

CHAPTER-III
FREEDOM OF INTER-STATE TRADE AND COMMERCE IN
SOME OTHER FEDERATIONS

1. Introduction:

In this chapter provisions of the Indian Constitution and some other federations relating to freedom of Inter-State trade and commerce have been discussed. An attempt has also been made to compare the provisions of Indian Constitution with the provisions of the constitutions of other countries.

Art. XIII of the Indian Constitution contains the provisions relating to freedom of trade, commerce and intercourse. The provision regarding these matters is drafted after taking into consideration American and Australian experiences in the matter.

Article 301 of the Indian Constitution states: "*Subject to the other provisions of this Part, trade commerce and intercourse throughout the territory of India shall be free.*"

The word 'free' used in the Article has been held to mean not absolute freedom but freedom from all restrictions except those that are provided for in the other articles of Part XIII. Similarly, the word 'intercourse' has been used to give the word 'freedom' in Article 301 the widest import. Naturally, this freedom provided for by Article 301 does not extend across the board to all types of trades and professions. The courts have held that businesses and other activities such as gambling, trafficking in women, other forms of prostitution, employing hired assassins or thugs to carry out illegal acts, etc. are not covered by this Article. Later on however, the hitherto accepted position that unlawful activities opposed to public health and safety would not be regarded as trade and commerce was questioned in the case of **Krishan Kumar v. State of Jammu and Kashmir**.⁵⁵ On this occasion, in a case relating to the imposition of tax on liquor, the Court felt that prevailing standards of morality prevalent at a particular point of time in the country could not be a valid measure against which to judge what should and

⁵⁵ Krishan Kumar v. State of Jammu and Kashmir, A.I.R. 1967 SC 1368:

should not be included within 'trade and commerce.' Unfortunately, this liberal approach came to an end when Krishna Iyer, J., noted in the case of **P.N. Kaushal v. Union of India**⁵⁶ that an order restricting the sale of liquor for two 'dry days' after every 'wet week' was valid and that those involved in the liquor trade could not avail of the protection afforded under Article 301. This, and other rulings of the Supreme Court of a like nature, effectively meant that any restrictions imposed upon a trade like liquor would be valid even if the conditions of Article 304 (b) were not satisfied.

Now, having understood what 'trade and commerce mean,' it can be stated that the freedom of trade and commerce can be infringed in any manner except for the situations when regulatory and compensatory measures are imposed. Otherwise, restrictions imposed on the freedom of trade and commerce may take the form of fiscal as well as non-fiscal measures. Thus, there is a violation of this freedom only when a legislative or executive act operates to restrict trade, commerce and intercourse, directly and immediately, as distinct from creating some indirect or inconsequential impediment that may be regarded as remote. The Essential Commodities Act and the Central Sales Tax Act have been held, in innumerable cases, to impose reasonable restrictions on the right to carry on trade and commerce as guaranteed by Articles 19 and 301. Besides these laws, measures such as traffic regulation, licensing of vehicles, charging for the maintenance of roads, etc. have been consistently held to impose a reasonable restriction upon the freedom contemplated in Article 301.

Article 302 states, "*Parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in public interest.*" Individual States and the Centre have built on this provision to bring in laws that pass off as 'legitimate regulation' since this does not infringe upon the freedom declared by Article 301. The term 'public interest' has given the Legislatures adequate leeway to frame laws. Examples of legislations made in public interest are the Essential Commodities Act, 1955 and the Central Sales Tax Act, 1956. It

⁵⁶ P.N.Kaushal v. Union of India, A.I.R. 1978 SC1457.

was held in the case of **State of Tamil Nadu v. Sitalakshmi Mills**⁵⁷ that even where a restriction imposes a direct burden on the freedom of trade and commerce under Article 301, it would be constitutionally valid if it were deemed to be in public interest. In this case, Section 8(2)(b) of the Central Sales Tax Act was challenged because under it, Parliament provided for a higher amount of tax to be paid by an unregistered dealer engaged in inter-State trade. The Supreme Court accepted the Government's plea that the law was in place to canalize inter-State trade through registered dealers over whom the Government could exercise supervision and therefore could act as an effective deterrent to income tax evasion. Hence, the law was accepted to be in public interest and for that reason it was not in violation of Article 301 but in total conformity with Articles 302 and 303.

Article 302 relaxes the restrictions imposed by Art.301 in favour of Parliament. Parliament can therefore legitimately impose restrictions on both inter-State as well as intra-State commerce. Before the **Sitalakshmi** case, the **Nataraja Mudaliar case**⁵⁸ also revolved around the legitimacy of the Central Sales Tax legislation and questioned the differential rates of taxation in different States. In this case, the Supreme Court asserted that there was no doubt as to the fact that exercise of power to tax could normally be presumed to be in public interest. Thus Article 302 as used as both a sword and a shield to put forward the presumption that there is always a strong chance that any Parliamentary law on taxes would be in public interest. Another essential condition to declaring the law under Art.302 to be valid is to ensure that it is in accordance with the conditions in Art.303 viz. that such Union law should not be discriminatory as between different States except where it is necessary for dealing with an extraordinary situation which may arise such as scarcity of goods.

