CHAPTER – II
CONCEPTUAL DEVELOPMENT OF FREEDOM OF TRADE AND COMMERCE IN INDIA

2.1. Introduction

The concept of trade originated with human communication and civilization in prehistoric times and is believed to have taken place throughout much of recorded human history. Trading was the main facility of prehistoric people, who bartered goods from each other before the innovation of the modern day currency. Trade, also called, goods exchange economy, is the transfer of ownership of goods from one person or entity to another by getting something in exchange from the buyer. Trade is sometimes loosely called commerce or financial transaction or barter. A network that allows trade is called a market. The original form of trade was barter, the direct exchange of goods. Later, one side of the barter was the metals, precious metals (coins), bill, and paper money. Modern traders instead generally negotiate through a medium of exchange, such as money.

Trade, exists for man, due to specialization and division of labour, in which most people concentrate on a small aspect of production, trading for other products. Trade exists between regions, because different regions have a comparative advantage in the production of some tradable commodity, or
because a different region’s size allows for the benefits of mass production. As such, trade at market prices between locations, benefit both locations.

Article 301\(^1\) of the Constitution of India, 1950 provides for the freedom of inter-State as well as intra-State trade,\(^2\) commerce and intercourse, subject, of course, to the provisions of Part XIII of the Constitution of India. Article 301 uses the words ‘trade, commerce and intercourse’. In its broadest significance ‘trade’ includes buying or selling of any goods or commodities or any occupation other than a profession carried on for profit; in its usual meaning it means business of selling or exchanging some tangible or intangible substance or commodity.\(^3\)

In the present chapter an attempt has been made to discuss the concept at length, starting from its very inception to its rooting in the Indian constitutional framework. For better understanding of the concept the chapter has been divided under two sub-headings of which the first deals with the actual meaning, scope and nature of the term trade, commerce and intercourse; while under the second sub-heading an analysis has been made on historical background of the concept of freedom of trade, commerce and intercourse under the Constitution of India. In order to understand the

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\(^1\) Provided that subject to the other provisions of Part XIII of the Constitution of India trade, commerce and intercourse throughout the territory of India shall be free.


\(^3\) Satya Poddar & Ehtisham Ahmad, GST Reforms and Intergovernmental Considerations in India, Department of Economic Affairs, Ministry of Finance, Government of India, March 2009, p.6. Downloaded from http://finmin.nic.in/workingpaper/gst%20reforms%20and%20intergovernmental%20considerations%20in%20India.pdf, retrieved on 11-11-2014, time 10 p.m.
constitutional provisions regarding freedom of inter-State trade, it is necessary to know the historical background. The factors which led to the formulation of the present constitutional provision have been dealt with in detail.

2.2. Meaning of Trade, Commerce and Intercourse

Article 301 of the Constitution of India provides freedom to those activities which fall under the categories of trade, commerce and intercourse. On the other hand, any activity not regarded as trade, commerce and intercourse, fall outside the purview of the freedom provided under Article 301. Hence, it is desirable to discuss the actual meaning, scope and nature of the term trade, commerce and intercourse.

2.2.1. Meaning of trade

The meaning of ‘trade’ is not only confined to the act of buying and selling. It also includes other activities which may be regarded as integral parts of the transaction of buying and selling, such as the transport of the merchandise,\(^4\) the interchange of commodities,\(^5\) fixation of price, hour, place, date and manner,\(^6\) forward contracts.\(^7\) The expression “trade” means lending, movements of goods,\(^8\) transaction linked with merchandise or flow of goods, the promotion of buying and selling, advance, borrowings, discounting bills

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4 Merchandise means trade in goods or trade in visible items and does not include trade in services.
6 Manohar v. State, (1951) SCR 671.
8 Article 366(12) of the Constitution of India, 1950 defines goods- “goods” includes all materials, commodities, and articles./ Section 2(7) of the Sales of Goods Act, 1930 defines goods as “goods” means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under contract of sale.
and merchantile documents, banking and other forms of supply of funds. The word “trade” is capable of bearing a variety of meanings according to the context in which it is used. In its more restricted sense, it means the buying and selling of goods, but in a slightly wider sense, it includes the buying of and selling of land. It is commonly used to denote operations of a commercial character by which the trader provides to customers for reward of some kind of goods or service. Money lending and financing constitute “trade”. Gambling, prize competition cannot be regarded as trade or commerce.

“Trade” means any trade, business, industry, profession or occupation relating to production, supply, distribution, control of goods and includes the provision of any services.

For the purpose of Article 301 of the Constitution of India, the expression “trade” has been used synonymously with the word “business”.

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9 Merchantile document means documents or agreements relating to trade in goods or trade in visible items and does not include documents relating to trade in services.
10 Section 5(b) of the Banking Regulation Act, 1949 define banking - “banking” means the accepting, for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise, and withdrawal by cheque, draft, order or otherwise/ downloaded from https://www.pnbindia.in/Upload/En/BANK%20REGULATION%20ACT.pdf, retrieved on 20-09-2015, time 10.10 pm.
13 Ibid.
Trade or business would mean some real substantial and systematic or organized course of activity or conduct with a set purpose.\(^{16}\)

It is submitted that, in construing trade of the country, a liberal and large construction should be made. Thus what is essential for trade is that there must be some transfer of goods for a profitable purpose and activities relevant thereto.

2.2.2. Meaning of commerce

The word ‘Commerce’, according to Stroud\(^{17}\) means ‘traffic-trade or merchandise in buying and selling of goods’. Thus ‘commerce’ is wider than the word ‘trade’ in its ordinary sense. Commerce not only includes buying and selling but also transportation of tangible or intangible goods, including transport of men and animals. What is essential for commerce is transmission and not only the realisation of profit or intention to gain.\(^{18}\)

The term ‘Commerce’ covers every species of movement of persons and things, whether for profit or not; every species of communication, every species of transmission of intelligence whether for commercial purpose or otherwise, every species of commercial negotiation which, as shown ‘by the established course of business’, will involve sooner or later an act of

transportation of persons or things, or the flow of services or power across State line.\textsuperscript{19}

Thus, broadly speaking, it may be said that ‘trade’ is narrower than commerce and technically means ‘buying and selling’. ‘Commerce’ is thus wider than trade or business in which persons bought, sold, bargained and contracted.\textsuperscript{20}

Recent trend of commerce includes e-commerce. E-commerce includes retailing and wholesale business, online newspapers and other information services\textsuperscript{21} online gambling services,\textsuperscript{22} offshore and inland banking, stock trading or everything that traditional commerce can offer.\textsuperscript{23}

\textbf{2.2.3. Meaning of intercourse}

The term ‘intercourse’ is derived from the Latin term \textit{‘intercursus’} which means ‘running between’. In its ordinary meaning, it means ‘movement of persons’.\textsuperscript{24} This movement may be for some purpose or purposeless.

Intercourse is a very wide term. It covers commercial as well as non-commercial intercourse.\textsuperscript{25} Trade is a species of commercial intercourse where

\textsuperscript{20} Supra, note 12.
\textsuperscript{21} Pay-per-use schemes for online databases, subscription services, online healthcare services, are a few examples./ Kamath Nandan, Law Relating to Computer Internet & E-commerce, 4\textsuperscript{th} Edition, 2009, Universal Law Publishing Company, Delhi, p.351.
\textsuperscript{22} Includes online casinos whose servers are located in tax havens or places where gambling is legal./Ibid.
\textsuperscript{23} Ibid.
the dominant element is intention to earn profit. Intercourse would connote movement and dealings even of non-commercial nature. It would include travel and all forms of dealings with others. Such dealings may be by speech, music, radio or television.26

Regarding the interpretation of ‘intercourse’ in Article 301 Seervai H.M.27 an eminent jurist, is of the contradictory opinion that it should be interpreted with the words ‘trade and commerce’ so that it would mean only commercial intercourse. Since the subject ‘intercourse, is not included in any of the legislative lists in the Seventh Schedule and Article 301 of the Constitution of India is a limitation on legislative powers, so it must mean commercial intercourse.

