RETROSPECTION OF FREEDOM OF OCCUPATION, TRADE, COMMERCE IN INDIA.

1.1 Historical Origin:

Laws regulating trade in India were made as early as in the Smiritis and the Arthashastra. The Said laws were made with the objective of providing goods at fair price to all and to make possible the all round prosperity of the state as the law makers aimed at the interest of all classes and their harmonious development.

The Aryans were not satisfied with their livelihood based on cattle breeding and agriculture and therefore started expanding their economy which was self sufficient but had to face considerable dislocation of proto-historic trade centers and trade activities with the advent of the Aryans in the Sapta Sindhu in early Vedic era.

In some passages of Rig-Veda, the Mahabharata and Pali Canon there are references to a caste less millennium of equality, plenty and piety. This was supposed to have existed in some remote unrecorded antiquity. It was Golden Age of Krta or Satyayuga when there was only one caste of Deva or Brahmaana, when people had no claim to private property, women were not regarded as mere chattel, everyone was pious and happy. Since early times the Indian economy had been self sufficient and all the rural centers even were self supporting. The scope of trade at national and international level was occasional and limited. The King had to do every thing for fairness of justice to all individual in his state.

Learned scholars used to tender advices to the king, to not to overburden the traders and merchants and business class, agriculture class etc. Some of these are:

(a) Bhodyana\(^4\) Says: “The king should lay just duties on other marketable goods according to their intrinsic value without oppressing the traders.

(b) The Dharma sutra indicates that the necessity of control over trade and commerce by the king /state was recognized as it contains provisions meant to regulate trade, including the sea, custom on the basis of the value of the merchandise and for the imposition of excise duty on manufactures by the king\(^5\)

(c) Narada warned Yudhishthira in the following words: “he should realize only such dues as prescribed in the canon (yathoktan) and no arbitrary imports are to be realized from merchants who come from distant countries for gain\(^6\)

(d) Manu\(^7\) says that “having all well considered the rates of purchase and of sale, the length of the road, the expense for food, the charges of securing goods, let the king make traders pay duty.”
(e) Ramayana - in the Ayodhyakanda (chapter 103) Rama is found explaining the Bharata the duty of protecting traders.

(f) Mahabharata: The Santi-parvan (89th Chap.) describes agriculture, cattle-rearing and trade as the sources of the worldly life. Narada draws our attention to the need of properly protecting the people including the sections of trade and industries and making them happy. To secure the economic prosperity of the country, the mercantile classes were treated with particular attention and solicitude. There is no greater wealth in a kingdom than its merchants.

(g) Arthashastra: - Public woman, gambling-establishments and gamblers, and the other similar parasites were to be controlled, beggars and burglars to be eradicated, and usurers to be discouraged. Agriculturists were especially to be protected from the parasites. The idea of freedom of trade as shown by our epics was not absolutely free but state prohibited some of the trades and imposed restrictions on it up to certain extent. Generally, state had absolute monopoly as in Army and other traders which was very important in state affairs.

1.1a. Different Kinds of Tolls:-

‘Jatkas’ refers to duty on articles of trade, on imports and exports, to excise duty on wines and liquor. Mahabharata speaks of sulka as the toll levied on merchandise for the protection of the state, Manu prescribes 1/20th of the value of commodity and thus implying the assessment of the duty on the money value of the merchandise, Kautiliya laid that the extra payment for those merchants who pass beyond the flag of the toll-house, without paying the toll, shall be fined eight times the amount of tolls due from them. The toll was absolutely under the control of state.

1.1b. Monopoly of the state for regulating Trade and Industries:

(a) Manu laid that the king is the owner of all the things dug up from mines. The most lucrative industries which commanded the wide market abroad and which filled the royal treasury were kept under the state control.

(b) Buhler notes that “saffron is still a royal monopoly in Kashmir.”

(c) Manu says that, “the king shall confiscate all the goods of him, who, out of greed, shall attempt to sell a property which is the king’s monopoly.”

(d) Kautiliya also says that “that government shall keep as a state monopoly both mining and commerce in minerals.”

At the time of Buddha in the 6th Century B.C., people amused themselves in fairs, and carnivals (Samaja) where animal-flights, and magical feats, dances and dramatic
performances were held for entertainment. Prostitution, Gambling, drinking were common vices. During the 4th Century B.C., Megasthenese observed the existence of seven castes-Brahmans, cultivators of land, herdsmen, hunters, artisans and traders, soldiers, spies and councilors to the king. Apart from the first, they were Vocational groups only, not caste based on heredity. Megasthenese remarks that vocations were not fixed on parentage only and the divisions of vocations had become more apparent than those of birth.14

1.1. b. Freedom of Occupation in Medieval India

In Medieval India the cultivators were required to pay a large number of cesses which were categorized as bhaga (land revenue), bhog (cases), and kar (extra cresses). However, it is difficult to calculate the share of their produce comprised, individually or collectively, nor how much of it went to the ruler, and how much to his subordinates or the local landed elites. The traditional share of the produce payable by the peasants, according to the Dharamashastras, was one-sixth, but the kings in south India were demanding one-third, or two-thirds of the produce. According to Barani, Balban advised his son, Bughra Khan, not to charge so much land-revenue(Kharaj) as to reduce the peasant to a state of poverty, nor so little that they become rebellious on account of excess wealth.15

The rate of tax varied according to the type of crops, soil, method of irrigation, etc. In addition to the land-tax, there were various other taxes, such as, tax on sale of produce, profession taxes. Trade and agriculture grew under the Vijayanagar rule. As village self-rule declined, there was the growth of a class of locally powerful people who used their position for developing agriculture by providing additional irrigation facilities for which an extra charge was made.16 Thus, despite continuous wars, there was growth of trade and urbanization in south India between 14th and 16th centuries, but the position of fundamental freedom of trade and commerce of citizens was not praiseworthy.

1.1c. Freedom of Trade/Commerce in India under British Rule (1600-1784)

In the seventeenth and eighteenth centuries India was a great agricultural country, great manufacturer, trading centers particularly of handicraft which produced fine textiles and other luxury items, for export handlooms to be supplied to the market in Asia and Europe. The East India Company and the British parliament, following the selfish commercial policy, discouraged Indian manufactures in the early years of British rule in order to encourage the British manufacture and to make India sub-servitor to the industries of Great Britain, they imposed unreasonable restriction on the trade and emphasized on produce of raw materials in order to supply the materials for the looms and manufacture for the Great Britain.
India had suffered from repeated famines in the last of eighteenth century. Industries and manufactures had declined in Bengal and Madras. This was the period of ‘decline of industries’ as called by R.C. Dutta. The economic condition of public and position of internal trade was very much suppressed by company. The revenues of the country were spent on the Company’s investments, i.e. on the purchase of Indian goods for exportation and sale in Europe without any commercial return. The people of India were harassed by a special Law which was called the ‘slave law’ unreasonable restriction were imposed on the people of India for providing labourers for the cultivation of tea in Assam; ignorant men and women were bound down by penal clause, upon their signing a contract, to work in tea gardens for a number of years.

By the Charter of 1813 Company’s trade monopoly for India was abolished. The private merchants were permitted to go and settle in India and thus to introduce severe competition in trade which prior to this was entirely in the Company’s hands. The value of trade thus tremendously increased The British merchants were given full freedom to settle in India after securing licenses for the purpose from the Director or from the board. The Britishers were interested to invest and develop their own industries which might give employment to Britishers only The industries of the people of India, and the wages and profits of the artisans of India, did not interest them much.

Economic deterioration, however, began in the eighteenth century, and the process reached its climax under the rule of the East India Company. India’s economy was subjected to weakened by the East India Company’s policy of discrimination and exploitation of our industries, competition with British machine-made goods The destruction on Indian shipping, the exemption of British merchants from the payment of the usual customs and transit duties, the Company’s complete monopoly of Indian trade, cheap imitation of Indian goods by British manufacturers, heavy duties imposed on Indian goods imported to England, and various other methods, adopted by the East India Company or the British Government, destroyed the Indian trade by the middle of the nineteenth century.

The dawn of new era in the freedom of trade and commerce in India began with the transfer of power from the East India Company to the British crown in 1858. The Government of India Act 1858, as agriculture was the only surviving national industry of the people at that time. Little was done to foster new industries after the crown assumed the administration of India in 1858. Even after it also in the last decades of the century Indian manufacturer and artisan found themselves in a state of poverty and decline. From the economic point of view, the people had lost to a larger extent by the loss of their weaving
industry and these losses were not replaced by any new industry. Millions of weavers became agricultural labourers which increased the pressure on the soil. The same thing happened and applies to the consumption of silk and woolen goods.

The indigo and tea were mainly grown and prepared by British capital with the Indian labour. The profit of their capital went to the share-holders in England and the wages of labour remained with the people of India. Many wild areas in hills and valleys were thus converted into tea-gardens, and hundreds of thousands of poor people found employment in these gardens. But the dark side of this industry was that the Indian labourers working in these industries were known as the slave labour.

