

# **THE CONSTITUTIONAL LAW**

TOPIC:

TRADE, COMMERCE AND INTERCOURSE:  
PARLIAMENTARY CONTROL OVER STATES



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## **Freedom of Trade, Commerce and Intercourse**

### **Introduction:**

In all Federations an attempt is made through constitutional provisions to create and preserve a national economic fabric to remove and prevent local barriers to economic activity, to remove impediments in the way of inter-State trade and commerce and thus to make the country as one single economic unit so that economic resources of all the various units may be utilized to the common advantage of all.

The framers of the Indian Constitution were fully conscious of the importance of maintaining the economic unity of the Union of India. Free movement and exchange of goods throughout the territory of India was essential for the economic unity of the country which alone could sustain the progress of the country. Free flow of trade, commerce and intercourse within and across inter-State borders is an important pre-requisite for ensuring economic unity, stability and prosperity of a country having a two-tier polity.

Most federal constitutions contain special provisions to protect this freedom. The Indian Constitution also contains provisions guaranteeing freedom of commerce, trade and intercourse throughout the territory of India. However, no freedom can be absolute. Limitations for the common good are inherent in such freedom. That is why, legitimate regulatory measures are not considered to constitute restrictions on this freedom.

Economic unity is one of the constitutional aspirations and safeguarding its attainment and maintenance of that unity are objectives of the Indian Constitution.

### **Motivation For The Constitution-Makers:**

In the matter of *Atiabari Tea Co. Ltd. V. State of Assam*<sup>1</sup>, the Supreme Court explained in detail the motivations and aspirations of the framers of the Constitution in drafting the Article under Trade, Commerce and intercourse in Indian territory in the following words:

“In drafting the relevant Articles [Arts. 301-305] the makers of the Constitution were fully conscious that economic unity was absolutely essential for the stability and progress of the federal polity which had been adopted by the Constitution for the governance of the country. Political freedom had been won, and political unity which had been accomplished by the Constitution, had to be sustained and strengthened by the bond of economic unity. Local or regional fears or apprehensions raised by local or regional problems may persuade the State legislatures to adopt remedial measures intended solely for the protection of regional interests without due regard to their effect on the economy. The object of the Constitution-makers was to avoid such possibility. Free movement and exchange of goods throughout the territory of India is essential for the economy of the nation and for sustaining and improving living standards of the Country.”

### **Article 301.**

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

The main provision framed is Art. 301. According to this article “trade, commerce and intercourse throughout the territory of India shall be free.” This constitutional provision imposes a general limitation on the exercise of legislative power, whether of the Centre or of the States, to secure unhampered free flow of trade, commerce & intercourse form one part of the territory to another. The purpose underlying Art. 301 is to promote economic unity of India and that there should not be any regional or territorial economic barriers.

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<sup>1</sup> AIR 1961 SC 232

### **Scope and object Art. 301.**

1. Article 301 imposes a limitation upon the exercise of legislative power, whether by the Union or by a State.
2. The object of the freedom declared by this Article is to ensure that the economic unity of India may not be broken up by internal barriers<sup>2</sup>.
3. Article 301 states that subject to the other provisions of Part XIII, trade, commerce and intercourse throughout India shall be free. It is not freedom from all laws but freedom from such laws which restrict or affect activities of trade and commerce amongst the States.

Article 301 of the Indian Constitution is modeled on section 92 of the Australian Constitution. The origins of Art 301 may be traced directly to sec. 92 of the Australian Constitution, but there are some significant differences between the two provisions like Coverage under Art. 301 is broader than that of Sec. 92 of the Australian Constitution. The freedom in India is wider than that in Australia under Section 92. While Section 92 refers to inter- State trade only, Article 301 includes both inter-State and intra-State Trade Activities. The restrictions in Australia were spelled out by the Court whereas in India the Constitution itself lays down restrictions on Article 301 which are contained in Articles 302 to 305.

Although Article 301 is positively worded, in effect, it is negative as freedom correspondingly creates general limitation on all legislative power to ensure that trade, commerce and intercourse throughout India shall be free.

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<sup>2</sup> *Atiabari Tea Co. v. State of Assam*, AIR 1961 SC 232; *State of Bombay v. Chamarbaugwala*, AIR 1957 SC 699

In *Jindal Stainless Ltd. v. State of Haryana*<sup>3</sup>, Article 301, refers to freedom from laws which go beyond regulations which burden, restrict or prevent the trade movement between States and also within the State.

**Trade in liquor.**

The permissive privilege to deal in liquor is not a “right” at all. The levy charged for parting that privilege is neither a tax nor a fee. It is simply a levy for the act of granting permission or for the exercise of power to part with the privilege. Therefore, Arts. 301-304 will be rendered inapplicable at this activity in question. Further, there is not a single judgment which upholds the applicability of Arts. 301-304 to the liquor trade. On the contrary numerous judgments expressly hold these articles to be inapplicable to trade, commerce and intercourse in liquor.

