

# Judicial Articulation and Regulation of Commerce

## Abstract

The freedom of trade commerce and intercourse given in Part XIII of the Indian Constitution is much debated topic, particularly in an era of globalization and liberalization where robust economy is the prerequisite need of every federal constituent and country. The article brings out the approach of Judiciary in defining the nature, scope and the interpretation of interstate commerce and free trade clause under part XIII of the Indian Constitution. Judicial articulation of regulation and restriction, relation of Part XIII with Parts of the Indian Constitution and judicial explanations of the phrase "absolute freedom and public interest". The researcher has also tried to analysed the judicial defining of powers of Provincial and National government under Part XIII of the Indian Constitution and its comparative study with the judicial decision in other federal countries.

**Keywords:** Interstate Trade, Regulation, Restriction, Public Interest, Absolute Freedom, Territory.

## Introduction

Freedom of interstate trade and commerce throughout the territory of India," subject to other provisions of Part XIII, is declared by Article 301 of the Constitution. Explaining the purpose of enacting this Article the Supreme Court has observed<sup>1</sup>:

*Article 301 assuring the freedom of trade, commerce and intercourse is not a statement of a mere cliché or the expression of a moral hope of a declaratory character; it is also not a mere statement of a directive principle of state policy, it exemplifies and cherishes a principle of paramount importance that the economic unity of the country will provide the main sustaining force for the stability and progress of the political and cultural unity of the Country.*

The above-mentioned rule has been echoed time and again by the court and scholars alike.<sup>2</sup> However, examining the words of Article 301 it is in the apt of things to make few preliminary observations which appear to be necessary to appreciate the subsequent discussion. These observations are directly connected with the opening remarks of the Supreme Court. If Article 301 "is not a declaration of a mere platitude or the expression of a pious hope of a declaratory character<sup>3</sup>" and "is not also a mere statement of a directive principle of state policy" then what is it; and how does it achieve the principle embodied and enshrined in it? In other words, whether it imposes a positive duty on someone to maintain the freedom or just commands not to interfere with it? Secondly, if the duty is not observed, or the command is not obeyed, then who will question such non-observance or disobedience? From the language of the Article it does not appear that it imposes any duty on any one or command any one to do or not to do something, but it may reasonably be said that if the language is to be given effect, then it imposes a limitation on anyone and everyone who impose a restriction on the freedom.

In that reference Article 301 gains the character of a limitation and, under the principal of judicial review, its violation can be challenged in a court of law. In the present article, attempt is made has been made by the researcher to determine the scope and content of freedom of trade and commerce as envisaged under Art.301 from the judicial view point.

## Objective of the Study

The research work has been taken up with an objective to make a comprehensive study of the provisions of commerce clause in major federal constitution of the world namely U.S., Canada, Australia and India. How have these provisions over the years helped to develop trade and commerce and whether provisions under the Constitution of India are an improvement over other constitution of the world?



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**Freedom: A General Limitation**

Article 301 ensures the freedom of trade, commerce and intercourse against the state action, legislative as well as executive. The power to limit the freedom of trade, commerce and intercourse lies in the hands of the state and if any power is retained or exercised by other persons or combines or groups it can be regulated/restricted and taken away by the state. Therefore, non-state acts restricting the free flow of trade and commerce need not be looked after by the Constitution because it sufficiently equips the state to take care of them. But for the purpose of Art.301 State should be construed liberally so as to cover all its organs and agencies covered in Article 12 for the purpose of the application of the Fundamental rights and the directive principles. The bodies created by the state and acting on its behalf should be equally subject to it, inter alia, on the ground that what the principal cannot do himself, he cannot authorize the delegate or agent to do.

Thus, it has been decided and accepted that all the legislative<sup>4</sup> as well as executive<sup>5</sup> powers of the Union and the states are subject to Art.301 and any exercise thereof inconsistent with it is unconstitutional and invalid. The generality of the words of Article 301 admits no exception to this proposition and the argument that Article 301 should be read as a limitation only to certain legislative powers and not on others has repeatedly been rejected. It does not mean that the limitation is absolute. The opening words of Article 301 dispel any such- misconception. But here is a very significant point to be noted that while the limitation of Article 301 has been relaxed in the subsequent provisions of Part XIII in favour, of the legislature, no such relaxation is given to the executive. Therefore, in regard to executive the limitation of Art.301 is absolute and no executive action inconsistent with it can be sustained unless it is supported by a valid law<sup>6</sup>.