During the four decades following the end of the Company’s regime more than twenty famines occurred in British India. The small industries were entirely ignored; instead of promoting a diversity of occupations through industrialization official policy deliberately subordinated the domestic industries and manufactures in India to the interests of the British economy. In the starting of twentieth century the industrial revolution in England sapped India of her economic stability. Her raw materials were shipped abroad, while her markets were dumped with cheap English industrial products and by their deliberated act the small scale industries of India died automatically.

The Nehru Committee appointed by the all parties’ conference in its report observed: “it is obvious that our first care should be to have our fundamental rights guaranteed in such a manner that they will not be permitted to withdraw under any circumstances.

The Government of India Act, 1935 conferred certain rights but forms the protection to British Subjects in India. The fundamental freedom of trade and commerce was also discussed by constituent Assemble under article 13 (1) (g) and 6 of the Draft Constitution a lot of discussion and argument had ensued while Article 19 (1) (g) and the clause 2 of the same Article being drafted. Some of the noteworthy arguments and opinions are as follows

{1} Thakurdas Bhargava justice proposed the ‘insertion of the word reasonable, before the word ‘restrictions’ in Clauses (3) to (6). He opined that the insertion of the word ‘reasonable’ would be like putting ‘the soul’ in an otherwise lifeless article”. It would prevent the executive and the legislature from playing with the rights of the people and would empower the court to see whether a particular Act was in the interest of public and whether any restrictions imposed were ‘reasonable’ Ambedkar accepted with an addition providing that existing laws should be saved only in so far as they imposed reasonable
[2] View of Mahboob Ali Sahib Bahadur, “Fundamental rights are fundamental, permanent, and sacred and out to be guaranteed against coercive power of a state by excluding the jurisdiction of executive and the legislature. However in a recent case Supreme Court upheld the order of National Film award restricting entry to only films certified by central government Board of Film Certification\textsuperscript{20} under cinematography Act, and said that order is not unreasonable and violative of fundamental rights.

[3] K.T. Shah Justice felt that the article as drafted “would amount more to a negation of freedom than the promise or assurance of freedom.” Since the exceptions were much more emphasized than the positive provisions and what was given by one right and seemed “ to be taken away by three or five left hands,” thereby rendering the article nugatory. Shah suggested an amendment laying greater emphasis on the rights and diluting the restrictive clauses.

[4] The more important and numerically larger school of thought in the Assembly, however, held by the view that the restrictive clauses were not essential but were dictated by needs of time.\textsuperscript{21} They felt that by virtue of its position the authority to make the laws limiting the operation of fundamental rights should appropriately vest in the legislature and not in the judiciary.

[5] Hanumanthaniya justice observed that no man who believed in violence and who sought to upset the state and society by violent methods could be allowed to have his way under the cover of fundamental rights, and it was for that reason that the Drafting Committee had thought it fit to limit the operation of these rights, Since courts can only interpret the law and can not change it and since law ought to keep pace with the change taking place in the social and political conditions and in the temper of psychology of the people, it was necessary to vest the power of limiting the operation of fundamental right in the legislature.\textsuperscript{22}

[6] Brajeshwar Prasad Justice agreed that the techniques and methods widely employed by modern law breakers could not be effectively checked by judicial institutions and ordinary laws of the nineteenth century, and the state must, therefore, be vested with wide discretionary powers to check the rogues from endangering the safety and existence of all the institutions of our modern life. Individual freedom, is risky and sheer illusion in a community where large chunk of the people are sink in the lowest depths of poverty, illiteracy, communalism and provincialism. Forcefully defending the restrictive clauses (2) to (6) Brajeshwar Prasad added that the legacy of centuries of backwardness and foreign misrule
could not be wiped out by one stroke of the pen, defending the vesting of powers to limit fundamental right in the legislature from a different angle.

{7} Algu Rai Shastri said; "it is true that state has been authorized to restrict this freedom in sub clauses (5) and (6) But a little restriction would show that it was necessary to limit the freedom so widely provided for in sub-clauses (f) and (g) of clause (i) of article 13. Such unrestricted freedom as is provided in these two sub-clauses could not be free from grave danger. Good citizenship implies restrictions. Be truthful and sweet in speech, but do not speak out the unpleasant truth. Anyone has the freedom to state the truth, but not freedom to speak out the unpleasant truth. This is a restriction and good citizens have to accept this restriction.

{8} In the view of T.T. Krishnamachari that draft article 13 really epitomized the attempt of the Drafting Committee to strike the golden means between the two extreme notions of undiluted rights and all powerful state. Krishnamachari envisaged that in future in India where the state is going to interfere more and more in the economic life of the people, not for the purpose of abridging the right of individuals but for bettering their lot.

{9} Amiyo Kumar Ghosh viewed that check and balance should be very precise and clear and should not be couched in ambiguous language and left to course for decisions. He remarks that without defining the term “interest of general public”. Public order and property it will take centuries for the Supreme Court to exactly say what really these words mean. By incorporating such words in the sub-clauses, wide powers have been given to the central and provincial legislature to frame laws by which they can restrict the freedom which has been given to the people under sub-clause (1) of this article.

II SCOPE AND OBJECTIVE OF ARTICLE 301

Regarding the inter relation of Article 19 (1) and Article 301, the view that Art. 19 (1) (g) deals with the right of the individuals and art. 301 provides safeguards for the carrying on trade as a whole distinguished from an individual’s right to do the same is hardly tenable. The Supreme Court has denounced the theory that Art 301 guarantee freedom “in the abstract as "unreal and unpractical". For it is “unpredictable because it interferes with the individual flow of the total trade volume and for the individual right therefore, the volume of trade theory is also untenable. In a taxing statute, the reasonableness of its provisions has to be tested not only in
view of the provisions of Articles 14 and 19 but also those of Article 304B. Levying entry tax in a case of the state of Assam & Ors. v. Chhotabhai Jethabhai Patel Tobacco Products Co. Ltd\textsuperscript{26} higher than prevailing in other states is not obstruction of free flow of trade and the levy is not discriminatory.

The controversy has arisen about the relationship of Article 19 (1) (g) with Article 301 and their scope in the light of each other. Thus the major differences between the two are:

1. Article 19 (1) (g) is a fundamental right, and enforceable directly in the Supreme Court under Article 32\textsuperscript{27} while Article 301 is a constitutional right.\textsuperscript{28}

2. The proclamation of emergency suspends Article 19 (1) (g) but Article 301 remains unaffected\textsuperscript{29} whereby the courts may take recourse to Art. 301 to adjudge the validity of a restriction on commerce.

3. Freedom of trade and commerce under art 301 is a wider concept than that of an individual's freedom to trade guaranteed by Article 19 (1) (g) as Article 19 (1) (g) as is confined to a citizen, as distinct from an alien or even corporation; the languages of Article 301 is quite general and it can be invoked by a non-citizen, corporation and even by a state on complaints of discrimination or preference which are outlawed by Art 303;

4. While restriction of the right under Article 19 (1) (g) must be reasonable whether imposed by Parliament or by a state legislature, it need not be regarded freedom under Article 301 if the restriction imposed by a state law is examined under the procedure laid down in the provisions of the Article 301 (b)

5. Article 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 Article 19 (1) (g) can be invoked when the complaint is with regard to the right of an individual to carry on business unrelated to or irrespective of, the movement of goods\textsuperscript{30} while Art 301 contemplate the right of trade in motion. Article 19 (1) (g) Secures the right at rest\textsuperscript{31} it is true that the ‘movement’ aspect\textsuperscript{32} of commerce is significant, and one of the dominant purposes underlying Art 301 is to keep interstate movement of goods and persons free and unhampered. Though the Supreme Court has placed emphasis on the movement. Yet it is difficult to accept the theory that Art 301 is limited only to movement and not to trade at rest. The concept of trade at rest has been countered by the statement that “there is no rest for the businessmen; the essence of intercourse is coursing not sitting”\textsuperscript{33}

6. Art 301 covers much interference with trade by commerce which may not ordinarily come within Article 19 (1) (g), e.g., Levy of octroi. An individual who is affected
by the violation of Article 301 and 304 can also complain of an infringement of Article 19 (1) (g) and bring an application under Article 32, even though Articles 301, 304 also ordinarily constitute an infringement of the fundamental right to trade which is granted by Article 19 (1) (g) but a tax which is compensatory in character cannot be held to constitute a restriction.