*State of Punjab v. Devans Modern Breweries Ltd.*<sup>4</sup>

The freedom guaranteed by Art. 301 is not available to liquor because it is a noxious substance injurious to public health, order and morality. Therefore, regulations in the interest of public health and order takes the case out of Art. 301.

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<sup>3</sup> AIR 2006 SC 2550

<sup>4</sup> (2004) 11 SCC 26 (paras 141, 116 and 145)

### **Arts. 19(1) (g) and Article 301.**

Article 19(1)(g) in Part III guarantees to every Indian citizen a fundamental right to carry on trade and business, subject to such reasonable restrictions as may be imposed in the interests of the general public. Also Articles 301 to 307 of Part XIII of the Constitution are provisions relating to trade, commerce and intercourse within the territory of India. Article 301 guarantees that trade; commerce and intercourse shall be free throughout the territory of India. It imposes a general limitation on the exercise of legislative power, whether of the Union or of the States, to secure unobstructed flow of trade, commerce and intercourse from one part of the territory of India to another.

*Prima face*, it seems that there is some overlapping between Art. 19(1)(g) and Art. 301, because both aim at the freedom of trade or business, and if either of the provisions is infringed, the aggrieved individual can seek his remedy from the Court against the offending legislative or executive action.

There are two obvious points of distinction, namely:

(a) While Art. 19(1)(g) confers a fundamental right, Art. 301 confers a justiciable right but it is not fundamental right.

(b) While Art. 19(1)(g) is confined to citizens, Art. 301 extends to all individuals.

In case of emergency, Art 19(1)(g) remains suspended and so the Courts can take recourse to Art. 301, to adjudge the validity of a restriction on trade, commerce and intercourse.

In some other situations, both provisions may be applicable and it may be possible to invoke both. Economic situations and conditions being unpredictable, it is not necessary to evolve any conceptualistic differentiation between the two Articles. Art. 301 is mandatory provision and any law contravening the same is ultra vires, but it is not a fundamental right and hence is not enforceable under Art. 32.

In the matter of *S. Ahmad v. State of Mysore*<sup>5</sup>, it was held that the three possible alternatives where a petition will lie can be: -

1. A provision may be valid under Art 301-304, but may be invalid under Art. 19(1) (g); or
2. It may be invalid under Art. 301-304 as well; or
3. It may be invalid under Art. 301-304, but not under Art. 19(1)(g)

But still a common ground is left where the two articles are bound to overlap; some basis of distinctions has, therefore, to be found out, particularly when the infringement of either provision gives justiciable right to the individual.

Prior to the Supreme Court decision in the *Automobile case*<sup>6</sup>, the consensus of opinion in the High Courts, broadly, was that while Art. 19(1)(g) looked at the freedom from the point of view of the individual, Art. 301 looked at it from the point of view of geographical barriers or restrictions against the movement of goods, while Art. 19(1)(g) lays down the rights of the citizen in the matter of profession, trade or business, Art. 301 deals with how the trade, commerce and intercourse is to be carried on between one place and another, whether the two places are situated in two States or are inside the same State<sup>7</sup>.

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<sup>5</sup> AIR 1975 SC 1443

<sup>6</sup> Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan, AIR 1962 SC 1406

<sup>7</sup> Moti Lal v. Uttar Pradesh Govt., AIR 1951 All. 257

The majority in the *Automobile case*, have held the distinction is not so simple. It was not correct to say that while Art. 19(1)(g) guaranteed an individual's right to carry on his trade Art. 301 guaranteed a free flow of the volume of trade against geographical barriers. Art. 301 according to the majority, also aimed at the freedom of the individual from restrictions, not necessarily geographical, - but since regulatory measures were outside the purview of Art. 301, the scope of the two provisions was not identical.

In *Bishamber Dayal Chandra Mohan v. State of U.P.*<sup>8</sup>, the freedom under both Art. 19(1)(g) and 301 is subject to restrictions imposed by the State in the collective interest, which must also be reasonable and not arbitrary or excessive. These limitations are inherent in both the freedoms. Regulatory measures do not constitute restrictions under either provision.

In the matter of *Saghir Ahmad v. State of U.P.*<sup>9</sup>, Mukherjea J. was of the view that while Art. 19(1)(g) deals with the rights of the individuals, Art. 301 provides safeguards for the carrying on trade as a whole distinguished from an individual's right to do the same.

However in the matter of *Dist. Collector, Hyderabad v. Ibrahim*<sup>10</sup>, the Supreme Court denounced the theory that Art. 301 guarantees freedom in the abstract and not of the individuals.