It is useful to note that in several cases, where the constitutional validity of a law imposing restrictions under Article 302 has been challenged, the Supreme Court has applied the test of reasonableness to hold the validity of those

⁵⁷ State of Tamil Nadu v. Sitalakshmi Mills A.I.R. 1974 S.C. 105

⁵⁸ State of Madras v. Nataraja mudaliar, A.I.R. 1969 Sc 147

restrictions. Even though the word 'reasonable' has not been explicitly mentioned in Art.302, the Supreme Court has chosen to read it into the provision in order to give more legitimacy to any tax law made with the intent to further public interest. This initiative can be witnessed in the case of **Prag Rice and Oil Mills v. Union of India**⁵⁹ where the Apex Court noted that "Although Art.302 does not speak of reasonable restrictions yet it is evident that the restrictions contemplated by it must bear a reasonable nexus with the need to serve public interest." This case involved the validity of certain Sections of the Essential Commodities Act in the backdrop of the Government imposing a Price Control Order on certain commodities. The majority in this case held that the Order was passed solely for the benefit of the public and would therefore fall under the category of a 'reasonable restriction.'

Article 303 of the Constitution provides for restrictions on the legislative powers of the Union and the States with regard to trade and commerce. This Article is an exception to Art.302 and essentially lays down that Parliament shall not pass any law giving any preference to any State over another, or discriminate between the States by virtue of any entry relating to trade and commerce in any of the three lists. At the outset it must be stated that this provision must be read along with Art.301 especially since Art.302 (2), an as an exception itself to Clause 1 of the same provision, authorizes Parliament to make discriminatory laws and to discriminate between the States in times of emergencies.

Article 303(2) of the Constitution is in the nature of a clarification. It begins with a non obstante clause and covers Article 303(1), because the latter clause refers to "legislature of a State" besides referring to Parliament. Article 303(1) is, in terms, an exception to Article 302 because of the non obstante clause. The object of including the legislature of a State appears to be emphasize that, like Parliament, even the Legislature of a State cannot give any preference or make any discrimination. As the majority in the **Atiabari case** pointed out⁶⁰, the limitation introduced in Article 303(1) cannot circumscribe or otherwise affect the

⁵⁹ Prag Rice and Oil Mills v. Union of India, A.I.R. 1978 SC 1295

⁶⁰ Atiabari Tea Co. Ltd. v. State of Assam, A.I.R., 1961 SC 232.

construction and scope of Article 301. The reference to entries in Article 303(1) cannot limit the application of Article 303(1) to these entries alone. This non obstante clause under Article 303 can only be made applicable to that to which it is appropriate i.e. only to the limitations imposed on Parliament under Article 303. The law may be made by Parliament under Entries relating to railways, highways, shipping, etc. These entries do not expressly refer to trade and commerce, though they may directly affect trade and commerce.

Article 304 speaks of restrictions on trade, commerce and intercourse among States. It is an exception to Articles 301 and 303 and the first clause allows taxes to be imposed on any goods that are imported into a State from other States or Union Territories subject to the notion that the tax imposed on such 'foreign' items will be the same as that which is imposed on the same type of goods within the State. The second clause refers to the imposition of 'reasonable restrictions' in public interest. This has often been used as an escape clause by States, desperately trying to justify the imposition of taxes, since it contains the golden words 'reasonable restrictions' and 'public interest' which are like music to the ears of a State trying to garner extra revenue. In **Tika Ramji v. State of Uttar Pradesh**,⁶¹ there was a local legislation in the State of Uttar Pradesh that imposed a restriction on the sale of locally produced sugarcane to dealers operating outside the State. When this was questioned, the Supreme Court opined that this was in the nature of a reasonable restriction in public interest as contemplated by Article 304(a) and that it was imposed in order to bolster the local economy of the State. The power conferred under Art. 304(a) is unqualified, whereas the power under Art. 304(b) is qualified by the proviso which has been made applicable to that particular clause.

The word 'discrimination' mentioned in Art. 304(a) refers to taxation only. Though the words in Article 304(a) mention only the words "tax on goods," it has been generally accepted that this includes every tax in respect of any aspect of goods which is within the legislative power of the State and consequently, such a tax can be imposed by the ordinary process of law. This would therefore include

⁶¹ Tika Ramji v. State of Uttar Pradesh, A.I.R. 1956 SC 676

a toll on goods, cess, octroi tax, or any tax imposed on a particular item. The main object of Article 304(a) is therefore not to make sure that goods have been adequately taxed, but to ensure that the States power is limited so as to prevent discrimination against imported goods by imposing taxes on such goods at a rate higher than that is borne by domestic goods, since the difference between the two rates of tax constitutes a tariff wall or barrier against imported goods. Thus, no item would be given a privileged status with respect to another solely because of the fact that it enjoys the patronage of a particular State government. Thus, in the case of **Mehtab Majid v. State of Madras**,⁶² the Madras Sales Tax Act imposed sales tax on tanned hides and skins at a rate higher than the one imposed on locally manufactured tanned hides and skins, and the same was held to be violative of Article 304(a) and not protected. However, in some cases, States may wish to protect and encourage local industry, and in such cases, a certain amount of preference for locally manufactured goods has not been held to be violative of Article 301.

