

Amend Constitution & Relevant Laws to Legalize Act of God

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Centre's two debt-burdening GST compensation options (GST-COs), offered to States, should trigger a serious debate on 'Act of God' (AoG).

India should provide constitutional and statutory protection to AoG that empowered Union Finance Ministry to contrive GST-COs. The AoG clarity on the Statute Book can help nip in the bud potential litigation in commercial contracts. It can also help arrest burgeoning trust deficit in the Centre-State relations.

Indian Constitution is outdated. It left out AoG. The name 'God', however, figures 13 times in the Constitution in relation to Oath/swearing in of key personnel in the overall governance system.

Parliament should thus debate whether the Constitution should be amended to specify and define AoG to cap political liability of authorities. Should it be defined as exclusive privilege of the central government? Or, should all three tiers of governments have the right to renege or tweak their obligations towards the citizens? Should invocation of AoG enjoy immunity from litigation?

Statutory protection against any official decision taken in the name of AoG can be granted by taking a leaf from The Fiscal Responsibility and Budget Management Act (FRBMA), 2003.

FRBMA says:

"No suit, prosecution or other legal proceedings shall lie against the Central Government or any officer of the Central Government for anything which is in good faith done or intended to be done under this Act or the rules made thereunder".

It adds:

"No civil court shall have jurisdiction to question the legality of any action taken by, or any decision of, the Central Government, under this Act".

Parliament should debate laws that require amendments to empower different stakeholders of economy to invoke AoG.

A fleeting look at Indian laws show that AoG finds mention only in three laws. None of them define AoG. The AoG-carrying laws are: The Railways Act, 1989 (RA), The Mines Act, 1952 and The Indian Carriage of Goods by Sea Act, 1925.

RA says:

"a railway administration shall be responsible for the loss, destruction, damage or deterioration in transit, or non-delivery of any consignment, arising from any cause except the following, namely: - (a) act of God; (b) act of war;

(c) act of public enemies".

It adds:

"When a railway administration contracts to carry passengers or goods partly by railway and partly by sea, a condition exempting the railway administration from responsibility for any loss of life, personal injury or loss of or damage to goods which may happen during the carriage by sea from act of God,... ."

Similarly, AoG figures only once in Mines Act and that too with regard to ***"Exemption from provisions regarding employment"***.

AoG is also mentioned only once in Indian Carriage of Goods by Sea Act, 1925 without defining what it is.

Neither AoG nor its enabler Force Majeure finds mention in The Indian Contract Act, 1872 (ICA). This law, however, has provisions that are invoked to enforce FM & AoG (ICA) and should be amended to define both FM and AoG.

Even the Insurance Act, 1938 (updated up to 2019) is silent on AoG. This is inspite of the fact insurance companies charge higher premium on AoG risk in insurance policies sold to customers.

Coming to the instant case - Covid-19 & Lockdown-caused economy's shrinkage, Finance Minister Nirmala Sitharaman reportedly said **"This year we are facing an extraordinary situation—we are facing an act of God which might even result in a contraction of the economy."**

She stated this while addressing a press conference after chairing 41st meeting of GST Council on 27th August 2020. At that meeting, the States were informed about Attorney General's (AG's) opinion about mounting GST compensation dues. The Centre gave two options to States to raise debt future receipts from GST compensation cess, which would be extended beyond existing sunset of June 2022.

The Finance Ministry articulated AoG in its 12-page note titled

"GST Compensation Options" released on 29th August. It says: "Parliament obviously could not have contemplated a historically unprecedented situation of huge losses of revenue from the base-arising from an Act of God quite independently of GST implementation-affecting both Central and State revenues, direct and indirect".

A biological disaster (BD) such as Covid-19 infection is a manmade disaster if we go by the classification of disasters available at National Disaster Management authority's (NDMA's) website - ndma.gov.in. It has also categorized nuclear and chemical tragedies as manmade disasters.

The website has listed seven other events such as earthquakes and cyclones as natural disasters. This classification should be incorporated in the Disaster Management Act (DMA), 2005. This law is also silent on AoG even though it is meant to tackle AoG-triggered disasters as well as manmade ones.