Further, an enquiry of the cases decided by the Supreme Court reveals that "state power" includes powers both Legislative as well as executive. In *Atiabri Tea Co. Ltd. v. State of Assam*,<sup>7</sup> Shah, J. observes that Art.301 incorporates a restriction on the exercise of power by Government agency Legislative as well as executive and besides, placing an irremovable ban on execution authority, it restricts the Legislative power of Parliament and the State Legislature conferred by Arts. 245, 246 and 248 and relevant entries in the Legislature lists relating to trade, commerce and intercourse. It is submitted that Art.301 imposes a general limitation on the exercise of legislative power whether by Union or States under any of the topic enumerated in the three lists in order to make certain that trade, commerce and intercourse throughout the territory of India shall be free.

Thus, Art.301 operates as a general limitation since Art.245 is "subject to other provisions of the constitution" and this includes Art.301 and other provisions of Part XIII which declare a general guarantee that trade, commerce and intercourse shall be free.

Dass, J. in *Automobiles Transport Ltd. v. State of Rajasthan*<sup>8</sup>, has approved this argument and

held that legislative powers of Parliament and state Legislatures are made subject to the provisions of constitution. Ramaswamy has suggested that the application of Art.301 cannot be made selective by saying that laws passed with respect to only non-taxation heads of power come within its ambit and that laws enacted in the taxation field allocated to Parliament and the state legislature do not come within its ambit. It is submitted that Supreme Court has suggested this reasoning in *Atibaricase*<sup>9</sup> and held that Art.301 is worded in general terms and therefore its application cannot be made selective. As regards the application of executive action within the ambit of Art.301, it is submitted that Supreme Court in *District Collector of Hyderabad v. Ibrahim & Co.*<sup>10</sup> has ruled that the right under Art.301 can be restricted by a law of Parliament or of a state Legislature but the right cannot be restricted by a mere executive order<sup>11</sup>.

To sum up, it is submitted that Indian Judiciary holds that in view of the generality of the words of Art. 301, there seems to be substance in holding the view that Art. 301 operate as a general limitation on all the Legislative as well as executive powers of both Parliament and state Legislatures. However, the declaration of freedom is not merely declaratory, it is intended to give effect to, and it constitutes a clear restriction upon, the legislative competence of Parliament as well as state Legislature.

**Individual Right Theory**

In the *District Collector, Hyderabad v. Ibrahim & Co.*<sup>12</sup> the Supreme Court said:

*There is no reason to think that while placing a restriction upon legislative power of the constitution guaranteed freedom in the abstract and not of the individuals.*

It is hoped that by the "freedom... of the individual" the Supreme Court did not mean that Article 301 created a juristic right in an individual. On its terms Article 301 assures the freedom of certain activities but "there is no guarantee of private enterprise in that Article... expressly as such."<sup>13</sup> It is another matter that those activities are not self-propelling and are to be carried on by the individuals. In legal theory right can be the attributes only of persons and not of acts, though, of course, they should be in relation to some act. Therefore, it is one thing to say that Article 301 guarantees the freedom of certain activities carried on by an individual but it as a different thing to say that it creates a juristic right in an individual to carry on certain activities. Moreover, what it creates is only freedom and not rights in the strict sense. Time and again this point have been argued in relation to a similar provision in section 92 of the Australian Constitution where it has been held that "it (section 92) does give the citizen the right to ignore and if necessary to call upon the judicial power to help him to resist, legislative or executive action which offends against the section" but it "does not create any new juristic rights." The same reason will apply to Article 301 with greater emphasis in view of a separate provision in Article 19 (I)(g) which creates a

right in a citizen "to carry ...on any trade or business" and also in the light of the history of the drafting of Article 301.

#### **Total Volume Theory**

The test that Article 301 is not violated to long as the total volume of trade and commerce remains the same after the implementation of a law as before "is unreal and impractical, for it is unpredictable whether by interference with the individual flow the total volume will be affected and it is incalculable what might have been the total volume but for the individual interference.<sup>14</sup> If this theory is accepted "then the result will be in all probability that the primary purpose of Article 301 will be defeated. This is because courts ...will avoid deciding questions about the calculated effect of laws.<sup>15</sup> The greatest weakness of this theory is that it attempts to characterize trade and commerce as an economic phenomenon apart from individual's action who engages in it. To adopt the words of Professor Ramaswamy "trade and commerce are not impersonal entities, nor are they self-propelling mechanisms. They are activities conducted by individuals. It is true, no doubt, that there is something like a national interest in preserving the free mobility of commerce subject to reasonable restrictions imposed on such mobility in the wider interests of the public. But how can we treat the trade and commerce of the country as a live unit and attribute to it a special point of view of its own.