It is submitted that the freedom guaranteed in Article 301 does not extend to ‘intercourse’ in its widest meaning. There are two reasons. Firstly, the word ‘intercourse’ is used in juxtaposition with the words ‘trade and commerce’; hence that word will mean ‘commercial-intercourse’ and not purposeless movement. Though that, Australian Court28 have given a wide meaning to the word ‘intercourse’, it is to be remembered that the Constitution of India in Article 19(1)(d) specifically guarantees to individual

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26 Ibid.
28 R. V. Smithers, (1912)16 CLR 99 (113).
citizens freedom of movement.\textsuperscript{29} Secondly, Article 301, which guarantees freedom of trade and commerce, constitutes general limitation on the exercise of legislative powers of Union and State Legislature. In none of the legislative list in the Seventh Schedule is ‘intercourse’ included as a subject of legislative power, whereas ‘trade and commerce’ is included in all the three lists.\textsuperscript{30} When there is no legislative power the question of fetters does not arise. Thus ‘intercourse’ cannot be taken in its widest meaning to be an independent head of freedom. Hence, for the purpose of the present study, the investigator proposes to consider it as part of trade and commerce.

In Australia the court in \textit{R. v. Smithers, ex-Par, Benson}\textsuperscript{31} interpreted Section 92\textsuperscript{32} of the Constitution to confer a personal right to pass over the continent of Australia irrespective of the fact that he might possess any commercial attribute. Perhaps, later on in \textit{Australian National Airways Pvt. Ltd. v. Commonwealth}\textsuperscript{33} Justice Dixon, pointed out that, notwithstanding the addition in Section 92, the word ‘intercourse’ is used in relation to the words

\textsuperscript{29} Article 19(1)(d) of the Constitution of India provides that all citizens shall have the right to move freely throughout the territory of India.

\textsuperscript{30} Infra, Chapter IV, note 41.

\textsuperscript{31} (1912) 16 CLR 99 at 113.

\textsuperscript{32} Section 92 of the Constitution Commonwealth of Australia (1) On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

(2) But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.

(1946) 71 CLR 29 at 82.
‘trade and commerce’, and was covered by those words. Thus ‘intercourse’ is not interpreted as a separate head of freedom.

It may be noticed that in transporting a bus-load of persons to another State, there might involve two parties in the inter-State journey, those making a pleasure trip and those going on a business journey. The latter could plead Article 301 against a law forbidding the journey but the former could not as that Article cannot be given that wide meaning.

In *Australian Communist Party v. Commonwealth*\(^\text{34}\) the Communist Party Dissolution Act, 1950, which dissolved the Communist Party, in order to stop traitorous and subversive activities, was challenged as violative of Section 92 of the Constitution. It was contended that the party had many inter-State activities, which no law could control, as Section 92 prohibited the enactment of any law which prevented the carrying out of these activities. It was held that the Act was valid. Latham, Chief Justice, opined as follows:\(^\text{35}\)

“If, in order to stop them, (traitorous and subversive activities) certain action was thought necessary by Parliament, if it is otherwise within power, it is no objection to such action that it has the effect of preventing all those activities and other activities, whether inter-State or intra-State.”

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\(^{34}\) (1951) 83 CLR 1.

\(^{35}\) Ibid. p. 170.
It is submitted that there is no justification for excluding all non-commercial intercourse from the purview of Article 301. Seervai H.M.’s arguments that since “intercourse” is not a subject included in any of the three legislative lists therefore, it must mean ‘commercial intercourse’ is too weak to stand. Adoption of this arguments then many, if not most, of the limiting provisions, including fundamental rights shall be robbed of their contents.

2.3. Activities which are not Trade

Article 301 of the Constitution of India provides freedom to those activities which fall under the categories of trade, commerce and intercourse. Any activities not regarded as trade, commerce and intercourse falls outside the purview of the freedom provided under Article 301. It is desirable to analyses for the purpose of the present study the activities which generally fall under the nature of trade, commerce and intercourse, but does not get protection under Article 301 of the Constitution of India.

2.3.1. Illegal activities

The restriction on ‘trade and commerce’ was upheld by the Supreme Court of India in State of Bombay v. R.M.D. Chamarbaugwala, where Justice Das enunciated the theory of ‘Extra-commercium’, by which he meant

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36 Supra, note 27.
37 Supra, note 19.
38 On that reasoning right “to freedom of speech and expression” [Article 19(1)(a)] should be limited only to expression through newspapers, books, and press (entry 39 of List III) because there is no entry on “speech” in any of the lists or right “to form associations or unions” [Article 19(1)(c)] should be limited only to trade unions (entry 22 of List III) because there is no mention of any other associations or unions in the legislative lists; or right to practice religion should be limited only to religious and charitable endowments and institutions (entry 27 of List III) because there is no entry on “religion” as such.
39 Supra, note 14.
that all those activities which are criminal or undesirable would not be protected by Article 301 of the Constitution of India. He pointed out that the activities like hiring *goondas* to commit assault, house-breaking or selling obscene pictures, trafficking in women are *extra-commercium*, although the external forms, formalities and instruments for trade may be employed.

### 2.3.2. Gambling or lotteries

In *State of Bombay v. R.M.D. Chamarbaugwala*, it was further pointed out that, India being a welfare State with a high moral background, it should not be supposed, that the makers of the Constitution intended gambling to form part of the trade and guarantee to its citizens the freedom to carry it on. In *M/s B.R. Enterprises v. State of Uttar Pradesh* the petitioners had challenged the validity of the Lotteries (Regulation) Act, 1998 passed by Parliament of India. The State of Uttar Pradesh had passed an order banning lotteries of other States by virtue of power entrusted under Section 5 of the impugned Act. They contended that Section 5 of the Act and the Uttar Pradesh order was violative of Article 301, 302 and 303 of the

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40 Ibid.
42 Supra, note 1.
43 Article 302 read as: Parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest.
44 Article 303 read as: (1) Notwithstanding anything in article 302, neither Parliament nor the Legislature of a State shall have power to make any law giving, or authorising the giving of, any preference to one State over another, or making, or authorising the 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.

(2) Nothing in clause (1) shall prevent Parliament from making any law giving, or authorising the giving of, any preference or making, or authorising the making of, any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India.
Constitution and hence invalid. The Supreme Court held that lotteries contain an element of chance and cannot, therefore, be trade and commerce as contemplated by Article 301 of the Constitution. This element of chance makes the lottery a gambling. Sale of lottery tickets organized even by the State could not be construed to be trade and commerce and even if it could be construed so, it cannot be raised to the status of “trade and commerce” as understood at common parlance of trade and commerce as used under Article 301. Hence the Act is not violative of Article 301 and 302 of the Constitution and is valid.

Lottery which is *res-extra-commercium* does not become commercial merely by putting on a cloak of State authority. ‘Trade’ is an exchange of any article either by barter or for money or for service rendered. In other words, it is exchange between two parties, one who tenders the consideration and the other who in return for the consideration goods, money, service or such other things. Party paying consideration in any trade is aware for what he is paying the consideration. He receives for the consideration an ascertained thing of service. It is neither hypothetical nor it is a contract for any uncertain thing. Thus, there is no element of chance under any ‘trade’. This element of chance makes the lottery a gambling. Trade is always associated with some skill

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45 Section 2(d) of the Indian Contract Act, 1872 define consideration as- when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise. In short consideration means in returns of something/downloaded from http://comtax.up.nic.in/Miscellaneous%20Act/the-indian-contract-act-1872.pdf, retrieved on 20-09-2015, time 10.42 pm.
while in lottery, there is absence of skill, and it is invariably, predominantly and essentially associated with the ingredients of chance. The Court also held that since lotteries are run by the State or with the ingredients of chance or with its authorization it does not make lottery a ‘trade’ as contemplated by Article 301 of the Constitution. Therefore, the Lotteries (Regulation) Act under which the power is conferred on State to ban sale of lotteries of other State does not violate Article 301 to 303 of the Constitution and is, therefore, valid.

The same view is followed in Australia, where the Court has held that the lotteries business does not come within the description of trade, commerce and intercourse and the provisions of Section 92 of the Constitution of Australia cannot be invoked to prevent either the suppression or the restriction on gambling. It may be pointed out that Basu D.D. an Indian Jurist did not agree with such demarcation of activities. He pointed out that the State Legislatures has ample power to restrict such activities, hence it was not necessary to exclude such activity from the juristic concept of trade and commerce. It is submitted that this view is not correct. To include all activities which come under the term ‘extra-commercium’, in the word ‘commerce’ in Article 301, would mean that not only lawful but also unlawful activities would get protection in Article 301. While, the State Legislature

46 Justice Evatt in the King v. Connare; Ex parte Wawn. (1939) 61 CLR 596, 621 and Justice Dixon in the King v. Martin, (1940) 62 CLR 457, 461.
47 Supra, note 12, p. 9737.
wants to control such activities would have to wait for the President’s assent in Article 304(b). Thus, it seems correct to say that only those aspect of trade and commerce which are recognised by law as lawful will get protection in Article 301. A similar view is followed in case of business in liquor. On the other hand under the Constitution of America, the Courts have included such activities in the term ‘commerce’, the Courts were concerned with problem of distribution of powers and not freedom of trade.

