induced in state coffers due to the transition.[74] In the very next clause, states were given the option to phase out any older laws dealing in these subjects, gradually.[75]

It must also be noted that Article 246A is unique in both creating a taxing power as well as in specifying the legislative field for its application, instead of letting a Schedule VII-list do so.[76] It gives this power to units at both the federal levels levying GST, simultaneously, except for the inter-state supply of goods and services where the Parliament would have exclusive law-making powers. The provision is effectively a non-obstante clause to Article 246 and Article 254.[77]

This is precisely where the "pooled sovereignty" argument takes a hit. Before the Amendment Act, there was never any overlap of legislative powers between the Union and the States, further buttressed by the judiciary's belief that this mutual exclusivity preserves state autonomy.[78] The Supreme

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71 The Economic Times (Press Trust of India), *Requirement of 50% States Ratifying GST Bill Complete*, September 1, 2016, available at https://economictimes.indiatimes.com/news/economy/policy/requirement-of-50-states-ratifying-gst-bill-complete/articleshow/53963756.cms#:~:text=in%20another%20tweet.-,The%20Constitutional%20Amendment%20Bill%20for%20GST,by%20Parliament%20on%20August%208.&text=Assam%20was%20the%-20first%20state,Pradesh%2C%20Delhi%2C%20and%20Nagaland (Last visited on December 20, 2020).

72 The Economic Times (Deepshikha Sikarwar), *GST Compensation to Manufacturing States Proposed at up to 1%*, July 22, 2015, available at https://economictimes.indiatimes.com/news/economy/policy/gst-compensation-to-manufacturing-states-proposed-at-up-to-1/articleshow/48166393.cms?from=mdr (Last visited on December 29, 2020).

73 Livemint (Gireesh Chandra Prasad), *Govt May Continue GST Compensation Scheme Till 2025*, December 24, 2018, available at https://www.livemint.com/Politics/Iq0tB2Nsd1jBbg4VGJm4GO/Govt-may-continue-GST- compensations-till-2025.html (Last visited on January 2, 2021).

74 The Constitution (Hundred and First Amendment) Act, 2016, §18; "Parliament shall, by law... provide for compensation to the States for loss of revenue arising out on account of implementation of the goods and services tax for a period of five years."

75 The Constitution (Hundred and First Amendment) Act, 2016, §19.

76 Karthik Sundaram, Tax, Constitution and the Supreme Court: Analysing The Evolution of Taxation Law in India, 33 (OakBridge Publishing, 2019).

77 *Id*., at 35.

78 Godfrey Phillips India Ltd. v. State of U.P., (2005) 2 SCC 515, ¶45.

Court went on to devise five key doctrines to discern exclusivity in legislations dealing in tax: colourable legislation,[79] pith and substance,[80] rule ofwidest possible interpretation,[81] the aspect theory[82] , and the rag-bag theory.[83] Union had its domain in Entries Eighty-Two to Entry Ninety-Two in List I, while the same for the states was demarcated to be in Entries Forty-Five to Entry Sixty-Three in List II, with the unsubstantial stamp-duties as a concurrent subject.[84] However, due to this simultaneous conferment of tax subjects, and the veto vested with the Union, States lose exclusive control over the few tax- subjects they previously had with them. There occurs no pooling, but abdication on part of the states. Two entries were omitted from List I,[85] two entries were omitted from List II[86] and two entries were severely restricted.[87] The Union may choose to completely obstruct or out manoeuvre the States in setting measures of taxes in all the subsumed fields. Illustratively, all the states may now jointly propose re-appropriating tax revenues on advertisements[88] in all newspapers and radio broadcasts.[89] However, the Centre may exercise its overwhelming vote weightage to block it, or use the undue bargaining power to steer the negotiation towards rates of its own liking.[90]

Further grist for the case against "pooled sovereignty" in the transitioned scheme comes from the effects of the Amendment Act on other provisions.

[79] R.S. Joshi v. Ajit Mills Ltd., (1977) 4 SCC 98, ¶16; Kunnathat Thatehunni Moopil Nair v. State of Kerala, AIR 1961 SC 552, ¶33; T.G. Venkataraman v. State of Madras, (1969) 2 SCC 299, ¶16.

[80] Hoescht Pharmaceuticals Ltd. v. State of Bihar, (1983) 4 SCC 45, ¶41; Ujagar Prints v. Union of India, (1989) 3 SCC 488, ¶48; Goodyear India Ltd. v. State of Haryana, (1990) 2 SCC 71, ¶71.

[81] Navinchandra Mafatlal v. CIT, AIR 1955 SC 58, ¶¶6-7; Khyerbari Tea Co. Ltd. v. State of Assam, AIR 1964 SC 925, ¶19; Chaturbhai M. Patel v. Union of India, Air 1960 SC 424, ¶11.

[82] BSNL v. Union of India, (2006) 3 SCC 1, ¶¶92A-E; Union of India v. Mohit Mineral (P) Ltd., (2019) 2 SCC 599.

[83] Jindal Stainless Ltd. v. State of Haryana, (2017) 12 SCC 1, ¶731; Ujagar Prints v. Union of India, (1989) 3 SCC 488, ¶53; State of A.P. v. NTPC Ltd., (2002) 5 SCC 203, ¶23.

[84] The Constitution of India, 1950, Schedule VII, List III, Concurrent List, Item 44 (Stamp duties).

[85] The Constitution of India, 1950, Schedule VII, List I, Union List, Item 92 (Tax on sale or purchase of newspaper), amended vide The Constitution (Hundred and First Amendment) Act, 2017 (w.e.f. July 1, 2017); The Constitution of India, 1950, Schedule VII, List I, Union List, Item 92C (Service Tax), amended vide The Constitution (Hundred and First Amendment) Act, 2017 (w.e.f. July 1, 2017).