These arguments are further supported by Article 305 which was amended to save the nationalization laws which could possibly be challenged under Article 301 irrespective of the fact that total volume of trade was not affected. It brings us to the conclusion that although Article 301 does not create a juristic right in an individual, it is also correct that it refers to total volume of trade and commerce throughout the territory of India. It certainly protects individual's activities and therefore he is entitled to challenge the validity of any legislative or executive action which restricts his activity not because he has a right to that activity but because he is an aggrieved party. And among individuals Article 301 expresses or implies no distinction between a citizen and an alien or a natural and a legal person. So, all of them may bank alike upon it and since States and the Union of India are also regarded as juristic persons<sup>16</sup> they may also make a claim under Article 301 wherever appropriate. So, it is clear from the foregoing discussion that Article 301 is a limitation on the exercise of legislative and executive powers by the state and that a court may enforce if it violated. But the more important point for determination is the extent of the limitation and when it is violated.

#### **Scope and Extent of Freedom of Trade and Commerce**

In the case of *Atiabari Tea Co. Ltd. v. State of Assam*<sup>17</sup> the appellants being the owner of the company and other tea growers transported their tea to Calcutta in West Bengal for sale and also for export. They were subjected to a tax on the tea which was transported through Assam by road or inland water way and the same tax also caught some tea

growers in West Bengal whose tea had to pass through a part of Assam on its way to Calcutta. The growers claimed that Assam Taxation (on goods carried by road on inland water ways) Act, 1954 was an unpermitted interference with freedom of trade, guaranteed to them by Art.301 hence the Act being unconstitutional. The main issue inter alia related to his determination of the scope of Art.301; and in the three different judgments delivered by the court, this continued to- be predominant. These judgments from different perspective attempted to determine the exact scope of freedom of trade and commerce.

The first judgment, classified by Dass, J. as narrowest was delivered by Sinha, C.J. who observed that taxation simpliciter was not within the purview of Art.301. He drew a distinction between taxation as such for the purpose of revenue and taxation for the purpose of making discrimination or giving preference. It was only the latter which could be said to impose obstructions on freedom of trade and commerce and therefore falling within the purview of Art.301. Dass, J. rejecting this interpretation in **Automobile case** observed that it cannot be accepted that the power of taxation is outside the purview of constitutional limitation. To support his view, he cited Art.245 dealing with the extent of laws made by Parliament and observed that this Article is subject to constitution and these words being wide to take in provisions of both Part XII and XIII.

The second opinion delivered by Shah, J. and termed by Dass, J. as broadest refused to recognize, the distinction between direct and indirect restrictions and observed that what is guaranteed under Art.301 is freedom in its widest amplitude freedom from prohibition, control, burden and impediment in commercial intercourse. His lordship further held that the freedom of trade, commerce and intercourse guaranteed by Art. 301 encompassed not only freedom from discriminative tariffs and trade barriers but also freedom all taxation on commercial intercourse.

Rejecting this widest interpretation Dass, J. in **Automobile case** held that this view is based on textual interpretation of Art. 301. The learned judge observed that since the concept of freedom of trade, commerce and intercourse is to be understood in the context of an orderly society and as part of the constitution which envisages distribution of power between centre and states, it has to recognize the need and legitimacy of some degree of regulatory control whether by the Union or by the states'. As the widest interpretation refuses to recognize any regulatory restriction, the court rejected it unhesitatingly.

The third judgment was that of majority and was delivered by Gajendragadkar, J. who observed that the restrictions freedom from which is guaranteed by Art.301 would be such restrictions as directly and immediately restricts or impede the free flow or movement of trade. Regarding taxation, the majority observed that taxation may and do amount to restrictions; but it is only such taxes as directly and immediately restricts trade that would fall within the purview of Art. 301. The learned judge rejected the

argument that all taxes whether or not their impact on trade is immediate, mediate, direct or indirect should be governed by Art. 301.