Thus, the word “trade” means ‘buying’ or ‘selling’ of goods while the term ‘commerce’ includes all forms of transportation such as by land, air or water. The term ‘intercourse’ means movement of good from one place to another place. Perhaps, the words ‘trade, commerce and intercourse’ covers all kinds of activities which are likely to come under the nature of commerce.

2.4. Development of Freedom of Trade in India before Independence

The Investigator starts investigation from the establishment of the Indian federation, since prior to it, there was no scope for any Free Trade Clause. Although for the first time, a full fledge federal structure was

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48 Article 304(b) read as: Legislature of a State may by law impose such reasonable restrictions on the freedom of trade, commerce or intercourse within or without that State as may be required in the public interest: Provided that no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President.
envisaged only under the Government of India Act, 1935, experimentation in that direction had already started under the Government of India Act, 1919.\textsuperscript{52}

The Investigator, therefore, traces the developments of freedom of trade and commerce in India since the coming into force of the Government of India Act, 1919.

### 2.4.1. Government of India Act, 1919

At the time of the passing of the Government of India Act, 1919, India was politically divided into two broad categories - the British India and the Indian States.\textsuperscript{53} The British India was divided into administrative units called Provinces, with the Governor-General in Council at the Centre and the Governors in Council in the different Provinces to administer the governmental functions vested ultimately in the King in Parliament.\textsuperscript{54} In this state of affair, the Montague-Chelmsford Report on Indian Constitutional Reforms visualized in 1918, that the ultimate destiny of India lays in a federation.\textsuperscript{55} On the other hand Government of India Act, 1919, that followed, could not make any headway in that direction.\textsuperscript{56} It did not touch the Indian States at all and in British India also, although it made some formal changes, the status of the Provinces were retained only as administrative Units.\textsuperscript{57}

\textsuperscript{52} Supra, note 19, p.10.
\textsuperscript{53} Ibid.
\textsuperscript{54} The Provincial governments worked as delegates of the Centre with no independent powers.
\textsuperscript{55} Report on Indian Constitutional Reforms, 1918, para 349 (Montague-Chelmsford Report).
\textsuperscript{56} Supra, note 52.
\textsuperscript{57} Section 45, Government of India Act, 1919, downloaded from http://www.sdstate.edu/projects outhasia, retrieved on 20-09-2015, time 11.24 pm.
however authorized the making of rules for the classification of Central and Provincial subject of legislation and “for the devolution of authority, in respect of Provincial subjects to local governments”\textsuperscript{58}

The Government of India Act, 1919 provided for devolution rules classifying the powers of government into Central subjects containing 47 items and Provincial subjects comprising of 51 items.\textsuperscript{59} Commerce, including banking and insurance, was shown among the Central subjects.\textsuperscript{60} All the important means of communications customs and other all-India sources of revenue were among the Central subjects\textsuperscript{61} and on a declaration by the Central Government, the control of production, supply and distribution of any articles as well as the development of any industries could become Central subjects.\textsuperscript{62} There was no mention of trade or commerce among the Provincial subjects, though on a declaration by the Central government any matter falling within a Central subject could be converted into a Provincial subject if it was “of a merely local or private nature within the Province.”\textsuperscript{63}

The Government of India Act, 1919 had provided for an appointment of a Statutory Commission to determine whether, and if so to what extent, it

\textsuperscript{58} Section 45-A Government of India Act, 1919. It may, however, be noted that certain types of laws could not be passed and taxes could not be imposed by Provincial Legislation without the previous sanction of the Governor-General; Section 80-A.

\textsuperscript{59} Scheduled I to the Devolution Rules, 1920 dividing the Legislative subjects into Part I and Part II.

\textsuperscript{60} Entry 17 of Part I.

\textsuperscript{61} Entries 5,6,10 and 11 of Part I.

\textsuperscript{62} Entries 19 and 20 of Part I.

\textsuperscript{63} Entry 51 of Part II.
was desirable to continue the system under the Government of India Act, 1919.

### 2.4.2. Report of the Indian Statutory (Simon) Commission, 1930

In 1927, a Statutory Commission presided over by Sir John Simon was formed and its report was published in May 1930. Among other recommendations there was two of great importance. The first was the recommendation of a federal form of Constitution for India. It pointed out that the ultimate Constitution of India must be federal, for it is only in a federal constitution that units differing so widely in Constitution as the Provinces and the States can be brought together while retaining internal autonomy.  

In order to form the federation, the Simon Commission suggested that the provinces should be given wide internal freedom though this did not mean that the Central Government would not be entitled to call for provincial assistance and co-operation in matters vital to the whole of India. As regards the demarcation of legislative powers, the report recommended that the Central Legislature should be given power to make laws for all persons and things within British India. While the provincial legislatures should be allowed to legislate ‘for the peace and good governance of the Province’,

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64 The Government of India Act, 1919 had introduced a system of diarchy with the object of introducing gradually a system of democratic and responsible government. Government of India Act, 1919 first time introduced a federal system in India but it was not a federal measure in the true sense. It did not provide for division of powers between the Centre and the States on the pattern of other federal countries like the United States or Canada. Secondly, it did not include the Indian States at all and in British India also, the Provinces were no more than administrative units and derived their power as a grant made by the Central Legislature to the Provinces.

subject to the previous sanction of the Governor-General in case of Bills which obviously encroach upon the Central sphere.\textsuperscript{66}

Thus, one finds for the first time a constructive proposal for a federal constitution. None of the previous commissions\textsuperscript{67} has suggested the federal structure.

The second important recommendation was related to the need for economic unity of India. The provinces were given powers to levy taxes on the free flow of trade and commerce. The Commission pointed out that there are obvious objections to such taxes. It is desirable that there should be the greatest possible freedom of movement of goods in India.\textsuperscript{68}

The main impediment to economic unity was the policy of isolationism followed by the Indian States. In this connection the Simon Commission observed that the States and British India must stand or fall together because of the prevailing economic forces. Industry is becoming increasingly important and this resulted in problems that both the States and British India must face together. Co-operation is becoming necessary in vital matters such as communication by way of rail, road or postal, customs, monetary policy and regulation of labour. The majority of States are landlocked therefore they

\textsuperscript{66} Ibid, para 96.
\textsuperscript{67} Commission on Constitutional Reform headed by Montagu-Chelmsford and its report published in 1918. The Government appointed the Reform Enquiry Committee in 1924 to suggest ways and means of constitutional advance “by the use of rule making power provided by Parliament under the statute.” The Committee submitted its report in March 1925.
\textsuperscript{68} Supra, note 65, para 17.
rely heavily on British India and the outside world. On the other hand, complication has been caused by the existence of parts in some other States.\textsuperscript{69}

The report regarding tariff-walls between Indian States further pointed out that the States themselves have their own tariff policies, and it is seriously possible that unless divergent interests are reconciled, a number of tariff walls will be put up in an area where fiscal unity is desired.\textsuperscript{70}

But no solution was provided, because the Indian States still enjoyed internal autonomy.

While the Simon Commission was in session, the Indian States Committee \textsuperscript{71} under the Chairmanship of Sir Harcourt Butler, started investigating the relationship between the paramount power and the Provinces. The Committee in its report pointed out that the paramount power had powers over external affairs, defence and inter-State relations, while the States were left with the remaining subjects of internal interests. Thus, inter-State trade and commerce was the concern of the Central Legislature, while intra-State trade and commerce was left to the Provinces.

\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{71} Indian States Committee, (1929).
The important part of the report was the suggestion for a “Zollverein”. Zollverein was a German form of common customs union, intended to do away with inter-State trade barriers; Prussia had instituted one in the nineteenth century.