Again in the matter of *Motilal v. State of U.P.*<sup>11</sup> and *Bapubhai v. State of Maharashtra*<sup>12</sup>, there was a view that the difference between Art. 19(1)(g) and Art. 301 is that Art. 301 could be invoked only when an individual is prevented from sending his goods across the State, or from one point to another in the same state, while Art. 19(1)(g) can be invoked only when the

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<sup>8</sup> AIR 1982 SC 33

<sup>9</sup> AIR 1954 SC 728, 742

<sup>10</sup> AIR 1970 SC 1725

<sup>11</sup> AIR 1951 SC 257

<sup>12</sup> AIR 1956 BOM 21

complaint is with regard to the right of an individual to carry on business unrelated to, or irrespective of, the movement of goods, i.e. while Art 301 contemplates the right of trade in motion, Art 19(1)(g) secures the right at rest.

**Subject to the other provisions of this part.-** This means that while the general rule of freedom of trade and intercourse is enunciated in Art. 301, it may be subjected to restrictions imposed by law.

(a) by Parliament, under Arts. 302 and 303(2), and

(b) by the State Legislatures, under Art. 304, subject to the limitations prescribed by Arts. 302-303, respectively<sup>13</sup>.

2. No such restrictions can be imposed by executive action.

**The scope and content of Art. 301 depends on the interpretation of these three expressions used therein, viz., Trade-Commerce-Intercourse/ Free/ Throughout Territory Of India.**

### **1. Trade, Commerce and Intercourse: -**

The words trade and commerce have been broadly interpreted. In most cases the accent has been given on the movement aspect.

**Trade, commerce.** – Though the word ‘business’ is ordinarily more comprehensive than the word ‘trade’, they are synonymous with the other. So used, trade or business would mean some real, substantial and systematic or organized course of activity or conduct with a set purpose.

**‘Intercourse’.** – This word is used to give the freedom declared by Art. 301 the largest import. It thus includes the freedom to import things for personal or commercial use<sup>14</sup>.

In the matter of *Koteshwar v. K.R.B. & Co.*<sup>15</sup>, the Supreme Court held that

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<sup>13</sup> State of Bihar v. Harihar Prasad Debuka, AIR 1989 SC 1119

<sup>14</sup> Chobe, B.N v. Palnitkar, AIR 1954 Hyd. 207.

‘a power conferred on the state Government to make an order providing for regulating or prohibiting any class of commercial or financial transactions relating to any essential article, clearly permits imposition of restrictions on freedom of trade and commerce and, therefore, its validity has to be assessed with reference to Art. 304(b)’.

In *Fatechand v. State of Maharashtra*<sup>16</sup>, the Supreme Court considered the question whether the Maharashtra Debt Relief Act, 1976, was constitutionally valid vis-à-vis Art. 301. This depended on the further question whether money-lending to the poor villagers which was sought to be prohibited by the Act could be regarded as trade, commerce and intercourse. The Court answered in the negative although it recognized that money-lending amongst the commercial community is integral to trade and is, therefore trade. The Court thus stated:

“In short, State action defending the weaker sections from social injustice and all forms of exploitation and raising the standard of living of the people, necessarily imply that economic activities, attired as trade or business, can be de-recognized as trade or business.”

In *State of Bombay v. Chamarbaugwala*<sup>17</sup>, the Supreme Court held that the protection offered by Art. 301 is confined to such activities as may be regarded a lawful trading activity and does not extend to an activity which is *res extra commercium* and cannot be said to be ‘trade’. It cannot include activities which are inherently pernicious, such as trafficking in women; hiring of goondas for committing crimes, gambling. and that, accordingly, there is no question of the application of Art. 301 or 304 to laws made for the suppression of such activities.

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<sup>15</sup> AIR 1969 SC 504

<sup>16</sup> AIR 1977 SC 1825

<sup>17</sup> State of Bombay v. Chamarbaugwala, AIR 1957 SC 699

## 2. Free: -

‘Shall be free’ ‘Freedom’ in this Article does not mean absolute freedom but freedom for all restrictions except those which are provided in other articles of Part XIII, as well as regulatory and compensatory measures. The power of the Union of the State to exercise legitimate regulatory control is independent of the restrictions imposed by Arts. 302-305. On the other hand, ‘restriction’ would not be valid if it does not come under Arts. 302-305. Now, since restrictions under the latter provisions can be imposed only by law the freedom under Art. 301 cannot be taken away by mere executive action.

The Supreme Court emphasized in *Atiabari case* that Art. 301 provides that the flow of trade shall run smooth and unhampered by any restriction either at the boundaries of the State, or at any other point inside the State themselves. The majority judgment emphasized that free movement and exchange of goods throughout the territory of India is essential for sustaining the economy and living standards of the Country.

The word ‘free’ in Art. 301 cannot mean absolute freedom or that each and every restriction on trade and commerce is invalid. The Supreme Court has held in *Atiabari* that freedom of trade and commerce guaranteed by Art. 301 is freedom from such restrictions as directly and immediately restrict or impede the free flow or movement of trade.