Interestingly, the concurring opinion of Subha Rao, J. was in consonance with the views of Dass, J., he emphasized that the doctrine of "direct and immediate" on the freedom is a reasonable solvent to the difficult situation that might arise under the constitution. His lordship held that a tax on the transport of goods or persons directly operates as a restriction on the movement of trade, unless it is compensatory or regulatory. In other words, his lordship emphasized that regulatory taxes do not encroach upon the freedom of trade, commerce and intercourse declared by Art. 301. A scrutiny of the dissenting opinion of Hidayatullah, J. reveals that despite extensive review of Australian and Indian cases, his conclusion on the scope of Art. 301 so far as taxation laws are concerned are substantially in conformity with the above referred two opinions of Automobile case.

Another question connected with the scope of Art. 301 relates to the widened of the freedom. The question may be formulated thus: How wide is the freedom guaranteed by Article 301? A survey of the leading judgments of Supreme Court suggests that it has been fervently argued before the court that the extent of freedom of commerce under Art. 301 is confined to only such laws as are passed by virtue of any entry relating to trade and commerce in any of the lists in the seventh schedule of the constitution. In other words, the argument is that the scope of Art. 301 must be the same as that of Art.303.

It was argued in Atiabari case that Art. 303 (i) expressly refers to the entries relating to trade and commerce in any of the lists in the seventh schedule and this gives a clear indication as to the scope of the provisions of Art. 301; but Gajendragadkar, J. rejecting the argument held that the setting in which the said entries referred to would of course determine the scope and extent of the prohibition prescribed by Art. 303 (i) but that cannot be pressed into service in determining the scope of Art. 301 itself. The learned judge reasoned that since the term intercourse did not occur in Art. 303, it proves that the scope of Article 301 and 303 are not exactly the same.

The same argument was unsuccessfully raised further in Automobile case. Rejecting the contention Dass, J. replied to the argument that Art. 301 must take colour from Art. 303, the learned judge observed that as far as Parliament is concerned, Art. 303(i) carves out an exception from relaxation given in favour of Parliament by Art. 302, the relaxation given by Art. 302 is itself in the nature of exception to the general term of Art. 301. It is submitted that the learned judge was logically as well as legally justified in holding that such interpretation which result in exclusion of what clearly is falling within the expressed terms of Art. 301. Interestingly, Subha Rao, J. in his concurring judgment approved this, and rejected the contention of controlling the scope of Art. 301 from the stand point of Art. 303 (i), though his reasons were different. Despite the phraseological temptations and forceful contentions of linking the

scope of Art. 301 to 303(i), the Supreme Court has persistently withstood the pressure and refused to be in the above line. Instead it has held that the protection is available only against every law or executive action which directly and immediately does not impede the flow of commerce. If for once, the contention is accepted the words "any entry relating to trade and commerce in any of the list" being of widest import and yielding very liberal interpretation will engulf the very scope of freedom of trade and commerce of Art. 301.

Coming back to the first point as to whether the taxation is wholly outside the purview of Art. 301, it is submitted that it was contended in **Atiabari case** that the power to levy tax is an essential part of sovereignty and that this power is not subject to judicial review; but rejecting the contention, Gajendragadkar, J. observed that though power of taxation is essential for the very existence of government, its exercise must inevitably be controlled by constitutional provisions and it cannot be said that the power of taxation per se is outside the purview of any Constitutional limitation. True it is said that the power of taxation should, not be violative of Constitutional provisions, but it is submitted, with respect, that in a federal structure like ours, where the legislative domain of both states and centre has been expressly defined, any liberal interpretation not in commensurate with the spirit of Constitution is detrimental to the cordial coexistence of states and centre and the majority judgment, it is submitted with respect does come within this category.

As mentioned earlier, Sinha, C.J. drew distinction between taxation simpliciter aiming to raise revenue and taxation used as a device for erecting trade barriers and tariff walls and to him the latter was hit by Art.301 but not the former. The distinction seems to be well founded as, by necessary implication, it means that Art. did not inhibit the legislative power of taxation and was directed only against other legislative interferences and restrictions impeding the free flow of trade and commerce. That taxation simpliciter aiming to raise the revenue outside the purview of Art. 301 is evident from the fact that entries 52 and 60 in List II and entry 35 in list III do confer legislative powers on the states to impose tax and if the majority opinion is applied, it is submitted, the above entries are rendered redundant. Accordingly, it is submitted, that Art.301 is not so far reaching in its effect as to over-ride all other legislative powers given under the constitution either to the Union or the state Legislatures. It is further submitted ' that in an era of planning where taxation is the primary source of the states, Art.301 should not be interpreted as effecting every legislative field, which deals with taxation because it would enlarge the scope of Art.301 beyond its legitimate bounds.