In Moti Lal’s Case the question was whether the provision of the Motor vehicles Act. 1939 under which transport authority were empowered to refuse to issue permits to private persons to operate their motor vehicles on certain routes violated Article 19 (1) (g) and 301 of the Constitution. Neither of the two provisions was found to have been violated, but observations were made on the scope of Article 19 (1) (g) and 301. Malick C.J. said “Article 19 lays down the right of the citizen, while Art 301 deals with how the trade, commerce and intercourse are to be carried on between one place and another.” Similar observation are made in State of Bombay v. R.M.D.C’s case wherein Das, C.J; said that Article 19 (1) (g) and 301, are two facets of the same thing” the freedom of trade, Art 19 (1) (g) looks at the matter from the point of view of the individual citizen and protect their individual right to carry on their trade or business. Art 301 looks at the matter from the point of view of the country’s trade and commerce as whole, as distinct from the individual interests of the citizens and it relates to trade, commerce or intercourse both with and within the states

The expression “reasonable restriction” signifies that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. No abstract standard or general pattern of reasonableness can be laid down as applicable in all cases. The restriction which arbitrarily or excessively invades the freight cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Art 19 (1) (g) and the social control permitted by clause (6) of Art, 19 it must be held to be wanting in that quality.

Professor Rice has rightly stated that right projected under Article 19 (1) (g) are much wider than “the activities protected by Article 301 but the Constitution can not look at any matter from two points of view and it is befogging to personalize” ‘trade and commerce as a whole’ and attribute to it a point of view ‘trade and commerce’ are nothing but non-trading and commencing. This view has been endorsed by others also.

The controlled price, under Government notifications of certain commodity would be in the interest of the country as whole for just distribution of basic necessities then the controlled price is neither arbitrary nor unreasonable, therefore it cannot be said to infringe
the free trade or commerce right under Art 301 of the Constitution and even if there is some alleged loss of some time also then it will be reasonable restriction. The object of the price control being to hold the price line or revert the prices to normal level.

Thus it is clear that according to one line of approach taken to distinguish Article 19 (1) (g) from Article 301, the former looks at the matter from the point of view of an individual while the latter looks from the point of view of general volume of trade and commerce. As per the other line of approach, Article 301 is limited to the freedom of traders, commerce and intercourse throughout the territory of India while Article 19 (1) (g) applies to the rest of the trading activities. The Research Scholar opines that the latter view is correct.

It may reasonably be assumed that two provisions of the Constitution cannot be read to reproduce the same thing. On this principle Article 301 must not cover that has already been covered by the Art 19 (1) (g) so as to avoid overlapping between the two. Actually, Article 301 is confined to very limited types of trade activities, it is very particular and specific while Article 19 (1) (g) is the quite general. The particular must undoubtedly reduce the scope of the general to avoid overlapping. There are following points of difference between the two:-

(i) Article 19 (1) (g), is a fundamental right and confined to citizens where as Article 301 is a Constitutional right.

(ii) Article 19 (1) (g) refers to “profession, occupation, trade or business”. While Article 301, speaks of “trade, commerce or intercourse”.

(iii) Article 19 (1) (g) does not contain the words “throughout the territory of India”. Which occur in Article 301? In this sense, Article 19 (1) (g) may be relevant for international trade unlike Article 301.

(iv) Article 19 (1) (g) though it is subject to Article 19 (6), is not made subject to any other expressed qualifications. But Article 301 is made subject to Article 302 to 307.

(v) Article 19 is primarily intended to restrict legislative or executive action, but has no direct relevance to the concept of federalism. In contrast Article 301-307 have a direct relevance to the concept of federalism. In many proceedings invoking Article 301-307 disputes can arise between the Union and a State, or between States,-thus attracting Article 131 of the Constitution.

111. TRADE, COMMERCE AND INTERCOURSES

The Constituent units of the federal countries have legislative powers of their own; to serve their own narrow and parochial interests, seek to create trade barriers by restricting the flow of commodities from outside and to other units. Creation of such regional trade barriers may prejudicially affect national interest and prove to be disadvantageous to all the
Constituent Units in the long run. Moreover, the industries and resources constituent units may be complementary to each other. The federal countries thus adopt suitable constitutional formula to create and preserve a national economic fabric transcending the boundaries to minimize the possibility of the emergence of local economic barriers, so as to remove impediments in the way of inter state trade and commerce, thus make the entire nation into one single economic unit so that the economic resources of all the various regions may be exploited, harnessed and pooled to the common advantage and prosperity of all.\textsuperscript{41}

Prior to the integration of the country and the new Constitution, there were large number of Indian States in existence which in exercise of their sovereign powers, had created customs barriers between themselves and the rest of India, creating hindrance in free flow of commerce at several points which constituted the boundaries of those Indian States. The main object of Article 301 was obviously to breakdown the border barriers between the states and to create one unit with a view to encourage to free-flow of stream of trade and commerce throughout the territory of India.\textsuperscript{42}

111.1 Trade, Commerce and Intercourse’s Scope and Object

In order to ensure that the State Legislatures subjects to local and regional rules do not create trade barriers in future, Article 301\textsuperscript{43} was incorporated in the Constitution to break down the borders barriers between the States and to create one unit for free flow of trade and commerce throughout the country. The origins of Art 301 may be traced directly to section 92 of the Australian Constitution, but there are some significant differences between the two provisions.

1. While section 92 immunizes interstate trade only, Art 301 covers both interstate and intrastate trade whereby its coverage is broader than that of section 92. As Art 301 avoids the words ‘among the states’ and thus is wider than Sec 92.

2. Section 92 makes freedom of trade absolutely free whereas Art 301 omit the word absolutely and for a good reason that no freedom can be absolute. Even in Australia, the freedom is not absolute but regulated and Relative in India Art 301 instead uses the words free throughout the territory if India instead of words absolutely free and among the states respectively as used in Sec 92.

3. Section 92 is worded generally and contains no exceptions and it has been for the courts to spell out the restrictions on it. On the other hand, impact of these exceptions is to make the position in India quite different from that in Australia in the area of freedom of trade and commerce.
4. In Australia the restriction applies both to the center and the states in India on the other hand, while the restraint applies formally both to the centre and the states, the scheme of the constitutional provisions (Arts 302-304) that, in effect, the Centre can dilute the restraint by its own legislative action but the states are subject to the control of the centre in this respect.

111.2 Meaning of the Trade, Commerce and Intercourse.

The scope and content of Art 301 depends on the interpretation of three expressions used free viz trade commerce and intercourse’, throughout the territory of India’. The word ‘trade’ means buying or selling of goods. Commerce includes all forms of transportation such as by land, air or water.\textsuperscript{44} Intercourse means movement of goods from one place to another place. The Framers of the Indian Constitution, instead of leaving the idea of intercourse to be implied by the process of judicial interpretations, expressly incorporated the same in Art 301.\textsuperscript{45}

The words trade and commerce have been broadly interpreted in most of the cases; the accent has been on the movement aspect. For example, in the Attabari case\textsuperscript{45} the court emphasized: “whatever else it (Art 301) may or may not include, it certainly includes movement of trade which is of the very essence of all trade and is its integral part” and further, that “primarily it is the movement part of the trade” which Art 301 has in mind, that “the movement or the transport part of trade must be free” and that “it is the free movement or the transport or goods from one part of the country to the other that is intended to be saved” again, in Madras v. Natarja Mudaliar\textsuperscript{46} the court stated that all restrictions which directly and immediately after the movement of trade are declared by Art 301 to be ineffective” 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 or such trading activities. In Koteswar v. K.R.B.A & Co.\textsuperscript{47} the Supreme Court has 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 imposition of restriction on freedom of trade and commerce and, hence, its validity has to be assessed with reference to Art 304 (b)” In this case, a restriction on forward contracts was held to be violative Art 301.

Although the usual forms and instruments are employed in certain activities, they may not be regarded as trade, business, commerce as for example, restriction on betting and gambling is not bad under Art. 301\textsuperscript{48} In this case, the Supreme Court had expressed some
sentiments suggesting that unlawful activities opposed to public morality and safety would not be regarded as trade and commerce. The Court relied on this broad proposition saying that dealing against morals would not be business. However involving the proposition to the meaning of the expression trade and business’ would depend upon, and very with the general standards of morality accepted at a particular point of time in the country. Though the standards of morality can afford guidance to impose restrictions, but cannot limit the scope of the right. Though again the Court has gone back to the proposition that no one has a right to trade in intoxicating liquors.

In Krishna Kumar v State of Jammu and Kashmir the Supreme Court refuses to countenance the argument that dealing in noxious and dangerous goods like liquor was dangerous to the community and subversive of its morals and therefore, was not trade. The Court stated that the acceptance of such a broad argument “involves the position that the meaning of the expression ‘trade or business’ depends upon, and varies with, the general acceptance of the standards of the morality obtaining at a particular point of time in our country”. The Court opined that the standards of morality could afford guidance to impose restrictions; but they could not limit the scope of the right. The morality or illegality or otherwise of a deal would not affect the quality or character of the activity though it might be a ground for imposition of a restriction on the said activity to the extent that the said restriction is reasonable.

In Har Shankar v Dy. E.T. Commissioner after reviewing the previous case-law, the Court observed that there is no Fundamental Right to do trade or business in intoxicants. The state under its regulatory powers has the right to prohibit absolutely every from of activity in relation to intoxicants-its manufacture, storage, export, import, sale and possession.

The state has complete right to control any aspect of the liquor trade. The state has exclusive right to manufacture and sell liquor. The state can sell its right to raise revenue, and the considerations charged by the state for this purpose is neither a tax nor fee but is like rental.