Should DMA's objective thus be specified as preventing, minimizing and managing AoG. This is because impact of all disasters can be cushioned with advance planning and forecasting.

NDMA is silent on 'lockdown' disaster, which continues to wreak havoc on the economy & GST in varied ways since its imposition on 24th March 2020. It's long-term fall-out on the economy and human life might well rival the long-term impact of atomic bomb.

By no stretch of imagination, Central Government-ordered lockdown can be rationalized as an AoG. Thus, both Covid pandemic & lockdown are not AoGs.

It is here pertinent to note that DMA, under which NDMA is constituted, does not define lockdown.

DMA should thus be amended to provide statutory backing for National lockdown. It should also specify who bears the short and long-term cost of the impact of lockdown in terms of revenue losses, business closures and job losses. As many 21 million salaried employees lost jobs due to lockdown-hit economic slowdown, according to Mahesh Vyas, Managing Director, Centre of Monitoring Indian Economy (CMIE).

AoG is also missing in the two GST compensation laws: 1) The Constitution (One Hundred and First Amendment) Act, 2016 and The Goods and Services Tax (Compensation to States) Act, 2017.

AoG should, therefore, be a standard clause in any existing and future law governing Centre-State relationship keeping in view States' bitter experience in getting both GST and Central sales tax (CST) compensation.

It is here apt to recall the minutes of GSTC meeting held on 22 nd and 23 rd December 2016. According to the Minutes, Haryana Finance Minister (FM) referred to **"a history of mistrust because CST compensation was not given to the States as per the agreed formula".**

He had joined State Finance Ministers' chorus for crystal clear provisions in GST compensation law for how shortfall in compensation fund would be bridged.

Kerala FM observed that there should be clear provision in the compensation law as to how 100% compensation shall be ensured and that shall be paid within the month.

In the meeting, J&K FM pointed out that the formulation earlier agreed for compensation was actually an insurance at 14% and there would be compensation even if a state suffered from a calamity.

In the subsequent GSTC meeting held in January 2017, Karnataka FM stated that

"he was very uncomfortable with the new definition of Compensation Fund under Section 2(4) which provided that if the cess amount fell short, the Council would decide as to how to raise resources".

According to the Minutes, Karnataka FM observed that

"all States had come on board for GST on the understanding that their interest would be fully protected and, therefore, if there was a shortfall in cess, it must be met. He added that as it was decided that compensation would be paid on bi-monthly basis, it could not be paid in the sixth year and, therefore, payment of compensation could not be deferred beyond 5 years".

The Minutes continue:

"He added that the understanding should be that if the amount for compensation was inadequate in the GST Compensation Fund, then cess could be collected in the sixth year or subsequent year to adjust the payment".

Unfortunately, Finance Ministry's 12-page note on GST-COs has not mentioned such concerns, which were repeatedly voiced by States in the run-up to enactment of The Goods and Services Tax (Compensation to States) Act, 2017.

The existing deficiencies in this law were crafted to enable the Centre to wriggle out of its constitutional obligation to compensate revenue losses suffered by the States due to GST reform thrust on them.

The Note wrongly makes AoG case by contending that the Centre's obligation to compensate states is limited to GST shortfall **"arising on account of implementation of GST".**

As put by the Note,

"The wording of the Constitution and statutory preamble make it clear that the spirit of the law is not to compensate states for all types of revenue losses, but rather for that loss arising from GST implementation. This year the Indian economy, nay the global economy, is suffering from an exogenous shock, namely the Covid-19 pandemic, whose scope and scale is unprecedented in history".

Having made an illogical case for differentiating GST revenue loss arising in the course of its implementation and the loss due to AoG, the Note explains the Centre's willingness to compensate States GST revenue loss during the statutory 5-year period.

The Note's logic is based on false assumption that implementation of GST got suspended during pandemic and the Government's panic reaction called lockdown.

The fact is that GST was implemented as usual. The receipts, however, largely accrued from sale of essential goods and services during dreaded lockdown. GST receipts continue to be constrained by restrictions during the continued phased unlocking of economy. AoG has no hand in this.

This analysis is sufficient to drive home the urgency for AoG clarity in the Constitution and all laws that might be misused by the authorities in the name God. Let us all not drag the God into human actions, right or wrong.