Article 305 makes no provision for the savings clause for the existing laws and it also provides for State monopolies. The obvious objective of this Article was to ensure no interruption or adverse effect to the fate of the laws already in place at that point of time, except by special sanction. Thus nothing present in Articles 301 or 303 would affect the provisions of any existing law unless the President granted prior sanction for the same and the burdens on trade and commerce would continue as before. In short, the conditions that are prescribed by Article 304 apply to only those laws made after the enactment of the Constitution. In the case of **Saghir Ahmed v. State of Uttar Pradesh**,⁶³, the Supreme Court dealt with the question as to whether an Act providing for State monopoly in a particular trade or business conflicts with the freedom of trade and commerce guaranteed by Article 301 but unfortunately left the matter undecided. Article 19 was amended by the Constitution (First Amendment) Act in order to take out a State monopoly of this nature outside the purview of Art. 19(1)(g).

⁶² Mehtab Majid v. State of Madras

⁶³ Saghir Ahmed v. State of Uttar Pradesh, A.I.R. 1954 SC 728

However, no corresponding provision was added to Art. 305. It is doubtful as to whether such a State monopoly would be easily justifiable in a Court of law without an amendment, and even if this were to be the case, the State monopoly would almost certainly have to be filtered out by means of Art. 301 i.e. it would have to be shown to be in 'public interest.'

Article 306 of the Constitution was deleted by the Constitution (Seventh Amendment) Act, 1956.

Article 307 stipulates that: "*Parliament may by law appoint such authority as it considers appropriate for carrying out the purposes of Article 301,302,303 and 304 and confer on the authority so appointed such powers and such duties as it thinks necessary.*" Interestingly, till date, no such authority has been specially constituted for this purpose. This Article represents an interesting recommendation that was made by the framers of the Constitution. They perhaps foresaw the difficulties that any Federal or quasi-Federal State would face in attempting to regulate trade within its various constituent units.

It has been suggested by many that a body consisting of economists, businessman, and the lawyers would be able to do a much better job in this area than a court having merely legal expertise. The Sarkaria Commission was also of the same opinion when it noted in its report that the innumerable laws and executive orders that occupied the field contemplated by Part XII and Part XIII in the present day and age led to an immensely complex structure. This in turn gave rise to complex questions leading to a multitude of controversies and conflicts of interests. The Commission therefore argued in favour of Inter-State Commission while observing that "The whole field of trade and commerce bristles with complex questions not only in regard to constitutional aspects but also in respect of the working arrangements on account of impact of legislation of the Union on the powers of the States and the effect of legislation of both the Union and the States on the free conduct of trade, commerce and intercourse. Trade, commerce and intercourse cover a multitude of activities. Actions of the Union and State Governments have wide-ranging impact on them...many issues of conflict of interests arise everyday." Till date, the only body that has been established has

been the inter-state Transport Commission to tackle the various problems of Inter-State transport. This too, was abolished when the new Motor Vehicles Act came into force in 1988.

II. Comparison with the Provisions under the Government of India Act 1935:

There was no entry in the G.I. Act, 1935, relating to inter-State trade and commerce in any of the Legislative Lists. Entries 27 and 29, List II, Sch. 7 of the G.I. Act, were as follows:

Entry 27: "Trade and commerce within the Province; markets and fairs, money lending and money lenders."

Entry 29: "Production, supply and distribution of goods; development of industries, subject to the provisions in List I with respect to the development of certain industries under Federal control."

Section 297 of the Act, hereafter referred to as "s. 297" secured the freedom of internal trade and was as follows:

S.297. (1) No Provincial Legislature or Government shall

a) by virtue of the entry in the Provincial legislative list relating to trade and commerce within the Province, or the entry in that list relating to the production, supply and distribution of commodities, have power to pass any law or take any executive action prohibiting or restricting the entry into, or export from, the Province of goods of any class or description; or

b) by virtue of anything in this Act have power to impose any tax, cess, toll or due which, as between goods manufactured or produced in the Province and similar goods not so manufactured or produced, discriminates in favour of the former, or which, in the case of goods manufactured or produced outside the Province, discriminates between goods manufactured or produced in one locality and similar goods manufactured or produced in another locality. Any law passed in contravention of this section shall, to the extent of the contravention, be invalid.

We have seen that the G.I. Act, 1935 made a sharp distinction between the legislative power in respect of general subjects and taxation. Section 297 secured

the complete freedom of internal trade in two ways. Entries 27 and 29 of List II would have enabled a province to foster domestic trade by prohibiting the import of goods manufactured and produced in other provinces of India and by prohibiting the export of goods outside the province. Section 297 (1)(a) expressly denied this power to provincial legislatures. Again, the power to impose taxes on goods and to impose tolls, cesses and other dues would have enabled the provinces to erect fiscal barriers by discriminatory taxation. Section 297 (1)(b) expressly denied this power to provincial legislatures. In the result, internal trade was made completely free by prohibiting both physical and fiscal barriers. This freedom was further secured by s. 298 which prohibited discrimination on the grounds of religion, place of birth, descent, colour or any of them in respect of the right to carry on any occupation, trade or business.