[86] The Constitution of India, 1950, Schedule VII, List II, State List, Item 52 (Entry tax), amended vide The Constitution (Hundred and First Amendment) Act, 2017 (w.e.f. July 1, 2017); The Constitution of India, 1950, Schedule VII, List II, State List, Item 55 (Tax on advertisements), amended vide The Constitution (Hundred and First Amendment) Act, 2017 (w.e.f. July 1, 2017).

[87] The Constitution of India, 1950, Schedule VII, List II, State List, Item 54 (Taxes on the sale of certain goods), amended vide The Constitution (Hundred and First Amendment) Act, 2017 (w.e.f. July 1, 2017); The Constitution of India, 1950, Schedule VII, List II, State List, Item 62 (Taxes on entertainment), amended vide The Constitution (Hundred and First Amendment) Act, 2017 (w.e.f. July 1, 2017).

[88] The Constitution of India, 1950, Schedule VII, List II, State List, Item 55 (Tax on advertisements), amended vide The Constitution (Hundred and First Amendment) Act, 2017 (w.e.f. July 01, 2017).

[89] Advertising sector is currently taxable under IGST, levied and collected by the Center; Cleartax, *GST on Advertising Sector*, January 5, 2021, available at https://cleartax.in/s/gst-advertising-sector (Last visited on May 12, 2021).

[90] Alok Prasanna Kumar, *Goods and Services Tax*, Vol. 51(34), Economic and Political Weekly, 10-11 (2016).

As tax-law scholar Kartik Sundaram puts it, this 'chain of restrictions' on the states' say in GST is further extended by Article 269A(1) and 269A(5), along with Article 286(1) and 286(2). Article 269A enables the collection of the new tax on inter-state supplies in course of trade and commerce by the Union, with sub-clause 5 governing the vital parameters for its operation.[91] It gives Union the power to frame principles that define the place of supply. This extends to the definition of what constitutes supply in the course of commercial activities. So when the amended Article 286 prohibits the states from levying this tax on supplies taking place outside of their territories, it is the Parliament that first decides as to when this happens (through conditional legislation) for 'levy'. Article 269A read with Article 286 lays the foundation for the Integrated Goods andServices Tax Act, 2017, conceptually tilted towards one federal unit.[92] This is in the context of a Centre that had had more sources of tax, to begin with.[93]

To fully grasp the high costs incurred from a legal point of view, consider the arc of Constituent Assembly Debates on the issue. The states' claim on sales tax revenue was considered to be essential by the framers of the Constitution, and as a result, placed exclusively under their legislative and administrative control. As mentioned previously, the few domains of taxation reserved for states were the only revenue sources tugged away from the Union. The status of sales tax would appear to be more precious and inextricable in this light. In dealing with its exemption from the clause on inter-state trade and commerce, Dr. Ambedkar grappled with the claims of Mahavir Tyagi, Amiyo Kumar Ghosh, Jagat Narain Lal, Hirday Nath Kunzru and B.M. Gupte.[94] While all of them had opposed the exclusion of sales tax from unitary control, Tyagi and Kunzru went a step further, each. The former suggested that the tax be uniform across the board (horizontally), while the latter demanded that only a consumption tax should be provided for in the Constitution. Rejecting all of them collectively, Ambedkar emphasised that this was the only major source of tax revenue for the provinces.[95] He claimed that his inflexibility on the subject emanated due to the direct proximity sales tax-revenue had with the standard of living with the people of a state.[96] Hence, Ambedkar (and later, the Assembly) was bestowing an economic safety net upon the state governments to maintain the minimally required standard of living within their territories. It was after factoring in the heavy value this legislative subject carried, that it was consciously put in List II. The drafters knew that if it were made

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91 Sundaram, *supra* note 76, at 40.

92 *Id*.

93 M. Asad Malik, *Changing Dimensions of Federalism in India: An Appraisal*, Vol. 2, ILI LAW REVIEW, 85, 103 (2019).

94 Constituent Assembly Debates, October 16, 1949, speeches by Mahavir Tyagi, Amiyo Kumar Ghosh, Jagat Narain Lal, H.N. Kunzru, B.M. Gupte, 329-336, available at http://loksabhaph .nic. in/ writereaddata/ cadebatefiles/ C1610 1949.html (Last visited on December 22, 2020).

95 *Id*., at 339-340; Ambedkar did not categorically reject substituting sales tax with consumption tax in the debate, but signalled its future consideration. Eventually, however, the Constitution did not include the amendment moved by Kunzru.

96 *Id*.

a concurrent or a unitary subject, the states would be stripped of their sole source of revenue without requital.[97]

The other component is the more estimable financial loss that would fall on the states immediately due to the transition. The GST Council had already factored in the same, by arriving at an estimate predicated on the numbers of the FY 2015-16.[98] The state revenues through subsumed state taxes and the fading central sales tax ('CST') were INR 4,40,000 crores and INR 56,000 crores, respectively.[99] These figures themselves were growing consistently, with a rate of about 14 percent per year.[100] Significant reductions in these, even for a few years, appeared to be weighty. As a corollary, the compensation required was not only to be sufficient but also mandatory for the Central Government (for the initial five years, as per §7(1) read with §1(r) of the Compensation Act). The concerned state legislatures had adopted the arrangement through ratification[101] under Article 368(2), implying consent. To complete the property rule analogy, suppose the liberty in List II, *State List*, Item fifty-four to be a 'property' exclusively belonging to the states. They consensually parted with it for a specified, negotiated cost captured by §7.

The anti-coercion principle was developed in the context of a Union legislature affecting changes in the scheme of distribution of powers to help its law acquire a dominating position.[102] The Union executive would then take the reins of the enacted law and unduly dictate the state executives' compliance by threatening the withdrawal of fiscal support.[103] The SCOTUS stepped in and reminded both the Congress and the Federal executive of its obligation towards conscionable conduct.

In the context of the GST, this unconscionability takes place if the five-year compensation clause is breached.[104] With a majority in the Parliament, the executive government pushed for the states to give up their exclusive (legislative and administrative) control of certain taxes. So much so that by the FY 2019-20, the state's (own) total revenue ('SOTR') was dependent majorly on the

[97] Subjects mentioned in Lists I and III are hit by the inalienability and liability rules, respectively, so that a negotiated cost isn't a requirement in those cases, as seen in Part II.