Customs union means a trade agreement by which a group of countries charge a common set of tariff to the rest of the world, while granting free trade among themselves. It is a partial form of economic integration that offers an intermediate step between free-trade zone and common market. A free-trade zone with common tariffs is a customs union.

The Butler Committee pointed out that, due to various customs-houses in the States, no free flow of trade and commerce was possible. In order to do

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72 Zollverein, means German customs union established in 1834 under Prussian leadership. It created a free-trade area throughout much of Germany and is often seen as an important step in German reunification.

73 The movement to create a free-trade zone in Germany received great impetus from economists such as Friedrich List, its most active advocate in early 19th-century Germany. In 1818 Prussia enacted a tariff law abolishing all internal customs dues and announced its willingness to establish free trade with neighbouring States. A decade later Prussia signed the first such pact with Hesse-Darmstadt. In 1828 a customs union was set up in southern Germany by Bavaria and Wurttemberg, joined in 1829 by the Palatinate; also in 1828 the Central German States established a similar union, which included Saxon, the Thuringian States, electoral Hesse, and Nassau. In 1834 these were among the 18 States that joined in the Zollverein. Hanover and Oldenburg joined in 1854; the two Mecklenburgs, Schleswing-Holstein, Lauenburg, and Lübeck joined in 1867; and thereby all Germany outside Austria was included except Hamburg and Bremen, which adhered in 1888, 17 years after the establishment of the German Empire, downloaded from http:// www.britannica.com/EBchecked/topic/657790/Zollverein, retrieved on 22.04.2015, time 2.30 p.m.


75 Free trade zone which allow mutual free trade but lack a common tariff system./ http://www.britannica.com/EBchecked/topic/147445/customs-union, retrieved on 22.04.2015, time 2:30 p.m.

76 At common market, in addition to the common tariffs, also allow free movement of resources such as capital and labour between member countries./Ibid.

76 Ibid.
away with these trade barriers it suggested that the ideal solution would be “Zollverein” combined with the abolition of internal customs in the States themselves.”

It may be noted that the suggestion for a customs union was not one of its kind. A similar suggestion had been drawn up during the Viceroyalty of Lord Reading. The main points of the suggestion were:

(i) The adoption of a common tariff administered by the officers of the Government of India even in maritime States.

(ii) The abolition of all inland customs.

(iii) The division of the customs revenue among British India and the different Indian States according to population and

(iv) The association of representatives of the Indian States with the Indian Legislature in the determination of policy.”

The above suggestion was not pressed.

The suggestion put forward by the Butler Committee could not be implemented immediately, because the majority of Indian States were not ready to join a customs-union. They feared that it might take away their

78 Lord Reading was the Viceroy of India from 1921 to 1925. Governor-General was usually known as Viceroy.
79 Indian Round Table Conference, Second Session, (1932) p. 42.
internal autonomy. For this reason, the incorporation of a protection clause in the Constitution was delayed.

2.4.3. White Paper, 1932

In 1929, Lord Irwin declared that, after the task of the Simon Commission was finished, a Round Table Conference would be convened in London. After the publication of the Simon Commission report, there were three successive conferences. In the second session, the Conference pointed out that terminal taxes were no doubt an addition to provincial resources, but, if they were allowed, they would hamper economic unity. Hence, they suggested that it should be subject to Federal control. The Conference further suggested that the provinces should be debarred from levying internal customs and transit duties. States which joined the Federation should be encouraged to abolish such taxes gradually.81

In the third session of the Conference, held from 17th November to 24th December, 1932, the Conference finally agreed upon certain principles, which were incorporated in the White Paper.

These proposals, provided a skeleton for the future Constitution of India. This document was an important development, for; it made a division of the trade and commerce power between the Federal Legislature and the

80 Ibid., p. 43, p. 41.
81 Proposals for Indian Constitutional Reform, (1933) para. 115.
Provincial Legislatures. Under Appendix VI, List I, the Federal Legislature was given exclusive power over foreign trade and the imposition and administration of terminal taxes on goods and passengers carried by rail, water or air while the provinces were given powers to make laws for the control of the production, supply and distribution of commodities, and to legislate in respect of trade and commerce within the province.

The White Paper did not contemplate a protection clause, but it made clear that a residual subject, not falling within the scope of any of the three lists, could be legislated by the Centre with the previous sanction of the Governor-General. The same, as the residual power was left with the Centre, the incorporation of a protection clause in the Constitution was left in the air.

2.4.4. Report of Joint Select Committee, 1933

In April 1933, immediately after the publication of the White Paper, a Joint Select Committee was appointed to examine the working basis of the new Constitution of India. The Committee approved the two important proposals of the Simon Commission.

Regarding the proposals for an All-India Federation, the Committee advocated ‘Provincial Autonomy’, in the sense that the Governor’s provinces would be free from control of the Centre in their defined sphere. But this did not mean that the provinces would enjoy an entirely independent political life
of their own. In order to avoid such possibilities, the committee suggested providing scope for readjustment by the Centre.\textsuperscript{82}

The suggestion of the committee for an All-Indian Federation had two difficulties to face; first, the Indian States were wholly different in status and character from the Provinces of British India, and second, these Indian States were not prepared to federate with the Provinces on the same terms.

Regarding distribution of legislative powers between the Centre and the Provinces, the Government of India Act 1919, under the Devolution Rules, the Centre was given exclusive power over commerce, including banking and insurance, while the provinces were not given specific powers in that connection. The Joint Select Committee suggested that the Centre should be given exclusive powers over import and export of commodities across the customs frontiers as defined by the Federal Legislature duties of customs.\textsuperscript{83}

Further, it recommended that terminal taxes should be transferred to the Central List. The report gave the provinces under Item 37, List II, powers over the control of production, supply and distribution of commodities. Item 46 of List II gave the provinces for the first time specific powers over ‘Trade and Commerce within the Province’, while Item 76 provided that any matter of merely local or private nature shall be within the provincial legislature’s powers.\textsuperscript{84}

\textsuperscript{82} The report of Joint Committee on Indian Constitutional Reform, (1934), Vol. 1, para. 26.
\textsuperscript{83} Ibid., pp. 152 - 153.
\textsuperscript{84} Ibid, pp. 156-157.
There were, according to the Committee, some difficulties in achieving economic unity throughout India. The difficulties were that economic policies being put to an ever-increasing strain under the prevailing arrangements, India was vitally affected even as the economic life of India developed.

It further stated that the free flow of trade is obstructed by the internal customs policies which the States are free to impose. Such restrictions which have caused trouble in the past are becoming and will become intolerable as development, both industrial and commercial, spreads from British India to the States.\textsuperscript{85}

Thus, in order to achieve economic unity and for the protection of inter-State trade and commerce, recommendation of the Committee was that the States following the federation should accept the principle of internal freedom for trade in India is to be greatly desired. Also the federal government alone should have the power to impose tariffs and other restrictions on trade. Further, the taking over of a State by the federation should imply its acceptance of the principle that it will not obstruct free interchange in such a manner that it will constitute a threat to the future of the federation.\textsuperscript{86}

The report did not suggest complete abolition of internal customs duties immediately, because according to it, this would create financial crises

\textsuperscript{85} Ibid, para 31.
\textsuperscript{86} Id.
in the States. Though these customs duties were the most important source of the State’s income, their customs barriers were in principle inconsistent with the freedom of inter-change of a fully developed Federation. The Committee suggested that moderation in the use of them could be a condition of federation.  

The Joint Committee’s proposals and the White Paper were the basis of a Government of India Bill, introduced in the House of Commons on 6th February, 1935 and was subsequently passed the Government of India Act, on 4th August, 1935.

