Subject Name: Constitution Law
Topic Name: Freedom of Trade, Commerce, Intercourse

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Introduction

Part XIII of the Constitution encompasses provisions pertaining to the freedom of trade, commerce, and intercourse within the territorial bounds of India, delineated across Articles 301-307. While Article 301 establishes the overarching principle of freedom in trade and intercourse, its application can be qualified by the limitations detailed in Articles 302-305.

Dominantly, authority rests with the Union, which holds the prerogative to impose reasonable restrictions in the public interest, thereby curtailing the freedom of trade or commerce. Similarly, a State legislature is empowered to impose such restrictions, albeit necessitating the sanction of the President. Consequently, the Union exercises control over the State legislature. Chapter XIII endeavours to forge India into a cohesive economic entity for trade and commerce, centrally overseen by the Union.

Article 301: Freedom of Trade, Commerce, etc.

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

The "freedom" articulated under Article 301 can be construed as the entitlement to unrestricted movement of persons or goods, whether tangible or intangible, commercial or non-commercial, without hindrance from barriers, whether inter-State, intra-State, or any other impediment functioning as such barriers. Therefore, 'freedom of trade, commerce, and intercourse' signifies the uninhibited movement, transportation, and exchange of goods, indicating the absence of prior restraint on trade and commerce.

Article 301 finds its roots in Section 92 of the Australian Constitution, which asserts: "...trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free." It is noteworthy that while Section 92 guarantees freedom among the States, i.e., at the inter-State level, Article 301 ensures it throughout the territory of India, encompassing both inter-State and intra-State domains.

Moreover, whereas Section 92 proclaims the freedom as "absolutely free," leaving room for the courts to impose certain restrictions or limitations dictated by common sense and evolving societal exigencies, Article 301 secures the freedom subject to restrictions or limitations that may be imposed under other provisions of Part XIII.

The "Commerce clause" enshrined in the American Constitution [Article 1, Section 8(3)] grants Congress the authority to regulate commerce with foreign Nations and among the several States. It has been established that when the subject matter is national in character or necessitates uniform legislation, the power to regulate such matters rests with Congress, and State regulation will not be permitted **(Southern Pacific Co. v Arizona (1945) 325 US 761)**.

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Under Article 301, the term 'trade' signifies a genuine, substantial, systematic, or organised course of activity or conduct with a defined purpose. It encompasses the buying and selling of goods and includes activities integral to the transaction, such as the transport of goods or merchandise from one place to another, and the interchange or exchange of commodities (**Atiabari Tea Co. v State of Assam AIR 1961 SC 232)**.

On the other hand, the term 'commerce' is broader than 'trade.' Technically, it also entails the buying and selling of goods, with the crucial distinction being the emphasis on transmission rather than profit-making, as in 'trade.' It encompasses the transportation not only of goods but also of people or animals.

It has been established that the protection afforded by Article 301 applies solely to activities deemed lawful trading activities and does not extend to activities outside the realm of trade, commerce, or business **(State of Bombay v R.M.D.C. AIR 1957 SC 699)**. For instance, in the case of lotteries, where chance prevails over skill, it falls outside the domain of res commercium. The sale of lottery tickets does not constitute a right under Article 301.

Even State lotteries do not qualify as "trade" as envisaged by Article 301. Consequently, the Central Lotteries (Regulation) Act, which empowers States to prohibit the sale of lotteries from

other States, does not contravene Articles 301-303 of the Constitution and is deemed valid **(M/s. B.R. Enterprises v State of U.P. AIR 1999 SC 1867)**.

Thus, 'unlawful' trading activities such as drug trafficking, prostitution, smuggling, liquor trade, hiring of criminals for criminal activities, gambling (including lotteries), rural money lending by unscrupulous individuals, are not shielded by Article 301.

In **Fateh Chand v State of Maharashtra (AIR 1977 SC 125)**, the Supreme Court upheld the validity of the Maharashtra Debt Relief Act, 1976, ruling that while the systematic business of money-lending within the commercial community constitutes "trade" under Article 301, rural money lending by unscrupulous individuals amounts to the exploitation of vulnerable sections of society and can be proscribed as pernicious trade.

The term 'intercourse' is employed to grant the freedom declared by Article 301 the broadest interpretation. It encompasses the freedom to import items for personal (non-commercial) or commercial use. Therefore, it denotes the freedom of individuals to traverse barriers and engage in transactions with citizens from other parts of the country.

Thus, intercourse involving the movement of property from one place to another is encompassed by Article 301. It is pertinent to note that Article 301 guarantees freedom not only from geographical barriers but also from restrictions imposed on individuals to conduct trade or business.

Objectives of Article 301

The primary objective of Article 301 is to dismantle border barriers between States and establish a unified economic unit to foster the free movement and exchange of goods, which can be utilised to the collective advantage of the entire nation. The underlying aim is to create and uphold a national economic framework (Atiabari Tea Co. case); however, state or regional interests must not be entirely disregarded (Automobile Ltd. case).

In a federation, it is imperative to minimise inter-State barriers as much as possible to cultivate in the populace a sense of belonging to one nation, despite residing in different geographical divisions of the country (A.K. Gopalan v State of Madras AIR 1950 SC 27).