[98] Siddhartha P. Saikia & Prasanta Sahu, *GST Council Meet: 14% Revenue Growth Assumed for States*, Financial Express, October 19, 2016, available at https://www.financialexpress.com/economy/gst-council-meet-14- revenue-growth-assumed-for-states/423515/ (Last visited on May 12, 2021).

[99] *Id.*

[100] *Id.*

[101] Press Release, Ministry Of Finance, March 05, 2017, available at https://pib.gov.in/Press ReleasePage .aspx?PRID =1484172 (Last visited on January 02, 2021).

[102] Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, Vol. 91, Texas L. Rev., 1283, 1284-1287 (2013).

[103] *Id.*; Hemel, *supra* note 26, at 3-20.

[104] The Goods and Services Tax (Compensation to States) Act, 2017, §2(r); This provision defines the transition period to be five years. It is in this time-frame that § 7 of the act ought to operate, mandating the calculation and disbursement of due compensation to states.

SGST.[105] Approximately sixty-six percent of the SOTR comes cumulatively from both SGST forms (forty-four percent) and sales tax forms (twenty-two percent).[106] Having stated this, consider the position on CSS. Most of such schemes demand a fifty-sixty percent contribution from the states themselves.[107] The Central government is obligated to release the rest, but it is contingent on the state government(s) releasing their shares first (and meeting some other conditions).[108] The consequence of low SGST revenues or lack of its recompense is that the states are disabled from performing executively since both state-sponsored schemes and CSS are paused. The argument made by Ambedkar on the direct link taxes akin to sales tax have on the living indices of a state is, therefore, truer today.

The entitlements, as a whole, trace back to the previously available liberty of the states in taxing certain subjects. This liberty, as the property of states, was generating several streams of revenue. All of the above considerations combined, then, comes to be the value of the property taken from states. The computation of this consideration and the specifics of paying it, then, finally took shape as provisions of the Compensation Act. It is to ensure the compensation of this value that the principle of anti-coercion was devised.

B. 'CONSENT' IS UNHESITATINGLY PRESUMED

The formation of a federal contract requires the consent of all participating parties. It will be seen from the Indian Constitution that it has envisaged the same in two of its provisions, namely, the proviso to Article 368(2) and Article 252. If the Supreme Court has previously presumed consent in the latter, the same standard would apply in cases of the former.

Article 252 is a close cousin of Article 249 of the Constitution. A resolution from the Rajya Sabha confers powers on the Parliament to legislate on issues otherwise the domain of states, as per Article 249. While not strictly indicative of an exchange, the provision does highlight that states may consensually cede legislative control, without any recompense. In reality, the utilisation of this provision has been heavily opposed by the states, as they contend that the majority party in the Upper House may do so without the state(s) making such a request to this effect. Moreover, the Union would at times be politically inclined to erode the state's

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[105] Bharath Kancharla, *For 2018-2019, Data Suggests a Shortfall of 7.5% in SOTR Compared to Estimates*, , March 06, 2020, available at https://factly.in/for-2018-19-data-suggests-a-shortfall-of-7-5-in-sotr-compared-to- estimates%EF%BB%BF/ (Last visited on December 03, 2020).

[106] Reserve Bank of India, Report, *State Finances: A Study of Budgets 2019-2020*, 30-33 (Issued on Sept. 30, 2019).

[107] Avani Kapur, *Centre Gives a Lot of Money to States for Social Welfare. A Good Policy, but Only on Paper*, THE PRINT, June 25, 2019, available at https://theprint.in/opinion/centre-gives-a-lot-of-money-to-states-for-social- welfare-a-good-policy-but-only-on-paper/253685/ (Last visited on December 29, 2020).

[108] *Id*.

autonomy using this provision, making the pervious point more of a probability.[109] Article 252 achieves the same outcome, but it comes closer to a 'federal contract' since the initiative here is taken by two or more state legislatures, themselves. This would be the most illustrative of mutual consent. Article 252 and its contents were, thus, envisaged to facilitate a federal bargain. I submit that the same intention lies behind the proviso to Article 368(2), the route was taken to bring the Amendment Act and consequently the GST regime.

To better understand this, please consider how Article 252 operates. For expediency demanding legislative uniformity across the concurring neighbour states, the Parliament may be requested to homogenise a law. This is required to be signalled by the passage of state resolutions, by which the states collectively act like a promisor. Illustratively, consider the enactment of the Urban Land (Ceiling and Regulation) Act, 1976 and Prize Competitions Act, 1955, both creatures of this provision.[110] States, in the first instance, wanted to regulate inter-state migration by equalising land prices, primarily to glean the increased value of lands flowing to real estate investors, along with other fiscal benefits such as elimination of speculation in the land price.[111] In the latter scenario, the states did prevent tax evasion generated by lotteries and, in a way, enhanced their revenues.[112] A property of the state (Items eighteen[113] and sixty-two[114]) stands transferred for exclusive control by the Union and constitutes as the latter's consideration.[115] The states get the desired financial results by the Union performing an act it was not otherwise bound to. This would constitute a bargained-for consideration for them.

In a federal contractual context, this is the very intent of Article 252: to sate the states' desire of reallocating resources through a facilitative bargaining mechanism. The very purpose of retaining this from the Government of India Act, 1935 was to facilitate the transfer of resources from Union to States, through this means.[116] This movement happens when the Parliament agrees to enact the law.

It is this Constitutional intent behind Article 252, which is similarly captured by the route provided in the proviso to Article 368(2), except, the

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[109] Gobind Thukral, *Invocation of Article 249 by the Centre Pushes Punjab CM Barnala into a Corner*, IndiaToday, September 15, 1986, available at https://www.indiatoday.in/magazine/indiascope/story/19860915-invocation-of-article-249-by-the-centre-pushes-punjab-cm-barnala-into-a-corner-801216-1986-09-15 (Last visited on December 27, 2020).