In **Bhola Prasad v. R.**⁶⁴ the Federal Court had to interpret s. 297 in relation to a law which prohibited the possession, import, etc., of intoxicating liquor. It was contended that the law violated s. 297. Gwyer, C.J. repelled that contention by observing that s. 297 restricted the power of the provincial legislatures under entries 27 and 29, List II, but if the legislature could point to another entry, as for example entry 31 relating to intoxicating liquor, s. 297 had no application.

Comparison of these provisions with the provisions of the Indian Constitution will show that the provisions of the latter constitution envisages basically a federal state with a central government having competence over defined areas known as states.⁶⁵ Secondly it would be found that before the present constitution came into force British India was governed by the Government of India Act, 1935.

Under the present constitution, the complete freedom of internal trade secured by section 297 of the Government of India Act, 1935 has been curtailed under articles 301 and 304 (b) because:

⁶⁴ *Bhola Prasad v. R.* (1942) F.C.R. 17

⁶⁵ D.K.Singh *Trade, Commerce and Intercourse in India* 14 J.I.L.I., 40 (1972)

- 1) The import and export of goods can now be prohibited because the restrictions have been held to include prohibition.⁶⁶
- 2) Preferences can be given and discrimination made as has been provided in articles 301 (2) and 304 (b).
- 3) According to Seervai, Part XIII was enacted in a period of economic planning, therefore, freedom is not an end in itself, and restrictions, prohibitions and state control can be imposed in the public interest and state monopolies can be created.⁶⁷ Thus freedom is not an absolute one.

According to Seervai Part XIII was enacted in a period of economic planning, therefore, freedom is not an end in itself and restrictions, prohibitions and state control can be imposed in the public interest and state monopolies can be created. Freedom thus is not an absolute one.

Section 297 did not apply to the central legislature, and it operated as a prohibition on the powers of provincial legislatures. It was directed against (i) prohibiting or restricting the entry into or exports from the province of goods, and (ii) discriminating between goods manufactured or produced within the province and similar goods manufactured or produced outside.⁶⁸

Thus, the prohibition was imposed on provincial legislatures in so far as they exercised their powers affecting inter provincial trade and commerce, laws operated within the boundaries of a province were not affected.⁶⁹

III. Comparison with the Constitutions of some other Federal Constitutions.

Inter-state trade and commerce and its regulation provoke a sharp controversy in all federal states. Powers are divided between central and regional Governments in such a way that it is difficult to find any useful principle of comparison between various constitutions.⁷⁰

⁶⁶ Narender Kumar v. Union of India A.I.R. 1960 SC 430

⁶⁷ Seervai, Op.cit.f.n. 2 at 985.

⁶⁸ D.K.Singh Op. cit.f.n. 1 at 44

⁶⁹ Automobile Transport (Raj.) Ltd. v. Rajasthan 1963 S.C.R. 596

⁷⁰ K.C.Wheare. Federal Government 126 (1968)

If one considers economic life within the boundaries of the federation a complicated situation is found. Generally in a federal Government, powers of exclusive control, actual or potential, over certain aspects of economic life vests. These include currency, coinage and legal tender, weights and measures, copy rights and patents, bankruptcy and insolvency, immigration and emigration from and to countries outside the federation; and the raising loans on the credit of general Government.

It is difficult beyond this list, to find any important topic in economic affairs which is granted without some qualification to the general governments in all federations.

A. Position in Australia:

In Australia the crucial provision to secure the freedom of trade, commerce and intercourse is section 92 of the constitution. It contains similar language as is used in Article 301 of Indian Constitution.

Section 92 of the commonwealth of Australia Act 1901 lays down:

On the imposition of uniform duties of customs, trade, commerce and intercourse among the states, whether by means of internal carriage or ocean navigation shall be absolutely free. But notwithstanding anything in this constitution, goods imported before the imposition of uniform duties of customs into any state or into any colony which, whilst the goods remain there in, becomes a state, shall on the passing into another state within two years after imposition of such duties, be liable to any duty chargeable on the importation of such goods into a commonwealth, less any duty paid in respect of the goods on their importation.

Section 92 applies to both states as well as commonwealth with the result, that it has very much circumscribed government interference with business.

It guarantees legislative as well as executive freedom. It prohibits fiscal burdens as well as discrimination. But this clause applies to Inter-State commerce and not to intra-state commerce.⁷¹

As a matter of fact, there is no provision in the Australian Constitution which guarantees right to carry on trade or business such as guaranteed in article 19 (1)(g) of Indian Constitution. Lord Wright held that only Section 92 declares right of trade or business.⁷²

Lord Porter is of the view that it does not create a new right and therefore, he added,

“it does give the citizen of state or commonwealth the right to ignore and if necessary to call on the judicial power to held him to restrict legislature or executive action which offends against the section.”