In the matter of *Amrit Banaspati Co. Ltd. V. Union of India*<sup>18</sup>, the Supreme Court observed that:

“Suffice it to say that it is only when the intra-state or inter-state movement of the persons or goods are impeded directly and immediately as distinct from creating some indirect or consequential impediment, by any legislative or executive action, infringement of the

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<sup>18</sup> AIR 1995 SC 925

freedom envisaged by Art. 301 can arise. Without anything more, a tax law, per se may not impair such freedom. At the same time, it should be stated that a fiscal measure is not outside the purview of Art. 301 of the Constitution.”

The Supreme Court has ruled that the imposition of sales tax on goods sold within the State cannot be considered as contravening Article 301.

A tax may, in certain cases, directly and immediately impede the movement or flow of trade, but the imposition of a tax does not do so in every case. It depends on the context and circumstances. Measures impeding the freedom of trade, commerce and intercourse may be legislative or executive and may be fiscal or non-fiscal. Freedom may be impeded by impediments on the individuals carrying on trade or business, on the business itself, or on the vehicles, carriers, instruments and labour used in trade and commerce.

Any person aggrieved by infringement of Art. 301 can seek his remedy from the court against the offending legislative or executive action.

### **3. Throughout The Territory Of India: -**

‘Throughout the territory of India’, these words extend the freedom not only to inter-State but also in intra-State transactions and movements<sup>19</sup>.

As according to *State of Bombay v. R.M.D.C.*<sup>20</sup>, Art. 302 and 304 state the words “territory of India” in Art. 301 removes all inter-State or intra-State barriers, and brings out the idea that for the purpose of the freedom of trade and commerce, the whole country is one unit.

Trade cannot be free throughout India if barriers exist in any part of India, be it inter-State or intra-State.

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<sup>19</sup> State of Madras v. Nataraja Mudaliar, AIR 1969 SC 147

<sup>20</sup> AIR 1957 SC 699

## **Regulatory Measures**

Measures which impose compensatory taxes, or, are purely regulatory, do not come within the purview of 'restrictions' contemplated in Article 301 because they facilitate flow of trade, rather than hampering it. Such measures, therefore, need not comply with the requirement of the provisions of Article 304(b). Thus, a State law imposing a tax, for vehicle, on the owners of motor vehicles does not directly affect the freedom of trade or commerce even though it indirectly imposes a burden on the movement of passengers and goods within the territory of the taxing State.

Regulatory measures are not regarded as violative of the freedom guaranteed by Art. 301. The word 'free' in Art. 301 does not mean freedom from such regulation as is necessary for an orderly society. Regulatory measures do not fall within the purview of the restrictions contemplated by Art. 301.

In the matter of *G.K. Krishnan v. State of Tamil Nadu*<sup>21</sup>, the Supreme Court observed: "there is clear distinction between laws interfering with freedom to carry out the activities constituting trade and laws imposing on those engaged therein rules of proper conduct or other restraint directed to the due and orderly manner of carrying out the activities."

The word 'regulation' does not have any fixed or inflexible meaning. It is difficult to define this word as it has no precise meaning. It is a word of broad import, having a broad meaning and is very comprehensive in scope. Every case has to be judged on its own fact and its own facts and in its own setting of time and circumstances. It may be that in some situations even a 'prohibition' may be regarded as being regulatory in nature and not hit by Art. 301.

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<sup>21</sup> AIR 1975 SC 583, 587

In the matter of the *State of Tamil Nadu v. Sanjeetha Tarding Co.*<sup>22</sup>, the Supreme Court observed: “According to us, the expression ‘free trade’ cannot be interpreted in an unqualified manner. Any prohibition on movement of any article from one State to another has to be examined with reference to the facts and circumstances of that particular case—whether it amounts to regulation only, taking into consideration the local conditions prevailing, the necessity for such prohibition and what public interest is sought to be served by imposition thereof.”

**Remedies for infringement of Art. 301.** – 1. Not being a fundamental right, the infringement of Art. 301 cannot be challenged by a petition under Art. 32. This does not mean, however, that the individual has no remedy if Art. 301 is infringed. Either an individual or a State can challenge any legislative or executive action which offends against this Article, by other proceedings e.g. under Art. 226.

2. The doctrine of severability applies where a statutory provision or order violates the provision of Art. 301 or 304.

**Restrictions upon the freedom.**— 1- The limitation imposed upon inter-State freedom of trade, commerce and intercourse, by the other provisions of Part XIII are –

(a) It is subject to non-discriminatory restrictions imposed by Parliament, in the public interest (Art. 302)<sup>23</sup>.

(b) Even discriminatory or preferential provisions may be made by Parliament, for the purpose of dealing with a scarcity of goods arising in any part of India (Art. 302(2)).

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<sup>22</sup> AIR 1993 SC 237, 243

<sup>23</sup> Dt. Collector of Hyderabad v. Ibrahim & Co., AIR 1970 SC 1278

(c) Non-discriminatory taxes may be imposed by States on imported goods similarly as in intra-State goods. (Art. 304(a).