2.4.5. The Government of India Act, 1935

The Government of India Act, 1935 introduced a federal form of Constitution with a powerful Centre. The Act drew three legislative lists of all the legislative subjects with 59 entries in List I, 54 in List II and 36 in List III. On the subject enumerated in List I exclusively the Federal Legislature and on subjects enumerated in List II exclusively the Provincial Legislatures could legislate while on the subjects included in List III both of them could do. Any subject not covered by any of the three Lists could be assigned by the Governor-General either to the Federal Legislature or to

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87 Ibid.
89 Section 100(1).
90 Section 100(8).
91 Section 100(2). In case of inconsistency between the Federal law and the Provincial law on List III the former was to prevail over the latter: Section 107.
Provincial Legislatures.\textsuperscript{92} Among others, all the matters important for the economic life of the country and requiring uniform policy were included in List I\textsuperscript{93} while the matters of local interest were put in List II\textsuperscript{94} and the matters which at times could require national laws and at others local laws were put in List III.\textsuperscript{95}

On the subject of distribution of powers on trade and commerce the Act in legislative List I gave exclusive powers to the Federal Legislature, including Entry 19 providing for import and export across customs frontiers as defined by the Federal Government. List II, the Provincial legislative List, gave exclusive powers to the Provincial Legislature including that of trade and commerce within the province, markets and fairs; money lending and money lender.\textsuperscript{96} In addition entry 29 of the said list provided for production, supply and distribution of goods, development of industries, subject to the provision of List II with respect to the development of certain industries under Federal control.\textsuperscript{97}

\textsuperscript{92} Section 104.
\textsuperscript{93} For example, currency and coinage (entry 5); Posts and Telegraph and other like means of communication (entry 7); import and export (entry 19); railway (entry 20); shipping and navigation (entry 21); air navigation (entry 24); copyright (entry 27); corporation (entry 33); development of industry (entry 34); insurance (entry 37); banking (entry 38) and many more.
\textsuperscript{94} Such as, forests (entry 22); fisheries (entry 24); trade and commerce within the province, markets and fairs (entry 27); production, supply and distribution of goods (entry 29); adulteration of goods (entry 30); and more.
\textsuperscript{95} Such as welfare of labour (entry 27); unemployment, insurance (entry 28); mechanically propelled vehicles (entry 20); and more.
\textsuperscript{96} Entry 27-Trade and commerce within the province, markets and fairs; money lending and money lender.
\textsuperscript{97} Production, supply and distribution of goods, development of industries, subject to the provision of List II with respect to the development of certain industries under Federal control.
This Act can be regarded to be an improvement on the Constitutions of America,\textsuperscript{98} Australia\textsuperscript{99} and Canada.\textsuperscript{100} in that it provided a specific division of the commerce powers between the Centre and the Provinces. It may be pointed out that none of the three legislative lists provided for power over inter-provincial trade and commerce. The reason was that the States that joined the Federation would be required to surrender powers only on three subjects, - External Affairs, Defense and Communications. Thus, it was not possible for the British Parliament to allot powers over inter-State trade and commerce to the Federal Legislature. On the other hand Inter-provincial trade and commerce could be regulated by the Governor-General under his residual powers, vested in him by Section 104. This Section authorised the Governor-General to empower either the Federal Legislature or a Provincial Legislature to enact a law with respect to any matter not enumerated in any of the Lists in the Seventh Schedule of the Act.\textsuperscript{101}

The most striking innovation was the introduction of a new clause, prohibiting certain restrictions on internal trade. This was the first time in the constitutional history of India that a provision was made for the protection of inter-provincial trade and commerce. The reason for its incorporation was that the Government of India Act, 1935 was assuming a federal form. The

\textsuperscript{98} Infra, Chapter VI, pp.237-246.
\textsuperscript{99} Infra, Chapter VI, pp.229-237.
\textsuperscript{100} Infra, Chapter VI, pp.246-253.
\textsuperscript{101} Jariwala C.M., Freedom of Interstate Trade in India, 1975, Sterling Publishers (P) Limited, New Delhi, p.10.
provinces were not only given powers over trade and commerce within the province but also taxation powers which in some measure, involved regulation of trade and commerce and could put restrictions on inter-provincial trade. In order to prohibit the States from imposing restrictions harmful to trade and commerce, a protection clause was necessary. India had already entered the Industrial Age and trade barriers were an obstacle to progress. Under-Secretary of State, Butler pointed out that in future if restrictions on trade were allowed to develop within India, it would be a serious situation and would upset many arrangements made in other directions.\(^\text{102}\)

The most important provision for the purpose of present investigation on development of freedom of trade under the Government of India Act, 1935 is Section 297.\(^\text{103}\) Unlike the Constitution of the Dominion of Canada,\(^\text{104}\) and of the Constitution of Commonwealth of Australia\(^\text{105}\) the Government of India Act, 1935 placed the new Section 297 under the heading of ‘Miscellaneous and General’. This shows that the British Parliament wanted the Free Trade clause to constitute a limitation not only on the taxation power but also the powers in relation to trade and commerce of the Provinces.\(^\text{106}\)

\(^{102}\) Parliamentary Debates. (1935), Vol, 300, Column 1405.
\(^{103}\) Infra, notes, 107, 108 and 109.
\(^{104}\) Which puts the corresponding Section 121 under the head of ‘Revenue; Debts; Assets; Taxation.’/Infra, Chapter VI, pp.246-253.
\(^{105}\) Which puts Section 92 under the head of ‘Finance and Trade.’/ Infra, Chapter VI, pp.229-237.
\(^{106}\) Supra, note 101, p.11.
The scheme of Section 297 stated that no Provincial Legislature of Government shall according to the entry in the Provincial legislative list relation to trade and commerce within the Province or the entry relating to the production, supply and distribution of commodities, have power to pass any law or take any executive action prohibiting or restricting the import or export of goods of any type from the Province.\(^{107}\) It allows the imposition of a tax, cess, toll or due imposed on similar home produced goods to be imposed on imported goods, from other Provinces, provided that there is no preference or discrimination.\(^{108}\) Any law passed in contravention of this provisions shall, to the extent of the contravention, be void.\(^{109}\)

The purpose of Section 297 was to achieve “as far as possible free trade within India”\(^{110}\) by imposing limitations on the legislative and the executive powers of the provinces. On the other hand, the application of sub-clause (a) of clause (1)\(^{111}\) was limited only to laws or executive actions in

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\(^{107}\) Section 297(1)(a), of the Government of India Act,1935 read as; By virtue of the entry in the Provincial Legislative List relation to trade and commerce within the Province, or the entry in that list relating to the production, supply, and distribution of commodities, have power to pass any law or take any executive action prohibiting or restriction the entry into, or export from, the province of goods of any class or description; or/Infra

\(^{108}\) Section 297(1)(b), of the Government of India Act,1935 read as: By virtue of anything in this Act have power to impose any tax, cess, toll or due which, as between goods manufactured or produced in the Province and similar goods not so manufactured or produced, discriminates in favour of the former or which in case of goods manufactured or produced outside the Province, discriminates between goods manufactured or produced in one locality and similar goods manufactured or produced in another locality.

\(^{109}\) Section 297(2), of the Government of India Act,1935 read as: Any law passed in contravention of this Section shall, to the extent of the contravention, be invalid.


\(^{111}\) Supra, note 107.
pursuance of two specific entries like entries 27\textsuperscript{112} and 29\textsuperscript{113} of List II and if any law or action could be supported under some other entry, either in List II or List III, Section 297(1)(a) had no application.\textsuperscript{114} Sub-clause (b) of Section 297(1)\textsuperscript{115} corresponds with Article 304(a) of the Constitution of India, 1950\textsuperscript{116} although it was wider insofar as it prohibited discrimination in taxation not only on goods coming from other Provinces or other parts of the country but also on those coming from other countries.\textsuperscript{117} Sub-clause (b) also indicates that except discriminatory taxes on goods, other taxes were not regarded as obstacles to free flow of trade and commerce.

The other provision of some relevance in the present investigation was Section 298 of the Government of India Act, 1935 which prohibited discrimination on the grounds of religion, place of birth, descent, colour or any of them in the matter of carrying on any occupation, trade, business or profession.

\textsuperscript{112} Supra, note 96.
\textsuperscript{113} Supra, note 97.
\textsuperscript{114} Bhola Prasad v. King Emperor (1942) FCR 17. In that case the Governor of Bihar in exercise of his legislative powers passed the Bihar Excise (Amendment) Act, 1940 imposing certain curbs on the possession, sale of intoxicating liquors. The Appellant, who was prosecuted for violating the provisions of the Act, challenged its validity, \textit{inter alia}, under Section 297(1)(a). The government defended the law on the ground that it was passed by virtue of entry 31 in List II and not by virtue of entries 27 or 29 to which alone Section 297(1)(a) applied. Speaking for the Federal Court, Chief Justice Gwyer, accepting the government’s stand, laid down that Section 297(1)(a) had no application if the legislature could point out to any entry other than entries 27 or 29 of List II to support its law.
\textsuperscript{115} Supra, note 108.
\textsuperscript{116} Infra, Chapter III, note 38.
\textsuperscript{117} [British] Parliamentary Debates. (1935), Vol. 300, Columns 1405-06. It appears from the debates in Parliament that the provision was also aimed at protecting British trade against discrimination by the Provinces.
These provisions remained in force till the Government of India Act, 1935 was replaced by the Constitution of India, 1950.