The effect of both the views is practically the same and both views declare any attempt to interfere with the freedom of an individual engaged in interstate trade and commerce as violative of Section 92. In **James v. Commonwealth**.⁷³ Privy Council said:

“the Commonwealth should be held to have failed in its attempt by the method adopted under the Act in question to control prices and establish a marketing system even though the commonwealth government is satisfied such a policy is in the best interests of the Australian people. Such a result cannot fail to cause regrets. But there is conveniences are liable to flow from a written constitution.”

Prof. Nicholas is of the view that this section requires attention in view of persistent differences of judicial opinion.⁷⁴ While criticizing section 92 he said that it is totally inapplicable to an age of planning of the commonwealth of Australia.

As a result of so wide language the freedom guaranteed under section 92 of Australian Constitution is un-limited and unqualified. But there can be no

⁷¹ M.P.Jain Indian Constitutional Law, 575 (1962).

⁷² James v. Commonwealth (1936) A.C. 631.

⁷³ James v. Commonwealth, (1936), A.C.631

⁷⁴ Nicholas, The Australian Constitution, 250 (3rd Ed.)

absolute freedom and it was necessary for the courts to evolve certain restrictions and limitations on the freedom. The Privy Council in **Commonwealth of Australia v. Bank of New South Wales**⁷⁵ has laid down two propositions:

- a) that regulation of trade, commerce and intercourse among the states is compatible with its absolute freedom; and
- b) that Section 92 is violated only when a legislature or executive act operates to restrict such trade, commerce and intercourse among the states directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote.

Accordingly legislation of prohibitory nature has been held to be bad.⁷⁶

The scheme developed in **Bank Nationalization Case**⁷⁷ has a striking similarity to the scheme of section 297 of Government of India Act, 1935. Section 92 operated in its terms as a prohibition on trade, commerce and intercourse among the states, that is, interstate and not intrastate trade, commerce and intercourse, and its construction in 1935 was taken as settled in two matters.

- 1) it was binding on the states only⁷⁸ and
- 2) it prohibited any discrimination against interstate as opposed to intrastate transactions.⁷⁹

It is likely that the draftsmen of the Government of India Act, 1935, were inspired by the Australian experience and incorporated in section 297 the above propositions as applicable in the section 92 context.⁸⁰ A significant development as already stated took place later in the construction of section 92, and it was held to be applicable to Commonwealth as well.⁸¹ This shift in the Australian scene

⁷⁵ Commonwealth of Australia v. Bank of New South Wales, (1950) A.C. 235

⁷⁶ Hughes and value Proprietary Ltd. v. State of New South Wales, (1955) A.C. 241. and Australian National Airways v. Commonwealth, 71 C.L.R. 29.

⁷⁷ Commonwealth v. Bank of New South Wales, (1950) A.C. 235.

⁷⁸ W and A. Mc. Arthur Ltd. v. Queensland (1920) 28 C.L.R. 530.

⁷⁹ Fox v. Robbins (1909) 8 C.L.R. 115

⁸⁰ D.K.Singh Op. cit.f.n. 1 at 44

⁸¹ James v. Commonwealth (1936) 55 C.L.R. 631.

may have some bearing as forming the conceptual back-ground for the enactment of Part XIII of present constitution.⁸²

Constituent Assembly tried to incorporate in article 301 the emotional appeal of section 92 of the Australian Constitution whilst altering its provisions. At the same time section 297 of the Government of India Act 1935 was before the Assembly as a guide line. Seervai have termed it as unfortunate.⁸³

It led over the Supreme Court to think that makers of our constitution wanted to enrich and widen the content of freedom guaranteed under section 297 of Government of India Act, 1935.⁸⁴ Undoubtedly it can be stated here that was limited in comparison with freedom of trade secured for interstate trade by section 297.

B. Position in U.S.A.:

In the United States Constitution there is no parallel provision as have been provided in Part XIII of the present constitution or section 297 of the Government of India Act, 1935. But the federal commerce power has been construed by the American Supreme Court yielding almost similar results by implication. The most important provision in the U.S.A. is Article 1 Section 8 clause 3, known as the Commerce clause, which provides, inter alia that Congress shall have power to regulate commerce among the several states.

This power of Congress is described as a regulation and it is limited to interstate commerce, and it has been construed so far as interstate and foreign commerce are concerned, as a matter of national concern and requiring national treatment.⁸⁵ This construction has given the Congress an exclusive jurisdiction in the matter.⁸⁶ The result is that though clause does not in terms restrict state protection, yet by a process of judicial interpretation it has come to have a restrictive effect on the states in those matters where the Supreme Court considers

⁸² D.K.Singh, Op.cit.f.n. 1 at 45

⁸³ Seervai Op.cit.f.n. 2 at 984.

⁸⁴ Atiabari Tea Co. Ltd. v. State of Assam, A.I.R. 1961 SC 232.