The majority judgment has been subjected to divergent views is evident from the fact that Seervai considers it in substance as having been overruled by **Automobile case**.<sup>18</sup> While Prof. Tripathi considers the opinion of Sinha, C.J. as correct though reasoning is not supportive.<sup>19</sup> Though **Automobile case** has to some extent minimized the rigour of the majority

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judgment of **Atiabari case** by introducing compensatory and regulatory test, yet the efficiency of such a liberal interpretation continues to be doubted. It is evident in the opinion of Mathew, J., **G.K.Krishnan v. State of Tamil Nadu**<sup>20</sup> wherein he observed that "Art. 304(a) prohibits only imposition of discriminating tax. It is not clear from the Article that a tax simpliciter can be treated as restrictions on the freedom of internal, trade." It is submitted that the distinction drawn by Mathew, J. between tax simpliciter and discriminatory are similar to the one mentioned by Sinha, C.J. which is indicative of the fact that reconsideration of **Atiabari case** and **Automobile case** is badly needed. What we require at this stage is to reconcile judiciary between the freedom of trade, commerce and the state's power of imposing taxes.

To conclude the above discussion the following propositions, emerge in regard to the scope of Art. 301:

1. Though tax constitutes a restriction, yet only such restrictions as directly and immediately restrict the free flow of trade, commerce and intercourse fall within the purview of Art. 301.
2. Taxes which are of regulatory & compensatory nature do not come within 'the purview of Art. 301.
3. Article 301 is concerned only with the movement part of trade, commerce and in intercourse.

### Trade, Commerce and Intercourse

The framers of Indian Constitution, instead of leaving the idea of 'intercourse' to be implied by the process of judicial pronouncements, expressly incorporated the same in Article 301. The words trade and commerce have been broadly interpreted. In most of the cases, the accent has been on the movement aspect. Each of the three terms used in this expression may be assigned a distinct meaning, but there is much overlapping between the first two and it is not only in common speech that key are used interchangeably, but the dictionaries also explain commerce as trade. Intercourse, however, is a wider term and unless it is read ejusdem generis it will include all social dealings, commercial or otherwise. But the dictionary meanings of these terms may not help much in understanding the meaning and implication, of this expression as used in the Constitution, Actually, this entire expression was adopted in Article 301 from section 92 of the Australian Constitution which in turn was based upon the meaning given to the expression "Commerce" used in the Constitution of the United States. Since the Supreme Court of India, as will be seen hereafter, has not given sufficient exposition of this expression it is reasonably justified to see its meaning in the Constitutions of the United States and Australia which form its basis and background.

In **Gibbons v. Ogden**, the first Case on Commerce clause decided by the Supreme Court of the United States, Marshall, C.J. gave such a wide definition to the word 'Commerce' that its limits have not yet been exceeded. In his view, Commerce could not be restricted "to traffic, to buying and selling, or the interchange of Commodities. 'Commerce', he

said, undoubtedly, is traffic, but it is something more; it is intercourse.

Later in the same opinion Marshall, C.J. qualified the word

*"Intercourse" with the word "Commercial". But today, as crown puts it, 'Commerce' in the sense of the Constitution.....covers every species of movement of persons and things, whether for profit or not; every species of Communication, every species of transmission of intelligence whether for commercial purpose or otherwise, every species of Commercial negotiation which, as shown by the established course of business, will involve sooner or later an act of transportation of persons or things, or the flow of services or power across state lines".*<sup>21</sup>

Further Commerce has been extended to cover even these activities which sometimes earlier had been declared as not being inter-state Commerce, such as gathering of news by a press association and its transmission to client newspaper<sup>22</sup> activities of a Group Health association,<sup>23</sup> insurance<sup>24</sup> and sports.<sup>25</sup>