This Section put fetters on the commerce power of the Provinces in two directions. It banned restrictions at the frontiers of the Provinces on the entry and export of goods. Further, as regards tariff-walls, it prohibited discrimination, in the taxation of goods, between goods manufactured and produced in the Province and goods not so manufactured or produced. It should be noted that this section applied only to Provincial Governments and Provincial Legislatures, while the Centre or the Native States did not come within the purview of this section. Thus, India was still lacking a free trade clause applicable throughout the territory of India.\textsuperscript{118}

\textbf{2.5. Development of Freedom of Trade in India after Independence}

The British Parliament passed the Indian Independence Act, on July 18, 1947, which gave India an independent status. A Constituent Assembly was constituted, which was given the powers of the Central Legislature and also powers to draft a new Constitution.

Under the British Rule, freedom of trade was the established practice in British India, with no inter-Provincial duties or other trade barriers,\textsuperscript{119} perhaps, it is not true. With the advent of provincial autonomy in

\textsuperscript{118} Supra, note 101, p.12.
April, 1937, it was considered necessary to place this matter on a statutory basis. Accordingly, Section 297 of the Government of India Act, 1935, prohibited Provincial Governments from imposing barriers on trade within the country; nor could they levy any tax cess, toll or other due which discriminated between goods manufactured in one locality and similar goods manufactured elsewhere. On the other hand, this was far from ensuring freedom of internal trade throughout the sub-continent. Indian States could, and very often did, levy export and import duties at their frontiers, and some of them derived considerable revenue from this source.\(^{120}\)

The Constituent Assembly realised that the provisions of Section 297 of the Government of India Act, 1935, hardly ensured free trade in India, because the restriction in Section 297 (1) (a) did not apply to any legislative powers of the Centre so there still existed trade barriers. It was because of these inter-State trade barriers that the inland trade and movement showed a considerable decline before the Assembly started its working.\(^{121}\) Even the Sapru Committee which was appointed to frame certain constitutional proposal recommended that all customs barriers between one unit and another shall be abolished and there shall be free trade within the Union.\(^{122}\)

\(^{120}\) Ibid.
\(^{121}\) Review of the Trade of India, (1946) part 11, p. 2.
\(^{122}\) Constitutional Proposals of the Sapru Committee (India) (1945) para, 284, downloaded from http://www.nihcr.edu.pk/Latest_English_Journal/4.%20sapru%20proposals,%20Amanullah.pdf, retrieved on 19-09-2015, time 10.35 pm.

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On 29th August 1947, a Committee was appointed to suggest an adequate solution to the above problem. Perhaps, the committee felt that the subject was of such vast importance that it should be considered by a separate sub-committee. The sub-committee after prolonged discussions put the protection clause under the heading of ‘Fundamental Rights’ in Clause 10. While presenting the report of the Advisory Committee Sardar Vallabhbhai Patel, Chairman, pointed out that in dealing with that clause, they had taken into account, the fact that among Indian States depend upon internal customs for a good part of their revenue and that it would be responsible on the part of the Union to enter into agreements with such States by which internal customs could be eliminated and complete free trade established within the Union.123

The Interim Report under Clause 10 proposed the following arrangements:

“Subject to regulation by the law of the Union trade, commerce and intercourse among the units by and between the citizens shall be free;

Provided that any unit may by law impose reasonable restrictions in the interest of public order, morality or health or in an emergency;

Provided that nothing in this Section shall prevent any unit from imposing on goods imported from other units the same duties and taxes to which the goods produced in the unit are subject;

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Provided further that no preference shall be given by any regulation of commerce or revenue by a unit to one unit over another”.

Commenting on the clause when the draft of the sub-committee’s report was under consideration, Ayyar Alladi Krishnaswami suggested that (i) goods entering a particular unit from other unites of the Union should not escape duties and taxes to which goods produced in the concerned unit itself were subject; (ii) it must be open to a unit in an emergency to place restrictions on inter-State trade and commerce; (iii) the freedom of trade guaranteed in the clause should specifically cover coastal trade; and (iv) it should be clearly laid down that this right would not extend to non-citizens carrying on trade.

These suggestions were accepted by the sub-committee and incorporated in its report submitted to the Advisory Committee. In a note of dissent, Shah K.T. argued that the clause, as it stood, did not permit restrictions being imposed by any unit on the freedom of trade within the Union on the ground of social reform. The decision of a unit, for instance, to prohibit intoxicating drinks or drugs or to stop immoral traffic, would not be covered by the proviso permitting reasonable restrictions in the interests of public order, morality or health. Shah K.T. suggested, therefore, that “social

reform” should be added expressly as a valid ground for restricting freedom of trade and commerce.\textsuperscript{126}

In pursuance of the Interim Report of the Committee, the Constitutional Adviser, Rau B.N., incorporated freedom of trade, commerce and intercourse among the units in Article 17 of draft Constitution. This Article provided as follows:

“Subject to the provisions of any Federal law, trade, commerce and intercourse among the units shall, if between the citizens of the Federation, be free:

Provided that nothing in this Section shall prevent any unit from imposing on goods imported from other units any tax to which similar goods manufactured or produced in that unit are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced;

Provided further that no preference shall be given by any regulation of trade, commerce or revenue to one unit over another;

Provided also that nothing in this Section shall preclude the Federal Parliament from imposing by Act restrictions on the freedom of trade, commerce and intercourse among the units in the interests of public order, morality or health or in case of emergency.”\textsuperscript{127}

This draft made two changes over the draft provided in the interim report: Firstly, the power given to the units in the previous draft to impose

\textsuperscript{126} Shah K.T.’s note of dissent, Select Documents II, 4(viii), pp. 170, 173/Ibid.

reasonable restriction in the interest of public order, did not find any place in the new draft. Secondly, a new provision was provided in draft Article 17 conferring powers on the Federal Parliament to impose restrictions on the freedom of trade in the interests of public order.

The scheme of the draft of the Constitutional Adviser suggests a rigid restriction on State power to restrict the freedom of trade, at the same time a restriction on the Federal Parliament to provide such legislation comes in the last provision of Article 17. It may be mentioned that the marginal notes\textsuperscript{128} to this Article refers to Section 297\textsuperscript{129} of the Government of India Act, 1935 and Section 92 \textsuperscript{130} and 99 \textsuperscript{131} of the Constitution of the Commonwealth of Australia.\textsuperscript{132}

\section*{2.6. Freedom of Trade under the Draft Constitution of India, 1948}

The Draft Constitution of India 1948, provided freedom of trade, commerce and intercourse in its Article 16, which provided that subject to the provisions of Article 244 of this Constitution and of any law made by Parliament, trade, commerce and intercourse throughout the territory of India shall be free. Article 243 of the Draft Constitution prohibits discrimination between States while making any law or regulation relating to trade. Article

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{128} Every clause in the Draft Constitution had a marginal note and also showed the corresponding provisions, if any, in other Constitutions.
\item\textsuperscript{129} Supra, note 107, 108, 109.
\item\textsuperscript{130} Infra, Chapter VI, note 3.
\item\textsuperscript{131} Infra, Chapter VI, note 5.
\end{itemize}
\end{footnotesize}
244 permits the State to impose similar tax on goods imported from other States and goods so manufactured or produced within the State and a reasonable restriction can be made on freedom of trade on the ground of public interest. Article 245 empowered Parliament to appointment an appropriate authority for the carrying out of the provisions of Articles 243 and 244. The Drafting Committee was of the opinion that it would be more appropriate to provide for the appointment of an authority by law instead of providing for an inter-State commission with limited powers as such a commission, if appointed with powers only to adjudicate disputes as to trade or commerce, might not have sufficient work to do.

The important changes effected by the Draft Constitution over the drafts provided by the Interim Report on the Fundamental Rights and the Constitutional Adviser were as follows.

Firstly, the words “by and between the citizens” in clause 10, of the report draft, were omitted as they would have caused difficulties at frontiers if parties dealing in inter-State trade were of different nationalities.