In Fatehchand v State of Maharashtra 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 poor villages 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 therefore it is a trade. In relation to village
people, the Court took into consideration the anti-social usurious, unscrupulous nature of money lending. The court refused to accept the thesis that for purposes of Art 301 the element of movement was essential. But the court ruled that “dealings of banks itself can be trade or intercourse”.

IV. FREE FLOW OF TRADE THROUGHOUT THE TERRITORY OF INDIA

The Supreme Court in Atiabari case while interpreting the meaning of the word free in Art 301 of the Constitution held 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 the Court adopted the test of direct and immediate restriction from an Australian decision. The freedom declared under Art 301 of the Constitution refer to the right of free movement of trade without any obstructions by way of barriers, inter-state or intra-state, or on other impediments operating as such barriers Section 92 of the Australian Constitution is similar to Art 301 of the Constitution of India as the two provide that trade, commerce and intercourses among the states shall be absolutely free except that Sec 92 uses the word Absolutely before the word Free.

In Automobile Transport Ltd v State of Rajasthan it was held that all obstructions or impediments, whatever shape they may take, to the free flow or movement of trade or non-commercial intercourse offend Art 301 of the constitution”. Where the constitutional validity of Sec.178 of the Delhi Municipal Corporation Act 1957 in the context of the terminal tax on goods carried by rail or road into Delhi was challenged as violative or freedom of trade, commerce throughout India, the Supreme Court observed that it has to be presumed that tax has been levied in public interest.

In District Collector, Hyderabad v. Ibrahim the Supreme Court has invalidated under Art 301 an attempt by a state to create an administrative order for the monopoly to deal in sugar in favour of cooperative societies. This order was issued while the proclamation of emergency was operative and so Article 19(1) (g) a fundamental right, could not be invoked; the court therefore, took recourse to Art 301 a constitutional right J.C. Shah. J. speaking for the court said that the freedom declared by Art 301 is in its widest terms applies to all forms of trade, commerce and intercourse, but at the same time he cautions that it is subject to certain restrictions specified in Arts 302 to 305. Though it is clear from these provisions that the freedom guaranteed by Art 301 cannot be taken away by executive action. The view is definitely held now that Art 301 applies not only to interstate, but also to intrastate trade and commerce. Levy of entry tax on goods entering in states is not ultra vires of free flow of trade.
but levy should not be discriminatory and unreasonable. The same is justified in a case of state of Assam and Ors v. Chhotabhai Jethabai Patel Tobacco Products Co. Ltd\textsuperscript{62}

V. REGULATION, PROHIBITION, TAXATION AND ARTICLE 301

The measures as traffic regulations, licensing of vehicles, charging for the maintenance of roads, equipments weight, size of load, lights, marketing and health regulations, price control economic and social planning, prescribing minimum wages are purely regulatory measures. A law which levies a tax or toll for the use of a road or bridge is not a barrier or burden on a trade but in reality helps the free-flow of trade by enabling the provision of a more convenient and less expensive route, Such compensatory taxes have to be charged within reasonable limits; and if the amount of such taxes is unduly high it certainly would hamper trade. In this connection the court has pointed out that the distinction between freedom in Article 301 and restriction in Articles 302 and 304 must be kept in mind, and that which in reality facilitates trade cannot be a restriction but actually which hampers trade will be a restriction.

In State of Mysore v. Sanjeeviah\textsuperscript{63} the Government rule under the Mysore Forest Act, to ban movement of forest produce between the sunset and sunrise, was held as void as it was not a regulatory but restrictive measure which infringed the right guaranteed under Article 301.

In Atiabari Tea Co. v. State of Assam\textsuperscript{64} the validity of the Assam Taxation (on Goods carried by Roads or inland waterways) Act 1954 was challenged on the ground that it violated Article 301 of the Constitution and was not saved by Article 304 (b). The petitioner carried on the business of growing tea and exporting it to Calcutta via Assam, while passing through Assam the tea was liable to be taxed under the Art. The Supreme Court held that the impugned law undoubtedly levied a tax directly and immediately on the movement of goods and therefore came within the purview of Article 301. The Act was therefore, held void. The court did not take into consideration the quantum of tax burden which by no means was excessive, simply because the tax levied on movement of goods, for one place to another, it was held to offend Art 301. The Court said that taxes may amount to restriction if they directly and immediately restrict trade. In the instant case, the tax undoubtedly affected the free-flow of trade but imposition of a duty or tax to every trade activities would not amount per se to an infringement of the free flow of trade, commerce and intercourse within the purview of Article 301. A tax may in certain cases, directly or immediately, restrict or hamper the flow of the trade, but every imposition of tax does not do so. Every case must be judged on its own facts and in its own setting of times and circumstances.\textsuperscript{65}
Such taxes could only be validly levied if the requirements of Article 304 (b) are satisfied i.e. the previous sanction of the president before the state enacts such a law and to ensure the safeguard the economic unity of the country is not disrupted by the state legislature. In the Atiabari case\textsuperscript{66} the requirements of Article 304 (b) had not been complied with. The court held that the Orissa Taxation Act is invalid because it lacked the previous sanction of the President under section 304 (b) and observed that the freedom guaranteed by Article 301 would become illusory if the movement, transport or the carrying of goods was allowed to be impeded, obstructed or hampered by taxation without satisfying the requirements of Article 302 to 304. The Orissa Legislature re-enacted the Act in 1968 after securing the previous sanction of the President making it retrospective in operation.

The concept of regulatory and compensatory taxation has been evolved with a view to reconcile the freedom of trade and commerce guaranteed by Art. 301 with the need to tax such trade at least to the extent of making it pay for the facilities provided to it by the state, e.g. a road net-work. The concept of regulatory and compensatory taxation has been applied by the Indian courts of the state taxation under entries 56 and 57 of list II.

The view propounded in Atiabari was bound to have great adverse effect upon the financial autonomy of the states. It would have rendered their taxing power under entries 56 and 57, list as redundant. Accordingly, the matter came to be re-considered by the Supreme Court in Automobile Transport Ltd v. State of Rajasthan\textsuperscript{67} The state of Rajasthan had levied a tax on motor vehicles (Rs. 60 on a motor car and Rs. 2000 on a goods vehicle per year) playing within the state in any public place or kept for use in the state. The validity of the tax was challenged but the court ruled that the tax was not hit by Art 301 as it was a compensatory tax having been levied for use of the roads provided and maintained by the state.

The majority view of the Atiabari judgment was overruled by Automobile to the extent that a tax does not cease to be compensatory because the precise or specific amount collected is not actually used in providing facilities. While in Atiabari the Court had dismissed the argument that the money raised through the tax would not be used to improve roads and waterways by saying that there were other ways apart from the tax in question, to raise the money, and that if the said object was intended to be achieved by levying a tax on the carriage of goods, the same would be done by satisfying Art 304 (b). Had the concept of compensatory tax been applied in Atiabari\textsuperscript{68} it was possible that the tax might have been held valid. Had the concept of direct restriction evolved in Atiabari case\textsuperscript{69} been applied in Automobile case\textsuperscript{70} the tax in question would have been held invalid as there is no difference
between a tax on carriage of goods and one on the instrumentalities used for the carriage of goods and passengers.

In practice, it is very difficult to successfully challenge a levy on motor vehicle. The Supreme Court will invalidate such a levy only when the tax receipts are far in excess of the permissible expenditure. The nature of the tax has also changed. To begin with, the tax was justified on the ground of being a fair recompense for the use of facilities provided by the state. Now anything which smoothness interstate trade and commerce falls within the compass of compensatory tax. The states have thus secured a good deal of freedom to impose taxation on motor vehicles under entries 56 and 57 of list II. It may be of interest to know that in Australia, the cost of road-construction is not to be met from a compensatory tax. This is to keep the incidence of taxation on very low. But the same is permissible in the U.S.A.\(^{71}\) In India such capital cost has been included in the concept of a compensatory tax.

The majority judgment in the Atiabari Tea Co.’s case\(^{72}\) read with majority judgment in the Automobile’s case\(^{73}\) lead to the following principles relating to Article 301:

1. Article 301 assures freedom of inter-state as well as intra-state trade, commerce and intercourse.

2. Trade, commerce and intercourse have the widest connotation and take in movement of goods and persons.

3. The freedom is not only from laws enacted in the exercise of the powers conferred by the legislative entries relating to trade and commerce or production, supply and distribution of goods, but also to all laws including tax laws.

4. Only those laws whose direct and immediate effect is to limit the compensatory taxes, intended to facilitate freedom of trade, are kept outside the scope of Article 301.\(^{74}\)

After Automobile Judgment,\(^{75}\) the concept of regulatory and compensatory trades has become established in India so far as Entry 56, 57 of List II are concerned, as is clear from the State of Assam v. Labanya Probha\(^{76}\) whereby the state taxation is permitted at a higher level. But vehicles which do not use the roads and are gas tractors, dumpers, rockers in no manner forming part of the flow of traffic on the roads cannot be taxed till the time they are working solely within the premises of their owners. Merely because they happen to be registered under Motor Vehicle Act is not decisive for the purpose of levy of tax.