Conclusions drawn from the American precedents, we must remember that although the intrinsic meaning of the term 'Commerce' and its central concept may mean the same thing in the two Constitutions yet it is "Commerce among... the several states" in the U.S. Constitution, while it is "trade, commerce and intercourse throughout the territory of India" in the Constitution of India. Secondly and that is more important, in the Constitution of the United States it is a grant of power while in the Constitution of India it is a limitation on the granted powers. A grant of power differs from a limitation in the sense that it extends to all matters incidental and ancillary to the grant while a limitation is confined only to the essence and ingredients of the matter. The grant becomes wider in the Constitution of the United States read with the 'necessary and proper' clause.<sup>26</sup> It is mainly for this reason that in the United States 'Inter-State Commerce' has come in recent years practically to connote both those operations which precede as well as those which follow commercial intercourse itself, provided such operations are deemed by the Court to be Capable of 'affecting such intercourse'. So, whatever may be 'Commerce' in the Constitution of the United States need not necessarily be so in Article 301.

The position in Australia is much the same as in India except to the extent that "trade, commerce and intercourse" in Section 92 is qualified by the words "among the states" while in Art. 301 it is qualified by the words "throughout the territory of India". In **W & A. Me. Arthur Ltd. v. State of Queensland**<sup>27</sup> the High Court of Australia said:

*The terms trade commerce and intercourse are not term of Article. They are expressions of fact, they are terms of common knowledge, as well known to laymen as to lawyers, and better understood in detail by traders and commercial men than by Judges. But as Judges we are taken to know and do, in fact, in this instance know the general import of the words. The particular instances that may fall within the ambit of the expression depend upon the varying phases*

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and development of trade, commerce and intercourse itself. Aviation and wireless telephony have lately added to the list of instances, but the essential character of the class remains the same. 'Trade and Commerce between different Countries... has never been confined to the mere act of transportation of merchandise over the frontier. But the words include that act is, of course, truism. But that they go far beyond it is a fact quite as undoubted. All the commercial assignments of which transportation is direct and necessary result form part 'trade and commerce'. The mutual communing, the negotiations, verbal and by correspondence, the bargain, the transport and the delivery are all, but not exclusively, parts of the class of relations between mankind which the world calls 'trade and commerce'.

Later in **Australian National Airways Pvt. Ltd. v. The Commonwealth**<sup>28</sup> an argument raised that transportation was not in itself commerce, but only a means by which commerce could be conducted was clearly rejected. Again, it was argued in **Bank of New South Wales v. Commonwealth**<sup>29</sup> that "trade strictly means the buying and selling of goods." Dixon, J. said that "the essential content of the expression 'trade, commerce and intercourse' in section 92" was not any less than what was included in the conception of commerce in the modern American view of the commerce power. Referring to its "Central Conception" as distinct from "an immense field of activities that are incident to commerce" he said:<sup>30</sup>

It covers intelligible as well as the movement of goods and persons. The supply of gas and the transmission of electric current may be considered only an obvious extension of the movement of physical goods. But it covers communication. The telegraph, the telephone, the wireless may be the means employed. It includes broadcasting and, no doubt, it will take in television. In principle there is no reason to exclude visual signals. The conception covers, in the United States, the business of Press agencies and the transmission of all intelligence, whether for gain or not, Transportation, traffic, movement, transfer, interchange, communication are words which perhaps together embrace an idea which is dominant in the conception of what the commerce clause requires. But to confine the subject matter to physical things and persons would be quite out of keeping with all modern developments. The essential attributes which belong to the conception should determine the field of human activities to which it applies. To place among the essential attributes the requirement that there should be goods for sale or delivery or a man upon a journey, is to mistake the particular for the general, the concrete example for the abstract definition, and to yield to habits of thought inherited from a more primitive organization of society.

Further he said that the words 'trade, commerce and intercourse' are not naturally susceptible of such a reactionary interpretation" and the very manner in which they were combined would carry, even to a mind unfamiliar with their background, an intention to include all forms and

variety of inter-state transaction whether by way of commercial dealing or of personal converse or passage.

As said above that the meaning, of the words 'trade, commerce and intercourse' is not necessarily wider than the modern concept of commerce in the United States but a question is sometimes raised as to whether the addition of the word 'intercourse' to 'trade and commerce' has made any difference. Dixon J. himself, referring to this matter in an earlier case, stated that he was not disposed to think that there was much covered by the word 'intercourse' that fell outside the commerce, power and concluded that "Actual movement of persons or goods among the States will... be regarded as enough here as it is in America."<sup>31</sup> But in *R v. Smitliers, Ex parte Benson*<sup>32</sup> to which reference was made by Dixon J. before reaching the above conclusion, it was held that 'intercourse' included non-commercial intercourse.<sup>33</sup> The view that 'intercourse' includes commercial intercourse as well as non-commercial intercourse is said to be correct.

