

INDIAN LAW INSTITUTE, NEW DELHI
(UNIVERSITY OF NAGPUR, NAGPUR)

Seminar

on

Indian Constitution: Trends and Developments

January 21 - 23, 1978

INDIAN FREE TRADE CLAUSE: SOME SUGGESTED REFORMS:

by

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Part XIII of the Indian Constitution provides for the free trade clause. This Part is said to be the most badly drafted in the whole constitution. The provisions of article 301, 303, 304 and 305 start with the words either 'subject to other provisions' or 'Notwithstanding anything'.. or 'Nothing in..' such an exception under exception has resulted in a baffling problem to the judiciary and the constitutional purdits. Moreover, the Constituent Assembly drafted the free trade clause on the experience of the Government of India Act, 1935 and some of the federal constitutions where the clause has presented great difficulties. The foreign experience does not suit to the constitutional provision as a whole. It has resulted in more ambiguity and more conflict with other provisions of the Constitution of India. Until now the Indian clause did not pose any great danger but in the charged circumstances when the federal structure in India is subject to strains and stresses, the free trade clause may require a second look.

The prophecy of Henry Clay that the free trade has never existed nor it will exist has come true so far as Indian Constitution is concerned. The scope of the Indian free trade clause has been greatly restricted because of exceptions upon exceptions and the judicial constitutional legislation. In order to refute Clay's prophecy a balanced clause is needed.

Today when the whole country is debating for the complete over-hauling of the Indian constitution we may suggest some reforms to the provisions of Part XIII. Following is the summary of some suggested reforms to the Indian Free Trade clause:

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1. The Word 'Intercourse'

Article 301 uses the word 'intercourse', which was borrowed from section 92 of the Australian Constitution. This word was interpreted by the Australian High Court to mean not only commercial intercourse but also simple intercourse and thus the court held that the freedom of movement was also protected under section 92. 1 But so far as the Indian Constitution is concerned the freedom of movement is specifically guaranteed to every citizen under article 19(1)(d). And the word 'Commerce' in article 301 includes commercial intercourse as well. If the word 'intercourse' is interpreted independently then it will cover a separate head of freedom of simple intercourse which is covered by article 19(1)(d). Moreover, there is no legislative entry which confers on Parliament or the State Legislature a legislative power with respect to intercourse. When no legislature is given such a power then there is no meaning in imposing any restriction on it. And, therefore, the word 'intercourse' may be taken out from article 301. The omission of the word 'intercourse' will avoid clash between article 19(1)(d) and 301.

II. Parliamentary Restriction.

Article 302 empowers Parliament to impose restriction on the freedom of trade, commerce and intercourse. The only restriction on Parliament's power is that the restriction may be in the public interest. This restriction is not very effective because normally the court shall have respect for the legislative determination. Even some authorities have gone to the extent that the question of public interest could not be justiciable and was a matter for Parliament to decide 2 or that the court was not the appropriate forum to decide this point 3. Though this is not correct yet, article 302 will not impose any meaningful restriction. So far as the fundamental right of citizen with respect to carry on trade or business guaranteed in article 19(1)(g) is concerned, article 19(6) imposes two restrictions; firstly, the restriction shall be in the interests of the general public; and secondly, the restriction shall be reasonable. This restriction is invariably applicable to Parliament as well as the State Legislatures. Moreover, article 304(b) imposes similar restriction on the State Legislature, and therefore, the requirement of reasonableness may be inserted in article 302.

1. R. v. Smithers, Ex-parte Benson, (1912) 16 C.L.R. 99.
2. Atiabari Tea Co. Ltd. v. State of Ass., A.I.R. 1961 S.C. 232, 254.
3. G.N. Joshi, Aspects of Indian Constitutional Law (1965) p.164, M. Dasgupta, Indian Constitutional Provisions Against Barriers To Trade and Commerce 2 J.I.L.I., 1960 p. 305.

Secondly, article 302 not only provides for interstate trade but also intrastate trade. This is imlide from the words 'within any part of the territory of India'. This provision was inserted on the experience of the American and the Australian Constitutions where no separate freedom with respect to trade and commerce. But the constitution in article 19(1)(g) specifically provides freedom to carry on trade business. And thus there was no need to incorporate such a provision. The authorities on Constitutional Law did not provide any acceptable solution so as to solve the conflict between articles 19(1)(g) and 301. The above suggestion will avoid to a great extent such a difficult problem.