⁸⁵ D.K.Singh, Op.cit.f.n. 1 at 45

⁸⁶ Corwin. The Constitution and what it means today, 49-54 (1961)

that uniformity is necessary to national economic well being.⁸⁷ Even the silence on the part of Congress in any particular aspect of the matter would be taken as an indication of being free from restraint by any state action.⁸⁸

However, a state legislation which discriminates against interstate commerce and is to be condemned as invasive of the federal jurisdiction in the absence of congressional legislation may be validated by Congress.⁸⁹

Congress can regulate even those activities which affect interstate commerce as to make their regulation appropriate.⁹⁰ The emphasis is on regulation which makes the federal control almost unlimited. The influence of commerce power on the states is a negative one, and by implication it acts as a restraint on the state legislative activity in this area.⁹¹

However, the object of Part XIII of the present Indian Constitution is not the same. Instead it aims at guaranteeing the freedom of trade, commerce and intercourse throughout the territory of India, and Parliament and state legislatures are expressly prohibited from making a law which inhabits that freedom.⁹²

While reading the provisions of Part XIII, Prof. Rice found in article 301 an echo of the federal commerce power as construed in the United States Constitution and read it in an affirmative grant of power for Parliament in addition to subject matters enumerated in the Union list of Schedule VII with "public interest", as equivalent of "due process of law" in its substantive, as contrasted to its procedural sense. Article 301 according to him, was a statement of part of the constitutional rule which invalidated 'state action' depriving persons of liberty or property, that is, action by government and not by persons.⁹³

C. Position in Canada:

In Canada, the Provinces have been deprived of the power to levy indirect taxes so that they may not be able to create inter-provincial trade barriers. This

⁸⁷ *Cooley v. Port Wardens* 12 How 299

⁸⁸ D.K.Singh Op.cit.f.n. 1 at 45

⁸⁹ *Prudential Insurance Co. v. Benjamin* (1946) 328 U.S. 428

⁹⁰ *U.S. v. Darley* (1941) 312 U.S. 100

⁹¹ *Wickard v. Filburn* (1942) 317 U.S. 111

⁹² D.K.Singh, Op.cit.f.n. 1 at 45-46

⁹³ Rice, *Division of Power* 1 J.I.L.I. 159 (1958-59)

has been further strengthened by making “regulation of trade and commerce” a Central matter, but this Central power has not played much meaningful role so far. Then Sec. 121 of the BNA Act. which provides that “articles of growth, produce or manufacture of any province shall be admitted free into each of the other provinces”, also curtails the provincial power to put restrictions on entry of goods from other provinces.

IV. American and Australian decisions compared:

The constitution of the United States of America provides only one clause, viz.; the Congress shall have power to regulate commerce among several States, etc. And this phrase, “to regulate commerce” has received different interpretations from different Judges of the U.S. Supreme Court. Indeed the U.S. Supreme Court has used the commerce power to meet all the demands, namely, economical, commercial, and industrial and transport revolutions of that country. The concept of commerce was always enlarged or reduced to meet the exigencies of different situations but the common thread was that transportation across the borders, either physically or conceptually was uniformly held to be a necessity ingredient of the expression ‘commerce’. The following cases illustrate more than anything else that ‘commerce’ in America has been used to mean traffic in its operation across the State borders:

- a) R.C. Tway Coal Co. v. C.H. Clark (1936) 80 Law Ed. 1160;
- b) Public Utilities Commission v. London (1919) 249 US 236;
- c) Kidd v. Pearson (1888) 32 Law Ed. 346; and
- d) Welton v. Missouri (1875) 91 US 275.

The Constitution of the Australian Commonwealth came to be passed in 1900. The Constitution-makers of the Australian Commonwealth made elaborate provisions on trade and commerce presumably to avoid confusion on the working of the constitutional provisions. While in the U.S. Constitution the expression used is commerce, in s.92 of the Australian Constitution, the expression ‘trade, commerce and intercourse’ has been used. The Australian Constitution Act not only does not provide for any restriction on the freedom of trade, commerce and

intercourse but has also used an expression of the widest amplitude, viz., “absolutely free”. This expression also came to be interpreted in a different manner. The Privy Council evolved the power to restrict the said freedom by the States from the concept of absolute freedom itself. This was necessitated because there was no statutory provision limiting the absolute freedom. In this respect, the Privy Council decisions in **Rex v. Smither**⁹⁴ are instructive. These decisions have taken the expression, “trade, commerce and intercourse” in its widest amplitude.

In **James v. Cowan**⁹⁵ the Australian Decisions broadly laid down that no law whether fiscal or other can be challenged unless it directly and immediately restricts the traffic across the borders; and secondly, the law which is regulatory in character cannot be called restrictive or violative of the freedom of trade, commerce etc. as guaranteed by section 92.

The composite expression, “trade, commerce and intercourse” was borrowed from an American decision into the Constitution Act of the Commonwealth of Australia. This expression has acquired a definite signification in both the countries, namely, free flow of movement of trade across the State borders, and the said freedom should not be disturbed or infringed by State action, whether by taxation or otherwise. However, this freedom may be subject to such laws as may be beneficial to the general public, that is to say, in the public interest.