(d) Reasonable restriction may be imposed by a State in the public interest (Art. 304(b).

(e) Restrictions imposed by existing law to continue except insofar as provided otherwise by order of the President [Art. 305]. Existing laws relating to any matter referred to in Art. 19(6)

(ii) are also protected.

2. The freedom cannot be restricted by mere executive order.

**A. Instances of laws held invalid:**

(i) Assam Taxation on Goods carried by Roads or Inland Waterways Act, 1954.

(ii) Jute Packaging Material (Compulsory Use in Packing Commodities) Act, 1987:

(iii) Provisos of Rule 2 made under the Mysore Forest Act, 1900.

(iv) Tripura Transit Rules, Rule 3.

**B. Instances of Acts held not to contravene Art. 301:**

(i) Andhra Pradesh Sugarcane (Regulation of Supply and Purchase), Act, 1961.

(ii) Assam Motor Vehicles Taxation (Amendment) Act, 1963, 1966.

(ii) A. P. General Sales Tax Act, 1957, Entry 24(a) of Sch. I

(iv) Karnataka Tax on Entry of Goods Act, 1979, S. 3(1).

(V) M.P. Sthaniya Kshetra Me Mal Ke Pravesh Par kar Adhiniyam, 1976, S.3.

(vi) Mines & Minerals (Reg. & Development) Act, 1957.

(vii) T. N. Essential Articles Control and Requisitioning Act, 1949.

(viii) T. N. Timber Transit Rules, 1968-Rr. 1-A(3)(b), 2, 3(ii) and 7(4).

(ix) Tripura Sales Tax Act, 1976, S.38-B.

## **Power of Parliament to impose restrictions on trade, commerce and intercourse.**

### **Parliamentary Power To Regulate Trade & Commerce:**

**Art. 302.** 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 the public interest.

Therefore, Art. 302 empowers Parliament to impose by law such restrictions on the freedom of trade, commerce and intercourse between one state and another, or within any part of the territory of India, as may be required in the public interest.

By virtue of Art. 302, Parliament is, notwithstanding the protection conferred by Art. 301, authorized to impose restrictions on the freedom of trade, commerce and intercourse in the public interest. Thus, Art. 302 relax the restriction imposed by Art. 301 in favor of Parliament.

*The Sarkaria Commission*<sup>24</sup> justified the present position in the following words as: “The need for empowering Parliament to place restrictions on trade and commerce even within a State is obvious. Ours is a vast country with varying economic potentiality and considerable differences in regard to existing levels of development. The Unions responsibility in respect of certain matters may, therefore, entail regulating trade and commerce even within a State for achieving national objectives. For example there is the need to protect the interests of the poor and weaker sections of our community like the tribal people etc. Indiscriminate exploitation of natural resources in one State, for example denudation of forests, may have far reaching implications for other States which may be affected by floods, silting up of reservoirs etc. Such situations may require imposition of

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<sup>24</sup> ] SARKARIA COMMISSION REPORT, 502 (1988)

restrictions on trade even within the State. The importance of Parliamentary control over intra-State trade is also significant where centers of production of certain commodities are situated entirely within a State but the centers of consumption are located outside the State.”

The requirement of ‘public interest’ in Art. 302 would not present any serious problem in the way of parliament regulating trade and commerce because of the strong presumption in favor of parliamentary legislation being in public interest.

The majority judgment in *Atiabari* case even suggested that *prima facie* the question of public interest underlying a Parliamentary law imposing restrictions on the freedom of trade ‘may not be justiciable’. If this be the correct approach, then Parliament’s power to decide what restrictions need be imposed under Art. 302 may be said to be practically unlimited.

But the correctness of the view was doubted in the matter of *Kheyerbari*<sup>25</sup> by the Supreme Court. In case of Art. 19(1)(g), the concept of public interest is justiciable and there appears to be no reason why Art. 302 should be treated differently. From a practical point of view, however, to hold ‘public interest’ as justiciable may not mean much for it is rare for a Court to hold that a legislation lacks public interest.

A person challenging the law will have to show to the Court why it is not required in public interest, and this, is a difficult task except in the rare case where the law is seen on its face to have been passed for a private purpose.

In another turn, Parliament enacted the Municipal Corporation Act, 1957, and empowered the Corporation to levy terminal tax on all goods carried by railway or road in the Union territory of Delhi from any place outside thereof. The Supreme Court declared the levy valid on two grounds, viz.

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<sup>25</sup> *Kheyerbari Tea Co V. State of Assam*, AIR 1964 SC 925

1. It does not impose any direct and immediate impediment on the inter-State movement of goods and so was not hit by Art. 301 which only hits direct and immediate impediments on intra-State or inter-State movements of goods or persons. It is true that a tax may in certain cases, directly and immediately impede the movement or flow of trade, but the imposition of the tax does not do so in every case.