[110] Arjun Krishnan & Vishnu Vardhan Shankar, *Cooperative Legislation and Article 252: Implications for Indian Federalism*, Vol. 16, Student Bar Review, 68, 71 (2004).

[111] H.K. Dua, *Parliament Passes Urban Land Ceiling and Regulation Act*, (February 29, 1976), available at https://www.indiatoday.in/magazine/indiascope/story/19760229-parliament-passes-urban-land-ceiling-and- regulation-act-819066-2015-03-09 (Last visited on May 13, 2021).

[112] *See* R.M.D. Chamarbaugwalla v. Union of India, AIR 1957 SC 628, ¶7.

[113] The Constitution of India, 1950, Schedule VII, List II, State List, Item 18 (Land tenures).

[114] The Constitution of India, 1950, Schedule VII, List II, State List, Item 62 amended vide the Constitution (Hundred and First Amendment) Act, 2016 (w.e.f. July 01, 2017); Prior to the amendment, this subject enabled the States to levy a tax on betting and gambling.

[115] Krishnan, *supra* note 110, at 69.

[116] *Id.*, at 72, 80-81; *See also* The Government of India Act, 1935, §103.

roles of promisor and promisee are switched, and changes outside of Schedule VII in the Constitution, can be brought about through this route. An amendment involving approval from states is another device for cooperative federalism. For instance, the U.S. Constitution does not expressly contemplate cooperative federalism. However, the Constitutions of India, Australia and Canada do so in their Articles 252, §51(xxxvii)[117] and §94[118] respectively. In Canada, inter-delegation is consensually permissible across vertical executives, regardless of legislative entitlements.[119] In the Australian variant, the transfer of legislative power is also accompanied by an option of a 'referral', where in place of a wholesale transfer of the state subject, it becomes a concurrent legislative subject.[120] The U.S. has no variant of Article 252 whatsoever. However, the SCOTUS, in 1937, proffered the obvious as a judicially devised position: redistribution of legislative powers may happen by way of state ratification of an amendment brought about by the federal government.[121] The U.S. Constitution, it stated, then clearly contemplated cooperative federalism by such means. An amendment subject to approval by states was deemed to be a transaction. Similarly, an amendment through Article 368(2) for bringing about GST is similar to one in Article 252, except this time, the initiative of a contract is taken by the Parliament. The consideration for the Union is the power of complete control over the states' property. For the states, it would be augmented tax revenues in the future, plus the compensation for losses arising out of transition. As emphasised in Section III.A., in the case at hand, the compensation for transitional losses effectively has implications for both the Centrally Sponsored Schemes ('CSS') as well as for the states' own.

Lastly, the Indian position of the states post-amendment under Article 368(2) also comes closer to an outcome under Article 252 by another metric. Both the routes lead to an irrevocable outcome, unless of course, the same procedure is adopted for reversion. For Article 252, two approaches have been taken by the Supreme Court, of which the 'complete abdication of the field' view, enjoys weightier judicial recognition. The federal law enacted upon the request of participating states cannot be overridden by new state legislation. In a series of judgments, the Supreme Court has held that the participating states having willingly traded their (legislative) control of the same for the sake of uniformity, have ceded control to oneentity (Parliament).[122] The same approach also appears to be supported by the Constituent Assembly.[123]

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[117] The Constitution of Australia, 1901, §51.

[118] The Constitution Act of Canada, 1982, §94.

[119] M. A. Adam, *Spending Power, Cooperative Federalism and Section 94*, Vol. 34, Queen's Law Journal, 200-208(2008).

[120] A. Lynch, *After a Referral: The Amendment and Termination of Commonwealth Laws Relying on s 51(xxxvii)*, Vol. 32, Sydney Law Review, 363, 365 (2010).

[121] United States v. Bekins, 1938 SCC OnLine US SC 96.

[122] Vijay Kumar Sharma v. State of Karnataka , (1990) 2 SCC 562, ¶99; Krishna Bhimrao Deshpande v. Land Tribunal, (1993) 1 SCC 287, ¶¶3-4; Thumati Venkaiah v. State of A.P, (1980) 4 SCC 295, ¶2; Union of India v. Valluri Basavaiah Chaudhary, (1979) 3 SCC 324, ¶¶50-53.

[123] Constituent Assembly Debates, (June 13, 1949), speech by K. Santhanam 812, available at https://eparlib.nic.in/bitstream/123456789/760459/1/CA_Debate_Eng_Vol_03.pdf (Last visited on

All these elements collectively denote that the consent of both the Parliament and states is presumed once the route in Article 252 is, successfully and completely, traversed.[124]

The transactional nature of the proviso to Article 368(2) is reinforced by its similarity to Article 252, both leading to a federal contract in their outcomes. Demonstrably, the Union and the states consensually crafted one in bringing about GST.

C. COMPENSATORY CESS, AS THE SUPPOSED CREDIT, CONSTITUTES CONSIDERATION

Hence, the constituent elements of a property rule paradigm are present in this case. This includes entitlement to the legislative subject akin to a property right, consent, transfer of the legislative subject, and a specified amount as compensation. An argument regarding as to whether §7(1) of Compensation Act, constitutes compensation, could be made. That, however, finds its pre-emptive rebuttal in Indian jurisprudence.

As Arvind Datar postulates, the Indian Constitution leaves what Laurence Tribe refers to as a 'sound of silence', which is a term for the metaphorical space given by the document to Courts to forge novel Constitutional norms.[125] In compliance with this, the Supreme Court devised the concept of 'compensatory taxes'. Crafted as an exception to Article 301,[126] which outlaws discriminatory taxes by states, such taxes were said to be covered by Article 304(a)[127] as long as they appeared to facilitate trade.[128] Distinguished from a fee, such taxes need only have somelink with the benefit provided, and not a commensurate link.[129] Furthermore, it appears that compensatory taxes only require some bearing with 'trade' at the macro level, and an appearance of enhancing the same.[130]

December 24, 2020).