Our Constitution-makers in enacting Art. 301 with succeeding Articles in Part XII have tried to avoid both the extreme of the American as well as Australian Constitutions.

Though the Honorable Judges of our Supreme Court have warned against the reliance of foreign decisions, there are certain fields where foreign decisions on the same matters or interpretation of the same words or phrases may be of great assistance to our courts. In the **Automobile Transport Ltd. v. State of Rajasthan** SUBBA RAO, J. said that a brief survey of the relevant provisions of

⁹⁴ *Rex v. Smither* (1912) 16 CLR 99; *W&A Mc Arthur Ltd. v. State of Queensland* (1920)28 CLR 530

⁹⁵ *James v. Cowan* (1932) AC 542; *Hughes Pvt. Ltd. v. State of New South Wales* (1955)93 CLR 160

those (American and Australian) Constitutions which form the background of Art. 301 and the interpretation put on them by the highest Tribunals of these countries would not only be relevant but also be necessary for appreciating the correct scope of Art. 301 of our Constitution. GAJENDRAGADKAR, J. in **Atiabari Tea Co. v. State of Assam** took a balanced view that is; the court would enquire how far other judicial minds have responded to the challenge presented by similar provisions in other sister Constitutions. In **Fateh Chand Himmatlal v. State of Maharashtra** KRISHNA IYER, J. while interpreting 'trade' said that when Indian courts are called upon to interpret words borrowed from foreign Constitutions, they must acclimatize the expressions to the particular conditions prevailing in the country. However, lexicographic aids and understandings in alien jurisdictions may be looked into, but not beyond that.

There is no gain saying the fact that our Judges of Supreme Court got enough light from the American and Australian decisions to avoid pitfalls and to proceed on the right track.

The Indian Constitution has borrowed from the Constitution Act of Australia the expression shall be "free" although the word 'absolutely' was deliberately dropped. Another fact to be mentioned is that the control over inter-State trade, subject to certain qualifications vested in the State under Entry 26 of List II in Schedule VII resembles the control exercised by the Constituent States of the Australian and American Federations as part of their residual sovereignty. While under U.S. and Australian Constitutions there is only one Entry in respect of trade and commerce which comes under the competence of the Centre, the residue of the authority is left to constituent units.

In India, our Parliament and States have, within their respective jurisdictions, full plenary powers of legislation also including what is called incidental and ancillary to the subject-matter. Entry 42 of List I of Schedule VII confers full powers on Parliament to make a law with respect to inter-State trade and commerce including one which imposes restrictions on the freedom of inter-State trade and commerce in public interest.

While by provision in Art.301 our Constitution-makers wanted to energise trade and commerce by giving a free flow without any State barrier being imposed on it, at the same time by Art. 302 they have conferred full powers on Parliament to enact laws whereby to impose restrictions on the freedom of trade and commerce between one State and another in public interest. This provision compares well with s. 99 of the Australian Constitution. But Art.303 (1) carries out an exception from the relaxation given by Art.302. In other words it limits the power of the State Legislatures to enact any discriminatory law giving preference to one State over another. Article 304 has been inserted as a proviso to Arts. 301 and 302. The first clause of Art. 304 authorises the States to impose taxes on goods imported from other States subject to the condition that there is no discrimination between two classes of goods, local or imported. The second authorizes the States to impose such reasonable restrictions on the freedom of trade, commerce or intercourse as may be required in the public interest. Thus, by removal of prohibition contained in clause: (1) of Art.303 on the exercise of State power, it is possible theoretically for a State to practice by its legislation, discriminations or preferences as between one State and another. But in practice this danger may not materialise because of the conditions imposed on the State legislation under Art.304 (b) which requires prior Presidential sanction to such legislation as well as 'reasonableness' of the measure. But it is to be noted in this connection that no "reasonableness" is attached to parliamentary law being enacted under Art.302.

It seems clear from the decided cases particularly in Australia on the freedom of trade, where the provisions under s. 92 is more emphatic than in Art.301 of the Indian Constitution- that the concept of freedom of trade, commerce and intercourse must be delimited by considerations of social orderliness. The word 'free' does not mean extra legem, any more than freedom means anarchy. Freedom does not mean that we are not subject to law.⁹⁶

⁹⁶ Duncan v. State of Queensland (1916)22 CLR 556.

Similarly, freedom of trade and commerce as enshrined in Art.301 of the Constitution cannot be extra legem. If the word 'free' in Art.301 means freedom to do whatever one wants to do then chaos may be the result.

V. **Relations of Part XIII with other provisions of Indian Constitution:**

In **Atiabari case** majority of the Court held that,

“The doctrine freedom of trade, commerce and intercourse enunciated by article 301 is not subject to the other provisions of the Constitution but is made subject only to the other provisions of Part XIII, that means that once the width and amplitude of the freedom enshrined in article 301 are determined, they cannot be controlled by any provision outside Part XIII”⁹⁷

Seervai while disagreeing with the above has said that this view is incorrect. The 'only' word has been used after word “subject”, through this word does not appear in the text.⁹⁸ He held it contrary to the settled principles of construction, because proviso to article 304 (b) requires previous consent of President to a bill for the purpose of clause (b). It relates part XIII to part XI, because article 255 of part XI provides that if previous consent is not obtained it can be satisfied subsequently. Therefore, the established freedom guaranteed under article 301 is subject to article 304 (b) and 255.