2. Even if the act 'directly and immediately' impedes the movement of the goods, the statutory provision is saved by Art. 302. There is a presumption that the imposition of a tax is in public interest<sup>26</sup>.

The Court has stated that only when the intra-State or inter-State movement of the persons or goods are impeded directly and immediately as distinct from creating some indirect or inconsequential impediment by any legislative or executive action, infringement of the freedom envisaged by Art. 301 can arise, without anything more, a tax law, may not impair the said freedom. At the same time, it should be stated that a fiscal measure is not outside the purview of Art. 301 of the Constitution.

**Limitations on Power of Parliament—Article 303 (1) and (2): -**

This guarantee of freedom is expressly subject to the other provisions of Part XIII (Articles 302 to 305) of the Constitution. Article 302 enables Parliament to impose restrictions, by law, on the freedom of trade, commerce and intercourse between one State and another or within any part of the territory of India as may be required in public interest. But, this power to place restrictions cannot be used by Parliament to make any law which discriminates between one State and another or gives preference to one State over another, "by virtue of

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<sup>26</sup> Amrit Banaspati Co. Ltd v. Union of India, AIR 1995 SC 1340

any Entry in the Seventh Schedule relating to trade and commerce” [Article 303(1)]. Clause (2) of the Article engrafts an exception to the limitation contained in clause (1), in as much as it permits Parliament to make a law giving preference, or making discrimination between one State and another, if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India. It was argued in *State of Madras v. Nataraja Mudaliar*<sup>27</sup>, that as it hampered trade and commerce by giving preference to one State over another, or by making discrimination between one State and another, Arts. 301 and 303(1) were infringed. The Court rejected the argument holding that an act enacted for the ‘purpose of imposing tax which is to be collected and retained by the State’ does not amount to a law giving preference to one State over another, or making any discrimination between one State and another, merely because of varying rates of tax prevailing in different States. Several reasons adduced in support of the view stated:

1. The flow of trade does not necessarily depend upon the rates of sales tax and various other factors also are relevant.
2. Referring to Australian cases<sup>28</sup>, the Court derived the principle applicable in the Nataraja case, viz. ‘where differentiation is based on considerations not dependent upon natural or business factors which operate with more or less force in different localities that the Parliament is prohibited from making a discrimination’.

Art. 302 thus authorize Parliament to mitigate the effect of Art. 301 and Art. 303 does not cut into Art. 302 much. In the end result, Parliament is left with an abundant capacity to regulate trade and commerce and it is more akin to the American congress in this respect than to the

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<sup>27</sup> AIR 1969 SC 147

<sup>28</sup> King v. Barger, 6 CLR 41

Australian Parliament. Art. 301 is worded on the model of Sec. 92 of the Australian Constitution, and both provisions restrict Parliament, but then Art. 302, to a very large extent, frees the Indian Parliament from the restraints of Art. 301.

**Instances of legislation under Art. 302:**

- (i) Essential Commodities Act, 1955<sup>29</sup>, and Orders made there under.
- (ii) Defence of India Act, 1962, and the Rules made there under<sup>30</sup>.
- (ii) Central Sales Tax Act, 1956, 8(2)(b).
- (iv) Mines & Minerals (Regulation & Development) Act, 1957<sup>31</sup>.

**Regulation and Restriction.** - 1. It is now established that even apart from the specific provisions in Arts. 302 -305, the Union as well as State Legislatures have the power to exercise legitimate regulatory<sup>32</sup> control over the freedom of trade and commerce, which does not amount to a restriction. In fact, legitimate regulation does not infringe the freedom declared by Art. 301<sup>33</sup>.

It is therefore necessary to distinguish a regulation from restriction, which term is used in Arts. 302, 304(b): While restrictions obstruct the freedom of movement of inter-State transactions, regulations promote it<sup>34</sup>.

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<sup>29</sup> Bishamber Dayal Chandra Mohan v. State of UP, AIR 1982 SC 33

<sup>30</sup> Surajmal Roopchand v. State of Rajasthan, AIR 1967 Raj. 104.

<sup>31</sup> State of T. N. v. Hind Stone, AIR 1981 SC 711

<sup>32</sup> Manick Chand Paul v. Union of India, AIR 1984 SC 1249

<sup>33</sup> Malwa bus services Ltd. v. State of Punjab, AIR 1983 SC 634

<sup>34</sup> Automobile transport Rajasthan Ltd. v. State of Rajasthan, AIR 1962 SC 1406

The following measures have thus been held to be regulatory –

- (a) Police regulations, such as provisions for lighting, rules of the road, etc., which facilitate the movement rather than retard it.
- (b) Licensing provisions with compensatory fees<sup>35</sup>.
- (c) Provision for necessary services to enable the free movement, whether charged for or not.