In G.K. Krishna v. State of Tamil Nadu\(^{77}\) the validity of a Government Notification under the Madras vehicles Taxation Act, 1931, enhancing motor vehicles tax on omnibuses from Rs.30 per seat per quarter to Rs.100 per seat per quarter was challenged on the ground
inter alia that the tax imposes restriction on the freedom guaranteed by Art. 301, on behalf of the Government it was claimed that this measure was taken with a view to avoid unhealthy competition between omnibuses. The court held that the collection of toll or tax for the use of roads, bridges or aerodromes, etc., do not operate as barriers or hindrance of trade. For a tax to become a prohibited tax, it has to be a direct tax, the effect of which is to hinder the movement of the trade. If the tax is compensatory or regulatory, it cannot operate as a restriction on the freedom of trade and commerce. A compensatory tax is based on the nature and the extent of the use made of the roads, for example a mileage or non mileage charge or the like, and if the proceeded are devoted to the repair, upkeep, maintenance and depreciation of the relevant roads that the collection of the taxation involves no substantial interference with the movement. The motor vehicles require, for their safe, efficient and economical use of roads for considerable hardness and durability; the maintenance of such roads will cost the Government. The users of public motor vehicles stand in a special and direct relation to such roads derive a special and direct benefit from them, and therefore it does not seem unreasonable that they should be called upon to make a special contribution to their maintenance and above their general contribution as Tax-payers of the state. The enhance tax therefore is compensatory and valid and tax collections amounted to Rs.16 crores while the annual expenditure was Rs.19.51 crore including the grants to local governments to maintenance of roads within their jurisdiction.

The state taxing power was further liberalized by upholding of a state tax on passengers and goods carried on national highway whereas Haryana levied a tax on transporters plying motor vehicles between Delhi and J&K for the transportation passing through Haryana without picking up or setting down any passenger in the state. The Supreme Court rejected the argument of the transporters that since the responsibility of constructing and maintaining of national highways vests on the Centre, the tax could hardly be regarded as compensatory. The court ruled that: ”A State incurs considerable expenditure even in connection with national highways, though by not directly constructing or maintaining but by facilitating the transport of goods and passengers along with them in various ways such as lighting, traffic control, amenities for passengers, halting places for buses and trucks. That part of a national Highway which lies within municipal limits is to be developed and maintained by the state. There is thus sufficient nexus between the tax and the passengers and goods carried on the national highways to justify the imposition.”

To say that a tax is compensatory and regulatory is not to say that the measure of the tax should be proportionate to the expenditure incurred on the regulation provided and the
services rendered. For if the tax were to be proportionate to the expenditure on regulation and service it would be fee and not tax while fee is leviable according to the benefits received and the expenditure incurred. In case of a regulatory and compensatory tax it is practically impossible “to identify and measure, with any exactitude, the benefits received and the expenditure incurred and levy the tax accordingly. What is necessary is to uphold such a tax for the existence of a specific, identifiable' object behind the levy and a sufficient nexus between the subject and the object of the levy if that be so, then it is not necessary to put the money realized into a separate fund or that the levy is proportionate to the expenditure. There can be no bar to an intermingling of the revenue realized from regulatory and compensatory taxes and from other taxes of a general nature. There can be no objection to “more or less expenditure being incurred on the object behind the compensatory and regulatory levy than the realization from the levy”.

Supreme Court further relaxed the concept of compensatory tax in Malwa Bus Service v. State of Punjab when it held that the burden on the stage carriage should not disproportionately exceed the cost of facilities provided by the state. An exact correlation between the receipts and expenditure incurred on providing facilities for smooth transport service cannot be insisted because “such a correlation is in the very nature impossible to attain”. In the instant case, as per the budget figure of 1981-82, the revenue receipts of the government from motor vehicles tax was Rs.50 crores as against the expenditure of Rs.34 crores. The Court observed that the figure of income and expenditure for only one year might present a distorted. More so when the budget expenditure on the roads and bridges did not include the expenditure incurred by the state on other heads connected with road transport as transport authorities, Directorate of Transport, traffic Police, provision for bus stands, which in fact was spent on providing facilities to motor vehicles operators. In this case though the cumulative figures of receipts and expenditure for nine years (1973-1982) presented a picture, The court however asserted that it was “the ultimate power to decide” whether in truth and substance a tax is compensatory or not. In Meenakshi v. State of Karnataka the Supreme Court held that abolition of octroi is a facility granted by the state for free flow of interstate transport inter state trade and commerce. The tax enhanced by the state on passenger vehicles was held to be compensatory on account of it's having been enhanced to compensate the loss suffered by state in its revenues on account of abolition of octroi.

The issue is when the Constitution itself provides a mechanism to impose restrictions on trade under Article 302-304, is it necessary to adopt other concept for the same purpose from foreign systems which operate in different context? Concept of compensatory
tax is borrowed from Australia where it has been evolved to dilute somewhat the rigours of Section 92 which admits no exception if a law imposes a restriction on trade, it is just unconstitutional.

Section 92 of the Australian Constitution says, “The imposition of uniform duties of customs, trade, commerce and intercourse among the states, whether by means of internal carriage or navigation, shall be absolutely free”. The wording used in Article 301-“throughout the territory of India” allows a State legislature by law to “impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that state as may be required in the public interest”. This wording is wider than the expression “among the states”, used in section 92 of the Australian Constitution or “among the several states” used in Article 1, section 8, clause (3) of the Constitution of the United States. In the U.S.A. the states have conceded some power to the inter state trade and commerce as against the constitutional protection given to such commerce to help them raise funds for maintenance of roads etc. it is seen as a judicial attempt to make the Indian Constitution more federal than what its Framers had envisaged it to be. State Notification requiring a person transporting goods through the state of Bihar on goods carrier/vessel to carry permits in the prescribed forms was held to be regulatory measure intended to prevent evasion of facilitated assessment of sales tax and promote and not impute inter-state trade.

In state of Tamil Nadu v. M/s Sanjeeth Trading Co. by a notification, timber was declared to be an essential article and a total ban was imposed on movement from the state of Tamil Nadu to any place outside the state. It was held that it was a regulatory measure for ensuring the availability of timer to a common man with a reasonable price, authorized under Art. 301 and 304 (b)

VI. EXCEPTIONS TO FREEDOM OF TRADE AND COMMERCE

The freedom guaranteed under Art 301 is freedom from all restrictions on trade, commerce, intercourse but the restrictions are specified in Art 302-305 in Part XIII of the Constitution and not subject to the provision of the other parts of the constitution. These provisions clearly show that the guarantee under Art 301 cannot be taken away by an executive action as it is imposition of a constitutional limitation on the legislative power of parliament and State legislatures.

VI.1 Parliamentary Power to Regulate Trade and Commerce

The freedom granted by Article 301 covers both interstate and intra-state commerce and trade, and Article 302 is in the nature of an exception to Article 301. In fact the majority judgment in Atiabari suggests that prima facie the question of public interest underlying a
parliamentary law imposing restrictions on the freedom of trade may not be justifiable’. But in case of Article 19(i)(g), the concept of public interest is justifiable. A person challenging the law will have to show to the court why it is not required in the public interest, and this, indeed, 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. But in Surajmal Roopchand & Co. vs. state of Rajasthan it is held that restrictions imposed on the movement of grain under the Defense of India Rules are in the interest of general public.

Lottery which is res-extra- commercium does not become commercial merely by putting on a clock of state authority. ‘Trade’ is an exchange of any article either by barter or for money or for service rendered. Party paying consideration in any trade is aware for that he is paying the consideration. It is neither hypothetical nor it is a contract for any uncertain things. There is no element of change under my trade this element of change makes the lottery gambling. Trade is always associated with some skill while in lottery there is absence of skill, predominantly and essentially with the ingredients of chance. Therefore, the Lotteries (Regulation) Act under which power is conferred on states to ban sale of lotteries of other states does not violate Acts. 301 to 303 of the Constitution and is therefore valid.

For Art 302, Art 303 (1) is an exception. Art 303 (1) lays down that the Parliament while imposing restrictions under Art 302, may not give any preference to one state over another, by virtue of any entry relating to trade and commerce in any of the Lists. The rigours of the limitation imposed on the Parliament by Art 303 (1) are relaxed somewhat by Art 303 (2) as under it the Parliament may prefer one state over another or discriminate between the states, if it is declared by law made by parliament that it is necessary to do so for dealing with an exceptional situation having arisen from scarcity of goods in any part of India. i.e. when Parliament is faced with the task of meeting an emergency Created by the scarcity of goods in any particular part of India, Parliament may enact a law making discrimination, or giving preference, in favour of the part thus affected Such a declaration by Parliament would be conclusive and not justifiable. Maintaining Supply of essential commodities and essential services is the prime duty of the state, therefore, Essential Commodities Act has been enacted by Parliament.