[124] Krishnan, *supra* note 110, at 85; K. Nagaraj v. State of A.P., (1985) 1 SCC 523.

[125] Arvind P. Datar & Rahul Unnikrishnan, *Interpretation of Statutes: A Doctrinal Study*, Vol. 29(2), National Law School of India Rev., 136-137 (2017).

[126] Art. 301 reads as follows: "Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free".

[127] Art. 304(a) is a non-obstante clause to Art. 301, and enables a State legislature to: "impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced…"

[128] Niranjan V., *Interstate Trade and Commerce: The Doctrine of Proportionality Reaffirmed*, Vol. 7(2), Indian Journal of Constitutional Law, 192, 194 (2008).

[129] *Id*., at 199-201.

[130] *See* State of Bihar v. Bihar Chamber of Commerce, (1996) 9 SCC 136, ¶12; Bhagatram Rajeevkumar v. CST, (1995) Supp(1) SCC 673, ¶8; *See* also Atiabari Tea Co. Ltd. v. State of Assam , AIR 1961 SC 232; Jindal Stainless Ltd. v. State of Haryana, (2006) 7 SCC 241; State of Karnataka v. Hansa Corpn., (1980) 4 SCC 697, ¶¶25-27.

Part XIII lays down six provisions that deal with trade and commerce within India, with an accompanying set of permissible restrictions. The judicial struggle was to check whether these taxes fall within the scope Article 304(a), failing which they would be violating Article 301. Starting from *Atiabari Tea Co. Ltd.* v. *State of Assam* ('Atiabari')[131] in 1962, its application was finally found to have no legal basis for this segment of the Constitution in *Jindal Stainless Ltd.* v. *State of Haryana* ('Jindal').[132] However, it only did so, if not emphatically, within the context of that Part. It did not obliterate the very existence of the concept, leaving it with some vestigial legitimacy in matters outside the context of Part XIII.[133] This is logical, given that compensatory tax may not always be discriminatory as per Article 301 (which happens to be the position espoused in Jindal).[134]

Furthermore, Article 304(a) only bars state imposed taxes, carrying a discriminatory effect. The case of Compensation Act, and GST in general, may be said to fall under Article 302, which allows the Parliament to impose restrictions on intra-state trade. The Parliament shall do so without violating Article 303(1), which bars it from a preferential treatment between states. Article 303(1) and Article 304(a), therefore, collectively constitute the non-discriminatory principle.[135] I submit that no such discrimination can possibly be introduced by the Compensation Act, since it is introduced by the Centre and not the states. Furthermore, the intended compensation shall be equal for all the transitioning states. In this light, I submit that the mechanism of compensation ideated by §18 of the Amendment, and given shape to in §7 of the Compensation Act, is this legally valid compensatory tax.

It is to be noted that a limited judicial attack on compensatory taxes did exist. This was mostly because the concept had gained applicability only in cases where 'facilitation of trade' was exclusively, and wrongly, conflated with 'movement of goods'.[136] However, three cases went on a different tangent in this regard. These would be *State of Karnataka* v. *Hansa Corpn.* ('Hansa Corp.'),[137] *Meenakshi* v. *State of Karnataka* ('Meenakshi Alias')[138] and *Geo Miller & Co. (P) Ltd* v. *State of M.P* ('Geo Miller'),[139] wherein the compensatory component of the superseding tax was held to preserve state autonomy. This was the legislative intent gleaned from Article 304, which precludes the need for Presidential assent before enactment. More specifically, these were instances where local /municipal

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131 Atiabari Tea Co. Ltd. v. State of Assam, AIR 1961 SC 232, ¶55.

132 Jindal Stainless Ltd. v. State of Haryana, (2017) 12 SCC 1, ¶¶264, 1159.4.

133 *Id.*, ¶¶1137, 1152, 1153; The last instance of the compensatory tax-test being applied was in Property Owners Assn. v. State of Maharashtra, (2019) SCC OnLine Bom 706.

134 Jindal Stainless Ltd. v. State of Haryana, (2006) 7 SCC 241; Niranjan V., *supra* note 128, at 203.

135 Jindal Stainless Ltd v. State of Haryana, (2017) 12 SCC 1, ¶152.

136 Niranjan V., *supra* note 128, at 196; Bolani Ores Ltd. v. State of Orissa, (1974) 2 SCC 777, ¶29; The Court construes precedent available to it to conclude that all laws taxing vehicles under List II, State List, Item 57 are compensatory by default.

137 State of Karnataka v. Hansa Corpn., (1980) 4 SCC 697.

138 Meenakshi v. State of Karnataka, 1984 Supp SCC 326.

139 Geo Miller & Co. (P) Ltd. v. State of M.P., (2004) 5 SCC 209.

taxes (covered by List II, State List, Item Fifty-Two) were subsumed in newly enacted state taxes, and the latter's legality was determined by their financial capability to make good for the loss of revenue.[140] It appears that compensatory tax was conceptually viewed as costs for the local bodies transferring both their power of levy and rate-setting. Although the three decisions were in the context of Article 301, I use them to highlight the treatment of these compensatory taxes as a 'transactional cost'. In other words, the judicial position is to treat them as compensating cost for a transaction, which stand invalidated if they are hit by Article 301.[141] The components of this tax that emerge from these cases are – Firstly, it ought to be an additional component in the superseding tax. The incoming tax-regime should have a levy separate from the whole, and yet be a part of the same package. This is to ensure a contingency fund that may not face the same compliance based and tax avoidance issues as the remainder conceivably may. Simultaneity of the two mitigates/makes up for such deficits on an 'as and when' basis. Secondly, this component should have the effect of bridging the revenue deficit relative to the supplanted tax regime. This ensures sensitising the administration with the new regime without compromising the revenues required for its unperturbed functioning.