On the other hand, the following have been held to be restriction rather than regulation:

- (i) A rule which totally prohibits movement of certain goods during a specified period<sup>36</sup>.
- (ii) Anything which directly hinders the free flow of trade, commerce and intercourse between any two parts of India, constitutes a restriction within the meaning of Arts. 302, 304

2. A restriction may be valid only if it conforms to the terms of Art. 302 or 304(b), as the case may be.

3. In determining whether a State Act imposing tax amounts to restriction on trade, commerce and inter-course among the States, the Court should examine whether the impugned provisions amounted to a restriction directly or indirectly on the movement of trade and commerce<sup>37</sup>.

**In the public interest.** – 1. This means that even where a restriction imposed by law imposes a direct burden on the freedom of trade under Art. 301, it may be constitutionally

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<sup>35</sup> State of Mysore v. Sanjeeviah, AIR 1967 SC 1189

<sup>36</sup> Koteswar Vittal Kamath v. K. Rangappa Balig & Co., AIR 1969 SC 504

<sup>37</sup> State of H.P. v. Yash Pal Garg, (2003) 9 SCC 92

valid, if it is required in the public interest, e.g., to prevent evasion of tax, to canalize inter-State trade through registered or licensed dealers<sup>38</sup>.

2. Article 302 is, however, subject to the condition in Art. 303 that such Union law should not be discriminatory as between different States except where it is necessary for dealing with a situation of scarcity of goods [Art. 303(2)].

3. In order to be protected by Art. 302, the nexus of the law with public interest must be reasonable, even though that word is not used in Art. 302<sup>39</sup>. This does not, however, imply any quasi-judicial obligation or compliance with the rules of natural justice<sup>40</sup>.

4. If the condition of public interest is satisfied, Art. 302 would authorize both inter-State or intra-State restriction<sup>41</sup>.

### **States power to regulate trade and commerce**

Limitations imposed by Article 303(1) on the legislative power of Parliament apply to that of the State Legislatures, also. But, the State Legislatures do not have the exceptional power to enact discriminatory laws, which is available to Parliament by virtue of Article 303(2).

Article 304 carves out two exceptions in favor of the State Legislatures, to the freedom guaranteed under Article 301.

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<sup>38</sup> State of T.N. v. Sitalakshmi Mills, AIR 1974 SC 1505

<sup>39</sup> Prag Ice and Oil Mills v. Union of India, AIR 1978 SC 1296

<sup>40</sup> Saraswati Industrial syndicate Ltd. v. Union of India, AIR 1975 SC 460

<sup>41</sup> State of Madras v. Nataraja Mudaliar, AIR 1969 SC 147

A State legislature may by law 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, however, not so as to discriminate between goods so imported and goods so manufactured or produced. [Clause (a) of Article 304].

Art. 304(a) imposes no ban, but lifts the ban imposed by Arts. 301 and 303, subject to one condition. Art. 304(a) is thus enabling and prospective. According to Art. 304(a), a State legislature may by law impose on goods imported from other States any tax to which similar goods manufactured or produced within that State are subject, as not to discriminate between goods so imported and goods so manufactured or produced.

For application of Art. 304(b) to a tax on trade, three conditions need to be fulfilled:

1. The Bill has to be introduced or moved in the State legislature with the prior sanction of the president, or that the Bill has been assented to by the President.
2. The tax in question constitutes a reasonable restriction.
3. The tax has been levied in public interest.

In **Automobile Transport**<sup>42</sup>, the Supreme Court compared Art. 304(b) with Art. 302 in the following words:

“This provision [Art. 304(b)] appears to the State analogue to the Union Parliament’s authority defined by art. 302. Leaving aside the pre-requisite of presidential sanction for the validity of State legislation under clause (b) provided in the proviso thereto, there are two important differences between Art. 302 & Art. 304(b). The first is that while the power of Parliament under Art. 302 is subject to the prohibition of preferences and discriminations

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<sup>42</sup> Automobile Transport v. State of Rajasthan, AIR 1962 SC 1406

decreed by Art. 303(1) unless Parliament makes the declaration contained in Art. 303(2), the State's power contained in Art. 304(b) is made expressly free from the prohibition contained in Art. 303(1), because the opening words of Art. 304 contain a non-obstanate clause both to Art. 301 and Art. 303. The second difference springs from the fact that while Parliament's power to impose restrictions upon Art 302 upon freedom of commerce in the public interest is not subject to the requirement of reasonableness, the power of the States to impose restrictions on the freedom of commerce in the public interest under Art. 304 are subject to the condition that they are reasonable”.

Although Article 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. In several recent decisions where the constitutional validity of a law imposing restrictions under Article 302 was challenged, the Supreme Court did apply the test of reasonableness to uphold the validity of those ‘restrictions’.