The words preference to one state over another and discrimination between one state and another in Art 303 occur in Sections. 51 (ii) and 99 of the Australian Constitution also. The Australian cases held that not all differences in treatment amount to preference and discrimination between the states in fact at time, a law applied uniformly may in effect result in differential treatment of the states owing to economic conditions prevailing therein.
but this is not prohibited. In States of Madras v. Nataraja Mudaliar the Court while rejecting the argument that as the Central sales tax vary from state to state, it hampered trade and commerce by giving preference to one state over another, or by way of discrimination between one and another state Art 301 and 301 (1) are infringed, it held 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 any preference to one state over another merely because of varying rates of tax prevailing in different states. Though the scheme of the Central Act was held valid in this case, there appears to be little doubt that if the Central Act had itself levied differential rates of sales tax, instead of leaving it to the states to fix the rate, then it would have been invalid because of Art 303. Because the Act left it to the states, it can be argued that the centre was not indulging in any discrimination between one state and another. Centre was not indulging interstate commerce as to rates of taxation, even a state could not be said to be discriminating against interstate commerce. 

VI.2 States’ Power to Regulate Trade and Commerce:

Art 304 consists of two clauses, empowers the states to make laws to regulate and restrict the freedom of trade and commerce to some extent. According to Art. 304 (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, however, not discriminate between goods so imported and goods so manufactured or produced. This provision is limited to one subject-matter only, viz tax on imported goods. A state is debarred from treating goods of other states the worse than it treats its own goods.

In state of Madhya Pradesh v. Bhailal Bhai a State of law imposed sales tax on imported tobacco but locally produced tobacco was not subject to such sales tax, The court invalidated the tax as discriminatory. Moreover if a particular article is not produced within the state. It can not use its Legislative power under section 304 (a)

Article 304(b) authorizes the state to impose such reasonable restrictions on the freedom of trade, commerce and intercourse as may be required in the public interest, But no bill or amendment for this purpose can be introduced by the Legislature of State without the previous sanction of the President as it ensures that a state legislation enacted under pressures of regional economic interest is duty examined by the Centre form the point of view of national economy. A law passed by a state to regulate inter-state trade and commerce must satisfy the following conditions under Art 304(b):-
(1) Previous sanction of the president must be obtained even when a state imposes a restriction only on intra state commerce although intrastate commerce falls within exclusive state legislative purview

(2) the law must be in the public interest:

(3) restrictions imposed by such a law must be reasonable. Thus, it is obvious that Parliament has been vested with wide powers to regulate trade and commerce.

The state power is subordinate to the Parliament’s regulatory measures. A state cannot enact regulatory laws without the sanction of the president. In the Atiabari’s case the state tax on the movement of goods was held invalid also on the ground that it was passed without the previous sanction of the President. But it is doubtful whether a discriminatory law can be regarded as reasonable or valid within Art. 14. The requirement of Art. 304 (b) applies to all state laws which impose restrictions on the freedom of trade, commerce and intercourse irrespective of the legislative entries under which they fall. The Supreme Court taking recourse to the words Legislature of a state in Art 304 has stared that Art 304 would protect laws made by a state Legislature but not the rules made by the executive government in exercise of delegated legislation if an Act has already received presidential assent then an amendment thereof, which does not impose any additional restriction, does not need fresh presidential assent.

VII. JUSTIFIABLILITY OF REASONABLENESS AND PUBLIC INTEREST

The powers of states to regulate freedom of trade and commerce under Article 304 is circumscribed by 2 additional restrictions viz, presidential assent, and reasonableness of restrictions unlike the parallel power of Parliament under Article 302.

The requirement of public interest is a common element in both the provisions. The question arises whether the two elements reasonableness’ and public interest are justifiable. The majority opinion suggested in the Atiabari case that the requirement of Public interest may be deemed to be non-justifiable as it may be said to be satisfied by the Presidential assent. But in Khyerbari the court called the view as not expression of definite opinion that the requirement of public interest does not become the subject matter of adjudication in court-proceedings when the validity of law passed under Article 304(b) is questioned, so the element of public validity interest appears to be justifiable.

In Kalyani Stores v. State of Orissa it was held that a state may validly impose restrictions under Article 304(b) (as on liquor, luxury tax on tobacco) to protect public wealth, health, safety, morals and property within state. Illustrations of unreasonable taxes
are: discriminatory tax, confiscatory tax, with no machinery for assessment, levy of tax. The Presidential assent cannot be regarded affording tax immunity from challenge of being too onerous, unreasonable because it is only one of the 3 conditions which must be fulfilled for a law to be valid under section 304(b)

The test of “public interest” appears to be the same as in Article 19 a factor considered relevant by the court in holding a tax in public interest, in Khyerbari was that the tax levied was to raise general revenue for the state (compensatory, a public purpose), and for keeping the waterways, roads in good condition in the state i.e public interest In Muni Lal Jain Vs. state Of Orissa the Supreme Court upheld the validity of the Act while recognizing that the power to legislate carries with it power to legislate retrospectively as well as prospectively.

VIII. SAVING OF EXISTING LAWS

The guarantee under Art 301 cannot be taken away be mere executive action. When power of legislation is restricted by Art 301, but within limits provided by Arts 302 to 305 it would be impossible to hold that the state by an executive order can do something which it is incompetent to do by legislation. A monopoly in favour of the state cannot be created by a mere administrative order. Art 305 protects a law and not mere executive action unsupported by law. Art 305 does not protect creation of monopoly in favour of a corporation which the state neither owns nor controls.

It is the duty of the Court to examine whether the impugned provisions (state Act imposing Tax) amounts to a restriction directly or indirectly on the movement of trade and commerce Article 305 saves the law’s enacted before the commencement of the Constitution from the operation of Arts. 301 to 303, except in so far as the President may by order otherwise direct So long the President does not act in this matter, burdens on trade and commerce that were existing on the eve of the Constitution, would continue to operate. Thus it is clear that the conditions laid down in Art 304 would apply only to that state, laws which is enacted after the commencement of the Constitution. The rules made after the commencement of the constitution under a pre-constitution act, cannot be deemed to be existing law’ The mere fact that there was authority in the state under a pre-Constitution act to make rules which may impose restriction on trade and commerce, will not render the rule made in exercise of the authority invalid after the constitution under existing law.

In Saghir Ahmed v. State of U.P. the Supreme Court left undecided the question whether a state monopoly would conflict with Art 301. Art 305 was amended by the Constitution (Fourth Amendment) Act, 1955, Art 305 saves from Art. 301, both
retrospectively and prospectively, for the carrying on by the state, or by a corporation owned or controlled by the state, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.” Thus, a state or the Centre can now run any business on a monopolistic basis without infringing Art 301 A law providing for acquisition of banks by the state is protected under Art 305. and so cannot be challenged under Art 301. The guarantee under Art 301 cannot be taken away be mere executive action. When power of legislation is restricted by Art 301, but within limits provided by Art 302 to 305, it would be impossible to hold that the state by an executive order can do something which it is incompetent to do by legislation. Article 305 does not protect creation of monopoly in favour of a corporation which the state neither owns nor controls. Article 307 empowers parliament to appoint such a authority as it considers appropriate for carrying out purpose of Articles 301,302,303 and 304. it can confer on such authorities, such powers and duties as it thinks necessary.

IX. CONCLUSION OF THE CHAPTER

Restriction on Parliament’s power (Article 301) begins this group of articles by stating that subject to the other provisions of this part of the Constitution, trade, commerce and intercourse throughout the territory of India shall be free. The very next article-Article 302, authorizes Parliament to impose, by law, restrictions on the above freedom in the public interest. Although requirement follows (by judicial interpretation) from Article 14 and (by express provision) from Article 19(1)(g) read with Article 19 (6) Parliamentary power under Article 302 is also subject to the restriction imposed by Article 303 (1) This prohibits the enactment of any law (by parliament or State legislature) which gives preference to one state over another or a law discriminating between one state and another by virtue of anything relating to trade and commerce in the legislative lists.

In the case of Saghir Ahmed v. The State of U.P the issue raised was whether an Act providing for a state monopoly in a particular trade or business conflicts with the freedom of trade and commerce guaranteed by article 301, but the Supreme Court left the question undecided. This led to Clause (6) of Article 19 being amended by the Constitution (First Amendment) Act in order to take such state monopolies out of the purview of sub-clause (g) of clause (1) of that article, but no corresponding provision was made in part XIII of the Constitution with reference to the opening words of article 301. It appears from the judgment of the Supreme Court that notwithstanding the clear authority of Parliament or of a state Legislature to introduce State monopoly in a particular sphere of trade or commerce, the law might have to be justified before the courts as being “in the public interest” under article
301 or as amounting to “reasonable restriction” under Article 304(b) it is considered that any such question ought to be left to the final decision of the Legislature. The question of inter-relationship between Arts. 19 (1)(g) and 301 is somewhat uncertain. In certain situation, only one of the two may be relevant, as for example when there is no direct burden on a trade but it may be restriction in terms of Article 19 (1)(g) read with Article 19 (6) In some other situation, both provisions may become applicable and it may be possible to invoke both, economic situations and conditions being unpredictable, it is not necessary to evolve ny conceptualistic differentiation between the two Articles.