Secondly, laws passed by Parliament were outside the reach of the Free Trade Clause. This clears away the difficulty under the draft of the

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133 Article 16 was retained in the Fundamental Rights chapter in the Draft Constitution of February 1948 and Articles 243-245 appeared under a separate heading ‘inter-State trade and commerce’ in Part IX of the Draft Constitution dealing with relation between the Union and the States.

134 Supra, note 119, p.702.
Constitutional Adviser which exempted Federal law in Article 17, but put conditions in the last provision of the Article on such law.

Thirdly, the word ‘reasonable’ omitted in both the drafts, was once more inserted in Article 244 (b) of the Draft Constitution of India 1948.

Fourthly, the words ‘in the interest of public order, morality, or health or in an emergency’ were omitted and the words ‘public interests’ were inserted in Article 244 (b) of the 1948 draft. Thus, finally, provisions were made for the first time for the establishment of a commission to consider matters of inter-State trade and commerce.

On the 3rd December, 1948, the Constituent Assembly initiated discussions on the final reshaping of the protection clause. When the discussion took place in the Assembly, it had, before it, not only the Draft Constitution, but also the long standing knowledge and experience of the major federal Constitutions of the world.\textsuperscript{135}

The major problem before it was whether the provision under the proposed Article 16, should be allowed to remain in the Chapter of “Fundamental Rights”. Ambedkar B.R. in his speech clarified the reason for its inclusion in the Fundamental Rights that the Indian States joined the Union only in respect of three subject foreign affairs, defence and communications,

\textsuperscript{135} Ibid
there was no other way left than to bring the freedom of trade and commerce under Fundamental Rights.\textsuperscript{136}

Constituent Assembly thought that the provision of the proposed Article 16 should be removed from the head of Fundamental Rights and be kept under a separate head. Further, the provision relating to freedom of trade and commerce were scattered in different parts of the Draft Constitution,\textsuperscript{137} hence the Constituent Assembly suggested to put in a serial order under one head.\textsuperscript{138}

These suggestions were accepted on 8\textsuperscript{th} September, 1949. Draft Article 16 was put in a new Chapter, X-A, exclusively devoted to “trade, commerce and intercourse within the territory of India”. Its purpose, as Ambedkar explained, was to assemble under a single part all the provisions on the inter-State trade and commerce scattered in different parts of the Draft Constitution. Part X-A contained five new Articles, namely, Articles 274-A, 274-B, 274-C, 274-D and 274-E.\textsuperscript{139}

The scheme of Part X-A of the Draft Constitution was as follows:

\begin{itemize}
\item \textsuperscript{137} Article 16, which said that trade and commerce, subject to any law made by Parliament, shall be free throughout the territory of India found its place in the list of Fundamental Rights. The other Articles, namely, 243, 244 and 245 appeared under a separate heading ‘inter-State trade and commerce’ in Part IX of the Draft Constitution dealing with relation between the Union and the States.
\item \textsuperscript{138} CAD, 1949, Vol. IX, p.1124.
\item \textsuperscript{139} Ibid.
\end{itemize}
The new Article 274-A\textsuperscript{140} virtually repeated the content of Article 16 laying down the general principle of freedom of trade, commerce and intercourse; Article 274-B\textsuperscript{141} empowered Parliament by law to impose restrictions in the public interest; Article 274-C\textsuperscript{142} prohibited Parliament and the State Legislatures from making any law giving any preference to one State over another, or making any discrimination between one State and another, except when Parliament found it necessary to do so to deal with a situation arising from the scarcity of goods in any part of India; Article 274-D\textsuperscript{143} vested in the State Legislatures the power to impose non-discriminatory taxes on goods imported from other States and reasonable restrictions on inter-State trade, commerce and intercourse in the public interest; and Article

\begin{footnotesize}
\begin{enumerate}
\item Article 274A- Subject to other provision of this Part, trade, commerce and intercourse throughout the territory of India shall be free.
\item Article 274B-parliament may, by law enacted by virtue of powers conferred by this Constitution, impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interests.
\item Article 274C-(1)Notwithstanding anything contained in Article 274B of this Constitution, neither Parliament nor the Legislature of a State shall have power to make any law giving or authorising the giving of preference to one State over another or making of any discrimination or authorizing the 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.
\begin{enumerate}
\item Nothing in clause (1) of this Article shall prevent Parliament from making any law giving any preference or making any discrimination as aforesaid if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of territory of India.
\end{enumerate}
\item Article 274D-Notwithstanding anything contained in Article 274A or Article 274C of this Constitution, the legislature of a State may, by law-
\begin{enumerate}
\item Impose on goods which have been imported from other States any tax to which similar goods manufactured or produced in that State are subject, so, however as not to discriminate between goods so imported and goods so manufactured or produced, and
\item 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.
\end{enumerate}
Provided that no Bill or amendment for the purpose of clause (b)of this Article shall be introduced or moved in the legislature of the State nor shall any Ordinance be promulgated for the purpose by Governor or ruler of the State without the previous sanction of the president.
\end{enumerate}
\end{footnotesize}
provided that Parliament might establish an appropriate authority for carrying out the purposes of Articles 274-A to 274-D. The idea of the framers was that the proposed authority might be something like the Inter-State Commission in the United States. The Article did not mention any such authority as it was thought desirable to give Parliament full freedom to establish such kind of authority as it might deem fit.

The opening words of Article 274A - ‘Subject to the other provision of this Part’ show that the Constituent Assembly wanted the Free Trade Clause to act as a general limitation on the legislative powers of both Parliament and the State Legislature. The proposed Article would enlarge the scope of the freedom, as compared to Article 16 of the Draft Constitution, because the latter was subject to Article 244 and law made by Parliament.

Pandit Thakur Das Bhargava raised several objections to the power conferred on the State Legislature under Article 274-D and pointed out that the Provinces are allowed to have their own way to impose restrictions upon the citizens of any other States, then all talks on one nation, unity, a single government and one single country shall be a mere nullity. He further pointed

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144 Article 274E-Parliament may by law appoint such authority as it considers appropriate for carrying out the purposes of Articles 274A, 274B, 274C and 274D of this Constitution, and confer on the authority so appointed such powers and such duties as it thinks necessary.


146 This words suggested that trade, commerce and intercourse throughout the territory of India are not absolutely free but are subject to other provisions of this part provided in Article 274A to 274D of the Draft Constitution.
out that such restrictions will give rise to provincial jealousies and provincial patriotism will do great injury to India as a whole.\textsuperscript{147}

He wanted inter-State trade and commerce to be almost absolutely free except in times of scarcity or times of national emergencies. He suggested that that the word ‘restriction’ in Article 274-B must be qualified by ‘reasonable’ so as to subject it to judicial review. He further suggested to substitute the words ‘in the interest of general public, in place of ‘in the public interest’.\textsuperscript{148}

None of these suggestions were accepted. Mr. T. T. Krishnamachari pointed out that such power conferred on the Parliament was a necessity for the future economic progress of the country. He further observed that trade and commerce could not be run without control and some kind of direction by the Government.\textsuperscript{149}

The Constituent Assembly adopted a course midway between giving the State power to impose restrictions and guaranteeing total freedom of trade and commerce. In order to quell the fears expressed by Pandit Thakur Das Bhargava, a proviso was inserted to Article 274D, which required the President’s assent as an additional safeguard to a reasonable restriction in the public interest.\textsuperscript{150}

\textsuperscript{147} CAD 1949, Vol. IX, p.1127.
\textsuperscript{148} Ibid., p. 1128.
\textsuperscript{149} Ibid., p. 1139-40.
\textsuperscript{150} Id.
It may be pointed out that the previous protection clauses were aimed at safeguarding only inter-State trade and commerce, but the draft accepted on 8th September, 1949, added the words “or within” to Article 274D (b) which clearly shows that the Constituent Assembly wanted to protect even intra-State trade and commerce too.