III. Safeguard against discrimination with respect to trade and commerce:

Article 303(1) Prohibits Parliament as well as the State Legislature from making any law giving any preference to one State over another or making any discrimination between one State and another. But article 303(2) provides one exception that Parliament alone can make preferential or discriminatory law provided 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. This article was drafted on the basis of the provisions of section 297(b) of the Government of India Act, 1935 and section 99 of the Australian Constitution, Under the above statutes there was no provision for the right to equality, and therefore, safeguard against discriminatory or preferential law with respect to trade and commerce was separately provided. The Draft Constitution of India, 1948 separated this safeguard from the free trade clause which was included in Article 16 under the right of equality. But later on it was realised that the provisions with respect to trade and commerce were scattered and they were put in one place. Article 303(1) starts with the words 'Notwithstanding anything in article 302.' This will mean that article 303 is a self-contained provision. Moreover, the Supreme Court of India allowed Parliament as well as the State Legislature to make discrimination or give preference to an individual or individuals over another provided that it comes within the ambit of 'reasonable classification' 4; whereas article 303(2) allows only Parliament to make discrimination or give preference in order to deal with scarcity of goods. Further, if the suggestion that the concept of reasonable-classification may also be applied in case of article 303 5 is to be accepted then article 303 may be omitted from Part XII, of the Indian Constitution. If the discrimination or preference is of such a nature that it restrict the free flow of trade and commerce then the provision of article 301 will apply or otherwise the general equality clause will give protection.

4. Ram Krishna Dalmia v. Tendolkar, A.I.R. 1958 S.C. 538.

5. See author's Freedom of Interstate in India, (1975) p.05.

IV. State Restriction:

The opening clause of article 304 uses the words 'Notwithstanding anything in Article... 303'. Article 303 does not recognise any exception in favour of the State Legislature, whereas, the opening clause exempt the application of article 303. Thus the reference to article 303 creates ambiguity and it should be dropped from article 304. Secondly, article 304(a) is the only article in Part XIII of the Indian Constitution which deals with provision relating tax. And this led the courts at one time to conclude that a tax measure did not attract the provision of article 304(b). 6. A tax may take the form of restriction on the free flow of trade and commerce throughout the territory of India and such a tax may also be a discriminatory tax also. And thus it may be suggested that the provision of article 304(a) may be dropped. Thirdly, the conditions for the State to impose restriction are at par with the conditions imposed under article 19 with the exception of the requirement of the President's assent. The Court while granting protection of article 19 did not provide any implied limitation, and therefore, the courts, while safeguarding the freedom of inter-state trade, must not add any exception upon exception. In order that the free trade becomes a reality in India, the judiciary may be required to reconsider its opinion in the Automobile case. 7. In this case the Supreme Court of India, following the Australian High Court's ruling on the regulatory and compensatory measures, 8 held that these measures did not attract the provision of article 301. Fourthly, the word 'within' in article 304(b) may be dropped. This is in consonance with the suggestion given above with respect to confining the scope of article 301 to 'interstate' and instead of including intrastate. Lastly, the proviso to article 304(b) requires the previous assent of the President. In the light of the changing position of the President of India, who has now become almost a rubberstamp, the proviso may adversely affect the autonomy of the State. And therefore the requirement of the President's assent may be omitted.

6. Balwant Raj v. South K. Market, A.I.R. 1952 Mys. 29;
H.P. Barua v. State of Ass., A.I.R. 1955 Ass. 249(S.B.),
State of Bom. v. United Motors India Ltd., A.I.R. 1953.
S.C. 252. Ram Transport v. State of U.P., A.I.R. 1957
All. 448.

7. Automobile Transport Ltd. v. State of Raj., A.I.R. 1962
S.C. 1406.

8. Hughes & Vale Pty. Ltd. v. State of N.S.W., (1953) 87
C.L.R. 49

V. Saving of Certain Laws:

Article 305 is an another exception to article 301. It saves: firstly, restriction imposed under the existing laws. This exception was provided so as to save at the time of the commencement certain law from being declared unconstitutional, But now after twenty-eight years of the Constitution being in force there are hardly few restrictions on freedom of interstate trade. If few restrictions still continues to date we may suggest that they may be required to fulfil the conditions of article 304(b). So far as the second part of article 305 is concerned which saves any law relating to the matter referred in article 19(6)(ii) such law may be required to satisfy the requirement of article 304(b).

VI. Interstate Commerce Commission:

Article 307 empowers Parliament by law to appoint an interstate commerce commission. After twenty-eight years of the Constitution of India in force, no such law is passed creating such a commission. Instead of a separate commission, we may suggest that the Interstate Council under article 263 may be conferred with the power of carrying out the purposes of Part XIII of the Constitution of India.

Concluding Remarks:

The free trade clause has been a baffling problem in the United States of America and Australia. Chief Justice Dixon at one point went to the extent to say that he will die, the provision of the free trade clause will be there on his heart. The Supreme Court of India in the Atiabari case and the Automobile case had no less difficulty in interpreting the provisions of Part XIII. When the Indian federal structure is showing strains and stresses, we may amend the badly drafted Part now instead of waiting for much water to flow.

The above reforms aims at the following structure of the freedom of interstate trade and commerce in India.

Article 301(1) There shall be freedom of trade and commerce among the States in India.

Art. 301(2) Nothing in this article shall prevent the State from making any law imposing reasonable restriction as may be required in the interests of the general public.

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