Section 92 like Article 301, uses a composite expression "trade, commerce and intercourse among the states" and therefore it is necessary that the trade and commerce must have an inter-state character before they fall under the protection of section 92. On that point many complicated problems arise which are demonstrated in *Hospital Provident Fund Pvt. Ltd. v. The State of Victoria*<sup>34</sup> wherein some facts resembled those of Banking Case and yet the High Court distinguished the two by saying that in the former it was not inter-state commerce protected by section 92. Similarly, section 92 would not apply to antecedent or subsequent transactions on the plea that they are incidental, ancillary or conducive to inter-state transactions or necessarily consequential upon them.

Thus, manufacture of goods destined for inter-state commerce is not protected by Section 92, nor the acquisition of movable property with reference to which no overt act has been done that may result in a dealing or movement inter-state. Whether a transaction is or is not an inter-state character will in many, if not most cases depend upon in the facts and circumstances of the case. These precedents from Australia may, apparently, serve as right guides in understanding the meaning of 'trade, commerce and intercourse' in Art. 301. But blind reliance on them may mislead. For apart from the visible distinction that the words 'trade, commerce and intercourse' are qualified by the words 'throughout the territory of India' in Article 301 and not by the words 'among the states' as in section 92, there are other provisions in the Constitution like the right to move freely throughout the territory of India and to carry on any occupation, trade or business. Certainly, these provisions shall influence and control the meaning of trade, commerce and intercourse in Art. 301. Therefore, while following the Australian precedents caution should be taken that other provisions of the Constitution are not ignored.

The Supreme Court of India in both cases namely **Atiabari**<sup>35</sup> and **Automobile**<sup>36</sup> discussed the

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provisions of Part XIII and their interpretation and application in quite detail yet in neither of them it defined the concept of "trade, commerce and intercourse" or its meaning. For example, Ganendragadkar, J. in **Atiabari Case** did not entertain any doubt that the sweep of the concept of trade, commerce and intercourse is very wide but since the Court was concerned with trade consideration of commerce and intercourse was given up. Similarly, after referring to the controversy on the meaning of the word intercourse Das, J. in **Automobile** refrained from expressing any opinion.

However, the concurring Judges in both the decisions explained the meaning of the expression "trade, commerce and intercourse". Thus, in **Atiabari** Shah J. said:

*"Trade and commerce do not mean merely traffic in goods i.e. exchange of commodities for many or other commodities. In the complexities of modern conditions, in their wide sweep are included carriage of persons and goods by road, rail, air and waterways, contracts, banking, insurance transactions in the stock exchanges and forward markets, communication of information, supply of energy, postal and telegraph services and many more activities too numerous to be exhaustively enumerated which may be called commercial intercourse. Movement of goods from place to place in some instances is an important ingredient of effective commercial intercourse, but movement is not as essential ingredients thereof. Dealing in goods and other commercial activities which do not import a concept of movement are as much part of trade and commerce as transactions involving movement of goods... Every sequence in the series of operations which constitutes trade or commerce in an act of trade or commerce."*

In **Automobile case** after looking into the meaning of commerce under the Constitution of the United States and of trade, commerce and intercourse in the Australian Constitution. Subha Rao, J. took the view that the expression "trade, commerce and intercourse" was a composite one and though they may not be words of Art. they have acquired a secondary meaning of significance and he accepted the meaning of significance and he accepted the meaning acquired by that expression by the gradual evolution of law in those countries.

The view of the freedom under Article 301 taken by Shah, J. was clearly rejected in **Automobile Case** and doubts are apparent even on the meaning he gave to 'trade and commerce'. Firstly, he has excluded the word intercourse from this description. Secondly, his description is not confined then it is too wide to be acceptable at least for the reason that it overlooks the distinction between words used in a grant of power and those used in a limitation on that grant. Every sequence in the series of operations which constitute trade or commerce may be trade or commerce for the purpose of the exercise of legislative power, but it cannot be so in Article 301. One agrees with the approach taken by Subha Rao, J. subject to the precaution and reservations already expressed in that regard. To be specific, for example,