Regulatory Measures or Compensatory Taxes

A contravention of the freedom safeguarded by Article 301 occurs only when a legislative or executive action directly and immediately constrains trade, commerce, or intercourse, as opposed to creating some indirect or inconsequential obstacle, which may be considered remote. If the restriction targets the flow of trade and commerce, or if the levy is excessive, it can be deemed direct and would violate Article 301 **(Automobile Transport Ltd. v State of Rajasthan AIR 1962 SC 1406; Atiabari Tea Co.).** The freedom may be encroached upon by both fiscal and non-fiscal measures.

Laws that are purely regulatory (imposing incidental or indirect restrictions) or those that impose purely compensatory taxes fall outside the purview of Article 301. The term "free" in Article 301 does not imply freedom from regulation. "There exists a clear distinction between laws impinging on the freedom to conduct the activities constituting trade and laws imposing rules of proper conduct or other restraints aimed at the orderly conduct of such activities" **(G.K. Krishnan v State of T.N. AIR 1975 SC 583).**

Therefore, measures such as traffic regulations, vehicle licensing, road maintenance charges, marketing and health regulations, price controls, economic and social planning, and the prescription of minimum wages, instead of hindering trade, actually facilitate the free movement of trade or commerce. A law imposing a tax for road/bridge usage does not impede or burden trade but rather aids the free flow of trade by enabling the provision of more convenient and cost-effective routes **(Automobile Transport Ltd. case).**

A regulation is not a restriction; the former pertains to incidental or non-essential aspects of trade transactions (such as matters concerning hours, equipment, load weight/size, and lighting, which are incidental to transportation), while the latter applies to direct or essential aspects of trade transactions (such as a complete ban on the movement of certain goods during a specific period or the prohibition of any class of commercial or financial transactions related to any goods, such as forward contracts).



The objective of regulation is to ensure the orderly conduct of trade. Although such regulations may entail some constraints (e.g., the elimination of intermediaries or the prevention of hoarding), these constraints do not impede the flow of trade but rather facilitate it (G.K. Krishnan v State of T.N. AIR 1975 SC 583).

Regulations like traffic rules facilitate the freedom of trade and commerce, whereas restrictions hinder that freedom. The requirement of an export permit for the transportation of timber from the

forest, with authorities obligated to permit the transportation of timber covered by the permit, was deemed valid as a regulatory and not restrictive measure **(South Kamrup (Meghalaya) Timber Merchant Asscn. v State of Assam AIR 1995 Ass. 86).**

However, regulatory measures can be challenged if they are construed as colorable attempts to restrict the flow of trade, commerce, and intercourse. Therefore, if the amount of a compensatory tax is unreasonably high or if the regulatory measure is excessively burdensome or discriminatory, it would indeed impede trade.

Compensatory Taxes

Only taxes that directly and immediately curtail trade fall within the realm of Article 301. In determining whether a tax directly infringes upon Article 301, the movement of the goods involved in the trade must be considered. If a tax is imposed solely based on the transportation of goods, it directly impacts the freedom of trade (Atiabari Tea Co. case; Maharaja Tourist Services v State of Gujarat AIR 1991 SC 1650). Conversely, a tax on luxuries enjoyed by individuals in hotels does not have a direct and immediate effect on impeding the freedom of intercourse (Express Hotels v State of Gujarat AIR 1989 SC 1949).

The concept of a 'Compensatory tax' implies a service roughly commensurate with the tax levied. Trade, commerce, and intercourse must contribute towards the facilities provided by the State, such as the construction, maintenance, and regulation of roads, bridges, and other transportation infrastructure necessary for such activities.

All that is required to validate a tax as compensatory is the presence of a specific, identifiable objective behind the levy and a nexus between the subject and object of the levy, without the need for precise determination of benefits received and expenses incurred. Once the connection between the levy and the service is established, the levy must be upheld, unless its compensatory nature is demonstrated to be largely or partially a mere facade, essentially restrictive of the freedom of trade (Automobile Transport Ltd. case).

As long as there is some correlation between the tax collected and the costs borne by the State, the tax cannot be contested as confiscatory, even if there is a marginal surplus over the costs. The mere fact that the budget estimates indicate that the revenue generated by the tax exceeds the expenditure on roads/bridges does not render the tax non-compensatory in character.

It is unnecessary to demonstrate that the entirety or a significant portion of the revenue is utilised. Once it is established that the tax is either compensatory or regulatory in nature, this serves as a guideline for the State Government to determine the rate at which the tax should be levied **(Maharaja Tourist Services v State of Gujarat AIR 1991 SC 1650; International Tourist Corpn. v State of Haryana AIR 1981 SC 774).**

However, a compensatory tax becomes "confiscatory" and thereby contravenes the freedom envisioned by Article 301 if:

- it is excessively heavy and prohibitive, hindering the free flow of trade and commerce, such as an excise duty on foreign liquor, or
- the burden imposed disproportionately exceeds the cost of the facilities, or
- no facilities are provided by the taxing State, and the tax is purely fiscal in nature, or
- the taxing State does not provide machinery for the assessment and levy of the tax, or
- the tax is discriminatory, discriminating between goods produced within the taxing State and similar goods imported from other States within the taxing State.