The stage of considering the reasonableness of a direct and indirect restriction of a Fundamental Right arises only when the restriction is otherwise valid. An allegedly additional restriction on trade and commerce is to be judged from a broader and general angle of the freedom of a particular trade. What may be restriction for an individual citizen on his trade may not be a restriction on the inter-state or intra-state commerce viewed from the angle of a trade as a whole. In this case the court has held that individuals affected by the violation of guarantees under Arts. 301 and 304 could also complain, at the same time of infringement of their right guaranteed under Article 19 (1) (g) of the Constitution provided a breach of the former involves violation of the latter also as it would ordinarily do. The research Scholar concludes that whatever be the object of the two articles might be, the meaning of trade does not change due to the difference of objectives of the two articles.

If an individual is prevented from sending his goods across the State or when he prevented from sending his goods from one part of the State to another, he may complain of an infringement of Article 301 read with Article 304\textsuperscript{113} from the trend of the case-law it appears that there is a greater readiness on the part of the courts to characterize an impediment on movement of commerce as direct and so hold it bad under Art 301 than the one not on movement which is usually held to be indirect or remote and so valid. e.g., octroi\textsuperscript{114} tax,\textsuperscript{115} purchase tax etc. Resort to 304 is done when the tax is hit by Art 301, 303 as Art 304 opens with the words, “Notwithstanding anything in Art 301,303”. The effect of Article 304(a) is to treat imported goods at par with goods manufactured and produced in the State. Levying tax on goods entering in a state in a case of national Aluminum Ltd. v. State of Orissa & Ors\textsuperscript{116} held not to be violative of fundamental rights.

On the hides and skins purchased in the raw from outside the state, and then tanned within the state, the tax was on the sale price of the tanned hides or skins, But on hides or skins purchased in raw form tanned within the state, the tax was on the sale price of the raw hides or skins. The Supreme Court declared the rule bad as discriminatory of interstate trade
and commerce as compared to interstate trade and commerce. The effect of the sales tax on the tanned hides or skins imported from the other states was lighter than the tax on the local product, and so the tax was discriminatory. The Court rejected the contention that Art 304 (a) was attracted only when the import was at the border, i.e., when the goods entered the state on crossing the border of the state. Art. 304 (a) which allows a state legislature to impose tax on goods imported from other states, does not support the contention that the imposition must be at the point of entry only. The discrimination in the instant case was not visible on the surface, but could be detected only by a study and analysis of the legal provisions and their effect. It is one of those few cases where the utility of consequential provisions regarding freedom of trade and commerce becomes vivid. Article 304 (b) ensures a balance between national and regional economic interest and it makes the Central Government rather than the courts, the arbiter of that restrictions. The states may be allowed to impose on trade and commerce, to avoid emergence of enforcing case-law which has been feature of USA and Australia. Raw hides and skins purchased locally in the state were subjected to a sales tax of 3 per cent at the point of last purchase on the state. No tax was to be levied when sold after tanning. As against this, hides and skins imported from other states in raw form and the sold after tanning as dressed hides and skins, were subjected to a tax of ½ % at the point of first sale in the state. This scheme was challenged as discriminatory but the Supreme court answered in the negative in Guruvaiah Case. The Court argued that the lower rate of tax on dressed hides and skins would offset the difference between the highest price of dressed hides and skins and the lower price of raw and skins. Art 304 (a) prevents discrimination against imported goods. The levy of 1 ½ % on dressed hides and skins was not discriminatory as it took into account the higher price of dressed hides and skins. Tax laws fall within the inhibition of Article 301 a tax law having a direct and immediate impact on trade and commerce would be barred by Article 301 unless it satisfies the requirements of Article 304 (b) in Abdul Kadir, the Supreme Court explained that all taxes are not hit by Article 301. But issue is such taxes saved under Article 304 (b). Payment of a luxury tax on storage, sending of tobacco in the shape of a license fee as a condition precedent to bringing the goods in the state Constitutes a direct impediment on the free flow of goods and is thus hit by Article 301.

The regulation of inter-state trade and commerce is assigned to the Centre Primarily to ensure that inter-state rivalries and competition do not lead to tensions and constraints. While there is a general declaration in the Indian Constitution that trade and commerce should be free, the Centre and the states (especially the former) have the power to regulate.
This is unlike countries like Australia where inter-state trade and commerce is free and the government has no regulatory powers. While the need to avoid inter-state barriers was anticipated in the Indian constitution and judicial pronouncements have protected free movement rights, a Constitution drafted many years ago couldn’t have anticipated all the issues that could arise fifty years later. Article 301 uses expressions like trade, commerce and intercourse, and throughout the territory of India, but there remains scope for interpretation.

Constitutionally, legislative power relating to trade and commerce is restricted, in the first place, by Article 14 of the Constitution, which guarantees equality before the law and equal protection of the laws, Secondly, Article 19, *inter alia*, guarantees to every citizen the right to carry on any trade, business or profession, subject to reasonable restrictions, which may be imposed in the interest of the general public. It is not merely an element of discrimination (between one group and another) that is material. The restriction must also be reasonable and in the interest of the general public. Articles 301-304 are further indications of restrictions on the legislature or executive, Indian states are empowered to legislate on trade and commerce for subjects under the state list, entry 26 (subject to the Concurrent list, entry 33) However, the words of Article 301 cover trade and commerce, within the state also. Article 302 is not relevant for states. But Article 303(1) declares that neither the state legislature nor parliament shall have power to make any law, giving or authorizing the giving of any preference to one state over another or making, authorizing the giving of any preference to one state over another or the making, authorizing or making of any discrimination between one state and another by virtue of any entry relating to trade and commerce in any of the lists in the Seventh Schedule. Article 303(2) is not relevant to the power of states. Article 304, clause (a), provides that 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, this must not discriminate between goods so imported and goods so manufactured or produced. This article permits state legislatures, by law, to impose such reasonable restrictions on the freedom of trade, commerce or intercourses with or within that state, as may be required in the public interest. At the same time, under the proviso to Article 304(b), no Bill or amendment for the purpose of Article 304(b) shall be introduced or moved in a state legislature, without the prior sanction of the president.

Part XIII provides two important facts: (a) Economic unity of the nation (b) Economic freedom to individual. Prior to integration of country and commencement of new constitution there were in existence a large number of princely states which in exercise of
their sovereign powers and raising state revenue created many custom barriers between themselves and rest of the country thus at several parts which constituted the boundaries of those states, free flow of commerce was hindered, Supreme Court in Atiabari Tea Co. v. State of Assam\textsuperscript{121} observed that the main object of art 301 was obviously to break down the border barriers among states and to create one unit with a view to encourage the free flow of stream of trade and commerce throughout the territory of India. Subramanian expresses that laws that are merely regulatory and which impose purely compensatory taxes and have intended to facilitate freedom of trade do not outscore Art 301 because they are not pernicious to freedom of trade\textsuperscript{122} Freedom under Article 301 and restrictions under Arts 303 and 304 are corollary to each other\textsuperscript{123} Article 307 authorize parliament to appoint authority for the purpose of Arts. 301,302,303 and 304. In Jindal Stripes Ltd v State of Haryana\textsuperscript{124} issue under consideration was as to whether compensatory tax under Haryana Local Area Development Tax Act 2000, is constitutional or not. The tax under issue has no direct nexus with trading facilities but is used for purpose to the benefit whereof to the traders was only incidental or indirect. The issue was whether this form of compensatory tax was protected from being hit by Art 301. The 2 judges bench found that the parameters of the judiciary developed concept of compensatory tax, has been blurred by later cases of Bhagat Ram\textsuperscript{125} and Bihar Chamber of Commerce\textsuperscript{126} which took the view that even a tax used for indirect or incidental benefit to traders was compensatory. The issue of Article 301 vis-à-vis Compensatory tax has been referred to Constitution Bench. Thus it is very clear, that till date, any direct tax acting as a restraint to freedom so contemplated under the fabric of the freedom of trade commerce and intercourse is ultravires of the Constitution. Whether the tax is prohibitory or compensatory has been left to facts and circumstances of each and very case. With so many judicial decisions regarding freedom of trade commerce and intercourse still there has been no evolution of any straight jacket formulae to decide the nature of tax and judicial decision because of lack of set criteria has varied in this respect. Trade, commerce and intercourse have the widest connotation and cover almost all the commercial activities. The freedom guaranteed is not only from the laws enacted in the exercise of the powers conferred by the related legislative entries but also the tax laws, Further it has to be concluded that only those taxes that directly hampers the trade or business will be void otherwise not. Laws, which are purely regulatory and compensatory in nature, are not violative of the Freedom so guaranteed.