Further article 19 (1)(g) of the present Indian Constitution deals with trade and as a rule of interpretation relating of Article 301 with article 19 (1)(g) is also necessary for proper construction. Article 19 (1)(g) guarantees to every citizen the right to carry on any trade or business.⁹⁹ But no trade can be carried over without property.¹⁰⁰ Article 19 (1)(g) guarantees the right to acquire hold and dispose of property. Again discrimination is not barred only by article 303. Article 14 and 15 also guarantees equality and as stated above relation of articles 303, 14 and 15 is necessary for the best interpretation of the Constitution.

⁹⁷ A.I.R. 1961 S.C. 232

⁹⁸ Seervai Op.cit.f.n.2 at 985

⁹⁹ Article 19 (1)(g) lays down:

All citizens shall have right to practice any profession or to carry on any occupation, trade or business.

¹⁰⁰ Seervai Op.cit.f.n. 2 at 986

In its earlier decisions, the Supreme Court failed to develop any clear line of relationship between article 301 and 19 (1)(g). In **Chamarbaugwalla case**¹⁰¹ Dass J. held that article 301 deals with trade in movements and therefore gambling is not protected under article 301.

Rights guaranteed under article 19(1) are only to 'citizen' and not to "any person" and are subject to reasonable restrictions provided in article 19(2) to 19(6). Article 19(5) provides that right of trade and commerce can be restricted in the public interest as well as in the interest of the protection of schedule tribes.¹⁰² Seervai is of the opinion that article 301 cannot be used to extend right of citizens which has expressly been limited by article 19. At the same time restrictions imposed on article 19(1)(g) cannot be abrogated by the article 301. It is, therefore, submitted that power of legislature to legislate on the freedom of trade, commerce and intercourse are subject to provisions of article 302 to 305 as well as of article 19(6).

Article 14 prohibits discrimination as a general rule. But it does not mean that reasonable classification cannot be made. Article 15 prohibits discrimination on the ground of religion, race, caste, sex or place of birth. Article 16 forbids discrimination on these grounds in public employment. Discrimination in economic field in favour of domestic trade is permissible under article 14 as distinction between "domestic trade" and "outside trade" is based upon a rational differentia reasonably related to the object i.e. to promote domestic trade. Article 303(1) prohibits discrimination but article 303(2) and 304(b) are exception to general rule. It is further submitted that such discrimination must stand the test of article 14 since all laws are subject to the provision of Part III.¹⁰³

The object of Part XIII of the Indian Constitution, therefore, is to guarantee the freedom of trade, commerce and intercourse throughout the territory of India. Its provisions operate as a limitation on the power of Parliament and state legislature which may in the absence of Part XIII, pass laws interfering with

¹⁰¹ State of Bombay v. R.M.D.Chamarbaugwalla, 1951 S.C.R. 874.

¹⁰² Seervai, Op.cit.f.n. 2 at 987

¹⁰³ Article 13 of the Indian Constitution

this freedom. The freedom is protected from legislature interference in the manner prescribed in the provision of part XIII.

Part XIII should not be read as providing for a source of legislative power, which is in Chapter I of Part XI, as the opening words of article 245 "subject to the provisions of this Constitution" suggests.¹⁰⁴ According to Shiva Rao Constituent Assembly debates support the above view.¹⁰⁵

Within their respective jurisdiction, Parliament and state legislatures have full and plenary power of legislation and extend to prescribing a course of conduct which promotes or prohibits something which is related to or course of conduct which promotes or prohibits something which is related to or connected with the subject matter of legislation, a legislature having power to make a law with respect to a subject matter may validly make a law with respect to something which is "incidental" or "ancillary" to that subject matter.¹⁰⁶ To find powers of legislation elsewhere will be futile.¹⁰⁷

Similarly to find in article 302 an additional source of power for Parliament is to misconstrue the article, further more it goes against the scheme of distribution of legislative powers envisaged in the Constitution. For example, entry 92 of list I of Schedule VII is 'interstate trade and commerce' Parliament has full and Plenary powers to make a law with respect to 'interstate trade and commerce' including one which imposes 'restrictions' on the freedom of trade and commerce, in public interest. If article 302 is construed as providing a source of power for Parliament, there appears to be an overlapping between the two provisions and that does not make any sense.

¹⁰⁴ D.K.Singh Op.cit.f.n. 1 at 47.

¹⁰⁵ Shiva Rao, The Framing of India's Constitution A study 699, 701-3 (1968)

¹⁰⁶ United Provinces v. Atiqua Begum A.I.R. 1941 F.C.16,
State of Bombay v. Balsara A.I.R. 1951 S.C. 918.

¹⁰⁷ D.K.Singh Op.cit.f.n. 1 at 47.