Once again, when on October 13th and 16th, the subject of freedom of trade and commerce came up for discussion the Constituent Assembly realized that some matters still had to be added and so two new Articles, 274DD and 274DDD were inserted. The new Article 274DD\textsuperscript{151} provided that any of the Indian States which was levying any tax or duty on inter-State import or export of goods might, by agreement with the Union Government, continue to do so for a maximum period of ten years, subject to the power of the President to terminate or modify such an agreement after a period of five years and subject to the consideration of the report of the Finance Commission constituted under Draft Article 260.\textsuperscript{152}

\textsuperscript{151}Article 274DD read as: Notwithstanding anything contained in the foregoing provisions of this Part, or in any other provisions of this constitution, any State which before the commencement of this Constitution was levying any tax or duty on the import of goods into the State from other States may, if an arrangement in that behalf has been entered into between the government of India and the government of that State, continue to levy and collect such tax or duty subject to the terms of such agreement and for such period not exceeding ten years from the commencement of this Constitution as may be specified in the agreement:

Provided that the President may at any time after the expiration of five years from such commencement terminate or modify any such agreement if, after consideration of the report of the Finance Commission constituted under Article 260 of this Constitution, he thinks it necessary to do so.

\textsuperscript{152}Corresponding provision in the Constitution of India, 1950, is Article 280. Article 280 provides that the President shall, within two years from the commencement of this Constitution and thereafter at the expiration of every fifth year or at such earlier time as the President considers necessary, by order constitute a Finance Commission which shall consist of a Chairman and four other members to be appointed by the President.
This Article was necessary because the federating States had to balance their budgets. If the custom duty levied by the Indian States were abolished with immediate effect, it would put the States in financial difficulties.\textsuperscript{153}

Article 274DDD\textsuperscript{154} laid down that the new Articles 274-A and 274-C, which enunciated the general principle of freedom of trade and commerce and prohibited the Union and the State Legislatures from discriminating between one State and another, would not affect the provisions of any existing law except in so far as the President might by order otherwise provide.

Thus, Article 274DDD was a consequential requirement, which kept in force all existing laws, subject to the Presidential powers to alter it. It provided a further exception to the general limitation regarding the existing law.\textsuperscript{155}

When the final draft came before the Constituent Assembly for the fourth time, the draft provisions of Part XA were reshaped and finally put in Part XIII consisting of Articles 301-307,\textsuperscript{156} without any change in the scheme.

It should be noted that before the Constitution of India was drafted, the Free Trade Clause was not considered as a matter of great importance. When Section 297 of the Government of India Act, 1935 was before the House of

\begin{footnotes}
\footnotetext[153]{Supra, note 119, p.705.}
\footnotetext[154]{Article 274DDD—Nothing in Article 274A and 274B and 274C of this Constitution shall affect the provisions of any existing law except so far as the President may be order otherwise provide.}
\footnotetext[155]{Supra, note 119, p.705-6.}
\footnotetext[156]{Infra, Chapter III, note 38.}
\end{footnotes}
Commons, it took in all 30 minutes to get it passed.\textsuperscript{157} Whereas it took four days for the Constituent Assembly to incorporate it in the Constitution.\textsuperscript{158}

2.7. The Constitution of India: Subsequent Developments

Since the coming of the Constitution of India into force the provisions on trade and commerce have undergone a few amendments. The first of these amendments introduced, what is now sub-clause (ii) of Article 19(6) putting State monopoly of any trade beyond the reach of Article 19(1)(g).\textsuperscript{159} Subsequent to this amendment, in \textit{Saghir Ahmed v. State of Uttar Pradesh}\textsuperscript{160} the Supreme Court of India entertained some apprehension that State monopoly in any trade could perhaps be challenged under Article 301. Consequently, Article 305 was amended to exclude the laws contemplated under Article 19(6)(ii) from the operation of Article 301.\textsuperscript{161} Before the expiry

\begin{footnotesize}
\begin{enumerate}
\item Discussion started on 11th April at 6.51 p.m. finished at 7.17 p.m. parliamentary Debate, (1935) Vol., 300, Col 1405, 1407.
Discussion started on 28th May at 8.11 p.m. finished at 8.15 p.m. parliamentary Debate, (1935) Vol. 302, Col. 1042.
\item The Constitution (First Amendment) Act, 1951, Section 3.
\item AIR 1954 SC 728, 742.
\item The Constitution (Fourth Amendment) Act, 1955, Section 4. The amendment was given retrospective effect. The Statement of Objects and Reasons for the amendment read:
    "A landmark judgment of the Supreme Court in \textit{Saghir Ahmed v. The State of Uttar Pradesh} has raised the question whether an Act providing for a State monopoly in a particular trade of business conflicts with the freedom of trade and commerce guaranteed by Article 301 but left the question undecided. Clause (6) of Article 19 was 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 III of the Constitution with reference to the opening words of Article 301. It appears from the judgment of the Supreme Court that notwithstanding authority of Parliament or of a State Legislature to introduced 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 302 or as amounting to a "reasonable restriction" under Article 304(b). It is considered that any such question ought to be left to the final decision of the Legislature. Clause 4 of the Bill accordingly proposes an amendment of Article 305 to make this clear.
\end{enumerate}
\end{footnotesize}
of the transitional life of five years of Article 369, matters included in that Article were, with minor variations, permanently put in the concurrent jurisdiction of the Union and the States by an amendment in Entry 33 of List-III in 1954. On the reorganization of States in 1956, categorisation of the States into Parts A, B, C and D was abolished and the entire territory of India was classified into two- “The States” and “The Union Territories”. Consequently, Article 306 which was made to give benefit to Part B States became redundant and was repealed. Besides, in Article 304(a) the words “or the Union territories” were inserted after the words “other States”.

Excepting these marginal amendments the provisions on trade and commerce have withstood the test of time without posing any serious difficulty though, in some areas particularly the application of Article 301 to tax laws, they are highly controversial.

2.8. Conclusion

It is seen from the foregoing discussion that the concept of ‘Trade’ is an exchange of any article either by barter or for money or for service rendered. In other words, it is exchange between two parties, one who tendencies
the consideration and the other who return, for the consideration, goods, money, service or such other things, except gambling and other illegal activities viz. transportation any woman or girl for the purpose of prostitution or other immoral acts, the counterfeiting of notes is a crime against inter-State commerce. Free trade is a norm that conceives the trade in goods, services, labour, and capital among or within sovereign States as a flow, without government discrimination.

It is seen that the provision of freedom of trade exists in India from the establishment of the Indian federation, since, prior to it there was no scope for any provision of free trade in India. Although for the first time a full fledge federal structure was envisaged only under the Government of India Act, 1935, experimentation in that direction had already been started under the Government of India Act, 1919.

It is observed that the Simon Commission in its report, 1930, pointed out that it is desirable that there should be the greatest possible freedom of movement of goods in India. While the Simon Commission was in session the Indian States Committee, in its report pointed out that inter-State trade and commerce was the concern of the Central Legislature, while intra-State trade and commerce was left to the States. The Committee also pointed out that, due to various customs imposed by the States, no freedom of trade and
commerce was possible and suggested for abolition of internal customs by the States themselves.

It is seen that the White Paper, 1932 made a division of legislative powers on trade and commerce between the Federal Legislature and Provincial Legislature. Federal Legislature was given exclusive power over foreign trade while Provincial Legislatures were given powers to make law in respect of trade and commerce within the Province.

It is seen that the report of the Joint Select Committee, 1933 gave the provinces powers over the control of production, supply and distribution of commodities and for the first time specific powers over: ‘Trade and commerce fall within the Province’.

It is seen that for the first time in the constitutional history of India, a specific provision on freedom of trade got its place under Section 297 of Government of India Act, 1935 which imposed limitations on legislative powers of government on freedom of trade and prohibited discrimination in taxation on goods coming from other Provinces.

It is seen that in the draft Constitution of India 1948, freedom of trade, commerce and intercourse was placed in Article 16, but on 8th September, 1949, draft Article 16 was put in a new Chapter, viz. XA consisting Articles 274A to 274DDD. When the final draft came before the Constituent
Assembly the draft provisions of Part XA were reshaped and finally put in Part XIII consisting of Articles 301-307, without any change in the scheme.

It is seen that the framers of the Constitution, since the inception of the subject of trade and commerce, has given great importance and dealt with the subject, with great concern. On the other hand, the process was not very coherent, consistent or smooth. Building on the foundations of Section 297 of the Government of India Act, 1935 the framers of the Constitution, were concerned for the minimization of State’s and corresponding maximization of the Union’s control over trade and commerce throughout the territory of India. This concern of the framers of the Constitution has been met with great debates and repulsions, in the course of its development, since the commencement of the Constitution. The provision of Article 301 of the Constitution of India is discussed in the next chapter to get a clear picture of freedom of trade, commerce and intercourse in Indian Constitutional context.