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1  Rig Veda II, 15.5; III, 33.12; V, 22.17
3  Banerjee, N.C., Economic Life and Progress, 1956, p. 156. Besides the direct evidence of
   Trade in the Rig Vedic period there are a few indirect indications to show the state of
   insufficiency of wealth in the early Aryan Community. Rig Veda II, 43.I.
4  Bhodhayana. I. 18.25.
6  Mahabhartara., 115 “Drut vanijya labh karnat”
7  Manu. vii 127.
8  Mahabharata, xii 87, 39-40
9  Arthashashtra, II l. p.48.
10 Kautilya, II xxi. 110
11 Sbe Vol. XXV, p. 323.
12 Yaj. II 251;
13 Kau, II, xii, 85.
14 Gazette of India; p 175 last para
15 Medieval India from Sultanate to the Mughals; Satish Chandra.
17 The Conference was convened at Bombay under the Chairmanship of Pt. Moti Lal Nehru. It
   provided report on 10th August 1928, popularly known as Nehru Report. (The History and
   Culture of the Indian people. Vol. I (Bhartiya Vidya Bhawan – under direction of Dr. K.M.
   text.)
18 Section 298 provided: “No British subject domiciled in India shall be ineligible for office
   under the crown in India or be prohibited from acquiring on any occupation, trade, business or
   profession in British India on grounds only of religion, place of birth, descent, colour or any of
   them.”
19 Fundamental Freedom of Trade and Commerce, KP Singh, New Delhi, 1992
20 Directorate of Film Festival & Ors v. Gaurav Ashwin Jain AIR 2007 SC 1640.
23 Reference has been made to this view, without finally deciding by Mukherjee J. in Saghir
26 AIR NOC2008 Gau 663
27 Ram Chandra Vs Orissa AIR 1956 SC 298; 305; Manik Chand Pal V Union of India (1984) 3
   SCC 65; AIR 1984 SC 1249
28 A. Ahmad V Mysore, AIR 1975 SC 1443 at 1446
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29  Bapubhai v Bombay AIR 1956 born 21; Usman v state AIR 1958 MP 33.
30  Motilal v U.P. AIR 1991 All 257, Also Saghir v U.P. AIR 1954 all 257 and AIR 1957 SC 728
31  Aliabari Tea Co. v Assam AIR 1961SC 232
32  Rice, Division of powers to control commerce 151(1959)
33  A. Ahmed v Mysore, AIR 1975 SC 1443 at 1446 1443 (para 6)
36  AIR1957 SC 699, See also Automobiles Transport Ltd. V Rajasthan AIR 1958 Raj. 114(116) Also see the observation of Beg. J. in A. Ahmed v Mysore, AIR 1975 SC 1443 where he says what may be restriction from the point of view of individual citizen engaged in a trade may not be a restriction on inter state or intra state commerce viewed ”from the angle of the trade as a whole”
38  Rice “Division of power to Control Commerce between Centre and states in India and the United State; I JILL (1958-59) pp 151-157
41  Bowie, Studies in Federation 296-357 (1954)
43  “Trade commerce and intercourse throughout of the territory of India shall be free”
44  Explaining the word “Commerce” in the commerce clause of the U.S. constitution, Marshall, C.J. Stated as early as 1824 in Gibbons v Ogden that commerce is traffic but it is something more it is intercourse.
45  AIR 1961 SC 232
46  AIR 1969 SC 147
48  Bombay v R.M.D.C. AIR 1957 SC 669
49  Krishna Kumar v Jammu & Kashmir AIR 1966 SC 1368
50  P.N. Kaushal v Union of India; AIR 1978 SC 1457
51  AIR 1966 SC 1368
52  AIR 1975 SC 1121
53  AIR 1975 SC1121 Co. v Lt. Govt. of Delhi; AIR 1979 SC 1550; (1979) 4SCC 232
The SC reasoned “When you are dealing with the problem of construction of a constitutional provision which is none too clear or lucid, you feel including to inquire how other judicial minds have responsible to the challenge presented by the similar provision in other sister constitutions”

Commonwealth of Australia v Bank of New South Wales; 1950 AC 235


Amrit Banaspati Co. v. union of India; AIR 1995 SC 1340. The court held that even if it is assumed that’s. 178 is contrary to art. 301 of the constitution, it would be saved by Art. 302 of the constitution. The Court reiterated the principal that the petition challenging constitutionality of a statute the allegations regarding the violation of constitutional provision should be specific, clear and unambiguous and should give relevant particulars and the burden in on the person who impeacher the law as violative of constitutional guarantee to show that the particular provision is infirm for all or any of the reason stated by him.

State of Kerala v Mother Provincial: AIR 1970 SC 2079

AIR 1961 SC 232

AIR 1962 SC 1906

Capital Geyhound Lines v Brice, 339 U.S. 542 (1950) interstate Transit Inc. v Dick Lindsay, 283 US 183 (1930)


International Tourist Corporation v State of Haryana; AIR 1981 SC 774, Also Manmohan Vig v State of Haryana; AIR 1981SC 1035

AIR 1983 SC 634 In Ambala Bus Syndicate (Pvt.) Ltd.v State 1983 P & M 220, the High
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Court upheld the same tax. B.A. Jayaram V India AIR 1983 SC 1005 K. Mahadevapa v State; AIR 1982, Knt. 113
80 Freightlines and Construction Holding Ltd. V New South Wales, (1968) AC 625
81 Aero Mayflower Transit Co. v Board of B.R. Commrs. 332 U.S. 497 (1947)
82 Indian constitutional Law M.P. Jain 4th edn wadhwa & co Nagpur, p 414
83 (1989) 2 SCC 192 State of Bihar v Harihar Prasad Debuka
84 AIR 1993 SC 237
85 District Collector, Hyderabad v Ibrahim & Co.; AIR 1970 SC 1255
86 Supra
87 Rai Ramakrishna v Bihar, AIR 1963 SC 1667
88 Surjomal Roobhand and Co. v State of Rajasthan, AIR 1967 RAJ. 104
89 In Fernandez v State; AIR 1955 TC 196; a tax on sale on state or purchase was held nonchallengeable.
90 Elliot v The Commonwealth-54 CLR 657 Colonial Sugar Refining Co. v Irving 1906 A.C. 360
91 AIR 1965 SC 147
92 Indian Constitutional law M P Jain, 4th edn Wadhwa & Co, Nagpur, p 414
93 AIR 1964 SC 1006
94 Kalyani Stores v Orissa; AIR 1966 SC 1686
95 Supra
96 Bombay v Chamabaugwala AIR 1956 Bom. 1
97 Mysore v H. Sanjeeviah, AIR 1967 SC 1189
98 AIR 1964 SC 925
99 Khyerbari & Co. Tea v State of Assam: AIR 1964 SC 925; (1964) 5 SCR 975
100 AIR 1966 SC 1686
102 Supra
103 AIR 1967 SC 1686
104 Distric Collector vs Ibrahim AIR 1970 SC 1275
105 Distt. Collector Hyderabad vs Brahim AIR 1970 SC 1275
107 Bangalore W.C. & Mills Co. v. Bangalore Corp. AIR 1962 SC 562
108 Mysore vs Sanjeeviah AIR 1967SC 1189
109 AIR 1954 SC 728 p. 742
110 R.C. Cooper v India, AIR 1970SC 564
111 Distt. Collector Hyderabad v Ibrahim, AIR 1970 SC 1275
112 AIR 1954 SC 728
113 Bapubhail Ratanchand Shah v State of Bombay,LLR 1955 Born 870, L.R. 892, AIR 1956 Born 21
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114 Transport Corporation of India v Municipal Corp. AIR 1963 MP 253; Orissa Cermatic Industries v Jharstguide Municipality AIR 1933 Ori. 171 City Municipality v Mahada AIR 1967 AP 363. For octroi mostly municipalities has been criticized on the ground that it creates trade barriers financial resources of Urban Local Bodies, 48 (1963). Also see supra, 302 Rajasthan High Court held octroi is invalid in Gauri Shankar v Municipality Board, AIR 1958 Raj. 198.

115 Andhra Sugars Ltd. v Andhra Predesh, AIR 1968 SC 599 Ct. Dhradunm Supra 8.5 at 405, also, GK Krishan v Tamil Nadu, AIR 1975 SC 583 590

116 AIR NOC 2008 Ori. 1547

117 Mehtab Mujid & Co. v Madras; AIR 1963SC 928. Also see a Hajee Abdul Shakoor & co. v Madras, AIR 1964 SC 1729.

118 V. Gurviah Naidu & Sons v Tamil Nadu: AIR 1977 SC 349.


121 Atiabari Tea Co. v State of Assam, AIR 1961 SC 232


123 Jariwalla, C.M. Freedom of interstate Trade in India, Delhi; Sterling Publishers, 1975

124 (2003) 8 SC 60

125 Bhagat Ram Rajkumar v CST; (1995) Supp. 1 SCC 673

126 State of Bihar v Bihar Chamber of Commerce; (1996) 9 SCC 136