### **Need For An Authority Under Article 307**

Article 307 empowers Parliament to appoint such authority as it considers appropriate for carrying out the purposes of Arts. 301, 302, 303 and 304. It can confer on such authorities such powers and duties as it thinks necessary.

Several State Governments are in favour of setting up an authority contemplated in Article 307. Some of them consider that such an 'authority' may be useful in the context of enforcement of laws relating to essential commodities and settling questions of taxation, cesses, duties, etc. One of them has also referred to the need for continuous appraisal of the various fiscal laws as well as executive decisions and measures which the Union and the

States took from time to time on trade, commerce and intercourse within the country. The Chambers of Commerce have also emphasized the need for setting up of an authority contemplated by Article 307, especially for recommending measures to rationalise or modify restrictions imposed by the different States.

The Government of India does not consider it necessary to set up such an authority. The Department of Civil Supplies has expressed its view as follows:

“Since the situations keep on changing from time to time in the country, the Ministries at the Centre should be able to respond to such situations more promptly and appropriately because they have the readily available advice with them of experts, legal opinion, information from various parts of the country and views of the producing and consuming States, etc. The establishment of an authority under Article 307, would only cause delays, conflicts and controversies among the various States/regions. Moreover, the authority if established, can only be a data collecting, deliberative and advisory body but not a decision making authority which still shall have to rest with the Central Government. The Department, therefore, does not consider the necessity of setting up of an authority under Article 307 of the Constitution to settle issues among the various States.”

Trade, Commerce and intercourse cover a multitude of activities. Actions of the Union and State Governments have wide-ranging impact on them. Legislative and executive actions in the field of licencing, tariffs, taxation, marketing regulations, price controls, procurement of essential goods, channelisation of trade, and controls over supply and distribution, all have a direct and immediate bearing on trade and commerce. Innumerable laws and executive orders occupy the field today. This has led to an immensely complex structure. Many issues of conflict of interests arise every day.

We are of the view that it would be advantageous to constitute an authority under Article 307 and It should be an expert body. Being removed from the pressures of day to day administration it would be able to formulate objective views, taking into account the long term perspective, in regard to various intricate problems relating to trade, commerce and intercourse. Being an expert constitutional body it would also inspire confidence among the various States and other interests. Such an expert body would be eminently suited to strike a proper balance between freedom of trade and the need for restrictions in order to foster development with social justice.

### **Conclusion & Suggestion**

Free flow of trade, commerce and intercourse within and across inter-State borders is an important pre-requisite for ensuing economic unity, stability and prosperity of a country.

Limitations for the common good are inherent in such freedom, least it should de-generate into a self-defeating license.

Notwithstanding the fact that the word 'reasonable' is not used in Article 302, a law imposing restrictions under Article 302 would be open to judicial review on the ground that it has no reasonable nexus with the public interest alleged. The proposal for insertion of the word 'reasonable' before the word 'restriction' in Article 302 is thus merely of theoretical significance and cannot be supported.

Intra-State trading activities often have a close and substantial relation to inter-State trade and commerce. State laws though purporting to regulate intra-State trade may have implications for inter-State trade and commerce. These may impose discriminatory taxes or unreasonable restrictions impeding the freedom of inter-State trade and commerce. If clause

(b) of Article 304 is deleted, the commercial and economic unity of the country may be broken up by State laws setting up barriers to free flow of trade and intercourse through parochial or discriminatory use of their powers.

The scheme of the Articles in Part XIII, considered as a whole, is well-balanced. It reconciles the imperative of economic unity of the Nation with interests of State autonomy by carving out in clauses (a) and (b) of Article 304, two exceptions in favour of State legislatures to the freedom guaranteed under Article 301.

Considering the intricate nature and the need for objective examination of the wide-ranging issue connected with the freedom of trade, commerce and intercourse, it is recommended, that an expert authority should be constituted under Article 307. Among other things, such an authority may be enabled to:

- (a) Survey and bring out periodically a report on the restrictions imposed on intra-State and inter-State trade and commerce by different governments and their agencies;
- (b) Recommend measures to rationalize or modify the restrictions imposed to facilitate free trade and commerce;
- (c) Examine complaints from the public and the trade in this regard; and
- (d) Suggest reforms in the matter of imposition, levying and sharing of taxes for purposes of Part XIII of the Constitution.

The ambit of Article 307 is wide enough to bring all matters relevant to freedom and regulation of trade, commerce and intercourse within the purview of such an authority 'for carrying out the purposes of Articles 301, 302, 303 and 304'. It is entirely left to the judgment of parliament to clothe the 'authority' under Article 307 with such powers and duties as may

be considered necessary. Such an 'authority' may have both an advisory and executive, role with decision-making powers. To begin with such an authority may be assigned an advisory role. In course of time in the light of experience gained, such additional powers as may be found necessary can be conferred on it.

Therefore we can say that Articles in the Part XIII of the Indian Constitution make a complete package to look after the activities of Trade, Commerce and Intercourse in all respects.

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