At this juncture, please note that the pertinent provision for generating compensatory funds in the Compensation Act envisages a compensatory 'cess', and not a tax.[142] The treatment of the same as a tax would have been legally suspect, if not for the top court's enunciation to the contrary. When the Compensation Act was challenged on grounds of legislative competence, the Court came up with a unique proposition: if the funds from the cess compensate for lost tax revenues, the cess stands metamorphosed into a 'tax' itself.[143] The Court did not need, in the facts of the case, to take the next step and categorise it as compensatory, but it unfailingly suggests so. Since it is nothing but a compensatory 'tax', its resultant fund is the putative transactional cost to be paid by the Union to the States. The only difference being that the Centre subsuming state taxes entails a transfer of legislative competence. States tweaking octroi, upon which they had an exclusive legislative domain, was more like an acquisition rather than a mutually negotiated transaction. In other words, the latter was akin to a transfer under the liability rule. The Union, on the other hand, has had no vested right in the subjects of the State list and an entitled acquisition is thus ruled out in the context of GST.

The amount supposed to be paid through the compensatory cess in the Compensation Act constitutes consideration in this federal contract. A further

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[140] Since this would be a case of a liability rule entitlement, this compensation need not be negotiated.

[141] *Supra* note 130; *supra* note 132.

[142] Cess, like tax, is a compulsory exaction of money by a public authority. It has all the four components of the latter, namely, object of taxation, measure of amount that falls under taxation, taxable person and rate of tax. Two further components to cesses remove their similarity. A cess is intended for a specific objective, unlike taxes which may be used for any public purpose. Secondly, cess revenues are not mandated to be shared between the Center and States by Art. 270; *See* State of W.B. v. Kesoram Industries Ltd., (2004) 10 SCC 201, ¶146.

[143] Union of India v. Mohit Mineral (P) Ltd., 2018 SCC Online SC 1727, ¶54.

delve would reveal the quantum to be unalterable while maintaining cess only as one of the means.

D. *RECOGNISING THE CONSTITUTIONAL PROMISE AND APPLICATION OF THE ANTI-COERCION RULE*

The authorial source of the Amendment Act and the presiding officer of the GST Council for its initial meetings ('council debates') was the same.[144] In either capacity, then, late Finance Minister Arun Jaitley's responses on the subject constitute external aids to decipher the legislative intent on the subject.[145] On March 17, 2017, upon being posed with a question about the mechanics of this compensation, he responded by quoting the entirety of §18 of the Amendment Act in his written reply. Appended to this was a reference to the proceedings of the GST Council, wherein the enactment of the Compensation Act was agreed upon. This is demonstrative of what is otherwise plainly clear: the source of the obligation for compensation is Constitutional, and that the specifics of its implementation were placed outside of it (in the GST Council). The body was merely its executant. When a levy is created by the legislature, assigning the time and manner of it to another body, it becomes a conditional, and not a delegated, legislation.[146] In other words, the obligation to compensate is not sourced from GST Council meetings, which would have been the case if it were a delegated legislation. It is §18 of the Amendment Act, read with Article 279A,[147] which is creating this obligation on the Union. The Council may only decide how to execute this pre-existing obligation, as opposed to the task of creating it. It is in this light that the council debates offer a revelatory glimpse into the normative force of this obligation.

A couple of years before GST being Constitutionally recognised, the Union had started reducing the measure of taxes under the Central Sales Tax Act, 1956.[148] It used to be a tax on inter-state sales, the proceeds of which also formed a significant chunk of the then SOTRs. Before it was finally supplanted by the GST,

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144 Ministry of Finance, Govt. of India, *GST Council Meetings*, (Last updated on January 1, 2021), available at http://www.gstcouncil.gov.in/meetings (Last visited on January 4, 2021); 1st to 27th GST Council meetings were presided over by Late Arun Jaitley, and the Compensation Act was enforced after the 16th meeting of the Council.

145 K.P. Varghese v. ITO, (1981) 4 SCC 173, ¶8; Lok Shikshana Trust v. CIT, (1976) 1 SCC 254, ¶34.

146 Conditional delegation gives the delegate only the discretion to decide the time, manner and operative area of the delegated rule. The rights are already created in a complete legislation, and it merely has to concern itself with its fluent execution. Illustratively, this task may include determining the date of its operation or exemptions within the rule. Whereas, delegated legislation bestows a delegate with rule-making powers to create rights to be enjoyed under a desired policy; *See* Hamdard Dawakhana v. Union of India, AIR 1960 SC 554, ¶28; I.T.C. Bhadrachalam Paperboards v. Mandal Revenue Officer, (1996) 6 SCC 634, ¶26.

147 Art. 279-A mandates the President to constitute the GST Council.

148 As a background, CST, a tax imposed on the inter-State movement of goods, was reduced from 4 per cent to 3 per cent in the financial year 2007-2008, after years of status quo on its measure. It was reduced further to 2 per cent in the following financial year, after the introduction of value-added tax (VAT).

a high-powered committee of Finance Ministers from across the states and the Union had decided to institute a CST compensation for this reduction. This, however, remained unfulfilled. During the debates, the representatives of the Union had the onus of dislodging the cynical notion about GST compensation meeting a similar fate. It is in this light and under a vehement attack of trust deficit, that the Union responses were formulated. As to the nature of the compensation cess, no less than the Presiding Chairman, in 2017 itself, first referred to its similarity with CST compensation in being a 'sovereign commitment'. In specifying the differences from that point onwards, he stated that the only differences occurred in the titles of the two and the time-frames they operated in.[149] The most significant departure, he said, is that the Compensation Act is an outcome of a Constitutional guarantee (referring to §18). It was authoritatively stated that the transitional-recompense for GST had the backing of a Constitutional provision, and that's precisely why the similar 'breach of promise' in CST compensation[150] stands on a lower footing.[151] It was in this context that he assured, that the Constitutional mandate of compensation shall be arranged for by other means in case market variations posed a hurdle.[152] The same fear was allayed again, in a consequent meeting, this time the compensation beingtermed as a Constitutional 'assurance'.[153] More crucial was the debate surrounding the time- limit for this compensation. At the time, the first draft of §10(4)[154] of the Compensation Act permitted the Centre to defer the compensation to the sixth year in case of a shortfall in the compensation corpus.[155] Despite initial prevarication on the point, the Chairman was forced to accede to the members' point of view that a five-year limit, as a Constitutional promise, will be substantially fulfilled only when the compensation reaches the states' coffers by the financial year 2022-23.[156] This shall be done by a credit to the compensation corpus through a cess, or by other modes including raising funds