it is not possible to include movement of persons from one place to another within 'trade, commerce and intercourse', in Art. 301. The reason is that Article 19(1) (d) guarantees to Indian citizens that right to move freely throughout the territory of India and the words 'throughout the territory of India' have been given the same meaning in this provision as in Article 301. In this situation 'Article 301 cannot be interpreted to extend a protection to non-citizens also which the Constitution very carefully keeps limited only to citizens also in Article 19(1) (d) and how illogical it would be of a citizen under Art. 19(5) can be prevented to move into any territory in the interest of any Scheduled Tribe but an alien cannot be so prevented unless the interest of Scheduled Tribe is found equivalent to public interest, and in case of State law, unless the law has also gone through the procedure laid down in the proviso the Article 304(b). There is no desirability either of taking any other view. Merely because intercourse has been separately mentioned in Article 301 of our Constitution in juxtaposition with the word commerce<sup>37</sup> or that three expressions in lifted from section 92 of the Australian Constitution is not justification to assign it a meaning that makes the Constitution to speak two different things at two places. American and Australian decisions cannot be of any help because in those Constitutions there is no parallel to the' above situation. It may be added that there is no justification for excluding all non-commercial intercourse from the purview of Art. 301. Seervai's argument that since intercourse is not a subject included in any of three legislative lists therefore it must mean commercial intercourse<sup>38</sup> is too weak to stand. In **State of Madras v. Nataraja Mudaliar**,<sup>39</sup> the court stated that "all restrictions which directly and immediately affect the movement of trade are. declared by Article 301 to be ineffective." Nevertheless, cases are not wanting where movement has not been involved but other aspects of trade and commerce have been involved. The view now appears to be fairly settled that the sweep of the concept 'trade, commerce and intercourse' is very wide and that the word trade alone, even in its narrow sense, would include all activities in relation to buying and selling, or the interchange or exchange of commodities and that movement from place to place is the very soul of such trading activities. In **Koteswar v. K.R.B. & Co**, restriction on forward contacts was held to be violative of Art. 301. The Supreme Court held that 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 restrictions on freedom of trade and commerce and, therefore, its validity has to be assessed with reference to Art. 304(b).

In **Fatehchand Himmattal v. State of Maharashtra**,<sup>40</sup> the Supreme Court considered the question that whether the Maharashtra Debt Relief Act, 1976 was constitutionally valid vis-a-vis Article 301. This depended on the further question that whether money lending to poor villagers which was sought to be prohibited by the Act could be regarded

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as trade, commerce and intercourse. The court answered in the negative although it recognized that the money lending amongst the commercial community is integral to trade and therefore is trade.

Certain activities may not be regarded as trade, commerce and intercourse although the usual forms and instruments are employed therein, as for example, gambling, and thus an Act restricting betting and gambling is not bad under Art. 301. In this case, the Supreme Court had expressed some sentiments of suggesting that unlawful activities opposed to public morality and safety would not be regarded as trade and commerce. But the court then moved away from this broad proposition saying that the wide proposition that dealing against morals would not be business, involves the position that the meaning of the expression trade or business would depend upon, and vary with the general standards of morality accepted at a particular point of time in the country.

After an elaborate study of the scope of the meaning of these words, it can be said that the word 'trade' cannot be confined to the movement of goods but extends to transaction linked with merchandise or flow of goods, the promotion of buying and selling, advances, borrowing, discounting bills and mercantile documents, banking and other forums of supply of funds. Money lending and trade financing also constitutes trade.

### Conclusion

To conclude, it is stated that it may be accepted though vaguely that Art. 301 is based on Section 92 of the Australian Constitution, however, there is no counterpart of Art. 19(l)(g) in the Australian Constitution and Section 92 are presumed to comprise rights of individual as well. Ramaswamy's assertion is based on legitimate reasoning when he points out that guarantee incorporated in Art. 301 though not a fundamental right in the technical sense, do protect the right of the individual. It is evident that while Art. 19(l)(g) confers a fundamental right; 19(l)(g) is confined to citizens whereas Art. 301 extend to all individuals.

However, despite these dissimilarities, other similarities are also evident. That is why Dass, J. in **Automobile Case** found the distinction not simple. It is submitted that it is not correct that Art. 19(l)(g) guarantees individual right while Art. 301 guarantees a free flow of the volume of trade against geographical barriers. Apparently, there seems to be some overlapping between the two Articles and in the absence of any authoritative explanation by the Supreme Court it is submitted that despite these overlapping Articles have their distinct area of operation.

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