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[149] Ministry of Finance, *Minutes of the 3rd GST Council Meeting*, October 18-19, 2016, available at http://www.gstcouncil.gov.in/sites/default/files/gst%20rates/Signed%20Minutes%20-%203rd%20GST% 20Council%20Meeting.pdf (Last visited on January 02, 2021); CST Compensation would be made by the Union only till the Financial Year 2013-2014, while GST Compensation operates from 2016-2017.

[150] Due for the period 2013-2014, not reimbursed till the time when this discussion took place in the 3rd meet of the Council; CST Compensation had its singular source in Budget 2013-2014.

[151] *Supra* note 149.

[152] *Id*.

[153] Ministry of Finance, *Minutes of the* 5th *GST Council Meeting held on 2-3 December 2016*, (December 2/3, 2016), available at http://www.gstcouncil.gov.in/sites/default/files/gst%20rates/Signed%20Minutes%20-%205th%20GST%20Council%20Meeting.pdf (Last visited on January 02, 2021).

[154] The Goods and Services Tax (Compensation to States) Act, 2017, §10.

[155] Ministry of Finance, *Minutes of the 8th GST Council Meeting*, January 3-4, 2017, available at http://www.gstcouncil.gov.in/sites/default/files/gst%20rates/Signed%20Minutes%20-%208th%20GST% 20Council%20Meeting.pdf (Last visited on January 03, 2021).

[156] *Id*.; *See* also Sacchidananda Mukherjee, *Possible Impact of Withdrawal of GST Compensation Post GST Compensation Period on Indian State Finances* 12 (National Institute of Public Finance and Policy, Working Paper No. 291, 2020) available at https://www.nipfp.org.in/media/medialibrary/2020/01/WP_291_2020.pdf (Last visited on January 2, 2021).

from the market.[157] It is in this context that §2(r) [158] defines the transition period to be five years, starting from 2016-17.

At one point, the debate became even more specific about the binding force of this mandate. The State of Jammu Kashmir stated that unforeseen calamities may exacerbate the transitional effects on notional losses in revenue and that fourteen percent be a flexible figure. Karnataka was concerned that states with a progressive growth rate (in indirect tax- revenues) higher than fourteen percent would be hurt by a uniform cap to calculate notional revenue.[159] Both the objections were phrased as challenging an unjust implementation of a Constitutional mandate. The Chairperson chose to give a general response to these specific concerns. Reiterating the previously discussed concept of 'pooled sovereignty',[160] he pushed each state to make some sacrifice for the larger purposes of uniformity in indirect taxation.[161] In doing so, he stood by the states' assertion that it was indeed a Constitutional promise, even though its implementation required prior debate.

The element of coercion, in the Union's stance in the year 2020, was in both the denial of this obligation and imposing means (financial borrowing by states in place of monetary borrowing by the Centre),[162] which were not consented to before the Constitutional amendment.

However, this constitutes an arrangement wherein periodical payments from the Union have previously been construed as a consequence of a Constitutional promise, if not a contract. The Supreme Court has held that the Union's promise of *de futuro* payments in fulfilling a Constitutional promise is a position from which it cannot deviate *ex post facto* (once the promisee alters its position).[163] If it does, the implication would be an 'imperfect obligation', a right violation for which the promisee would be left without a remedy, somethingwholly impermissible under a Constitutional negotiation.[164] In the above case, known in the popular narrative as the *Privy Purses* case,[165] the unarticulated premise was that the surrender of state sovereignty by rulers of the erstwhile princely states was a voluntary transaction. Privy purse payments were the only privilege, in a list of thirty-four others, that found Constitutional protection.[166] There was a surrender of sovereignty by the rulers' act of acceding to states, akin to modern-day state governments surrendering a legislative subject. The assertion made in the

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157 *Supra* note 149.

158 The Goods and Services Tax (Compensation to States) Act, 2017, §2.

159 *Supra* note 149.

160 *Id*.

161 *Id*.

162 *See supra* note 42.

163 Madhav Rao Jivaji Rao Scindia Bahadur v. Union of India, (1971) 1 SCC 85, ¶59.

164 *Id*., ¶¶46-47, 371.

165 *Supra* note 163.

166 Youtube, *Arvind Datar vs Raju Ramachandran Arguing Privy Purses Case Moderated by Justice Sikri*, August 24, 2019, available at https://www.youtube.com/watch?v=P4zHuLm8G-8 (Last visited on December 30, 2020).

Privy Purses case was not the only instance of a somewhat raw version of the anti-coercion principle finding applicability in India. In 1965, the Court determined the nature of the Union's obligation of payments to legally recognised Rulers of States in British India. It held that sacrificing provincial sovereignty to forge a Union may be a political act, but it becomes a protected political obligation by the Constitution recognising it.[167] Unlike a periodical payment to be paid by the Union as per §60(1)(*g*) of the Code of Civil Procedure, these Constitutionally backed political payments were termed to be political pensions. The implication being that it cannot be treated like any other legally recognised debts,[168] and that the Union shall have no choice but to make good its promises.[169] Such payments as consequences of a promise to further federal obligations may be termed any which ways for historical reasons, but in essence, they are sanctimonious political pensions.[170]

However, these cases only dwell on the binding nature of a Constitutional promise and are to be distinguished from the contents of the principle discussed in Part II. These two ratios do not deal with a Constitutional contract. While the sovereign representatives can be said to be parting with their property, this is still not a negotiation between Constitutional units, for reallocating Constitutional spaces. This is a negotiation between provisional representatives of the Indian Union as it then stood and those of other territories, to bring about a new Constitution.

However, they do assist in defining a Constitutional promise which may lead to an alteration of relationships and, eventually, to a contract. The promise of compensation by the Centre through the discussed means, in the Amendment and the consequent debates of the Council, led the states to ratify it. The promise combined with the heavy price paid by the states leads to the fiction of a Constitutional contract. It is in this light that the obligation emanating from §18 trumps the claim that there exists no Constitutional obligation to compensate states.[171]

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167 Usman Ali Khan v. Sagarmal, AIR 1965 SC 1978, ¶12.

168 In the sense of enforceability. No other but a Constitutional Court with powers to entertain federal disputes may entertain related claims.

169 *Supra* note 163, ¶9.

170 *Id.*, ¶12.

171 Business Standard (Press Trust of India), *Centre not Obliged to Pay for Shortfall in GST Compensation Fund: S a y s A-G*, July 30, 2020, available at https://www.business-standard.com/article/economy-policy/centre-not-obliged- to-pay-for-shortfall-in-gst-compensation-fund-ag-120073001207_1.html (Last visited on January 02, 2021); Attorney General has later modified his position slightly to state that only when the Council agrees does it become a legal obligation, which contradicts the debates on the Compensation Act; *See* Scroll Staff, *Attorney General Tells Centre it Must Compensate States Fully for Loss of GST Income During Lockdown*, August 26, 2020, available at https://scroll.in/latest/971452/attorney-general-tells-centre-it-must-compensate-states-fully-for-loss-of-gst- income-during-lockdown (Last visited on 3, 2021).

The parallel claim made by the Ministry of Finance, that a sudden unforeseen circumstance would exempt the Union from its obligation,[172] also does not find any purchase. Sovereign State can't opt-out of Constitutional obligations by citing situational concerns. That apart, the larger point made for the applying anti-coercion principle is that there exists a contractual obligation as a consequence of a Constitutional promise. If the Union is permitted to breach this obligation, the states will still be implementing GST without the promised financial backup, the precise circumstances this principle has been devised to preclude. The further coercive decree was that the only means to raise funds for recompense is if the states do it themselves.[173]

As an aside, please note that the jurisprudence surrounding indirect taxation inducing a contractual obligation, albeit between the legislature or executive and an assessee, is firm in this regard. The Union executive is bound by a variant of the promissory estoppel even when the arrangement may not be termed as a formal contract.[174] Defences like executive necessity do not dislodge this contractual obligation and are pre-empted by promissory estoppel.[175] This obligation should only become stronger when this informal contract comes about between Union and a state.

IV. CONCLUSION

When a federal branch crosses the fine line of incentives to arm twisting, the anti-coercion principle comes into play. The anti-coercion rule mandates that the federal branches adhere to the exact terms of promise before either of them induced the state-level branches to act on it. To make this doctrine applicable, a Court supposes the deeming fiction of an informal contract at a federal level. This is brought about by bargaining between or amongst vertically-federal units, wherein one of the trades its control over a certain property for a negotiated cost. This property, in the wider politico-legal sense of the term, includes any theoretical object over which a government may assert its control. It could be control over a field of legislation and/or sources of revenue. The theoretical trade occurs when states give their assent to a Constitutional amendment resulting in some deprivation for them, for a cost. Once the trade goes through and one of these federal units ceases to have this theoretical- proprietary control over a subject, the Union cannot

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172 Anup Roy, *GST Compensation Row: FM's 'Act of God' can be a Nightmare for RBI*, BUSINESS STANDARD, August 31, 2020, available at https://www.business-standard.com/article/economy-policy/gst-compensation-row-fm-s-act-of-god-can-be-a-nightmare-for-rbi-120083001002_1.html (Last visited on January 03, 2021).

173 *See supra* note 42.

174 Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P., (1979) 2 SCC 409, ¶24; The Court states that the legislatures should be bound by promissory estoppel so as to bridge the gap between law and morality. That is, the latter denoting trust in the contractual relations entered into by such institutions.

175 Union of India v. Indo-Afghan Agencies Ltd., AIR 1968 SC 718, ¶¶11, 19.

depart from paying costs it had earlier agreed to, despite any situational changes in circumstances.

When more than half of the Indian states ratified the 101st Amendment Bill in compliance with Article 368(2), precisely the same happened. This involved the abdication of legislative subjects by the states, which are jurisprudentially treated as Constitutionally granted liberties to legislatures. This consent was obtained only by way of repeated assurances about a certain cost to be paid till a point of time in the future, made both on the floor of the Parliament and later on in the debates before an administrative body giving statutory shape to it. These costs may take the shape of a compensatory tax but remain a cost in effect, nevertheless. The quantum is to be met, for which one such means is the compensatory tax. The Centre would be responsible for raising the funds, either as specified in the Act or by other means, but in no way was this to be passed on to the states.

India goes a step further in possessing precedents that categorise these agreed upon costs as Constitutional promises. Such promises have a halo over them which makes an inter-federal contract more binding than any other inter-governmental contract. The consideration involved does not relate to solely finance, but the surrender of Constitutional 'liberties'. These liberties may be traded away as if they were properties, and have the seller put a fix on their values. The anti-coercion principle ensures that the resulting promise is best adhered to by paying the states for their sold properties. Conditions created by an unforeseeable pandemic only make any departure from past promises more unconscionable. Hence, the anti- coercion principle finds full application in the case of GST compensation for the agreed-upon five-year period.

The Union may enter into a seemingly pooled arrangement of sovereignty or legitimately purchase those from the states. However, if it does not oblige by paying the agreed- to-costs, it will end up building or exacerbating a federal trust-deficit. This deficit is antithetical to the Constitutional objective of facilitating a trust-based paradigm envisaged in Article 249, Article 252, and Article 368, wherein federal units bargain with each other, reliably.